IN THE COURT OF APPEALS OF IOWA

No. 9-115 / 08-1060
Filed April 22, 2009

ROBERT SHAW,
Plaintiff-Appellant/Cross-Appellee,

vs.

LOREN BUSER d/b/a
BUSER INSURANCE AGENCY,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

Plaintiff appeals and defendant cross-appeals from a district court judgment in an action arising from a failed business transaction. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark W. Fransdal of Redfern, Mason, Larsen & Moore, P.L.C., Cedar Falls, for appellant.

David L. Riley of McCoy, Riley, Shea & Bevel, P.L.C., Waterloo, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Mansfield, JJ.

DOYLE, J.

Robert Shaw appeals and Loren Buser, d/b/a Buser Insurance Agency, cross-appeals from a district court judgment in an action arising from a failed business transaction. We affirm in part, reverse in part, and remand.

I. Background Facts and Proceedings.

Loren Buser has owned and operated Buser Insurance Agency for forty-two years. He sold his first life insurance policy in November 1966, eventually developing a successful business with several hundred clients. Robert Shaw, a former financial advisor with American Express, began working with Buser in late December 1998 after learning that Buser was planning to retire in a few years. Shaw maintained his own clientele and occasionally assisted Buser with some of his clients.

As the years went by, Shaw began helping Buser with his clients on a more frequent basis. Buser owned a cabin on a lake in South Dakota and spent much of his time there. In February 2002, Shaw approached Buser about purchasing the agency upon Buser's retirement. Although Buser initially told Shaw he did not want to sell his agency to him, the parties continued negotiating and on July 9, 2002, signed the written agreement that is the subject of this dispute.

Their agreement provided in relevant part:

> WHEREAS, Loren E. Buser is sole owner, operator and proprietor of the Buser Insurance Agency; and
>
> WHEREAS, Buser wishes and desires to provide for business continuation; and
>
> WHEREAS, Robert Shaw has been an associate with the Buser Insurance Agency for the past several years; and

> WHEREAS, Robert Shaw wishes to acquire the Buser Insurance Agency over the course of time; and
>
> WHEREAS, the parties have agreed to a division of income in exchange for percentage ownership . . . .
>
> . . . .
>
> It is agreed that the business of the Buser Insurance Agency shall be divided into separate divisions and shall be serviced by Shaw and Buser and compensated as follows:
>
> 1. Renewal Business/Existing Business
>
> | Year | Shaw / Buser |
> |---|---|
> | 1) Remainder of 2002 | 35%/65% |
> | 2) 2003 | 35%/65% |
> | 3) 2004 | 40%/60% |
> | 4) 2005 | 45%/55% |
> | 5) 2006 | 50%/50% |
> | 6) 2007 | 50%/50% |
> | 7) January 1, 2008 | Shaw will own the agency |
>
> . . . .
>
> 4. Renewal Ownership. All renewal commissions, the rights related thereto and their ownership shall remain the sole property of Buser during the term of this Agreement and until such time as all terms and conditions, payments and obligations related hereto have been met and satisfied in full.
>
> . . . .
>
> 6. Existing Renewals. On January 1, 2008, all existing renewals will be assigned to Shaw. Shaw will pay to Buser 2-1/2 times the renewal value for Buser's shares for calendar year 2007 which shall be made in equal quarterly installments over the subsequent 2-1/2 years.

The agreement defined "Renewal Business/Existing Business" as "all renewals and commissions generated from current or existing business involving individual health, life, long-term care, disability and medical along with all group insurance including life, health, accident, disability and 401 (k) and other retirement plans." At trial Shaw further described renewals as "the amount of money that comes in on business in a year's time on . . . health insurance and . . . life insurance business."

After entering into the agreement set forth above, Shaw began to provide services for most of the agency's clients while Buser spent the majority of his

time at his cabin in South Dakota. When he was in Iowa, Buser would focus on his "favorite" and higher-paying clients. Twice each month, Shaw would prepare a bill for the agency for his share of the renewals according to the schedule set forth in paragraph one of their agreement. Buser's secretary would then write Shaw a check based on the bill he provided to her.

