IN THE COURT OF APPEALS OF IOWA

No. 9-527 / 08-1148
Filed November 12, 2009

JEANETTE R. SMITH and CECIL J. SMITH REVOCABLE TRUST,
Plaintiffs-Appellees,

vs.

NILE J. SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Calhoun County, Joel E. Swanson, Judge.

Defendant appeals the district court's decision granting plaintiffs a permanent injunction and denying his counterclaims. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Joseph E. Halbur, Carroll, for appellant.

William D. Kurth of Kurth Law Firm, Lake City, for appellees.

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

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

MILLER, S.J.

I. Background Facts & Proceedings

Cecil and Jeanette Smith owned farmland in Calhoun County that was leased to their son, Verne Smith, on a crop-share basis for many years. Cecil and Jeanette were divorced in 1995, and each received one-half of the farmland.[1] Verne continued to farm the property as a single entity, and divided the landlord's share equally between Cecil and Jeanette, instead of treating each property separately.

From 1987 until 1996 Crutcher-Tufts Corporation had an oil and gas lease on the property owned by Cecil and Jeanette. On May 13, 2002, another son of Cecil and Jeanette, Nile Smith, obtained an oil and gas lease for each parent's land by separate but identical leases. The leases had a stated consideration of $100 and gave Nile all mineral, water, oil, and gas rights to the properties. Nile testified he sent two $100 bills to Cecil and Jeanette at Cecil's address.[2] Jeanette testified she did not receive consideration for the lease. The leases were for the "purpose of exploring, prospecting, drilling and mining for and producing oil, gas, [and] water . . . ." Each lease ran until Nile filed a notice of release with the Calhoun County Recorder. These leases were recorded on June 12, 2002.

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[1] Cecil and Jeanette originally owned 720 acres of farmland. After the dissolution they each owned 360 acres of the land. In 2004 eighty of the acres, forty owned by Jeanette and forty owned by a trust that had been established by Cecil, were sold. Those eighty acres are not involved in this litigation.

[2] Jeanette testified she had been living in Florida, but came back to the former marital residence in Iowa, where Cecil was living, to take care of him when he became sick with leukemia. Jeanette took care of Cecil until he died, on October 15, 2002, and then she returned to Florida.

On August 30, 2002, Cecil created the Cecil J. Smith Revocable Trust (Trust) and appointed himself trustee. He transferred his real property to the Trust. On September 3, 2002, Cecil and Jeanette each entered into a new farm lease with Verne. Those leases run until 2013. Cecil died on October 15, 2002. A cousin, Glen Smith, was appointed as the successor trustee. The farm leases were recorded on September 9, 2003.

There was an abandoned house on Cecil's property. Nile testified Cecil told him he could live in the house and that Glen was present during this conversation. In 2003 Nile began fixing up the house, and in 2004 he and his wife moved there. Verne did not agree to having Nile live on the property, and he brought his concerns to Glen, the trustee. Glen permitted Nile to live on the property. Nile did not pay rent for the house, but paid the insurance, electric bill, telephone bill, and property taxes. Nile testified that after the value of the house went up Glen suggested that Nile file an application for homestead tax credit. Nile's wife did so, seeking credit for the house and forty acres on which it is located, even though Nile and his wife did not own the property.

The relationship between Verne and Nile became increasingly acrimonious.[3] Glen withdrew as trustee, and in March 2007 James Finley became the successor trustee. Nile planted some trees on the trust property. He moved a trailer home onto the property for the stated purpose of housing for an employee for his potential oil and gas business. Nile dug a hole next to the

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[3] Verne testified he was afraid of Nile because of Nile's violent past. Jeanette testified that Nile had made "really scary threats" and she also feared him and was afraid of what he might do. Nile has a criminal history. He has past convictions for felony possession of a firearm and conspiracy to counterfeiting.

trailer and was planning to connect a water line on the property to the trailer home. He dug a hole for burning and burying garbage. Nile dug a trench, over one thousand feet long, diagonally across Jeanette's property. According to his testimony the trench was part of putting in a road to establish a drill site on the property. A September 6, 2007, work order from Iowa One Call showed Nile intended to excavate a pond and ditches.

