IN THE COURT OF APPEALS OF IOWA

No. 9-412 / 08-0180
Filed November 25, 2009

JOHN PAVONE and SIGNATURE MANAGEMENT GROUP, L.L.C.,
Plaintiffs-Appellees,

vs.

GERALD M. KIRKE and WILD ROSE ENTERTAINMENT, L.L.C.,
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

The defendants appeal from a judgment entered on a jury verdict in plaintiffs' favor in plaintiffs' breach of contract action. **REVERSED AND REMANDED.**

Mark McCormick, David Swinton, and David W. Nelmark of Belin Lamson McCormick Zumbach Flynn, P.C., Des Moines, Thomas D. Waterman of Lane & Waterman, L.L.P., Des Moines, and Brent B. Green and Mariclare Thinnes Culver of Duncan, Green, Brown & Langeness, Des Moines, for appellants.

Maurice B. Nieland of Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser, L.L.P., Sioux City, Glenn L. Norris of Hawkins & Norris, P.C., Des Moines, and Stanley E. Munger and Jay E. Denne of Munger, Reinschmidt & Denne, L.L.P., Sioux City, for appellees.

Heard by Vogel, P.J., Potterfield, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MAHAN, S.J.

Defendants Gerald M. Kirke and Wild Rose Entertainment, L.L.C. (collectively "Wild Rose") appeal from the judgment entered on a $10 million special verdict in favor of plaintiffs John Pavone and Signature Management Group, L.L.C. (collectively "SMG"). Wild Rose argues the district court erred in (1) overruling its motion for directed verdict on SMG's section 3A and 5A claims, (2) overruling its statute of frauds objection to SMG's testimony that the parties orally agreed to apply section 3A to Emmetsburg, (3) overruling its objection to the court's instruction allowing the jury to award benefit-of-the-bargain damages on SMG's section 5A claim, (4) failing to find that SMG's claims are barred when no management agreement was ever approved by the Iowa Racing and Gaming Commission (IRGC), (5) allowing the jury to award damages for a period of as much as thirty years, and (6) denying its motion for new trial based on inconsistency in the special verdict. We reverse the judgment in favor of SMG and remand for entry of judgment in favor of Wild Rose.

I. Background Facts and Proceedings.

In early 2004, plaintiff John Pavone was seeking opportunities to manage casinos through his company SMG. At the same time, defendant Gerald Kirke was pursuing opportunities to obtain licenses to develop and operate new casinos in Iowa through his company, Wild Rose.[1] In April 2004, the parties entered into a consulting agreement under which SMG would provide consulting services to Wild Rose, with the mutual goal of obtaining licenses for Wild Rose to

[1] Wild Rose's president and minority shareholder, Dr. Michael Richards, is not an individual party to this action.

open casinos that SMG would manage. Thereafter, Wild Rose submitted an application for a license to operate a casino in Ottumwa. Through the efforts and drafts of Wild Rose's attorney, James Krambeck, and SMG's attorney, Ryan Ross, a written consulting agreement ("October Agreement") was prepared. The parties executed the October Agreement on October 22, 2004.

Of particular relevance to this appeal are sections 3A and 5A of the October Agreement. These sections provide as follows:

> **3. Ownership in Ottumwa Project and Management Entity.** If Wild Rose is awarded a license to operate a casino in Ottumwa, Iowa, then upon completion of the development of the Ottumwa Project, the parties shall grant and convey an interest to each other as follows:
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> *A. Management Agreement*. Upon completion of the Ottumwa Project, Wild Rose shall enter into an exclusive management agreement with an entity to be solely owned by Pavone (subject to rights of Wild Rose under paragraph C below) for the management of the Ottumwa Project. This Management Agreement shall provide for an annual management fee equal to four percent (4%) of the Adjusted Gross Revenue of the Ottumwa Project. The terms of the Management Agreement shall be similar to the terms of the gaming development agreement between Wild Rose and the City of Ottumwa, Iowa.
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> . . . .
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> **5. Future Casino Development Opportunities.**
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> A. First Look and Good Faith Negotiation as to Future Casino Development and Management Opportunities.
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> i. If Wild Rose has the opportunity to develop or operate any other casino in Iowa, Wild Rose will use good faith best efforts to involve SMG when the opportunity is first known, and to negotiate in good faith a Management Agreement consistent with the terms outlined in Wild Rose's gaming development agreement with the City of Ottumwa, Iowa. It being understood that the award of any management agreement must also be satisfactory to third party community and non-profit organizations. And it being further understood that any casino in the Central Iowa area will likely require the involvement of a management company, other than SMG.

