FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-427 / 90-1733

DAVENPORT BANK and TRUST COMPANY,

Appellee,

vs.

STATE CENTRAL BANK,

Appellant.

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Appeal from the Iowa District Court for Lee County, John C. Miller, Judge.

Davenport Bank brought this action against State Central Bank alleging a breach of a claimed accord and satisfaction between the two banks on a loan participation agreement. **REVERSED.**

Patrick M. Roby and Diane Kutzko of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for appellant.

Terry M. Giebelstein and Robert V. P. Waterman of Lane & Waterman, Davenport, for appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

This action arises from a dispute over the terms of a series of participation agreements existing between Davenport Bank and Trust Company and State Central Bank. Under the participation agreements, Davenport Bank would purchase the amount of a loan exceeding State Central's loan limit. Between April 20, 1983, and January 3, 1984, the banks entered into ten participation agreements. These agreements secured loans of approximately $1.6 million made by State Central to the farming operations of Ed Holtkamp & Sons, Inc. The Holtkamps defaulted on their loans, and their collateral was sold. The banks dispute who is entitled to $241,424.19 in proceeds.

Prior to mid 1979, Davenport Bank used a preprinted participation form which provided in case of default by the Holtkamps and recovery of less than the full amount of the loans, proceeds would be shared by Davenport Bank and State Central on a pro rata basis. All ten participation agreements signed by State Central were on Davenport Bank's pre-1979 pro rata forms. In mid 1979 Davenport Bank changed its preprinted participation forms to provide for a last-in, first-out sharing of the loan collateral. In short, upon a loan default Davenport Bank's loan participation would be repaid first before the originating bank would receive anything.

In April 1984 Robert Lenertz, senior vice president of Davenport Bank, received a participation agreement on the

Holtkamp loan from State Central in the amount of $830,587.33. Lenertz noticed the agreement was on the old pro rata form. Davenport Bank retyped the participation agreement on its new form and sent it to William Logan, president of State Central. A cover letter stating "I have enclosed a new participation for your signature as the one you sent was revised some years ago" accompanied the new participation form. Tyler Logan, State Central's vice president and counsel, signed the retyped participation certificate and sent it back to Davenport Bank.

On February 1, 1985, State Central sent a letter to Davenport Bank alleging a mistake on the new participation form and pointing out the different provisions concerning disposition of the amounts realized from the loan collateral in the event of default. From February 1, 1985, until May 7, 1985, a series of letters were exchanged between the banks disputing whether the loan proceeds should be split on a pro rata or a first-in, first-out basis.

On May 7, 1985, William Logan wrote to the Davenport Bank indicating the following:

> The first $600,000 collected on the Holtkamp liquidation is Davenport Bank's. The slight adjustment from your $650,000 could be subscribed to the attorney's fees we will absorb. After the first $600,000, State Central will receive $600,000. We recognize that we might not collect $600,000, but we're working on it. Once State Central's $600,000 is collected, we will share 50/50. There's a chance it might exceed $1,200,000, but everything will have to break just right.

On May 24, 1985, Davenport Bank responded by letter indicating the above proposal was acceptable.

The principle asset of the Holtkamps' farming operation was a Missouri farm which the president of State Central believed was worth approximately $860,000 when he wrote his May 7, 1985, letter. When the Holtkamps' collateral was later liquidated, however, the Missouri property was worth $420,000. The total liquidation netted $717,151.62. State Central offered to split these proceeds pro rata with Davenport Bank. Davenport Bank took the position State Central's May 7, 1985, letter indicated Davenport Bank would receive the first $600,000 even if less than $1.2 million was collected. Davenport Bank opined the May 1985 exchange of letters constituted an accord and satisfaction.

Davenport Bank brought this action against State Central alleging breach of an accord and satisfaction. State Central asserted the defense of mistake. This action was tried to a jury. The jury returned special verdicts consisting of answers to two questions. The questions answered by the jury were: (1) has the plaintiff proved its claim of accord and satisfaction, and (2) has the defendant proved its defense of mistake. Both questions were answered in the affirmative. Davenport Bank's motion for judgment notwithstanding the verdict was granted by the trial court.

