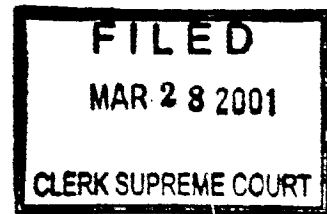


IN THE COURT OF APPEALS OF IOWA

No. 0-511 / 99-1965
Filed March 28, 2001



JERRY D. WEILAND,
Appellant,

vs.

MARZEN AGRI SERVICE COMPANY d/b/a GREG MARZEN,
Appellee.

Appeal from the Iowa District Court for Floyd County, James M. Drew,
Judge.

Plaintiff appeals the district court ruling denying his claim for unpaid rent
and granting defendant's counterclaim in his breach-of-contract action.

AFFIRMED.

Robert W. Brinton of Brinton, Bordwell & Johnson, Clarion, for appellant.

H.P. Folkers of Folkers and Keen, Mason City, for appellee.

Heard by Streit, P.J., and Vogel and Hecht, JJ.

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VOGEL, J.

Jerry D. Weiland appeals the district court ruling denying his claim for unpaid rent in his breach-of-contract action and granting the counterclaim of Greg Marzen dba Marzen Agri Service Co. (Marzen). We find there was a partial failure of consideration and affirm.

Background facts. Weiland owned 433.3 acres of farmland in Floyd County, Iowa. In the fall of 1997, Weiland was notified that the Iowa Department of Transportation (DOT) may condemn a portion of this land for the construction of a new highway. He then rented this land to Marzen in the fall of 1997 for the 1998 crop year. The proposed condemnation was addressed in the farm lease in paragraph 27, which read as follows:

Tenant and Landlord both acknowledge notice that a portion of the premises described in Paragraph 1, above, are subject to acquisition by the State of Iowa for the purpose of construction of a state highway. Both parties acknowledge that condemnation proceedings may take place during the term of the Lease and that any crops then growing on the premises would likewise be subject to acquisition and/or condemnation. As further consideration, both parties release and discharge each other from any liability or responsibility which may arise as a result of the acquisition or condemnation resulting in termination of the leasehold interest acquired by this agreement. Both parties recognize that upon acquisition and/or condemnation leasehold as to the portion of the property condemned or acquired by the State will terminate and that the State of Iowa will be the only party responsible for compensation to the Tenant. Tenants only recourse will be with the State of Iowa. If a portion of the leased premises is condemned or acquired by the State of Iowa or other public entity, tenant shall remain obligated to pay the rent set forth in paragraph 2 above.

Weiland and Marzen entered into the lease on October 9, 1997. Having paid the initial lease payment of \$5,000, Marzen tilled the land in the months of October and November 1997. Marzen made the second lease payment of \$31,096.25 on

March 1, 1998. A condemnation hearing was held on March 26, 1998, and approximately half of the leased land was condemned by the DOT. Weiland was fully compensated for this taking. Because of the timing of the taking, Marzen had not put in a crop prior to the condemnation. On May 7, 1998, Marzen leased 63 of the condemned acres from the DOT. Marzen did not make the remaining lease payment to Weiland in September of 1998. Weiland brought an action against Marzen for the remaining payment of \$31,096.25 he claimed was due under the lease. The trial court found the lease to be ambiguous and concluded there had been a partial failure of consideration. Weiland now appeals.

Scope of review. Contract interpretation involves ascertaining the meaning of contractual words; construction refers to deciding their legal effect. *Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22, 25 (Iowa 1978). Interpretation of a contract is reviewed as a legal issue, unless that interpretation depended on extrinsic evidence. *Fausel v. JRJ Enterprises, Inc.*, 603 N.W.2d 612, 618 (Iowa 1999). However, we always review construction as a legal issue. *Id.*

Contract interpretation. Weiland asserts the trial court erred in finding the lease ambiguous and should have enforced the contract by ordering Marzen to make the remaining payment. The trial court determined paragraph 27 was subject to two interpretations: 1) Marzen was obligated to make the second lease payment of \$31,096.25 under any circumstance, or 2) Marzen would be obligated to make the second payment only if he received income from a crop or damages from the DOT for an unharvested crop.

