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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JACK WALLACE and **SILVER SERVICE, LTD.,** Plaintiffs-Appellees, vs. **PREM SAHAI,** Defendant-Appellant, **SUBHASH SAHAI** and **ANIL SAHAI,** Defendants.	Filed September 25, 1986 260 6-218 85-504

Appeal from the Iowa District Court for Polk County (No. 46-26994) - Richard A. Strickler, Judge.

Defendant in an action for conversion appeals from judgment for plaintiff, asserting that the trial court erred in finding defendant's good faith irrelevant to the issue of liability, in failing to make findings or conclusions relating to defendant's affirmative defenses, and in failing to reduce the damage judgment by the amount of partial payment. **AFFIRMED AS MODIFIED.**

Patrick W. Brick and Luis Herrera of Brick, Seckington, Bowers, Swartz & Gentry, P.C., Des Moines, for defendant-appellant.

H. Alan Bowers of Baird, Bowers, Holliday & Wilson, Des Moines, for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Sackett, JJ.

PER CURIAM 261

The plaintiff in this action, Jack Wallace, started a precious metal recovery business in 1976. In 1973, Wallace expanded his business operation to include the purchase of gold scrap. As part of the plaintiff's business operation, he would frequently take physical delivery of the refined products in the form of silver bars, gold bars, or gold coins.

In February 1980, the defendant, Prem Sahai, entered into the gold business with Alan Brotman under the name of Brotman Investments. The business was incorporated on April 1, 1980, as Brotman Investment Corporation. During the period from February through August 1980, Brotman ran the business with Sahai not having an active role. In August 1980, however, Sahai became concerned with the operation of the business and a different arrangement for the business operation was devised. On October 4, an inventory was taken of the corporation's property at its offices and at its bank.

Also on October 4, prior to the inventory that day, Wallace transferred possession of two gold kilo bars to Brotman, convinced that Brotman wanted the bars for a few days to show a friend. Brotman placed these two bars in the corporation's safety deposit box at the Central National Bank. Brotman did not intend to tell Sahai that the bars were Wallace's property. Rather, his intent was to mislead Sahai into believing the bars to be corporate property because corporate inventory was short.

On October 6, 1980, Sahai, in his capacity as an officer and director of Brotman Investment Corporation, removed the bars from the safety deposit box and, believing them to be corporate property, delivered them to Farmers National Bank in Webster City, Iowa, as collateral security for loans made by that bank to Brotman Investment Corporation in the amount of $100,000. These loan proceeds were placed in the Brotman Investment Corporation checking

account at the Farmers National Bank, from which various corporate debts were paid.

On February 2, 1981, Sahai paid off the balance of these loans with his own funds. Sahai obtained these funds through a loan from the Farmers National Bank, using the bars and other precious metals as security. As a consequence of paying off the loans with his own funds, Sahai took possession of the collateral for those loans, including the two gold bars at issue here.

Brotman had agreed to return the gold bars to Wallace on October 6, 1980. Thereafter, Wallace was told a number of different stories by Brotman as to the bars' whereabouts. Finally, Wallace filed suit against Brotman on February 11, 1981. During Brotman's deposition on April 6, 1981, Wallace learned that the bars had been placed in the corporate safety deposit box and removed by Sahai. Subsequent to Wallace obtaining this knowledge, he dismissed the action against Brotman and instituted the present action against Sahai on May 26, 1982.

The parties waived jury trial and the case was tried to the court. On February 6, 1985, the court filed its Findings of Fact, Conclusions of Law and Decree, entering judgment in favor of Wallace and against Sahai for conversion of the bars in the amount of $43,916 plus interest. Sahai's motions for amended and enlarged rulings and for a new trial were overruled on March 22, 1985. This appeal followed.

As this case at law was tried to the court, our review is limited to the correction of errors at law. R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d 416, 418-19 (Iowa 1983). The trial court's findings of fact are binding on this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). Evidence reviewed for its substantiality is viewed in the light most favorable to the judgment. Blunt, Ellis and Loewi, Inc. v. Igram, 319 N.W.2d 189, 192 (Iowa 1982).

Sahai's first contention on appeal is that the trial court erred when it concluded that his good faith actions in connection with the gold bars were irrelevant for the purposes of determining liability. In particular, Sahai maintains that, given several of the trial court's express findings, he obtained an interest in the gold bars from Brotman Investment Corporation under Iowa Code section 554.2403 as either a "good faith purchaser for value" or as a "buyer in the ordinary course of business." As "good faith" is relevant to these applications of section 554.2403, he alleges the trial court erred in holding his good faith irrelevant to liability. We disagree.

