IN THE COURT OF APPEALS OF IOWA

No. 8-868 / 07-1863
Filed April 22, 2009

JOHN D. AHRENS, Individually and
d/b/a/ OUTLAW DREDGING COMPANY,
Plaintiffs-Appellants,

vs.

GEORGE AXMEAR,
Defendant-Appellee.

Appeal from the Iowa District Court for Poweshiek County, Annette J. Scieszinski, Judge.

John D. Ahrens appeals the dismissal, following trial to the court, of his lawsuit seeking money damages from George Axmear. **AFFIRMED.**

Jeffrey Garland, Hailey, Idaho, for appellants.

Jane Odland of Walker & Billingsley, Newton, for appellee.

Considered by Vogel, P.J., and Miller and Doyle, JJ.

MILLER, J.

John D. Ahrens appeals the dismissal, following trial to the court, of his lawsuit seeking money damages from George Axmear. We affirm the judgment of the district court.

George Axmear leased a dredge from John D. Ahrens's father to assist in pumping out a dairy-farm manure lagoon in Iowa in late 2004. When the dredge proved to be too small to perform its intended function, Ahrens's father suggested Ahrens, whose business was located in Indiana, as a possible source for a larger dredge.

Axmear needed to dredge immediately, as it was November and cold weather would soon prevent him from doing the job. He contacted Ahrens, and they reached an oral agreement that Ahrens would lease a dredge to Axmear. The agreement, among other things, required Axmear to insure the dredge while in his possession and to return it in the same condition as when received, normal wear and tear excepted.

Ahrens provided the dredge and Axmear began using it. Certain equipment failures occurred and repairs were required. The dredge shortly proved unable to perform as hoped. Axmear used it for only about six days and then had it pulled out onto a grassy area near the edge of the lagoon. Ahrens agreed to leave the dredge in Iowa for possible use in the spring of 2005.

Axmear, perhaps believing that insurance he had procured on Ahrens's father's dredge had been transferred to Ahrens's dredge, failed to acquire insurance for Ahrens's dredge. Axmear did not use the dredge in the spring of

2005, and arrangements were made to have it picked up in March and returned to Indiana. The ground near the dredge was too soft to allow the crane that was to load it onto a semi-trailer to get close enough to do so. Persons employed by Axmear undertook to move the dredge closer to a driveway or roadway where the crane and semi-trailer were located. In doing so, the bucket of an end loader being used to move the dredge made contact with one of the dredges pontoons. The evidence is in conflict as to whether the contact dented the pontoon, caused a “crease” in it, or made a hole in it.

After the dredge was returned to Indiana a dispute developed between the parties concerning the nature and extent of any damage to the dredge’s pontoon. Ahrens at some point also claimed that, in addition to damage from the end loader, Axmear’s handling of the dredge had damaged the bottoms of the pontoons. Axmear apparently pursued a claim under an insurance policy he thought covered the dredge, but in fact did not. An insurance adjuster investigated and took photos. According to witnesses who testified at trial, the photos do not reveal a hole. Further, the investigation did not reveal any damage to the bottoms of the pontoons.[1]

Following several communications about their dispute, the parties agreed to meet in Iowa in an attempt to resolve their differences. They met on December 30, 2005. Ahrens brought an attorney with him to the meeting. The parties reached an agreement, drafted by Ahrens’s attorney. In its entirety the handwritten agreement provides:

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[1] The adjuster’s photos do not include photos of the bottoms, and the adjuster may not have inspected the bottoms.

> Agreed this 30th day of December 2005, at Montezuma, Iowa: To resolve our dispute concerning the damage to John's dredge, George agrees to pay repair costs, not to exceed $14,000.00 (fourteen thousand dollars), directly to the repair shop when the repairs are completed and immediately upon receipt of the repair shop's invoice.
>
> For his part, John will pay all transportation and crane costs, and any repair costs in excess of the fourteen thousand dollars which George has agreed to pay.
>
> George and John also agree that pictures of the damaged areas will be provided to George, plus pictures of the repairs.

Both John D. Ahrens and George Axmear signed the agreement, dated "12-30-05," before leaving their meeting.

In very early March 2006, Axmear received an invoice by mail from Matt's Repair, Inc., of Lowell, Indiana. The invoice showed a charge of $15,060.00 to Ahrens's business for "Labor to repair 1996 Versi-dredge, model #5012, as Instructed" with $1060.00 paid and a balance due of $14,000.00. Axmear had received no pictures of any damage or repairs, continued to doubt that he had caused or was responsible for any significant damage to the dredge, and doubted that the represented repairs had been or would be made. He drove to Indiana to check on the purported damage and repairs. When he appeared at Matt's Repair and inquired about the bill they had sent to him, he was told there was no bill for him to pay.