On October 18, 2007, Jeanette and the Trust[4] (plaintiffs) filed an action against Nile seeking a permanent injunction to prohibit him from digging on the surface of the land.[5] The district court granted a temporary injunction to plaintiffs. The petition was later amended to add claims of trespass and breach of contract. Nile filed an answer and raised counterclaims alleging the plaintiffs had interfered with his rights under his oil and gas leases. The petition was thereafter amended a second time to add a claim that Nile's lease was void for failure of consideration.[6] Plaintiffs also claimed they previously had leased the property to Verne, and were therefore unable to give possessory rights to Nile.

In a trial brief Nile claimed plaintiffs lacked standing and that Verne was the real party in interest. Nile claimed Jeanette and the Trust's predecessor, Cecil, signed the oil and gas leases, and plaintiffs were estopped from denying

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[4] The plaintiffs' lawsuit names the trust, rather than its trustee, as a party plaintiff. No objection to proceeding in that manner has been raised, and we therefore proceed with the appeal accordingly.

[5] While this action was pending, plaintiffs filed a forcible entry and detainer action against Nile. Nile was ordered to vacate the house on the trust property. There is no indication in the record that he appealed this ruling.

[6] Although this division of the plaintiffs' petition was headed "Lack of Consideration," the body of the division in fact asserted a failure of consideration, alleging Nile had "failed to pay the consideration required," and praying for relief based on his alleged "failure to pay the consideration required."

the validity of the leases. Nile claimed his May 2002 oil and gas leases were superior to Verne's farm leases because his oil and gas leases were recorded prior to the recording of Verne's farm leases.

The district court entered an order on June 4, 2008, finding Nile's oil and gas leases were "not what they purport to be and are void on their face." The court granted plaintiffs' request for injunctive relief, ordering that Nile "shall not occupy, enter, or in any way hinder the farming operation on the real estate." The court denied and dismissed Nile's counterclaims.

Nile filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), asking the court to make findings on his claims regarding standing, real party in interest, estoppel, priority of leases, and his counterclaims. The district court found plaintiffs had standing and were the real parties in interest. The court found there was insufficient evidence presented on the issue of estoppel. The court determined Verne's crop share farm lease was superior to any oil and gas lease. The court found no reason to depart from its ruling on Nile's counterclaims. Nile appeals.

II. Standing

Nile contends the district court should have dismissed plaintiffs' action for lack of standing. He asserts that under the farm leases, Verne was the owner and occupier of the land, citing *Tetzlaff v. Camp*, 715 N.W.2d 256, 260 (Iowa 2006) ("Property law regards a lease as the equivalent to a sale of the premises for the term of the lease, making the tenant both owner and occupier during the

term.”). Nile claims plaintiffs did not have a sufficient interest in the property to bring this suit.

On issues of standing, our review is for the correction of errors at law. *Birkhofer ex rel. Johannsen v. Birkhofer*, 610 N.W.2d 844, 847 (Iowa 2000). “Standing has been defined as the right of a person to seek judicial relief from an alleged injury.” *Bushby v. Washington County Conservation Bd.*, 654 N.W.2d 494, 496 (Iowa 2002). To have standing a party must (1) have a specific, personal, and legal interest in the litigation, and (2) be injuriously affected. *Birkhofer*, 610 N.W.2d at 847.

Jeanette and the Trust brought the following claims against Nile: (1) injunction and damages; (2) trespass; (3) breach of contract (oil and gas leases); (4) failure of consideration (leases); and (5) inability to grant possessory rights (leases).

Jeanette and the Trust were the owners of the property leased by Verne. If Nile damaged the land through unauthorized excavation or other actions, the value of the property would be impaired. *See Neubauer v. Hostetter*, 485 N.W.2d 87, 90 (Iowa 1992) (noting a landlord has a reversionary interest in real estate, and that interest can be valued and insured separately from the tenant’s interest). It is clear that on the claims for injunction and damages by plaintiffs, Jeanette and the Trust had standing to bring their claims.

