



IN THE COURT OF APPEALS OF IOWA

H. MATT NELSON,	)	
Plaintiff-Appellee,	)	Filed December 29, 1982
vs.	)	
	)	2-340 270
LARSON & NELSON INSURANCE AGENCY,	)	2-67576
INC.,	)	
Defendant-Appellant.	)	

Appeal from Wright District Court, Newt Draheim, Judge.

Defendant appeals from the trial court's judgment awarding plaintiff \$5597 in this suit for breach of a contract to buy an insurance agency. **AFFIRMED.**

James L. Kramer of Johnson, Erb, Latham & Gibb, P.C., Fort Dodge, for defendant-appellant.

Robert E. Lee of Arends & Lee, Humboldt, for plaintiff-appellee

Considered en banc.

When plaintiff H. Matt Nelson purchased his insurance agency, he agreed to pay \$12,000 to Farmers Mutual Hail Insurance Company in equal installments of \$6000 plus interest on February 15, 1977, and February 15, 1978.

In 1976, he negotiated a sale of his business to Richard Barnes, and sold Barnes the business with the expirations (commissions) which would become payable after the farmers who had purchased hail insurance from the agency paid their premiums at the end of the growing season. In a bill of sale dated January 7, 1977, Nelson warranted that there were "no encumbrances, taxes, liens, or charges upon said Expirations." At trial, Nelson conceded that this was not true.

A contract of sale was signed by Nelson and Barnes on February 12, 1977. In that contract, Nelson sold his entire interest in the contract previously executed between Farmers and himself, and Barnes (the buyer, defendant in this case) agreed to assume the former obligation of Nelson under that contract—that is, the payments for the business. In the earlier contract, as incorporated by reference in the contract of sale between Nelson and Barnes, Nelson authorized Farmers to deduct the 1977 and 1978 payments from the deferred and renewal commissions figured in 1977 and 1978 in lieu of a direct payment by him to Farmers.

Nelson contends that the February 12, 1977, contract of sale made it clear to Barnes that Farmers had a lien on the expirations and that any warranty expressed in the earlier document was thereby nullified. Barnes, on the other hand, contends that Nelson's express warranty was breached.

In February, 1978, Farmers refused to pay commissions due to the agency unless Barnes would assume Nelson's debt under the note. In order to receive the commissions due, Barnes agreed to assume Nelson's obligation.

Barnes argues that he told Nelson that he would not assume Nelson's debt unless Nelson agreed that he could deduct the \$6,000 obligation (plus interest) from his contract obligation to Nelson, and that Nelson agreed. There was testimony by Nelson and by Calvin E. Humphrey, a Farmers agent, that Barnes was made aware of the obligation to Farmers and of Farmer's lien upon the expirations early in the negotiations and repeatedly thereafter.

In 1978, Nelson was entitled to \$8,108.90 under the contract, and Barnes paid Nelson \$2403.40. He credited \$6360 to Nelson's debt to Farmers, leaving a balance of \$653.50 over what Nelson would otherwise have been entitled to under the contract. Nelson did not receive a balance of \$5597 to which he would have been entitled under the contract, were it not for the payment to Farmers.

The trial court found that Barnes knew of the encumbrances at the time of the purchase and that Nelson was not entitled to any commissions earned in 1977 and payable in 1978. The court found, however, that Nelson was entitled to the full \$8000 agreed to in the contract, and entered judgment for \$5597 plus interest, the difference between \$8000 and the \$2403 actually paid.

Barnes contends that under the January bill of sale, he acquired no more than the assets of the agency, and did not assume any of Nelson's debts. He argues that his knowledge or lack of knowledge of Nelson's debt to Farmers is immaterial, since he did not undertake to discharge that debt. Because of Nelson's alleged breach of his warranty that the assets Barnes purchased were unencumbered, Barnes argues that he was entitled to reduce his contract payments to Nelson by the amount of \$6360, which Farmers deducted from his commission payments. He argues that the trial court erred when it awarded damages to Nelson, since, in his opinion, the award is not supported by the evidence or by any finding of the trial court. Finally, he argues that he is entitled to recoupment for the amount of Nelson's debt paid by Barnes.

I. Scope of Review.

Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4.

II. Substantiality of the Evidence.

"Findings of facts in a law action. . . are binding upon the appellate court if supported by by substantial evidence." Iowa R. App. P. 14(f)(1).

We find that there is substantial evidence that supports the trial court's findings of fact. Testimony by Nelson and Humphrey, as well as documentary evidence, amply substantiates the court's conclusions.

III. The Recoupment Defense.

"Any defense that a contract or writing sued on is void or voidable, . . . or which alleges any matter in justification, excuse, release or discharge, . . . must be specially pleaded." Iowa R. Civ. P. 101. The defendant failed to allege recoupment at trial, and cannot now elect that defense. Nor did the defendant introduce a motion under rule 179(b) to preserve error with regard to the court's alleged failure to rule on the recoupment theory so that it could enlarge or amend its conclusions. See Sucow v. Boone State Bank & Trust Co., 314 N.W.2d 421, 424 (Iowa 1982).

For these reasons, the findings and the judgment of the trial court are affirmed.

AFFIRMED.