

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

PRODUCERS LIVESTOCK MKTG. ASSN. V. PETERSON

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PRODUCERS LIVESTOCK MARKETING ASSOCIATION, APPELLEE,

v.

BRYAN PETERSON, APPELLANT.

**FILED**

FEB 15 2011

Filed February 15, 2011. No. A-10-436.

CLERK  
NEBRASKA SUPREME COURT  
COURT OF APPEALS

Appeal from the District Court for Valley County: KARIN L. NOAKES, Judge. Affirmed.

Barry D. Geweke, of Stowell, Kruml, Geweke & Cullers, P.C., L.L.O., for appellant.

David A. Domina and Jason B. Bottlinger, of Domina Law Group, P.C., L.L.O., for appellee.

MOORE and CASSEL, Judges.

PER CURIAM.

INTRODUCTION

Bryan Peterson appeals from an order of the district court for Valley County, granting summary judgment in favor of Producers Livestock Marketing Association (Producers) in the amount of \$722,550. This case involves the losses Peterson sustained on four hedge contracts. Under Peterson's contracts with Producers, Producers agreed to hedge Peterson's risk on corn by buying futures contracts and Peterson agreed to be liable to Producers for any losses. On appeal, Peterson argues that the trial court erred in finding that Producers kept Peterson informed about market conditions and that there was no duty established under the parties' contracts which required Producers to provide Peterson advice on whether to sell or hold the hedge contracts. Peterson also argues that the trial court erred in failing to find that Producers breached an implied covenant of good faith and fair dealing, in denying Peterson's claim that Producers should have entered into a speculative contract with Peterson rather than a hedge contract, in awarding Producers summary judgment against Peterson in the amount of \$722,550, and in dismissing Peterson's counterclaim. For the reasons set forth below, we affirm.

## BACKGROUND

On May 21, 2009, Producers filed suit against Peterson on four contracts, requesting a total judgment against Peterson of \$722,550. The record shows that Peterson and Producers entered into commodities contracts that were titled as hedge contracts. Under all four contracts, Peterson and Producers agreed that Producers would buy corn futures contracts for Peterson, the intent of which was to hedge against the increasing price of corn due to the fact that corn is an integral part of the feeding process for Peterson's cattle.

All four contracts contain Producers' agreement to buy, on Peterson's behalf, bushels of December 2008 corn. The first three contracts are dated June 10, 2008. In the first contract, Producers agreed to buy 50,000 bushels at \$6.93 per bushel. Under the second contract, Producers agreed to buy 35,000 bushels at \$6.95 per bushel. Under the third contract, Producers agreed to buy 65,000 bushels at \$6.95 per bushel. Under contract four, dated June 18, 2008, Producers agreed to purchase 50,000 bushels at \$7.75 per bushel.

On November 26, 2008, Producers liquidated each of the four contracts, at Peterson's direction, and sustained the following losses: \$170,000 on contract one; \$119,537.50 on contract two; \$222,137.50 on contract three; and \$210,875 on contract four, for a total of \$722,550.

Under the parties' contracts, Producers agreed to pay all margin calls necessary to establish and maintain the commodity futures position. The parties' contracts state that Producers will hedge Peterson's price risk on the commodity by buying futures contracts, while Peterson would be responsible for, or entitled to, the net result of the futures position. The parties agree that Peterson did not pay Producers, as required under the contracts, for the losses that were sustained when the contracts were liquidated.

In Peterson's answer and counterclaim, filed June 30, 2009, Peterson stated that Producers was in breach of contract by failing to perform its obligations under the hedge contracts with reasonable care, skill, and diligence and that Producers breached the implied covenant of good faith and fair dealing. Peterson also stated that Producers had the duty to keep him well informed on market conditions and failed to do so. Lastly, Peterson also stated that Producers failed to set up Peterson's contracts in a speculative contract rather than a hedge contract.

In his counterclaim, Peterson filed suit against Producers for the lost profit on the hedge contracts purchased by Peterson through Producers, stating there could have been a profit in excess of \$100,000 if the contracts had been liquidated at an earlier date.

Subsequently, Producers filed a motion for summary judgment, stating that there were no genuine issues of material fact and that Peterson owed Producers \$722,550.

