IN THE COURT OF APPEALS OF IOWA

No. 1-478 / 90-1191

JAMES F. SCHAER,

Plaintiff-Appellee/Cross-Appellant,

vs.

JOHN PAPPAJOHN,

Defendant-Appellant/Cross-Appellee.

FILED
MAR 24 1992
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Pappajohn has appealed from the trial court's judgment, and Schaer has cross-appealed. **AFFIRMED.**

John A. McClintock and David L. Brown of Hansen, McClintock & Riley, Des Moines, for appellant/cross-appellee.

Lawrence L. Marcucci and John C. Conger of Marcucci, Wiggins & Anderson, P.C., West Des Moines, for appellee/cross-appellant.

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

OXBERGER, C.J.

In 1977 James Schaer became associated with venture capitalist John Pappajohn in various real estate ventures. The parties disagree on the nature of their association. Pappajohn asserts that Schaer was an at-will employee of one of his wholly-owned corporations, Equity Dynamics, Inc., while Schaer claims he and Pappajohn were partners with an oral contractual relationship.

From 1977 to 1986 Schaer managed various apartment complexes and office buildings owned by investor groups organized and dominated by Pappajohn. Schaer also invested himself in certain projects organized by Pappajohn.

In 1986 Pappajohn terminated his relationship with Schaer. Pappajohn characterizes this act as a termination of Schaer's at-will employment with Equity Dynamics. Schaer characterizes it as a breach of the parties' contract by Pappajohn.

Later in 1986, Equity Dynamics paid Schaer $55,557.36 in deferred management fees allegedly earned before his termination. At the same time, Schaer signed a document entitled "release." The parties now disagree about the nature and effect of this "release." Schaer contends the document referred merely to certain specific deferred fees. Pappajohn contends the document was a release of all potential claims against himself, against Equity Dynamics, and against any of the investment entities or investment properties.

In 1988 Schaer filed the present lawsuit against Pappajohn. Insofar as is relevant here, Schaer asserted three theories: (1) breach of contract, (2) interference with prospective business advantage, and (3) breach of fiduciary duty. These three theories were submitted to the jury, and the jury was allowed to award punitive damages on the latter two theories. The jury returned a verdict in favor of Pappajohn on the theory of breach of fiduciary duty, but the jury returned verdicts in favor of Schaer on the theories of breach of contract and interference with prospective business advantage. The jury awarded Schaer compensatory damages of $293,737.72 and punitive damages of $450,000. However, upon posttrial motions the district court set aside the verdict for interference with prospective business advantage and the punitive damage award based on that verdict. Compensatory damages on the theory of breach of contract were allowed to stand.

On the basis of these verdicts and rulings, the district court entered a judgment in favor of Schaer for $293,737.72, the amount of the compensatory damages awarded on the breach of contract claim. Pappajohn has appealed from this judgment, and Schaer has cross-appealed.

In his appeal, Pappajohn contends that all of Schaer's claims are barred by the release document noted above. He therefore argues the district court erred by submitting any of Schaer's claims to the jury.

Pappajohn next contends the evidence did not support the jury's verdict against him on Schaer's breach of contract claim (the only one of Schaer's claims which survived posttrial motions). Pappajohn asserts the evidence showed he and Schaer had no personal contract, and the relationship was instead an at-will employment relationship (terminable for any lawful reason) between Schaer and Equity Dynamics, Inc. As an alternative way of expressing this sufficiency-of-the-evidence issue, Pappajohn contends if there did exist an oral contract for management fees and division of partnership proceeds, as claimed by Schaer, any such contract was fatally indefinite and therefore unenforceable.

In addition, Pappajohn challenges the district court's instruction on the measure of damages for breach of contract. He asserts the instruction should have allowed for those damages which were foreseeable consequences of the breach or were reasonably foreseen at the time the parties entered into the contract. He argues that by omitting a foreseeability requirement, and by allowing all damages "arising naturally from the breach," the district court improperly used a measure of damages from tort law rather than contract law.

The remaining issues are raised by Schaer in his cross-appeal.

Schaer contends the district court erred by granting Pappajohn a judgment notwithstanding the verdict on Schaer's claim for interference with prospective business advantage. Schaer contends the evidence permitted the jury to find (1) he had an "existing relationship" with the real estate entities entitling him to manage them in return for management fees, and (2) Pappajohn had no right to unilaterally end that relationship.

In a related issue, Schaer contends the district court also erred by granting Pappajohn a judgment notwithstanding the verdict on Schaer's claim for punitive damages. (The punitive damage award was based on the claim for interference with prospective business advantage; when the district court set aside the verdict on that theory, it also set aside the punitive damage award.) Schaer argues the verdict on interference with prospective business advantage should not have been set aside (see above), and that consequently there was no need to set aside the punitive damage award. He also argues the evidence showed malice by Pappajohn and therefore supported the punitive damage award. As evidence of malice, Schaer asserts that Pappajohn fabricated claims of wrongdoing and mismanagement so he could terminate his relationship with Schaer and wrongfully retain income generated by Schaer's efforts.

