IN THE COURT OF APPEALS OF IOWA

FILED
JUN 29 1988
CLERK SUPREME COURT

G. DEAN GARLAND and SECURE BEEF LTD., a limited partnership,

Plaintiffs-Appellees,

vs.

CAPITAL RESOURCES CORPORATION, PAUL W. THIELKING, A.P.W. THIELKING, NICK FEILEN, STEPHEN K. THIELKING, ARMIN F. THIELKING, PAUL M. THIELKING, JOHN THIELKING, JOHN F. HENSS, and BRENTON BANK & TRUST COMPANY OF MARSHALLTOWN, IOWA, f/k/a FIDELITY BRENTON BANK & TRUST COMPANY,

Defendants-Appellants.

Filed June 29, 1988

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7-514
87-518

Appeal from the Iowa District Court for Marshall County (No. 35985), Carl D. Baker, Judge.

The defendants appeal from a judgment for plaintiffs in an action for breach of a contract for the sale of a meat packing company. **AFFIRMED.**

Roy M. Irish of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, Des Moines, for defendants-appellants.

Joel T. S. Greer and John B. Grier of Cartwright, Druker & Ryden, Marshalltown, for plaintiffs-appellees.

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

OXBERGER, C.J.

The defendants Capital Resources Corporation (CRC) and several named individuals appeal the decision of the district court awarding a jury verdict against them in the amount of $2,428,000 to the plaintiff, G. Dean Garland, and $178,750 to the plaintiff, Secure Beef Ltd. Garland and Secure Beef Ltd. had sued the defendants for breach of contract. We affirm.

CRC contracted with Garland to purchase Marshall Packing Company, Inc. In partial consideration, CRC agreed to pay to Garland an amount equal to 20% of the yearly net income of Marshall Packing Company plus 20% of the yearly net income of Feilen Meat Company over and above the sum of $293,146 for ten consecutive years. CRC further agreed (1) to pay certain indebtedness of Marshall Packing Company of $125,000 to "certain limited partners" of Secure Beef Ltd.; (2) to cause Marshall Packing Company to lease from Garland certain property adjacent to Marshall Packing Company; and (3) to cause Marshall Packing Company to enter into an employment agreement with Garland. Defendants, several named individuals, acted as guarantors to the contract. The jury found that a breach had occurred and awarded damages as stated above. The issue as to whether a breach occurred was not appealed. We affirm the trial court's judgment on the verdict awarding damages to the plaintiffs.

The defendants argue that the trial court erred in submitting Instruction No. 17 to the jury because it was improper for the jury to consider evidence (1) of the net income of the two companies; (2) of an alleged debt to certain limited partners of Secure Beef Ltd.; (3) of liability of CRC and named individuals for failure of Marshall Packing Company to lease from Garland certain real property; and (4) of the alleged failure of Marshall Packing Company to comply with the terms and provisions of the employment agreement it had signed with

Garland. The defendants timely objected to all but one of the above objections at the reading of the instructions to the jury. The defendants did not object to Instruction No. 17 on the ground that it was improper for the jury to consider evidence of an alleged debt to certain limited partners of Secure Beef Ltd. because the plaintiff partnership was not the real party in interest.

Only objections or grounds for error that are specified to the trial court shall be considered on appeal. I. R. Civ. P. 196; Moser v. Stallings, 387 N.W.2d 599, 603-04 (Iowa, 1986). The defendant is bound by the parameters of that objection and cannot amplify or change that objection on appeal. Id. Consequently, the defendants did not preserve error regarding the issue of the real party in interest as pertains to Jury Instruction No. 17 for our review.

Concerning those errors properly preserved during trial, our review is on errors assigned. I. R. App. P. 4; Hamilton v. Luckey, 315 N.W.2d 823, 825 (Iowa App. 1981). All pleaded issues must be submitted to the jury if they are supported by substantial evidence. Hoekstra v. Farm Bureau Mutual Ins. Co., 382 N.W.2d 100, 107 (Iowa 1986). The sufficiency of the evidence will be given the most favorable construction possible in favor of the party urging submission of the instruction. Id. at 108.

