IN THE COURT OF APPEALS OF IOWA

No. 0-643 / 10-0234
Filed October 6, 2010

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 decision determining his oil and gas leases were void for failure of consideration. **AFFIRMED.**

Joseph E. Halbur, Carroll, for appellant.

William D. Kurth, Lake City, for appellee.

Considered by Potterfield, P.J., Tabor, J., and Huitink, S.J.*

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

HUITINK, S.J.

I. Background Facts & Proceedings

Cecil and Jeanette Smith owned farmland in Calhoun County. They divorced in 1995, and each received one-half of the farmland.[1] Both before and after the divorce they leased the farmland to their son, Verne Smith, for agricultural purposes.

On May 13, 2002, Cecil and Jeanette each signed an oil and gas lease on their individual properties with another son, Nile Smith.[2] These leases provided:

> Lessor, in consideration of one hundred and other valuable consideration dollars, ($100) in hand paid the receipt and sufficiency of which is hereby acknowledged grants, leases and lets exclusively unto Lessee for the purpose of exploring, prospecting, drilling and mining for and producing oil, gas, water including but not limited to gas producible from coal-bearing formations, and all substances in association therewith, laying pipelines, building tanks, power stations, roads, telephone lines and other structures thereon to produce, save, take care of, treat, transport, produce and own said products exclusively and housing its employees on the following described land . . . .
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> The primary term of agreement shall run until such time as Lessee releases agreement by filing Notice of Release with Calhoun County Recorder, Calhoun County, Iowa.

The oil and gas leases were recorded on June 12, 2002.

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

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[1] Cecil and Jeanette originally owned 720 acres of farmland. In 2004, eighty acres were sold. The present dispute involves 640 acres—320 acres owned by Jeanette and 320 acres owned by the Cecil Smith Trust.

[2] From 1987 until 1996, Crutcher-Tufts Corporation had an oil and gas lease on the property owned by Cecil and Jeanette.

lease with Verne which runs until 2013.[3] Cecil died on October 15, 2002. A cousin, Glen Smith, was appointed as the successor trustee.

Nile testified Cecil told him he could live in an abandoned house on the Trust's property. Nile stated 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 with having Nile live on the Trust's property, and he brought his concerns to Glen. Glen determined Nile could live on the property. Nile did not pay rent for the house, but paid the insurance, electric bill, telephone bill, and property taxes.

Glen withdrew as the trustee in 2007, and James Finley became the successor trustee. Nile and Verne had disagreements about the use of the property. 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 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 diagonally across Jeanette's property. He stated this was for the purpose of marking out a roadway to establish a drill site on the property.[4]

On October 18, 2007, Jeanette and the Trust (plaintiffs) filed an action against Nile seeking a permanent injunction to prohibit him from digging on the surface of the land. The district court granted a temporary injunction to plaintiffs.

[3] It is not clear from the farm lease signed by Cecil whether he signed in his individual capacity or as the trustee for his revocable trust.

[4] As successor trustee, Finley took the position that Nile was a tenant at will. He felt Nile was interfering with the farming operation and decided to evict him from the property. The Trust 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.

The petition was later amended to add claims of trespass, breach of contract, and failure of consideration. Nile filed an answer and raised counterclaims alleging the plaintiffs had interfered with his rights under his oil and gas 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 appealed. We affirmed the district court on the issues of standing and real party in interest. *Smith v. Smith*, No. 08-1148 (Iowa Ct. App. Nov. 12, 2009). We reversed the injunction, however, finding the district court had declared the oil and gas leases void on an invalid ground. *Id.* We noted there was an unresolved factual issue as to whether the leases were void due to failure of consideration. *Id.* We also noted there was an unresolved issue concerning whether the leases were subject to termination due to Nile's alleged violations of the lease provisions. *Id.* We concluded the issue of Nile's counterclaims could not be determined until these questions regarding the validity of the oil and gas leases were resolved. *Id.* The case was remanded to the district court. *Id.*

The parties agreed the case could be addressed on remand based on the record already made. The district court determined there had been a failure of consideration for the oil and gas leases, finding, "Nile J. Smith has failed to establish by any quantum of proof that consideration was paid by him for the alleged lease." The court further found that even if it assumed Nile had paid the $100 consideration specified in the leases, his actions interfered with the

agricultural lease and "violated the intent, purpose, and understanding of any existing oil and gas lease . . . ." Based on these findings, the court concluded Nile's counterclaims were moot.

The district court amended its order to provide the oil and gas leases were terminated for failure of consideration. The court concluded the leases were forfeited, and Nile was "enjoined from any further attempts to enforce any provisions of the now forfeited lease." Nile's counterclaims were dismissed. Nile again appeals the decision of the district court.

II. Standard of Review

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). In equity cases, we give weight to the fact findings of the district court, especially on credibility issues, but we are not bound by the court's findings. Iowa R. App. P. 6.904(3)(*g*).

III. Failure of Consideration

On the issue of consideration, we previously stated:

> 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, as here, where an amount of consideration is recited in the agreement. *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. *Kristerin Dev. Co. v. Granson Inv.*, 394 N.W.2d 325, 331 (Iowa 1986).
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> . . . 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." [*Federal Land Bank v. Wood*s, 480 N.W.2d 61, 66 (Iowa 1992).] 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.*

Smith v. Smith, No. 08-1148 (Iowa Ct. App. Nov. 12, 2009) (footnotes omitted).