A landowner may bring a trespass claim if his or her ownership interest has been affected, even if the landowner is not currently in possession. For example, in *Hassoldt v. Patrick Media Group, Inc.*, 100 Cal. Rptr. 2d 662, 675

(Cal. Ct. App. 2000), the court held that a landowner could bring a trespass claim based on the improper cutting of a tree, even though the property was currently leased out. In *Smith v. Cap Concrete, Inc.*, 184 Cal. Rptr. 308, 310 (Cal. Ct. App. 1982), the court held that a landowner could bring a trespass claim against someone who left concrete on the landowner's property when the property was being leased. As the court explained in both cases, "The cause of action for trespass is designed to protect *possessory*—not necessarily ownership—interests from land from unlawful interference. . . . [H]owever, an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest." *Hassoldt*, 100 Cal. Rptr. 2d at 675; *Smith*, 184 Cal. Rptr. at 310. Here the activities of Nile (planting trees, installing a trailer house, digging holes, trenching, and potentially excavating) clearly were of a long-term nature and affected the ownership interest. Thus, the plaintiffs had standing to bring their trespass claims.

The remaining claims of breach of contract, failure of consideration, and inability to grant possessory rights, involve the oil and gas leases. The parties to the leases were Nile, Jeanette, and the Trust's predecessor, Cecil. *See Bergfeld v. Farm Credit Banks*, 439 N.W.2d 217, 218 n.1 (Iowa Ct. App. 1989) (noting parties to an agreement have standing to enforce that agreement). Therefore, Jeanette and the Trust had standing to bring claims relating to the oil and gas leases.

We determine Jeanette and the Trust had standing to bring all of the claims raised in their petition.[7] We therefore affirm on this issue.

III. Real Party in Interest

Nile also claims Jeanette and the Trust were not the real parties in interest in this action, and that Verne was the real party in interest. The parties agree this issue, like the issue of standing, should be reviewed for the correction of errors at law. *See Birkhofer*, 610 N.W.2d at 847.

Under Iowa Rule of Civil Procedure 1.201, "Every action must be prosecuted in the name of the real party in interest." The fact that a party has standing does not necessarily mean that it is the real party in interest. *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 434 (Iowa 2008). "A real party in interest . . . is the person who is the true owner of the right sought to be enforced." *Id.* at 435. The rule is designed to protect a party from double recovery on the same claim, but should not be applied in a way to absolve a party from having to pay at all. *Zimmerman v. Kile*, 410 N.W.2d 262, 265 (Iowa 1987).

Jeanette and the Trust were the real parties in interest on their claims against Nile for an injunction and damages to the property, because they were the true owner of their rights as property owners. They were the real parties in interest as to their trespass claims, as Nile's alleged activities affected their ownership interests. On their claims based on the oil and gas leases, they were

[7] The district court did not grant any relief to plaintiffs on their claim of breach of contract, and no issues relating to the merits of that claim have been raised on appeal. We therefore do not further address the claim of breach of contract.

the true owners of their interests in the leases. We affirm the district court's ruling on this issue.

IV. Injunctive Relief

Based on plaintiffs' claims that Nile did not have any enforceable rights under the leases, they sought an injunction prohibiting him from entering the property. The district court found the oil and gas leases were void, and granted plaintiffs' request for injunctive relief. Our review of a district court order issuing a permanent injunction is de novo. *Opat v. Ludeking*, 666 N.W.2d 597, 603 (Iowa 2003).

An injunction is not a routine remedy; it should be exercised only under extraordinary circumstances. *Myers v. Caple*, 258 N.W.2d 301, 304 (Iowa 1977). "The party seeking an injunction has the burden to show not only a violation of his rights but also that he will suffer substantial damage unless one is granted." *Id.* at 305. Additionally, a party is entitled to injunctive relief only where there is no adequate remedy at law. *Id.* at 304. "In deciding whether an injunction should be issued, the court must weigh the relative hardships on the parties by the grant or denial of injunctive relief." *Opat*, 666 N.W.2d at 604.

