IN THE COURT OF APPEALS OF IOWA

No. 9-657 / 09-0222
Filed November 25, 2009

JOHN P. PAVONE and SIGNATURE MANAGEMENT GROUP, L.L.C.,
Plaintiffs-Appellants,

vs.

GERALD M. KIRKE and WILD ROSE ENTERTAINMENT, L.L.C.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

Plaintiffs appeal from the district court's entry of summary judgment in favor of defendants. **AFFIRMED.**

Timothy S. Bottaro and Amanda Van Wyhe of Vriezelaar, Tigges, Edgington, Bottaro, Boden & Ross, L.L.P., Sioux City, for appellant.

Mark McCormick, David M. Swinton, and Margaret C. Callahan of Belin Lamson McCormick Zumbach Flynn, P.C., Des Moines, and Brent B. Green and Mariclare Thinnes Culver of Duncan, Green, Brown & Langeness, Des Moines, for appellees.

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

DANILSON, J.

Plaintiffs John Pavone and Signature Management Group, L.L.C. (collectively "SMG") appeal from the district court's entry of summary judgment in favor of defendants Gerald M. Kirke and Wild Rose Entertainment, L.L.C. (collectively "Wild Rose"). We affirm.

I. Background Facts and Proceedings.

In early 2004, the Iowa Racing and Gaming Commission (IRGC) announced it would be accepting applications from companies hoping to be awarded licenses by the IRGC to open gambling casinos in select Iowa cities. This case stems from an October 22, 2004 agreement (the "October Agreement") between SMG and Wild Rose with regard to the parties' mutual goal of obtaining licenses for Wild Rose to open and own casinos that SMG would manage. In early 2005, as Wild Rose's applications for casino licenses were pending before the IRGC, relations between SMG and Wild Rose went sour. The parties attempted to finalize a management agreement that would supersede the October Agreement, but final negotiations failed when the parties could not reach agreement as to several critical terms.

On March 31, 2006, SMG filed a petition against Wild Rose seeking damages for Wild Rose's alleged breach of the October Agreement with regard to a casino in Emmetsburg that the IRGC had awarded Wild Rose a license to operate. A jury trial in that case began on August 20, 2007. The jury returned a special verdict in favor of SMG, finding Wild Rose had breached two sections of the October Agreement, and awarded SMG benefit-of-the-bargain damages in

the amount of $10 million. Wild Rose's appeal of the verdict in that case is currently before our court in *Pavone v. Kirke*, No. 08-0180.

Meanwhile, on June 8, 2006, the IRGC also awarded Wild Rose a license to operate a casino in Clinton. As the parties had no further communication after May 2005, it follows that no negotiation occurred with regard to the Clinton casino. On August 15, 2008, SMG filed a petition initiating the instant case, seeking damages for Wild Rose's failure to perform under the October Agreement with regard to the Clinton casino. Wild Rose filed a motion for summary judgment, arguing SMG's action should be barred under the doctrine of claim preclusion because it was based upon the same claim between the same parties as SMG's prior action for Emmetsburg.

Following a hearing, the district court entered a ruling granting summary judgment in favor of Wild Rose on January 7, 2009, determining that SMG had a single cause of action for breach of contract against Wild Rose, which SMG improperly split by limiting their first action to losses from the Emmetsburg casino and later bringing a second action with regard to the Clinton casino. The district court also concluded that Wild Rose repudiated any further obligation to SMG under the October Agreement when it sent the May 24, 2005 letter formally terminating the agreement. SMG appeals.

II. Standard of Review.

We review the district court's summary judgment ruling for the correction of errors at law. Iowa R. App. P. 6.907 (2009); *Lobberecht v. Chendrasekhar*, 744 N.W.2d 104, 106 (Iowa 2008). We may uphold the ruling on any ground raised before the district court, even if that ground was not a basis for the court's

decision. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3); *Lobberecht*, 744 N.W.2d at 106. The moving party has the burden to establish it is entitled to judgment as a matter of law, and the evidence must be viewed in the light most favorable to the nonmoving party. *Hunter v. City of Des Moines Mun. Hous. Auth.*, 742 N.W.2d 578, 584 (Iowa 2007).