State Central appeals, claiming the trial court erred in granting Davenport Bank's motion for judgment

notwithstanding the verdict because there was sufficient evidence to create a jury question regarding mistake. In the alternative, State Central asserts the trial court erred in submitting the issue of accord and satisfaction to the jury.

Our review is for the correction of errors at law. Iowa R. App. P. 4. When considering a motion for judgment notwithstanding the verdict, the trial court must view the evidence in the light most favorable to the party against whom the motion is directed. Johnson v. Dodgen, 451 N.W.2d 168, 171 (Iowa 1990). In reviewing the propriety of the trial court's ruling on such a motion, we view the evidence in the same manner. Id. The question is whether there was sufficient evidence to generate a jury question. Id. If there is substantial evidence to support the claim or defense, the motion for directed verdict or judgment notwithstanding the verdict should be denied. Id. Under the substantial evidence standard, if reasonable minds might draw different inferences from the facts, even when they are not in dispute or contradicted, the court must submit the issue to the jury. Kansas City Life Ins. Co. v. Hullinger, 459 N.W.2d 889, 894 (Iowa App. 1990).

With these principles in mind, we turn to the issues raised in this appeal. State Central contends there was substantial evidence to support the defense of mistake. Under Iowa law

> [w]here a mistake of both parties at the time a contract was made as to a basic assumption on

> which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in s 154.

Restatement (Second) of Contracts § 152 (1981); See Pathology Consultants v. Gratton, 343 N.W.2d 428, 437-38 (Iowa 1984). Not all mistakes, however, are sufficient to avoid a contract. A mistake in the legal sense, as used here, is limited to an erroneous belief as to a then-existing or past fact. Pathology Consultants, 343 N.W.2d at 437. A party's failure to anticipate future events or contingencies is not a mistake as to a then-existing or past fact that would normally entitle him to relief. Id.

In granting Davenport Bank's motion for judgment notwithstanding the verdict, the trial court found an accord and satisfaction did exist. However, the trial court also found

> [t]he mistake which is claimed in this case relates to opinions held at the time letters were exchanged in May of 1985, as to what the collateral could and would be sold for in the event of liquidation following default on the loans. This is not a belief as to a then-existing or past fact, but rather a belief as to what would or might happen in the future.

Additionally, the trial court found State Central's defense of mistake failed because State Central assumed the risk of mistake in its May 7, 1985, letter.

Both parties introduced testimony bearing on the issue of mistake. Logan testified the purpose of the May 7, 1985, letter was to convey his intent that the proceeds

from liquidation be divided on a pro rata basis with Davenport Bank receiving its $600,000 first in time and State Central receiving its $600,000 second in time. State Central asserts the proposal was premised on the belief held by both banks that the collateral was worth approximately $1.2 million at the time the letter was written. The testimony of Robert Lenertz, senior vice president of Davenport Bank, supports State Central's assertion. Lenertz testified as follows:

> Q. And isn't it correct that his proposal, which you accepted on behalf of the Davenport Bank, was that everybody thought there was at least one million two; you get the first 600; they would get the next $600,000? A. Yes.
>
> Q. And isn't it true that it would appear, at that particular point in time, that there were at least $600,000 apiece in assets and that you think that was the basis of the proposal?
>
> * * *
>
> Q. * * * You assumed that you would each get at least $600,000, didn't you? A. It would appear at that particular point in time that there was at least $600,000 apiece in assets, and I think that was the basis of the proposal.
>
> * * *
>
> Q. So it is true, isn't it Mr. Lenertz, that everyone assumed, when this proposal was made, that you would each get at least $600,000? A. Yes.
>
> * * *
>
> A. It was assumed there was one million two in assets at that particular time.
>
> Q. You knew that was the only reason he made that proposal?
>
> * * *
>
> A. That [was] the basis we understood, the collateral would be worth at that time, that's correct.

