

IN THE COURT OF APPEALS OF IOWA

No. 0-381 / 89-1411

DAVID A. BACULIS,

Plaintiff-Appellant,

vs.

MOLLY L. MIEHE,

Defendant-Appellee.

FILED

OCT 23 1990

CLERK SUPREME COURT

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Appeal from the Iowa District Court for Johnson County,
Kristin L. Hibbs, Judge.

Plaintiff appeals a district court ruling denying his
claim for recovery on a note. **AFFIRMED.**

Emmit J. George, Iowa City, and Constance Peschang-
Stannard, Iowa City, for appellant.

Timothy S. Grady, Iowa City, for appellee.

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

PER CURIAM

The appeal follows the trial court's refusal to award plaintiff-appellant David A. Baculis judgment on a promissory note given plaintiff by defendant-appellee Molly L. Miehe. The trial court found plaintiff had waived or forgiven the note. We affirm.

On September 15, 1986, defendant gave plaintiff the promissory note for \$3,400, payable starting October 15, 1986, at \$86.22 (apparently per month) until paid. Defendant admitted she signed the promissory note and it had not been paid. Defendant testified plaintiff told her she did not owe the note and he had torn it up. The issue is whether there is substantial evidence to support the trial court's finding of a waiver. Plaintiff contends there is not because the only evidence of waiver or forgiveness is defendant's testimony, and defendant's testimony is vague as to the time and place of forgiveness. Plaintiff also argues the only way an obligation under a promissory note can be forgiven without consideration is that the forgiveness be in writing. Plaintiff also argues the burden of proving a discharge is on the defendant and she failed to meet the burden.

Defendant admitted signing the promissory note and that it had not been paid. It was a negotiable instrument. See Iowa Code § 554.3104(1). Therefore, we agree with plaintiff the burden of proving discharge or forgiveness by

a preponderance of the total evidence is with defendant. See Iowa Code § 554.3307(2). The question is, did defendant meet this burden.

The parties were engaged over the course of several years in several romantic relationships. They traveled together and plaintiff gave defendant certain gifts and property. The promissory note was executed after a breakup when plaintiff advanced some money to defendant. The parties subsequently got back together for a period. The trial court found that during this time back together in October 1986 the parties took a trip to the Bahamas and plaintiff told defendant not to worry about the note and he had torn it up. The trial court also found no demand for payment was made until a difficulty that transpired shortly after the parties had broken up in September 1987.

We find there is substantial evidence to support these findings. We therefore are bound by these findings. We find it unnecessary to address plaintiff's contention the only way a note can be discharged, without consideration, is to have the discharge in writing. Iowa Code section 554.3605 provides in applicable part:

Cancellation and renunciation.

(1) The holder of an instrument may even without consideration discharge any party

(a) in any manner apparent on the face of the instrument or the indorsement, as by intentionally cancelling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature; or

* * *

There is evidence plaintiff said he ripped up the note, and the trial court found that evidence true. Plaintiff's representation of mutilation or destruction was sufficient for cancellation.

AFFIRMED.