IN THE COURT OF APPEALS OF IOWA

FILED
MAY 28 1987
CLERK SUPREME COURT

26

BROOKS HOLDING COMPANY TRUST,

Plaintiff-Appellee,

vs.

WAVERLY GRAVEL & READY-MIX CO., an Iowa Corporation; IRVING W. BUDLONG; CROELL REDI-MIX, INC., an Iowa Corporation;

Defendants-Appellants,

BREMCO CONSTRUCTION CO., an Iowa Corporation; NUCON CONSTRUCTION, INC., an Iowa Corporation;

Defendants,

and THE FIRST NATIONAL BANK OF WAVERLY,

Defendant-Appellant,

and ASSINK BROS., INC.

Defendant.

Filed May 28, 1987

7-102
85-1689

BROOKS HOLDING COMPANY TRUST,

Plaintiff-Appellee,

vs.

CHERYL V. BUDLONG; IRVING W. BUDLONG; CROELL REDI-MIX, INC., an Iowa Corporation; and THE FIRST NATIONAL BANK OF WAVERLY,

Defendants-Appellants.

7-103
85-1690

Appeal from the Iowa District Court for Bremer County (Nos. 22731 & 22749) - B. C. Sullivan, Judge.

Some defendants in a foreclosure action appeal from summary judgment for plaintiff. **REVERSED AND REMANDED.**

Gary W. Kazragis and Robert W. Thompson, of Rickert, Thompson & Kazragis, Reinbeck, for defendants-appellants Waverly Gravel & Ready-Mix Co and Budlong.

Michael K. Kennedy, of Kennedy & Kennedy, New Hampton, for defendant-appellant Croell Redi-Mix, Inc.

David M. Engelbrecht, of Engelbrecht, Ackerman & Hassman, Waverly, for defendant-appellant bank.

Don L. Hagemann, of Hagemann, Goeke & Egli, Waverly, and Edgar F. Hansell, of Nyemaster, Goode, McLaughlin, Emery & O'Brien, P.C., Des Moines, for plaintiff-appellee.

David R. Mason, of Redfern, McKinley, Mason & Dieter, Cedar Falls, for defendants Bremco and Nucon.

Heard by Snell, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J.

The issue we must address is whether the trial court properly granted summary judgment for Plaintiff-Appellee Brooks Holding Company Trust, in a vendor's action to accelerate a promissory note, foreclose on a security interest in personal property and foreclosure on an installment sale real estate contract. Appellants Waverly Gravel & Ready-Mix Co., and Irving W. Budlong, vendees, contend a factual issue was generated on the issue of plaintiff's waiver of acceleration and plaintiff was not entitled to summary judgment. We agree and reverse and remand.

In about 1979, defendants Waverly Gravel and Irving W. Budlong purchased a ready-mix plant from plaintiff's successor in interest. The purchase included real estate and personal property. The purchase documents included an installment real estate contract, a promissory note and a security agreement.

On September 20, 1983, defendants Waverly Gravel and Budlong sold on contract to Defendant Croell Redi-Mix, Inc., the personal property and real estate which they had purchased from plaintiff's predecessor. All property remained subject to plaintiff's security interests.

In September and October, 1984, plaintiff filed suit against defendants seeking to foreclose on the real estate and personal property. There were two suits, the first to foreclose on the security agreement and the second to foreclose on the real estate contract. The suits basically involve the same issues and are consolidated on appeal. Plaintiff claimed acceleration of the note and contract because defendants were in violation of certain provisions in the security agreement, namely:

b) Defendant has breached its warranty of the Security Agreement that the collateral will be kept at the debtor's property in Waverly and Shell Rock, Iowa, because Defendant has sold the Waverly property and subsequently said collateral is no longer being kept at the debtor's property;

c) Defendant has failed, pursuant to the Security Agreement, to provide Plaintiff with a disclaimer or consent by Defendant, Croell Redi-Mix, Inc., acknowledging the security interest of Plaintiff in the collateral and has failed to promptly notify the Plaintiff in writing that Defendant, Croell Redi-Mix, Inc., claimed an interest in the collateral;

d) Defendant has breached its covenant, pursuant to the Security Agreement not to sell the collateral to any other person, firm or corporation without the consent of the Plaintiff and has failed to substitute new collateral therefor.

Plainiff claims these violations accelerated the note and the note accelerates the real estate contract.

