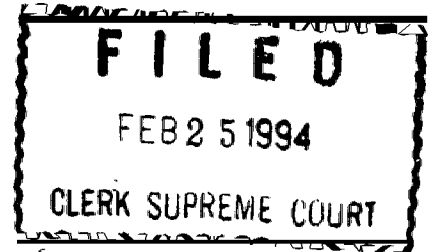


IN THE COURT OF APPEALS OF IOWA

No. 3-644 / 93-119



WILKIN ELEVATOR, d/b/a LOWDEN FEED SERVICE,

Appellant/Cross-Appellee,

vs.

BENNETT STATE BANK,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Cedar County,
James E. Kelley, Judge.

Elevator appeals and bank cross-appeals a directed
verdict for the bank on the elevator's claims of tort and
breach of contract arising from their business dealings.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Bradley Norton of Norton & Norton, P.C., Lowden, for
appellant.

David J. Meloy of Stanley, Lande & Hunter, P.C.,
Muscatine, for appellee.

Heard by Oxberger, C.J., Sackett, J., and Critelli,
S.J.*

*Senior judge from the 5th Judicial District serving
on this court by order of the Iowa Supreme Court.

CRITELLI, S.J.

Doug and Judy Beuthien raised hogs for several years and obtained financing for their operation from Bennett State Bank. In 1980, the Beuthiens signed an agricultural security agreement which gave the Bank a security interest in all of their livestock. The security agreement was amended in 1987 to fulfill the requirements of Iowa Code section 554.9307, which provides that a lender must give notice to potential buyers of farm products in order to maintain a lender's lien. The Bank filed financing statements with the Iowa Secretary of State in 1984 and 1989.

Wilkin Elevator d/b/a Lowden Feed Service (Lowden) began selling hog feed to the Beuthiens in February 1989. Lowden was a dealer of Golden Sun Feeds, and the Beuthiens received the feed from Golden Sun. The Beuthiens signed a promissory note for the purchase of the feed. The Beuthiens provided Lowden with two financial statements.

In December 1990, the credit manager for Golden Sun, Paul Fredrickson, spoke to the president of the Bank, Vergil Hering, about the Beuthiens' financial situation. It was the Bank's practice to loan the Beuthiens the money to purchase hogs, and when the hogs were sold, to apply the proceeds to the Beuthiens' debts with the Bank and Lowden. Hering assured Frederickson that the Bank would insist that when the Beuthiens sold hogs the feed bill would be paid.

In May 1991, the Bank was placed under new management. Hering left his employment with the Bank. The new management demanded an updated financial statement from the Beuthiens.

In July 1991, the Beuthiens wrote a check to Lowden that was returned for insufficient funds. The Beuthiens did not have sufficient funds in their account to pay the check because the Bank had exercised its ability to take funds from the Beuthiens' checking account and apply it to their debt to the Bank. Golden Sun then demanded that Lowden pay it for the feed delivered to the Beuthiens and Lowden did so. The Beuthiens bought no feed from Lowden after August 8, 1991.

On October 18, 1991 and October 22, 1991, the Beuthiens sold hogs and the checks issued for the hogs were jointly made out to the Beuthiens, the Bank, and Lowden. Lowden received these checks.

On October 25, 1991, the Beuthiens entered into a settlement agreement with the Bank concerning their overdue notes. They agreed to deliver to the Bank certain hogs, farm machinery, and crops. After the settlement, all checks from the sale of Beuthiens' hogs were issued in the name of the Bank only. No notice of the settlement agreement was given to the Beuthiens' other creditors.

On November 15, 1991, the Beuthiens paid Lowden a portion of their debt for the hog feed. The amount of

\$19,593 remained unpaid. In February 1992, the Beuthiens filed for bankruptcy.

Lowden sued the Bank alleging several theories of recovery. They claimed: (1) the settlement agreement was not valid; (2) breach of an oral contract; (3) breach of a constructive contract; (4) breach of an implied contract; (5) intentional interference with a contract; (6) fraudulent conveyance; (7) equitable estoppel; (8) equitable subrogation; and (9) waiver of lien by course of prior dealing.

The Bank filed a counterclaim seeking the proceeds of the checks dated October 18 and October 22, 1991, which Lowden held.

The Bank filed a motion for summary judgment. The district court granted the motion on the claims of invalid settlement, intentional interference with a contract, fraudulent conveyance, equitable subrogation, and waiver of lien by course of prior dealing.

The case then proceeded to trial before a jury on the claims of breach of an oral, constructive or implied contract and equitable estoppel. After the parties presented their evidence, the court directed a verdict for defendant on these four claims. The court found there was insufficient evidence in the record to support Lowden's claims. The court also found for the Bank on its counterclaim. Lowden appealed and the Bank cross-appealed.