III. Merits.

This cause of action is premised upon the same "contract" (the October Agreement) that is involved in *Pavone v. Kirke*, No. 08-0180, the companion case that is also currently before this court. In the instant case, the district court determined that a letter dated May 24, 2005, to SMG from Wild Rose terminated the October Agreement. The letter states:

> This letter is to formally notify you that the Agreement dated October 22, 2004 (the "Agreement") between Signature Management Group, L.L.C. ("Signature") and Wild Rose Entertainment, L.L.C., terminated pursuant to its terms effective May 11, 2005. Upon receipt of a final invoice from Signature, Wild Rose will pay the agreed consulting fees and expenses through May 11, 2005.
>
> Since the Iowa Racing and Gaming Commission did not award a license to Wild Rose for the Ottumwa project, and referendums were defeated in Warren, Madison and Dallas counties last November, the contingencies set forth in the Agreement unfortunately were not satisfied.
>
> We thank you for the consulting services Signature provided to Wild Rose and sincerely regret we were unable to realize our respective expectations under the Agreement.

SMG argues that the letter does not repudiate the agreement and, if it does, that there was not a total repudiation of the agreement or, alternatively, that the repudiation was nullified by Wild Rose's actions after the letter.

In determining the lack of any genuine issue of material fact, the district court stated:

> Plaintiffs also argue that they themselves did not treat the May 24, 2005 letter as a repudiation; therefore, it cannot be one. Plaintiffs rely on *Lane v. Crescent Beach Lodge & Resort, Inc.*, 199 N.W.2d 78, and the Black's Law Dictionary definition of repudiation, for the proposition that repudiation does not constitute anticipatory breach unless the other party elects to treat it as a breach, and brings suit for damages . . . . However, in this case, plaintiffs did treat the May 24, 2005 letter as an anticipatory breach of the October 22, 2004 agreement. They filed suit for breach of contract on March 31, 2006, arguing that the May 24, 2005 letter breached the agreement. Plaintiffs went to trial on this issue, and won a verdict in their favor. On appeal, plaintiffs also argue that there was a breach of the agreement. In the petition for this case, plaintiffs argue that the May 24, 2005 letter was a breach of the October 22, 2004 agreement. Plaintiff John Pavone submitted an affidavit that he did not treat the October 22, 2004 agreement as wholly abandoned or repudiated following receipt of the May 24, 2005 letter. This assertion alone does not create a genuine issue of material fact concerning the issue of repudiation. Plaintiffs' actions of filing suit for breach of the agreement show that they did believe the contract had been repudiated. There is no genuine issue of material fact concerning repudiation.

Our supreme court has addressed what constitutes a repudiation of a contract in stating, "Normally, repudiation consists of a statement that the repudiating party cannot or will not perform." *Conrad Bros. v. John Deere*, 640 N.W.2d 231, 241 (Iowa 2001) (citing II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.21, at 535 (2d ed.1998)). Such statement must be sufficiently positive to be reasonably understood that a breach will actually occur. *Id*. In

other words, the repudiation must be definite and unequivocal, and it must give the other party a positive notice of an intended breach. *See id*.

Here, the letter states that it notifies SMG that the October Agreement is "terminated pursuant to its terms." SMG's petition in the companion case also relies on this letter as a breach of the October Agreement. Although SMG may disagree that Wild Rose was entitled to terminate the October Agreement by "its terms," clearly the May 24, 2005 letter constitutes a definite and unequivocal repudiation of the agreement.[1]

SMG relies upon various emails between Wild Rose and SMG counsels for his contention that Wild Rose's actions after the letter constituted a retraction of the repudiation. We have reviewed the emails relied upon by SMG and determine this contention is without merit. At best, counsel for Wild Rose offered to speak with his client as to whether negotiations may continue.

SMG also contends that any repudiation did not apply to the entire October Agreement and that SMG did not treat the repudiation as a total breach. Repudiation or renunciation of a contract by an anticipatory breach was explained by our supreme court in *Danico v. Ford*, 230 Iowa 1237, 300 N.W. 547, 550 (1941):

> In *Collier, Inc., v. Rawson*, 202 Iowa 1159, 211 N.W. 704, 705 (1927), which was an action at law for damages resulting from the renunciation of a continuing executory contract, the court said,

[1] This determination is consistent with Jury Instruction No. 18 given in the companion case, *Pavone v. Kirke*, No. 08-0180. We observe that the instruction on the measure of damages in that action included the following items:

1. The value of the lost profits, earnings, and benefits that SMG would have made to date *if the contract had not been terminated*.
2. The present value of the lost profits, earnings, and benefits that SMG would have made in the future *if the contract had not been terminated*.

See Jury Instruction No. 18 (emphasis added).

