

IN THE COURT OF APPEALS OF IOWA

No. 6-624 / 05-1892
Filed September 21, 2006

LIBERTY BANK, F.S.B.,
Plaintiff-Appellee,

vs.

DIAMOND PAINT AND SUPPLY, INC.,
and STEVE DIAMOND,
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

The defendants appeal from the district court order granting summary
judgment in favor of the plaintiff on its breach of contract claim. **AFFIRMED.**

Mark J. Herzberger of Moyer & Bergman, P.L.C., Cedar Rapids, for
appellants.

Thomas H. Burke and Drew J. Gentsch of Whitfield & Eddy, P.L.C., Des
Moines, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

EISENHAUER, J.

Defendants Diamond Paint and Supply, Inc. (Diamond Paint) and Steve Diamond appeal from the district court order granting summary judgment in favor of Plaintiff Liberty Bank, F.S.B. (Liberty Bank) on its breach of contract claim. Defendants contend the district court erred in granting summary judgment and in awarding Liberty Bank attorney fees.

The defendants entered into two rental agreements with NorVergence, to which Liberty Bank is the assignee of NorVergence's interest. The agreements provided the defendants would rent certain telecommunication equipment from NorVergence for the purpose of receiving voice phone calls as unlimited data, thereby reducing or eliminating the per minute usage charge on telephone service. Defendants failed to make all of the installment payments required under the agreements. Liberty Bank then sued the defendants for breach of contract. The defendants challenged the validity of the agreements. The district court granted summary judgment in favor of Liberty Mutual.

Pursuant to Iowa Rule of Civil Procedure 1.981(3), summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. We examine the record before the district court to determine whether any genuine issue of material fact exists and whether the court correctly applied the law. *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 45 (Iowa 1999). We view the facts in a light most favorable to the party opposing the motion for summary judgment. *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 201 (Iowa 1997).

Defendants first contend the district court erred in granting summary judgment because the waiver of defense and hell or high water clauses contained in the agreements are not enforceable. Such clauses relate to the unconditional nature of the payment obligations of the lessee to an assignee of a finance lease. Iowa Code § 554.9403 (2005). The protections afforded by the hell or high water provisions become effective “upon the lessee’s acceptance of the goods.” Id. § 554.13407; *Great Am. Leasing v. Star Photo Lab, Inc.*, 672 N.W.2d 502, 505 (Iowa Ct. App. 2003). Defendants, in their brief, claim “valid delivery and acceptance certificates were never submitted to Norvergence.” However, the secretary and treasurer of Diamond Paint signed the delivery and acceptance certificate and, as the trial court ruled, she had been previously authorized by the defendants to sign.

Defendants argue the rental agreements do not fall within the scope of the UCC because the agreements are predominantly for services, not goods. However, the rental agreement is titled “Equipment Rental Agreement” and makes repeated reference to “equipment.” Schedule A sets forth a lengthy list of the equipment with which the agreements deal. There is no genuine dispute that the agreements cover goods and not services.

Defendants also argue the hell or high water clauses are not enforceable because the agreements are not finance leases. We disagree. The rental agreement states:

ARTICLE 2A STATEMENT: YOU AGREE THAT IF ARTICLE 2A OF THE UNIFORM COMMERCIAL CODE IS DEEMED TO APPLY TO THIS RENTAL, THIS RENTAL WILL BE CONSIDERED A FINANCE LEASE THEREUNDER. YOU WAIVE YOUR RIGHTS AND REMEDIES UNDER ARTICLE 2A of the UCC.

Article 2A applies to “any transaction, regardless of form, that creates a lease.” Iowa Code § 554.13102. We conclude the rental agreement meets the definition of a lease as provided in Article 2A. See Iowa Code § 554.13103(1)(j) (defining a lease as “a transfer of the right to possession and use of goods for a term in return for consideration”). Accordingly, Article 2A applies to the rental and therefore the parties agreed it would be a finance lease. *Star Photo Lab, Inc.*, 672 N.W.2d at 505.

Defendants next contend the rental agreements are void and unenforceable due to the close connection between NorVergence and Liberty Bank. However, Iowa has yet to adopt the close connection doctrine. *Citicorp of N. Am. v. Lifestyle Comm. Corp.*, 836 F. Supp. 644, 659 (S.D. Iowa 1993).

Finally, we conclude defendants have failed to preserve error on their remaining claims of fraud and unconscionability because they were not presented to and passed upon by the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). The trial court did not rule on these issues because it found the hell or high water provisions applicable. Because we agree, these defenses are effectively cut off and do not prevent granting of summary judgment.

Defendants also argue the district court erred in awarding Liberty Mutual attorney fees. We review the district court's award of attorney fees for an abuse of discretion. *Great Am. Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration*, 691 N.W.2d 730, 732 (Iowa 2005). Reversal is warranted only when the court rests its discretionary ruling on grounds that are clearly unreasonable or untenable. *Id.*

Iowa Code section 625.22 provides, “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.” The parties’ rental agreements provided an agreement that the losing party would pay the attorney fees of the successful litigant. Defendants make no argument that the amount of attorney fees awarded to Liberty Bank was excessive or unreasonable. Accordingly, we affirm the district court’s grant of summary judgment in favor of Liberty Bank and its award of attorney fees.

AFFIRMED.