FILED
MAY 25 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed May 25, 1982

291

JAMES N. BISHOP,

Plaintiff-Appellee,

vs.

EDWARD J. HUFF,

Defendant-Appellant.

2-101
2-66759

Appeal from Johnson District Court, Robert Osmundson, Judge.

Defendant appeals from an adverse judgment for plaintiff in this suit arising from a dispute over money plaintiff loaned defendant to purchase land. AFFIRMED.

C. Peter Hayek of Hayek, Hayek, Hayek & Holland, Iowa City, for defendant-appellant.

Ronald W. Wendt of Nazette, Hendrickson, Marner & Good, Cedar Rapids, for plaintiff-appellee.

Heard en banc.

PER CURIAM

Defendant appeals from an adverse judgment for plaintiff in this suit arising from a dispute over money plaintiff loaned defendant to purchase land. We affirm.

The facts are not in dispute in this case. Plaintiff Bishop is defendant Huff's brother-in-law. On September 2, 1977, plaintiff loaned defendant $12,000 for a downpayment on a land purchase, and the defendant executed a promissory note to plaintiff for that amount. The note was payable in four equal installments of principal and interest of nine and one-half percent over the next year.

When plaintiff made the $12,000 loan, he thought he was only providing part of the downpayment. When he learned that the $12,000 loan constituted the entire downpayment, he thought his brother-in-law had taken advantage of him, so he demanded a share of the profits from the resale of the land. Defendant orally agreed to this new arrangement and agreed to give plaintiff one-third of the expected $60,000 in profits, in addition to repayment of the loan.

By 1979 defendant had apparently still not sold the land and had never made any payments to plaintiff, so plaintiff agreed to accept $10,000 in profits, plus the $12,000 principal and accrued interest. This agreement was drawn up into a promissory note dated and signed July 12, 1979. Defendant again made no payments, and plaintiff sued upon the last note.

Defendant's defense was that the interest rate on the original note is usurious and thus it tainted the validity of the second note. The court found that the parties had rescinded the original note, replaced it with an oral contract for a share of the profits, rescinded that contract, and entered into yet a third contract which did not contain a usurious interest rate. Judgment was for plaintiff Bishop

in the sum of $24,388 with interest from September 1, 1979, to August 18, 1980, at nine and one-half percent, and interest from August 19, 1980, at ten percent.

Our review is for correction of errors at law. Iowa R. App. P. 4.

I. Modification or Rescission.

The resolution of this case depends upon the legal question of whether the parties modified or rescinded and replaced their original contract. The trial court decided that there were two valid rescissions, one resulting in the oral contract between the parties and the other resulting in the promissory note upon which plaintiff sued. We agree with the trial court's decision.

When a contract is rescinded, the contractual obligations between the parties are discharged and the parties may enter into a new contract. While new consideration is required to modify a contract, it is not required to rescind a contract. Recker v. Gustafson, 279 N.W.2d 744, 755 (Iowa 1979).

We agree with the trial court that the facts of the instant case show there was rescission. The terms of the first written contract between the parties were simple. There was a $12,000 loan with interest for a definite term. Defendant was a borrower, and plaintiff a lender. The oral contract changed their relationship completely. Plaintiff was not only going to be repaid the funds he loaned, but he was also going to share in defendant's profits when the land was sold. Plaintiff had a one-third interest in defendant's venture, which is an interest completely different from the one he had when he initially loaned defendant the money. This new oral contract, creating a wholly new relationship between the parties, is the result of a valid rescission.

The parties' relationship once again changed when they drew up a promissory note in July 1979. Plaintiff was going to accept $10,000 less in profits from the sale than he would have received under the oral contract. One has to manifest an

intention to rescind or abandon the previous contract and act so inconsistently that he is estopped from asserting his rights under the previous contract. Severson v. Elberon Elevator, Inc., 250 N.W.2d 417,421 (Iowa 1977). Certainly accepting $10,000 less under the new contract, when the other party gives no additional consideration, manifests an intention to rescind rather than modify the previous contract.

We agree with the trial court and affirm their judgment for plaintiff in the promissory note.

II. Usury Defense.

Having decided the contracts were rescinded, the issue of defendant's usury defense is irrelevant. We look only to the interest rate on the promissory note upon which this suit is based. It is not usurious.

Defendant is responsible for the costs of this suit.

AFFIRMED.

All judges concur except Carter, J., who concurs specially.

CARTER, J., (concurring specially).

I concur only in the result. I strongly disagree that the evidence will support a finding that the original usurious transaction was rescinded and a new contract was substituted in its stead. In order to find a rescision of the September 2, 1977, agreement, rather than a modification of that agreement, it must be shown that both parties were completely free of that agreement prior to the striking of the new bargain. On the present record, it is clear that defendant was not relieved of the obligations of the September 2, 1977, note until he agreed to the new terms.

I concur in the result because I conclude on the particular facts of the present case that it has not been established that the initial usury tainted the ultimate agreement which was enforced by the court. This is primarily true because it appears without dispute that plaintiff subsequently became entitled to additional payment of an unliquidated sum as a condition for his forebearance of earlier collection efforts. The parties then agreed to liquidate the amount thus owed. Under these circumstances it becomes highly unlikely that the amount which defendant ultimately agreed to pay would have been materially different had a lower rate of interest been involved at the inception of the transaction.