

IN THE COURT OF APPEALS OF IOWA

No. 0-558 / 09-1818
Filed September 9, 2010

**RONALD D. KINZLER and
PHYLLIS L. KINZLER,**
Plaintiffs-Appellees,

vs.

JERRY L. POPE,
Defendant-Appellant.

Appeal from the Iowa District Court for Iowa County, Kristin L. Hibbs,
Judge.

Defendant appeals from the district court's declaratory judgment ruling
rendered in favor of plaintiffs in a real estate dispute. **REVERSED AND
REMANDED.**

James E. Claypool of Claypool & Claypool, Williamsburg, for appellant.
Joseph T. Moreland of Hayek, Brown, Moreland & Smith, L.L.P., Iowa
City, for appellees.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

DANILSON, J.

Defendant Jerry Pope appeals from the district court's ruling in this declaratory judgment action, which favorably determined Pope had a life interest in the real estate at issue. Pope appeals from the court's denial of attorney fees and perceived premature exoneration of an injunctive bond posted by Ronald and Phyllis Kinzler. Pope is entitled to attorney fees because this action is premised upon a contract permitting attorney fees to be awarded in "any action or proceeding related to the contract," and the attorney fee provision was not limited to non-collateral disputes. Pope was also never afforded a hearing to present evidence of damages incurred while he was enjoined before the injunctive bond was exonerated. Because neither attorney fees nor a damage hearing were granted, we reverse and remand.

I. Background Facts and Proceedings.

In July 2005, Pope sold the Kinzlers a 3.68-acre parcel of real estate in rural Iowa County on an installment sale contract.¹ A county road running east and west divides the parcel roughly in half. The Kinzlers' home is located on the northern 1.98 acres. This action involved a dispute as to the right, title, and interest in the 1.7 acres south of the county road.²

Paragraph 18 of the installment sale contract between the parties reserves use of the buildings south of the county road by Pope until his death. That paragraph states in part:

¹ The Kinzlers rented the house located on the parcel from Pope for twenty-three years prior to the purchase. During that time, Pope was generous to the Kinzlers, and the parties were amicable until this dispute arose in July 2007.

² Although the parties have a lengthy history, we reiterate only the facts applicable in addressing the issues before us.

Seller reserves for his lifetime the use and occupancy of those buildings lying south of the road which he currently uses and for which he shall remain fully responsible for payment of the electricity consumed thereon. Buyers shall maintain insurance on the buildings; however Seller shall reimburse Buyers for his proportionate share of taxes on buildings used by him. If any repairs are required on the buildings used by Seller, which is not reimbursed by insurance, the parties will at that time reach an agreement regarding the share of such cost.

Paragraph 11(e) of the contract states:

In any action or proceeding relating to this contract the successful party shall be entitled to receive reasonable attorney's fees and costs as permitted by law.

The Kinzlers paid the balance of the contract purchase price in June 2006. Pope's attorney then prepared a deed stating, "Deed given in satisfaction of contract recorded in book 745 at pages 252-256." The deed did not contain any language in regard to Pope's life interest in the real estate south of the county road.³ After the deed in satisfaction of the contract was issued and recorded, a dispute arose between the parties concerning the fence surrounding the land south of the county road and the extent of Pope's life interest in that land.

The Kinzlers initiated these proceedings in September 2008 by filing a petition seeking declaratory judgment of their right to exclusive possession of the land south of the county road. Relying on the doctrine of merger, the Kinzlers contended the execution of the deed was the consummation of the contract, and because the deed did not grant Pope a life interest, he no longer had a right to the property. The Kinzlers also requested a temporary injunction prohibiting Pope from interfering with their access to the land and prohibiting Pope from

³ Pope's attorney stated that he did not believe language clarifying the agreement of the parties reserving Pope's life interest was necessary in the deed, nor did he intend for such omission to extinguish the life interest.

keeping livestock on the land. Pope filed counterclaims seeking declaratory judgment, arguing the parties intended him to have a right to exclusive possession of the land for his lifetime, and requesting reformation of the deed to conform with the language of Paragraph 18 of the installment sale contract. Pope's counterclaim seeking monetary damages for trespass, interference with use of property, and conversion was severed and reserved for trial at a later date, if necessary. Both parties requested attorney fees as provided for under the contract.

On September 25, 2008, the district court granted the Kinzlers' application for a temporary injunction, conditioned upon the Kinzlers posting a bond with sureties. The Kinzlers posted the bond, and a writ of injunction was issued. The writ of injunction enjoined Pope from keeping any livestock on the property and to remove the fence he had installed on the property.⁴

On September 17, 2009, after a bench trial, the court denied the Kinzlers' petition for declaratory judgment and sustained Pope's counterclaims. The court determined that any presumption of merger of the contract into the deed was overcome by clear evidence of the intention of the parties that a merger was not intended. The court further concluded that the parties intended Pope to have exclusive use of the land lying south of the county road for his lifetime.⁵ The court dissolved the temporary injunction, exonerated the bond posted by the

⁴ On January 21, 2009, the court modified the injunction order to eliminate the requirement that Pope remove the fence.