The parties' relationship continued amicably in that manner until September 2007 when Buser's attorney, Patrick Galles, sent Shaw the following letter:

> In anticipation of the upcoming transition, I have reviewed the sale agreement between you and Loren. It appears that effective January 1, 2008 you will be purchasing Loren's renewals at the rate of 2 1/2 times the annual renewal value from 2007. The annual renewal commissions for 2006 were in the neighborhood of $88,550.44. For planning purposes the amount due in January will be somewhere in excess of $220,000.00. From talking with Loren the 2007 renewals should be slightly higher than the 2006. Whatever 2 1/2 times the 2007 renewal figure is Loren is willing to carry on a 5-year note at 6% interest with monthly payments amortized over 5 years.

Shaw, who had already signed a lease for his own office space from which to operate the agency, faxed Galles a response the following day stating, "Pat, the agreement is for me to purchase Loren's renewals. At this point in time I own 50% and he owns 50%. The figures should be roughly 2 1/2 times $44,000 or $110,000."

It thereafter became clear in a series of letters exchanged between the parties that Shaw believed "Buser's shares" amounted to fifty percent of the agency's renewals. He consequently thought that on January 1, 2008, he would be purchasing those fifty percent of renewals at two and one-half times their 2007 value. Buser, on the other hand, believed he had retained ownership of all

the renewals, so that Shaw's purchase price for the agency would be two and one-half times the total annual renewals for 2007.

In early October 2007, while Buser was in South Dakota, Shaw changed the mailing address for Buser Insurance Agency to the address for his new office. Shaw then removed a computer, refrigerator, and all of the files for Buser's clients, past and present, from Buser's office the night before he returned to Iowa. Because the lease for his new office space did not commence until November 1, Shaw moved all of those items to his home.

When Buser walked into his office after coming back from South Dakota, he "could see, first of all, the computer was gone. Walked back to the file room, saw the refrigerator was gone. Opened the file drawers. All the fi[l]es were gone." He later discovered Shaw had changed some of the computer passwords Buser needed to access his clients' files. Upon discovering the missing items and files, a "very upset" Buser called his attorney. He also called the police and told them Shaw had stolen his computer, refrigerator, and client files. The police declined to pursue the matter after speaking to Shaw.

Shaw then filed a petition for declaratory judgment, requesting the court declare his right to purchase Buser Insurance Agency for "two and one-half times the 50% share of renewals (commissions) assigned and paid to Buser for the year 2007, pursuant to paragraphs 1 and 6 of the Agreement." After being served with notice of the suit, Buser went to see Van Miller, one of his agency's largest clients, in order to inform him of his dispute with Shaw. Buser "may have" told Miller that Shaw "had stolen files from the office and the police were

involved." Miller ultimately decided to switch his company's business to another agency, but he kept his personal business with Buser.

Upon learning of Buser's conversation with Miller, Shaw amended his petition for declaratory judgment to assert claims for slander and intentional interference with prospective business advantage. He also added a breach of contract claim based on Buser's failure to pay Shaw his share of renewals after he left the agency. Buser filed an answer and counterclaim, seeking damages for Shaw's breach of contract, removal of client files, breach of fiduciary duties, and mail fraud.

Towards the end of December 2007, Shaw gave Buser a check for what he calculated his first installment to be under the parties' agreement. Buser did not accept the check and later sold the agency to a different buyer. Shaw eventually returned all of Buser's client files to him in January 2008. He then amended his petition for a second time to assert claims for specific performance and breach of contract based on Buser's failure to sell the agency to him.

About two weeks before trial, Shaw sought to amend his petition for a third time to add another breach of contract claim for Buser's failure to pay him past commissions for two of the agency's clients, Community Motors and Miller. The district court granted Shaw's third motion to amend over Buser's objection and proceeded to hear the parties' evidence in support of their claims.

