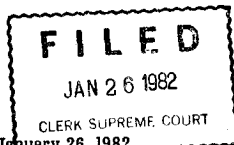


IN THE COURT OF APPEALS OF IOWA



ELIASON & KNUTH DRYWALL CO., INC.,)
 Plaintiff/Appellee/Cross-Appellant,)
 vs.)
 IOWA FUND, INC.,)
 Defendant/Appellant/Cross-Appellee.)

Filed January 26, 1982

1-127
 2-65617

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UNIVERSAL MANUFACTURING CO.,)
 Plaintiff/Appellee/Cross-Appellant,)
 vs.)
 IOWA FUND, INC.)
 Defendant/Appellant/Cross-Appellee.)

1-296
 2-65731

Appeal from Polk District Court, Ray Hanrahan, Judge.

Defendant-appellant and cross-appellee appeals the district court's refusal to allow defendant, the developer of an industrial park, the specific sewer use charges it requested from plaintiff. Plaintiffs-appellees and cross-appellants, landowners in the industrial park, appeal from the district court's declaratory judgment that they must pay reasonable sewer charges. Defendant-appellant also appeals the trial court's ruling that its claim against Universal Manufacturing Co. for damages to the sewer line is barred by the statute of limitations. AFFIRMED.

James L. Bennett, Des Moines, for defendant/appellant/cross-appellee.

Richard J. Sapp of Nyemaster, Goode, McLaughlin, Emery & O'Brien, Des Moines, for plaintiff/appellee/cross-appellant, Eliason & Knuth Drywall Co., Inc.

George A. Wilson III of Dreher, Wilson, Adams & Jensen, Des Moines, for plaintiff-appellee/cross-appellant.

Heard and considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Defendant-appellant and cross-appellee appeals the district court's refusal to allow defendant, the developer of an industrial park, the specific sewer use charges it requested from plaintiff. Plaintiffs-appellees and cross-appellants, landowners in the industrial park, appeal from the district court's declaratory judgment that they must pay reasonable sewer charges. Defendant-appellant also appeals the trial court's ruling that its claim against Universal Manufacturing Co. for damages to the sewer line is barred by the statute of limitations. We affirm.

Defendant, Iowa Fund, Inc., sold lots in its industrial park to plaintiffs. Eliason & Knuth Drywall Co., Inc., (hereinafter referred to as Eliason & Knuth), negotiated the purchase of its lot through Jester and Sons Realty Company. Joe Jester represented defendant, and plaintiff Eliason & Knuth met with only him prior to purchasing the lot. Eliason & Knuth testified that in its discussion of sewer service with Jester, Jester informed it that there be no sewer charges at the industrial park because all plaintiff had to do was hook up to the existing sewer lagoon. Plaintiff Eliason & Knuth's purchase agreement was dated April 12, 1968, and the warranty deed and possession were conveyed June 9, 1968. The purchase agreement contained the following paragraph: "4. It is understood and agreed that the Buyer shall be allowed to connect to the sanitary sewer which shall be available and located on the East side of N.E. 17th Street in front of Lot 29."

Universal Manufacturing Co., (hereinafter referred to as Universal), received title to its lot by warranty deed dated March 4, 1969. Universal's president and general manager, Earl Lierley, contacted James L. Bennett, president and general counsel of Iowa Fund, Inc., and they negotiated Universal's

purchase of Lot 32. Bennett represented to Lierley that Lot 32 was fully developed, including sewer service. The deed conveying title did not mention sewer service charges. Lierley testified that Bennett "... never represented to us that we should pay anything."

Throughout the development of the industrial park, defendant has been required to upgrade and enlarge the sewage system because of the increasing number of users at the industrial park, and defendant is trying to pass those costs on to the sewer users.

Eliason & Knuth initiated a declaratory judgment action on May 26, 1978, because of the threat of litigation from defendant's efforts to collect the sewer charges. Universal instituted a similar action, and its case was consolidated with Eliason & Knuth's case. We consolidate the cases on appeal too. The trial court in April 1980 found that plaintiffs had a right to use the sewer system, would not issue an injunction against defendant, and ruled that defendant was entitled to judgment for the "fair and reasonable" charge for use of the sewer system from the time plaintiffs hooked onto the system. The trial court was unable to determine the amount for which plaintiffs were liable, given the evidence that was presented, so it retained jurisdiction to determine that amount. The court also ruled that there was no waiver or estoppel on defendant's part.

