

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

MINGO TRUST & SAVINGS BANK,)

Plaintiff-Appellee,)

vs.)

CONTINENTAL GRAIN COMPANY,)

Defendant-Appellant,)

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BRIAN J. SAMSON, RICK SAMSON,)

DONALD SAMSON d/b/a SAMSON)

FARM TRUCKING, INTERNATIONAL)

HARVESTER CREDIT CORPORATION,)

JOHN DEERE COMPANY, and)

NEWTON IMPLEMENT CO., INC.,)

Defendants.)

8-148

87-897

Appeal from the Iowa District Court for Jasper County
(No. CD 97-247), Michael J. Streit, Judge.

Continental Grain Company appeals and Mingo Trust & Savings Bank cross-appeals from a district court judgment against the defendant in the amount of \$65,618.55, for a conversion of collateral subject to a security interest of plaintiff bank. **AFFIRMED.**

T. James McDonough and Larry Seckington of Brick, Seckington, Bowers, Swartz & Gentry, P.C., Des Moines, for appellant.

Ben Clayton and James W. Cleverly, Jr.¹⁹⁹ of Diehl,
Clayton & Cleverly, Des Moines, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Plaintiff Mingo Trust & Savings Bank (bank) began making farm loans to Rick and Brian Samson for use in their farming operation sometime in late 1982 or early 1983. In January 1983, both Rick and Brian signed separate agricultural security agreements giving the bank a security interest in and to:

all equipment, all farm products including but not limited to crops, livestock, supplies used or produced in farming, feeding or ranching operations; all contract rights and accounts; now owned or hereafter acquired.

In July 1984, Rick and Brian individually signed as renewal of prior loans, promissory notes in excess of \$100,000. The parties again executed separate agricultural security agreements giving Mingo Bank a first security interest in and to:

all farm equipment and machinery, farm products, grain, crops, livestock, inventory, accounts and/or contract rights receivable and general intangibles now owned or hereafter acquired and used in or arising out of the conduct of the farming operation.

There is no dispute that the security agreements properly described the farmland that the Samsons were farming and that the security agreements gave the bank a security interest in all crop raised or produced on those farms. In addition, it is admitted that the security agreements were properly perfected. Further, each agreement contained a clause restricting the debtor from selling, transferring, assigning, delivering, or otherwise disposing of any col-

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lateral or any interest therein without the prior written consent of the bank.

The Samson accounts became delinquent. On May 11, 1984, and January 23, 1985, the bank sent Rick Samson and Brian Samson a demand letter. The demand letter essentially notified the debtors that their loans were delinquent, that a certain amount was past due, and that payment was demanded. The January 23, 1985, demand letter was accompanied by a letter from the bank which informed the Samsons that if they began to sell or seal their grain and brought in the proceeds to apply on their loans, then payment in full would not be demanded. These letters will be referred to in Division III of this ruling.

This case involves the 1984 crops of the Samsons. On October 25, 1984, the Samsons began selling grain to defendant's elevator located in Marshall County about forty miles from Mingo near where they farmed. The 1984 grain was sold under the name of B & R Farms, which was a trade name for Brian and Rick Samson. Deliveries of grain in excess of \$95,000 were made to defendant through March 5, 1985.

Plaintiff bank first became aware of Rick and Brian selling grain to defendant Continental Grain on March 5, 1985. The bank at that time required Continental to issue a joint check for any grain sold by Brian or Rick Samson under their names or on behalf of B & R Farms.

The Samsons failed to pay their account with the bank. Consequently, the bank brought suit against Rick and Brian Samson and Continental Grain. When the Samsons filed for relief in the United States Bankruptcy Court, the automatic stay went into effect. However, plaintiff bank proceeded against Continental Grain under its action for conversion. This case was tried to the court without a jury.

The district court held for the bank on its conversion claim. However, the court held that the January 23, 1985, letters acted as a waiver of the bank's lien as to sales after that date. Of the \$96,946 sale of grain made to Continental, the court entered judgment in favor of the bank in the amount of \$65,618.55. This amount represented the sales made prior to January 23, 1985. Defendant on appeal contends that: (1) its motion for directed verdict should have been granted since the grain purchased by the defendant was not proven to be grain which was subject to the bank's security interest; (2) the bank failed to establish that it was injured by the defendant's conversion; and (3) the May 11, 1984, letter from the bank to the Samsons constituted a waiver of the bank's security interest. The bank, in its cross-appeal, claims that the district court erred in finding that the bank's letters of January 23, 1985, waived the bank's security interest in Samson's crop sales after that date. We affirm.

I.

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Continental argues there was insufficient evidence that the grain it purchased was covered by the bank's security interest. It presented testimony that the grain the Samsons sold to Continental was grain owned by a corporation called Samson Farms, Inc. The court declined to give any weight to this evidence. It found specifically that the grain sold to Continental under the name "B & R Farms," was the grain of Brian and Rick Samson. It further found that this grain which was sold came from the farms farmed by the Samsons. The trial judge, who had the benefit of observing and hearing first hand the testimony of the witnesses, made the following finding, "Having personally listened to Don Samson, Brian Samson, and Rick Samson as witnesses and having observed their demeanor and having weighed their credibility, the Court finds that their testimony that Samson Farms, Inc. was the real owner of the grain sold to Continental Grain is entitled to no weight."

