IN THE COURT OF APPEALS OF IOWA

FILED
JUN 27 1995
CLERK SUPREME COURT

No. 5-128 / 94-0163

SWEA CITY STATE BANK,

Appellee,

vs.

FARMERS COOPERATIVE ELEVATOR COMPANY, LEDYARD, IOWA,

Appellant.

Appeal from the Iowa District Court for Kossuth County, Joseph J. Straub, Judge.

Appeal from judgment in action for conversion. **REVERSED AND REMANDED.**

Harold W. White of Fitzgibbons Brothers, Estherville, for appellant.

Robert A. Dotson of the Dotson Law Firm, Algona, for appellee.

Heard by Donielson, C.J., and Hayden and Sackett, JJ., but decided by Donielson, C.J., and Hayden and Huitink, JJ. Sackett, J., takes no part.

DONIELSON, C.J.

At issue is whether the defendant is entitled to a new trial due to the trial court's refusal to instruct on the defense of mitigation of damages. Our review is for the correction of errors at law. Iowa R. App. P. 4. We find the mitigation instruction should have been given and reverse and remand this case for further proceedings.

The plaintiff, Swea City State Bank, had provided farm financing to the Johnsons. The bank had a first security interest in the Johnsons' crops. The bank issued a notice to the defendant, Farmers Cooperative Elevator Company, informing it of its security interest and instructing it to issue joint checks for the purchase of the Johnsons' crops.

Despite notice of the bank's security interest, the elevator purchased $93,982.16 of corn from the Johnsons but did not issue a check jointly payable to the bank. The bank subsequently filed a conversion action and obtained a verdict against the elevator. On appeal the elevator contends the trial court erred in refusing to submit a jury instruction on the defense of mitigation of damages and in failing to grant its motion for judgment notwithstanding the verdict.

I. MITIGATION OF DAMAGES.

The trial court refused to submit an instruction on the issue of mitigation because the defendant failed to plead the defense of mitigation. In seeking an

instruction on mitigation, the defendant relied on Iowa R. Civ. P. 106.[1] Rule 106 provides issues tried by express or implied consent are treated as if they had been raised in the pleadings. In resisting submission of the instruction, the plaintiff cited provisions of the Iowa Code which require the defense of mitigation to be plead. Iowa Code §§ 619.7-.8 (1995).[2]

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[1] When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Iowa R. Civ. P. 106.

[2] In any action brought to recover damages for an injury to person, character, or property, the defendant may set forth, in a distinct division of the defendant's answer, any facts, of which evidence is legally admissible, to mitigate or otherwise reduce the damages, whether a complete defense or justification be pleaded or not, and the defendant may give in evidence the mitigating circumstances, whether the defendant proves the defense or justification or not.

Iowa Code § 619.7 (1995).

No mitigating circumstances shall be proved unless pleaded, except such as are shown by or grow out of the testimony introduced by the adverse party.

Iowa Code § 619.8 (1995).

Sections 619.7 and .8 "treat the matter of minimizing damages as a special defense which defendant must plead and prove or he is limited to circumstances growing out of plaintiff's testimony." *Nizzi v. Laverty Sprayers, Inc.*, 259 Iowa 112, 122, 143 N.W.2d 312, 318 (1966). Iowa Rule of Civil Procedure 106 was amended in 1984 to excuse a party's failure to plead where an issue is tried by consent. The parties cite no authority, and we are aware of none, which interprets the application of amended rule 106 to a party's failure to plead the defense of mitigation. We do not reach this issue of apparent first impression because we otherwise find submission of a mitigation instruction was warranted under section 619.8..

The Iowa Code specifies "[n]o mitigating circumstances shall be proved unless pleaded, except such as are shown by or grow out of the testimony introduced by the adverse party." Iowa Code § 619.8. A review of the record reveals the plaintiff elicited testimony on the issue of mitigation.[3] We find the mitigation testimony introduced by the plaintiff was sufficient to except the defendant from the pleading requirement of section 619.8.

Mitigation principles apply to conversion actions. *McCray v. Carstensen*, 492 N.W.2d 444, 446 (Iowa App. 1992). Considerable evidence regarding mitigation was

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[3]Appendix pages 55-62.

introduced without objection. The trial court should have submitted this defense for consideration by the jury. We reverse and remand this case for retrial.

II. JUDGMENT NOTWITHSTANDING THE VERDICT.

The elevator contends the trial court erred in not granting its motion for judgment notwithstanding the verdict. It claims its alleged wrongful acts did not harm the bank as it would have allowed an advancement of funds to pay the elevator even if the checks had been jointly issued. There was evidence indicating accurate knowledge regarding its collateral position would have affected the bank's decision to advance funds to pay the Johnsons' elevator expenses. This evidence supported the bank's contention that it was damaged and precluded entry of a judgment notwithstanding the verdict.

The elevator also contends judgment notwithstanding the verdict was appropriate because the bank held no bona fide indebtedness with the Johnsons at the time of trial. There was documentary and testimonial evidence which established the Johnsons' debt to the bank was not extinguished. The bank and the Johnsons had entered into a settlement agreement which specified the bank's agreement to forgo collection efforts against the Johnsons did not constitute debt forgiveness. The elevator cites no authority for its contention that the debt was eliminated and the bank

no longer had a claim to the crop proceeds. A judgment notwithstanding the verdict was not warranted on this basis.

REVERSED AND REMANDED.