IN THE COURT OF APPEALS OF IOWA

No. 9-1056 / 09-0798
Filed February 24, 2010

G & K SERVICES, INC.,
Plaintiff-Appellant/Cross-Appellee,

vs.

SENECA WASTE SOLUTIONS, L.L.C.,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Appeal and cross-appeal from the district court ruling in a breach-of-contract action. **AFFIRMED.**

Jonathan Kramer of Whitfield & Eddy, P.L.C., Des Moines, for appellant.

Brenda Myers-Maas, West Des Moines, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

SACKETT, C.J.

Plaintiff-appellant ("G & K") appeals and defendant-appellee ("Seneca") cross appeals from the district court ruling in a breach-of-contract action. G & K contends the court erred in determining it had a continuing duty to perform the contract after Seneca's bad faith. It also challenges the court's order regarding payment for the transcript on appeal. Seneca contends the court erred in denying its counterclaim for damages. We affirm.

Background. G & K, a uniform and equipment leasing company, entered into a sixty-month contract with Seneca in March of 2005 to supply and clean uniforms for Seneca. Seneca agreed to "accept exclusively from G & K, all the merchandise/service items listed in the addendum(s)," which, at time of signing, were twenty-six pairs of pants and thirty-nine pairs of jeans. "Additional items requested by [Seneca], verbally or in writing" were "covered by this agreement." G & K agreed to return all items picked on the normal weekly delivery day in "clean and useable condition" on the next delivery day, including repairing any items in need of repair. The contract provided Seneca could terminate the agreement "without penalty" if Seneca believed "G & K has consistently failed to provide quality service as required," if Seneca gave written notice of deficiencies, G & K failed to resolve the deficiencies within sixty days, and if Seneca gave a second written notice within ten days after the sixty-day period for cure. If Seneca breached or terminated the contract early, the contract provided for liquidated damages of fifty percent of the average weekly amounts invoiced to

Seneca in the prior ninety days, multiplied by the number of weeks remaining in the contract term.

Between 2005 and 2007 Seneca added employees and requested additional uniforms and other items such as towels, rugs, and mops from G & K, which were provided. Beginning in early 2006, Seneca complained to the delivery driver numerous times about uniforms not being returned the next delivery day and not being repaired before being returned. On April 11, 2007, Seneca sent written notice of several deficiencies to G & K. Following the notice G & K and Seneca met and discussed the deficiencies. G & K made some effort to resolve the deficiencies, but the shortages and lack of repair problems continued. Seneca sent a second notice to G & K on June 11, citing the same deficiencies and terminating the contract.

On April 6, 2007, Seneca executed a contract with Phelps, a competitor of G & K. Although Seneca received some non-uniform items from Phelps, such as mats, during the sixty-day cure period with G & K, G & K continued to be the exclusive provider of uniforms during that period.

In December of 2007 G & K filed suit against Seneca, alleging breach of contract. Seneca responded with affirmative defenses and a counterclaim. The case was tried to the court in February of 2009 and the district court issued its ruling in April.

The district court examined the provisions of the contract and concluded Seneca breached the exclusivity provision of the contract by receiving items from Phelps starting in May of 2007, before the contract with G & K was terminated on

June 11. The court further concluded Seneca proved that G & K breached the service guarantee and failed to cure the garment deficiencies during the sixty-day cure period. Concerning Seneca's counterclaim for damages, the court found it did not provide "relevant documentation" of the damages and did not establish that the claimed damages were all attributable to G & K's failure to perform. The court concluded:

> G & K was in material breach of providing the garment items required under the agreement. Seneca was in breach of the agreement in that it was not acting in good faith in giving G & K an opportunity to cure. However G & K failed to cure the garment item deficiencies during the sixty day period whether Seneca was acting in good faith or not. In other words the fact that Seneca was acting in bad faith regarding G & K's right to cure was meaningless because G & K did not cure the problems during the cure period. Therefore it made no difference Seneca was not acting in good faith. Stated another way G & K was not harmed by the lack of good faith because it did not cure the problem in any event.

The court ruled in favor of Seneca on G & K's breach-of-contract claim and in favor of G & K on Seneca's counterclaim. It assessed the costs of the action against G & K. G & K appealed and Seneca cross-appealed. The parties disagreed on ordering the transcript, so Seneca filed a motion to compel G & K to order the transcript. The court ordered that the parties obtain two copies of the transcript and that each advance half the cost. It expressly did not determine who should be responsible for the costs, leaving that determination to the appellate court.

