FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GULF FARM CENTER, INC.,	)	
Appellant,	)	Filed April 28, 1978
vs.	)	
WILBUR STAYNER,	)	458 2-59979
Appellee.	)	

Appeal from Worth District Court - B. C. Sullivan, Judge.

Plaintiff appeals from judgment entered in favor of defendant on a counterclaim for crop damage, assigning as error the refusal of trial court to direct a verdict in its favor on its claim for balance due on an open account, the admission of evidence and instruction of the jury on the question of defendant's mitigation of damages, the submission of the issues of express and implied warranty to the jury, and the refusal of the court to grant its motion for mistrial. Reversed and Remanded with Instructions.

Warren L. De Vries and David M. Nelsen, of Mason City, counsel for appellant.

Walter C. Schroeder, of Winston, Schroeder & Reuber, of Mason City, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

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DONIELSON, J.

Plaintiff-Gulf Farm Center, Inc. appeals from a judgment for $5,000 entered in favor of defendant-Wilbur Stayner on his counterclaim for crop damage allegedly caused by a herbicide sold to defendant by plaintiff. Plaintiff assigns as error the refusal of the trial court to direct a verdict in its favor on its original notice to recover for a balance due on an open account, the admission of evidence and instruction of the jury on the question of defendant's mitigation of damages, the submission of the issues of breach of express and implied warranties to the jury, and the refusal of the court to grant its motion for mistrial.

Plaintiff sold certain merchandise and provided custom services to defendant. In its original notice filed in magistrate's court, plaintiff alleged that defendant owed $840.99 plus interest "on balance due on merchandise." Defendant answered and denied liability. He also filed a counterclaim in several divisions, claiming crop damage of $12,250.30 as a result of his use of the materials supplied by plaintiff. His counterclaim was based upon the theories of breach of implied warranty, breach of express warranty and strict liability in tort. Plaintiff's action on its open account and defendant's counterclaim were transferred to district court and consolidated for trial to a jury, which returned a verdict in favor of defendant in the amount of $5,000.

Initially, plaintiff contends that it was entitled to a directed verdict on its action on the open account because defendant presented no evidence disputing the existence of the account or the amount due, and consequently, there was no issue to be decided by the jury. When presented with a motion for directed verdict, both the trial court and this court must view the evidence in the light most favorable to the party against whom the motions are made, whether the evidence is contradicted or not. Rule 14(f)(2), Rules of Appellate Procedure. Every legitimate inference that may be fairly and reasonably deducted therefrom must be carried to the aid of the evidence. Prestype Inc. v. Carr, 248 N.W.2d 111, 118-119 (Iowa 1976); Champlin v. Walker, 249 N.W.2d 839, 840 (Iowa 1977).

In the instant case, defendant readily admitted in his own testimony that plaintiff had sold and delivered the goods as alleged and that the amounts reflected in plaintiff's petition and bills and accounts which were introduced into evidence were fair and reasonable. Further, defendant admitted that he had not paid the claimed balance.

After reviewing the entire record, we conclude that, viewing the evidence in the light most favorable to defendant, there was no issue regarding the existence or amount of the balance due on the open account. Nonetheless, defendant argues in his brief that there was a want or failure of consideration and that he was entitled to set up this defense without denying under oath the correctness of the account. 1 C.J.S. Account, Action on § 17 at p. 617 (1936). However, want and failure of consideration are distinct affirmative defenses which must be accordingly pleaded. See rules 72 and 101, Rules of Civil Procedure; Hart v. Hart, 160 N.W.2d 438, 445 (Iowa 1968); Hiatt v. Hamilton, 215 Iowa 215, 219-221, 243 N.W. 578 (1932); Goodpaster v. Porter and Courtney, 11 Iowa 161, 164 (1860); Foods, Inc. v. Leffler, 240 N.W.2d 914, 919-920 (Iowa 1976). If a litigant desires to have his theory of affirmative defense submitted to the jury in an instruction, such affirmative defense must be raised in the answer. Murphy v. City of Waterloo, 255 Iowa 557, 566, 123 N.W.2d 49 (1963). Since defendant did not specifically plead want or failure of consideration in his answer, he is not entitled to any relief on appeal. Consequently, the court erred in failing to direct a verdict for plaintiff on its claim.