Defendants resisted the summary judgment claiming (1) assets had been transferred in 1980 through 1982 without objection from plaintiff, (2) plaintiff was secure since purchase from plaintiff Waverly Gravel had improved the property in excess of $400,000, (3) Croell Redi-Mix had placed improvements in excess of $100,000 on the property, (4) plaintiff consented to the transfer of vehicles to Croell in October, 1983, and (5) plaintiff accepted payments on the note and contract after they had notice of the sale to Croell.

The only question before us is whether there is sufficient evidence from which a fact finder could find waiver of the acceleration clause. Defendant claims sufficient evidence was presented to raise a factual question and summary judgment should not have been entered.

In reviewing the grant of summary judgment under Iowa Rule of Civil Procedure 237(c), the question is whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. Suss v. Schammel, 375 N.W.2d 252, 254 (Iowa 1985), Brown v. Monticello State Bank of Monticello, 360 N.W.2d 81, 83-84

(Iowa 1984). It can be fatal to the party resisting the summary judgment motion to rely alone on a perceived weakness in the movant's contentions. Suss, 375 N.W.2d at 254. The resisting party must set forth specific facts showing there is a genuine issue for trial. Iowa R. Civ. P. 237(e); Iowa Civil Rights Commission v. Massey-Ferguson, Inc., 207 N.W.2d 5, 8 (Iowa 1973). Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. Adam v. Mt. Pleasant Bank & Trust Co., 355 N.W.2d 868, 872 (Iowa 1984).

Only when the evidence is undisputed is the issue of waiver one of law for the courts. Scheetz v. IMT Insurance Co. (Mutual), 324 N.W.2d 302, 304 (Iowa 1982). Acceleration clauses can be waived by a previous course of dealing between the parties. Dunn v. General Equities of Iowa, Ltd., 319 N.W.2d 515, 515 (Iowa 1982). Acceleration provisions are not self-executing and the holder of an instrument must take some positive action to exercise his option to declare payments due under an acceleration clause. Dunn, 319 N.W.2d at 515; Weinrich v. Hawley, 236 Iowa 652, 656, 19 N.W.2d 665, 667 (1945).

Waiver can be shown by the affirmative acts of a party, or can be inferred from conduct that supports the conclusion waiver was intended. Scheetz, 324 N.W.2d at 304; Continental Casualty Co. v. C. R. Kenney Co., Ia., 258 Iowa 658, 660, 140 N.W.2d 129, 130 (1966). Where the waiver is implied, intent is inferred from the facts and circumstances constituting the waiver. Id. See Dunn, 319 N.W.2d at 517 (Where evidence plaintiff accepted late payments on at least three of the four prior occasions provided substantial basis for trial court to find a course of dealing demonstrating waiver of timely payment). Wavier can be expressed or implied. Matter of Guardianship of Collins, 327 N.W.2d 230, 234 (Iowa 1982). No consideration is required. Id. Smith v. Coutant,

232 Iowa 887, 894, 6 N.W.2d 421, 425-26 (1942). A showing of prejudice is not necessary. Id.

There is evidence plaintiff had knowledge of earlier transactions dating back to 1980. There is evidence certain assets covered under the security agreement were sold in 1980 and 1982. On October 20, 1983, plaintiff agreed to the transfer of vehicles in which it held a security interest from Waverly Gravel to Croell, agreed to the release and made no objections thereto. The affidavit of Paul A. Meyers, officer of State Bank of Waverly, as trustee of plaintiff trust, stated it learned of the sale to Croell on October 4, 1983. Despite the fact plaintiff learned of the sale in October, 1983, plaintiff continued to go along with the contract until May, 1984, when the bank notified defendant the contracts would accelerate in June, 1984. However, even after notification of acceleration, plaintiff accepted from defendant payments made on October 3, 1984, October 5, 1984, April 8, 1985 and April 20, 1985.

Plaintiff retains its security interest in property sold to Croell except that which the trustee has released. There is evidence plaintiff's security position has been enhanced by improvements made by Waverly Gravel and Croell and there is sufficient and improved collateral to secure the obligation. There is evidence there are assets in excess of $910,000 to secure plaintiff's claim of $560,000. There is evidence after October, 1983, the trustee continued to accept payments on the original contract. When suit was brought there were no allegations that the payments due on the contracts were not current.

