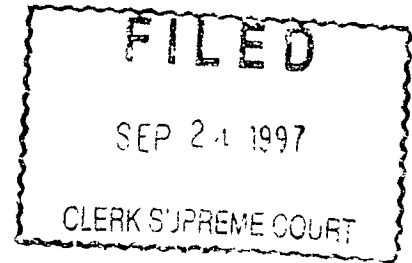


IN THE COURT OF APPEALS OF IOWA

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No. 6-611 / 95-1872
Filed September 24, 1997



JAMES H. DICKENS,
Appellant,

vs.

STANLEY W. HAAG, and
STANLEY W. HAAG, M.D., P.C.,
Appellees.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

James Dickens appeals the district court's order granting defendants' motion for summary judgment. **REVERSED AND REMANDED.**

James A. Albert and Michael J. Galligan of the Michael J. Galligan Law Firm, P.C., Des Moines, for appellant.

Michael F. Burger and Joseph R. Gunderson of Dreher, Simpson & Jensen, P.C., Des Moines, for appellees.

Heard by Huitink, P.J., and Streit and Vogel, JJ.

HUITINK, P. J.

Dr. James Dickens appeals from the district court's summary judgment ruling dismissing breach of contract and related tort claims against Dr. Stanley Haag. We reverse and remand.

I. Background Facts and Proceedings.

Dickens and Haag were formerly partners in Hilltop Pharmacy. Hilltop Pharmacy was a business Haag and Dickens owned and operated as an adjunct to their medical practice. Their partnership agreement included a mandatory buy-sell provision obligating the withdrawing partner to sell and the remaining partner to buy the withdrawing partner's interest on the terms specified in the agreement.

This dispute originates in Dickens' failed attempt to sell his share of Hilltop Pharmacy to David Cassady at a price substantially greater than that provided in the partnership agreement. In his petition, Dickens alleged Haag breached an oral agreement modifying their buy-sell agreement to permit the sale to Cassady. Dickens also sued Haag for tortious interference with an existing contract, intentional interference with prospective business advantage, and breach of fiduciary duty.

Haag denied making any oral agreement to modify the buy-sell provisions of the parties' partnership agreement. In his motion for summary judgment, Haag argued Dickens' claims for breach of contract based on an oral modification of the partnership agreement or a waiver of its terms failed as a matter of law and should be dismissed.

The summary judgment record includes evidentiary support for the following factual contentions. Haag rejected Dickens' first proposal to modify the partnership agreement in April 1992. In June 1992, the parties rejected Cassady's \$200,000 offer to buy their entire interest in Hilltop Pharmacy. In June 1993, Haag told Dickens he could sell his partnership share. Dickens subsequently sold his share to Cassady for \$120,000. Although Haag expressed no initial objection to Dickens' sale to Cassady, he refused to approve the sale when he could not reach an agreement with Cassady concerning division of future pharmacy profits. In December 1993, Haag purchased Dickens' partnership interest pursuant to the buy-sell agreement for \$50,000. Approximately one year later, Haag sold Hilltop Pharmacy to Cassady. The record also indicates Haag has always and continues to deny making any agreement to modify the buy-sell provisions of the partnership agreement or to waive any of its provisions.

The district court granted Haag's motion for summary judgment citing the lack of any consideration supporting Dickens' claimed modification of the partnership agreement. The court also concluded there was no waiver of the buy-sell provisions because Dickens purported agreement resulted in obligations and duties different from those included in the original partnership agreement. Dickens' remaining tort claims were dismissed because the court found they were contingent on Haag's ability to prove the partnership agreement was modified as he claimed or its buy-sell provisions were waived.

On appeal, Dickens argues the district court erred in finding the purported modification of the partnership agreement was unenforceable for lack of consideration. He also disputes the court's conclusion that Haag did not waive the buy-sell provisions of their agreement.