Defendants argue that the trial court erred in allowing the jury to consider an element of damages pertaining to consideration to be paid to Garland in the amount of 20% of the net income of Marshall Packing Company and Feilen Meat Company over and above the sum of $293,146 for ten consecutive years. Defendants argue that because the two companies had zero net income during the first year of operation when the breach occurred, the plaintiff is only entitled to 20% of zero.

Instruction No. 17 read to the jury is as follows:

PLAINTIFF'S CLAIM AGAINST DEFENDANTS -- BREACH OF CONTRACT

Garland and Secure Beef assert that the defendants breached the agreement in the following particulars:

1. In failing to pay to Garland the sum of $250,000, plus interest from March 8, 1984, at ten percent per annum, as specified in paragraph 5 of the agreement.

2. In failing to pay to Garland twenty percent of the net income of Marshall Packing Company over a ten-year period, as set forth in paragraph 2 of the agreement.

3. In failing to pay Garland twenty percent of the net income of Feilen Meat Company over and above the sum of $293,146, less income taxes thereon, for ten consecutive years.

4. In failing to pay to Secure Beef the sum of $125,000 as set out in paragraph 6 of the agreement.

5. The loss sustained by Garland due to the failure of the defendants to cause Marshall Packing Company to lease from Garland certain real estate adjacent to the property of Marshall Packing Company, Inc., pursuant to paragraph 9 of the agreement.

6. The failure of the defendants to cause Marshall Packing Company to comply with the terms and provisions of the employment agreement labeled Exhibit C attached to the agreement.

To entitle the plaintiffs to recover, the burden is upon them to establish by a preponderance of the evidence all of the following propositions:

1. The existence of the contract;

2. The terms and conditions of the contract;

3. The plaintiffs have fully performed all of the terms and conditions required of them;

4. The contract was breached in some particular as charged by the plaintiffs;

5. The plaintiffs have suffered damages as a result of the breach, and the amount thereof.

If the plaintiffs have established all of the foregoing propositions by a preponderance of the evidence, then the plaintiffs are entitled to recover in some amount.

If the plaintiffs have failed to establish by a preponderance of the evidence any one or more of the foregoing propositions, then the plaintiffs cannot recover and your verdict will be for the defendants.

It is difficult to ascertain from the appellant's brief the exact nature of their objection to this instruction as pertains to the net income of Marshall Packing Company and Feilen Meat Company. Apparently, the defendants assert

that the trial court should have excluded sentences number two and three (regarding Marshall Packing and Feilen Meats) from the first section of the above instruction because the evidence showed that both companies had no net profits *from which* to calculate 20%. Appellees, on the other hand, assert that Instruction No. 17 properly includes Garland's lost profits as breach of contract damages.

The evidence reflects and the parties do not dispute that CRC was to pay Garland 20% of the net profits of Marshall Packing Company and of Feilen Meat Company over a *period of ten years as partial consideration* for the sale of Marshall Packing Company. The jury determined that a breach occurred. Lost profits generally result from two situations:

> [T]he profit which the nondefaulting promisee expected to make from the breached contract or ... the profit which he expected to make from collateral transactions -- using the promised performance as one of the bases of those collateral transactions.

22 Am. Jur. 2d, Damages, § 171, p. 241.

Lost profits must be proven within a reasonable degree of certainty and not be based on speculation and conjecture. Id. at § 172, p. 242-44. Mid-Country Meats v. Woodruff-Evans Const., 334 N.W.2d 332, 337 (Iowa App. 1983). It is sufficient if the evidence produces a fixed method by which lost profits may be estimated within a reasonable degree of accuracy. Harsha v. State Sav. Bank, 346 N.W.2d 791, 797 (Iowa 1984); Orkin Exterminating Co., Inc. (Arwell Div.) v. Burnett, 160 N.W.2d 427, 430 (Iowa 1968); Thorp Sales Corp v. Gyuro Grading Co., Inc., 331 N.W.2d 342, 348 (Wisc. 1983).