Schaer also contends the district court erred by refusing to submit an instruction allowing the jury to

award punitive damages on his breach of contract claim. Schaer acknowledges punitive damages are not usually available for breach of contract. However, he argues that punitive damages may nonetheless be available where the breach of contract also constitutes an intentional tort or other illegal or wrongful act committed or continued with a willful or reckless disregard for another's rights. Pogge v. Fullerton Lumber Company, 277 N.W.2d 916, 920 (Iowa 1979). He argues the evidence in this case established both prongs of that standard and therefore supports a punitive damage award on the breach of contract claim.

In addition, Schaer contends there was no substantial evidence to support the jury's verdict in favor of Pappajohn on Schaer's claim for breach of fiduciary duty. Schaer argues, in essence, that his evidence established a breach of fiduciary duty as a matter of law.

Finally, Schaer contends the jury improperly calculated the compensatory damages it awarded him on his breach of contract claim. He argues the evidence does not support the jury's calculation of $293,737.72 for lost management fees, and instead requires a calculation of $334,937.09.

We review on error. Iowa R. App. P. 4.

THE RELEASE: We first consider whether the trial court erred in not directing a verdict in favor of Pappajohn based upon the release executed between the parties.

Pappajohn asserts the "release" was intended to be a full satisfaction of any and all claims either party might have and therefore acts as a complete bar to any and all claims of Schaer. Pappajohn argues there is no evidence that suggests any ambiguity in the agreement in any respect. Schaer asserts there was no intent between the parties that the "release" apply to the claims in this case and there was no consideration to constitute an accord and satisfaction. The trial court concluded the issue concerning consideration was a fact question to be determined by the jury. We agree with the trial court.

The release stated: ". . . this Release is executed as a compromise settlement of a disputed claim." (emphasis added). At the time of the signing of this release, money was owed to Schaer by Pappajohn. The money owed was for management fees received by Equity Dynamics for management services already performed. Schaer argues the release was only intended to apply to those management fees owed. There was a dispute over the amount of money Schaer was to receive from the past fees collected. There is however no dispute that fees were owed.

Accord and satisfaction is a contract. Kellogg v. Iowa State Traveling Men's Association, 29 N.W.2d 559, 567 (Iowa 1947). It must, therefore, have all of the essential elements of a valid contract. Id. There must be a proper subject, and a meeting of the minds of the parties with

respect to the subject matter. Whether there is an accord and satisfaction ordinarily involves a pure question of intention which is ordinarily a jury question. Id. In the present case, we find that whether Schaer understood or from the circumstances should have known the release involved more than the money already owed to him at the time it was signed was a fact issue that was properly submitted to the jury. We affirm the trial court on this issue.

CONTRACT: We next consider whether the trial court erred in submitting the contract claim to the jury. Pappajohn asserts that Schaer's alleged contract for management fees is fatally indefinite and cannot be enforced. Schaer argues there was a valid, enforceable contract to jointly investigate, acquire and manage investment properties and divide the management fees equally.

When terms of an agreement are definitely fixed so nothing remains except to reduce them to writing, an oral contract will be upheld unless the parties intended not to be bound until the agreement was reduced to writing. Severson v. Elberon Elevator, Inc.,250 N.W.2d 417, 420 (Iowa 1977). The terms are sufficiently definite if the court can determine with reasonable certainty the duty of each party and the conditions relative to performance. Id. In deciding whether a joint venture agreement exists,

we have said that "no particular form of expression or formality of execution is necessary. It need not be expressed but may be implied in whole or in part from the conduct of the parties." Farm-Fuel Products v. Grain Processing, 429 N.W.2d 153, 156 (Iowa 1988).

In a memo dated September 26, 1977, regarding Schaer, Pappajohn stated:

> We are going to decide which areas to get involved in, and probably set up a separate company and call it Hawkeye Realty or something like that . . . Jim needs no money, he has plenty of cash, plenty of cash flow and I really feel he's the perfect guy for me. (emphasis added).

The record indicates that over the course of eight years, Schaer and Pappajohn exhibited a pattern of conduct. They investigated investment properties. Some of these opportunities arose from sources available to Schaer which were then brought to the attention of Pappajohn. Decisions to enter into the projects arose from mutual discussions between Schaer and Pappajohn. Schaer's return was consistently 50% of the fees. The memo suggests Pappajohn's interest in Schaer's financial resources. Such an interest would not exist where an employer is only considering the hiring of an employee. We find there is sufficient evidence in the record in which reasonable minds could find an enforceable agreement existed. We affirm the trial court's decision to submit the issue to the jury.

INSTRUCTION NO. 23: We consider whether the trial court erred in submitting instruction no. 23 to the jury. Instruction No. 23 stated:

> The measure of damages, if any you find, for the loss of management fees as a result of breach or contract, breach of fiduciary duty, or intentional interference with the prospective business advantage, is such amount as may reasonably be considered as arising naturally from the breach of the contract, breach of the fiduciary duty, or the intentional interference. This amount cannot exceed $1,294,274, the amount claimed by the Plaintiff.

