IN THE COURT OF APPEALS OF IOWA

No. 2-843 / 12-0189
Filed November 15, 2012

MIDWEST MEDIA GROUP, INC.,
Plaintiff-Appellee,

vs.

FUSION ENTERTAINMENT, INC., n/k/a FUSION COMMUNICATIONS INC., LATINO MEDIA GROUP, INC., JEFF LYLE and DAVE MCANALLY,
Defendants-Appellants.

Appeal from the Iowa District Court for Scott County, John D. Telleen, Judge.

The defendants appeal from the judgments entered in favor of the plaintiff on its claims for civil conspiracy, unjust enrichment, and conversion. **AFFIRMED.**

Mark L. Zaiger and Dana L. Oxley of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellants.

Anthony L. Vitullo of Fee, Smith, Sharp & Vitullo, LLP, Dallas, Texas, and Abbe M. Stensland of Simmons Perrine Moyer Bergman PLC, Cedar Rapids, for appellee.

Heard by Doyle, P.J., and Mullins and Bower, JJ.

BOWER, J.

The defendants appeal from the judgments entered in favor of the plaintiff on claims for civil conspiracy, unjust enrichment, and conversion. They contend the district court erred as a matter of law in determining the parties' lease agreements were not disguised sales contracts creating security interests. The defendants also contend the court erred in holding them liable for unjust enrichment when the plaintiff also recovered on both breach-of-contract claims. Finally, they contend the plaintiff cannot recover on its conversion claim because the parties' agreements were not true leases, and civil conspiracy is not actionable.

Finding no error in the district court's order, we affirm.

I. Background Facts and Proceedings.

Midwest Media Group (MMG) is an Illinois corporation that leases and sells high-end video equipment. Fusion Entertainment, Inc., n/k/a Fusion Communications, Inc. (Fusion) is an Iowa corporation that is owned fifty-percent by Jeff Lyle and fifty-percent by Investment Lease Corporation. Dave McAnally owns a controlling interest of Investment Lease Corporation. Lyle is the corporate secretary of Fusion and McAnally is a director.

Lyle and McAnally formed a company called Regional News Network (RNN) in 1999. RNN also did business under the name of Independent News Network (INN). INN produces video segments for various news stations and requires the type of equipment MMG sells to do its business.

On October 22, 2007, MMG executed a rental contract with INN to lease media equipment. This contract, No. 5333, called for INN to pay thirty monthly payments of $13,319.52, or a total of $399,585.60. The agreement allowed INN to purchase the equipment without penalty any time after the first twelve months of the lease by paying the remaining principal balance. At the end of the lease term, the principal balance would be $0, allowing INN to purchase the equipment without extra cost. The agreement also imposed a penalty of thirty-percent of the remaining balance due under the amortization schedule if INN returned the equipment at any time prior to the end of the lease agreement.

On November 9, 2007, MMG executed another rental contract with Fusion for the lease of media equipment. This contract, No. 6144, required Fusion to make thirty monthly payments of $24,302.30, or a total of $729,069.60. The contract terms regarding purchase and penalty were otherwise the same as contract No. 5333.

In August 2008, INN and Fusion both defaulted on their rental agreements with MMG. The parties contemplated refinancing the two rental contracts into a single rental agreement between MMG and INN. The proposed refinanced rental agreement, No. 6849, was conditioned on payment of all past-due sums on contracts No. 5333 and No. 6144. At the time the refinance contract was proposed, there was approximately $90,000 past due on the accounts. This amount was never paid to MMG.

At the end of 2008, MMG threatened to repossess the rented items. Lyle informed Mike McDonald, a principal of MMG, that a representative of Investment

Lease Corporation—McAnally—would be contacting him regarding a buy out of the rental contracts with INN and Fusion. Lyle never informed McDonald that McAnally was an owner of Fusion. McAnally informed McDonald that he would receive a check on December 29, 2008, in the amount of $34,000. The check was sent on December 30, 2008, but was destroyed in a fire at UPS and never reissued.