Scope and Standards of Review. Our review of law actions is for correction of errors at law. Iowa R. App. P. 6.907. The findings of fact in an action tried to the court have the effect of a special verdict and are binding on us if supported by substantial evidence. *Id*.; *Iowa Beta Chapter of Phi Delta Theta*

Fraternity v. State, 763 N.W.2d 250, 257 (Iowa 2009). We view the evidence in the light most favorable to supporting the judgment and liberally construe the court's findings to uphold, rather than defeat, the court's decision. *State v. Dohlman*, 725 N.W.2d 428, 430 (Iowa 2006). The district court's conclusions of law and its application of the legal conclusions to the facts are not binding on appeal. *Raper v. State*, 688 N.W.2d 29, 36 (Iowa 2004).

G & K's appeal. Viewing the evidence in the light most favorable to upholding the district court's findings, we find substantial evidence supports the court's findings of fact. The issue before us, however, is how the terms of the contract apply to those facts.

G & K contends the court erred in determining it had a continuing duty to perform "after the established bad faith by Seneca." It argues that when a contract contains a right to cure, the other party "has an obligation to facilitate the cure through an obligation of good faith and fair dealing." It further argues that bad faith is "a material breach that relieves the other party of a duty to perform." In dealing with the chronology of events, G & K argues it "could not have materially breached the agreement prior to Seneca's bad faith because Seneca's breach occurred prior to the start of the cure period."

Seneca responds first that G & K did not preserve this issue for review because it was not properly submitted to or ruled on by the district court. It further responds that G & K did not file a motion to amend or enlarge "that would have given the district court an opportunity to address this issue."

As quoted above, the district court concluded G & K was in material breach of the provisions of the guarantee in the contract and Seneca was in breach "in that it was not acting in good faith in giving G & K an opportunity to cure." The court further concluded that Seneca's bad faith "was meaningless" because G & K did not cure the material breach of the guarantee provisions. "Therefore it made no difference Seneca was not acting in good faith."

Although we are not bound by the district court's legal conclusions concerning the contract or its application to the facts, we agree with the court's interpretation of and construction of the contract for the most part. Our additional and differing conclusions are set forth below.

The contract required Seneca to "accept exclusively" from G & K the items covered by the contract. Those items included the items specified in the attached addendum and "additional items requested by [Seneca], verbally or in writing." By accepting items from a competitor beginning in May of 2007, Seneca breached the exclusivity requirement of the contract.

G & K guaranteed certain levels of service, including, as relevant here: to "return all items picked up on the normal delivery day by the next scheduled delivery day," to repair "all items in need of repair" by the next delivery day, and to "return all items in a clean and useable condition." Before the April 11, 2007 notice letter from Seneca, G & K had repeatedly, over the course of more than a year, failed to return all items picked up, failed to repair some items—some more than once, and failed to return all items in useable condition. These actions constituted a breach of the service guarantee.

Seneca gave written notice to G & K of some of G & K's failure "to provide quality service" on April 11, 2007, as required in the contract. Seneca sent G & K a second, contractually-required notice at the end of the contractual sixty-day period for curing the service deficiencies. During the cure period, G & K continued to return clothing items in unusable condition, with unrepaired holes, tears, or split seams. G & K's failure to cure allowed Seneca to terminate the contract without penalty.

The "cancellation without cause" provisions of the contract specifically provide for liquidated damages if Seneca "breaches or prematurely terminates this Agreement for any reason, *except for reasons set forth in the Guarantee clause above*." (Emphasis added.) Although Seneca's acceptance of items from a competitor in May of 2007 was a breach of the agreement, the move to a competitor was because of G & K's continued breach of its service guarantee. Because Seneca breached the agreement for reasons set forth in the guarantee clause, its actions fall outside the cancellation without cause provisions and the liquidated damages and attorney fees do not apply.

We agree with the district court's determination that "Seneca established deficiencies in service by G & K prior to April 11, 2007, which continued during the sixty day cure period following the April 11 letter." We conclude, as did the district court, that Seneca terminated the contract for cause—G & K's breach of the service guarantee and subsequent failure to cure. Although Seneca acted in bad faith in not allowing G & K to cure some of the non-garment deficiencies, the repeated and ongoing serious garment deficiencies were the cause of the

contract termination. Seneca's bad faith did not hinder or prevent G & K from curing the garment deficiencies and did not excuse G & K from performing under the contract. *See Vicorp Rests., Inc. v. Bader*, 590 N.W.2d 518, 524-25 (Iowa 1999) (denying relief to party that *prevented* the other party from curing). The district court did not err in its understanding of the contract or in its application of the contract terms to the facts before it. We affirm the judgment in favor of Seneca on G & K's breach-of-contract claim.

