

IN THE COURT OF APPEALS OF IOWA

No. 4-097 / 93-0237

FILED

MAY 26 1994

CLERK SUPREME COURT

HEISTERKAMP, LTD., An Iowa Corporation,

Plaintiff-Appellee,

vs.

F & N INVESTMENTS, INC., BEHRENS SAND AND
GRAVEL, INC., HOMESTEAD TRUCKING, INC.,

Defendants,

CHARLES E. LAKIN III, and LAKIN GRAIN COMPANY,

Defendants-Appellants.

Appeal from the Iowa District Court for Monona County,
Robert C. Clem, Judge.

Lakin and Lakin Grain Company appeal from the district
court decision finding them liable to Heisterkamp under a
harvesting agreement. **REVERSED AND DISMISSED.**

Robert W. Green of Carter, Sar, Edmonds & Green, Sioux
City, for appellants.

Donald H. Capotosto of Morrow, Allen & Capotosto,
Onawa, for appellee.

Heard by Donielson, C.J., and Sackett and Habhab, JJ.

SACKETT, J.

The focal question in this appeal is whether defendants-appellants Charles E. Lakin III and Lakin Grain Company properly managed and distributed money under a bailment agreement. Under the agreement, defendants agreed to seal crops with the U.S. Commodity Credit Corporation and distribute the money among persons having an interest in the grain. The trial court found defendants had not correctly managed the bailment and entered judgment against defendants jointly and severally for \$25,917.98 plus interest at the rate of ten percent from May 5, 1987. Defendants appeal raising a number of issues, including (1) plaintiff did not show damage; (2) plaintiff had an opportunity to mitigate damages and failed to do so; and (3) preclusive effect should be given to another judgment. We agree. We reverse and dismiss plaintiff's petition.

The factual scenario is extremely complicated. Though much of the evidence came in through joint exhibits and little evidence was in dispute, neither side has given us much help in sorting out the relevant facts. We first attempt to set forth those relevant facts that do not seem to be disputed.

Plaintiff-appellee Heisterkamp, Ltd.¹ was hired by

1. Heisterkamp, Ltd. is controlled by Delbert Heisterkamp.

Fred O. Beekman² to custom harvest corn and beans for the 1986 crop year. Plaintiff was to be paid a per acre price for harvesting. Plaintiff did not receive the promised compensation. Plaintiff brought suit against Beekman's corporations contending it had an unpaid balance of \$35,292.85 for harvesting corn³ and should be paid. Plaintiff was not able to collect the \$35,292.85 from Beekman's corporations.

Plaintiff had an alternative count in its petition contending it was a party to an agreement made November 12, 1986, whereby defendants Lakin and Lakin Grain were to pay plaintiff the the harvesting out of loans on corn delivered to defendants to be sealed in the 1986 Feed Grain Program. Plaintiff sought judgment against Lakin and Lakin Grain for \$35,292.85.

An agreement was made among defendants Lakin and Lakin Grain, Beekman and his corporations, plaintiff and others that the corn would be delivered to the Lakin Elevator. Beekman would seal the grain and defendants would be responsible for paying the money received from sealing the grain to a number of persons, including the elevator for

2. Beekman also operated under or controlled Behrens Sand & Gravel, Inc., Homestead Trucking, Inc., and F & N Investments, Inc., all named as defendants in this lawsuit but not parties to the appeal.

3. The lawsuit also contended there was a balance of \$7,156.61 unpaid for harvesting soybeans. The issues before us involve the corn.

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certain charges and plaintiff according to a predetermined schedule of priority of payment. The corn was delivered and it was sealed and plaintiff's name was included on the checks. Plaintiff, who had earlier filed a thresherman's lien, had signed a form provided by the ASCS that released its lien but requested the sealing checks include its name. Defendants received the checks and with some effort were able to obtain the endorsement of the payees on the checks. The checks were finally endorsed by all payees and in defendants' possession on March 10, 1987.⁴ On March 11, 1987, defendants prepared a proposed distribution showing plaintiff was to receive \$28,612.40. Defendants did not immediately distribute the sealing money but made arrangements to increase the available monies through the utilization of what the farming community referred to as PIK and Roll. PIK and Roll, a process for redeeming sealed grain, was the result of a program established by the federal government ASCS several weeks before the November 12, 1986 agreement.⁵ Certificates called PIK certificates were created. The PIK certificates, among other things, could be used by a producer to redeem sealed grain through

4. The amount received from sealing the grain was reduced because Beekman, etc. had a federal tax lien the parties did not know about which was deducted from the sealing loans.