Following the trial, the district court entered a ruling, which stated, "The crux of this lawsuit is the meaning and effect of the document signed by the parties on July 9, 2002." The court determined that agreement was "clearly ambiguous" because "[t]wo separate meanings as to the final payment amount

are supported by the language contained therein." The court further determined "the ambiguities in the contract are such that there was not mutual assent as to the terms of the agreement which would be necessary to create a contract." Although the court found there was no enforceable written contract between the parties, it determined Shaw was entitled to $6206.83 in damages based on the parties' "unwritten agreement" that Shaw would receive ten percent of the commission Buser earned on a life insurance policy he sold to Miller. The court denied all of the parties' other claims.

Shaw appeals. He claims the district court erred in determining there was no express contract between the parties. Based upon that written agreement, he argues he is entitled to $116,000 in actual damages plus $25,000 in liquidated damages for Buser's failure to sell him the agency; $5736.96 for unpaid renewals from October 15, 2007, through December 31, 2007; and $22,593.88 for his share of past commissions received by Buser from Community Motors. He further claims the court erred in dismissing his slander claim.

Buser cross-appeals. Like Shaw, he also claims the court erred in determining there was no express contract between the parties. He asserts Shaw breached that contract in failing to purchase the agency, entitling him to $25,000 in liquidated damages plus attorney fees. He additionally claims the court erred in allowing Shaw to amend his petition for a third time and awarding him $6206.83 in damages.

II. Scope and Standards of Review.

As this matter was filed and tried as an action at law, our review is for the correction of errors at law. Iowa R. App. P. 6.4; *Schaer v. Webster County*, 644

N.W.2d 327, 332 (Iowa 2002) (stating the interpretation of a contract is reviewed for the correction of errors at law). Findings of fact in a law action are binding on appeal if they are supported by substantial evidence. Iowa R. App. 6.14(6)(*a*).

III. Discussion.

A. Breach of Contract.

We begin our discussion with the oft-stated proposition that "there can be no contract without a meeting of the minds of the parties." *Lamson v. Horton-Holden Hotel Co.*, 193 Iowa 355, 361, 185 N.W. 472, 474 (1921); *see also Schaer*, 644 N.W.2d at 338 ("For a contract to be valid, the parties must express mutual assent to the terms of the contract."). However, although

> [i]t is often said broadly that if the parties do not understand the same thing there is no contract . . . it is clear that so broad a statement cannot be justified. It is even conceivable that a contract may be formed which is in accordance with the intention of neither party. If a written contract is entered into, the meaning and effect of the contract depends on the interpretation given the written language by the court. The court will give that language its natural and appropriate meaning . . . .

Iowa-Des Moines Nat'l Bank v. Insurance Co. of N. Am., 459 F.2d 650, 655 (8th Cir. 1972) (quoting 1 Williston on Contracts § 95, at 349-50 (3rd ed. 1957)). Both parties seek enforcement of their written agreement. They each claim the district court erred in concluding that agreement lacked mutual assent. We agree.

Paragraph six of the parties' agreement provides in relevant part that on "January 1, 2008, all existing renewals will be assigned to Shaw. Shaw will pay to Buser 2 1/2 times the renewal value for *Buser's shares* for calendar year 2007 . . . ." (Emphasis added.) Shaw understood the phrase "Buser's shares" to mean that he was buying fifty percent of the agency's renewals at two and one-

half times their 2007 value. His understanding was based on his belief that he had already obtained fifty percent ownership of the renewals under the schedule set forth in paragraph one as compensation for services he provided to the agency in the years leading up to his purchase of the agency. Buser, on the other hand, understood the phrase "Buser's shares" to mean he was selling Shaw all of the agency's renewals at two and one-half times their 2007 value. His understanding was based on his belief that he had retained ownership of all of the renewals pursuant to paragraph four of the agreement and that the table in paragraph one "was a compensation schedule, not an ownership schedule."

