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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

118

GROWMARK, INC.	)	
Plaintiff-Appellee,	)	
vs.	)	
JOHN W. SNOOK, a/k/a JOHN SNOOK, and NATIONAL BANK AND TRUST COMPANY,	)	8-34 87-159
Defendants-Appellants.	)	

Appeal from the Iowa District Court for Wayne County (No. 20558), Robert O. Frederick, Judge.

The defendant National Bank and Trust appeals from a jury verdict in favor of the plaintiff. **AFFIRMED IN PART AND REVERSED IN PART.**

Stephen P. Meyer of Meyer Law Firm, Chariton, for defendant-appellant National Bank & Trust.

R. William Petersen and William L. Shelton of Shelton Law Firm, Chariton, for plaintiff-appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

PER CURIAM

The plaintiff, Growmark, Inc., operates local Farm Service establishments which sell to farmers such supplies as seed, feed, fertilizer, pesticide, and herbicide. When selling supplies for the production of a grain crop, Growmark sometimes finances the sales by taking a security interest in the year's crops. Under this financing arrangement, Growmark expects to be paid in full at the end of the crop year in the fall.

John Snook and his brothers farm over 1500 acres of land. In 1981 and 1982, Snook purchased supplies from Growmark under the financing arrangement described above. Before extending this financing, Growmark contacted Snook's primary agricultural lender, the defendant National Bank & Trust Company of Chariton. National Bank & Trust gave Snook a good credit reference. National Bank & Trust also gave Growmark a subordination agreement whereby it subordinated their existing lien to the lien of Growmark.

Snook eventually sold grain in which Growmark claimed a security interest pursuant to the financing arrangement described above. Snook did not use the sale proceeds to pay his debt to Growmark, and he ultimately owed Growmark over $69,000.

Growmark responded to Snook's default by filing a lawsuit against several defendants. Growmark alleged conversion of grain in the petition against Snook, his

farming partners, and the elevator which bought the grain. Those parts of the case have been settled and are not involved in this appeal.

In that part of its petition which named National Bank & Trust as a defendant, Growmark alleged a number of causes of action, including conversion, fraudulent misrepresentation, negligent misrepresentation, and breach of implied contract. The conduct of the bank complained of consists of the bank's statement that the Snook loan was current, its opinion that Snook's pay habits were satisfactory, and its not volunteering that Snook had partners in the 1982 crops.

Growmark's suit against the bank was tried to a jury, which awarded Growmark $69,286 in actual damages and $20,000 in punitive damages. The district court then entered judgment for Growmark in this amount, subject to a $12,200 credit for amounts received in settlement from other defendants. The bank has appealed from this judgment.

Our review is on errors of law. Findings of fact in a law action, which means generally any action triable by ordinary proceedings, are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). In considering the propriety of a motion for directed verdict, the court views the evidence in the light most favorable to the party against whom the motion was

made. Iowa R. App. P. 14(f)(2). Even when the facts are not in dispute or contradicted, if reasonable minds might draw different inferences from them, a jury question is engendered. Iowa R. App. P. 14(f)(17).

I.

The bank contends it had no duty to Growmark to disclose unrequested information about Snook's business dealings.[1] The bank argues the district court therefore erred by denying its motion for directed verdict, by submitting instructions to the jury regarding circumstances when such a duty could arise.

A duty to disclose can arise from "a relation of trust, from confidence, from inequality of condition and knowledge, or other attendant circumstances." 37 Am. Jur. 2d, Fraud and Deceit, 145 (1968); Restatement (Second) of Torts, § 551(2)(a)-(e) (1977). If there exists a confidential relationship between the two parties and the trusted party has superior knowledge of material facts, the trusted party has a duty to disclose all the material facts favorable to his own position and adverse to the other. First Nat'l Bank in Lenox v. Brown, 181 N.W.2d 178, 182 (Iowa 1970). In such a situation, if the trusted party

1. What Growmark did not know and what the bank failed to inform Growmark of, was that Snook had entered into a joint venture with three investors. In addition, the bank was to honor letters of credit in favor of the investors in the amount of $95,000 if for some reason Snook failed to perform.