Wild Rose also submitted an application for a license in Emmetsburg. On November 3, 2004, the parties apparently orally agreed the October Agreement would cover casino opportunities in both Ottumwa and Emmetsburg. The October Agreement was attached to both the Ottumwa and Emmetsburg applications, and the applications were filed with the IRGC on November 10, 2004.

In early 2005, as the applications before the IRGC were pending, relations between SMG and Wild Rose began to deteriorate. The parties attempted to finalize a management agreement that would supersede the October Agreement, but final negotiations failed when the parties could not reach agreement as to fees, term length, and responsibility of hiring key employees, among other things. On May 3, 2005, SMG informed Wild Rose it was sending a letter to the IRGC to advise that the parties had not succeeded in reaching a management agreement. This letter stated, in pertinent part:

> This correspondence is in response to the request by IRGC staff for an executed copy of the management agreement between Wild Rose Ottumwa, L.L.C. and the Signature Management Group, L.L.C. for casino operations in Emmetsburg Iowa and Ottumwa Iowa. During our meeting with IRGC Staff on February 16th, 2005, we were asked to provide the commission staff with an executed copy of the management agreement consistent with the terms and conditions as outlined between the parties within the letter of intent dated October 22nd, 2004. This agreement is contained within our license application as submitted to the IRGC.
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> After several weeks of negotiations the parties have unfortunately failed to reach an agreement between the parties. Signature Management Group, L.L.C. remains hopeful that the parties may be able to reach an agreement that will be acceptable to both parties however given the state of current negotiations; I would be less than candid if Signature did not express its doubts as to the successful resolution of this matter.

The parties stalled attempts to renegotiate as they waited to learn whether IRGC would grant Wild Rose either or both casino licenses. On May 11, 2005, IRGC denied Wild Rose's application for a license in Ottumwa, but granted Wild Rose a license to establish and operate a casino in Emmetsburg. After the license was granted for Emmetsburg, attorneys Ross and Krambeck discussed whether negotiations between SMG and Wild Rose would resume. The record suggests both parties (for various reasons) felt relations were too damaged to continue and determined negotiations had reached an impasse. On May 24, 2005, Wild Rose formally notified SMG of the termination of the October Agreement.[2] Wild Rose paid SMG more than $110,000 for SMG's consulting services from October 22, 2004, through May 11, 2005.

On March 31, 2006, SMG filed the present suit alleging Wild Rose breached its contract with SMG. Specifically, SMG contended Wild Rose (1) breached section 3A of the October Agreement by failing to enter into and perform a management agreement with SMG for the Emmetsburg casino and (2) breached section 5A of the October Agreement by failing to use good faith best efforts to negotiate a management agreement with SMG for the Emmetsburg casino.

The case proceeded to a jury trial beginning on August 20, 2007. Wild Rose filed a motion for directed verdict on August 30, 2007, which the district court later denied. On September 5, 2007, the jury returned a special verdict in favor of SMG, finding Wild Rose had breached both sections 3A and 5A of the October Agreement. The district court allowed the jury to award benefit-of-the-

[2] Wild Rose hired Kevin Preston as general manager of the Emmetsburg casino.

bargain damages on both claims. The jury awarded SMG damages in the amount of $10 million, without distinguishing between the two claims. Wild Rose filed a motion for judgment notwithstanding the verdict, or alternatively, for a new trial. The district court denied the motion on December 31, 2007. Wild Rose now appeals.

II. Motion for Directed Verdict.

Our rule governing motions for judgments notwithstanding the verdict states:

> If the movant was entitled to a directed verdict at the close of all the evidence, and moved therefor, and the jury did not return such verdict, the court may then either grant a new trial or enter judgment as though it had directed a verdict for the movant.

Iowa R. Civ. P. 1.1003(2) (2009); *see Easton v. Howard*, 751 N.W.2d 1, 4 (Iowa 2008) (noting "[t]he purpose of the rule is to allow the district court an opportunity to correct any error in failing to direct a verdict"). A motion for judgment notwithstanding the verdict must stand on the grounds raised in the movant's motion for directed verdict. *Easton*, 751 N.W.2d at 4-5.

We review the district court's denial of a directed verdict for correction of errors at law. *Id*. at 5. In doing so we view the evidence in the light most favorable to the nonmoving party and take into consideration all reasonable inferences that could by fairly made by the jury. *Id*. If substantial evidence in the record supports each element of a claim, the motion for directed verdict must be overruled. *Id*. Evidence is substantial when reasonable minds would accept the evidence as adequate to reach the same findings. *Id*. Our role on appeal is to

determine whether the trial court correctly determined there was sufficient evidence to submit the issue to the jury. *Id*.