Seneca's cross-appeal. Seneca claimed damages totaling $3,396.47 for a washing machine and clothes dryer, clothing and laundry charges, and time spent by Seneca employees in dealing with service issues. The district court determined that Seneca did not prove its claimed damages or that the damages "were all attributable to G & K's failure to perform under the contract." It granted judgment in favor of G & K on Seneca's counterclaim.

Seneca argues the district court's findings are not supported by substantial evidence because Seneca provided ample evidence in support of its claimed damages. It further argues the court erred in not awarding damages in an amount adequate to place it in the position it would have been in if G & K had not breached the contract. *See Midland Mut. Life Ins. Co. v. Mercy Clinics*, 579 N.W.2d 823, 831 (Iowa 1998) ("Under Iowa law, when a contract has been breached the nonbreaching party is generally entitled to be placed in as good a position as he or she would have occupied had the contract been performed.").

"Expectation interest" or "benefit of the bargain" damages may be awarded based on breach of a contract. *See id.* However, "damages based on

breach of a contract must have been foreseeable or have been contemplated by the parties when the parties entered into the agreement." *Kuehl v. Freeman Bros. Agency, Inc.*, 521 N.W.2d 714, 718 (Iowa 1994). The contract specifically contemplates "damages" if G & K fails to meet its service guarantee: "[Seneca] will be entitled to a credit equal to the weekly charge for the nonconforming item." There is no substantial evidence Seneca ever sought a credit for nonconforming items that G & K did not provide. Although Seneca used the washing machine and clothes dryer at times to clean employee uniforms, the evidence supports a finding the appliances were purchased so employees could clean their t-shirts, socks, and other non-rented uniform items. Seneca's purchase of the appliances allegedly as a remedy to G & K's service deficiencies was not foreseeable. In addition, substantial evidence supports the finding that "at no time prior to the filing of the suit by G & K against Seneca did Seneca ever advise G & K that it had incurred expenses as a result of the deficiencies and was seeking reimbursement therefor." We agree with the district court's conclusion that Seneca failed to establish it was entitled to damages. We affirm the judgment in favor of G & K on Seneca's counterclaim.

Attorney fees. G & K requests an award of appellate attorney fees and requests that we remand to the district court for a determination of both district court and appellate attorney fees. As noted above, in the "cancellation without cause" paragraph, the contract provides for Seneca to pay costs and reasonable attorney fees G & K incurs to "enforce Customer's obligations" under the contract. As we have concluded Seneca's cancellation of the contract was not

without cause, the attorney fee provisions do not apply. We deny G & K's request for appellate attorney fees.

Iowa Rule of Appellate Procedure 6.805(2). G & K, in its reply brief, raises an issue that arose after it filed its proof brief. The parties had a dispute over ordering the transcript and how much should be ordered. Seneca filed a motion under Iowa Rule of Appellate Procedure 6.805(2) requesting that the court compel G & K to order the transcript at G & K's expense.

Rule 6.804(3) provides for the appellant to designate in the combined certificate which portions of the transcript it ordered transcribed if the entire transcript is not ordered. Rule 6.805(1) provides for the appellee to designate additional parts of the transcript. Rule 6.805(2) provides for "disputes concerning which parts of the proceedings are to be transcribed and which party is to advance payment to the reporter" to be submitted to the district court. The court ruled "the parties should each advance one-half of the costs for the trial transcript and one copy." It explicitly made "no determination of which party should ultimately be responsible for costs of appeal, including costs of the transcript," and left that determination to this court.

Our supreme court has repeatedly stated issues cannot be raised for the first time in a reply brief or, if raised, will not be considered because they are not properly before the appellate court. *See, e.g.*, *Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 770-71 (Iowa 2009); *State v. Carroll*, 767 N.W.2d 638, 644 (Iowa 2009); *Goodenow v. City Council*, 574 N.W.2d 18, 27 (Iowa 1998); *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa

1996). From our review of these and other cases, it appears the issues raised in the reply briefs were issues that could have been raised in the initial briefs. The cases, however, make no distinction between issues that could have been raised and those that arose after the initial briefs were filed. Although we could reason there should be a distinction for issues such as this one that could not have been raised in the initial brief, we need not do so because the assessment of costs of this appeal resolves the dispute in the ordinary course without our having to "consider" the issue raised in the reply brief that is not properly before us.

For the reasons set forth above, we affirm the district court's decision. As there was a cross-appeal and we affirmed on both the appeal and cross-appeal, costs of this appeal are taxed two-thirds to appellant and one-third to cross-appellant.

AFFIRMED.