IN THE COURT OF APPEALS OF IOWA

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No. 7-403 / 96-0929

ELMER J. SCHETTLER,

Plaintiff-Appellee,

vs.

ROBBINS FISCHER,

Defendant-Appellant.

FILED
DEC 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Carroll County, Joel R. Swanson, Judge.

Defendant appeals a district court ruling in favor of plaintiff on plaintiff's contract action against defendant regarding defendant's co-liability to pay certain loans. **AFFIRMED.**

Larry J. Cohrt of Swisher & Cohrt, P.L.C., Waterloo, for appellant.

Kay E. Dull, Sioux City, for appellee.

Heard by Sackett, P.J., and Vogel and Mahan, JJ.

MAHAN, J.

Defendant Robbins Fischer appeals a district court ruling in favor of plaintiff Elmer J. Schettler. Defendant contends the district court erred in: (1) failing to instruct the jury he was entitled to a credit for assets taken by Schettler; (2) denying his motions for directed verdict and judgment notwithstanding the verdict; and (3) denying his motion to reschedule trial. We affirm.

Miller Farm Foods Company, Inc. (Miller Farms) is a soybean milk processing company originally incorporated in 1985. Fischer served as president from 1985 until 1991. Schettler became a minor shareholder in 1986. The company was experiencing difficulties due to underfinancing. At the request of Fischer, Schettler loaned Miller Farms approximately $77,000 over a three-year period. Miller Farms was forced to relocate from Cedar Falls to Manning, Iowa, in 1989-1990. The relocation effort was assisted by the Iowa Development Commission, Manning Development Corporation, Manning Trust & Savings Bank (Manning), and Bank Midwest. Bank Midwest authorized an initial line of credit for Miller Farms in the sum of $100,000. The note was signed by Schettler as secretary of Miller Farms and personal guarantees were also signed by both Schettler and Fischer. Miller Farms also obtained an operating loan from Manning in the sum of $100,000. The note was signed by Fischer as president and Schettler as secretary. Again, Fischer and Schettler signed personal guarantees. In all, the sum of $253,641 was advanced to Miller Farms by the two

lending institutions. Despite this infusion of capital, the company continued to experience financial difficulties.

On March 1, 1991, a letter from Manning arrived at Miller Farms notifying the corporation the loans were going to be extended until September 1, 1991, and Manning would deem the loans due and payable at that time unless certain conditions were met. Schettler and Fischer subsequently entered into a contract dated March 1, 1991, providing that if they were called upon to satisfy the loans, they would each pay one-half of the amount due. On July 9, 1991, Bank Midwest sent a letter requesting payment in full. Schettler paid off both notes on July 15, 1991. In return, he received an assignment of Manning's financing statement. Schettler continued to invest heavily in the company and took over daily management. The record indicates his investment may have been close to one million dollars.

Miller Farms was unable to repay the substantial debt owed to Schettler. Following the district court's approval of his petition for replevin, Schettler foreclosed and repossessed Miller Farms' assets. Thereafter, Schettler filed the instant petition against Fischer seeking the sum of $126,820.29 representing one-half of the sums paid to the two lending institutions. Fischer obtained a continuance of the trial date. Unhappy with the new date set, Fischer once again requested a new trial date. The district court denied this request.

At trial, at the conclusion of the plaintiff's evidence, Fischer made a motion for directed verdict. The court denied the motion. Prior to instructing the jury, Fischer

requested an instruction that he was entitled to a credit for the value of the assets recovered from Miller Farms by Schettler. The district court also denied this request. The jury reached a verdict against Fischer in the amount of $149,964.99 with interest and costs. Fischer filed motions for judgment notwithstanding the verdict (JNOV) and for new trial. The motions were denied and Fischer appealed.

I. FAILURE TO INSTRUCT. In a heading, Fischer states the trial court failed to properly instruct the jury, but he makes no attempt to explain this position or make any citations. Schettler notes this fact in his brief and concludes he is unable to respond because no argument was made. "Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue." Iowa R. App. P. 14(a)(3); *Genetzky v. Iowa State Univ.*, 480 N.W.2d 858, 861 (Iowa 1992). We find Fischer waived this issue.

II. DENIAL OF MOTIONS. We review a denial of a motion for a directed verdict and a motion for JNOV for correction of errors at law. *Scoggins v. Wal-Mart*, 560 N.W.2d 564, 566 (Iowa 1997); *Magnusson Agency v. Public Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 25 (Iowa 1997). When reviewing the denial of a motion for a directed verdict or JNOV, we review the evidence in the light most favorable to the nonmoving party. *Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92, 96 (Iowa 1995). The motion for JNOV must stand or fall on the grounds raised in the motion for directed verdict. *Magnusson Agency*, 560 N.W.2d at 25. We review the

evidence in the same light as the district court and determine whether a fact question was generated. *Funzar v. Allied Property & Cas. Ins. Co.*, 548 N.W.2d 880, 884 (Iowa 1996).