In Scheetz the Iowa court said:

> The issue of waiver is generally one of fact for the jury, in particular where acts and conduct are relied upon as the basis for the waiver. Continental Casualty Co., 258 Iowa at 661, 140 N.W.2d at 130; Williams v. Stroh Plumbing & Electric, Inc., 250 Iowa 599, 602, 94 N.W.2d 750, 753 (1959) (question of fact whether failure to respond to monthly billing statements constituted waiver of right

to offset claim against account billed); see Iowa Grain v. Farmers Grain and Feed Co., 293 N.W.2d 22, 25 (Iowa 1980) (fact issue whether commodity account holder's response to margin calls waived prior breach by broker); Pond v. Anderson, 241 Iowa 1038, 1041, 44 N.W.2d 372, 376 (1950) (jury question whether disputed phone conversations constituted waiver); cf. Travelers Indemnity Co. v. Fields, 317 N.W.2d at 186 (fact issue where evidence raises question of voluntariness of act purported to constitute waiver).

324 N W.2d at 304. The fact there is evidence plaintiff had knowledge of the sale to Croell for some time before taking action and continued to accept payments from Waverly Gravel after having knowledge of the sale to Croell is evidence from which a trier of fact could determine plaintiff had waived acceleration, particularly in view of the fact there is evidence plaintiff retained its security position and the value of the security in which plaintiff held an interest increased after the transfer. We determine there is sufficient evidence to generate a fact question as to whether plaintiff's acceptance of payments after knowledge of sales of assets to third parties waived their right to accelerate the contracts.

We reverse and remand.

Cost on appeal are taxed to plaintiff.

REVERSED AND REMANDED.

Schlegel, J., and Sackett, J., concur, Snell, P.J., dissents.

A "course of dealing" is "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Iowa Code § 554.1205(1) (1987); Dunn v. General Equities of Iowa Ltd., 319 N.W.2d 515, 517 (Iowa 1982); see also Restatement (Second) of Contracts § 223 at 157-58 (1979). Our cases have applied this principle in determining that in situations in which the holder of an installment note routinely accepts late installment payments, the note-holder waives the right to accelerate the payment obligations upon a subsequent late payment. Dunn, 319 N.W.2d at 517. I believe the fact situation in the present case would not support the conclusion of a reasonable fact finder that such a course of dealing existed between any of the parties to this case. In addition, I believe the record fails to present any other evidence tending to show such a waiver. Accordingly, I dissent.

The appellant contends, and the majority holds, that a fact finder could determine that certain prior transactions amongst the parties constituted a waiver of the acceleration clause of the security agreement. These transactions were made in 1980, 1982, and 1983. In 1980, certain vehicles were sold by defendant Waverly Gravel & Ready Mix to defendants Bremco Construction and Nucon Construction. In 1982, these same vehicles were transferred between Bremco and Nucon. In 1983, certain other vehicles were transferred by Waverly Gravel to defendant Croell Redi-Mix. Although appellee agreed to the transfer of titles which accompanied these transactions, appellee did not learn of the transactions until after they had occurred. I cannot agree that appellee's after-the-fact agreement to transfer titles to these vehicles amounts to a course of dealing which can "fairly . . . be regarded as establishing a common basis of understanding" to the effect that appellee would waive the acceleration provision in the

event of Waverly Gravel's sale of substantially all the assets and real estate subject to appellee's security interest. It is a flimsy, and in my view nonexistent, thread of logic that connects these ex post facto title transfers to the en masse sale of collateral.

The majority also maintains that the appellee's trustee stated by way of affidavit that appellee had knowledge of the sale of assets and real estate on October 4, 1983. The majority goes on to find appellee's delay until May 1984 significant to the waiver analysis. Even a cursory reading of the trustee's affidavit reveals, however, that it includes no such statement. The appellant's brief in support of their summary judgment resistance concedes that appellee did not become aware of the sale until January 1984. In addition, the majority finds appellee's acceptance of contract payments following its notice of acceleration to be evidence tending to show waiver. Were appellee attempting to enforce the acceleration clause because of a default on contract payments, this evidence might be relevant. See Dunn, 319 N.W.2d at 516; Farmers' & Merchants' Bank v Daiker, 153 Iowa 484, 487, 133 N.W. 705, 705-06 (1911). Appellee, however, is attempting to accelerate the contract because appellants breached contractual rights other than the payment schedule. Relevant in this respect is section eight of the breached security agreement which provides that

> waiver by Secured Party of any event of default hereunder, or of any breach of the provisions of this Agreement by Debtor, or any right of Secured Party hereunder, shall not constitute a waiver of any other event of default or breach or right, nor of the same event of default or breach or right on a future occasion.

Finally, the majority relies on the status of the appellee's security interest following the prohibited transfers. The majority fails to explain the relevance of this evidence to either the contract breach or the waiver issue. No authority is cited that would illuminate this evidence's relevancy. I do not think it relevant

to the issue presented to the district court by appellee's summary judgment motion

For the above-discussed reasons, I dissent