On December 31, 2008, RNN filed a Chapter 7 petition with the bankruptcy court. Lyle attached a copy of the unexecuted agreement that would have refinanced MMG's leases with INN and Fusion. Lyle identified the equipment in the refinance agreement as the personal property of RNN; he did not indicate that some of the equipment had been leased by Fusion, which was not in bankruptcy. Lyle failed to identify the property as leased and failed to identify MMG as the owner. As a result, the rental equipment leased by both INN and Fusion became ensnared in the bankruptcy proceedings.

After RNN filed bankruptcy, Latino Media Group (LMG), a wholly owned subsidiary of Fusion, undertook the same business of RNN. It operated in the same office space, provided the same services to the same customers, and had the same officers and directors. LMG began using INN as an assumed name. Fusion and LMG continued to use MMG's rental equipment to generate revenue.

On January 21, 2010, MMG filed a petition against Fusion, LMG, Lyle, McAnally, and Terrence Mealy, alleging breach of contract, conspiracy, fraud, negligent misrepresentation, and unjust enrichment. Mealy was dismissed from the lawsuit without prejudice on March 1, 2010. An amended petition was later

filed, adding a conversion claim. The defendants raised no affirmative defense in their answer.

The case proceeded to trial in June 2011. On November 1, 2011, the district court entered judgment in favor of MMG against Fusion for breach of contract in the amount of $471,744.60, against the defendants jointly and severally on MMG's claim for conversion in the amount of $711,496.05. The court also found in favor of MMG against the defendants jointly and severally on their claims of unjust enrichment and conversion in the amount of $711,496.05. MMG's claims for fraud and negligent misrepresentation were dismissed.

The defendants filed a timely motion for new trial, which the district court denied. The defendants appeal.

II. Scope and Standard of Review.

Because this matter was tried as an action at law, our review is for correction of errors at law. Iowa R. App. P. 6.907. The trial court's findings carry the force of a special verdict and are binding if supported by substantial evidence. *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 179 (Iowa 2010). We are not bound by the trial court's legal conclusions. *Id.*

III. Security Interest.

The Uniform Commercial Code, as codified in Iowa, defines a lease as "transfer of the right to possession and use of goods for a term in return for consideration, but a sale . . . or retention or creation of a security interest is *not* a lease." Iowa Code § 554.13103(1)(j) (2009) (emphasis added). A security interest is defined as "an interest in personal property or fixtures which secures

payment or performance of an obligation." *Id.* § 554.1201(37)(a). A transaction creates a security interest if (1) the consideration the lessee is to pay the lessor for the right to possess and use the goods is an obligation for the term of the lease *not subject to termination by the lessee*, and (2) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement. *Id.* § 554.1201(37)(b)(4).

The defendants first contend the rental agreements were not leases, but were disguised sales contracts creating security interests. The district court rejected this argument, finding the defendants retained the right to terminate the lease early by returning the rental equipment and paying a fee of thirty-percent of the remaining balance due on the entire rental. The court also noted that the defendants failed to raise any affirmative defenses in their answer as required in Iowa Rule of Civil Procedure 1.419, which states: "Any defense that a contract or writing sued on is void or voidable, or was delivered in escrow, or which alleges any matter in justification, excuse, release or discharge, or which admits the facts of the adverse pleading but seeks to avoid their legal effect, must be specially pleaded."

Although the defendants failed to plead any affirmative defenses in their answer, they argue the issue was tried by implied consent. Although generally, an issue not raised by the pleadings should not be considered on appeal, where the parties proceed to try an issue not raised in the pleadings, it is generally deemed to have been properly raised and is included in the case. *Folkers v.*

Britt, 457 N.W.2d 578, 580 (Iowa 1990). According to the defendants, the fact that the trial court ruled on the question of whether the lease agreements were disguised security interests shows the issue was tried by consent of the parties.