> Where no substantial evidence exists to support each element of plaintiff's claim, directed verdict or judgment notwithstanding the verdict is proper. Substantial evidence is that which a reasonable mind would accept as adequate to reach a conclusion. Where reasonable minds could differ on an issue, directed verdict is improper and the case must go to the jury.

Thompson v. United States Fidelity & Guar. Co., 559 N.W.2d 288, 290-91 (Iowa 1997).

A. Lack of Consideration. Fischer contends there was no evidence establishing consideration for the March 1, 1991 agreement requiring the parties to assume equal responsibility for repayment. Where there is a written contract, the burden of proof is on the party relying upon the defense of lack of consideration. *Insurance Agents, Inc. v. Abel*, 338 N.W.2d 531, 534 (Iowa App. 1983).

Consideration constitutes either a benefit to the promisor or a detriment to the promisee. *Magnusson Agency*, 560 N.W.2d at 26. Consideration may consist of a performance or a return promise, and it must be bargained for. *Id.* A promise to do that which one is already obligated to do will not suffice as consideration. *Insurance Agents, Inc.*, 338 N.W.2d at 534. The parties were guarantors to the loans extended to Miller Farms. Each had an obligation to pay the bank if Miller Farms could not. The parties had no prior obligations between themselves under the contract. The

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contract entered into on March 1, 1991, created detriments to each party by promising to pay one-half of the obligation of the other if one of the named banks pursued either of the parties.

Further, even if the parties had a prior obligation and no new detriment, there was a benefit conferred to each promisor. The contract defined the contribution rights of each party. Each party knew the amount of their required contribution and had the comfort of knowing neither of them would be required to pay all of the debt. We find there was substantial evidence of consideration. The question was properly left to the jury.

B. Credit for Value of Assets Received Upon Foreclosure By Schettler. In the March 1, 1991 contract, the parties agreed to be responsible for one-half of the debts not repaid by Miller Farms. Schettler subsequently paid the note and received an assignment of the bank's security interest. When Schettler foreclosed the notes, he recovered Miller Farms' assets.

The jury heard conflicting testimony about the value of the assets of Miller Farms with some testimony claiming the assets had no value. The district court took judicial notice of the file from the replevin action filed by Schettler against Miller Farms. The file contained a list of the valuation of Miller Farms' assets as assigned by Schettler. We find there was substantial evidence and a question of fact for the jury to decide.

*C. **Damages.*** Fischer contends Schettler failed to establish his damages. There was much discussion over the payment of the note by Schettler. Further, as stated above, there was much discussion and evidence concerning the replevin action. We find there was substantial evidence of damages and a question of fact existed. The issue was properly left to the jury.

D. Application of the U.C.C. Fischer alleges in his motion for JNOV and in his appeal the court should apply the Uniform Commercial Code. This was not pled nor was it raised in the motion for directed verdict. The argument is outside the scope of the motion for directed verdict. Further, we believe the U.C.C. is inapplicable in this case. This dispute relates to the March 1, 1991 contract, which is not a secured transaction.

III. MOTION TO RESCHEDULE. A ruling denying a motion for a continuance is discretionary and calls for a reversal only upon a showing of abuse of discretion. *State v. LaGrange*, 541 N.W.2d 562, 564 (Iowa App. 1995). The trial court has very broad discretion in ruling on a motion for a continuance. *Id.* Trial judges are called upon to do justice to those needing and deserving a continuance, while at the same time resolutely moving the trial assignment toward the speedy resolution of the case. *Id.* We find the court did not abuse its discretion when it chose not to reschedule the trial date. This action was on file for one year and five months prior to trial. This was a simple contract action. Fischer's argument has no

merit. There was no reason to further extend the trial date. The court did not abuse its discretion.

IV. MOTION FOR NEW TRIAL. We review the grant or denial of a motion for new trial for abuse of discretion. *Magnusson*, 560 N.W.2d at 30. If a jury verdict is supported by sufficient evidence and the verdict effectuates substantial justice, no new trial is necessary. *Id.* The court properly left the issues discussed above to the decision of the jury. The jury's decision is supported by substantial evidence. We affirm the decision of the trial court in refusing to order a new trial.

For all the reasons stated above, we affirm the trial court's decision to deny the motion for directed verdict and the motion for JNOV. We also affirm its decision not to grant a new trial.

AFFIRMED.