STATE OF MINNESOTA
IN COURT OF APPEALS
A10-869

Glacial Plains Cooperative,
f/k/a United Farmers Elevator,
Appellant,

vs.

Chippewa Valley Ethanol Company, LLP,
successor to Chippewa Valley Ethanol Company, LLC,
Respondent.

Filed February 8, 2011
Reversed and remanded
Hudson, Judge

Swift County District Court
File No. 76-CV-09-483

Michael M. Fluegel, Jason G. Lina, Fluegel, Anderson, McLaughlin & Brutlag, Chtd., Morris, Minnesota (for appellant)

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Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant cooperative association challenges the district court's judgment declaring that appellant's contract with respondent ethanol company did not require

respondent to pay storage costs for grain stored in appellant's grain-handling facility. Because the district court's findings do not support its conclusions of law, we reverse and remand for the entry of judgment in favor of appellant for unpaid storage costs.

FACTS

Appellant Glacial Plains Cooperative, formerly known as United Farmers Elevator, is a Minnesota cooperative association. Respondent Chippewa Valley Ethanol Company, LLLP (CVEC) is a limited liability limited partnership and a successor to Chippewa Valley Ethanol Company, LLC.

In the early 1990s, CVEC planned to build an ethanol plant in Benson, but CVEC did not want to pay for a grain-handling facility to supply the plant. Glacial Plains expressed interest in handling all of the grain to be processed by the plant in exchange for payment. In 1994, the parties signed a contract stating that, in consideration for Glacial Plains' right to handle all of the grain provided to the plant, Glacial Plains would purchase an equity stake in an entity that would then transfer land to Glacial Plains to build a grain-handling facility. In return for its position as exclusive grain handler for CVEC's plant, Glacial Plains agreed to keep the handling facility operational and provide sufficient grain to keep the plant running at full capacity.

The 1994 contract also provided that CVEC would pay a handling fee of 3.2 cents per bushel to Glacial Plains for all grain delivered to the plant, effective for three years, with that fee to be renegotiated for each successive three-year period. The contract also stated that "[i]f [CVEC] fails to process corn for a ten (10) day period, storage charges

will be paid to [Glacial Plains] on [CVEC] inventory according to [Glacial Plains'] tariff storage rate."

The ethanol plant and the handling facility were built next to each other, with grain conveyed from handling-facility bins to the plant. When the plant began operations in 1996, it had a grain requirement of about 16,300 bushels per day, or 5.77 million bushels per year. The handling facility then had a capacity of about 398,000 bushels. By 1999, the ethanol plant required over 7 million bushels per year to operate. The handling facility added approximately 364,000 bushels of additional storage capacity around the same time.

In 1999, the parties extended the 1994 contract in writing to increase the handling fee to 4.0 cents per bushel. In 2001, they signed an addendum contract in which they agreed to "clarify and modify" the contract by recalculating the handling fee for the upcoming three-year period using a formula based on fixed-cost, variable-cost, and margin components. Neither the 1999 nor the 2001 modifications included a provision relating to storage costs.

Meanwhile, in 1998, Glacial Plains and the Benson Corn Pool entered into a corn-origination contract by which the corn pool agreed to buy all of its corn from Glacial Plains, and Glacial Plains agreed to become the sole procurement agent for the corn pool.[1] In 2002, Glacial Plains also entered into a corn-origination contract with CVEC,

[1] Cooperative members utilize a corn pool to fulfill their corn-delivery requirements without delivering corn on their own.

under which CVEC agreed to purchase all of its corn from Glacial Plains, and Glacial Plains agreed to have adequate supplies of corn on hand for CVEC at all times.[2]

In 2003, CVEC completed a major expansion to the ethanol plant, which ultimately increased ethanol production from about 15 million gallons per year to about 49 million gallons per year. The expanded plant requires about 17.24 million bushels of grain per year and operates about 355 days per year.

