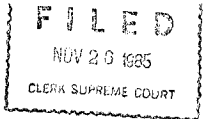


IN THE COURT OF APPEALS OF IOWA



HUBBARD MILLING COMPANY,)

141

Plaintiff-Appellant,)

Filed November 26, 1985

vs)

CITIZENS STATE BANK,)

5-457
84-1674

Defendant-Appellee.)

Appeal from the Iowa District Court for Allamakee County - C. W. Antes,
Judge

Plaintiff appeals the trial court's order dismissing plaintiff's contract action asserting that the trial court erred in ruling that there was no consideration to support the subordination agreement between the parties. **REVERSED.**

Guy P. Booth of Dumbaugh, Booth, Chapman & McGraw, Mount Vernon,
Iowa, for plaintiff-appellant.

Barry S. Mueller of Kelly & Mueller, Postville, Iowa, for defendant-appellee.

Considered by Snell, P.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

This action was brought by Hubbard Milling Company (Hubbard), against Citizens State Bank of Postville, Iowa (Citizens), to recover the proceeds of a sale of certain pigs which were repossessed, finished, and sold by Citizens, and the proceeds of which were totally applied by Citizens to indebtedness of LeRoy L. Odem (Odem) to the bank. Hubbard claims a security interest in the pigs, resulting from a subordination agreement between Hubbard and Citizens.

Citizens defended the action on the basis of affirmative defenses, including claims of ambiguity, material misrepresentations, plaintiff's failure of performance, and a failure or lack of consideration.

Trial to the court as a law action resulted in a judgment for Citizens, dismissing Hubbard's action. Hubbard brings this appeal.

The trial court found that during the months of September and October, 1981, Odem executed and delivered notes to Hubbard in the total amount of \$48,000. The court found that those notes transferred a debt of the Postville Feed Mill, owned by Odem, to Odem personally. Prior to that transaction, Postville Feed had been indebted to Hubbard. The effect was to make Odem, personally, the obligor to Hubbard. The court further found that Citizens had a security agreement, given by Odem, covering all livestock "now owned by Debtor or hereafter acquired by Debtor" which was in full force and effect as of October 1, 1981.

The court further found that on October 1, 1981, Hubbard prepared and secured the execution of, by Citizens, a subordination agreement, which read as follows:

Whereas, the Citizens State Bank, Postville, Iowa, is the owner and holder of financing statements executed by Le Roy L. Odem, Postville of Allamakee County, State of Iowa (hereinafter called the "Borrower").

Now therefore, in consideration of a loan in the amount of \$48,000 or \$40.00 on each feeder pig to be made by Hubbard Milling Company (hereinafter called the "Lender") to the Borrower for the purpose of purchasing feed and concentrates to feed out feeder pigs, the Citizens State Bank does hereby give its consent to the Borrower to obtain said loan from the Lender and further agrees to and does hereby subordinate to the extent of \$48,000 or \$40.00 on each feeder pig in favor of the Lender and his successors and assigns, its lien, right, title and interest in such of the property covered by the instruments first described above which is specifically described below: All feeder pigs, market hogs - mixed color, mixed breed now owned or hereafter acquired.

In Witness whereof, the Citizens State Bank has caused these presents to be signed on the 1st day of October 1981.

Signed: Citizens State Bank, By Jerald D. Solberg, Executive Vice President.

The trial court found that following the execution of that document, Odem did not buy any feed from Hubbard. The evidence showed, however, that Odem purchased feed from the Postville Feed Mill, which purchased feed from Hubbard. Odem's manner of operation with Citizens did not change following the execution of the subordination agreement.

The trial court concluded that there was no showing in the evidence that there was any consideration for the subordination agreement signed by the Citizens. In its "Judgment and Decree," the court stated:

It is therefore the order of this court that Plaintiff has failed to sustain his burden

I Scope of Review. Our review of this law action is for the correction of errors at law. Iowa R. App. P. 4. Findings of fact by the trial court are binding upon this court if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1). This court is not bound by the trial court's determinations of law, neither is it precluded from inquiry into whether trial court applied

erroneous rules of law which materially affected its decision. Blunt, Ellis & Loewi, Inc. v. Igram, 319 N.W.2d 189, 192 (Iowa 1982).

II. Failure or Lack of Consideration. "All contracts in writing, signed by the party to be bound or by his authorized agent or attorney shall import a consideration." Iowa Code § 537A.2. Insurance Agents, Inc. v. Abel, 338 N.W.2d 531, 534 (Iowa Ct. App. 1983). This language establishes a presumption of consideration when the agreement sought to be enforced is in writing and signed by the party to be bound. Id. The defendant who relies upon the defense of lack of consideration where there is a written contract has the burden of proving there is none. Id.

On the plea of want of consideration, "the law does not measure, but only ascertains existence." It is elementary that the size of the consideration does not matter. Bell v. Cooper, 190 Iowa 529, 534, 180 N.W. 642 (1920).

III. Error by the Court. The trial court erred in finding that plaintiff, Hubbard, failed to sustain its burden. The agreement was admitted as having been executed by Citizens, by its authorized agent, Solberg, the executive vice president. There is no claim that it was not properly executed with necessary authority. Consideration was therefore presumed. Citizens raised the affirmative defense that the agreement was not binding because it lacked consideration. There is insufficient evidence to support a finding by the trial court that Citizens sustained its burden of proving that the agreement was without consideration. The court applied an erroneous rule of law to the effect that plaintiff was required to sustain the burden of proving consideration existed.

The trial court was also in error in its application of section 537A.3 to the facts of this case. That section states:

Failure of consideration. The want or failure, in whole or in part, of the consideration of a written contract may be shown as a defense, total or partial, except as provided in the Uniform Commercial Code, chapter 554.

Where, as here, the consideration is set forth in the written instrument, that section has no application. North v. Manning Trust & Savings Bank, 169 N.W.2d 780, 786 (Iowa 1969). The written agreement in this case stated: "Now therefore, in consideration of a loan in the amount of \$48,000 . . .," thus stating the consideration. In any case, the provisions of that statute do not alter the obligation upon the defendant to prove by a preponderance of the evidence that there was no consideration for the agreement. That, the defendant has not done in this case. Though perhaps minor, the record shows that a benefit accrued to Citizens, in the continuation of the relationship with Odem. Odem provided testimony that the loan from Hubbard helped him to continue in the business that provided the source of the relationship with Citizens. In the face of such evidence, the evidence elicited by the defendant fails to sustain the burden of showing that the agreement here was without consideration.

The case is remanded for entry of judgment for plaintiff.

REVERSED.