While in Indiana Axmear called Ahrens in an attempt to view the dredge and see the purported repairs. Ahrens would not tell Axmear where the dredge was located, informed him it was being used, and told him he could not see it.

As shown by Ahrens's own testimony, the purported repairs had not in fact been made.[2]

Ahrens did not provide the pictures of damaged areas and repairs as required by the parties' December 30, 2005 agreement. Axmear did not pay for the purported repairs. Ahrens brought this lawsuit against Axmear. He claimed, among other things, that Axmear breached the parties' November 2004 oral contract for the lease of the dredge, and that Axmear breached the parties' December 30, 2005 settlement agreement.

The district court concluded that the parties' December 30, 2005 agreement constituted an "accord." We agree. *See In re Estate of Buss*, 577 N.W.2d 860, 862 (Iowa Ct. App. 1998) ("An accord is an agreement in which the parties agree to discharge a preexisting contract or obligation by giving and accepting a substituted consideration in settlement of the claim."). The court found that Ahrens had failed to comply with the terms of the accord, and concluded that he therefore was not entitled to enforce the agreement. Ahrens appeals. His claims of error are largely that certain findings of fact by the district court are not supported by substantial evidence.

Our review in this law action is for correction of errors of law. Iowa R. App. P. 6.4; *Fausel v. JRJ Enterprises, Inc.*, 603 N.W.2d 612, 617 (Iowa 1999). The district court's findings of fact are accordingly binding on us if supported by substantial evidence. Iowa R. App. P. 6.14(6)(*a*); *Fausel*, 603 N.W.2d at 617. "Evidence is substantial when a reasonable mind would accept it as adequate to

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[2] Ahrens did testify that repairs were made later, in the late summer of 2006 and the spring of 2007.

reach a conclusion." *Arnevik v. Univ. of Minn. Bd. of Regents*, 642 N.W.2d 315, 318 (Iowa 2002).

The district court found, in part: "It is not proven what, if any, damage Axmear caused to the dredge." Ahrens first claims this finding is not supported by substantial evidence.[3] As noted above, the evidence is in conflict as to the nature and extent of damage to the pontoon caused by contact made by the end loader. Although some evidence suggests the contact caused a "hole" in the pontoon, an equal or greater amount of evidence, apparently found credible by the trial court, indicates the contact caused only a dent or "crease." Other evidence indicates that some denting of the pontoons occurs as part of the normal wear and tear that happens during use or transportation. We read the district court's finding, as it relates to any damage to the pontoon caused by the end loader, to mean that Ahrens did not prove that any such damage went beyond normal wear and tear. We conclude this finding, as it relates to damage to the pontoon caused by the end loader, is supported by substantial evidence.

Ahrens's argument in support of this claim also briefly mentions the purported damage to the bottom of the pontoons. Ahrens did testify that Axmear had caused holes in the bottoms of the pontoons. Testimony also shows that holes in the bottoms of the pontoons would cause the dredge to list or sink. Ahrens testified that in March 2006, when Axmear was in Indiana attempting to

[3] As previously noted, the district court concluded that the parties December 30, 2005 agreement constituted an accord, a conclusion with which we agree. The finding in question would appear to be relevant to Ahrens's claim of breach of the parties' oral agreement and mere surplusage concerning his claim that Axmear breached the later, written settlement. We nevertheless choose to address this claim, finding no merit to it.

see the dredge, any pictures, and the purported repairs, the dredge was being used. Any such use was well before Ahrens's testimony indicates that most of the purported repairs were made in the summer of 2006 and were completed in the spring of 2007. Further, inspection by the insurance adjuster in April 2005 had not revealed any holes in the bottoms that Ahrens claims existed upon the dredge's return. We conclude the court's finding, as it relates to damage to the pontoon bottoms, is supported by substantial evidence.

The district court found, in part: "In fact, the repairs [to the dredge's pontoons] had not been made." Ahrens claims this finding is not supported by substantial evidence.

When read in context, this finding clearly relates to the time when Axmear visited Matt's Repair in early March 2006. Ahrens himself testified that the purported repairs were made in the summer of 2006 and spring of 2007. The court's finding is fully supported by the evidence.

The district court found, in part: "[I]t is not credibly shown that any repair of the alleged damage has been completed." Ahrens claims this finding is not supported by substantial evidence.