Where, as here, the dispute centers on the meaning of certain contract terms, we engage in the process of contract interpretation. *Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001). The primary goal of contract interpretation is to determine the parties' intentions at the time they executed the contract. *Id.* Interpretation involves a two-step process: (1) the court must determine what meanings are reasonably possible from the words chosen and (2) the court must choose among possible meanings. *Id.*

The first step involves determining whether a term is ambiguous. "A term is ambiguous if, 'after all pertinent rules of interpretation have been considered,' 'a genuine uncertainty exists concerning which of two reasonable interpretations is proper.'" *Id.* (quoting *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999)). We find substantial evidence supports the district court's determination that the parties' written agreement "is clearly ambiguous" as "[t]wo separate meanings as to the final payment amount are support[ed] by the language contained therein." The preamble of the agreement states "the parties have

agreed to a division of income in exchange for percentage ownership." Thus, according to Shaw, the percentages in paragraph one of the agreement "are the percentages which would apply to both the division of revenues and the division of ownership of the renewals between Shaw and Buser" until January 1, 2008, when "Shaw will own the agency." However, as Buser points out, the introductory sentence to the table in paragraph one states, "It is agreed that the business of the Buser Insurance Agency shall be divided into separate divisions and *shall be serviced by Shaw and Buser and compensated as follows*." (Emphasis added.) Buser therefore believed that paragraph merely set forth the manner in which Shaw was to be compensated for his work for Buser's clients.

Shaw finds additional support for his position in paragraphs seven and eight of the agreement. Paragraph seven states, "In the event of Buser's death on or before January 1, 2008, Shaw will immediately be assigned all renewals and Shaw will pay Buser's estate an amount equal to the balance due pursuant to the schedule set forth above." Paragraph eight provides that "[i]n the event of a breach of terms of this Agreement by Shaw, all split clients assigned to Shaw and subsequent split renewals shall be reassigned to Buser." Shaw asserts that if he "were not obtaining a percentage interest during the course of the Agreement, then these provisions [assigning renewals] . . . would be meaningless."

Buser conversely relies on paragraph four of the agreement in asserting Shaw did not obtain any ownership interest in the agency during the course of their agreement. That provision provides:

> All renewal commissions, the rights related thereto and their ownership shall remain the sole property of Buser during the term of this Agreement and until such time as all terms and conditions, payment and obligations related hereto have been met and satisfied by Shaw in full.

Shaw acknowledges this provision is in direct conflict with the meaning he attaches to the phrase "Buser's shares" in paragraph six.

The circumstances surrounding the formation of the agreement further support a finding of ambiguity. Shaw communicated his desire to purchase the agency through a "sweat equity" arrangement to his attorney, who then suggested language to effectuate that intent. An early draft of the agreement contains a notation written by Buser's attorney below the table in paragraph one stating, "Shaw pays 2 1/2 x 50% renewals value as of 1/1/2008." That language, however, does not appear in the final agreement signed by the parties. Buser testified he never saw any notes proposing that he sell his agency for two and one-half fifty percent of his annual renewals, and that had such a proposition been suggested to him, he "would have walked away."

Given the conflicting language contained in the agreement and the parties' differing expectations, we conclude the district court correctly determined the provision regarding the purchase price for the agency was reasonably susceptible to two different meanings. However, determining what meanings are reasonably possible from the words chosen is only the first step in ascertaining the parties' intentions at the time they executed the contract. *See Walsh*, 622 N.W.2d at 503.

"Inasmuch as the parties may have attached different meanings and may have had different intentions at the time of formation of the contract, the court

must determine which party's meaning and intention should prevail." 5 Margaret N. Kniffin, *Corbin on Contracts* § 24.5, at 15 (Joseph M. Perillo ed., rev. ed. 1998); *see also Walsh*, 622 N.W.2d at 503 (stating once an ambiguity is identified, the court must then choose among possible meanings). In certain limited circumstances, the court may discover that the parties' failure to agree has resulted in no contract having been formed. *See Corbin on Contracts* § 24.5, at 15; Restatement (Second) of Contracts § 20(1)(a), at 58 (1981) ("There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and . . . neither party knows or has reason to know the meaning attached by the other."). We do not believe such a situation exists in this case.

