IN THE COURT OF APPEALS OF IOWA

No. 9-525 / 08-1100
Filed November 25, 2009

C AND J VANTAGE LEASING CO., ASSIGNOR TO FRONTIER LEASING CORPORATION, ASSIGNEE,
Plaintiff-Appellee,

vs.

THOMAS WOLFE d/b/a LAKE MACBRIDE GOLF COURSE and THOMAS WOLFE, Individually,
Defendants-Appellants.

THOMAS WOLFE d/b/a LAKE MACBRIDE GOLF COURSE and THOMAS WOLFE, Individually,
Third-party Plaintiffs-Appellants,

vs.

C. ALLEN RICE and ROYAL LINKS USA, INC.,
Third-party Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

Thomas Wolfe, doing business as Lake MacBride Golf Course, appeals from an adverse district court summary judgment ruling in this action concerning a lease agreement. **AFFIRMED.**

Billy J. Mallory and Allison Steuterman of Brick, Gentry, Bowers, Swartz & Levis, P.C., West Des Moines, for appellants.

Edward N. McConnell and Aaron Ginkens of Ginkens & McConnell, P.L.C., Clive, for appellee Frontier Leasing.

Jeffrey Lipman, Des Moines, for appellee C and J Vantage.

Heard by Vaitheswaran, P.J. and Mansfield, J. and Miller, S.J.*

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

VAITHESWARAN, P.J.

This is one of a series of appeals involving the "Beverage Caddy Express" carts manufactured by Royal Links USA, Inc. and financed by C and J Vantage Leasing Company or other lessors. The primary issue raised in this appeal from a summary judgment ruling is the enforceability of a non-cancelability provision in the lease.

I. Background Facts and Proceedings

The summary judgment record reveals the following facts. Royal Links USA, Inc. marketed non-motorized snack and beverage carts to golf courses around the country. A Royal Links representative approached Lake MacBride Golf Course about acquiring one of these golf carts in exchange for displaying advertising on the cart. According to the representative, Royal Links would pay the golf course a monthly sum equal to the monthly cost of leasing the cart, and Royal Links would provide the lease documents. The representative also informed Lake MacBride that, at the expiration of the lease period, Lake MacBride would own the cart free and clear, and Royal Links would pay the golf course $2000 per year for five years to compensate for its advertising privileges.

A person affiliated with the golf course completed a credit application and returned it to the Royal Links representative. Royal Links transmitted that application to C and J Leasing Corporation.[1] C and J approved the golf course's credit application after which the golf course's owner, Thomas Wolfe, signed a lease agreement with C and J.

[1] Although the lease agreement was entered into by C and J Leasing Corporation, a different C and J entity, C and J Vantage Leasing Company, filed the petition commencing these proceedings. We will refer to both companies as C and J.

Under the lease agreement, the golf course was to pay C and J $299 per month in "periodic rent" for sixty months. The agreement stated in bold capital letters that "THIS LEASE IS NONCANCELABLE."

Royal Links later notified Lake MacBride that it would no longer pay the golf course for advertising privileges, as previously agreed. Royal Links subsequently filed for bankruptcy. Soon thereafter, C and J informed Lake MacBride that, notwithstanding Royal Links' actions, the golf course would have to continue making its lease payments to C and J. The golf course stopped making those payments.

C and J filed a breach of contract action against Wolfe (doing business as Lake MacBride Golf Course), alleging Wolfe was in default on the lease agreement in the amount of $12,872. Wolfe filed an answer raising several affirmative defenses as well as several counterclaims.[2]

C and J moved for summary judgment on its breach of contract claim, asserting that "[a]ny defenses raised [by Wolfe] have no legal merit" due in relevant part to the "non-cancelability of this lease." After filing the summary judgment motion, C and J assigned the lease to Frontier Leasing Corporation and moved to substitute Frontier as the real party in interest. The district court granted the motion.

Wolfe resisted the summary judgment motion on several previously raised grounds as well as a new ground premised on our state's "money and interest" statute. *See* Iowa Code ch. 535 (2005). Wolfe also filed a motion for partial

[2] Wolfe also filed a third-party petition against C. Allen Rice, the president of C and J, as well as Royal Links. The proceedings against Royal Links were stayed by the bankruptcy court.

summary judgment as to one of its affirmative defenses and as to a counterclaim raising a violation of Iowa's Business Opportunity Act. *See id.* ch. 551A. Following a hearing, the district court granted Frontier's summary judgment motion and denied Wolfe's partial summary judgment motion. The court entered judgment in favor of Frontier for $14,431.50. The district court later granted Frontier's motion for enlarged findings and conclusions and dismissed the counterclaims and third-party claims filed by Wolfe.