Pappajohn asserts the jury was submitted an erroneous measure of damages under the claim for breach of contract. Schaer argues the inclusion of the tort claims in the instruction merely alerted the jury that the management fees being claimed as damages were the same under any of the legal theories asserted by the Plaintiff.

Pappajohn next asserts Instruction No. 23 incorrectly failed to instruct on foreseeability of the damages. It is hornbook law that damages resulting from breach of contract are recoverable only for those injuries which may reasonably be considered as arising naturally from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time of contracting, as the probable result of the breach. Meyer v. Nottger, 241 N.W.2d 911, 920 (Iowa 1976). (emphasis added).

Schaer argues the words "arising naturally from" is consistent with Iowa Law. He argues the only difference between Jury Instruction No. 23 and Pappajohn's requested Instruction No. 20 is the omission of the alternative language, "or such as may reasonably be supposed to have been in the contemplation of the parties at the time they

made the contract, as the probable result of the breach." Schaer relies upon Schuller v. Hy-Vee Food Stores, Inc., 407 N.W.2d 347, 351 (Iowa Ct. App. 1987), for the proposition that if an instruction correctly states the applicable law, it will be deemed proper even though an alternative is available. (emphasis added).

Schaer argues an instruction on foreseeability of damages for breach of contract is an "alternative" to the measure of damages which "arise naturally from" the breach of a contract.

The case of Hadley v. Baxendale, 9 Exch. 34, 156 Eng. Rep. 145 (1854), lays down two rules: (1) where there are no special circumstances to distinguish the contract involved from the great mass of contracts of the same kind, the damages recoverable are such as would naturally and generally result from the breach according to the usual course of things; and (2) where there are special circumstances in the contract, damages which result in consequence of those special circumstances are recoverable if, and only if, those special circumstances were communicated to or known by both parties to the contract at the time they entered into the contract. 22 Am.Jur. 2d Damages § 464 (1988).

Under this well established principle, the question whether a court is required to instruct the fact finder on foreseeability of damages in a breach of contract action,

turns on whether there are special circumstances in the contract which render the instruction necessary. The measure of damages for breach of contract is the loss which would naturally follow the breach under ordinary circumstances, or under the special circumstances of the case, if they were made known to the party guilty of the breach at the time the contract was entered into. International Harvester Co. of America v. Chicago, M. & St. P. Ry. Co., 172 N.W. 471 (Iowa 1919). (emphasis added). Ordinarily, the question whether certain damages are reasonably foreseeable at the time of the contract is a factual one to be determined by the jury. Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp., 98 Nev. 113, 642 P.2d 1086, 1087 (1982). Damages can be presumed foreseeable as a matter of law only if it can be said that they are the direct or natural result of the breach. Id

The trial court, in effect, indicated by its instruction on damages that if the jury found by the facts that a contract existed, the management fees sought by Schaer were then recoverable under the ordinary circumstances of this type of contract. We find no special circumstances exist, in this type of contract, which would require a defaulting party to be placed on notice that an action to recover lost management fees would arise if the contract were breached. The loss of management fees therefore could reasonably be considered by the court as

arising naturally from breach of the contract itself. Absent any special circumstances in this contract by which the loss of the management fees would not have been contemplated, the court did not err in refusing to give an instruction on foreseeability of the damages. We affirm the trial court on this issue.

RELATIONSHIP OF EQUITY DYNAMICS TO THE PARTIES: Pappajohn asserts that Equity Dynamics was the employer of Schaer and was therefore able to terminate him as an at-will employee. Consequently, since all contractual rights Schaer had could only originate from his status as an employee, there is no evidence to support any theory of recovery other than a wrongful discharge theory. Pappajohn argues there was no evidence to support a wrongful discharge theory and the trial court should have sustained and dismissed all contract claims. Schaer asserts his contract was with Pappajohn, and Equity Dynamics was only a conduit through which to conduct their contractual venture.

We find there is sufficient evidence from which the jury could conclude that Equity Dynamics was only an instrument through which the parties conducted business affairs. The jury was provided instructions on Pappajohn's employee at-will theory and found the parties agreed to conduct a management venture through Equity Dynamics, and we will not disturb this on appeal.

SCHAER'S CROSS-APPEAL:

CALCULATION OF DAMAGES: Schaer asserts the jury incorrectly calculated the actual damages on plaintiff's loss or management fees. In the absence of a challenge in the trial court to the calculation of damages, the contention cannot be considered on appeal. See Semler v. Knowling, 325 N.W.2d 395, 399 (Iowa 1982). No such challenge was made by Schaer. Since Schaer first raises his objections relative to the measure and computation of damages on appeal, we are precluded from considering them.

We have considered all other issues raised by Schaer on cross-appeal and affirm the trial court.

Costs are taxed to Pappajohn.

AFFIRMED.