A. Section 3A Claim.

Wild Rose argues the district court erred in overruling its motion for directed verdict on SMG's section 3A claim. Wild Rose contends section 3A failed to establish the material terms required in a management agreement, and was therefore an unenforceable "agreement to agree."

"An agreement to agree to enter into a contract is of no effect unless all of the terms and conditions of the contract are agreed on and nothing is left to future negotiations." *Scott v. Grinnell Mut. Reins. Co.*, 653 N.W.2d 556, 562 (Iowa 2002) (quoting *Crowe-Thomas Consulting Group, Inc. v. Fresh Pak Candy Co*., 494 N.W.2d 442, 444-45 (Iowa Ct. App. 1992)). A writing that clearly contemplates the subsequent execution of a formal agreement raises the inference that the parties to the writing did not intend to be bound until the subsequent formal agreement is finalized. *See, e.g.*, *Kopple v. Schick Farms, Ltd*., 447 F. Supp. 2d 965, 976 (N.D. Iowa 2006); *Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Comm'n*, 464 N.W.2d 450, 453 (Iowa 1991); *Crowe-Thomas*, 494 N.W.2d at 444-45. Furthermore, an agreement that is absent essential details and terms (or leaves such details and terms open for subsequent negotiation) is not usually recognized as a binding contract between the parties. *See Kopple*, 447 F. Supp. 2d at 977-78; *Air Host*, 464 N.W.2d at 453. Generally speaking, we do not find that a binding contract exists where parties agree to a contract on a basis to be settled in the future. *Air Host*, 464 N.W.2d at 453.

In its ruling on Wild Rose's post-trial motions, the district court determined:

> Viewing the evidence in a light most favorable to the plaintiffs, the evidence is sufficient to support a finding that the October Agreement outlines all of the material terms and conditions regarding the ownership and management of the Emmetsburg Casino. These essential terms include: 1) a description of the parties; 2) that Pavone would manage the casino; 3) that Wild Rose would own the casino; 4) that the duration of the agreement through, the incorporation by reference of the Ottumwa Gaming Development Agreement ("OGDA"), was an initial term of ten years which could be extended for three-year terms at the option of Wild Rose for a term of up to 30 years; 5) that the duties of the casino manager would be governed by industry standards known to the parties; 6) that compensation of the manager would be 4% of adjusted gross revenue together with an equity swap and reciprocal buy-sell agreements; and 7) that the agreement could be terminated for cause as set forth therein.
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> A reasonable finder of fact could conclude that Wild Rose agreed to enter into and perform a management agreement with Pavone on these terms and that no other terms were essential to the transaction. As Pavone puts it, Wild Rose was going to own and Pavone was going to manage. Wild Rose later determined it wanted concessions from plaintiff. For example, Wild Rose wanted the ability to hire and fire key management employees. This is evidenced by the fact Gary Kirke hired Kevin Preston as general manager of the casino without consulting Pavone. However, a reasonable jury could conclude that Pavone's agreement to manage the casino addressed this issue. A jury could reasonably conclude that the authority to manage the casino included the authority to control the hiring and termination of key management employees. A reasonable finder of fact could conclude that when Pavone refused to surrender control of management employees to the owner, the defendants refused to enter into and perform a management agreement on the material terms set forth in the October Agreement thereby breaching paragraph 3(A) of the contract. This was a legitimate jury question. Defendants are not entitled to judgment notwithstanding the verdict.

We disagree. Upon our review of the undisputed facts in this case, we find the October Agreement created a consulting agreement between SMG and Wild Rose, but not a management agreement. By its terms, section 3A of the October Agreement contemplates the parties' execution of an "exclusive

management agreement" *if* Wild Rose was awarded a license to operate a casino. This language provides a strong inference that the parties did not intend to be bound by a management agreement until its final terms were settled and a final management contract was executed. *Crowe-Thomas*, 494 N.W.2d at 444-45.

Furthermore, the October Agreement failed to establish many material terms necessary for a binding management contract. For example, the October Agreement did not include any essential terms relating to the hiring and firing of key personnel, duration of the contract, or the scope of services to be provided by SMG. The absence of these essential terms leaves many specifics of the management agreement open for future negotiation. Indeed, after the October Agreement was created, SMG admitted on several occasions that no management agreement existed between the parties and prompted attorney Ross to begin drafting a formal management agreement, which was to be significantly longer and more comprehensive than the October Agreement.[3] The parties continued to negotiate, and in May 2005 SMG wrote a letter to the IRGC admitting the parties had failed to reach a management agreement.