Although Weiland argues the lease should only be read to provide for payment under any circumstances, we agree with the trial court that paragraph 27 can be read to address the situation following investment in the land by the tenant and prior to harvest. The second sentence in that paragraph speaks to the acquisition of growing crops. Later in the paragraph, the parties acknowledge the leasehold may terminate and the State would then be responsible for compensating the tenant, presumably for the crop taken. Under that scenario, according to the final sentence of paragraph 27, the tenant would still be obligated to make the lease payments to the landlord, but the state would have compensated the tenant for the crop. Even Weiland's testimony did not provide one clear meaning of paragraph 27. Therefore, the trial court was correct in ruling the lease was ambiguous.

The court then looked to interpret the lease as to what the parties intended¹. It concluded Weiland's interpretation would be neither fair nor reasonable. Such an interpretation would lead to a double recovery by Weiland, including cash rent from Marzen plus condemnation compensation by the DOT. Conversely, Marzen would be left with no crop and a \$31,096.25 payment due to Weiland. The court reasoned, and we agree, this interpretation was not the intent of the parties. Weiland supported this conclusion when he stated, "Well, the State said that they would compensate with the renter. . . . When the State condemned it they said the tenant would become theirs."

¹ Marzen died prior to trial and a claim was made in his estate. The actions were tried together.

Partial failure of consideration. A contract imports consideration and failure of consideration is a defense in a breach of contract action. *Chase Inv. Co. v. Kramer*, 243 Iowa 1369, 1372, 55 N.W.2d 467, 468 (Iowa 1952). Failure of consideration can be either total or partial. *Federal Land Bank of Omaha v. Woods*, 480 N.W.2d 61, 66 (Iowa 1992). A partial failure of consideration occurs when a part or portion of the consideration within the original contemplation of the parties actually moved from obligee to obligor. *Id.* Here, although Weiland, under the lease, provided the land for use by Marzen, the DOT condemned 222.07 acres prior to Marzen being able to farm the land. We agree with the trial court that, through no fault of either party, there was a partial failure of consideration.

Accordingly, we affirm the trial court.

AFFIRMED.

Hecht, J., concurs; Streit, P.J., dissents.

STREIT, P.J. (dissenting)

The trial court has done all it can to right a purported wrong—a wrong created *after* Weiland and Marzen voluntarily agreed to lease ground at a set price even "[i]f a portion of the leased premises [was] condemned or acquired by the State of Iowa or other public entity."

The trial court concluded the Weiland-Marzen lease was ambiguous and embarked on a search for the parties' contractual intent. The court took a significant misstep: It ignored the actual intent of the parties and, under the guise of ambiguity, found what it believed was a more fair and reasonable contract.

In paragraph 27 the parties agreed as follows:

1. Tenant and Landlord both acknowledge notice that a portion of the premises described in Paragraph 1, above, are subject to acquisition by the State of Iowa for the purpose of construction of a state highway.
2. Both parties acknowledge that condemnation proceedings may take place during the term of this Lease and that any crops then growing on the premises would likewise be subject to acquisition and/or condemnation.
3. As further consideration, both parties release and discharge each other from any liability or responsibility which may arise as a result of the acquisition or condemnation resulting in termination of the leasehold interest acquired by this agreement.
4. Both parties recognize that upon acquisition and/or condemnation leasehold as to the portion of the property condemned or acquired by the State will terminate and that the State of Iowa will be the only party responsible for compensation to the Tenant.
5. Tenants [sic] only recourse will be with the State of Iowa.
6. If a portion of the leased premises is condemned or acquired by the State of Iowa or other public entity, tenant shall remain obligated to pay the rent set forth in paragraph 2 above.

(Paragraphing and numbers added.)

Paragraph 27 thus warns of the uncertainties affecting the leased ground and delineates the implications of a taking by the State of Iowa. Sentence 1 of paragraph 27 acknowledges the ground being rented by Marzen is subject to a taking. Sentence 2 further acknowledges the taking could occur during the term of the lease and thus could also involve the taking of growing crops. Sentence 3 states the parties will release each other from any liability that could arise from a taking. Sentence 4 acknowledges a taking will terminate any possessory interest Marzen has in the ground. It also states Marzen can only seek compensation from the State of Iowa for such termination of his interest. Sentence 5 confirms Marzen's only recourse in the event of a taking is with the State. Finally, sentence 6 reflects the predominant purpose of paragraph 27—it states Marzen must pay Weiland all of the rent specified in the lease regardless of a taking. Neither this sentence, nor any of the prior sentences in paragraph 27, nor paragraph 27 as a whole make the September 1998 payment contingent on the taking of a growing crop, Marzen's receipt of income from a crop, or Marzen's receipt of damages or other compensation from the State.²