On appeal, defendant contends that the court erred by finding that there was insufficient evidence of what a fair and reasonable charge for sewer use would be, and the court's refusal to allow the charges defendant demanded denied it equal protection and due process. Plaintiffs contend on appeal that the purchase agreement controls and, since it did not provide for sewer charges, plaintiffs are not liable for those costs. Plaintiffs also contend that the court incorrectly placed the burden of proof upon them to prove that there was an agreement that plaintiffs would not have to pay sewer charges rather than require defendant to prove the existence of an agreement requiring plaintiffs to pay. Plaintiffs also

assert that the court erred in finding defendant had not waived its right to collect sewer charges and was not estopped from collecting such charges. Additionally, plaintiffs say the court erred in finding plaintiffs would be unjustly enriched if not required to pay for sewer usage, in denying plaintiff's request for an injunction, and in considering defendant's constitutional issues when defendant did not raise or argue them to the trial court.

L. The trial court correctly found that each plaintiff had the right to use defendant's sewer system. The court also found a corresponding duty to pay for using the system, i.e., that there was an implied contract that plaintiffs would pay defendant to use the system. Plaintiffs allege this finding as error.

While a court does not have the right to make a new contract for the parties, or change a contract for the benefit of one of the parties to the detriment of the other, Osterling v. Sturgeon, 261 Iowa 836, 843, 156 N.W.2d 344, 348-49 (Iowa 1968), it does have the power to interpret and construe the terms of a written contract. "Interpretation involves ascertaining the meaning of contractual words; construction refers to deciding their legal effect. Interpretation is reviewed as a legal issue unless it depended at the trial level on extrinsic evidence. Construction is always reviewed as a law issue." Fashion Fabrics of Iowa v. Retail Investors, 266 N.W.2d 22, 25 (Iowa 1978). "When a case is tried to the court, as here, ... [i]nterpretations of words of a contract by the trial court as trier of fact are binding on us if supported by substantial evidence." Allen v. Highway Equipment Co., 239 N.W.2d 135, 139 (Iowa 1976), quoting Connie's Construction v. Fireman's Fund Insurance, 227 N.W.2d 207, 210 (Iowa 1975).

The trial court allowed the parties to present extrinsic evidence, it considered that evidence when it interpreted the contract, and then found that there was an implied contract for plaintiffs to pay defendant for sewer use. Plaintiffs contend that since the contract did not specifically mention sewer

charges, the contract alone controls and therefore they are not liable. We are not constrained to looking only at what is expressly written on the face of a contract. Contractual obligations arise not only from the express provisions, but also by implication. Terms which may be implied from a contract have the same effect as the express provisions. Fashion Fabrics of Iowa, 266 N.W.2d at 27.

We think the trial court was correct in finding an implied contract. The express contractual language regarding the sewer only provides that plaintiffs could hook into the system. We think it was implied that they would have to pay once they hooked into the system.

II. Since defendant did not send Eliason & Knuth a bill for sewer charges until 1975, plaintiffs say that defendant has waived any right to collect fees and is therefore estopped from collecting the fees. Defendant did, however, advise plaintiffs' counsel on June 26, 1972, that plaintiffs were responsible for sewage charges.

We can draw an inference of waiver from the facts and circumstances in a situation. Continental Casualty Co. v. G. R. Kinney Co., Iowa, Inc., 258 Iowa 658, 660, 140 N.W.2d 129, 130 (Iowa 1966). Waiver is an intentional relinquishment of or an abandonment of a known right or privilege, Iowa Grain v. Farmers Grain and Feed Co., Inc., 293 N.W.2d 22, 25 (Iowa 1980), and estoppel requires that one knowingly take a position with the intention that it be acted upon and that there be reliance thereon by another to his prejudice. Holden v. Construction Machinery Co., 202 N.W.2d 348, 356 (Iowa 1972). Plaintiff's primary argument that waiver and estoppel apply is that defendant waited several years before it actually billed plaintiff for sewer charges. In the absence of stronger proof to the contrary, we do not think that defendant's actions or alleged inaction constitutes a waiver of all its rights. Defendant did act to preserve and assert its rights by contacting plaintiff's attorney and by billing plaintiff. We agree with the trial court on this

finding.

