FILED
AUG 27 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

| | | |
|---|---|---|
| **ALFRED LEONARD and ALBERT LEONARD as Guardians of ROSE LEONARD and Conservators of her property,** | ) | Filed August 27, 1986 |
| Plaintiffs-Appellees, | ) | 178 |
| vs. | ) | 6-234 |
| **AMERICAN INVESTMENT, INC., and DARRELL D. ANDERSON,** | ) | 85-1178 |
| Defendants-Appellants. | ) | |

Appeal from the Iowa District Court for Fremont County (21613) - Glen M. McGee, Judge.

Defendants appeal the civil judgment entered against them. **AFFIRMED.**

Raymond E. Pogge of Pogge, Root & Fleming, Council Bluffs, Iowa, for defendants-appellants.

Richard B. Maher, Tabor, Iowa, for plaintiffs-appellees.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ.

On August 11, 1971, Darrell D. Anderson, as president of Home Federal Mortgage, Inc., drafted a lease between the corporation and Rose Leonard. The lease was "for the sole purpose of leasing a house" but also provided the corporation with a first right to hunt on the premises. The house was located on approximately an acre of land, while the section of land involved 160 acres. The rent was $150 per year, for a ten-year period (September 1, 1971 to September 1, 1981), with an option given to the corporation to renew said lease for an additional ten-year period. The lease provided that the corporation would do all repairing and remodeling on the house and furnish a fire and extended coverage insurance policy in the amount of $2,000 payable to Rose Leonard. The lease also provided that it could be assigned by either party.

In July, 1984, a fire totally destroyed the house. At this time Rose Leonard's sons, Alfred and Albert Leonard, had been appointed as voluntary conservators of their mother. The lease had also been assigned to various assignees, with defendant, Darrell D. Anderson, as the present assignee. Over the years defendant had done extensive repairing and remodeling to the house, at a cost between $12,000 to $15,000. Due to the fire, the defendants collected $16,000 in insurance proceeds which included the loss of the house, repairs done to the house, and the personal property destroyed in the fire. The defendants did not tender the $2,000 to plaintiff as required in the lease.

On August 4, 1984, plaintiff served defendant with notice of termination of the lease. Defendants subsequently rented and incurred expenses in establishing other property for hunting. This was the basis for their counterclaim.

Plaintiffs filed their petition on November 1, 1984, alleging declaratory judgment, quantum meruit, and right to the insurance proceeds. Specifically,

plaintiff prayed for a judgment declaring said lease expired, requesting an award of reasonable rental value for use of property and an award of insurance proceeds. Defendants in their answer and counterclaim affirmatively state that assignee American Savings Company had exercised the 1981 option and that Mrs. Leonard had received full rent payments. In the counterclaim defendants assert damages caused by plaintiffs improper termination of the lease.

The trial court awarded judgment to the plaintiff. The court concluded that when the house was destroyed by fire it became impossible for the plaintiffs to perform the contract. The trial court also found that the lease option was properly exercised by a letter from Darrell D. Anderson, president of American Savings Company, to Mrs. Leonard dated July 15, 1981. Judgment was ordered against defendant for the $2,000 insurance loss to plaintiff and for $450 for the yearly rents for 1981, 1982, 1983, plus 10% interest and court costs.

We note that our review of the trial court is limited to errors of law. Iowa R. App. P. 4. Therefore, this case is reviewed as tried in the court below. Mosebach v. Blythe, 282 N.W.2d 755, 758 (Iowa 1979). If supported by substantial evidence and justified as a matter of law, the judgment will not be disturbed on appeal. Atlantic Veneer Corp. v. Sears, 232 N.W.2d 499, 502 (Iowa 1975); Iowa R. App. P. 14(f)(1). But the reviewing court is not bound by the trial court's determination of law. Mosebach, 282 N.W.2d at 759.

On appeal the defendants argue that the trial court erred in: allowing plaintiffs to amend their petition to raise the affirmative defense of impossibility of performance, not specifically listing the reasons for overruling their motion to dismiss plaintiff's petition and in finding impossibility of performance and thereby dismissing their counterclaim for damages.

I.



In their first assignment of error, the defendants contend that the trial court erred when it allowed the plaintiffs to amend their petition, at the close of their case, to assert that the destruction of the house made performance of the lease impossible. Defendants contend that this amendment substantially changed the issues and hampered their ability to prepare to defend this issue.