II. Standard of Review.

We review an appeal from summary judgment for errors of law. Iowa R. App. P. 4. Summary judgment is appropriate only if no genuine issue of material fact exists. *C-Thru Container Corp. v. Midland Mfg. Co.*, 533 N.W.2d 542, 544 (Iowa 1995). The moving party bears the burden of proving the nonexistence of a material fact. *Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). We must view the evidence in the light most favorable to the nonmoving party. *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 811 (Iowa 1994). This procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. *Id.* A fact issue is generated if reasonable minds can differ on how the issue should be resolved. *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986). If the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Milne*, 424 N.W.2d at 423. When a motion for summary judgment is supported, the nonmoving party must respond with "specific facts showing there is a genuine issue for trial." Iowa R. Civ. P. 237(e); *Uhl v. City of Sioux City*, 490 N.W.2d 69, 74 (Iowa App. 1992). If the nonmoving party

does not so respond, “summary judgment, if appropriate, shall be entered against him.” *Id.*

III. Modification.

A written contract may be modified by an oral agreement of the contracting parties. *Whalen v. Connelly*, 545 N.W.2d 284, 291 (Iowa 1996). Whether the parties intended to modify the contract and the terms of the modified contract are ordinarily questions of fact. *Davenport Osteopathic Hospital Assoc. v. Hospital Service*, 261 Iowa 247, 253, 134 N.W.2d 153, 157 (1967).

Generally, new consideration is necessary to support a contract modification. *Recker v. Gustafson*, 279 N.W.2d 744, 749 (Iowa 1979). “Consideration” is a benefit to the promisor or loss or detriment to the promisee. *Federal Land Bank of Iowa v. Woods*, 480 N.W.2d 61, 65 (Iowa 1992) (citing *Test v. Heaberlin*, 254 Iowa 521, 523, 118 N.W.2d 73, 74 (1962)). Because Dickens’ claims are based on an oral modification, he has the burden of proving new consideration supports the modification. *See Hubbard Milling Co. v. Citizens State Bank*, 385 N.W.2d 255, 258 (Iowa 1986) (want or failure of consideration is an affirmative defense where a written agreement is involved)(emphasis supplied).

Based on our limited scope of review, we are unable to say Dickens’ breach of contract claim fails as a matter of law. Under his theory, the parties agreed to modify the buy-sell agreement by permitting the sale of a partnership interest to a third party. If this is true, each partner was relieved of their respective obligation to

buy or sell a partnership interest. We believe the exchange of benefits and detriments implicit in such an agreement could provide new consideration for Dickens' claimed modification of the partnership agreement. The district court erred when it reached a contrary conclusion. The parties remaining factual disputes preclude entry of summary judgment on this issue.

IV. Waiver.

Waiver is "the voluntary or intentional relinquishment of a known right." *Travelers Indemnity Co. v. Fields*, 317 N.W.2d 176, 186 (1982). Waiver can be shown by the affirmative acts of a party, or can be inferred from conduct indicating a waiver was intended. *Continental Casualty Co. v. G. R. Kinney Co.*, 258 Iowa 658, 660, 140 N.W.2d 129, 130 (1966). Waiver is generally a fact issue for the jury's determination. *Continental Casualty Co.*, 258 Iowa at 661, 140 N.W.2d at 130. (citations omitted). Unlike modification, waiver does not require consideration. *In the Matter of the Guardianship of Collins*, 327 N.W.2d 230, 233 (Iowa 1992). If, however, different duties and obligations apart from the parties' original contract result, there is a modification and not a waiver. *Quigley v. Wilson*, 474 N.W.2d 277, 280 (Iowa App. 1991).

As noted earlier, the district court determined, as a matter of law, Dickens' waiver claim failed because the oral agreement created new and different obligations other than those provided in the original partnership agreement. We disagree.

At best, the district court's finding that new or different obligations resulted from Haag's alleged waiver is premature. Under Dickens' waiver theory, any resulting new or different obligations inhered in Haag's relationship with Cassady. There is arguably nothing in the summary judgment record to suggest any contingencies resulting from Haag's waiver were not dealt with by the existing terms of the partnership agreement. As already noted, the terms of any modification or waiver are fact questions to be resolved by the jury. Under these circumstances, these fact questions must first be resolved before the court can determine as a matter of law whether any new or different legal obligations resulted from Haag's alleged waiver.

Therefore, the judgment of the district court is reversed and this case is remanded for trial on all counts alleged in Dickens' petition.

REVERSED AND REMANDED.