Next, plaintiff argues that the court erred in admitting evidence and instructing the jury on the question of defendant's mitigation of damages because mitigation was not specifically pleaded and was not an issue in the case. Section 619.7, The Code, provides, **inter alia**, that in an action to recover damages for injury to property, the defendant may set forth in a distinct division of his answer any facts to mitigate or otherwise reduce the damages and he may give in evidence the mitigating circumstances, whether he proves the defense or justification or not. Section 619.8 provides that 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. In other words, all matters in mitigation of damages must be specifically pleaded and proved to entitle a party to introduce evidence and obtain an instruction thereon. Morse v. Century Cab Co., 230 Iowa 443, 448-449, 297 N.W. 877 (1941); see Stauter v. Walnut Grove Products, 188 N.W.2d 305, 312 (Iowa 1971); Vawter v. McKissick, 159 N.W.2d 538, 541 (Iowa 1968).

In the instant case, plaintiff did not plead facts relating to mitigation of damages by defendant and there is no evidence that defendant's testimony regarding mitigation was shown by or grew out of plaintiff's testimony. On the contrary, the testimony

regarding mitigation was given by defendant during his case in chief on the counterclaim. Although it was defendant's duty to minimize his damages, plaintiff was under the duty to plead and prove that the damage could be minimized. DeWaay v. Muhr, 160 N.W.2d 454, 457 (Iowa 1968). This, plaintiff failed to do. Since evidence of mitigation should not have been admitted, the trial court erred in placing this issue before the jury in Instruction Nos. 27 and 35. However, we find this error to be harmless and without prejudice to plaintiff. The law is settled that the admission of improper evidence is harmless when it is favorable to the appellant, Baker v. Chicago, B. & Q. R. Co., 73 Iowa 389, 393-394, 35 N.W. 460 (1887); Drath v. Deitz, 15 Iowa 436, 437 (1863), and an error in an instruction which is favorable to appellant is harmless as well. Smith v. J. C. Penney Co., 260 Iowa 573, 588-589, 149 N.W.2d 794 (1967); Trapalis v. Gershun, 259 Iowa 775, 783, 145 N.W.2d 591 (1966); Judd v. Rudolph, 207 Iowa 113, 120-121, 222 N.W. 416 (1928); City of Charles City v. Rasmussen, 210 Iowa 841, 842, 232 N.W. 137 (1930). Although plaintiff objects to the admission of evidence and instruction on the question of mitigation, such evidence and instruction, even if considered by the jury, would have only served to reduce the amount of damages awarded to defendant, thereby benefiting plaintiff. Consequently, even if the jury did consider the improper testimony and instruction in rendering its verdict, plaintiff cannot claim to have been harmed or prejudiced in any way by this fact.

Further, after reviewing the entire record, especially the testimony of defendant and plaintiff's expert witness, William Lundgren, we find that sufficient evidence existed to generate a jury question on the issues of breach of implied and express warranties. Finally, we find plaintiff's contention that he was entitled to a mistrial because of the comments made by the trial judge to plaintiff's counsel regarding the use of certain terminology by Lundgren to be without merit. Although we find that the judge's remarks that the jury was being misled and that the witness was attempting to confuse the jury were improper, we do not find them to be so prejudicial as to require a new trial. See Kengorco, Inc. v. Jorgenson, 176 N.W.2d 186, 191 (Iowa 1970).

In ruling on plaintiff's motion for mistrial, the trial court noted that plaintiff did not make his motion at the conclusion of the witness' testimony, but waited until the next morning after plaintiff had rested its case and defendant had presented a rebuttal

witness. The trial court concluded that the motion was not timely made since it was not made at the end of the witness' testimony or at least at the time plaintiff rested. Nonetheless, the judge did give the jury a curative instruction to the effect that at no time during the trial did the court intend to express any opinion or intimation as to the truth or falsity of any matter in dispute. We find that this instruction was marginally sufficient to overcome any possible prejudice or adverse impression which a juror might have received as a result of the judge's original improper comments.

Consequently, the judgment of the district court is reversed and the cause is remanded with instructions that the court enter judgment for plaintiff on its claim for $840.99 plus interest from January 1, 1974 which is to be set off against the $5,000 awarded defendant.

REVERSED AND REMANDED WITH INSTRUCTIONS.