5. This process was authorized under the provisions of 7 C.F.R. § 770.3(b) and 7 C.F.R. § 770.4(e) adopted on October 16, 1986, in 51 F.R. 36921.

use of a procedure called PIK and Roll. The money realized from utilization of PIK and Roll could result in realizing a substantially greater return from grain than would be realized were the grain sold at market or just sealed.

Clearly, by using the PIK and Roll procedure, it was possible to realize substantially more money from the corn than would have been realized had the corn only been sealed and stored.⁶ However, in order to PIK and Roll, Beekman had to purchase PIK certificates and Beekman, as producer, had to go to the ASCS office to accomplish the transaction. Apparently Beekman was not very cooperative with the defendants but the transaction was finally completed. However, to complete the transaction, it was necessary to buy for Beekman \$35,918.98 worth of PIK certificates. Defendants used the sealing money to purchase the certificates.⁷

6. The amount of additional revenue to be generated in this case from PIK and Roll was substantially increased because the corn involved was both white and yellow. For ASCS purposes, both kinds of corn had the same loan value but the market value of white corn is substantially higher.

7. Defendants prepared an accounting on March 11, 1987, that showed \$45,118.96 in elevator charges to 3-11-87 and additional charges of \$31,013.27 for costs to store and handle the sealed corn for a total payment to the elevator of \$76,132.23 and to plaintiff of \$28,612.40. The \$31,013.27 was for storage and cost for the minimum nine months sealed grain must be stored if the PIK and Roll procedure was not utilized.

When the check was sent to plaintiff from the sealing money, the accounting showed the sum of \$44,562.26 to the elevator for charges to 1-5-87 plus interest from 2-1-87 of \$1142.70 and charges to buy the PIK certificates for white corn on 3-17-87 for \$35,918.98. The \$31,013.27 additional

When the corn was redeemed through the PIK and Roll procedure, elevator charges to store the sealed grain of \$31,013.27 were no longer owed. Therefore, in essence, buying the PIK certificates only reduced the sealing money available for distribution by \$6000.

The PIK and Roll procedure freed over fifty thousand dollars worth of white corn from the sealing lien and a warehouse receipt was issued for the corn made out in the name of the producer, Beekman. Defendants did not give the receipt to Beekman but sent the receipt with a letter to Delbert Heisterkamp for plaintiff corporation on March 31, 1987. The accompanying letter explained Beekman had instructed the warehouse receipt be sent to plaintiff and explained procedures and pricing for grain represented by warehouse receipts and that a decision would be needed on sale whether it was jointly with Beekman or one of them singularly. At the time Delbert received the warehouse receipt, plaintiff corporation had not received any money from defendants. Delbert did not bother to check with defendants or his own attorney but, on about April 10,

charges to bring the total to \$76,132.23 on the 3-11-87 accounting are not included on the 4-20-87 accounting because by using the PIK and Roll procedure, these charges have been eliminated.

Plaintiff seeks to make its point by relying on the 4-20-87 accounting and defendants seek to make their point by relying on the 3-11-87 accounting.

The trial court made no specific findings as to which accounting was correct and neither side has attempted to explain the difference.

1987, Delbert, a farm implement dealer and farm custom operator, just gave the warehouse receipt to Beekman.⁸

On April 20, 1987, a check for \$22,719.15 was sent by defendants to plaintiff. This was the last money plaintiff was to receive on its account until defendants paid an additional \$9,374.87⁹ to the Monona Clerk of the District Court when defendants were finally successful in retrieving, after considerable litigation and other expense, from Beekman, who then was in bankruptcy, the warehouse receipt Delbert had turned over to him. There were no other assets available to pay plaintiff. Even after this payment, plaintiff still had a bill for harvesting corn of \$25,917.98. The trial court found defendants breached the bailment agreement and entered judgment against defendants for \$25,917.98 plus interest at the rate of ten percent from May 5, 1987.