For these reasons, we conclude the October Agreement constituted an agreement to agree to a contract on a basis to be settled in the future. *See Air Host*, 464 N.W.2d at 453; *Crowe-Thomas*, 494 N.W.2d at 444-45. The record does not contain evidence sufficient to reasonably conclude otherwise. *Easton*, 751 N.W.2d at 4-5. As such, the district court erred in overruling Wild Rose's

[3] Attorney Ross prepared and submitted to attorney Krambeck the first draft of the "proposed" management agreement on February 21, 2005. The draft was nineteen pages in length and contained many more terms than the October Agreement.

motion for directed verdict on SMG's section 3A claim and in submitting the issue to the jury.

B. Section 5A claim.

Wild Rose further argues the district court erred in overruling its motion for directed verdict on SMG's section 5A claim. Wild Rose contends it was under no contractual duty to negotiate the management agreement in good faith and the record does not contain sufficient evidence for the jury to find the breakdown in negotiations was caused by Wild Rose's bad faith. Therefore, Wild Rose claims, the court erred in submitting SMG's section 5A claim to the jury.

"A contract imposes upon each party a duty of good faith in its performance and enforcement." *Engstrom v. State*, 461 N.W.2d 309, 314 (Iowa 1990) (citing Restatement (Second) of Contracts § 205 at 99-101 (1981)). As Wild Rose acknowledges, our supreme court has recognized the duty of good faith applies only with regard to the performance and enforcement of contract. *Id.* at 314. The duty of good faith does not extend to negotiations, but rather, bad faith negotiations of a contract may result in the imposition of sanctions or other tort remedies. *See id*.

In this case, however, section 5A states: "Wild Rose will use *good faith* best efforts to involve SMG when the opportunity is first known, and to *negotiate in good faith* a Management Agreement . . . ." (Emphasis added.) Although section 5A does not necessarily require the parties to *reach* a management agreement,[4] the express provisions of section 5A impose a duty on Wild Rose to

[4] As Jury Instruction No. 16 explains:

use good faith to involve and negotiate with SMG regarding any casino opportunities available to Wild Rose. Additionally, Iowa law and the Restatement impose a duty on a party to a contract to use good faith in performance of such contract. In contrast to Wild Rose's contention, therefore, we find it is possible in this case for Wild Rose to be found in breach of section 5A.

We must now determine whether the pertinent facts on the issue of Wild Rose's good faith in negotiations were in dispute. If so, the motions for directed verdict and judgment notwithstanding the verdict were properly denied. *Easton*, 751 N.W.2d at 5. If not, the determination was for the court. *Id*.

Upon our review of the record, we conclude the undisputed facts on the issue of Wild Rose's actions in negotiations with SMG clearly show Wild Rose performed a good faith negotiation in an effort to reach a management agreement with SMG. The record contains extensive correspondence between Wild Rose and SMG as both parties diligently worked to reach a management agreement. The parties were able to agree on a somewhat complicated fee arrangement. However, negotiations reached an impasse when the parties could not agree on the hiring and firing of key personnel. This was by no fault of Wild

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> Paragraph 5(A) of the October 22, 2004 agreement imposes upon the defendants a duty of good faith in the negotiation of a management agreement for future casino developments including Emmetsburg. A party breaches a duty of good faith by violating community standards of decency, fairness, and reasonableness.
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> The fact the parties may have failed to reach an agreement as to material terms of a management contract regarding Emmetsburg other than those terms the plaintiffs contend were required by Paragraph 5(A) of the October agreement does not necessarily mean that defendants acted in bad faith.
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> You shall consider all of the surrounding facts and circumstances in determining whether the defendants breached a duty of good faith.

Rose; it was completely reasonable that Wild Rose demanded a right to approve or disapprove of important personnel decisions.

For the foregoing reasons, we conclude Wild Rose did not breach a duty of good faith by violating community standards of decency, fairness, and reasonableness throughout the course of its negotiations with SMG. The record does not contain evidence sufficient to reasonably conclude otherwise. *Id.* at 4-5. As such, the district court erred in overruling Wild Rose's motion for directed verdict on SMG's section 5A.

III. Conclusion.

Upon our determination that no factual issues existed as to SMG's breach of contract claims under sections 3A and 5A, we conclude the district court erred in overruling Wild Rose's motions for directed verdict and in submitting the claims to the jury. In light of this conclusion, there is no reason to address the remaining claims on appeal. We therefore reverse the judgment in favor of SMG and remand for entry of judgment in favor of Wild Rose.

REVERSED AND REMANDED.