In weighing the relative rights of the parties, the court found Nile's oil and gas leases were void, necessarily meaning that he had no interest in the property. Plaintiffs claimed the leases were void or voidable on two grounds—failure of consideration and inability to grant possessory rights. The district court did not directly address either of these grounds.

A. The court addressed a different ground, stating, "The lease is 'perpetual' as it has no ending date. Clearly, the real estate 'leased' is agricultural ground. (See Article I, Section 24, Iowa Constitution)." Article I, section 24 of the Iowa Constitution provides, "No lease or grant of agricultural lands, reserving any rent, or service of any kind, shall be valid for a longer period than twenty years." Even under this constitutional provision, however, a lease of agricultural land may be valid for twenty years and invalid only for the excess. *See Casey v. Lupkes*, 286 N.W.2d 204, 207 (Iowa 1979). Furthermore, the constitutional provision does not apply to agricultural land leased for purely non-agricultural purposes, such as mining. *Howard v. Schildberg Constr. Co.*, 528 N.W.2d 550, 553 (Iowa 1995). We conclude that even if Article I, section 24 of the Iowa Constitution had been raised by the parties, the oil and gas leases would not be invalid under this provision.[8]

B. One of the issues raised by plaintiffs was lack of possessory interest. Their petition stated, "Plaintiffs had leased possessory rights to the property to Verne Smith and therefore were unable to give possessory rights to Defendant under Defendant's Oil and Gas Lease previously leased to Verne Smith." A farm lease, however, would not prohibit a land owner from separately leasing the mineral rights to the property. *See Schlosser v. Van Dusseldorp*, 251 Iowa 521, 522-23, 101 N.W.2d 715, 716 (1960) (finding owner leased land to tenant for farming and also leased land for mining of gravel); 38 Am. Jur. 2d *Gas*

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[8] Non-agricultural leases may be perpetual. *Horizon Homes of Davenport v. Nunn*, 684 N.W.2d 221, 227 (Iowa 2004) ("It is true that Iowa law does not favor perpetual leases and that language creating one must be clear, unequivocal, and unmistakable to be enforceable.").

& Oil § 22, at 438 (1999) ("A landlord may sever his or her interest in the gas and oil in the land from his or her other interests in the land and sell either interest separately." (footnotes omitted)). Therefore, Nile's oil and gas leases cannot be void merely because Jeanette and the Trust already had leased the property for farming.[9]

C. Another issue raised by plaintiffs was their claim that the oil and gas leases were voidable for a failure to pay the required consideration. The want or failure of consideration may be raised as a defense to a written contract. Iowa Code § 537A.3 (2007). This section applies even in circumstances where, as here, an amount of consideration is recited in the agreement.[10] *See Hubbard Milling Co. v. Citizens State Bank*, 385 N.W.2d 255, 259 (Iowa 1986). The party claiming lack or failure of consideration has the burden of proof on this issue.[11] *Kristerin Dev. Co. v. Granson Inv.*, 394 N.W.2d 325, 331 (Iowa 1986).

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[9] In a related issue, Nile contends Jeanette and the Trust are estopped from claiming they did not have the right to lease the property to him for oil and gas exploration. He claims that by signing the lease they admitted they had the ability to lease the property to him. We conclude we do not need to address this issue because we have found Jeanette and the Trust had the ability to enter into the oil and gas leases even though they had already leased the property to Verne for agricultural purposes.

[10] Nile asserts that the language of the lease provides that the consideration of $100 has been paid. The lease states, "Lessor, in consideration of one hundred and other valuable consideration dollars, ($100) in hand paid the receipt and sufficiency of which is hereby acknowledged . . . ." *Hubbard Milling Co. v. Citizens State Bank*, 385 N.W.2d 255, 259 (Iowa 1986), provides, however, "a defense of failure or lack of consideration under section 537A.3 is not precluded from being raised merely because the parties recited a consideration in their agreement." We determine plaintiffs may raise the issue of lack of consideration, and the language of the lease is a factor to consider in determining the merits of plaintiffs' claim.