Defendants first contend plaintiff has shown no damage. Plaintiff sought to establish liability against defendants because \$35,918.98 of the sealing money had been utilized for the purchase of PIK certificates. Plaintiff contends this was not contemplated by the agreement that

8. As will be discussed later in the opinion, by giving the warehouse receipt to Beekman, additional litigation and storage fees were occurred to retrieve the receipt Beekman subsequently took to Nebraska.

9. This apparently was additional money defendants received in an action to acquire a warehouse receipt on white corn.

the grain be sealed. Defendants argue PIK and Roll was not fully understood when the November harvesting agreement was entered into but it became, in the interim, an excellent way to receive more money under the sealing program and, consequently, was contemplated by the agreement. Whether the agreement made in November contemplated the elevator assisting in the utilization of the PIK and Roll at the time, we need not address. The trial court found it was not specifically detailed in the agreement and, while plaintiff was not a party to the procedure, plaintiff knew it was happening. We agree with these findings of the trial court as being a fair characterization of the record and being supported by substantial evidence. The trial court then went on to find defendants breached the bailment in buying the PIK certificates and the trial court imposed liability against defendants and in plaintiff's favor because the \$35,918.98 used to buy PIK certificates was not taken from the grain stored at the elevator before the warehouse receipt was issued and sent to plaintiff.

Defendants contend this was error because, had the PIK certificates not been purchased and the total monies paid out, the most the record shows plaintiff would have realized under the first distribution, had the PIK certificates not been bought, was \$28,612.40, not the \$22,719.50 it did receive.

Plaintiff, in addition to showing a breach of contract, must also show damages as a result of the breach.

A finding of the amount plaintiff would have received, had no PIK certificates been purchased, is a necessary finding to determine damages plaintiff actually sustained. This finding the trial court never made. The only conclusion that could be reached from the joint exhibits is, if the transaction had been closed with the receipt of the sealing money and the PIK certificates not purchased and all the sealing money paid out, the maximum plaintiff would have received on its harvesting bill would have been \$28,612.40. Plaintiff received \$37,987.24. It would have received \$9,374.87 less but for the benefits of the PIK and Roll procedure. Even if the PIK and Roll procedure was not contemplated by the bailment agreement as the plaintiff urges, plaintiff has failed to prove it was damaged in any way by the utilization of the procedure because plaintiff received more money than it would have received had the PIK and Roll not happened.

To recover, plaintiff must show it was damaged because defendants purchased PIK certificates contrary to what they considered was the bailment agreement out of the sealing money. To determine appropriate damage, it is necessary to determine what is necessary to place plaintiff in as favorable a position as it would have been had the bailment agreement not been violated. See Dealers Hobby, Inc. v. Marie Ann Linn Realty Co., 255 N.W.2d 131, 134 (Iowa 1977). The general principle underlying allowance of damages is that of compensation with the ultimate purpose

to place the injured party in as favorable a position as though the contract had been performed. Golden Sun Feeds, Inc. v. Clark, 140 N.W.2d 158, 161 (Iowa 1966).

Even if defendants violated the agreement by purchasing the PIK certificates, plaintiff has shown no damages. We agree with defendants that the plaintiff's petition should be dismissed on these grounds.

The trial court also found defendants were liable to plaintiff because they should have taken the sealing money out before issuing the warehouse receipt.¹⁰ Plaintiff, while complaining the PIK and Roll should not have been utilized and defendants had no authority to buy the PIK certificates from the sealing money, also claimed it should benefit from the PIK and Roll and receive the balance of its account from the sale of the white corn under warehouse receipt. Defendants contend, even if this were the case, they showed plaintiff failed to mitigate damages and there are facts and circumstances that show, had plaintiff retained the warehouse receipt and not, without legal advice or without inquiring of defendants why the warehouse receipt was sent, just given it to Beekman, plaintiff would have received more money. Defendants point to the negotiable warehouse receipt for 24,926.43 bushels of corn

10. The PIK and Roll was complicated because it had to be accomplished by Beekman, the producer, who, at this stage, was not cooperative. Defendants would not have been authorized to withhold from Beekman's grain without Beekman's consent.

worth over \$50,000. The warehouse receipt was issued to Beekman. While plaintiff had not gotten any money, it kept the warehouse receipt for ten days and then just gave it to Beekman without any further checking.