The facts here are in conflict. John Snook was heavily indebted to the Bank. The prospects of his receiving operating money from the Bank or others for the crop year 1982 were rather slim. Thus he entered into joint ventures with three individuals who agreed to advance a total of $96,719. A condition of the joint venture agreement was that John Snook furnish irrevocable letters of credit to protect their advancements in the event Snook, as the farm operator, failed to produce the minimum number of bushels as established by contract. If Snook failed to produce, as required under the contract, then he was obligated to the investors.

The Bank agreed to provide the letters of credit. The money Snook received from the investors, even though the proceeds were to be used for the 1982 crop expense, was, by a prior agreement with the Bank, received by the Bank and applied to Snook's loan. This circumstance was not revealed by the Bank in the credit report it prepared for Growmark.

The Bank counters by arguing that the names of those who are a part of the joint venture were set forth in Snook's booking order for fertilizer to be purchased from Growmark. In addition, in application to Growmark for supplier credit, Snook revealed that he was indebted to the Bank on a short-term loan for $95,000.

We determine there is substantial evidence as to the existence of a relationship of trust and confidence and, under the circumstances here, a duty to disclose existed as to information that if otherwise concealed, would be damaging to plaintiff Growmark. As the court stated in Lenox, ". . . . the superior party [bank] has a duty to disclose all material facts of which [it] is aware, or at least those favorable to [its] own position and adverse to the other." 181 N.W.2d at 182. A jury question was generated.

II.

The bank also contends that even if a duty to disclose could conceivably exist, the evidence in the present case was insufficient to permit a finding that the duty had been breached. The bank argues the evidence showed that all disclosures and lack of disclosures made by the bank were either: (1) true, (2) made with no intent to deceive, (3) immaterial to Growmark's obtaining a first lien on Snook's crops, (4) unjustifiably relied on by a lender with equal access to information and equal competence in forming an opinion, or (5) not the cause of Growmark's damages. The bank argues that due to the alleged insufficiency of the evidence on these issues of falsity, intent to deceive, materiality, justifiable reliance, and causation of damage, the district court erred by denying the bank's motions for directed verdict and by submitting to the jury the claims for fraudulent misrepresentation.

In order to establish fraud, Growmark must show by a clear and convincing preponderance of the evidence, a knowing, material misrepresentation by the bank made with the intent to induce Growmark to act, upon which Growmark justifiably relied to its damage. Wilden Clinic, Inc. v. City of Des Moines, 229 N.W.2d 286, 292 (Iowa 1975); Nie v. Galena State Bank & Trust Co., 387 N.W.2d 373, 375 (Iowa App. 1986); Beeck v. Kapalis, 302 N.W.2d 90, 94 (Iowa 1981).

This court has discussed the issue of a material representation as follows:

> A fact is material if it substantially affects the interest of the party alleged to have been defrauded. Materiality has been found where a fact influences a person to enter into a transaction, where it deceives him or induces him to act, or where the transaction would not have occurred without it. (citations omitted)

Smith v. Peterson, 280 N.W.2d 761, 765 (Iowa App. 1979) (emphasis added).

Had either Snook or the bank revealed to Growmark the joint venture arrangements and the interest in the crops acquired by the investors, Growmark asserts it would not have approved Snook's loan application. In addition, there is substantial evidence in the record that Growmark justifiably relied on the information provided by the bank as to Snook's financial status, which was arguably inaccurate, when Growmark agreed to extend credit to Snook to enable him to grow a crop.

The Lenox case provides guidance as to the fraudulent misrepresentation claim. First Nat'l Bank in Lenox v. Brown, 181 N.W.2d 178 (Iowa 1970). There, our supreme court found fraud where the bank had failed to disclose material facts to the borrower in order to ameliorate an unfavorable financial position. Id. at 184.

In this case, it can be argued that it was in the bank's interest that Snook's investors realize their investment return so it would not have to honor the letter of credit for $95,000. Snook had to grow a crop in order for this to happen. This he could not do without the loan from Growmark. Growmark argues it would not have made the loan to Snook knowing there were three other interested parties in his 1982 crop. The bank, though it knew of the investors, did not inform Growmark. Based on arguably inaccurate credit history, and not knowing of Snook's investors' interests in the 1982 crop, Growmark made the loan to Snook.