To summarize, the parties agreed Marzen would pay roughly \$67,000 in rent to Weiland under all circumstances and Marzen would have to deal with the State if the ground was condemned or otherwise acquired. Their lease is not

² If other farm leases are interpreted as the Weiland-Marzen lease has been interpreted in this case, a lease that merely mentions a crop could arguably be read to mean payment of rent is contingent on a harvest. Such a reading—which would excuse a tenant from paying full rent in the event of a crop failure resulting from a flood, a drought, a plague of locusts, or the like—is inconsistent with how farm leases have traditionally been carried out.

fairly susceptible to any other interpretation. See *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991). Accordingly, it should be enforced as written. See *id.*

Nonetheless, the trial court concluded "the intent of the [parties'] agreement was that Mr. Marzen would pay rent and in exchange he would either get the income from all 433.3 acres or recover damages from the DOT." This interpretation simply does not reflect the parties' actual intent. To reiterate, the parties agreed Marzen would pay Weiland all of the rent and his only recourse would be with the State if a taking occurred. Marzen may have *assumed* he would be able to generate income from the ground or recover from the State when he agreed to these terms. In hindsight, his assumption appears to have been misguided or perhaps even foolish.³ Even so, what Marzen may have assumed does not change the actual intent of the parties as it is reflected in the clear and unambiguous language of their lease. Neither the trial court nor this court should contort the parties' contractual language to blur the plain meaning of their lease.

After settling on a palatable interpretation of the parties' lease, the trial court found there had been a failure of consideration as to the portion of the leased ground taken by the State.

Failure of consideration covers every case where a contractual obligation is not performed irrespective of the fault of the breaching party. Thus, a failure of consideration may describe

³ At best, this may have constituted a unilateral mistake by Marzen. Marzen has not urged unilateral mistake as a basis for voiding the parties' lease. In any event, a unilateral mistake generally does not avoid a contract. See Restatement (Second) of Contracts § 153 (1981).

nonperformance which does not constitute a breach. A failure to render a promised performance may not be a breach of contract for the reason that performance has become impossible without fault; but is nonetheless a failure of consideration discharging the other party from his duty to perform under the contract, giving him the right to the restitution of payments already made or other benefits conferred.⁴

Federal Land Bank of Omaha v. Woods, 480 N.W.2d 61, 66 (Iowa 1992) (quoting *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990)).

The defense of failure of consideration does not apply to this case. Weiland performed his contractual obligation: He promised to lease 433.3 acres of ground to Marzen that both parties knew was subject to a taking, and he rendered such performance—he did not promise to hold Marzen to his rent obligation only if Marzen received income from a crop or money from the State. Thus, Marzen got what he bargained for—a possessory interest in the ground until it was taken by the State.

In hindsight, this result may seem unfair and unreasonable because Marzen never received damages or other compensation from the State. However, in paragraph 27 Marzen and Weiland specifically contemplated the possibility of a taking and contracted away the defense of failure of consideration and similar defenses like the defense of impossibility—thus leaving Marzen's

⁴ As stated in *Corbin on Contracts*,

Inasmuch as the concept of consideration relates to formation of contracts, it is far preferable to limit the use of the term "consideration" to that topic. It is confusing and misleading to use the term consideration to discuss issues relating to nonperformance and breach. The Restatement (Second) of Contracts is in accord in avoiding the term "failure of consideration."

2 Joseph M. Perillo & Helen Hadjiyannakis Bender, *Corbin on Contracts* § 5.20, at 103-104 (rev. ed. 1995) (footnote omitted).

"only recourse . . . with the State of Iowa." Despite these lease terms, Marzen did not attend the condemnation hearing that resulted in the taking of a portion of his leasehold interest and never claimed anything from the State. Whether such a claim would have been successful is a mystery. Regardless, we cannot ignore the parties' actual intent simply so we can find a more fair and reasonable contract. The State's taking does not excuse Marzen's failure to make the September 1998 payment to Weiland.

I would reverse the trial court.