> "It is now well settled that the final renunciation by one party of a contract, providing for future performance, gives to other party an immediate right of election either to continue to assert his strict contract rights, or to accept the renunciation and sue upon that as a distinct cause of action."
>
> In the same case the court adopted the following statement, cited in *Roehm v. Horst*, 178 U.S. 1, 20 S.Ct. 780, 44 L.Ed. 953 (1900), from *Johnstone v. Milling*, L.R. 16 Q.B.Div. 467, "Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission."
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> In *Quarton v. American Law Book Co.*, 143 Iowa 517, 528, 121 N.W. 1009, 1013 (1909), the court said, "It would be intolerable to hold that, if one party repudiates, renounces, or abandons his contract, the other may not treat the renunciation or repudiation as putting an end to it."

More recently, the court recited:

> Where one party to a contract repudiates the contract before the time for performance has arrived, the other party is relieved from its performance. *See* Restatement (Second) of Contracts § 253(2) (1981); 13 Richard A. Lord, *Williston on Contracts* § 39:37, at 663 (4th ed. 2000) [hereinafter *Williston*]. Additionally, once a party repudiates a contractual duty before performance is due, the other party may enforce the obligation by filing a claim for damages without fulfilling any conditions precedent. Restatement (Second) of Contracts § 253 cmt. b; 13 *Williston* § 39:37, at 666, 668. A repudiation of a contract is accorded the same effect as a breach by nonperformance. Restatement (Second) of Contracts § 255 cmt. a.

Conrad Bros., 640 N.W.2d at 241.

A breach of a contract may be a total breach for damages of all remaining rights to performance, or a partial breach for only part of the injured party's rights to performance. Restatement (Second) of Contracts § 236, 214. However, a breach by repudiation alone before any breach for nonperformance can only give rise to a claim for total breach. *Id*. at § 253(1), 286.

In the companion case, *Pavone v. Kirke*, No. 08-0180, anticipatory breach and breach of nonperformance were alleged and tried.[2] Generally, a breach by nonperformance accompanied or followed by repudiation also gives rise to damages for a total breach. *Id*. at § 243, 250-51.

There are several exceptions to this general rule. The first exception is where the only remaining duties of performance under the contract are those of the party in breach. *Id*. This first exception is inapplicable as clearly the October Agreement was not completely performed by SMG. The second exception arises where the parties have agreed that the repudiator's performance will be continued. *Id*. at § 243 cmt. b, 252-53. Here, there was no such agreement between the parties.

A third exception may also exist. Our supreme court has permitted a second suit where the contract was divisible. *Collier*, 202 Iowa 1159, 211 N.W. 704 at 705. As the court explained:

> If it could be said that the contract was indivisible in its nature, and capable only of a single breach, the first complaint might amount to an election to seek in that suit all damages for past as well as anticipated breaches. In the first action the plaintiff assigned a breach of contract as to a past and a particular breach or breaches. It is a continuing contract. There was no claim or charge as to all future and unfulfilled obligations. The contract is executory, and the first action applied to a recovery only of that part of the contract that was executed. The first action was not anticipatory in any sense.

Id.

[2] In this action, the petition has not specifically identified the breach or breaches to be anticipatory breach or breach of nonperformance. However, SMG agreed with Wild Rose's statement of undisputed material facts that SMG considered the May 25, 2005 letter as a "letter of breach" in its petition in the companion case. Further, SMG has not identified any other alleged breach in its own statement of disputed facts.

In *Collier*, our supreme court essentially determined that the parties' performance could be apportioned into "corresponding pairs of part performances" or "agreed equivalents" as those phrases are sometimes used.[3] *See id*.; Restatement (Second) of Contracts § 240, 229. This exception may permit a second suit, but it is only applicable where calculation is feasible such as where:

> [T]he price of separate items is separately stated in the agreement itself or in a price list on which the agreement was based, or can be reliably ascertained from stated prices for components or from a total price for similar items.

Restatement (Second) of Contracts § 240, cmt. d., p. 231-32.

A review of the October Agreement may suggest that the agreement is divisible on the basis of each casino in Iowa that Wild Rose has the opportunity to develop or operate. Further, in determining whether a contract is divisible, our supreme court has concluded that the resolution of this question depends on the parties' intent. *Equity Control Ass'ns Ltd. v. Root*, 638 N.W.2d 664, 671 (Iowa 2001). The severable nature of the subject may assist, but it does not overcome the parties' intent if shown in the contract terms. *Id*. at 672.

