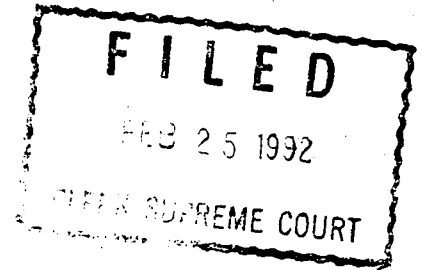


IN THE COURT OF APPEALS OF IOWA

No. 1-412 / 90-1126



LUKE KRIENER and LEONA KRIENER,

Appellees,

vs.

LEON HAGEMAN,

Appellant.

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Appeal from the Iowa District Court for Winneshiek
County, James C. Bauch, Judge.

Defendant appeals a judgment entered against him in
district court on a promissory note. **AFFIRMED.**

Dale L. Putnam, Decorah, for appellant.

Frank D. Elwood of Elwood & Elwood, Cresco, for
appellees.

Considered by Schlegel, P.J., and Sackett and Habhab,
JJ.

HABHAB, J.

Jean and Leon Hageman have been involved in farming operations in northern Iowa for many years. Leona and Luke Kriener (Krieners) also lived on a farm. Leona Kriener and Jean Hageman are sisters.

From 1970 to 1980, Luke Kriener sold farm equipment. Leon Hageman purchased a combine from Luke Kriener through Ingersoll Farm Equipment in 1978. Leon Kriener paid half of the \$16,000 purchase price and borrowed the remaining \$8,000 from the Krieners. Krieners prepared a promissory note using a bank form which the Hagemans signed on May 29, 1979. The note had no due date and provided for repayment of the \$8,000 plus 10 percent interest. No payments were ever made on the note.

During the fall of 1980, the Krieners and the Hagemans agreed to a renewal note. On November 29, 1980, Leon Hageman (Hageman) signed the renewal note in the amount of \$8,000 with the interest rate increased from 10 percent to 15 percent. Jean Hageman did not sign the 1980 note. The 1980 note was again executed on a standard bank form.

Hageman made a few sporadic payments on these notes, but by 1987 full payment was long overdue. By this time Luke Kriener had become blind and suffered severe medical problems. The Krieners needed the money to pay medical bills. Luke Kriener had lost a kidney in 1983. He was on a dialysis machine for seven months. He lost the transplanted kidney and obtained another in 1986. His toe

was amputated in 1985 (his leg was amputated shortly before trial in 1990). His medical bills through the year 1987 exceeded \$100,000.

In the fall of 1987, the Krieners went to the Hagemans' home and asked for payment on the 1980 note. On October 5, 1987, the Krieners and Hagemans entered into an agreement whereby if the Hagemans paid \$10,500 by March 1, 1988, this would be considered payment in full on the note. The Krieners did not accept this agreement as a replacement for the 1980 note, nor did they surrender the 1980 note as they did the 1979 note. Within two days Hageman paid \$2,644.29, but made no further payments although demand therefor was made.

The Krieners then instituted these proceedings seeking payment under the 1980 promissory note. The district court found the 1987 agreement was unenforceable because it was not supported by consideration since Hageman was already obligated to pay a liquidated amount under the 1980 note. The court further found there was adequate consideration to support the 1980 note; the Krieners agreed to wait for payment of the \$8,000 under the 1979 note in return for an increased interest rate. The court entered judgment against Hageman for \$20,721.87. The court also ordered Hageman to pay attorney fees of \$251.54. He now appeals. We affirm.

Where an action is tried by ordinary proceedings, the trial court's findings have the effect of a special

verdict; they are binding on us if supported by substantial evidence. Sergeant v. Leonard, 312 N.W.2d 541, 543 (Iowa 1981). We view the evidence in the light most favorable to the judgment. Id.

I.

To support his argument that the result of the October 5, 1987, meeting created a settlement agreement, Hageman contends that on that date a bona fide dispute between the parties existed on an unliquidated outstanding debt. The trial court found otherwise.

We find substantial evidence in the record to support the finding of the trial court that the debt under the 1980 note was liquidated. A debt is considered liquidated when the precise amount thereof is fixed or has been agreed upon. Olsen v. Wilson & Co., 244 Iowa 895, 901, 58 N.W.2d 381, 385 (1953). An unliquidated claim is one in which the amount has not been fixed by agreement or cannot be determined by the rules of arithmetic or law. Id.

We agree with the trial court that the debt under the 1980 note was liquidated. In this respect, it is beyond dispute there was an \$8,000 note dated November 29, 1980, that carried interest at 15 percent and that it had matured. By applying the rules of arithmetic, the district court was able to determine the amount of the debt. We agree with the following findings of the trial court:

A great deal of testimony was offered as to when interest payments were made and in what amount but

there was no dispute as to the original \$8,000 debt at the interest rate of 10 percent and later 15 percent. With these figures known and evidence offered as to interest payments made, the court can calculate the balance due.

II.

We also find substantial evidence in the record to support the trial court's finding that there was no additional consideration given for the October 5, 1987, agreement. Although we do not necessarily disagree with the premise advanced by Hageman that an agreement not to go through bankruptcy may constitute adequate consideration, we, like the trial court, are unable to find from the record that such agreement was ever reached in this case. We affirm on this issue.

