IN THE COURT OF APPEALS OF IOWA

No. 4-011 / 93-0041

FILED
MAY 26 1994
CLERK SUPREME COURT

GEORGE WARNER,

Appellant,

vs.

ALDEN STATE BANK,

Appellee.

Appeal from the Iowa District Court for Hardin County, Joel E. Swanson, Judge.

Plaintiff appeals the judgment for defendant, following a jury trial, on his claim of breach of contract. **AFFIRMED.**

Ann Troge and Roger L. Sutton of the Sutton Law Office, Charles City, for appellant.

William R. King and Diane M. Stahle of Davis, Hockenburg, Wine, Brown, Koehn & Shors, P.C., Des Moines, for appellee.

Heard by Schlegel, P.J., and Habhab, J., and McCartney, S.J.*, but decided by Donielson, C.J., and Hayden, Sackett, Habhab, Cady, and Huitink JJ.

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

PER CURIAM

Plaintiff George Warner began dealing with Alden State Bank in 1986. He obtained an initial loan of $10,000 to pay off a debt. Warner subsequently obtained operating loans from the Bank for his farm expenses, such as seed, feed, and veterinary bills. The Bank took a security interest in certain farm assets. Warner was primarily involved in grain farming and a hog operation. In 1987 Warner had financial problems due to falling hog and grain prices.

In March 1988 Warner spoke to an attorney, Michael Vestle, about a Chapter 12 bankruptcy reorganization. Warner also spoke to the Bank president, Carl Dencklau, about his financial problems. The Bank agreed to continue to provide loans for operating expenses. In preparation for the bankruptcy, Warner prepared cash flow charts in which he anticipated paying off his debts within seven years.

Warner filed his Chapter 12 bankruptcy plan in May 1988. By September 1988, he realized his hog operation was not profitable enough to meet his projected cash flow charts. He then decided to add a cattle operation. Warner approached Dencklau about obtaining a loan to purchase cattle. Dencklau told Warner he would have to get approval from the bankruptcy court before the Bank would consider such a loan. On November 4, 1988, the bankruptcy court authorized Warner to incur debt of $265,000 to obtain feeder calves.

Vestle requested written documentation of the Bank's position. On December 6, 1988, the Bank responded by the following letter:

> I am writing you to advise you that the Alden State Bank has agreed to fund George Warner's livestock enterprises as requested from the Bankruptcy Court under the application of debtor-in-possession for authority to incur debt secured by property of the estate. We are agreeing to do this under the terms and conditions which shall be later set forth by the Bank.

Warner first sought a loan to purchase cattle in February 1989. The Bank told Warner he needed to make the hog operation more profitable before the Bank would loan him money to purchase cattle. Warner's financial statement of January 1989 showed he was losing a substantial amount of money in the hog operation. Warner approached the Bank again in July 1989 about a loan to purchase cattle. The Bank made the same response, that the losses on the hog operation needed to be brought under control first. On neither of these occasions did Warner seek to rely upon the December 6, 1988, letter from the Bank as requiring the Bank to lend him money.

In August 1989, Warner's financial situation had reached a point where the Bank determined it could no longer finance his farming operation. The Bank informed Warner that it would only lend him sufficient money to feed the hogs he had at that time and get them ready for market. The marketing of these hogs was completed by November 1989.

Warner did not raise his contention until March 1990 that the December 6, 1988, letter created a commitment by the Bank to lend him money to purchase cattle. However, the Bank disagreed with his interpretation of the letter.

On June 15, 1990, Warner converted his bankruptcy case to a Chapter 7 proceeding, which required the liquidation of his assets. He was later discharged from bankruptcy.

Warner brought the present suit claiming the December 6, 1988, letter created a contract and that the Bank breached this contract by refusing to lend him money to purchase cattle. The case was tried to a jury. By a special verdict form, the jury found Warner proved there was an enforceable contract to lend money and the Bank breached the contract. The jury also found the Bank proved its affirmative defense of waiver. Based on this verdict, the district court dismissed the case.

Warner filed a motion for a new trial. He claimed there was not sufficient evidence in the record to support the jury's finding that he had waived his rights under the contract. The district court denied the motion. The court noted that Warner had failed to object to the jury instruction on waiver. The court determined there was sufficient evidence to submit the issue of waiver to the jury and sufficient evidence to support the jury's verdict. Warner's motion for new trial was denied. He now appeals.

Warner contends the district court abused its discretion in denying his motion for new trial because there was insufficient evidence to support the jury's verdict on the issue of waiver. He states that he never intended to give up his rights under the contract. He admits he was silent for a period of time about his rights, but claims that his silence was not indicative of waiver. He believes that in order to show waiver, his silence must be inconsistent with any other explanation.

Trial courts have considerable discretion in granting or denying motions for new trial. State v. Dalgliesh, 223 N.W.2d 627, 628 (Iowa 1974). Only when there has been a clear abuse of the court's discretion in ruling on a motion for new trial will we interfere on appeal. Houvenagle v. Wright, 340 N.W.2d 783, 785 (Iowa App. 1983).

The Bank contends Warner failed to preserve error because he did not object to the jury instruction on waiver. However, Warner is not claiming on appeal that the jury should not have been instructed on this issue. He claims only that there was insufficient evidence to support the jury's verdict. We find error has been preserved.

It has long been the law in Iowa that contract rights can be waived. In re Guardianship of Collins, 327 N.W.2d 230, 233 (Iowa 1982). The essential elements of waiver are the existence of a right, actual or constructive knowledge of it, and an intention to give it up. Scheetz v. IMT Insurance Co., 324 N.W.2d 302, 304 (Iowa 1982).

Waiver can be express or implied. Folkers v. Britt, 457 N.W.2d 578, 582 (Iowa 1990). When the waiver is implied, intent is inferred from the facts and circumstances constituting the waiver. Scheetz, 324 N.W.2d at 304. The issue of waiver is generally one of fact for the jury, especially where acts and conduct are relied upon as the basis for the waiver. Id.

We determine there is substantial evidence in the record to support the jury's verdict. The evidence shows the contract in question arose on December 6, 1988, when the Bank wrote the letter stating it would fund Warner's livestock enterprises. The parties admit Warner had certain rights under the contract and he had knowledge of his rights.

Warner did not assert any rights under the contract until March 1990, some fifteen months later. During the interim, he had twice requested the Bank to lend him money to purchase cattle, and on each occasion the Bank turned him down. Additionally, in August 1989 the Bank informed Warner it would not lend him any more money. Thus, although the Bank refused to perform under the contract, Warner did not even mention the contract, let alone pursue his rights. We find this is sufficient evidence to support a finding that Warner intentionally relinquished his rights under the contract.

Because we have found there was substantial evidence to support the jury verdict, we conclude the district court

did not abuse its discretion in denying the motion for new trial and consequently we affirm the decision of the district court. Costs of this appeal are assessed to plaintiff George Warner.

AFFIRMED.