The bank's security agreement contained a clause covering "all crops" located on the real estate that Rick and Brian Samson farmed. Rick and Brian sold their grain under their trade name of "B & R Farms." This trade name was used only in connection with the sales made to Continental Grain. The manager of Continental Grain knew that B & R Farms was Brian and Rick Samson. The manager made a lien search for B & R Farms. He did not request a lien search on Brian or Rick.

As it relates to the defendants' contention that the plaintiff failed to submit proof that the grain sold to Continental came from the farm of the Samsons, this court in Adair County Farm Service v. Creston Feed & Grain, Inc., 390 N.W.2d 608 (Iowa App. 1986), held the secured party had established that grain purchased by the elevator was grain secured by Adair County Farm Service's security agreement, based on evidence that the debtor farmed only land described in the financing statement. In that case, somewhat like the case before us, the elevator contended that the secured party had to trace the grain so as to identify which field produced the grain that was purchased by the elevator. [In the case before us the elevator contends that the record is "devoid of any evidence that the grain purchased by it was grain to which the bank's security interest attached (no evidence of the source of the grain)."] In the Adair County case, we there held:

Because the record indicates the debtor only farmed the land described in the financing statement, our task is much easier. We do not decide whether a debtor who grows crops, a part of which are covered by a security agreement and the remainder which are not so covered, and sells all of his crops, needs to prove which elevator bought crops only covered by the security agreement. Given the facts in the record, we know that the debtor only grew crops in 1981 on the 660 acres described in the security agreement and all of these crops were sold only to the three defendant elevators.

Adair, 390 N.W.2d at 611.

Here, as in Adair County, the only land farmed by the Samsons was the land described in the security agreements. But even if this was not the case, the security agreements gave the bank security in all crops of the Samsons. The only crops sold to the elevator by B & R Farms was the crop of the Samsons. Thus, the origin of the grain loses its importance.

The trial court did not err in overruling Continental's motion for directed verdict on the ground it asserts in this division of our ruling. The record indicates substantial evidence, when viewed in the light most favorable to the bank, to support the trial court's decision. Having reached this result, we need not decide whether defendant waived error by failing to renew its motion for directed verdict at the close of all evidence. But see Luddington v. Moore, 261 Iowa 641, 155 N.W.2d 428 (1968).

II.

Continental Grain next contends Mingo Bank failed to prove the injury it sustained was due to Continental's conversion of the bank's secured property. It claims that the trial record is completely void of evidence as to the disposition of the proceeds from the sale of Samsons' grain after October 25, 1984. The bank counters by arguing that Continental never raised this issue in pleadings or at the trial. The bank states that, "It is a basic rule of appellate procedure that questions not presented to and not

passed on by the trial court cannot be raised or reviewed on appeal." It relies on Shill v. Coreage Corp., 353 N.W.2d 416, 420 (Iowa 1984), and Cole v. City of Osceola, 179 N.W.2d 524, 527 (Iowa 1970), for its authority.

We need not decide that procedural question for Mingo Bank presented substantial evidence that its secured property was sold by the Samsons to Continental, thereby destroying the bank's collateral and preventing it from foreclosing or repossessing the same. The bank was unable to trace the grain because it was commingled with other grain at the elevator. Proceeds are identifiable when the proceeds are directly traceable from the sale of the collateral. Humboldt Trust & Sav. Bank v. Entler, 349 N.W.2d 778, 783 (Iowa 1984). The proceeds were not identifiable at court because the drafts issued by Continental to Samsons were subsequently negotiated.

Mingo Bank did not know the grain had been sold until more than ten days had passed, at which time the proceeds had ceased to be perfected under Iowa Code section 554.9306(3). With the grain having been sold and the drafts negotiated, there was no means by which the bank could identify the proceeds of its security interest.

The grain in which Mingo Bank had a security interest was sold to Continental Grain, with the Samsons directly receiving the proceeds. There was no evidence the bank ever received any of the proceeds to apply towards the

Samsons' loans, nor do the Samsons contend they were not given proper credit on their account. (The payments samsons did make were properly credited.)

The bank presented evidence that both Rick and Brian Samson had outstanding balances on their loans in excess of \$98,000 each at the time of trial. With the collateral being sold and the proceeds not applied towards the bank's loans, the court found there was substantial evidence the bank has suffered injury. The findings of fact by the trial court are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We agree with this finding of the trial court.

III.

Mingo Bank contends that neither its May 11, 1984, nor its January 23, 1985, letter constituted a waiver of the bank's security interest in the collateral. Continental Grain argues that both letters constituted waivers.