Iowa Code section 554.2403 (1985), in pertinent part, provides as follows:

> 1. A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though (a) the transferor was deceived as to the identity of the purchaser; or (b) the delivery was in exchange for a check which is later dishonored; or (c) it was agreed that the transaction was to be a "cash sale"; or (d) the delivery was procured through fraud punishable as larcenous under the criminal law.
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> 2. Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
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> 3. "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

In order for a good title to be transferred to a good faith purchaser for value, the transferor must have at least voidable title. Although Sahai alleges that Brotman Investment Corporation obtained voidable title to the bars as a result

of negotiations between Brotman and Wallace, the trial court found that the bars were never in fact corporate property. This finding is supported by substantial evidence in the record and we are consequently bound by it.

Alternatively, Sahai maintains that section 554.2403 is applicable because he was a "buyer in the ordinary course of business" under subsections (2) and (3). We disagree. "Buyer in ordinary course of business" is defined in Iowa Code section 554.1201(9) as

> a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in the ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. (emphasis added).

Uniform Commercial Code comment two to section 554.2403 notes that subsections (2) and (3) were designed to protect "persons who buy in ordinary course out of inventory." (emphasis added). We think that the circuitous method by which Sahai came into possession of the bars fails to qualify as the "ordinary course of business" of Brotman Investment Corporation. Compare, General Motors Acceptance Corporation v. Keil, 176 N.W.2d 837 (Iowa 1970). In any event, we note that Sahai's present argument is marred by the same flaw that proved fatal to his previous contention: he maintains that he obtained his right to the bars from the corporation that simply had no rights or interests in the bars to transfer. Any "entrusting" that occurred took place between Wallace and Brotman, not between Wallace and Brotman Investment Corporation. As we said above, the trial court found the bars were not corporate property. This finding is supported by substantial evidence. Accordingly, the evidence did not establish that Sahai obtained an interest in the gold bars pursuant to section 554.2403, and the trial court did not err when it found Sahai's good faith to be irrelevant to his liability.

Sahai next contends that the trial court erred when it failed to make any findings of fact or conclusions of law addressing his affirmative defenses of waiver, laches, equitable estoppel, and estoppel by acquiescence. Sahai's motion for amended findings and conclusions in connection with this allegation was overruled by the trial court.

The courts of this state have repeatedly held that a decision which is proper on any ground shown by the record will not be disturbed on appeal. Houlahan v. Brockmeier, 258 Iowa 1197, 1203, 141 N.W.2d 545, 549, op. supp. 258 Iowa 1197, 141 N.W.2d 924 (Iowa 1966). Independent claims not addressed in the findings but inconsistent with the judgment are considered to have been decided adversely to the losing party, and review is merely to determine whether the evidence is adequate to support the findings that the trial court is thus deemed to have made. F.S. Credit Corporation v. Shear Elevator, Inc., 377 N.W.2d 227, 232-33 (Iowa 1985).

We think that in this case there is substantial evidence in the record in support of the findings of fact we deem the district court to have made rejecting Sahai's affirmative defenses. Sahai's claim of waiver falls due to the absence of any evidence tending to show that Wallace intended to give up his right to claim conversion against Sahai after he learned of the whereabouts of the gold bars. Such intent is a requisite to the affirmative defense of waiver. In the Matter of the Guardianship of Collins, 327 N.W.2d 230, 234 (Iowa 1982). Also, nothing in the record leads us to believe that Wallace delayed for an unreasonable period of time prior to bringing suit against Sahai. Such a showing is necessary to a successful assertion of laches. First Federal Savings and Loan Association of Storm Lake v. Blass, 316 N.W.2d 411, 414 (Iowa 1982). Similarly without merit are Sahai's claims of equitable estoppel and estoppel by acquiescence. See Walters v. Walters, 203 N.W.2d 376, 379 (Iowa 1973) (elements of equitable

estoppel set forth); Davidson v. Van Lengen, 266 N.W.2d 436, 438 (Iowa 1978) (discussion of estoppel by acquiescence).

Lastly, Sahai contends that the trial court erred when it failed to reduce the plaintiff's damage judgment by the value of scrap gold that had been given to Wallace by Brotman when he failed to return the gold bars.

Generally, the compensatory measure of damages for conversion is the value of the property converted at the time of conversion. Ontario Livestock Commission Co. v. Flynn, 126 N.W.2d 362, 368 (Iowa 1964). These damages may be reduced, however, by a showing that a third person has made a partial payment to the plaintiff with respect to the converted interest. F.S. Credit Corporation, 377 N.W.2d at 233; Keota Produce Co. v. Chicago, Rock Island & Pacific Railway, 189 Iowa 1284, 1286, 179 N.W. 834, 835 (1920). In the present case, the plaintiff testified that he received gold scrap with a value of approximately ten percent that of the bars from Brotman. This occurred after Brotman realized he would not be able to return the bars as Sahai had taken possession of them. We feel this was a partial payment of the converted property and that the trial court erred in not modifying the damage award to reflect that payment. Accordingly, we reduce the trial court's award by ten percent, or $4,391.60, to $39,524.40. As modified, the trial court's decision is affirmed.

AFFIRMED AS MODIFIED.