The allowance of amendments should be the rule and denial the exception. Chao v. Waterloo, 346 N.W.2d 822, 825 (Iowa 1984); Ackerman v. Lauver, 242 N.W.2d 342, 345 (Iowa 1976), see Iowa R. Civ. P. 88. Amendments should not be allowed if they substantially change the issues. Ackerman, 242 N.W.2d at 345; Kardux Transfer, Inc. v. McGrew, 350 N.W.2d 223, 225 (Iowa Ct. App. 1984). In determining whether to allow an amendment to the petition, the trial court has considerable discretion and we interfere only where an abuse of discretion is clearly shown. Moser v. Brown, 249 N.W.2d 612, 615 (Iowa 1977). Finally, we recognize the principle that the time of the amendment is not the determinating factor, rather we consider whether the amendment substantially changes the issue. Beneficial Finance Co. of Black Hawk County v. Reed, 212 N.W.2d 454, 456 (Iowa 1973).

We can interfere with the trial court's decision only if an abuse of the court's discretion is clearly shown. Such abuse hinges upon whether the amendment substantially changed the issues involved in this case. In their petition plaintiffs requested declaratory judgment stating that the lease had expired and thereby extinguished defendant's rights in said property. In their answer defendants affirmatively asserted that the 1981 option had been exercised, and therefore defendant had a right to the property. The existence of a valid contract is the crux of this case. The theory that the performance of the contract

was rendered impossible by the house's destruction is an argument which relates to the lease's validity. Defendant knew of the house's destruction and was aware that said event would alter the parties' relationship. This amendment did not substantially change the issues and it worked no hardship on defendant.

We affirm on this claim of error.

II.

At the end of plaintiff's presentation of evidence, defendants moved to dismiss plaintiff's petition and renewed the motion after presentation of all evidence. On appeal defendants contend that pursuant to Iowa Rule of Civil Procedure 118, the court was required to rule on each separate ground in the motion. Here the court summarily overruled this motion. Defendants also generally assert that the trial court erred in failing to sustain either motion to dismiss.

"A motion, or other matter involving separate grounds or parts, shall be disposed of by separate ruling on each and not sustained generally." Iowa R. Civ. P. 118. The purpose of this rule is to enable the parties to know what grounds are sustained by the court and thus limit issues on appeal. Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 743 (Iowa 1977).

Here the court overruled all grounds of defendant's motions to dismiss. We recognize that the trial court should have specifically ruled on the three divisions of defendant's motion but failure to do so does not expand the issues on appeal. Further, we note that defendant failed to move for an enlargement of the trial court's findings as provided by rule 179(b), Rules of Civil Procedure. In the absence of such a motion we will not assume the court ignored defendant's motion, but rather we assume the trial court considered the motion to dismiss and correctly rejected it. Fort Dodge Country Club v. Iowa-Illinois Gas and

Electric Company, 231 N.W.2d 595, 597 (Iowa 1975). The failure of the trial court in not specifically ruling on the motions did not prejudice defendants in view of the court's order rejecting the defendant's contentions.

On appeal defendants also generally allege that the trial court erred in overruling their motions to dismiss. We recognize the proposition that a motion to dismiss made during trial to the court is equivalent to a motion for directed verdict in a jury trial. Brown v. Ellison, 304 N.W.2d 197, 202 (Iowa 1981). A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)2). Movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). When substantial evidence has been presented to support each element of a claim, a motion for directed verdict must be overruled. Henkel v. R and S Bottling Co., 323 N.W.2d 185, 188 (Iowa 1982).

At the close of all evidence the court had four claims before it: a request for a judgment declaring the lease expired and defendant's rights extinguished, the theory of quantum meruit, an illegal right to insurance proceeds, and, through the allowance of the amendment, impossibility of performance. Upon considering the evidence in a light most favorable to plaintiff, we have reached the following conclusions. We concur with the trial court in finding that through the letter dated July 15, 1981, the defendants exercised their option. This extended the lease until September 1, 1991. Because of this finding plaintiffs request for declaratory judgment was without merit.

With the renewal of the option, an express agreement existed. Quantum meruit is a concept based upon the existence of an implied contract, and since

an express contract supersedes an implied contract, Chariton Feed and Grain, Inc. v. Harder, 369 N.W.2d 777, 791 (Iowa 1985), this was not a theory upon which plaintiff could recover.

