

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 28 1987

CLERK SUPREME COURT

IVAN JOENS and BETTY J. JOENS,)

Plaintiffs-Appellants,)

vs.)

ORLAND D. FARA, d/b/a MANNING)
AGRICULTURAL CENTER,)

Defendant-Appellee.)

Filed May 28, 1987

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7-78
86-833

Appeal from the Iowa District Court for Carroll County (No. 28496),
Albert L. Habhab, Judge.

Plaintiffs appeal from adverse judgment in an action for conversion in which enforcement of a landlord's lien was sought, asserting that the trial court should not have permitted amendment on the date of trial to allow a defense of waiver or estoppel, that the trial court applied an erroneous standard of proof, and that the evidence was insufficient to establish waiver or estoppel.

AFFIRMED.

James Van Ginkel of Kluever, Van Ginkel & Van Ginkel, Atlantic, for
plaintiffs-appellants.

Michael J. Winter, Council Bluffs, and William W. Ranniger, Manning,
for defendant-appellee.

Considered by Snell, P.J., and Schlegel and Sackett, JJ.

SNELL, P.J.

On August 24, 1984, the appellants, Ivan and Betty Joens, initiated the present action wherein they seek damages for the conversion of crops upon which they maintained a landlord's lien. See Iowa Code § 570.1 (1987). The appellee, Orland D. Fara, doing business as Manning Agricultural Center, followed with a general denial. On April 11, 1986, Fara filed a motion for leave to amend the answer so as to plead affirmative defenses of waiver and estoppel. On April 15, 1986, the date of trial, the district court allowed the amendment. Trial commenced to the court which, on May 22, 1986, ruled in favor of Fara and dismissed the appellants' petition. This appeal followed. Our review is limited to the correction of errors at law. Iowa R. App. P. 4.

I.

Appellants first maintain the district court erred in allowing Fara to amend his answer on the date of trial. The amended answer alleged, for the first time, that the appellants had waived their statutory landlord's lien and, in addition, were estopped from asserting it. The amendment of pleadings is provided for by Iowa Rule of Civil Procedure 88, which provides, in pertinent part, that "[l]eave to amend, . . . shall be freely given when justice so requires." The allowance or disallowance of such amendments is a matter for the exercise of the trial court's discretion. Chao v. City of Waterloo, 346 N.W.2d 822, 825 (Iowa 1984). This discretion is broad and will not be interfered with on appeal unless the discretion is abused. Kellar v. Peoples Natural Gas Co., a Div. of InterNorth, Inc., 352 N.W.2d 688, 692 (Iowa App. 1984).

The parties to the case at bar agree that were the amendment not allowed Fara would have no good defense to the appellants' claim. When the district court allowed the amendment, it also gave appellants the option of having a continuance granted and the trial rescheduled in order to allow any further

preparation that may have been necessary. In addition, the district court gave appellants the option of delaying trial until the afternoon so as to allow further depositions to be taken during the morning. Appellants declined both offers. No additional witnesses were made necessary by the amendment. The attorney who filed the motion for leave to amend on April 11, 1986, filed his appearance for Fara on that same date. Although we frown upon amendments made on the eve of trial which substantially change the defense, Barker v. Tuttle, 260 N.W.2d 843, 846 (Iowa 1977), we think any possible prejudice to the appellants was provided for by the district court's offers to continue and reschedule the trial. When the appellants declined those remedial offers, they did so at their own risk. In light of their decision to proceed directly to trial, their prejudice argument today rings hollow. We cannot say the district court *clearly abused* its discretion in allowing Fara's amendment. *See Ackerman v. Lauver*, 242 N.W.2d 342, 345 (Iowa 1976) (*failure to request time to prepare for trial of allegedly "new" issues injected by late amendment weighs against resisting party on appeal*); Atlantic Veneer Corporation v. Sears, 232 N.W.2d 499, 503 (Iowa 1985) (*allowance of in-course-of-trial amendment of answer to counterclaim so as to allege estoppel defense not abuse of discretion where no resulting prejudice to counterclaimant*).

II.

The appellants' second contention is that the district court applied an erroneous standard of proof in determining that Fara had proven his affirmative defenses of waiver and estoppel. In its conclusions of law, the district court stated that "waiver or estoppel is an affirmative defense the burden of proving which is on the Defendant. In this respect, the proof of the Defendant must be by a preponderance of the evidence." In support of their argument that this constitutes error, the appellants cite to Anita Valley, Inc. v. Bingley, 279 N.W.2d

37, 41 (Iowa 1979), where our supreme court stated that the affirmative defenses of equitable estoppel and laches must be established by clear, convincing, and satisfactory proof.

We feel neither required nor compelled to resolve the issue of the proper standard of proof required in order to demonstrate an estoppel in the context of a landlord's lien under Iowa Code section 507.1 (1987). This is because we believe the district court applied the correct standard to the waiver defense and, for reasons we set forth in section III *infra*, we think the merits of that defense were correctly resolved by the district court. The following excerpt from Corpus Juris Secundum, which sets forth the burden of proof for the waiver issue in the present context, was relied on by the district court:

The burden of proving a waiver by the landlord of his statutory lien is on the party attacking the lien and it must be established by a preponderance of the evidence.

