

IN THE COURT OF APPEALS OF IOWA

FILED

SEP 30 1987

CLERK SUPREME COURT

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E. F. HUTTON COMPANY, INC.,)

Plaintiff-Appellee,)

Filed September 30, 1987

vs.)

GEORGE STAUB and HAZEL CARSON,)

7-57
86-259

Defendants-Appellants.)

Appeal from the Iowa District Court for Des Moines County (No. 1550-0383),

D. B. Hendrickson, Judge.

Defendants appeal from judgment for plaintiff in an action upon a promissory note. **AFFIRMED.**

Richard A. Bartolomei and Denise S. Lange, Des Moines, for defendants-appellants.

Kevin M. Abel of Belin, Harris, Helmick, Tesdell, Lanson, Blackledge & McCormick, P.D., Des Moines, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

Defendants appeal from judgment for plaintiff in an action upon a promissory note asserting: (1) that the evidence was insufficient to show the existence of consideration for the note; and (2) that a failure to hold a hearing on the issue of the amount of attorney fees operated as a denial of due process. We affirm.

Defendants, acting as a partnership, opened an account with plaintiff for the trading of commodities. The account incurred substantial losses for which the defendants were immediately indebted to the plaintiff. Unsuccessful attempts were made to collect the amount due. Ultimately, in 1981, a promissory note was executed by defendants for \$15,096, the principal amount of the account debt plus accrued interest. The note called for an initial payment of \$5,000, with monthly payments of \$2,500 thereafter until the debt was paid. Only the first payment of \$5,000 was made.

Plaintiff commenced an action upon the note in 1983. Defendants appeared pro se throughout most of the proceedings, including the trial. From the record, we note that both defendants are experienced businesspersons who have held responsible positions in numerous business ventures. Defendant Staub has degrees in accounting and political science; he also attended two years of law school.

The trial court awarded plaintiff judgment in the amount of \$10,096 plus interest, plus attorney fees in the amount of \$5,544.46. Defendants have appealed from this judgment; plaintiff has requested additional attorney fees for this appeal.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. The findings of fact of the trial court are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

Defendants' first argument is that the note was unenforceable because they received no consideration for the note. As part of this argument, defendants contend in their brief, as well as numerous times during the trial, that plaintiff is attempting to receive a double recovery by collecting on both the initial account which was opened with plaintiff and on the note. Defendants are alleging that the note is unenforceable because there was no consideration where plaintiff never treated the partnership margin account as having been paid off when it accepted defendants' note.

We summarily dismiss this argument as having no merit. We note that the trial court repeatedly explained to defendants that double recovery would not be allowed. The plaintiff stipulated on the record that the suit was brought on the note, not the account. This is borne out by the following transcript excerpt:

MR. STAUB: Basically, they have considered the note as not having consideration because they kept this account open and they did not keep an account open as money owing to them on a note. It specifically specifies its unregulated commodities.

THE COURT: I don't agree that that's the interpretation that necessarily can be given to the fact they carried an open account plus the promissory note, but I can assure you that it's me that will stop them from having a double recovery, if there is a double recovery.

MR. ABEL: Your honor, I would even stipulate on behalf of the Plaintiff that we would not seek any recovery on the account statements. This case was brought on the promissory note and that's the only recovery sought by the Plaintiff.

Defendants' other contention with regard to the consideration issue is that the note was not given as security for an antecedent debt. The trial court's ruling on this matter is as follows:

CONSIDERATION.

The note in this case was given to secure the debt to Plaintiff that had been incurred in Defendants' margin account. The law in Iowa is clear that failure of consideration is not a defense if the note was given for an antecedent debt. Section 554.3408; Northwestern Nat. Bank of Sioux City v. Steinbeck, 179 N.W.2d 471, 475 (Iowa 1970).

This Court concludes that the note in this case was for an antecedent debt and finds there is no merit to Defendants' claim of failure of consideration.

We find that the undisputed facts show that the promissory note was executed as a result of a prior indebtedness arising in the commodities account maintained with the plaintiff for which the defendants were liable. Hence, we adopt and affirm the trial court's finding in this respect.

Furthermore, we agree with plaintiff's contentions that consideration may be established on two additional grounds: (1) a written promissory note itself imports consideration, Iowa Code § 537A.2 (1983); see Insurance Agents, Inc. v. Abel, 338 N.W.2d 531, 534 (Iowa App. 1983); and (2) the extension of time granted defendants to make payment to the plaintiff under the terms of the note may be deemed as consideration. Iowa Code Ann. § 554.3408 Uniform Commercial Code notes 11 and 12 (West 1967); see C.I.T. Corporation v. Furrow, 227 Iowa 961, 964, 289 N.W. 697, 698 (1940).

Based on the foregoing discussion, we find that there was a bargained-for signed promissory note. Accordingly, we affirm the trial court in its findings with regard to the consideration issue.

Defendants' second argument on appeal is that the trial court's failure to hold a hearing on the issue of the amount of attorney fees operated as a denial of due process. The trial court's ruling with regard to the issue of attorney fees is as follows:

ATTORNEY FEES.

The note in this case calls for payment of reasonable attorney fees in the event suit is instituted to collect all or part of the note. Counsel submitted claims for \$7,064.50 and \$280.00, plus expenses of \$544.46. These claims do not include one day of trial time. The Court concludes after taking into account the numerous motions filed, the degree of difficulty with respect to legal issues raised, and the nature of the case in general, that a reasonable fee to be assessed against Defendants would be \$5,000.00, plus expenses of \$544.46.

We find that the trial court did not abuse its discretion or commit any errors of law in handling the issue of attorney fees. The trial court is not required to hold a hearing on the issue of attorney fees. Nelson v. Iowa State Highway Commission, 253 Iowa 1248, 1256, 115 N.W.2d 695, 699 (1962). The court is an expert on what are reasonable fees. Id. The court made its determination as to the amount of attorney fees to be awarded based on the evidence before it. Such award appears to be reasonable.

Moreover, defendants admit in their brief that they did not raise a constitutional challenge at trial. Thus, we find no error was preserved with regard to the issue of denial of due process.

We accordingly affirm the trial court's decision with respect to the amount of attorney fees awarded plaintiff's counsel.

Plaintiff requests attorney fees on appeal. Appellate courts are given discretion to allow attorney fees on appeal. Bankers Trust v. Woltz, 326 N.W.2d 274, 278 (Iowa 1981). Because we find defendants' claims to be meritless and frivolous, we award plaintiff attorney fees in an amount to be computed upon receipt of an affidavit from plaintiff's attorney as to the amount claimed.

We therefore affirm the trial court in all respects and award plaintiff attorney fees on appeal, the amount to be computed upon receipt of plaintiff's attorney's affidavit.

AFFIRMED.