Material differences of misunderstanding are a standard cause of contract disputes. Restatement (Second) of Contracts § 20 cmt. b, at 59. "Almost never are all the connotations of a bargain exactly identical for both parties." *Id.*; *see also Corbin on Contracts* § 1.9, at 25 ("Agreement consists of mutual expressions; it does not consist of harmonious intentions or states of mind."). It is therefore

> important to distinguish between the common problem of interpretation of key terms of a contract and the much less common question whether a material difference of understanding has prevented the manifestation of mutual assent necessary to create a contract at all.

Restatement (Second) of Contracts § 20 rptrs. ns., at 61. The district court did not make that essential distinction here.

This is not the *Peerless* case where each party had a different ship in mind and the court had no way to break the tie by determining which party's position was more reasonable.[1] To hold here, where there is a written contract

> freely entered into, without fraud, misrepresentation, or unconscionable advantage, reduced to writing by the parties themselves or by their chosen counsel, framed in intelligible form, in familiar nontechnical words of common usage, and for years allowed to stand unchallenged as the evidence of their agreement, may be adjudicated null and void upon the plea that the minds of the parties never met in accord upon the construction to be placed upon one item thereof would be to destroy the sacredness of all contracts.

Lamson, 193 Iowa at 361, 185 N.W. at 474. It is enough that there is a core of common meaning, as there is in the agreement present in this case, sufficient to determine the parties' performances with reasonable certainty or to give a reasonably certain basis for an appropriate legal remedy. Restatement (Second) of Contracts § 20 cmt. b, at 59. In light of the foregoing, we conclude the district court erred in finding there was no contract due to lack of mutual assent rather than resolving the ambiguity present in the parties' agreement.

We therefore reverse the decision of the district court dismissing both parties' breach of express contract claims based on the failed sale of the agency, and remand to allow the district court, as trier of fact, to interpret the contract

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[1] The "most famous statement" demonstrating lack of mutual assent arose in the case of *Raffles v. Wichelhaus*, 2 Hurl. 906, 159 Eng. Rep. 375 (1864). *See Hill-Shafer P'ship v. Chilson Family Trust*, 799 P.2d 810, 814 (Ariz. 1990).

> In *Raffles,* the parties agreed on a sale of goods which was to be delivered from Bombay by the ship "Peerless." In fact, two ships named "Peerless" were sailing from Bombay at different times, and each party had a different ship in mind. The arrival time of the merchandise was of the essence to the contract. Because the understandings of the parties were different as to a material term, no binding contract was formed.

Hill-Shafer P'ship, 799 N.W.2d at 814-15.

anew and choose which meaning should prevail based on the record already made. *See Walsh*, 622 N.W.2d at 504 (remanding to allow district court to interpret ambiguous contract); *Fausel v. JRJ Enters., Inc.*, 603 N.W.2d 612, 618 (Iowa 1999) ("[W]hen the meaning of an agreement depends on extrinsic evidence, a question of interpretation is left to the trier of fact . . . .").

Because we conclude the court erred in finding there was no express contract in this case, we must also reverse its denial of Shaw's additional breach of contract claims based on that express contract. Shaw sought damages in the amount of $5736.96 for Buser's failure to pay him renewals from October 15, 2007, through December 31, 2007, and $22,593.88 for his share of past commissions received by Buser from Community Motors. The court's determination that Shaw was not entitled to those damages cannot stand because it was based on the court's erroneous conclusion that the parties' written agreement was unenforceable.

In the same vein, we reverse the court's determination that Shaw was entitled to $6206.83 in damages pursuant to the parties' "unwritten agreement" that Shaw would receive ten percent of the commission Buser earned on a life insurance policy he sold to Miller. *See Scott v. Grinnell Mut. Reins. Co.*, 653 N.W.2d 556, 562 (Iowa 2002) ("[T]he law will not imply a contract where there is an express contract."). The court should revisit the aforementioned items of damages on remand. In so concluding, we deny Buser's final claim that the court erred in allowing Shaw to amend his petition to add the breach of contract claims regarding the Community Motors and Miller accounts.