The defendants argue that the plaintiffs are entitled only to 20% of zero because no profits were experienced before the breach occurred. The plaintiffs argue that in fact some profits were made during the first few months of operation and, more importantly, they are due 20% of the projected profits as payment

for the sale of Marshall Packing Company. Clearly, it was within the province of the jury to determine the amount of such damages in this case. There is considerable evidence in the record that all parties relied upon their own estimates of future profits as well as those future profit projections compiled by the other parties during negotiations and at the time the contract was signed in order to arrive at the 20% figure. All parties' future profit projections were based upon the past profitable history of Marshall Packing Company and Feilen Meat Company, among other factors. Past history of company profits does not trigger the "new business" rule. Harsha v. State Sav. Bank, 346 N.W.2d 791, 797-99 (Iowa 1984).

We therefore affirm the district court's judgment as regards this issue.

The defendants' two remaining objections to Instruction No. 17 are analogous and will be discussed here jointly. The defendants argue that the court should have not submitted to the jury the issue of the defendants' liability regarding the alleged failure of Marshall Packing Company to lease certain real property from Garland. The plaintiffs argue that lease payments were properly submitted as consequential damages. In like manner, the defendants also assert it was improper for the trial court to submit to the jury the issue of their liability regarding the failure of Marshall Packing Company to comply with the terms and provisions of the employment agreement.

Pertinent to these issues are paragraphs number 9, 10 and 17 of the agreement. Paragraph 9 and 10 discuss CRC's obligation to cause Marshall Packing Company to enter into a lease and employment contract, and incorporated the lease and employment agreement into the contract. Paragraph 17 states that the individually named defendants will guarantee the complete and timely performance of CRC's obligations under the contract.

It is the defendants' position that their only obligation was to cause Marshall Packing Company to sign the rental and employment agreement with Mr. Garland; they did not agree to cause Marshall Packing Company to make lease payments as specified in the lease or to comply with the terms and provisions of the employment agreement.

Paragraph number 9 of the agreement states that CRC:

> [A]grees to cause Marshall Packing Company to lease from Garland ... certain real property ... for a term of one year ... from the closing date [of this contract] ... for an annual rental of $20,000 .... The parties agree to negotiate in good faith for an extension of said lease upon its expiration.

(Emphasis added.)

The terms of this paragraph are not ambiguous. The lease was incorporated into the agreement by attachment and reference, and as such became part of the contract. As a result of the signing of the contract into which the lease was incorporated, CRC was able to purchase 100% ownership of Marshall Packing Company and the plaintiff reasonably expected to receive rent for at least a period of a year. Further, the parties, Garland and CRC, agreed to not only enter into the rental agreement but to negotiate for an extension upon its expiration. The plaintiffs pled and introduced evidence that the lease was signed but that no rent was paid. The defendants did not introduce any evidence controverting this. The evidence supporting the plaintiffs' position is substantial and generated an issue for the jury.

Paragraph 10 of the contract incorporates the employment agreement between CRC and Garland in a similar fashion. There is substantial evidence in the record that as a result of this contract entered into between Mr. Garland and CRC, that Mr. Garland would have been employed by Marshall Packing Company for ten years, as he would have received rent on his property for at least one year. Because the CRC breached this contract, such payments were

not forthcoming. This issue was properly pled and there exists sufficient evidence to support it. Therefore, a jury issue was likewise generated.

The individually-named defendants acted as guarantors to this contract *pursuant to paragraph* 17 of the contract. They agreed to guarantee the complete and timely performance of all of CRC's obligations under this contract. In effect, if CRC breached the terms of this contract, in any manner, the individually-named defendants agreed to act as guarantors. There is no language in the contract which limits their role in this regard. As previously stated, this issue was *properly pled and there exists substantial* evidence to support it. Therefore a jury issue was also generated in this regard.

We affirm the judgment of the trial court on the jury verdict against the defendants in the amount of $2,428,000 as to G. Dean Garland and $178,750 as to Secure Beef Ltd., and tax costs of this appeal to the defendants.

AFFIRMED.