A. Nile contends that in the remand decision the district court improperly placed the burden on him to show he had given consideration for the leases, rather than requiring Jeanette and the Trust to show a lack of consideration. The failure of consideration may be raised as a total or partial defense to a contract. Iowa Code § 537A.3 (2007). The party claiming lack or failure of consideration has the burden of establishing the defense. *Margeson v. Artis*, 776 N.W.2d 652, 656 (Iowa 2009); *see also Meincke v. Northwest Bank & Trust Co.*, 756 N.W.2d 223, 227 (Iowa 2008) ("A failure of consideration is a defense to enforcing the contract that must be proven by the party asserting the defense."). On our de novo review of the evidence, we place the burden on Jeanette and the Trust to show failure of consideration.

B. Nile claims Jeanette did not show a failure of consideration for the oil and gas lease on her property. A valid contract must consist of an offer, acceptance, and consideration. *Margeson*, 776 N.W.2d at 655. Consideration may be either a legal benefit to the promisor, or a legal detriment to the promisee. *Meincke*, 756 N.W.2d at 227. "[A] failure of consideration means the contract was valid when formed but becomes unenforceable because the performance bargained for has not been given." *Federal Land Bank*, 480 N.W.2d at 66. "A total failure of consideration occurs when a party has failed or refused to perform a substantial part of what the party agreed to do." *Johnson v. Dodgen*, 451 N.W.2d 168, 172 (Iowa 1990).

"We determine whether there is consideration from what is stated in the instrument or by what the parties contemplated at the time the instrument was executed." *Meincke*, 756 N.W.2d at 227. Each oil and gas lease provided for the payment by Nile of $100. Nile testified he paid the consideration in cash. He stated he sent two $100 bills to Cecil's address as consideration for the two leases. After the divorce Jeanette lived in Florida, but she testified she came to Iowa to take care of Cecil when he got sick and then she moved back to Florida after he died on October 15, 2002. Jeanette was asked, "Did you receive any consideration for this lease?" and she replied, "No."

We conclude Jeanette has adequately shown a failure of consideration.[5] Jeanette testified she had not received any consideration for the oil and gas lease. We, like the district court, find Jeanette's testimony on this subject to be more credible than that of Nile. Concerning the credibility of witnesses, we give weight to the factual findings of the district court. *See* Iowa R. App. P. 6.904(3)(*g*). A failure of consideration renders a contract unenforceable. *See* *Johnson*, 451 N.W.2d at 172. Because there has been a failure of consideration, Nile's oil and gas lease with Jeanette is unenforceable.

C. Nile asserts the evidence shows he paid the $100 consideration for the lease with Cecil. As noted above, Nile testified he sent two $100 bills to Cecil and Jeanette at Cecil's address in Emmetsburg. Because Cecil is now

[5] Our determination of the claim of failure of consideration does not address the issue of the adequacy of consideration. *See Kristerin Dev.*, 394 N.W.2d at 331-32 ("The court generally will not inquire further into the 'adequacy' of the consideration given."). Thus, we do not consider whether $100 was an adequate payment for the oil and gas leases. We review only whether *any* consideration was provided by Nile for the oil and gas leases. *See Johnson*, 451 N.W.2d at 172 (noting that to provide a complete defense, a party must show a total failure of consideration).

deceased, there was no corresponding evidence to show whether the money was received by Cecil.

Nile testified he sent the two $100 bills together. Jeanette stated she did not receive the consideration for the lease. From this testimony it is possible to infer that Cecil also did not receive the $100 consideration for the lease. Furthermore, it is clear from the district court's decision that the court did not find Nile to be a credible witness. Based on a finding Nile did not provide believable testimony on this issue, and the lack of other evidence to show any consideration was given for the lease with Cecil, we conclude the Trust adequately proved a failure of consideration. We conclude Nile's oil and gas lease with Cecil, and subsequently, the Trust, is also unenforceable due to a failure of consideration.

IV. Forfeiture by Conduct

In addition to finding a failure of consideration, the district court found Nile had forfeited his interest in the leases by exceeding the terms of the oil and gas leases and interfering with Verne's agricultural lease. On this issue we previously stated:

> 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.

Smith v. Smith, No. 08-1148 (Iowa Ct. App. Nov. 12, 2009).

We have already declared the two oil and gas leases unenforceable because there was a failure of consideration. We conclude we do not need to further consider whether the leases were also unenforceable due to Nile's wrongful activities. Therefore, we do not address the issue of forfeiture of the leases based on alleged violations of the lease provisions.

V. Injunction

Nile contends the district court improperly granted an injunction prohibiting him from enforcing his rights under the oil and gas leases. On the issue of the issuance of an injunction we stated:

> 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.

Id.

Nile claims Jeanette and the Trust have not shown a violation of their rights, or that they would suffer substantial damage unless an injunction was granted. Because the oil and gas leases were unenforceable, Nile did not have any right to use the property under the leases.[6] In weighing the relative rights of the parties, it is clear Nile does not have any rights to the property under the oil

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[6] We note Nile's use of the house on the Trust property does not apparently arise from the oil and gas leases. Nile testified Cecil agreed to let him stay in the home and in exchange he would pay the insurance and property taxes for the home. These terms do not relate to the provisions of the written oil and gas leases. The evidence shows there may have been a separate agreement relating to the home. Finley, the successor trustee, stated Nile was a tenant at will in the house before he was evicted by the Trust.

and gas leases. Nile has taken actions detrimental to the landowners, such as planting trees, digging holes, and excavating a trench. We conclude the district court properly granted an injunction prohibiting Nile from attempting to enforce the provisions of the oil and gas leases.

VI. Counterclaims

Finally, Nile asserts the district court should have granted him relief on his counterclaims against Jeanette and the Trust. Nile's counterclaims allege Jeanette and the Trust breached the terms of the oil and gas leases. We have already determined these oil and gas leases are unenforceable, and therefore Nile may not enforce the terms of the leases. The district court properly ordered the counterclaims dismissed.

We affirm the decision of the district court.

AFFIRMED.