



IN THE COURT OF APPEALS OF IOWA

VOORHIES GRAIN, INC.,)

Appellant,)

Filed September 9, 1977

vs.)

JOHN KIRLIN,)

Appellee.)

149
2-58527

Appeal from Black Hawk District Court - Dennis D. Damsgaard, Judge.

Plaintiff elevator appeals judgment by trial court awarding damages against farmer for breach of contract to sell soybeans. - Affirmed.

Michael W. Rickert, of Rickert & Thompson Law Office, of Reinbeck, for Appellant.

Robert Beard, of Reinbeck, and D. Quinn Martin, of Waterloo, for Appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiff, Voorhies Grain, Inc., appeals judgment awarding it \$2760 in an action at law against defendant farmer, John Kirlin, for breach of two oral soybean contracts. This appeal raises issues concerning: 1) consideration of the buyer's duty to mitigate damages in calculating damages for non-delivery; 2) sufficiency of the evidence to support a finding that (a) a failure to deliver on final contract date constituted a breach, (b) buyer had actual knowledge of breach on that date and (c) there was no trade custom in the area for an automatic extension of a soybean contract; and 3) the existence of an action for conversion for goods identified to the contract.

Plaintiff's petition alleged defendant on or about March 14, 1972, orally agreed to sell 2000 bushels of soybeans at a price of \$2.87 per bushel to be delivered at the elevator at harvest. It also alleged that on or about October 2, 1972, defendant agreed to sell an additional 2000 bushels of soybeans at a price of \$3.16 per bushel to be delivered at harvest. Defendant admitted the oral contracts but denied the soybeans were to be delivered at harvest, claiming that the contracts called for delivery on or about November 30, 1972. Further, defendant alleged that plaintiff learned of defendant's breach, as a matter of law, when defendant failed to deliver on November 30, 1972.

The trial court found the oral soybean contracts had a November 30, 1972, delivery date and that the two contracts were breached on November 30, 1972, when defendant failed to deliver the 4000 bushels. It also found plaintiff had actual knowledge of the breach when the beans were not delivered by that date. Soybeans were readily available on the open market and there was no meeting of the minds extending the delivery date; any claimed extension was unilateral and without consent. See e.g. Pillsbury Co. v. Ward, 250 N.W.2d 35 (Iowa 1977). Additionally, the trial court found there was no usage of trade or commercial custom in and around Voorhies, Black Hawk County, Iowa, for an automatic extension of a contract of sale of soybeans after the final date of delivery. It held plaintiff had a duty to mitigate damages and that the measure of damages was the difference between the contract price agreed to and the market price on November 30, 1972.

Our review is on errors of law. Findings of fact are binding upon this court if supported by substantial evidence. Rule 14(f)(1), Rules of Appellate Procedure.

Plaintiff's initial contention is that a buyer is not required by law to cover within the meaning of §554.2712, The Code, or mitigate upon failure of the seller to deliver. A buyer is not required by law to cover. Section 554.2712(3). And a failure to cover does not bar other available remedies. However, the buyer or aggrieved party is required under the provisions of the Uniform Commercial Code to mitigate damages. *Whewell v. Dobson*, 227 N.W.2d 115, 119 (Iowa 1975).

The remedy for nondelivery granted in §554.2713 must be read in conjunction with §554.2715(2)(a) which limits the recovery of consequential damages to such as could not reasonably have been prevented by cover. Thus even if the buyer elects not to cover, this section limits the amount of consequential damages recoverable to those which could not have been prevented by cover. The trial court correctly applied as the measure of damages the difference between the agreed contract price and the market price together with any consequential damages. Section 554.2713(1). We find no merit in plaintiff's first assignment of error.

The second error alleged on appeal concerns the sufficiency of the evidence to determine when the breach of contract occurred, whether there was no custom or usage of trade in and around Voorhies, Iowa, and when the plaintiff had actual knowledge of the breach. To uphold the trial court's verdict, we need only find there was substantial evidence. Rule 14(f)(1), R. App. P.

There was testimony by many witnesses that delivery "at harvest" generally meant an October-November delivery with November 30th being the last date for delivery. Although Richardson, the manager of plaintiff elevator, denied he told defendant Kirlin that the last date for delivery was November 30, 1972, the contract book wherein he wrote the March purchase of soybeans contained the date of November 30th. Further, there was no sale date written on the October purchase because Richardson considered delivery would be within the next 30 days. We find there was sufficient evidence for the trial court to find November 30, 1972, was the last day Kirlin could perform the contract without being in default. See *Cargill, Inc. v. Fickbohm*, 252 N.W.2d 739, 740-42 (Iowa 1977).

Plaintiff argues that it did not learn of the breach within the meaning of §554.2713(1) until May, 1973, when defendant delivered his soybeans to another elevator. This may have been the date plaintiff finally knew it would not get the soybeans and would have to seek a dollar settlement with defendant, but plaintiff knew defendant was in default long before this. Richardson met Kirlin in January at the National Bank in Waterloo and told him he would have to have the money or the beans. Kirlin replied he didn't have the money and the beans were in the field. The issue was when did plaintiff learn of the breach. We find the trial court was correct when it held plaintiff knew of the breach on November 30, 1972.

Plaintiff argues there was sufficient evidence for the trial court to find that a custom or usage of trade existed in and around Voorhies, Iowa, in the fall of 1972 for the automatic extension of a contract for the sale of soybeans beyond the final date of delivery. The evidence is to the contrary. The trial court found there was no custom or usage for the automatic extension of a contract of sale after the final date of delivery had passed. In the Voorhies vicinity, up to the fall of 1972, no one had ever experienced this particular problem so there was no basis or foundation for the development of a custom or usage of the trade. Several of the witnesses testified that when grain could not be delivered, the farmer and elevator got together and made arrangements in the event of nondelivery. But none testified they had ever heard of an automatic extension at the elevator's option. Plaintiff was unable to establish a foundation for the custom or usage evidence and the trial court did not err in so finding.

Plaintiff's last argument for reversal is that the goods were identified and that the trial court should have entered judgment in its favor based upon conversion. Plaintiff relies on §554.2501(1)(b), The Code, which relates to identification for insurable interest purposes. The trial court by implication found this to be a sale of 4000 bushels of beans whether grown on defendant's land or not. We find the record supports this finding. Thus, the contracts did not identify the soybeans and plaintiff's argument is without merit.

The judgment is affirmed.