Ahrens did testify that the repairs in question were made in late summer of 2006 and spring of 2007. However, under the parties' written settlement agreement Ahrens was obligated to provide photographic evidence of the claimed damage and Axmear was obligated to pay for the repairs "when the repairs are completed." Matt's Repair, apparently at the instigation of Ahrens, sent an invoice for the purported repairs at a time when, even according to

Ahrens's own testimony, the repairs had not been made. Ahrens refused to allow Axmear to view and inspect the alleged damage when Axmear was in Indiana and attempting to do so. There is no evidence that Ahrens later offered an opportunity for Axmear to do so. Ahrens testified that he had photographs of the damage and repair work, but failed or refused to provide them to Axmear as called for by the parties' agreement. He sold the dredge, but was unable or unwilling to identify the buyer and Axmear thus could not inspect it even after Ahrens had sold it.

In making the finding in question the district court clearly considered the question of credibility, finding it had not been "*credibly* shown that any repair of the *alleged* damages had been completed." (Emphasis added.) The district court's opportunity to evaluate credibility of witnesses is better than ours, and factual disputes depending heavily upon such credibility are best resolved by that court. *Tim O'Neill Chevrolet v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996). Giving due deference to the district court's credibility determination, we conclude substantial evidence supports the finding in question.

The district court found, in part: "Ahrens has never provided the photographic documentation [of the damage and repairs] he agreed would be a predicate to Axmear's payment of up to $14,000 for repairs." Ahrens claims this finding and the court's conclusion that Axmear had no obligation to pay for repairs because Ahrens had not furnished Axmear with photographs of the damage and repairs "is not supported by substantial evidence and is legally incorrect." In his arguments in support of his claim Ahrens presumes the court meant “condition precedent” by its use of the word “predicate.” We can find no standard or legal dictionary that defines the word “predicate” as a “condition precedent.” We will, however, initially assume the district court so intended, as Axmear does not argue the contrary. For the following reasons we find no reversible error on this issue.

First, by the time of the parties’ December 30, 2005 agreement a substantial dispute existed as to the nature and extent of damage, if any, caused to the dredge by Axmear. As shown by the evidence presented at trial, Axmear had valid reasons to question whether any substantial damage beyond ordinary wear and tear had occurred. Under such circumstances it would appear logical that he would want and expect the photographic evidence of damage and repairs before he made payment. The parties’ written agreement does not purport to be an integrated contract that includes all of the terms of their agreement, thus leaving open the question of whether providing the contemplated photographs was a condition precedent. “Contract interpretation involves ascertaining the meaning of contractual words, and extrinsic evidence is admissible as an aid to interpretation when it sheds light on the situation of the parties, antecedent negotiations, the attendant circumstances, and the objects they were striving to attain.” *Kroblin v. RDR Motels, Inc.*, 347 N.W.2d 430, 433 (Iowa 1984). Axmear in fact testified, without objection, that receiving the contemplated photographs was a condition of his obligation to make payment. Under the circumstances presented we cannot conclude that a finding by the district court that Ahrens providing the contemplated photographs was a condition precedent to Axmear’s obligation to pay, if that in fact is what the court meant by its finding, is unsupported by substantial evidence.

Second, in his brief on appeal Ahrens states he understood that his obligation to provide the photographs "would have been a concurrent one." Consistent with that belief, he testified that in his opinion Axmear was to be given "the pictures at the exchange." Ahrens argues that Axmear repudiated the December 30, 2005 agreement "before the repairs were completed"[4] and therefore any duty on his part to provide the photographs was excused. The district court concluded that although there was an "accord" the evidence failed to show any "satisfaction," "due to Ahrens' own failure to perform under the settlement agreement." Ahrens testified he "had photos" but "threw them away" because Axmear repudiated their agreement. However, Axmear testified he never told Ahrens he would not honor their settlement agreement and he remained willing to pay if provided the contemplated photos showing damage and an invoice showing the repairs had been made.[5] The district court apparently credited Axmear's testimony that he did not repudiate the agreement as claimed by Ahrens. Thus, even if Ahrens's obligation to provide photographs was only an obligation concurrent with Axmear's obligation to pay, the court's finding is supported by substantial evidence. Giving due deference to the court's

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[4] We note that, to the contrary, Ahrens testified that, "When I called George *and told him that the repairs were substantially done* . . . , he told me he changed his mind. . . ." (Emphasis added.)

[5] Axmear had not been provided any invoice other than the one sent when repairs had admittedly not been made.

credibility determination, we cannot conclude that the district court erred in its conclusion that Ahrens breached the parties' accord.

Finally, Ahrens claims that Axmear requested only pictures to confirm repair of damage to the bottom of the dredge and thus waived any condition concerning pictures of damage to the sides of the pontoons. We do not believe this issue was presented to or passed upon by the district court, and thus it appears it was not preserved for our review. Further, the record simply does not support the claim that the request for, or agreement concerning, photographs was so limited.

Finding no merit to the claims of error, we affirm the judgment of the district court.

AFFIRMED.