Paragraph 8 of the October Agreement specifically provides:

> Each party may terminate this agreement without cause upon giving of at least 120 days written notice to the other party. Notwithstanding the foregoing, if this agreement is unilaterally terminated without cause by Wild Rose, the provisions of section 3 and 4 of this agreement shall continue to be binding upon the parties subject to the terms of such separate agreements, as contemplated herein as may then exist.

[3] The contract in *Collier* involved installments of payments for advertising space with stated prices. *Collier*, 202 Iowa 1159, 211 N.W. at 704-05.

Neither this provision nor any other provision of the agreement recites the agreement as being divisible by casino. Where the parties negotiated and agreed that only section 3 and 4 were divisible, and this action was premised upon a breach of section 5, we conclude the October Agreement was not divisible by casino.[4] Because the repudiation by the May 24, 2005 letter was a termination of the entire October Agreement, the repudiation constituted a total breach and required SMG to seek damages for all remaining rights of performance under the contract in the first lawsuit.

SMG also contends it did not treat the repudiation as a total breach. SMG did, however, elect to bring the first suit, and as one authority has stated:

> An injured party who has a claim for damages for total breach as a result of repudiation, and who asserts a claim merely for damages for partial breach, runs the risk that if he prevails he will be barred under the doctrine of merger for further recovery, even in the event of the subsequent breach because he has "split the cause of action."

Restatement (Second) of Contracts § 243 cmt. b, 252-53.

The facts in this action also support the conclusion that Wild Rose's nonperformance of the October Agreement, without regard to any repudiation, if a breach, was a total breach requiring all damages to be sought in the initial suit. Emails through SMG's counsel in an effort to encourage Wild Rose to perform clearly proved unsuccessful. Where the contract requires performances to be exchanged under an exchange of promises and the injured party has not fully performed his duties, the claim for damages is for a total breach. *Id*. at § 243(1),

[4] The divisibility of a contract is ordinarily a question of fact. *Equity Control*, 638 N.W.2d at 671. However, there is no genuine issue of material fact in these proceedings because the parties' intent is clearly shown in paragraph 8 of their agreement.

250. Here, if Wild Rose's lack of performance relating to the Clinton casino was not otherwise excused or discharged, there can be no dispute that the breach was material, as there was no performance whatsoever after the parties' negotiations stopped.

The final contention by SMG is that when the first lawsuit was brought, a Clinton casino license had not been granted and any damages relating to the Clinton casino would have been speculative. Precisely *when* SMG's lawsuit was brought, however, does not change the fact that SMG was entitled to bring only *one* action claiming such damages under the October Agreement. In regard to damages arising from an anticipatory breach, one commentator has stated:

> A cause of action in favor of the plaintiff thereupon arose for the recovery of the damages consequent upon such breach. It might have brought suit immediately, or waited such length of time as the statute of limitations permitted, but only one action could be brought, and in that action, whenever brought, full recovery, covering future as well as the past, could be had. . . .
>
> It makes no difference that the liquidation of damages suffered by the plaintiff from the breach, in so far as the future was concerned, would be beset with difficulties. Those difficulties are the same in kind and no greater in degree than are frequently encountered in actions for personal injuries. . . . Uncertainties that may arise from an inability to forecast correctly what the future has in store for a plaintiff whose rights have been invaded by a breach of contract or a tort do not suffice to convert his right of action into a contingent one or to bar him from recovery as of a matured and accrued claim.

23 Richard A. Lord, *Williston on Contracts* § 69:38, at 577-78 (4th ed. 2000) (citing *City of Bridgeport v. Aetna Indemnity Cos.*, 91 Conn. 197, 99 A. 566 (1916).

IV. Conclusion

Upon our review, we find Wild Rose's May 24, 2005 letter constituted a definite and unequivocal repudiation, and served as a total breach of the October Agreement in its entirety. Any actions by the parties thereafter did not amount to a retraction of the repudiation. Even if we assume there was no repudiation, Wild Rose's nonperformance under the contract before SMG had fully performed constituted a total breach. Further, the October Agreement was not divisible by casino, and SMG was entitled to bring one action seeking damages for Wild Rose's anticipatory breach and breach of nonperformance of the agreement. SMG has already brought such action in the companion case, *Pavone v. Kirke*, No. 08-0180. Any claim by SMG seeking damages for remaining rights of performance under the contract should have been brought in the first lawsuit. We conclude no genuine issue of material fact exists in this case, and we therefore find no error in the district court's entry of summary judgment in favor of Wild Rose. For these reasons, we affirm.

Having considered the issues raised on appeal, we affirm.

AFFIRMED.