IN THE COURT OF APPEALS OF IOWA

No. 9-744 / 08-1872
Filed October 21, 2009

GAYLEN SMITH and LLOYD PAULEY d/b/a P & S EQUIPMENT,
Plaintiffs-Appellants,

vs.

NORMAN MEADOWS,
Defendant-Appellee.

Appeal from the Iowa District Court for Monona County, Duane E. Hoffmeyer, Judge.

Plaintiffs appeal from a money judgment in their favor, contending the district court erred in not awarding them interest. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Thomas Anderson of Anderson & Remack, L.L.P., Omaha, Nebraska, for appellants.

Matthew Minnihan of Minnihan Law Firm, Onawa, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

Plaintiffs Gaylen Smith and Lloyd Pauley d/b/a P & S Equipment appeal from a money judgment in their favor, contending the district court erred in not awarding them interest. They also challenge the court's valuation of a tractor. We affirm in part, reverse in part, and remand.

SCOPE OF REVIEW. We review actions at law for correction of errors at law. Iowa R. App. P. 6.4. We are bound by the district court's findings of fact if supported by substantial evidence. *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 758 (Iowa 1988).

BACKGROUND. These facts are basically without dispute. Defendant bought a tractor from plaintiffs on October 2, 1997, for $22,000. Defendant tendered a check for $22,000, but plaintiffs were not to cash it for thirty to sixty days. The check was not honored, and on February 24, 2000, the parties signed the following written agreement:

> This is an agreement drawn up between Gaylen Smith/Lloyd Pauley, d.b.a. P & S Equipment, Portsmouth, IA, and Norman Meadows, Ute, IA.
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> Norman Meadows purchased an IH 5488 tractor from P & S Equipment in the amount of $22,000 on October 2, 1997. A check was written for the full amount.
>
> A verbal agreement was reached between Mr. Smith and Mr. Meadows, at that time, to not cash the check until such time as a financial endeavor of Mr. Meadows was completed. The anticipated length of time was 30 to 60 days. Mr. Meadows agreed to pay interest on the full amount, commencing 30 days after the transaction, should it be necessary to hold the check for any length of time beyond the anticipated period.
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> As time passed and Mr. Meadows' financial endeavor had not been completed a subsequent agreement was made between Mr. Smith and Mr. Meadows that the agreed upon interest rate would be 15% on the full amount commencing 30 days after the transaction and compounded annually. This rate was agreed upon

> in consideration of the extended length of time that the check was to be held. At this writing the time period has been 2 yrs. 4 mos. and 22 days.
>
> Upon payment in full of principal and interest Mr. Smith has agreed to fix the air conditioner in the tractor. According to Mr. Smith this was working at the time of the sale but subsequently quit. It will be his responsibility to see that it is repaired.
>
> S/ Gaylen Smith 4-21-00
> S/Norman Meadows 4-21-00
> S/ Sherri Vaughn (Notary Public) 4-21-00

On October 5, 2007, plaintiffs filed the petition that led to this appeal. They contended that, among other things, after the April 21, 2000 agreement was entered, no payment had been made by or for defendant. They also alleged that they were able to repossess[1] the tractor on May 4, 2007, and the value of the tractor was between $10,000 and $12,000. They further claimed the balance due on the agreement, including interest, was $89,002.27 and that they were entitled to judgment in that amount less the value of the repossessed tractor. Defendant answered and sought dismissal of the petition.

The matter came on for trial. Plaintiffs appeared. Defendant did not appear, but was represented by counsel. Defendant raised a statute of limitations argument, which the district court determined was not persuasive.[2] No appeal was taken from this finding. The court found defendant affirmed the initial purchase of the tractor, presented a check for the full purchase price, took possession of the tractor, and used it from October 2, 1997, until May 4, 2007, without making any payments of any kind. The court found that when the tractor

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[1] The district court found the evidence showed the tractor was returned, not repossessed.

[2] The court reasoned that a written negotiable instrument started the process that led to the agreement that could arguably be referred to as a promissory note.

was returned it had a value of $11,000. The defendant conceded it was returned to plaintiffs. The court then found:

> [w]hen taking into consideration the length of time that passed wherein the plaintiffs allowed the defendant to use this tractor, their awareness that they were entitled to interest from the date of the "agreement" signed April 21, 2000, that they had the right but failed to make any efforts for payment or the interest charges until this action was filed that they have waived their right to interest at 15%.

The court further found:

> that to do justice between the parties, the plaintiffs should be entitled to the $22,000 sale price less the $11,000 current value of the tractor received and accepted by them plus interest at the statutory rate. The court does not find they are entitled to interest and concluded that they have waived the right to do so and defendant has met to the extent needed its burden of proof to establish waiver of the interest entitlement. To do differently would result in plaintiffs having a tractor worth $11,000 and a money judgment of $78,002.27. This would be grossly inequitable considering the actions of both parties.