The trial court did rule on the defendants' argument that the lease agreements were, in fact, disguised security interests. It found the defendants' argument failed because the lease agreements did not comport with the first part of the definition of "security interest" contained in section 554.1201(37)(b)(4) because the term of the lease was subject to termination at any time by the defendants. On appeal, the defendants argue the thirty-percent penalty contained in the lease agreement effectively prohibited them from terminating the contract. They claim that taking the economic realities into consideration, the penalty precluded them from terminating the agreement early.

While the district court considered the defendants' argument that the lease agreements were disguised security interests, it never considered this "economic realities" argument now advanced by the defendants on appeal. Issues must be raised and decided by the district court before we will decide them on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Because this issue was not presented to and passed on by the district court, we will not consider it for the first time on appeal.

IV. Unjust Enrichment.

The doctrine of unjust enrichment is an equitable principle that mandates "one shall not be permitted to unjustly enrich himself at the expense of another to receive property or benefits without making compensation" for them. *Johnson v.*

Dodgen, 451 N.W.2d 168, 175 (Iowa 1990). Generally, the existence of a contract precludes the application of the doctrine of unjust enrichment. *Id.* The defendants contend the district court erred as a matter of law in holding them liable for unjust enrichment because the lease agreements with RNN and Fusion were express contracts.

While it is well settled that there cannot be an express contract and an implied one relating to the same subject matter and covering all its terms, there may be an implied contract on a point not covered by an express one. *Carlson v. Maughmer*, 168 N.W.2d 802, 803 (Iowa 1969). MMG argues it is entitled to the unjust enrichment damages because the defendants did not merely fail to pay what was due under the contracts, they knowingly continued to use the equipment for years and were enriched by its use.

Contract No. 5333 covered the use of the equipment from October 2007 through April 2009. Contract No. 6144 covered the use of the equipment from November 2007 through May 2009. At the time of the court's ruling in November 2011, the defendants were still in possession of the equipment and were using it for profit. Therefore, MMG was entitled to receive damages for unjust enrichment for the additional thirty-month time period in which the defendants used the equipment outside of the written lease agreements. Had the defendants returned the equipment to MMG after falling into arrears on their lease payments, MMG would have had the option to rent the equipment to other parties. Accordingly, the elements of unjust enrichment have been proved. *See State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154-55 (Iowa 2001)

(distilling the elements of recovery for unjust enrichment: (1) defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances).

Alternatively, the defendants contend the court erred in holding Lyle and McAnally personally liable for unjust enrichment because they did not benefit at MMG's expense. They argue that while RNN and Fusion may have received a benefit, the salaries Lyle and McAnally received from Fusion are insufficient as a matter of law to support a judgment against them as individuals.

Our supreme court has recognized there are few limitations on the principle of unjust enrichment. *Id.* at 155. "Instead, benefits can be direct or indirect, and can involve benefits conferred by third parties. The critical inquiry is that the benefit received be at the expense of the plaintiff." *Id.* (citation omitted). We agree with MMG that there is no requirement to prove the benefit be conferred directly to Lyle and McAnally. *See Iconco v. Jensen Constr. Co.*, 622 F.2d 1291, 1302 (8th Cir. 1980) ("We find no requirement in the cases that the plaintiff itself must have conferred the benefit sought to be recovered from the defendant."). "[I]t is essential merely to prove that a defendant has received money which in equity and good conscience belongs to plaintiff." *In re Estate of Stratman*, 1 N.W.2d 636, 642 (Iowa 1942). There is sufficient evidence by which the court could find MMG met its burden of proof on the unjust enrichment claim with regard to Lyle and McAnally.

V. Conversion.

The defendants next contend the court erred in finding in favor of MMG on its conversion claims. A conversion occurs when one exercises wrongful dominion or control over the property of another in denial or inconsistent with the other's possessory right to the property. *Larson v. Great W. Cas. Co.*, 482 N.W.2d 170, 173 (Iowa Ct. App. 1992).