The May letter demanded payment in full. It did not ask the Samsons to sell, seal, or in any manner liquidate their assets. It was only a demand for payment. The trial court so found. This finding is supported by substantial evidence. There is the testimony of Mr. Schiermeister that the letter in question was only a demand for the debt that was due and was not a demand for the Samsons to liquidate their crop. It was for the trial court to determine the credibility of the witnesses and the weight to be accorded

their testimony. The trial court's findings of fact have the effect of a jury verdict. Having found that the trial court's finding is supported by substantial evidence, we conclude that the trial court did not err in determining that the May 11 letter was not a waiver by the bank of its security interest in the Samson's farm products.

The January 23, 1985, demand letter is similar in content to the May 11 demand letter. However, when the January 23 letter is read with the companion letter sent the Samsons which advised that payment in full under the demand letter would not apply if they sold and sealed the secured gain the question arises as to whether the companion letter acted as a waiver of the bank's security. The trial court held that it did.

The determinative issue is whether the companion letter of January 23 constituted authority from the bank to sell the collateral. Iowa Code section 554.9306(2) provides:

(2) Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

The trial court made a finding of fact that the Samsons had authority by virtue of the January 23 companion letter and the surrounding circumstances to sell their crop. We must examine the record to determine whether there is substantial evidence to support the finding by the trial

court. It is clear that section 554.9306(2) does protect a secured party whose collateral has been sold or disposed of by providing that its security interest continues notwithstanding such sale or other disposition by the debtor. That section affords additional protection to the secured party by providing that the security interest "continue in any identifiable proceeds including collections received by the debtor."

However, that section is equally clear that the protections under the security interest may be lost if the sale is authorized by the secured party in the security agreement or "otherwise." The security agreements in the case before us did not authorize sale. Factually, each agreement has a provision obligating the debtor not to "sell, transfer, assign or otherwise dispose any collateral or any interest therein without prior written consent of the bank."

Since the security agreement does not contain a provision authorizing the sale, the bank cannot be held to have waived its security interest in the collateral unless it "otherwise" consented to the sale. In this respect, we note that our supreme court has held that an express prohibition against sale contained in a bank's security agreement can be overridden and waived by the bank's prior course of conduct allowing its borrower to sell its collateral. Such conduct rises to the level of establishing a

course of dealing from which it can be implied that the borrower has the authority to sell the secured collateral.

Hedrick Sav. Bank v. Meyers, 229 N.W.2d 252 (Iowa 1975);

Lisbon Bank and Trust Co. v. Murray, 206 N.W.2d 96, 98

(Iowa 1973).

In Hedrick, the supreme court noted:

[T]here is substantial evidence to support the trial court's finding that, from the very beginning of plaintiff's relationship with Eckley [the borrower], sales of livestock pledged as collateral were made to various dealers. Plaintiff had knowledge of this, raised no objection, accepted checks from these sales for credit to Eckley's account, and clearly relied on Eckley's honesty to properly account for the proceeds. This established a course of dealing from which the trial court could find, as it did, implied authority to sell to defendants in the challenged transactions.

Hedrick, 229 N.W.2d at 255.

In Lisbon, the supreme court held:

At trial the bank acknowledged a general course of dealing, notwithstanding the security agreements, permitting [Meier, the borrower] to sell collateral and apply the proceeds either to substitute on the notes. The bank admitted Meier accordingly sold hogs and horses on several prior occasions but denied he was authorized to sell cattle.

Lisbon, 206 N.W.2d at 98.

The trial court found and we agree that the bank did not engage in a prior course of conduct with the Samsons which impliedly waived their security interest. However, as previously stated, the trial court did find that as a result of the January 23 companion letter the bank waived its security interest. In this regard the trial court made the following findings:

In the instant case, the letter of January 23, 1985, directed the Samsons to sell the collateral and apply the proceeds to the repayment of the loan. It did not tell them that all payments by the purchaser were to be co-payments to the plaintiff and the debtor. It did not indicate that the sale of the crops were to take place through any but normal sale channels. Although there were prior dealings between the Samsons and Mingo Trust & Savings, the letter of January 23, 1985, clearly departed from the procedures or understandings between the Bank and the Samsons prior thereto. In this case, Mingo Trust & Savings Bank expressly waived its security interest for all crop sales occurring after the date of its letter of January 23, 1985.

The court based its findings of the bank's waiver on the letter that directed the Samsons to sell or seal the collateral. The court additionally found that the January 23 letters clearly departed from the procedures and understandings between the bank and the Samsons prior to that date. As to the latter finding, the evidence is conflicting. But a disputed question of the debtor's authority to sell collateral is for the trier of fact to decide. Lisbon Bank and Trust Co. v. Murray, 206 N.W.2d 96 (Iowa 1973); Producers Livestock Mktg. Ass'n v. John Morrell & Co., 220 Iowa 948, 951-52, 263 N.W. 242, 244 (1935).

Again, the trial court's fact findings are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). Such findings have the effect of a jury verdict to be disturbed only if induced by an erroneous application of law. Hedrick Sav. Bank v. Myers, 229 N.W.2d 252, 254 (Iowa 1975).

We conclude that the findings of the trial court are supported by substantial evidence. Accordingly, we affirm the trial court when it concluded that the January 23 letter acted as a waiver.

AFFIRMED.