A hearing on Producers' summary judgment motion was held on February 19, 2010.

In an order filed April 1, 2010, the trial court found that no genuine issues of material fact existed and that summary judgment should be granted in favor of Producers in the amount of \$722,550. The trial court found that after Producers liquidated the December 2008 futures contracts at a loss, Peterson failed to pay the losses as required under the contracts. The trial court also dismissed Peterson's counterclaim. Specifically, the trial court stated that there were no material facts in dispute and that Producers did not breach any terms of the contracts. Peterson appeals.

## ASSIGNMENTS OF ERROR

On appeal, Peterson argues that the trial court erred in (1) finding that Producers kept Peterson informed about market conditions and shared that information with Peterson and that there was no duty established under the contract which required Producers to provide Peterson advice on whether to sell or hold the hedge contracts, (2) failing to find that Producers breached an implied covenant of good faith and fair dealing, (3) denying Peterson's claim that Producers should have entered into a speculative contract with Peterson rather than a hedge contract, (4) awarding Producers summary judgment against Peterson in the amount of \$722,550 with interest accruing at the current judgment interest rate, and (5) dismissing Peterson's counterclaim.

## STANDARD OF REVIEW

Summary judgment is proper if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. In reviewing a summary judgment, the appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

## ANALYSIS

### *Producers' Duty to Inform and Advise Peterson.*

On appeal, Peterson argues that the trial court erred in finding that Producers kept Peterson informed about market conditions and that there was no duty established under the hedge contracts which required Producers to provide Peterson advice on whether to sell or hold the contracts.

In support of his argument, Peterson cites section 1(5) of the hedge contracts which required Producers to "[k]eep well informed on market conditions and maintain regular contact with [Peterson] during the contracted period." Peterson acknowledged in his deposition that he talked to the commodities manager of Producers once a week about the status of the markets and the affect on Peterson's hedge contracts. Peterson also stated that Producers kept him informed about the gains and losses on his contracts at all times. Peterson stated that he made the conscious decision to hold on to the hedge contracts because he thought that the price of corn was going to go back up.

On this record, we conclude that Producers kept Peterson informed about the market conditions and shared that information with Peterson. As the trial court found, no genuine issues of material fact exist as to whether Producers kept Peterson informed about market conditions and shared that information with Peterson.

In support of his argument that the trial court erred in failing to find that Producers owed Peterson a duty to advise Peterson to sell or hold his hedge contracts, Peterson cites section 2(6) of the parties' contracts which requires Peterson to "[p]ay [Producers] a service fee of \$.05/bushel that will be paid within 7 business days" of the contract date. Peterson points to the affidavit of Wally Muhs which was offered into evidence by Peterson at the summary judgment hearing. In Muhs' affidavit, he states that he has been a licensed and certified commodities

broker for over 27 years. Muhs also stated that he had reviewed the hedge contracts and that in his opinion, given the service fee Peterson paid Producers under the contracts, Peterson had the right to expect that Producers would stay informed on market conditions and advise Peterson when to buy, sell, and otherwise protect his positions.

In addressing Peterson's arguments, the trial court stated:

The contract does not contain a provision requiring Producers to make recommendations as to the futures market. There was no duty established under the contract which required Producers to provide advice on whether to sell or hold the contracts. Therefore, any dispute as to whether or not the advice was given or not given or disputes as to the value of the advice are not relevant.

We agree with the trial court. In the instant case, section 2(6) of the parties' contracts does not contain any provision requiring Producers to advise Peterson to sell or hold his hedge contracts. Additionally, Peterson fails to point us to any other provision in the hedge contracts imposing a duty to advise on Producers. The hedge contracts are clear and unambiguous, and therefore, they are not open to construction. A written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction. *Keenan Packaging Supply v. McDermott*, 13 Neb. App. 710, 700 N.W.2d 645 (2005). Therefore, the trial court did not err in finding that there was no duty established under the hedge contracts which required Producers to provide Peterson advice on whether to sell or hold the contracts. No genuine issues of material fact exist as to Producers' duty to advise Peterson.

#### *Implied Covenant of Faith and Fair Dealing.*

Peterson argues that the trial court erred in failing to find that Producers breached an implied covenant of good faith and fair dealing. Specifically, Peterson states that Producers injured his rights to receive the benefit of the hedge contracts because Peterson failed to advise him to get out of the hedge contracts.