III.

We turn now to Hageman's contention that a settlement agreement was entered into by the parties on October 5, 1987, and that this constituted a new contract. The Krieners deny this and, although they admit an accord was reached, they deny there was ever a satisfaction.

The case of Sergeant v. Leonard, 312 N.W.2d 541 (Iowa 1981), casts light on this dispute. The Sergeant case was a suit for a real estate commission. The court held that the broker and the property owner intended to suspend the listing contract pending performance of modification by the owner as opposed to substituting the modifying agreement.

The court held the broker could enforce the original listing contract upon the owner's breach of the modification. It stated:

A. Two principal legal situations may arise when a contract obligation is modified, an accord or a substituted contract. With an accord the parties intend that the original contract obligation remains viable but that it is suspended pending performance by the debtor of the modification. If the debtor breaches the modification, the creditor may sue on the original contract or on the modification. The American Law Institute states in Restatement (Second) of Contracts, Section 281 (1981):

"(1) An accord is a contract under which an obligee promises to accept a statement performance in satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty.

"(2) Until performance of the accord, the original duty is suspended unless there is such a breach of the accord by the obligor as discharges the new duty of the obligee to accept the performance in satisfaction. If there is such a breach, the obligee may enforce either the original duty or any duty under the accord.

"(3) Breach of the accord by the obligee does not discharge the original duty, but the obligor may maintain a suit for specific performance of the accord, in addition to any claim for damages for partial breach."

B. With a substituted contract the parties intend to terminate the original contract obligation and to substitute the modification. If the debtor breaches the modification, the creditor may sue only on that agreement. The same Restatement states in section 279:

"(1) A substituted contract is a contract that is itself accepted by the obligee in satisfaction of the obligor's existing duty.

"(2) The substituted contract discharges the original duty and breach of the substituted contract by the obligor does not give the obligee a right to enforce the original duty."

C. Whether a contract is an accord or a substitute contract is a question of interpretation, subject to the general rules stated in Chapter 9. In resolving doubts in this regard, a court is less likely to conclude that an obligee was willing to accept a mere promise in satisfaction of an original duty that was clear than in satisfaction of one that was doubtful. It is therefore less likely to find a substituted contract and more likely to find an accord if the original duty was one to pay money, if it was undisputed, if it was liquidated and if it was matured.

With the aforesaid as our background, two principal legal situations may arise when a contract obligation is modified--an accord or a substituted contract. Id. at 545. With an accord the parties intend that the original contract obligation remains viable, but that it is suspended pending performance by the debtor of the modification. Id. If the debtor breaches the modification, the creditor may sue on the original contract or on the modification. Id.

With a substituted contract the parties intend to terminate the original contract obligation and to substitute the modification. Id. at 546. If the debtor breaches the modification, the creditor may sue only on that agreement. Id. Whether a contract is an accord or a substitute contract is a question of interpretation. Id. A court should be less likely to find a substituted contract, and more likely to find an accord, if the original duty was to pay money, if it was undisputed, if it was liquidated, and if it was matured. Id.

A defendant bears the burden of proof to an accord and satisfaction by a preponderance of the evidence. RMP Industries, Ltd. v. Linen Center, 386 N.W.2d 523, 524 (Iowa App. 1986). An accord and satisfaction requires valid consideration which is offered, intended, and accepted as full satisfaction of the original claim. Id. The general rule is that where a debt is liquidated, payment by the debtor of a lesser sum will not result in accord and satisfaction, as the claim requires further consideration for its discharge. Olson, 244 Iowa at 902, 58 N.W.2d at 386.

We find substantial evidence in the record that the note of 1980 remained a viable note with "suspended" designation pending performance by Hageman of the terms of the agreement. When the terms were modified, an accord was reached. With the accord, the parties intended the original contract obligation would remain viable but that it was suspended pending performance by Hageman of the modification. It is clear Hageman breached the modification, and under these circumstances, we agree with the trial court that the Krieners were entitled to recover under the 1980 note.

We affirm the district court on all issues.

AFFIRMED.

Schlegel, J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I concur specially. Plaintiffs sued defendant on a note given November 29, 1980, in a principal amount of \$8,000, with interest at fifteen percent. The note was given to replace a 1970 note that was never paid.

On October 5, 1987, plaintiff and defendant agreed the note would be satisfied if defendant paid \$10,500 by March 1, 1988. Defendant paid \$2,644.29, but did not pay the balance by March 1, 1988. In September 1988, the balance of the agreement not having been paid, plaintiffs sued on the November 29, 1980 note. Defendant contended his only obligation to plaintiffs was to pay the balance of the \$10,500 note, while plaintiffs contended they should have the total amount of principal and interest still unpaid on the November 29, 1980 note.

The focal question is whether the plaintiffs were required to honor the October 5, 1987 settlement agreement. The settlement agreement was contingent on being paid by March 1, 1988. It was not paid by that date and, because of that, I would find plaintiffs were no longer required to honor it. I, therefore, would affirm the judgment on the note.