IN THE COURT OF APPEALS OF IOWA

No. 9-991 / 09-1066
Filed March 10, 2010

IN THE MATTER OF THE ESTATE OF RALPH M. ANDERSON, Deceased.

PAUL ANDERSON,
Petitioner-Appellant,

vs.

THE ESTATE OF RALPH M. ANDERSON,
Respondent-Appellee.

Appeal from the Iowa District Court for Hardin County, Carl D. Baker, Judge.

Paul Anderson appeals from the district court decision ordering him to pay damages to the estate of his father, Ralph M. Anderson. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

G. Arthur Cady, Hampton, for appellant.

Larry Curtis, Ames, Thomas Lawler, Parkersburg, and James P. Walters of Walters & Johnson, Iowa Falls, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

VOGEL, P.J.

Paul Anderson appeals from the district court decision ordering him to pay damages to the estate of his father, Ralph M. Anderson. We affirm the finding of the district court that the estate suffered a loss because Paul was a holdover on the farmland, but we reverse as to the amount of damages.

I. Background Facts and Proceedings.

Ralph M. Anderson died on August 4, 2006. He was survived by three of his children, Paul Anderson, Laura Conaway, and Barbara Marvick, as well as three grandchildren, Amber Reed, Haley Anderson, and January Wygle, the children of his predeceased son, John Anderson.

On July 30, 2004, Paul entered into a lease agreement to farm Ralph's 394 acres as well as live in the residence on the farm. Laura signed the lease as attorney-in-fact for Ralph, the landlord. After Ralph died and during the pendency of the estate, Paul continued to farm the land and live in the residence. The lease covering the 394 acres and the residence terminated on February 28, 2008. Included in the lease was a provision:

> At the termination of this Lease, Tenant will relinquish possession of the Real Estate to the Landlord. If Tenant fails to do so, Tenant agrees to pay Landlord, $150 per day, as liquidated damages until possession is delivered to Landlord.

After the lease terminated, Paul did not farm the land, but lived in the residence until July 8, 2008.

Ralph's will devised his property among his beneficiaries such that Paul was to receive 40 of the 394 acres. The "home place" where the residence was

situated was devised to the three grandchildren, who together were to receive 200 of the 394 acres.

Paul was the executor of his father's estate. On March 21, 2007, Paul executed a court officer's deed, conveying the forty acres to himself. He did not execute the deeds to the other beneficiaries at that time.

On January 18, 2008, he filed his "Final Report and Request for Executor Extraordinary Fee." Separate objections were filed by Barbara and by the grandchildren. A hearing was held on April 30, 2008, with the district court ruling on some matters on June 2, 2008. Significant in that ruling was the district court's findings that Paul had mismanaged the estate and had failed to deliver property to the devisees as required by statute, and that there was a clear hostility between the executor and the beneficiaries. Paul was ordered to convey the rest of the real estate to the appropriate beneficiaries, which he followed through with on June 6. Paul was then removed as executor and the current executor was appointed to serve.

A subsequent hearing was held on February 19, 2009, wherein the objectors requested Paul pay the fair rental value of the residence and liquidated damages for the time he remained on the farm after his lease expired on February 28, 2008. The district court filed its ruling on March 30, 2009, with an enlarged ruling filed on June 15, 2009.[1] The court ordered Paul to pay the estate $4000 as rent and $4000 as liquidated damages. Paul appeals.[2]

[1] Barbara reached an agreement with Paul, which was approved by order entered June 11, 2009, disposing of her objections to the final report filed by Paul.

[2] While the objector-grandchildren did not agree with the district court's calculations, they did not cross-appeal the ultimate judgment.

II. Scope of Review.

"Because this action was tried in probate as a proceeding in equity, our review is de novo." *In re Estate of Thomann*, 649 N.W.2d 1, 3 (Iowa 2002); *see* Iowa Code § 633.33 (2005).

III. Liquidated Damages Under the Farm Lease.

We begin by noting that title to the real estate passed to the grandchildren immediately after Ralph died, subject to the right of possession of the executor to administer the assets of the estate, including the payment of debts and charges. Iowa Code § 633.350. However, the devisee grandchildren had the right to rents and profits from the property, again subject to the executor determining net income. *Id.* § 637.201; *In re Estate of Pitt*, 153 Iowa 269, 269, 133 N.W. 660, 661 (1911).

The district court considered various methods for calculating the amount Paul owed the estate for remaining on the farm beyond the term of his lease, and factored in the acquiescence of the other beneficiaries to Paul's holdover. The court accepted the objector's request of $16,200,[3] but reduced that amount by $8200 for their failure to mitigate their damages. The court ordered Paul to pay "liquidated damages and rent to the estate in the amount of $8000." The June 15 order on Paul's motion to enlarge and amend, designated the judgment as "$4000 for rent and $4000 in liquidated damages" finding:

[3] Paul asserts that the district court's calculation of damages of $16,200, which was later reduced, did not follow the formula set forth in the farm lease for liquidated damages. He claims that the court should have used the contract amount of $150 per day times the 92 days from March 1, 2008, until June 1, 2008, when the new tenant took possession of the farm land. Using that formula, Paul asserts the district court should have started with a figure of $13,800. We agree with Paul that the $16,200 does not stem from a formula, but is what the objectors requested.