Did plaintiff fail to mitigate damages in parting with the negotiable warehouse receipt? The trial court found plaintiff had no obligation to mitigate under the circumstances of the case. The possession of the warehouse receipt by plaintiff would have precluded Beekman from negotiating it. The extra corn evidenced by the warehouse receipt would not be available had defendants not accomplished the PIK and Roll.

The burden to prove a failure to mitigate damages is on the party claiming damages should be mitigated, in this case, defendants. See Iowa Power and Light Co. v. Board of Water Works, Trustees of City, 281 N.W.2d 827, 833 (Iowa App. 1979).

Plaintiff contends it had no obligation to mitigate damages by utilizing the warehouse receipt because it had not yet learned it would not be paid in full. The duty to mitigate damages does not arise until the damaged party has reason to know of the breach by the other. See Harmsen v. DR. MacDonald's, Inc., 403 N.W.2d 48, 51 (Iowa App. 1987). However, the trial court found it undisputed that plaintiff did not execute a release of its thresherman's lien before the grain was sealed in ruling on a 179(b) motion. The agreement merely provided for the distribution of proceeds

of sale of the grain and did not provide plaintiff's bill would be paid in full. We find no evidence plaintiff ever was told prior to receiving the warehouse receipt that payment would be made in full for its harvesting. Whether plaintiff approved of the PIK and Roll or not, the trial court found, and it is supported by substantial evidence, plaintiff knew the PIK and Roll was going on. We cannot agree with plaintiff that it had no obligation to mitigate damages because it did not know the bailment contract could have been breached.

Mitigation is a defense in those cases where the damaged party can, by the exercise of reasonable diligence and with minimal expenses, prevent all or part of his or her loss. See Reinking v. Goodell, 161 Iowa 404, 412, 133 N.W. 774, 777-78 (1911).

The warehouse receipt was necessary to sell the grain. While the warehouse receipt was not made payable to plaintiff, it was put in possession of it.¹¹ The letter sent with the warehouse receipt clearly specified the receipt was sent under Beekman's direction. Beekman still owed plaintiff money. The letter also indicated plaintiff should check with Beekman on sale. Plaintiff was clearly knowledgeable about the farming community and a warehouse receipt. Defendants' communications with Beekman had

11. Regulations preclude the issuing elevator from retaining possession of a warehouse receipt.

broken down. Plaintiff was protected from Beekman selling the corn without its participation as long as it kept the warehouse receipt. The correspondence accompanying the warehouse receipt could have been more specific but it also is reasonable to believe a person in plaintiff's position would not just turn over the receipt not having received money from either defendants or Beekman. Defendants suggested plaintiff gave Beekman the warehouse receipt because Delbert, an implement dealer, was attempting to sell farm machinery to Beekman.

Plaintiff's giving the warehouse receipt to Beekman reduced plaintiff's recovery. In May 1987, defendants made an agreement with Beekman to purchase the white corn evidenced by the warehouse receipt for \$51,099.18. Defendants then had filed a lawsuit against the Beekman corporation, including plaintiff and the other claimants to the grain, to enforce the purchase agreement and determine the distribution of the white corn proceeds. Defendants were successful in the lawsuit and were ordered to be paid storage on the corn until they could recover the warehouse receipt from Beekman that plaintiff once held. Beekman had the receipt in Nebraska and only after the accrual of considerable storage and the expenditures of substantial attorney fees was the warehouse receipt surrendered to the Monona County District Court. Had plaintiff kept the receipt rather than give it to Beekman who took it to Nebraska, an additional \$10,000 would have been available

for distribution that was lost in accrued storage charges.

Even if plaintiff should have recovered on the PIK and Roll, it failed to mitigate damages.

We reverse the judgment and' dismiss the cause at plaintiff's cost.

REVERSED AND DISMISSED.