Wolfe appealed. After the notice of appeal was filed, the district court granted Frontier's application for attorney fees. Wolfe appealed that order as well. The Iowa Supreme Court consolidated the appeals and transferred them to this court for disposition.

II. Standards of Review

We review the district court's ruling on a motion for summary judgment for the correction of errors at law. *See* Iowa R. App. P. 6.4. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). We review the attorney fee award for an abuse of discretion. *See GreatAmerica Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration, Inc.*, 691 N.W.2d 730, 732 (Iowa 2005).

III. Non-Cancelability Provision

Wolfe's first and primary argument is that the non-cancelability provision of the golf course's agreement with C and J is unenforceable. Both parties

characterize this provision as a "hell and high water" clause. Therefore, we will proceed as if it is.[3]

"In general, a hell or high water clause makes a lessee's obligation under a finance lease irrevocable upon acceptance of goods, despite what happens to the goods afterwards."[4] *GreatAmerica Leasing Corp.*, 672 N.W.2d at 504. Our state extends the protection of hell or high water clauses to all finance leases, even if such a provision is not explicitly contained in the parties' agreement. Iowa Code § 554.13407(1), cmt. 1 (stating the hell or high water protection given to finance leases is "self-executing" and "no special provision need be added to the contract").

Wolfe argues that the hell or high water clause in the golf course's agreement with C and J is not enforceable because the agreement is not a finance lease but a secured transaction. Frontier Leasing, in turn, acknowledges that the agreement may have created a security interest rather than a finance lease, but asserts that this distinction does not affect the enforceability of the hell or high water provision.

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[3] As noted, the challenged clause simply states that "THIS LEASE IS NONCANCELABLE," whereas a typical hell or high water clause states:

> LESSEE ACKNOWLEDGES AND AGREES THAT LESSEE'S OBLIGATION TO PAY ALL RENTAL PAYMENTS DUE OR TO BECOME DUE HEREUNDER FOR THE TERM SHALL BE ABSOLUTE AND UNCONDITIONAL AND SHALL NOT BE SUBJECT TO ANY REDUCTION, SETOFF, DEFENSE, COUNTERCLAIM OR DEFERMENT FOR ANY REASON WHATSOEVER.

Citicorp of N. Am., Inc. v. Lifestyle Commc'n Corp., 836 F. Supp. 644, 655 (S.D. Iowa 1993); *see also GreatAmerica Leasing Corp. v. Star Photo Lab, Inc.*, 672 N.W.2d 502, 503 (Iowa Ct. App. 2003).

[4] The effect of hell or high water clauses has been succinctly described as follows: "In short, rent payments continue to come hell or high water, without any reduction or offset, even if the lessee is wrongfully dispossessed of the equipment by the lessor." *Citicorp*, 836 F. Supp. at 656.

We find it unnecessary to decide whether the agreement is a secured transaction or a finance lease because Wolfe has not explained why a hell or high water clause would be unenforceable if the agreement were deemed a secured transaction rather than a finance lease.[5] *See Benedictine College, Inc.*

[5] Wolfe might have argued that, if the agreement were deemed a secured transaction, an assignee could enforce a hell or high water provision in the agreement only if the assignee met the requirements of a holder in due course. *See* Iowa Code § 554.9403(2). The argument would continue as follows: assuming that the agreement was indeed a secured transaction, Frontier was not a holder in due course and, accordingly, would not have been entitled to enforce the hell or high water provision. As Wolfe did not make this argument, we need not consider it. *See* Iowa R. App. P. 6.14(1)(*c*); *Hyler v. Garner*, 548 N.W.2d 864, 870 (Iowa 1996) ("[W]e consider only the errors specifically assigned . . . and adequately supported by analysis and authority.").

Apparently anticipating that this argument would be made, Frontier argues in its responsive brief that it was a holder in due course. Specifically, it maintains,

> Under Iowa law, a "waiver of defense" clause in a master lease is enforceable by the lessor's (Vantage) assignee (Frontier) and therefore the assignee (Frontier) is entitled to the same protection afforded a holder in due course so long as the assignee (Frontier) to the assignment took for value, in good faith, and without notice of any claim of defense.