The trial court's denial of defendant's motion to dismiss was correct. We find substantial evidence to support each element of plaintiffs claim of impossibility of performance and right to insurance process. The insurance proceeds, totalling $2,000, were provided for in the original contract. Defendant contends that the insurance proceeds should go to them to pay toward rebuilding. This assertion is not supported by parties intentions nor the written instrument and is therefore rejected. Regarding the theory of impossibility of performance, the following division fully discusses the elements of that claim.

III.

Defendant contends the trial court erred because its ruling was contrary to the law and evidence presented. Specifically, the defendant argues that the fire did not totally destroy the leasehold, only the house was destroyed. Defendants assert they still possess a right to hunt and therefore the court erred in dismissing their counterclaim.

The cardinal principle in the construction of written contracts is the intent of the parties must control; and except when there is ambiguity, the parties' intent is determined by what the contract itself says. Iowa R. App. P. 14(f)(14); Chariton Feed and Grain, Inc., 369 N.W.2d at 785. Here, the lease provided that the "sole purpose" of the agreement was to lease the house. Also provided within said lease was the provision defendants be given first right to hunt. Defendant interprets the agreement to provide for the renting of the house and the separate right to hunt the premises. In cases such as this, when the language is clear, the intention expressed in the words of the agreement prevail

over the interpretation of the parties. Bidinger v. State, 341 N.W.2d 734, 737 (Iowa 1983). We resolve all doubts concerning the meaning of this agreement against defendants as the drafter. Village Supply Company, Inc. v. Iowa Fund, Inc., 312 N.W.2d 551, 555 (Iowa 1981). As drafted by defendants, the "sole purpose" of the lease was the rental of the house, with the rental went the privilege of the first right to hunt. Without the house rental this privilege disappeared.

Defendant asserts the theory of impossibility of performance was not supported by the evidence or the law and therefore the courts ruling is reversible error. We recognize the doctrine of impossibility as an excuse for nonperformance where "that which has been promised becomes objectively impossible to perform due to no fault of the nonperforming party." Nora Springs Cooperative Co. v. Brandau, 247 N.W.2d 744, 747 (Iowa 1976). The doctrine of impossibility of performance refers to extraordinary circumstances which the parties could not have anticipated and arise due to no ones fault. Associated Grocers of Iowa Cooperative, Inc. v. West, 297 N.W.2d 103, 108 (Iowa 1980). When performance is rendered impossible by the destruction of the subject matter of the agreement, the obligor will be discharged. Salinger v. General Exchange Insurance Corp., 217 Iowa 560, 565, 250 N.W. 13, 15 (1933), and District Township of Union v. Smith, 39 Iowa 9, 11, 18 Am. Rep. 39, 40 (1874).

Regarding the theory of impossibility, or as stated by the more modern authorities, impracticability of performance, Restatement (Second) of Contracts, sections 261 and 263 provide:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

* * *

> If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction, or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.

Under these provisions of the Restatement, if the existence of a specific thing is necessary for the performance of the contract then the destruction of that thing makes performance impracticable and discharges the obligors duty to render performance. Restatement Contracts (Second) § 263, comment a (1981).

"In promises for an agreed exchange, a promisor is discharged from the duty of performing his promise of substantial performance of the return promise is impossible because of the non-existence, destruction or impairment of the requisite subject matter." Estate of Wegner, 88 Misc.2d 418, 419, 388 N.Y.S.2d 258, 260 (1976). See also Mouhelis v. Thomas, 95 Ill. App. 3d 181, 419 N.E.2d 956 (1981), and Oldum v. Old Home Manor, Inc., 313 Pa. Super. 99, 459 A.2d 757 (1983).

Here the destruction of the house rendered performance of the rental agreement impossible. The lease provided for the furnishing of a fire insurance policy, it did not anticipate the complete destruction of the house. The rental of this house was the "sole purpose" of the lease, its destruction discharged plaintiff's duty to perform. With the discharge of the rental obligation went a discharge of the attendant hunting right. The right to hunt existed only as long as the rental obligation. Plaintiffs correctly presented the notice of termination to defendants.

Regarding the court's order that defendant pay $450 in back rent, defendants contend this to be error. Defendants assert that plaintiffs have the checks and to require them to pay again would constitute double rent. We note that

failure to state, argue, or cite authority supporting a legal issue may result in waiver of that issue. Iowa R. App. P. 14(a)(3). Here defendants failed to cite any authority in support of this proposition, therefore we deem it waived.

**AFFIRMED.**