The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003). The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract. *Id.*

Given our resolution above that Producers did not have a duty under the contracts to advise Peterson to get out of the hedge contracts, we find that Peterson's claim is without merit. The trial court did not err in finding that Producers did not breach an implied covenant of good faith and fair dealing. On this record, no genuine issue of material fact exists as to whether Producers breached an implied covenant of good faith and fair dealing.

#### *Speculative Contract Versus Hedge Contract.*

Peterson contends that the trial court erred in denying his claim that Producers should have entered into a speculative contract with Peterson instead of a hedge contract. Peterson points again to the affidavit of Muhs. In his affidavit, Muhs defined speculation as looking for a favorable fluctuation in price for the realization of profit on the corn futures contract itself. Muhs stated that Producers should have known that Peterson was speculating rather than hedging and that Producers had a duty to place Peterson into a speculative account rather than a hedge

account. Muhs stated that if Producers had placed Peterson in a speculative account rather than a hedge account, Peterson would not have lost the money that he did.

In dismissing Peterson's argument, the trial court stated:

This claim has no merit. There is no evidence that [Peterson] was tricked or improperly induced into the hedge contract. Parties to contracts are not required to advise the other party as to which type of contract would be most beneficial for them and this contract does not require such advisement.

We agree with the trial court. The record shows that Peterson told Producers that he planned to acquire corn because as a cattle feeder he needed to buy corn and control the price required to be paid for it. Peterson clearly understood that as a result, his contracts would be considered hedge contracts. The contracts themselves state, "[Peterson] understands [Producers] will hedge [Peterson's] price risk on the above contracted commodity by buying futures contracts." In Peterson's deposition, Peterson stated that he "probably didn't" tell Producers that he wanted to purchase a speculative contract for corn. On this record, there is no evidence that Producers knew or should have known that Peterson was speculating rather than hedging. Therefore, no genuine issue of fact exists as to Peterson's claim and the trial court did not err in so finding.

#### *Summary Judgment and Peterson's Counterclaim.*

Peterson contends that the trial court erred in granting summary judgment in favor of Producers in the amount of \$722,550 with interest accruing at the current judgment interest rate and in dismissing Peterson's counterclaim. Peterson generally contends that Producers did not meet its duties as Peterson's broker.

In entering summary judgment, the trial court found that Producers performed its duties, that Producers did not breach any term of the contract, and that there were no material facts in dispute. The trial court also noted that after Producers liquidated the December 2008 futures contracts at a loss, Peterson refused to pay the losses as required under the contract. The court further noted that Peterson's counterclaim should be dismissed given its finding that Producers had no duty under the contract to advise Peterson to get out of the hedge contracts when the price of corn went down.

On this record, we conclude that the trial court did not err in granting summary judgment in favor of Producers and against Peterson or in dismissing Peterson's counterclaim. Having reviewed the record most favorably to Peterson, we conclude that the trial court's grant of summary judgment in favor of Peterson was proper because the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts. As the trial court found, the record shows that Producers is entitled to judgment as a matter of law.

#### CONCLUSION

After reviewing the record, we conclude that the trial court did not err in finding that Producers kept Peterson informed about market conditions and shared that information with Peterson and that there was no duty established under the parties' contracts which required Producers to provide Peterson advice on whether to sell or hold the hedge contracts. Additionally, the trial court did not err in failing to find that Producers breached an implied

covenant of good faith and fair dealing or in denying Peterson's claim that Producers should have entered into a speculative contract with Peterson rather than a hedge contract. The trial court was correct in awarding Producers summary judgment against Peterson in the amount of \$722,550 and in dismissing Peterson's counterclaim. Therefore, the trial court's judgment in favor of Producers and against Peterson is affirmed in all respects.

**AFFIRMED.**

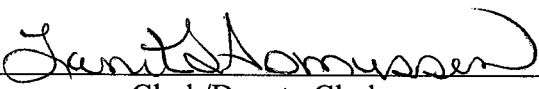
CARLSON, Judge, participating on briefs.

THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of this Court, in the City of Lincoln.



  
Clerk/Deputy Clerk

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