There are several problems with this argument.

First, as a factual matter, it appears undisputed that Frontier did not take without notice of any claim of defense, as it accepted the assignments several months after Wolfe filed his answer and counterclaims to C and J's lawsuit. At oral arguments, Frontier stated that the notice of claims envisioned by this doctrine was "notice from a third party" and it received no such notice. We can find no legal support for this proposition.

Second, Frontier cites to *Citicorp* for its proposition that it was a holder in due course, but that court's discussion of the doctrine was in connection with its analysis of a "waiver of defenses" clause rather than a "hell or high water" clause. 836 F. Supp. at 657. The two clauses are distinct. *Id.* at 655, 657; *see also In re O.P.M. Leasing Servs., Inc.*, 21 B.R. 993, 1008 (Bankr. S.D.N.Y. 1982) (distinguishing between a waiver of defense clause, which requires assignee to be a holder in due course, and a hell or high water clause, which does not). A typical waiver of defenses clause reads as follows:

> LESSEE AGREES NOT TO ASSERT AGAINST ASSIGNEE ANY DEFENSE, SETOFF, RECOUPMENT, CLAIM OR COUNTERCLAIM, HOWEVER ARISING, THAT LESSEE MAY HAVE AGAINST LESSOR. ASSIGNEE SHALL HAVE ALL THE RIGHTS, REMEDIES, POWERS AND PRIVILEGES OF LESSOR HEREUNDER BUT SHALL HAVE NONE OF THE OBLIGATIONS OF LESSOR HEREUNDER.

Citicorp, 836 F. Supp. at 657. No such clause appears in the contract between Wolfe and C and J. While Frontier argues that the contract's "assignment" clause is in fact a "waiver of defenses" provision, the assignment clause simply states that the lease is assignable subject to notice to the lessee, and "all the provisions of this Lease for the

v. Century Office Prods., Inc., 853 F. Supp. 1315, 1320 (D. Kan. 1994) ("Although plaintiff strenuously argues that the agreement at issue is a 'true lease,' it has set out no argument and cited no case law explaining why the waiver of defenses clause would be invalid if this agreement was deemed to be a 'true lease.'"). For this reason, we conclude that the hell or high water provision is enforceable. *See* Iowa Code § 554.13407(1).

The enforceability of this provision precludes Wolfe's affirmative defenses of fraud in the inducement, estoppel, mutual mistake, and an interest-rate disclosure defense grounded in Iowa Code chapter 535. *See O.P.M. Leasing Servs.*, 21 B.R. at 1007 (stating "clauses containing unconditional promises are strictly enforceable as a matter of law" and "no facts submitted or to be submitted by the lessee opposing summary judgment are in any way relevant to the lessee's unequivocal liability based on these hell or high water provisions").[6]

IV. Unconscionability

Wolfe asserts that the lease agreement was unconscionable. Our court has quoted with approval language suggesting that an unconscionability defense

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benefit of Lessor shall inure to the benefit of and be exercised by or on behalf of such assignee." This is not a waiver of defenses provision.

Finally, while comment 1 to section 554.13407 suggests that hell or high water clauses are subject to the general good faith requirement contained in section 554.1203, a requirement that an assignee take the assignment in good faith is not coextensive with a requirement that an assignee be a holder in due course. *See* James J. White & Robert S. Summers, *Uniform Commercial Code* § 14-7, at 525 (5th ed. 2000) (stating "lack of 'good faith' and 'notice' of a defense are not the same"). For these reasons, we reject Frontier's argument that it was a holder in due course entitled to the protection of a nonexistent waiver of defenses clause.

[6] Wolfe does not argue that these specific defenses would survive a hell or high water clause if such a clause is found to be enforceable. *See, e.g., Citicorp*, 836 F. Supp. at 658-63 (addressing claims that would render contract void despite enforceability of hell or high water provision). In the absence of argument on this point, we decline to address this issue. *See* Iowa R. App. P. 6.14(1)(*c*); *Hyler*, 548 N.W.2d at 870.

survives an enforceable hell or high water clause. *GreatAmerica Leasing Corp.*, 672 N.W.2d at 505 ("It follows that contractual limitations upon remedies are generally to be enforced unless unconscionable." (quoting *O.P.M. Leasing Serv.*, 21 B.R. at 1006-07)). Therefore, we will address this defense on the merits.