⁵ Among other findings, the court noted that although Pope had not kept livestock on the property since 1993, the Kinzlers knew Pope planned to pasture a few calves there as a hobby during his retirement.

Kinzlers, and denied Pope's claim for attorney fees, without further discussion on these issues.

Pope filed a posttrial motion, requesting an award of attorney fees and for the ability to seek damages against the bond. The court denied Pope's requests. Pope now appeals.

II. Standard of Review.

Our review of a declaratory judgment action depends upon how the action was tried to the district court. *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 178 (Iowa 2010). "Generally, an action on contract is treated as one at law." *Id.* The parties agree on this standard of review. Upon our review for errors at law, we are not bound by the district court's legal conclusions, but the findings of the court are binding if supported by substantial evidence. Iowa R. App. P. 6.907 (2009); *Harrington v. Univ. of N. Iowa*, 726 N.W.2d 363, 365 (Iowa 2007).

III. Issues on Appeal.

A. Attorney Fees.

Generally, attorney fees are not allowable unless authorized by statute or contractual agreement. *Van Sloun*, 778 N.W.2d at 182; *FNBC Iowa, Inc. v. Jennessey Group, L.L.C.*, 759 N.W.2d 808, 810 (Iowa Ct. App. 2008). A written contract must contain a clear and express provision regarding attorney fees and litigation expenses in order for a court to be authorized to add attorney fees and litigation expenses to a favorable judgment. *EFCO Corp. v. Norman Highway Constructors, Inc.*, 606 N.W.2d 297, 301 (Iowa 2000); *FNBC Iowa, Inc.*, 759 N.W.2d at 810. In this case, the parties' installment sale contract contained a provision regarding attorney fees, stating:

In any action or proceeding relating to this contract the successful party shall be entitled to receive reasonable attorney's fees and costs as permitted by law.

The parties do not dispute the clarity and validity of this provision.

We turn first to the Kinzlers' contention that the attorney fee provision of the installment sale contract did not survive the merger doctrine and was not part of the final agreement between the parties. See, e.g., *Phelan v. Peeters*, 152 N.W.2d 601, 602, 260 Iowa 1359, 1362 (1967) ("The broad rule is that a contract to convey land presumptively becomes merged in the subsequent deed executed in performance thereof and that the deed speaks and the contract is silent as to all matters of conflict between them. The rule has many qualifications, one of which is that collateral agreements or conditions not incorporated in the deed or inconsistent therewith will be deemed to survive for the purpose of enforcement."). The Kinzlers note that although the district court determined Paragraph 18 regarding Pope's life interest in the real estate was a "collateral agreement" that survived the presumption of merger into the deed, the court did not mention any other "collateral agreement" that survived the merger doctrine. Therefore, the Kinzlers argue, the attorney fee provision was extinguished with the recording of the deed issued in satisfaction of the contract.

We disagree. The Kinzlers have not appealed the district court's ruling that the contract provision granting Pope a life estate in a portion of the property conveyed did not merge in the deed. Pope's right to the life estate was entirely derived from the real estate contract as alleged in his counterclaim. The district court concluded Pope's right to the life estate was a collateral agreement not incorporated into the deed. As such, the contract terms remained binding on the

parties as it pertained to the life estate. The provision in the contract relative to the attorney fees does not limit its application to non-collateral matters or provisions central to the contract. Rather, the attorney fee provision states it shall apply to “any action or proceeding relative to this contract” Accordingly, if some of the contract terms survive as collateral matters not subject to the merger doctrine, it is reasonable to conclude the attorney fee provision equally survives to such actions or proceedings relating to the contract.

This interpretation is consistent with the parties’ pleadings to the district court, in which the Kinzlers and Pope requested attorney fees as provided for under the installment sale contract. As the Kinzlers stated in their petition, “The Contract allows the plaintiffs to receive reasonable attorney’s fees and costs as provided by law in any action or proceeding relating to the Contract”; and as Pope stated in his answer and counterclaim:

That the Defendant’s property interest is derived by a written contract which specifically provides that in any action or proceeding relating to the contract the successful party shall be entitled to receive reasonable attorney’s fees and costs as permitted by law.

It is clear the parties did not intend for the attorney fee provision to be extinguished by the deed at least in any action premised on the contract.

Upon our finding that the attorney fee provision of the contract was not subject to the presumption of merger into the deed as to actions premised on collateral matters, we turn to Pope’s argument that the district court erred in failing to award a reasonable amount of attorney fees to the prevailing party in the underlying action, pursuant to Iowa Code section 652.22 (2009). Section 625.22 authorizes a court to award attorney fees in contract cases. That section

states in part: “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.” Iowa Code § 625.22.