Davenport Bank asserts the $1.2 million referred to in State Central's May 7, 1985, letter was a projection

of anticipated future recoveries rather than a mistake as to a then-existing fact. The following testimony of William Logan, president of State Central, supports Davenport Bank's assertion:

> Q. So in February of '85, to May of '85, State Central Bank hoped it would be able to sell the collateral for one million two? A. We all hoped that.
> Q. But State Central hoped that? A. And so did Davenport Bank.
> Q. And at the same time is it fair to say that that was going to be greatly dependent upon what might happen in the future? A. Absolutely.
> Q. So when you said one million two, you are predicting future events? A. Correct.

Viewing this evidence in the light most favorable to State Central, we determine reasonable minds could draw different inferences from the testimony. In short, the evidence was contradictory. In jury trials controverted issues of fact are for the jury to decide. Kaiser v. Stathas, 263 N.W.2d 522, 525 (Iowa 1978). The jury members had to choose which evidence was more convincing. They did and chose in favor of State Central.

The trial court correctly instructed the jury on the law of mistake. The trial court also correctly instructed the jury on the law of assumption of the risk of mistake in instruction No. 11B as follows:

> A party bears the risk of mistake, and a contract is not avoidable due to mistake, when:
> a. The risk is allocated to the party by agreement of the parties; or
> b. The party is aware at the time the contract is made that it has only limited knowledge with respect to the fact to which the mistake relates, but treats its limited knowledge as sufficient; or

c. It is reasonable in the circumstances to allocate the risk of mistake to that party.

The instructions were not objected to or challenged here. A jury is presumed to follow instructions unless there is evidence to the contrary. See Hansen v. Franklin County, 247 Iowa 1287, 1291, 78 N.W.2d 805, 807 (1956). Inherent in the jury's verdict that State Central proved its defense of mistake was that State Central did not assume the risk of mistake. The trial court erred in substituting its judgment for that of the jury.

We hold there was sufficient evidence to create a jury question regarding the defense of mistake. We reverse the trial court on this issue and reinstate the jury verdict. Accordingly, we do not address State Central's alternative assignment of error.

Costs of this appeal are taxed to Davenport Bank.

REVERSED.

Sackett, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I respectfully dissent. I would affirm the trial court's grant of judgment notwithstanding the verdict.

As set out in the majority opinion, William Logan of State Central Bank wrote to the Davenport Bank on May 7, 1985. Once again, the letter stated:

> The first $600,000 collected on the Holtkamp liquidation is Davenport Bank's. The slight adjustment from your $650,000 could be subscribed to the attorney's fees we will absorb. After the first $600,000, State Central will receive $600,000. We recognize that we might not collect $600,000, but we're working on it. Once State Central's $600,000 is collected, we will share 50/50. There's a chance it might exceed $1,200,000, but everything will have to break just right.

The relevant issue facing the parties on the date of this correspondence was the future liquidation value, rather than the present value, of the collateral. However, a mistaken belief regarding the future value of the collateral could not have supported a defense of mistake. A mistake in the legal sense is limited to an erroneous belief regarding a then-existing or past fact. Pathology Consultants, 343 N.W.2d at 437. It appears that State Central has attempted to overcome this problem by asserting that the erroneous belief concerned the then-existing value of the collateral rather than its projected value upon liquidation. However, State Central's argument must fail.

The value of the collateral on May 7, 1985 is a fact wholly immaterial to the accord and satisfaction. A mistake as to such a fact is similarly insufficient to

support State Central's defense of mistake. Restatement (Second) of Contracts § 152 states:

> [w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable . . . . (emphasis added).

A mistake regarding the then-existing value of the collateral could have had no effect on the agreement.

Even assuming the legal merit of State Central's theory, I find no record evidence to support a factual finding that $1.2 million was not the value of the collateral on May 7, 1985. Without proof that $1.2 million was not the present value, State Central cannot demonstrate the error in its claimed belief. Therefore, State Central failed to introduce evidence sufficient to engender a jury question on the issue of mistake.

I would affirm.