> The 2004 farm lease required Paul to pay rent and to pay liquidated damages.
>
> . . . The judgment for rent represents compensation for Paul's occupancy of the residence on the farm until July 8, 2008. The judgment for liquidated damages covers the entire farm for the period from March 1, 2008, until June 1, 2008, when the farm was rented.

Paul asserts the estate sustained no loss as he proposed in his final report filed on January 18, 2008, which was well before the termination of his lease, that he be allowed to farm the land for another year at $200 per acre. He claims he merely remained living in the residence but did nothing to "take possession" of the tillable ground, awaiting approval of the final report and his request to re-lease the land. From his perspective, it was the objections to his report and subsequent hearings that stalled the process of the estate securing a tenant on March 1, 2008, after his lease had expired. A new lease was eventually entered into on June 1, 2008, for $200 per acre, with the husband of Amber Reed as the tenant. However, had Paul conveyed the farmland out of the estate within nine months from his appointment as executor as required by Iowa code section 633.355, the grandchildren would have had "possession" such that they could have secured their own tenant beginning March 1, 2008. *See* Iowa Code § 633.355. The testimony from a Hardin county realtor supported the district court's conclusion the estate had been damaged, as entering into a farm lease for the 2008 crop season was delayed and $225 per acre could have been secured, with an earlier lease commitment. We affirm the district court's finding that the estate, albeit essentially the grandchildren, was damaged by Paul's holdover of the farmland.

Nonetheless, Paul contends the court erred in ordering him to pay $4000 of liquidated damages for holding over on the *entire* farm for the period of March 1, 2008, to June 1, 2008, as he had been devised 40 of the 394 acres described in the farm lease and that land had already been conveyed to him. Therefore, he should not have been ordered to pay liquidated damages for remaining on what was in part his own land. We agree with this point. Paul's acres represent 9.85% of the total. Therefore, we reduce the $4000 judgment by 9.85%, to $3606.

IV. Damages for Rent of the Residence.

Paul next asserts the district court erred in ordering him to pay actual damages of $4000 for his holdover occupancy of the residence from March 1, 2008, until July 8, 2008. He claims that historically "whoever farmed the land also received the home and outbuildings without payment of additional rent." Therefore, he argues that if the liquidated damages award is upheld for the farmland for the time frame of March 1, 2008, until June 1, 2008, then any additional "rent" on the house should only be calculated from June 1, 2008, until he vacated the house on July 8, 2008. We agree. The full liquidated damages provision of $150 per day should have been substantially reduced after the farmland was leased on June 1. There was nothing in the farm lease stating that rent would be charged on the residence separate from the rent on the farmland. To continue the full amount of liquidated damages for the remaining 38 days that Paul remained in the house, amounts to a sheer penalty (38 days x $150 per day = $5700). *See Engel v. Vernon*, 215 N.W.2d 506, 516 (Iowa 1974) ("The court will look into all the circumstances and give effect to such an agreement only so

far as equity and good conscience will permit; and if the sum stipulated is out of reasonable proportion to the loss or injury actually sustained or reasonably to be anticipated, it will be treated as a penalty."); *see also Aurora Bus. Park Assocs., L.P. v. Michael Albert, Inc.*, 548 N.W.2d 153, 156 (Iowa 1996). The realtor, Jeff Obrecht, testified the reasonable rental value of the residence was $350 per month. We affirm the district court that judgment should be entered for Paul's holdover of the residence, but reverse on the amount and find that judgment should be entered against Paul for $350 for the month of June and $90 for the eight days of July before he vacated the house.[4]

V. Attorney's Fees.

Finally, Paul asserts the court erred in failing to award him attorney's fees. The lease provided,

> If either party files suit to enforce any of the terms of this Lease, the prevailing party shall be entitled to recover court costs and reasonable attorneys' fees.

Paul did not prevail. The decision of the district court that "each party shall pay their own attorney fees" is affirmed.

V. Conclusion.

The decision of the district court is affirmed in part and reversed in part, reducing the judgment against Paul for holdover of the farm lease from $4000 to

[4] Paul also argues he should not have to pay any rent, as he paid $8000 (of estate funds), to repair the roof on the house, and that repair inures to the benefit of the objectors. The district court found in its June 2, 2008 ruling that because Paul failed to obtain court authority for these repairs, he was to reimburse the estate for the amounts expended. We agree because Paul should have timely conveyed the property out of the estate and not made the repairs without court approval.

$3606. The judgment against Paul for holdover of the residence is reduced from $4000 to $440.

Costs on appeal are assessed one-half to Paul and one-half to the Estate.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Doyle, J. concurs. Mansfield, J., dissents.