Waiver must be established by a preponderance of the evidence, which shows affirmatively an agreement by the landlord, or conduct tantamount thereto, that the tenant might deal with the property as though free of any lien.

52 C.J.S. Landlord & Tenant § 651 (1968). We think the district court was correct in its application of this standard to Fara's affirmative defense of waiver.

III.

Moreover, and contrary to the appellants' final contention, we think the record supports the district court's determination that Fara carried his burden in showing that the appellants waived their statutory lien. The principles that guide our review of this issue are well established and often cited. They are summarized in Prestype, Inc. v. Garr, 248 N.W.2d 111, 113 (Iowa 1976), as follows:

On appeal from a law action tried to the court, as here, review in this court is only on errors assigned and the matter is not triable de novo. Under this limited extent of review the findings of fact by the trial court have the effect of a special verdict and are equivalent to a jury verdict. If supported by substantial evidence and

justified as a matter of law, they are binding on us and the judgment will not be disturbed on appeal.

Further, we must construe the evidence in the light most favorable to the trial court's judgment, and this court will not weigh the evidence or pass on the credibility of the witnesses.

However, the rule does not preclude inquiry into the question whether, conceding the truth of a finding of fact, a conclusion of law drawn therefrom is correct, nor does it apply if in arriving at a finding the trial court erred in its ruling on evidence or in other respects upon questions of law which materially affect that decision. . . . [citing authorities]."

(quoting Whewell v. Dobson, 227 N.W.2d 115, 117 (Iowa 1975)).

The lien involved in the present case is given to landlords by Iowa Code section 507.1 (1987), which provides in pertinent part that "[a] landlord shall have a lien for his rent upon all crops grown upon the leased premises," A landlord whose lien has been lost or destroyed by reason of the sale of the crops by the tenant may maintain an action against the purchaser for conversion unless the landlord has waived, or is estopped from asserting, the lien. Wilson v. Fortune, 209 Iowa 810, 811, 229 N.W. 190, 191 (1930). The landlord waives the statutory lien by consenting to or authorizing the sale of crops encumbered by the lien. Id.; Randall v. Ditch, 123 Iowa 582, 585, 99 N.W. 190, 191 (1904). This waiver results even though the tenant has promised to turn the proceeds over to the lienholder. Hoyt v. Clemans, 167 Iowa 330, 333, 149 N.W. 442, 443 (1914). In addition, some courts have held that the lien is waived where the landlord has made it a practice and custom to permit his tenant to sell the goods on which the landlord has a statutory lien. See 52 C.J.S. Landlord & Tenant § 65(d) (1968) and cases therein cited; cf. Fishbaugh v. Spunaugle, 118 Iowa 337, 345-46, 92 N.W. 58, 61 (1902) (the fact that other sales of produce from the leased land had been made by the tenant with the knowledge and consent of the landlord's agent is a circumstance tending to corroborate the tenant's

claim that like consent was given to the present sale made to defendant grain elevator).

During the 1983 crop season, the time period directly relevant to the present appeal, the appellants leased the cropland to Ivan's brother, Lester Joens, pursuant to a written cash-rent lease. The \$12,560.00 rent was due on or before November 1, 1983. Lester had leased the land from the Joenses, on a cash-rent or crop-share basis, for all but four of the preceding twenty years. On November 1, Lester paid \$6,500.00 toward the rent, leaving a balance of \$6,060.00. This \$6,500.00 was a portion of the proceeds from Lester's sale of corn and beans to Fara. Approximately one-half of these crops had been raised on the land leased from the appellants to Lester. The record clearly demonstrates that Ivan expected Lester to harvest the crops from the land, sell them to Fara, and pay his rent from the proceeds. This arrangement had been used by the appellants and Lester during preceding years. Ivan assumed the crops would be delivered to Fara "because [Lester] had done [such] business with [Fara] for a long time." Ivan also testified that he "didn't worry about where [Lester] took the crops . . . it didn't make any difference to me as long as he took care of business on his end and paid the rent." Ivan knew of the statutory landlord's lien at the time he entered into the 1983 written lease. We think the record contains substantial evidence in support of the district court's determination that the appellants consented to the sale of the crops and chose instead to look directly to Lester for payment. This case is clearly distinguishable, therefore, from cases such as Prior v. Rathjen, 199 N.W.2d 327 (Iowa 1972), in which the record demonstrated the crop sale was made without the landlord's consent. Id. at 329. Because of their consent to the sale, appellants may not look now to Fara for damages. Cf. Wright v. E. M. Dickey Co., 83 Iowa 464, 466-68, 50 N.W. 206, 206-07 (1891) (landlord estopped from claiming lien where he con-

sented to tenant's sale of wheat and relied on tenant to pay rent out of proceeds from sale). The record supports the district court's finding that the appellants' *consented to the sale of the crops* and, as a consequence, waived their statutory lien.

The judgment of the district court is affirmed.

AFFIRMED.

Schlegel, J., concurs; Sackett, J., concurs in result only.

SACKETT, J. (*special concurrence*)

I concur with the result only.