Plaintiffs challenge this holding, contending that defendant never raised the issue of waiver, there was no evidence of waiver, and the district court invoked principles of equity in a law case and essentially reformed the contract, despite the fact defendant was not seeking reformation.

Defendant responds that plaintiffs waived their right to collect interest by sitting on their rights for almost ten years[3] and they should not be rewarded for letting their legal rights sit idle. Defendant further argues that the court was correct in finding plaintiffs made no attempt to enforce the contract for ten years and therefore waived their right to collect interest.

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[3] Approximately seven and a half years passed between signing the document providing for interest and filing this action.

Contract rights can be waived. *Dunn v. General Equities of Iowa, Ltd.*, 319 N.W.2d 515, 516 (Iowa 1982). Waiver is an affirmative defense. *New Hampshire Ins. Co. v. Christy*, 200 N.W.2d 834, 837 (Iowa 1972). "Failure to plead an affirmative defense normally results in waiver of the defense, unless the issue is tried with the consent of the parties." *Dutcher v. Randall Foods*, 546 N.W.2d 889, 893 (Iowa 1996). The burden of proving an affirmative defense by a preponderance of the evidence rests upon defendant. *Continental Cas. Co. v. G. R. Kinney Co.*, Iowa, 258 Iowa 658, 661, 140 N.W.2d 129, 130 (1966). Where acts and conduct are relied upon as proof of waiver, the intention of the party charged with waiving his rights must clearly appear. *Id*. Waiver is defined as "the voluntary or intentional relinquishment of a known right." *Scheetz v. IMT Mut. Ins. Co.*, 324 N.W.2d 302, 304 (Iowa 1982); *Travelers Indem. Co. v. Fields*, 317 N.W.2d 176, 186 (Iowa 1982)). "The essential elements of a waiver are the existence of a right, knowledge, actual or constructive, and an intention to relinquish such right." *Id*. Waiver can be express, "shown by the affirmative acts of a party," or implied, "inferred from conduct that supports the conclusion waiver was intended." *Id*.

Defendant did not raise an affirmative defense. The district court addressed it and found that the evidence showed one or two efforts by the plaintiffs to contact the defendant for payment or return of the tractor over the years. The court indicated that even assuming there were a few more efforts, this was minimal considering the almost ten years plaintiffs allowed defendant to keep the tractor without any payment.

There is no evidence of an affirmative act of plaintiffs that would indicate a waiver, nor is there any evidence of an express or intentional relinquishment of the right to collect for the tractor. Gaylen Smith, who together with Lloyd Pauley owned P & S Equipment, testified that he believed that between 2000 and 2007 he talked to defendant "30, 40 times" regarding the tractor. He further testified to specific instances where he called defendant and defendant gave excuses of waiting for money from an estate and reasons why it was not forthcoming.

Waiver can be shown by the affirmative acts of a party, or can be inferred from conduct that supports the conclusion waiver was intended. *Continental Cas. Co.*, 258 Iowa at 660, 140 N.W.2d at 130. When the waiver is implied, intent is inferred from the facts and circumstances constituting the waiver. *Scheetz*, 324 N.W.2d at 304.

Defendant did not raise waiver as an affirmative defense. He offered no proof to support a waiver. The district court, in determining there was a waiver, found that plaintiffs' minimal attempts to collect the debt supported a finding the interest agreed to by the parties had been waived. Defendant cites no authority, nor do we find any, that would support a finding that a minimal attempt to collect a debt, standing alone, is substantial evidence to support a finding of a waiver. Defendant did not prove the affirmative defense of waiver. We reverse on this issue and remand to the district to consider plaintiffs' claim for interest.

VALUE OF TRACTOR. Plaintiffs contend the district court erred in valuing the tractor at $11,000. They argue their evidence was that the tractor was worth $10,000, and defendant offered no evidence to dispute that number.

If the valuations used by the district court are within the permissible range of the evidence we will not change them on appeal. *See In re Marriage of Steele*, 502 N.W.2d 18, 21 (Iowa Ct. App. 1993); *see also In re Marriage of Alexander*, 478 N.W.2d 420, 422 (Iowa Ct. App. 1991). The district court's valuation of the tractor is within the permissible range of evidence and we affirm on this issue.

ATTORNEY FEES. Defendant's attorney has requested appellate attorney fees. He cites no statutory or contract provision that supports his request for attorney fees and we find none. We award no appellate attorney fees.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.