The defendants first assert that the judgment against Fusion, Lyle, and McAnally for conversion of the equipment covered in contract No. 5333 must be reversed because there is no evidence those defendants used or asserted dominion or control over the equipment.

Fusion is the parent company of LLG, a wholly-owned subsidiary. While ownership by a parent corporation of the stock of another corporation does not create an identity of corporate interest between the two corporations so as to render the acts of one as the acts of the other, there are exceptions to the general rule of limited stockholder liability. *Schoor v. Deitchler*, 482 N.W.2d 913, 915 (Iowa 1992). For example, the corporate veil will be pierced where, as the district court found here, "the corporation is a mere shell, serving no legitimate business purpose, and used primarily as an intermediate to perpetuate fraud or promote injustice." *Ross v. Playle*, 505 N.W.2d 515, 517 (Iowa Ct. App. 1993). Likewise, Lyle and McAnally are liable as officers of the corporation for the fraudulent acts they participated in or committed. *See Briggs Transp. Co., Inc. v. Starr Sales Co., Inc.*, 262 N.W.2d 805, 808 (Iowa 1978).

The district court found

> that Defendants Lyle and McAnally through their controlling interests and positions as officer and directors of Fusion and LMG had an agreement and understanding to accomplish the unlawful purpose of converting MMG's property to the use of Fusion and LMG without paying compensation and that the motive for this was so Fusion and LMG could continue to use the property, so they could continue to individually receive salary and benefits and further, so that Fusion and LMG could continue to pay lease payments to their landlord, ILC, the company owned and controlled by David McAnally. The wrong or injury inflicted on MMG was the continued use of its property without paying compensation.

Substantial evidence supports the district court's findings.

The defendants next assert MMG failed to establish its entitlement to immediate possession, a requirement in proving a conversion claim. The defendants' claim is premised on their argument that the rental agreements were disguised security interests. We have already rejected that argument. We likewise reject the defendants' claim that MMG acquiesced to Valley Bank taking possession of the equipment during the bankruptcy proceeding.

The defendants argue Lyle cannot be held personally responsible for the conversion because he acted in good faith in including the equipment on the bankruptcy schedules. They argue that although Lyle may have erroneously believed that the equipment was a corporate asset, there is no evidence that he did so with the intent to deprive MMG of its rights to the property. The district court disagreed, finding that in considering Lyle's credibility and demeanor, his testimony was not credible or consistent with his prior sworn testimony.

Finally, the defendants argue the conversation claim regarding the equipment rented in contract No. 6144 must be reversed because it is duplicative of the breach of contract claim. *See Preferred Mktg. Assoc. Co. v. Hawkeye*

Nat'l Life Ins. Co., 452 N.W.2d 389, 396 (Iowa 1990) (holding conversion claim need not be considered where damages would duplicate the recovery for breach of contract; a party cannot be compensated twice for the same damages). The damages for breach of contract cover the loss of rental payments as set forth in the rental agreement. The damages for conversion cover the loss of the value of the equipment. Because these categories of damages differ, we find they are not duplicative.

VI. Conspiracy.

Lastly, the defendants contend MMG's conspiracy claim is not actionable.

Under Iowa law, "a conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish by unlawful means some purpose not in itself unlawful." *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 171 (Iowa 2002). Civil conspiracy is not in itself actionable, but is merely an avenue for imposing vicarious liability on a party for the wrongful conduct of another with whom the party has acted in concert. *Id.* at 172.

The conspiracy claim related to the defendants' liability for conversion. If the conversion claim failed, so must the conspiracy claim. However, we have found the district court properly ruled in favor of MMG on its claims of conversion. For the reasons stated above, we find a conspiracy existed regarding the conversion as it relates to Fusion, McAnally, and Lyle. Accordingly, we affirm the district court's judgment in favor of MMG.

AFFIRMED.