A bargain is "unconscionable at law if it is 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'" *Casey v. Lupkes*, 286 N.W.2d 204, 207 (Iowa 1979) (citation omitted). We determine unconscionability as of the time the lease was entered. *Id.* at 208.

Wolfe specifically argues that C and J: (1) "used Royal Links and the sales representative to secure [Wolfe's] signature on the Lease and now disavows any responsibility for the representations that were used to secure the execution of the contract," (2) "masqueraded the sale of the Cart through the use of an alleged 'finance lease' in an effort to conceal the interest rate imposed," and (3) "used a credit application that specifically stated it would only be shared with Royal Links affiliates and/or assigns to have [Wolfe] execute the contract." We will analyze these arguments together.

All three may be resolved by examining the arguments Wolfe has not made. First, Wolfe does not assert that he was denied the opportunity to read the lease agreement before signing it. *See Home Fed. Sav. & Loan Ass'n v. Campney*, 357 N.W.2d 613, 619 (Iowa 1984) (finding terms of contract did not constitute unfair surprise, even though party had not read contract, where there was an opportunity to read it). In addition, Wolfe does not claim that he was under any compulsion to sign the agreement. *See Lakeside Boating & Bathing,*

Inc. v. State, 402 N.W.2d 419, 422 (Iowa 1987) (noting party was "under no apparent compulsion to sign" lease). Wolfe also does not assert that he was unable to bargain with C and J regarding the terms of the lease. *Cf. Home Fed. Sav. & Loan Ass'n*, 357 N.W.2d at 319 (noting that defendants were "in no position to bargain with plaintiff" about due-on-sale clause). Finally, Wolfe does not explain how Royal Links' decision to share the credit application with C and J rendered the lease agreement unconscionable. For these reasons, we conclude the district court did not err in rejecting the unconscionability defense.

V. Iowa Code chapter 551A.

Wolfe also argues that the district court erred in dismissing his business opportunity counterclaim. *See* Iowa Code ch. 551A. We disagree.

Section 551A.1(2)(a) defines a "business opportunity" in relevant part as "*an opportunity to start a business* according to the terms of a contract between a seller and purchaser in which the purchaser provides an initial investment exceeding five hundred dollars." (Emphasis added.)

The contract between C and J and Wolfe was for the lease of a beverage cart to be used in Wolfe's ongoing golf course business. *See id.* § 551A.1(2)(b)(2) (stating "business opportunity" does not include an "offer or sale of a business opportunity to an ongoing business where the seller will provide products, equipment, supplies, or services which are substantially similar to the products, equipment, supplies, or services sold by the purchaser in connection with the purchaser's ongoing business"). C and J was not a seller of anything, let alone a business opportunity. Indeed, the owner of C and J testified by deposition that he was not in the business of financing business opportunities.

He stated, "[s]omebody may have a business opportunity for a start-up and we may finance part of the equipment. We are not financing the business opportunity." Based on this evidence, we conclude the district court properly dismissed Wolfe's business opportunity claim.

We find it unnecessary to address the remaining arguments raised by the parties concerning the lease, including the argument that Royal Links was an agent of C and J.

VI. Attorney Fees.

Wolfe finally asserts that the district court abused its discretion in taxing Frontier's attorney fees of $13,088.91 against Wolfe.

Iowa Code section 625.22 provides that when judgment is recovered "upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as a part of the costs a reasonable attorney's fee to be determined by the court." Wolfe does not challenge the fact that the agreement provided for an award of attorney fees in the event of a default by Wolfe. Nor does he challenge the amount or reasonableness of the attorney fees awarded. Instead, Wolfe argues that the district court "erred by refusing to apportion the award of attorney fees between the contract and non-contract claims."

As the district court found:

> This matter was commenced as a contract action by the plaintiff against the defendants. The defendants' counter-claim involved the tort theories. The court concludes that all issues contract or otherwise arise out of the same contract action and there should not be an apportionment of the attorney fees between the contract and tort theories.

We discern no abuse of discretion in this ruling.