In October 2003, the parties signed another addendum, again adjusting the handling fee upward to five cents per bushel, based on fixed, variable, and margin components. The 2003 addendum also stated: "As part of this agreement [Glacial Plains] will provide CVEC 180,000 bushels of storage. Any volumes over 180,000 bushels shall be invoiced out at prevailing market rates." The addendum specified that it would run for a three-year period, retroactive to August 1, 2003.

In 2005, Glacial Plains entered into an additional corn-origination contract with CVEC. This contract specified that Glacial Plains would "increase the allowed storage available to CVEC by an additional 45,000 bushels during the term of [the] agreement." The contract had no stated termination date, but it allowed termination by either party with 90-days' written notice. In August 2008, Glacial Plans gave the required notice to CVEC to terminate this corn-origination contract. The notice stated that, with the

[2] The plant uses corn from three sources: member deliveries, corn pools, and corn that CVEC purchases in excess of member requirements. The origination contract with Glacial Plains related to the corn that CVEC needed in excess of corn-pool and member requirements.

cancellation of the contract, the CVEC storage space would be decreased by 45,000 bushels "to the original 180,000 bushels."

After the 2005 corn-origination contract was terminated, CVEC's then-general manager wrote to Glacial Plains' general manager, stating that CVEC "agree[d] that 180,000 bushels in the [handling] facility will continue to be allocated to CVEC on a cost-free basis," and that Glacial Plains "must provide additional storage to CVEC on a prevailing market-rate basis" to fulfill its obligation to provide storage capacity to handle all of the plant's grain requirements. The letter stated that "[t]he 180,000 bushel volume is simply inadequate for CVEC to manage its 16.7 million bushel per input requirements, especially now that much of that volume will need to come from other parties." Glacial Plains continued to bill CVEC for grain storage, CVEC refused to pay, and Glacial Plains eventually declined to accept deliveries of corn to be processed by CVEC because storage costs had not been paid.

CVEC filed a demand for arbitration under the 1994 contract, alleging that Glacial Plains had breached that contract by failing to provide the agreed-on level of storage for CVEC. In response, Glacial Plains filed a complaint in district court for breach of contract based on CVEC's refusal to pay storage costs and a declaration that the 1994 contract did not require it to provide no-cost storage for CVEC's corn inventory. CVEC denied that storage costs were owed and sought dismissal of the action. After a hearing, the parties agreed to proceed by trial before the district court on both issues.

At trial, Glacial Plains presented testimony from an expert grain merchandiser, a grain merchandiser employed by Glacial Plains, and Glacial Plains' general manager.

CVEC presented testimony from CVEC's former general manager and CVEC's finance manager. The district court issued its findings of fact, conclusions of law, order for judgment, and judgment, denying Glacial Plains' claims for relief. The court concluded that the 1994 contract was ambiguous with respect to CVEC's obligation to pay storage costs, and that Glacial Plains had not proved by a preponderance of the evidence that CVEC was required to pay Glacial Plains any storage costs, other than in a situation when CVEC did not process any grain for a ten-day period.[3] This appeal follows.

D E C I S I O N

On appeal from a judgment when there has been no motion for a new trial, this court's review is limited to "whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and the judgment." *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976). But a motion for a new trial is not a prerequisite for appellate review of a substantive legal issue that was considered and addressed by the district court. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 311 (Minn. 2003). Because the district court addressed the legal issue of whether the parties' contract was ambiguous, we may review that determination, even absent a motion for a new trial. *See id.*

The determination of whether a contract is ambiguous presents a question of law, which this court reviews de novo. *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). The purpose of contract interpretation is to ascertain and

[3] CVEC also asserted a counterclaim for failure to deliver the same grade of corn as delivered by CVEC members. But the district court found that no evidence or argument had been submitted relating to this claim and declined to address it.

enforce the intent of the parties. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). If a contract is unambiguous, the parties' intent is determined from its plain language. *Id*. But if a contract is ambiguous, the court may consider evidence other than the language of the contract itself to determine the parties' intent. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982). "A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation." *Art Goebel, Inc.*, 567 N.W.2d at 515.