I. SCOPE OF REVIEW

Our scope of review in this case is for the correction of errors at law. Iowa R. App. P. 4.

II. COURSE OF DEALING

Lowden first contends the district court erred in granting summary judgment on the issue of its reliance on the Bank's prior course of dealing. This contention is based on section 554.9306(2), which provides:

Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition 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.

A prior course of dealing may, upon proper proof, constitute authority to sell pledged collateral under section 554.9306(2). Hedrick Sav. Bank v. Myers, 229 N.W.2d 252, 256 (Iowa 1975).

As used in the statute, "otherwise" should be construed to include a prior course of dealing. Id. "Course of dealing" is defined in section 554.1205(1), as follows:

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.

In order for a party to take collateral free of a properly perfected security interest under the "course of dealing"

doctrine, that party must present proof of a course of dealing and show that the purchase involved was within the course of dealing. Larsen v. Warrington, 348 N.W.2d 637, 641 (Iowa App. 1984); Humboldt Trust & Sav. Bank v. Entler, 349 N.W.2d 778, 781 (Iowa App. 1984).

Thus, where a lender has, by a course of dealing, permitted a farmer to sell hogs which are collateral under a security agreement, Iowa courts have found the lender has lost its security interest. Hedrick, 229 N.W.2d at 256; Ottumwa Prod. Credit Ass'n v. Heinhold Hog Market, Inc., 340 N.W.2d 801, 803 (Iowa App. 1983).

In considering the district court's grant of a motion for summary judgment, our scope of review is whether genuine issues of material fact exist and whether the law was applied correctly. Stanfield v. Polk County, 492 N.W.2d 648, 649 (Iowa 1992). On appeal, we examine the record in the light most favorable to the party opposing the motion to determine if the movants have met their burden. Shaw v. Soo Line R.R. Co., 463 N.W.2d 51, 53 (Iowa 1990). Summary judgment is appropriate where there is no material fact in issue and the moving party is entitled to judgment as a matter of law. Id.

In the present case, we determine there is a genuine issue of material fact concerning whether the Bank waived its security interest in the proceeds from the sale of hogs by its course of dealing with the Beuthiens. We note that Hering testified that when he was president of the Bank,

the Bank did not require prior authorization before the Beuthiens sold hogs. We conclude summary judgment was not proper on this issue. Therefore, we reverse and remand for further proceedings on this issue.

III. SETTLEMENT AGREEMENT

Lowden contends the district court should not have granted summary judgment to the Bank on its claim that the Bank settlement agreement was invalid. They claim the Beuthiens gave preferential treatment to the Bank over other creditors when they entered into the settlement agreement.¹

The general rule is that debtors may lawfully prefer one or more of their creditors to others in applying their assets to the discharge or securing of their obligations. Production Credit Ass'n v. Shirley, 485 N.W.2d 469, 472 (Iowa 1992). It is generally immaterial that the preference delays or wholly prevents other creditors from obtaining payment, since this is the natural result of the preferential transfer. Id. Furthermore, a debtor's intent

1. Appellant frames this issue with reference to Iowa Code chapter 681. This chapter incorporates the theory of fraudulent conveyances, but applies only to general assignments. See Friedmeyer v. Lynch, 226 Iowa 251, 261, 284 N.W. 160, 165 (1939) (A fraudulent intent to dispose of property by an assignment given to a creditor for the express purpose of hindering, delaying, and defrauding other creditors is invalid when the assignee takes not only with knowledge, but by participating in the fraud.).

to hinder, delay, or defraud other creditors does not alone invalidate a preferential transfer. Id.

However, when a preferred creditor knows of the debtor's fraudulent intent and accepts a mortgage or transfer of property, wholly or in part to aid the fraud, that secured creditor has participated in the wrong and the transaction is fraudulent and will not be honored. First State Bank v. Kalkwarf, 495 N.W.2d 708, 712 (Iowa 1993). Such fraud must be found under the circumstances considered as a whole. Id. Some indicia of fraud are: inadequacy of consideration, insolvency of the transferor, and pendency or threat of third-party litigation. Id. Additionally, the creditor must be able to show prejudice, meaning the creditor must be able to show it would have received something which has become lost by reason of the conveyance. Production Credit Ass'n, 485 N.W.2d at 474.

We determine there is a genuine issue of material fact on this issue. By the settlement agreement of October 25, 1991, the Beuthiens conveyed to the Bank their real estate, 1991 crop, hog inventory, and equipment. It is clear this conveyance caused at least a hindrance and delay to the Beuthiens' other creditors, including Lowden. Whether the Beuthiens had a fraudulent intent, and if so, whether the Bank knew of this intent, are questions of fact. We conclude summary judgment was not proper on the issue of whether the settlement agreement was invalid. We reverse and remand for further proceedings on this issue.