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III. The trial court decided that defendant failed to establish what would be a fair and reasonable charge for use of the system because defendant apparently tried to pass on all the costs associated with its sewer system. Defendant calculated the charges partially on the basis of square feet occupied by each lot owner, a figure which allegedly has nothing to do with sewer loads. Defendant claimed the sewer charges were similar to what the city of Des Moines charges, but plaintiffs' charges were allegedly much greater than what it would have been to use the city system. Defendant's president testified that the charges were based partially on the water usage of each lot owner but was unable to explain the formula. Defendant included its tax obligations on the sewer lagoon as part of plaintiffs' sewer charge. Defendant allegedly breached a contract to an engineering firm, and defendant's president testified that if it is held liable, all those costs will be passed on to plaintiffs and the other lot owners. Defendant even wants to pass on the costs of hiring an expert witness for a lawsuit which does not involve the plaintiffs. The defendant simply established what all its costs were, rather than delineate the difference between operating costs and capital improvement costs. Without doing discovery on its own, the trial court really could not have come to a conclusion about what a fair and reasonable charge would be. Defendant was given a second chance to present evidence, but failed to do so. We therefore agree with the trial court in that defendant has failed to establish the fair and reasonable charge for the use of its sewer by the plaintiff.

Plaintiffs are responsible for a proportionate share of the sewage maintenance and treatment costs, but they are not responsible for the original investment cost of the system, capital improvements in the system, or other extraneous costs that are not directly related to the maintenance of the sewer

system. As the supreme court of Iowa recently pointed out in Village Supply Co., Inc. v. Iowa Fund, Inc., No. 66590 (Iowa, filed November 25, 1981), "costs necessarily incurred to keep the system operating to perform its intended function" are expenses the users should cover.

Our ruling that defendant may not charge plaintiff and the other lot owners for all the costs involved in building, developing, improving, and expanding the sewer system necessarily implies that we disagree with defendant's argument that it is in the position of a municipality by operating a sewage system, and should be able to charge back all of its costs. Defendant is neither a municipality nor a public utility, and cites no authority that a private corporation in this position should be given the powers of a public body.

IV. Defendant also asserts constitutional grounds on appeal, saying that the trial court's refusal to approve defendant's request for specific rates is a denial of equal protection of the laws and is an unconstitutional confiscation of defendant's property without due process of law. Defendant cannot raise an issue for the first time on appeal. State v. Whiteside, 272 N.W.2d 468, 472 (Iowa 1978). By our ruling that an implied contract exists and that defendant had the right to collect sewer usage charges, any constitutional claim is actually moot. When defendant failed to put on further proof as to what fair and reasonable rates would be, it failed to take advantage of the trial court's accommodations. No constitutional issues are presented when the only reason defendant was not granted the specific charges it asked for is that it failed to present proof when given a second chance to do so by the court.

V. Defendant asserts that Universal's sewer system connection has damaged the sewer line, but the trial court found that any claim defendant would have for the alleged improper connection is barred by section 614.1(4), The Code 1979. That

section requires that actions brought for injury to property must be brought within five years after their causes accrue. The connection was made in August 1969, and more than five years have gone by. Defendant is barred in this claim. We agree with the trial court.

VL An implied contract exists requiring plaintiffs to pay reasonable sewer use charges. Defendant is not a municipality or a public utility, and it may not charge each lot owner for the total cost of the sewage system development. Defendant failed to present any evidence of its costs, clearly differentiating between development costs and maintenance costs, even though twice given an opportunity by the trial court to do so. He has waived any right to compensation to the date of the trial.

Costs are taxed to defendant.

AFFIRMED.