Even when the facts are not in dispute or contradicted, if reasonable minds might draw different inferences from them, a jury question is engendered. Iowa R. App. P. 14(f)(17). Here, the facts are clearly in dispute. Because of the scope of review to which we are limited in determining the propriety of a directed verdict and, the facts being in dispute, we find it was proper for the trial court to submit the issue of fraud to the jury with proper

instructions by overruling defendant's motion for a directed verdict.

III.

The Bank contends that punitive damages should not have been submitted. Punitive damages may be appropriate in cases where the defendants have committed the intentional tort of fraud. Cornell v. Wunschel, 408 N.W.2d 369, 382 (Iowa 1987). In Holcomb v. Hoffschneider, 297 N.W.2d 210, 214 (Iowa 1980), the supreme court stated that exemplary damages are not appropriate in every fraud case. There must be some aggravating factor such as malice or outrageous conduct.

In Kimmel v. Iowa Realty Co., Inc., 339 N.W.2d 374, 384 (Iowa 1983), the court observed the rule in Holcomb must be read in conjunction with the rule that malice sufficient to justify exemplary damages may be either actual or legal malice. The court stated: "To establish legal malice it need only be shown that wrongful or illegal conduct was committed or continued with a reckless disregard at another's rights." Id. In these matters we must give the evidence the most favorable construction it will reasonably bear. Thus, if there is evidence bearing on the issue of willful or malicious conduct, we will not disturb the verdict. Sandhorst v. Mauk's Transfer, Inc., 252 N.W.2d at 399.

We find the evidence engendered a sufficient fact question to justify submission of the punitive damage instruction.

IV.

In viewing the evidence in the light most favorable to the plaintiff, which is what we must do in deciding on the propriety of a motion for directed verdict, we hold that for the same reasons it was proper to submit the issue of fraud to the jury, it was proper for the issue of negligent misrepresentation to be submitted to the jury. There is a clear factual dispute as to the elements of this tort. Thus, it is a question for the jury to decide. Accordingly, the trial court properly overruled the defendant's motion for a directed verdict. But even if it was improper, it cannot go unnoticed that the jury did not return a verdict on this theory of the law.

V.

The bank contends the district court also erred by submitting the issue of breach of contract to the jury. The bank argues that the district court misinterpreted the subordination contract between the bank and Growmark by determining as a matter of law, and instructing the jury, that it was an implied condition of the contract that the bank knew of no persons other than itself and Growmark claiming an interest in Snook's crops. The bank argues that such an implied condition was neither essential to the parties'

rights and duties nor reasonable under the circumstances; the bank therefore argues that because the contract included no such implied condition, the bank's failure to disclose other possible creditors or claimants of Snook cannot sustain Growmark's claim for breach of contract.

Growmark argues that it was always the intention of both parties to the subordination agreement that Growmark receive a priority lien on the entire 1982 crop. Growmark contends that because the bank breached the implied condition of the agreement which required it to inform Growmark of any other interested parties in the 1982 crop, Growmark never received a priority lien on the 1982 crop. The bank, though it knew of the Oppenheimer investors, never informed Growmark of their interest in Snook's 1982 crop.

There is a dispute over the facts sufficient enough to warrant jury consideration. It was proper for the trial court to overrule defendant bank's motion for directed verdict as to this issue. We again point out, however, that the jury's verdict did not rest on this theory of law.

VI.

Finally, the bank contends the district court erred by computing the interest on the punitive damage award from the date Growmark's petition was filed. We agree. Interest does not run on punitive damages before judgment. Midwest Management Corp. v. Stephens, 353 N.W.2d 76, 82 (Iowa 1984); Hall v. Montgomery Ward & Co., 252 N.W.2d 421,

426 (Iowa 1979); Peterson v. First National Bank of Iowa, 423 N.W.2d 889, 890 (Iowa App. 1988). Accordingly, we reverse that part of the trial court's ruling that awarded interest from the date of the filing of the petition. Interest is awarded from the date of the judgment itself. Hall, 252 N.W.2d at 426.

AFFIRMED IN PART AND REVERSED IN PART.