IV. TORTIOUS INTERFERENCE WITH CONTRACT

Lowden claims the district court should not have granted summary judgment to the Bank on its claim that the Bank tortiously interfered with the contract between Lowden and the Beuthiens.

Intentional interference with a contract requires proof that: (1) plaintiff had a contract with a third party; (2) defendant knew of the contract; (3) defendant intentionally and improperly interfered with the contract; (4) the interference caused the third party not to perform, or made performance more burdensome or expensive; and (5) damage to the plaintiff resulted. Burke v. Hawkeye Nat'l Life Ins. Co., 474 N.W.2d 110, 115 (Iowa 1991). The supreme court has pointed out that the third element requires an improper interference. Jackson v. State Bank of Wapello, 488 N.W.2d 151, 157 (Iowa 1992).

We determine summary judgment was improper on this issue as well. The parties agree there was a contract between Lowden and the Beuthiens, and that the Bank knew of the contract. Whether the Bank's actions intentionally and improperly interfered with the contract is a genuine issue of material fact. Therefore, we reverse and remand for further proceedings.

V. CONSTRUCTIVE CONTRACT

Although referred to in a general sense, Lowden has not presented any argument on the issues of express or

implied contract. However, assuming Lowden did raise an argument on these issues, we affirm the trial court.

Lowden claims the district court should not have directed a verdict for the Bank on the issue of whether there was a constructive contract between Lowden and the Bank.

In reviewing rulings on motions for directed verdict, we simply need ask whether there was sufficient evidence to generate a jury question. Jackson, 488 N.W.2d at 155. Evidence is sufficient if there is substantial evidence to support every element of the claim submitted. Id. We view the evidence in the light most favorable to the adverse party. B & B Asphalt Co., Inc. v. T.S. McShane Co., Inc., 242 N.W.2d 279, 284 (Iowa 1976). The movant is considered to have admitted the truth of all evidence offered by the opposing party and every favorable inference which may fairly and reasonably be deduced from it. Id.

A constructive contract, otherwise known as a contract implied in law, is an obligation imposed by the law without regard to either party's expressions of assent either by words or acts. Irons v. Community State Bank, 461 N.W.2d 849, 855 (Iowa App. 1990). Constructive contracts are imposed by law to prevent unjust enrichment. Id. The doctrine of unjust enrichment mandates that one shall not be permitted to unjustly enrich himself at the expense of another or to receive property or benefits without making

compensation for them. Johnson v. Dodgen, 451 N.W.2d 168, 175 (Iowa 1990).

We determine the district court did not err in directing a verdict for the Bank on this issue because Lowden failed to present sufficient evidence to impose a constructive contract. We note that a constructive contract is a form of restitution, and is a form of remedy which should be imposed only when there is no other remedy provided by law. See Irons, 461 N.W.2d at 855.

VI. EQUITABLE ESTOPPEL

Finally, Lowden contends the district court should not have directed a verdict for the Bank on its claim of equitable estoppel.

Equitable estoppel is based on the concept that one who has made certain representations should not thereafter be permitted to change his or her position to the prejudice of one who has relied thereon. Fernandez v. Iowa Dep't of Human Servs., 375 N.W.2d 701, 708 (Iowa 1985). The elements are: (1) a false representation or concealment of material facts by the actor; (2) lack of knowledge on the part of the other person; (3) intention by the actor that the representation or concealment be acted on; and (4) reliance by the other person to his or her prejudice. Henderson v. Millis, 373 N.W.2d 497, 505 (Iowa 1985).

Lowden's claim is based on Hering's statement to Frederickson that the Bank would insist that when the

Beuthiens sold hogs the feed bill would be paid. However, Frederickson was an employee of Golden Sun, not Lowden. Lowden presented no evidence of any representations the Bank made to it. Therefore, we affirm the action of the district court directing a verdict for the Bank on this issue.

VII. INTEREST

In its cross-appeal, the Bank contends the district court should have awarded it interest on its counterclaim from the date the counterclaim was filed. The district court granted interest from September 9, 1992, the date Lowden deposited the checks with the clerk of court.

Because we have reversed and remanded for a new trial on several issues in this case, we find we need not now address this issue concerning the interest due on the Bank's judgment against Lowden.

VIII. SUMMARY

In summary, we have reversed and remanded for further proceedings on the issues of whether the Bank waived its security interest in the proceeds of hogs sold by the Beuthiens by its prior course of dealing, whether the settlement between the Bank and the Beuthiens was invalid, and whether the Bank tortiously interfered with the contract between Lowden and the Beuthiens. We have affirmed the district court's action in directing a verdict

on the issues of constructive contract and equitable estoppel. Costs of this action are assessed to Bennett State Bank.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.