MANSFIELD, J. (dissenting)

I respectfully dissent. In my view, the district court did not properly apply the law of liquidated damages or the law of mitigation in this case. My colleagues adjust the district court's damages award without taking these factors into account, and therefore reach an incorrect result.

Iowa now follows the modern approach favorable to liquidated damage clauses. *Rohlin Const. Co. v. City of Hinton*, 476 N.W.2d 78, 79-80 (Iowa 1991); *see also Midwest Oilseeds, Inc. v. Limagrain Genetics Corp.*, 387 F.3d 705, 715-16 (8th Cir. 2004).

Here Paul Anderson entered into a farm lease with the decedent where he agreed to pay $45,310 per year. The lease provided that if the tenant failed to give up possession at the end of the lease term, he would pay liquidated damages to the landlord of $150 per day. This liquidated damage provision seems on its face to be reasonable. One hundred fifty dollars per day times 365 days would equal $54,750. Thus, the clause charges Paul only slightly more, on a pro rata basis, than the previous rent was. Moreover, our own legislature has recognized the time sensitivity of farm leases. *See* Iowa Code § 562.5 (2005) (mandating March 1 termination date). When a tenant holds over into the spring, the potential arises that the economic value of the farmland will be lost for the year, because no crop will be planted. For these reasons alone, I would enforce the clause as written.

Furthermore, the evidence at the hearing provided further support for enforcement of the liquidated damage clause. According to testimony from a realtor, cited by my colleagues, the estate lost $25 per acre in rent, or $9850,

because of Paul's holdover. The $9850 in actual damages is not far from the $13,800 produced by mathematical application of the clause. *See* Restatement (Second) of Contracts § 356(1) at 157 (1979) (liquidated amount may be reasonable in light of anticipated *or actual* loss (emphasis assed)).

Thus, I have no difficulty whatsoever in holding that Paul should have been ordered to pay at least $13,800 (or $150 times 92 days), since he held over on the entire property until at least June 1, 2008. I would agree with my colleagues that if this action is being pursued on behalf of the beneficiaries, rather than the executor, the $13,800 should be reduced to account for Paul's 9.85% interest in the farmland. While we sometimes rob Peter to pay Paul, there is no reason to require Paul to pay himself. Accordingly, it seems to me a minimum award of $12,440 ($13,800 times .9015) would have been appropriate.

The district court, however, awarded only $4000 in liquidated damages and $4000 in actual damages. This outcome cannot be supported in my view. With liquidated damages you are either in or out. If the clause was a penalty, it should have been invalidated and the court should have determined actual damages instead. If the clause was not a penalty, as I believe, its terms should have been followed. One cannot simply rewrite the parties' contract to award a "fair" amount of liquidated damages. [5]

[5] I generally agree with my colleagues' computation of actual damages from June 1, 2008 to July 8, 2008. After June 1, assuming Paul had been dispossessed of the farmland and was only staying in the residence, the holdover liquidated damage provision no longer applied (or if it did, it would constitute a penalty). At that point, actual damages had to be proved. The evidence supports my colleagues' $440 calculation of actual damages for that June 1-July 8 time period. Nonetheless, because the district court's factual findings mandated an award of over $8000 in liquidated damages alone, I would affirm.

From reading the district court's opinion, it also appears to have concluded that the beneficiaries failed to mitigate damages because they did not "immediately take legal action to remove Paul after the expiration of the lease." This also appears to me to have been an error. Paul had an affirmative duty to vacate when his lease expired. The duty to mitigate generally does not include a duty to bring a lawsuit to evict a holdover tenant who remains in possession. *See Resolution Trust Corp. v. Cramer*, 6 F.3d 1102, 1108-09 (5th Cir. 1993); Restatement (Second) of Property: Landlord and Tenant §§ 14.5, at 30, 14.7, at 43 (1977).

In any event, once a liquidated damages clause is determined to be valid, the damages thereunder may not be reduced based on failure to mitigate. *Fed. Realty Ltd. P'ship v. Choices Women's Med. Ctr., Inc*., 735 N.Y.S.2d 159, 161-62 (2001); 22 Am.Jur.2d *Damages* § 538 at 473–74 (2003).

> It follows naturally that once a court has determined that a liquidated damages clause is valid, it need not make further inquiries as to actual damages. This includes a determination of whether the parties attempted to mitigate damages resulting from the breach . . . . [T]here exists no duty to mitigate damages where a valid liquidated damages clause exists.

Barrie Sch. v. Patch, 933 A.2d 382, 392 (Md. 2007); *see also Lake River Corp. v. Carborundum Co*., 769 F.2d 1284, 1291 (7th Cir. 1985). Mitigation arguments may be considered in determining whether the clause is a penalty, but not to reduce the damages once the clause is found to be enforceable.

The beneficiaries make most of these points in their appellees' brief. I find their arguments generally persuasive. However, since they did not cross-appeal, I think they are stuck with the district court's award of $8000. Nonetheless, I

would not reduce those damages as my colleagues have done. Instead, I would affirm on the ground that the record amply justifies the damages that were awarded.