Although the district court's memorandum of law stated that the 1994 contract was "fully integrated," the district court also determined that the contract was ambiguous and proceeded to consider extrinsic evidence. In so doing, the district court found that CVEC had paid storage costs as invoiced "for some period" after the plant began operations. Despite this finding, the district court concluded that the extrinsic evidence, including the parties' course of dealing, did not support appellant's argument that it had the right to charge storage costs, other than after a ten-day period when no grain had been processed.

Glacial Plains does not challenge the district court's determination that the 1994 contract is ambiguous, but it argues that the district court's conclusions of law are not supported by its findings of fact, which demonstrate that Glacial Plains was entitled to charge storage costs on amounts greater than 180,000 bushels. CVEC argues that the 1994 contract was unambiguous, but that, in any event, the district court's conclusion may be sustained on the basis that the contract prohibited the charging of storage costs.

We first address whether, as a matter of law, the 1994 contract is ambiguous. The 1994 contract specifies that if the ethanol plant did not process corn for a ten-day period,

CVEC would pay storage charges "on [CVEC] inventory according to [Glacial Plains'] tariff storage rate." The contract also states that CVEC would pay a handling fee of 3.2 cents per bushel. But the contract is unclear as to whether the handling fee alone was intended to compensate Glacial Plains for any storage costs, apart from when CVEC failed to process any corn for a ten-day period. Therefore, because the contract's language is reasonably susceptible to more than one interpretation, the district court did not err by concluding that it was ambiguous.

CVEC argues that the court improperly admitted parol evidence to interpret the 1994 contract. The parol-evidence rule bars admission of extrinsic evidence of negotiations occurring before or contemporaneously with the signing of a fully-integrated, unambiguous contract. *Apple Valley Red-E-Mix, Inc. v. Mills-Winfield Eng'g Sales, Inc.*, 436 N.W.2d 121, 123–24 (Minn. App. 1989), *review denied* (Minn. Apr. 26, 1989). But we have concluded that the 1994 contract is ambiguous. When a contract is ambiguous, evidence of oral agreements that tend to establish the parties' intent is admissible. *Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 17 (Minn. 1982). Further, the parol-evidence rule does not exclude evidence of subsequent oral modifications of a written contract. *LaPanta v. Heidelberger*, 392 N.W.2d 254, 258–59 (Minn. App. 1986). Here, the district court admitted testimony relating to the parties' conduct occurring after the signing of the 1994 contract—as opposed to conduct occurring prior to or contemporaneously to its execution. The parol-evidence rule does not exclude this evidence. *See id.*

CVEC also argues that the statute of frauds precludes any evidence of oral modification of the 1994 contract such as the parties' partial performance. The Minnesota statute of frauds requires that, if a contract, by its terms, is not to be performed within one year, it must be in writing and signed by the party against whom it is to be enforced. Minn. Stat. § 513.01 (2010). But partial performance may remove a contract from the statute of frauds. *See Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 325–26 (Minn. 2004) (concluding that "extensive performance by both parties" relating to a listing agreement took the agreement out of the relevant statute of frauds). Here, the record unequivocally shows that both parties extensively performed their obligations under the 1994 contract. We also note that the parties clarified the contract in writing in 1999, 2001, and 2003. Therefore, CVEC's statute-of-frauds argument fails, and the district court properly considered evidence of the parties' oral modification.

Contract interpretation—course of performance

If a contract is ambiguous, relevant evidence may be taken from the parties' course of performance, their course of dealing, and their usage of trade. Restatement (Second) of Contracts § 202(5) (1981). Course of performance refers to the actions of the parties during the performance of the contract at issue. *Cut Price Super Mkts. v. Kingpin Foods, Inc.*, 256 Minn. 339, 354, 98 N.W.2d 257, 268 (1959). Evidence of course of performance is useful because it demonstrates the parties' practical construction of the terms of a contract, which is probative of their intent. *Cornell v. N.F.C. Eng'g Co.*, 274 Minn. 391, 395–96, 144 N.W.2d 369, 372 (1966).