This is a declaratory judgment action, but it is based on contract. *Van Sloun*, 778 N.W.2d at 178 (“It is not significant that the action was brought as a declaratory judgment action.”). The relief requested by the Kinzlers was a court declaration that their rights to the real estate under the contract were exclusive. Although the Kinzlers’ petition also contained a request for injunctive relief, that request was not dispositive on how the court tried the case. *See Harrington*, 726 N.W.2d at 365. Pope brought a counterclaim seeking a declaration and reformation of the contract in regard to his life interest in the real estate. Pope also brought a counterclaim for monetary damages based on the Kinzlers’ interference with his right to the real estate.

Because this case is contractual in nature and was tried as a legal action to the district court, section 625.22 applies. *See Van Sloun*, 778 N.W.2d at 178-79, 182-84; *Lindsay v. Cottingham & Butler Ins. Servs., Inc.*, 763 N.W.2d 568, 572-73 (Iowa 2009); *Harrington*, 726 N.W.2d at 365. Under that section, the district court should have awarded attorney fees to Pope, because Pope’s property interest was derived by a written contract specifically providing for the successful party to receive reasonable attorney fees. *See* Iowa Code § 652.22; *EFCO Corp.*, 606 N.W.2d at 301.

Pope also requests that he be awarded attorney fees for this appeal. A party entitled to attorney fees under a contract may be entitled to reasonable

attorney fees on appeal, see *Beckman v. Kitchen*, 599 N.W.2d 699, 702 (Iowa 1999), and the Kinzlers have waived their objection to Pope's failure to file an affidavit required under section 625.24. See *Van Sloun*, 778 N.W.2d at 183. Given that Pope prevailed on his appeal, we find reasonable appellate attorney fees should be awarded in his favor; however, we prefer the district court determine the appropriate amount. See *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982).

We remand for a determination of a reasonable amount of trial and appellate attorney fees to be awarded to Pope. See *Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 832 (Iowa 2009) (noting that the determination of the amount of such fees and expenses is normally a matter entrusted to the discretion of the district court).

B. Temporary Injunction Bond.

Pope argues the district court erred in exonerating the bond posted by the Kinzlers before Pope could make a claim against the bond for damages suffered as a result of the issuance of the temporary injunction. In its declaratory judgment ruling, the court determining Pope had the right to "use the property for any lawful purpose during his lifetime." In that same ruling, the court also dissolved the temporary injunction and exonerated the bond. The effect of the court's ruling was to discharge the Kinzlers and their surety from any liability for damages under the bond and to eliminate the bond as a source of funds for the payment of any such damages. See Iowa R. Civ. P. 1.1508.

Because the court's ruling occurred prior to a decision on whether Pope had sustained damages as a result of the temporary injunction, the protection of

the bond was rendered illusory. More importantly, Pope was denied a hearing on whether he had a valid claim under the bond.⁶ See *Bank of Monroe v. Gifford*, 65 Iowa 648, 648-49, 22 N.W. 913, 914 (1885) (finding that no action at law can be maintained upon an injunction bond until the final determination of the cause in which the injunction issued, even though the injunction has been dissolved because improperly granted).

Although it was entirely appropriate for the district court to order that the Kinzlers had no obligation to continue the bond once the injunction had been dissolved, see *Citizens State Bank v. Harden*, 439 N.W.2d 675, 676 (Iowa Ct. App. 1989), whether the Kinzlers and their surety had any liability to Pope for the period during which the bond was in effect is a different question. A decision on that issue must await a determination of the damages, if any, that Pope suffered by reason of the issuance of the writ of temporary injunction. See *Financial Mktg. Servs., Inc. v. Hawkeye Bank & Trust*, 588 N.W.2d 450, 461 (Iowa 1999) (reversing for hearing to determine damages during period that injunction bond was issued). But see *Milwaukee W. Bank v. Cedars of Cedar Rapids, Inc.*, 170 N.W.2d 670, 673-74 (Iowa 1969) (noting that attorney fees are not recoverable as damages from the period that injunction bond was issued when the temporary writ was “merely collateral or auxiliary to the main subject-matter of the action”).

Thus, the court should not have exonerated or released the Kinzlers and their surety from any liability to Pope for damages sustained during the term of

⁶ We acknowledge that in some cases the evidence at trial may be sufficient to determine damages (or lack thereof) incurred while the injunction was in force. Unfortunately, Pope was never asked if the court could rely upon the evidence at trial, or if he desired to present additional evidence, to determine damages (if any) before the bond was exonerated.

the bond. See *Lacey v. Davis*, 126 Iowa 675, 675 102 N.W. 535, 535 (1905) (stating that a right of action does not accrue upon a bond given for the issuance of a temporary writ of injunction until the main action has been determined). That part of the court's order exonerating the bond and releasing the surety from liability is reversed. We remand the case to allow the district court to modify its prior ruling to be consistent with our decision, and for any other appropriate proceedings.

REVERSED AND REMANDED.