In general, "allowance of amendments should be the rule and denial the exception." *Chao v. City of Waterloo*, 346 N.W.2d 822, 825 (Iowa 1984); *see also* Iowa R. Civ. P. 1.402(4) ("Leave to amend . . . shall be freely given when justice so requires."). Leave to amend is generally granted when there is no substantial change in the defense or issues of the case. *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174, 179 (Iowa 1987). We afford considerable discretion to the trial court in ruling on such motions and will reverse the court only when a clear abuse of discretion has been shown. *Davis v. Ottumwa Young Men's Christian Ass'n*, 438 N.W.2d 10, 14 (Iowa 1989). We do not believe the court abused its discretion in allowing Shaw's third amendment in this case as the additional breach of contract claims added by that amendment did not substantially change the issues before the court.

B. Slander.

The final issue presented for our consideration is whether the district court erred in finding Shaw failed to establish his slander claim against Buser. We conclude it did not.

Shaw alleged Buser "committed slander per se when he accused [him] of theft to the Cedar Falls Police Department and to Van Miller." *See Lara v. Thomas*, 512 N.W.2d 777, 785 (Iowa 1994) (stating an attack on the integrity and moral character of a person is slanderous per se, as are slanderous imputations affecting a person in his profession). However, at trial Shaw limited his slander claim to Buser's conversation with Miller during which Buser "may have" told Miller that Shaw "had stolen files from the office and the police were involved." Our analysis will therefore focus on that conversation. Buser asserts that his

statements to Miller were not slanderous because they were substantially true. We agree.

In *Hovey v. Iowa State Daily Publication Board, Inc.*, 372 N.W.2d 253, 256 (Iowa 1985), our supreme court adopted the rule that "if an allegedly defamatory statement is substantially true, it provides an absolute defense to an action for defamation." "Thus, it is no longer necessary for a libel [or slander] defendant to establish the literal truth of the publication in every detail as long as the 'sting' or 'gist' of the defamatory charge is substantially true." *Behr v. Meredith Corp.*, 414 N.W.2d 339, 342 (Iowa 1987). Our supreme court has further stated that in determining whether a statement is actionable, the court must look to the totality of the circumstances. *Jones v. Palmer Commc'n, Inc.*, 440 N.W.2d 884, 891 (Iowa 1989) *disavowed on other grounds by Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 224 (Iowa 1998).

The evidence presented at trial established that when Shaw left Buser's office he took, among other items, a computer and refrigerator with him. He also took all of Buser's client files, past and present. Buser reported those items as missing to the police. He then informed Miller that Shaw had either "taken" or "stolen" Buser's client files and the police were involved. These statements were substantially true.

When Shaw surreptitiously removed the files from Buser's office while Buser was in South Dakota, he knew Buser contested Shaw's partial ownership of the agency. Buser was adamant that the agency's client files belonged to him, testifying he was "very, very riled up and upset about my files. Forty years of work gone." Shaw later returned all of Buser's files to him after it became clear

Buser was not going to sell the agency to him. In light of the foregoing, we find substantial evidence supports the district court's finding that "[d]espite the irresponsible behavior shown by both parties," Shaw did not prove Buser committed slander per se in his statements to Miller. *See Brown v. First Nat'l Bank*, 193 N.W.2d 547, 553 (Iowa 1972) (stating it is for the finder of fact to determine whether the defendant's words had a defamatory meaning in the case before it).

IV. Conclusion.

We conclude the district court did not err in finding Shaw failed to establish his slander claim against Buser and affirm that portion of the court's decision. However, the court did err in finding the parties' written agreement failed for lack of mutual assent. We therefore reverse the court's dismissal of both parties' breach of contract claims based on the failed sale of the agency and remand to allow the court to interpret the contract anew. Because we conclude the court erred in finding there was no express contract in this case, we must also reverse its denial of Shaw's additional breach of contract claims under that express contract and its award of $6206.83 in damages to Shaw pursuant to an "unwritten agreement" between the parties. The case is remanded for further proceedings consistent with this opinion. Costs are taxed one-half to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.