Here, the district court found, as to course of performance, that CVEC had paid storage costs as invoiced "for some period" after the plant began operations, excluding any ten-day period when CVEC did not process grain; that, during another period, storage costs were not invoiced and paid; and that, recently, CVEC had paid storage costs in accordance with later modifications and clarifications of the 1994 contract. But the district court concluded that "[t]he gratuitous payment of storage fees without a corresponding duty to pay noted in any written agreement is nevertheless inadequate to allow the Court to read such an obligation into the written contract at issue." The district court considered the 2003 modification of the 1994 contract, which specifically authorized the payment of storage costs, but concluded that the modification controlled only one three-year period.

Glacial Plains argues that the district court's findings of fact do not support its conclusion of law that Glacial Plains was not entitled to charge any storage costs to CVEC, unless the plant completely failed to process corn for a ten-day period. Glacial Plains maintains that the parties' course of performance relating to the 1994 contract conclusively shows that the parties intended CVEC to pay storage costs to Glacial Plains on grain stored over 180,000 bushels. We agree.

The district court's findings were based on extensive evidence relating to CVEC's payment of storage costs to Glacial Plains over several years. The district court expressly found that: CVEC paid storage costs invoiced by Glacial Plains from January – June 1997; Glacial Plains billed CVEC for storage in excess of 180,000 bushels in December 2002; and CVEC paid storage costs as invoiced by Glacial Plains until November 2008.

At trial, a grain merchandiser employed by Glacial Plains testified that Glacial Plains would charge CVEC storage on any bushels stored over 180,000 (or 225,000 when the 2005 corn-origination contract was in place). CVEC's finance manager testified that, by 1997, storage costs were being paid to Glacial Plains. Although Glacial Plains did not introduce evidence of storage costs paid from June 1997 – November 2002, its billing records to CVEC from 1997, the end of 2002, and 2003 – October 2008 show that CVEC regularly paid storage costs to Glacial Plains. These payments include approximately $119,000 paid from December 2002 through July 2003, which was immediately prior to the effective date of the 2003 agreement that expressly authorized storage costs for bushels stored over the 180,000-bushel limit.

In addition, Glacial Plains' general manager testified that since 1999, there had been discussion about the amount of storage available to CVEC, and in 2003 "[w]e finally decided to put it in the contract and specifically state what the storage was . . . because we could not find it in any other previous documents." He stated his belief that, while CVEC paid the handling fee on all bushels, "[the] reality . . . is that anything over 180,000 bushels [CVEC] pay[s] storage as [it] ha[s] paid storage . . . in the past." And the former CVEC general manager testified that, in a September 2008 letter, he agreed that 180,000 bushels would continue to be allocated to CVEC on a cost-free basis, with Glacial Plains providing additional storage at prevailing market rates. Therefore, contrary to the district court's conclusion that the 1994 contract did not authorize the payment of storage costs, the evidence unequivocally shows that the parties performed

consistently with an interpretation of the contract that entitled Glacial Plains to payment of storage costs for any bushels stored over the 180,000-bushel free-storage limit.

CVEC suggests that the parties agreed that the negotiated handling fee fully compensated Glacial Plains for any grain-storage costs incurred. But the record does not support this argument, and CVEC has failed to point to evidence that would reasonably sustain the district court's determination that no storage costs were owed on bushels exceeding 180,000 in Glacial Plains' facility. Because the district court's conclusions of law are not supported by its findings of fact, which correctly reflect the evidence presented at trial, we reverse.

We finally note that, at trial, the parties reached a tentative stipulation as to an amount that would adequately compensate Glacial Plains for unpaid storage costs from November 2008 – September 2009, should it be concluded that CVEC owes Glacial Plains for grain stored in excess of 180,000 bushels. We have so concluded and therefore remand to the district court to determine the ultimate amount owed, consistent with this opinion.

Reversed and remanded.