VII. Conclusion.

We find it unnecessary to decide whether the contract between Lake MacBride Golf Course and C and J was a secured transaction or a finance lease because we conclude, in either event, the hell or high water clause was enforceable and precludes the defenses of fraud in the inducement, estoppel, mutual mistake, and an interest-rate disclosure. We conclude the district court did not err in rejecting Wolfe's argument that the contract was unconscionable and in dismissing the counterclaim premised on the business opportunity act. We find it unnecessary to address the remaining arguments raised by the parties concerning the agreement.

We conclude the district court did not abuse its discretion in declining to apportion the attorney fees among contract and non-contract claims.

AFFIRMED.

Miller, S.J. concurs. Mansfield, J. concurs specially.

MANSFIELD, J. (concurring specially)

I agree that the district court should be affirmed, but disagree somewhat as to the grounds for affirmance. In my view, a "hell or high water" clause does not automatically preclude a lessee from raising fraud in the inducement or a statutory defense based on Iowa Code chapter 535. It also may not preclude a mutual mistake defense, depending on the circumstances.

My understanding of the purpose of a "hell or high water" clause is that it overrides the normal common law presumption that contractual promises are dependent rather than independent. That presumption is of ancient lineage and dates back to *Kingston v. Preston*, 99 Eng. Rep. 437 (King's Bench, 1773). When the lessee agrees to pay come "hell or high water," he or she is obligated to pay regardless of whether he or she receives any of the performance promised in return. The promise to pay is thus said to be "independent." I do not believe, however, that the "hell or high water" clause necessarily prevents a party from raising defenses to *contract formation*, such as fraud in the inducement and (perhaps) mutual mistake, or *statutory defenses* such as might be available under chapter 535. *See Colorado Interstate Corp. v. CIT Group/Equip. Fin., Inc*., 993 F.2d 743, 749 (10th Cir. 1993) (holding "hell or high water" clause enforceable "[i]n the absence of fraud or deceit"); Uniform Commercial Code § 2A-407, cmt. 5 (suggesting that a lessee could have a claim against the lessor, notwithstanding the "hell or high water" clause, based on "the law with respect to fraud, duress, or the like").

However, Wolfe bears the burden of establishing a genuine issue of material fact on these defenses, and as to each of them I would hold he failed to meet that burden.

The evidence here is that Lake MacBride was told in July 2003 that Royal Links would make the lease payments so that the cart would not cost Lake MacBride anything. In fact, for over a year, the cart did not cost Lake MacBride anything. However, in October 2004, some fifteen months after the parties entered into their original transaction, Royal Links stopped making the payments. I do not believe this is enough to raise a triable inference of fraud in the inducement. To be fraudulent, a promise to perform a future act must be made with the present intent not to perform. Nonperformance alone does not prove an intention not to perform. Otherwise, every breach of contract would call for a fraud remedy. *See Magnusson Agency v. Pub. Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 28 (Iowa 1997); *Robinson v. Perpetual Servs. Corp*., 412 N.W.2d 562, 565 (Iowa 1987); *Irons v. Cmty. State Bank*, 461 N.W.2d 849, 854 (Iowa Ct. App. 1990). Evidence that Royal Links stopped paying in October 2004 is not enough to establish that the July 2003 promises were fraudulent. Summary judgment was properly granted here. Likewise, the evidence does not establish a mutual mistake. The fact that a contract is not ultimately performed does not mean that it was the product of a mutual mistake. Also, even if there were a mutual mistake, one could conclude that the "hell or high water" clause assigns the risk of mistake to the lessee. *See* Restatement (Second) of Contracts § 154(a), at 402 (1981).

I also believe that the asserted statutory defense based on Iowa Code section 535.2 is invalid. Wolfe complains that the leasing agreement did not disclose an interest rate as allegedly required by section 535.2, even though the effective rate of interest was in excess of 15.25 percent. However, apart from any other potential flaws, this argument cannot succeed because section 535.2 is not a "disclosure" law. It requires the parties to memorialize their agreement in writing, if they are entering into a business loan with a rate of interest above five percent, *see* Iowa Code § 535.2(2)(a)(5), but it does not require a specific form of disclosure (as does the federal Truth in Lending Act, for example). Thus, it is sufficient that the due dates and amounts of the lease payments were spelled out in writing, and that Wolfe agreed to them. To comply with section 535.2(2)(a)(5) the agreement did not have to specify the actual interest rate derived from that payment schedule, even if one were to assume that section 535.2 applies to this transaction.

Except as stated here, I join in the balance of my colleagues' opinion.