[11] Generally, "[i]t is presumed that an agreement, which has been written and signed, is supported by consideration." *Meincke v. Northwest Bank & Trust Co.*, 756 N.W.2d 223, 227 (Iowa 2006). This presumption may be overcome by proof of a failure or lack of consideration. *Id.*

There is a difference between lack of consideration and failure of consideration. *Federal Land Bank v. Woods*, 480 N.W.2d 61, 66 (Iowa 1992). There is a lack of consideration where no consideration exists or was intended to pass, and in these circumstances no contract is formed. *Id.* In other circumstances, there is a failure of consideration when a contract that was valid when formed becomes unenforceable "because the performance bargained for has not been given." *Id.* Ordinarily, we do not inquire into the adequacy of consideration. *Hubbard Milling*, 385 N.W.2d at 258. "[W]e do ascertain whether any consideration was provided, that is, whether there was a benefit to the promisor or a detriment to the promisee." *Id.*

In this case there is an unresolved factual issue as to whether Nile paid any consideration for the oil and gas leases. This issue must be resolved by the district court to determine whether enforceable oil and gas leases exist and then determine whether injunctive relief is appropriate.

The district court found, in part, that "Nile Smith has exceeded any reasonable interpretation of any rights he may have obtained under the Oil and Gas Leases." Nothing we have said disturbs this finding. Nile planted trees on the property, moved a trailer house onto the property, dug holes for water service and garbage disposal, dug long trenches, and apparently intended to dig a pond. These activities may reasonably be viewed as having interfered with the existing agricultural use of the property and as not being justified under the oil and gas leases, even if the leases are valid.

At oral argument, Nile's counsel conceded that any activities in excess of Nile's rights under the oil and gas leases could be enjoined, but argued that the district court erred in declaring the leases void *ab initio*. We agree the court erred in declaring them void *ab initio*. However, nothing would prevent the district court on remand from enjoining any improper activities, even if the leases are valid.

We determine the grant of injunctive relief should be reversed. The case should be remanded to the district court to resolve the issue of failure of consideration; determine the effect of any failure of consideration, if the court finds there is a failure of consideration; and further consider the issue of injunctive relief if necessary.

V. Forfeiture of the Leases

The plaintiffs in part sought forfeiture of the oil and gas leases, based on Nile's alleged violations of the lease provisions. The district court did not reach this issue either.

Even if the leases were originally valid and enforceable, subsequent wrongful activities of the lessee could, in appropriate circumstances, justify their termination. *See* 49 Am. Jur. 2d *Landlord & Tenant* § 248, at 274 (2006) ("If a lessee makes use of the property in a manner that was not intended at the time of the lease, the lessor may dissolve the lease. . . . The commission of waste upon the premises may effect a forfeiture of the lessee's estate in the leased premises . . . ."). Upon remand the district court should, if necessary, address

the plaintiffs' request for a declaration that Nile has by his actions forfeited the leases.

VI. Counterclaims

Nile raised counterclaims asserting Jeanette and the Trust had denied him his rights under the terms of the oil and gas leases. In particular, he asserted the leases permitted him to move an employee onto the property, put in a roadway, and drill for oil or gas, and he asked for damages because plaintiffs had breached the contract by not permitting these actions. On appeal, Nile contends his oil and gas leases were valid, and asserts he has proved his counterclaim for breach of contract.

We have already determined the leases are not invalid under Article I, section 24 of the Iowa Constitution, and that the plaintiffs had the ability to lease the properties for agricultural purposes and separately lease the properties for mining purposes. We have determined there were factual issues regarding the claim of failure of consideration, and on that issue the case should be remanded for resolution by district court, and then the issue of injunctive relief should be re-examined if necessary. Likewise, the merits of Nile's counterclaim for breach of contract are dependent upon whether the oil and gas leases are unenforceable for failure of consideration. Thus, the district court should also re-examine Nile's counterclaim for breach of contract, if necessary, based on its resolution of the issues of failure of consideration and forfeiture of any lease rights.

We affirm in part, reverse in part, and remand for further proceedings by the district court. We do not retain jurisdiction. Costs of this appeal are taxed one-half to Nile and one-half to plaintiffs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.