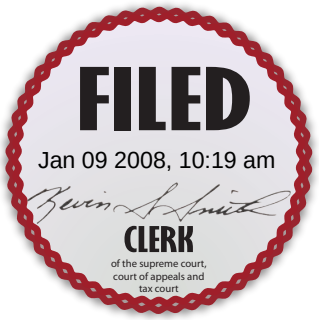

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IN THE COURT OF APPEALS OF INDIANA

KENNETH J. HENDRICKSON d/b/a FAMILY FARM SEEDS, and FAMILY FARM SEEDS, INC.,	)	
Appellants-Defendants,	)	
vs.	)	No. 91A05-0705-CV-266
KERKHOFF SEED FARM, INCORPORATED,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Robert B. Mrzlack, Judge
Cause No. 91D01-0510-CC-00165

JANUARY 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Appellants-Defendants Kenneth J. Hendrickson ("Hendrickson") and Family Farm Seeds, Inc. ("Family Farm Seeds") (collectively, "the Defendants") appeal the trial court's entry of judgment against them on Kerkhoff Seed Farm, Inc.'s ("Kerkhoff") claim for collection of a debt and the trial court's entry of judgment against them on their breach of contract counterclaim. We affirm in part, reverse in part, and remand.

The Defendants raise several issues, which we consolidate and restate as:

I. Whether the trial court erred by entering judgment against both Hendrickson and Family Farm Seeds on Kerkhoff's collection of a debt claim;

II. Whether the trial court's judgment against the Defendants on their breach of contract counterclaim was contrary to law; and

III. Whether the trial court erred in its determination of damages.

Kerkhoff produces seed corn for seed companies. Family Farm Seeds is a seed dealer that sells hybrid seed corn to area farmers for planting. Hendrickson incorporated Family Farm Seeds when he formed it in January 2000, and he is the vice-president and treasurer of the corporation and authorized to make contracts for it.

In July 2003, Family Farm Seeds and Kerkhoff entered into a contract for Kerkhoff to produce several specific hybrids of seed corn for Family Farm Seeds to sell to farmers for the 2004-growing season. The contract price for the hybrid seed corn ranged from $33.50 to $42.00 per unit, and Family Farm Seeds requested well over one thousand units. Kerkhoff prepared the contract and, for billing purposes, designated the contract as 03-FFS-01. The contract indicated that the "Seller" was "Kerkhoff Seed

Farm, Inc." and that the "Buyer" was "Family Farm Seeds" located in Chalmers, Indiana. Exhibits at 6. In regard to shipping, the contract provided that the "Corn will be shipped in Buyer supplied truck between 11/1/03 and 3/1/04." *Id.* at 7. The contract provision for payment provided:

> Seller shall invoice Buyer 30 days prior [to] payment due dates as follows. 1/2 November 15th 2003, (Quantities may be determined by handscreen projection if seed has not been conditioned by the time the invoice is due)[.] The balance will be due January 15, 2004. Any adjustments will be made at that time if needed.

Id. at 8. The contract also provided that the "NORAMSEED Rules of the American Seed Trade Association" were applicable. *Id.* The signature block of the contract provided:

Family Farm Seeds	Kerkhoff Seed Farmers, Inc.
By: _____	By: _____
Date: _____	Date: _____

Id. Hendrickson signed the contract for Family Farm Seeds, and Kerkhoff's president, Daniel Kerkhoff, signed the contract for Kerkhoff.

In September 2003, Kerkhoff prepared and sent Family Farm Seeds an addendum to the 03-FFS-01 contract, and this addendum raised the quantity of one of the corn seed hybrids by 200 units and added another 100 units of another type of hybrid seed.

On November 2, 2003, Kerkhoff sent an invoice for the 03-FFS-01 contract to Family Farm Seeds at its Chalmers address. The invoice indicated that the total amount due was $58,700, that $29,350 was due for the November 15 installment, and that the

balance would be due on January 15.[1] Printed at the bottom of the invoice was a notation explaining that a "Finance charge of 15% APR (1.25% per mo.) will be incured [sic] on all invoices 30 days past due." *Id.* at 10. Family Farm Seeds sent Kerkhoff a check for $15,000 on February 12, 2004, and on February 28, 2004, sent another check for $16,500. Family Farm Seeds did not object to the balance due or the 15% interest statement printed on the invoice.

On June 9, 2004, Kerkhoff sent an invoice for $25,687.50 to Family Farm Seeds seeking the remaining payment on the 03-FFS-01 contract.[2] That same day, Kerkhoff also sent an invoice for $2,685 to Family Farm Seeds for payment on a 03-FFS-02 contract. Both of these June invoices contained the notation that a "Finance charge of 15% APR (1.25% per mo.) will be incured [sic] on all invoices 30 days past due." *Id.* Family Farm Seeds did not make any payment on these invoices. Family Farm Seeds did not object to the balance due or the interest statement printed on the invoices.

On March 28, 2005, Kerkhoff sent another invoice to Family Farm Seeds for the 03-FFS-01 contract and the 03-FFS-02 contract. The invoices again contained the finance charge language, and this time, the finance charge was added to the balance due on both invoices. Family Farm Seeds still did not make any payment on these invoices.

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[1] This invoice amount was based on handscreen projections.

[2] The total amount due was adjusted to $57,187.50 based on the seed amounts that Kerkhoff actually provided to Family Farm Seeds, and the $31,500 payments that Family Farm Seeds made were then subtracted from this adjusted amounts to reach the $25,687.50 balance.

On March 30, 2005, Kerkhoff's attorney sent Family Farm Seeds a letter, requesting payment of the balance due and indicating that a lawsuit would be filed for collection of the debt if Family Farm Seeds did not pay the outstanding balance within ten days. On March 31, 2005, Hendrickson sent Daniel Kerkhoff a letter that contained a list of complaints, including that the seed was "delivered late" in April, which caused him "1 lost sale" and that a customer found gravel in a bag of seed. Exhibits at 68. Hendrickson's letter did not make any complaints about the balance due or the interest rate listed on the two invoices.

On April 14, 2005, Kerkhoff filed a complaint against Hendrickson and Family Farm Seeds for the unpaid balance on the seed production contract. The Defendants then filed a breach of contract counterclaim against Kerkhoff.[3] In September 2006, Kerkhoff again sent an invoice to Family Farm Seeds for the unpaid balance due, but Family Farm Seeds did not pay.

In December 2006, the trial court held a bench trial. During trial, Family Farm Seeds stipulated to Kerkhoff's introduction of the invoices that it had sent to Family Farm Seeds and to two invoices, which Kerkhoff printed a few days before trial and which showed that Family Farm Seeds owed $36,604.69 ($25,687.50 balance due + $10,917.19 interest) on the 03-FFS-01 contract and $3,691.88 ($2,685.00 balance due + $1,006.88 interest) on the 03-FFS-02 contract. Family Farm Seeds did not argue that it did not receive the seed corn hybrids listed on the invoices. Instead, Family Farm Seeds'

[3] The Defendants have not included a copy of Kerkhoff's complaint or their own counterclaim in their Appellants' Appendix.

argument focused on its breach of contract counterclaim and the fact that the parties' contract did not include a provision regarding interest.

Following the bench trial, the trial court issued a general judgment in favor of Kerkhoff on its claim for collection of a debt and against the Defendants on their for breach of contract counterclaim. The trial court entered judgment against both Hendrickson, individually, and Family Farm Seeds for $40,296.27 plus court costs. The Defendants then filed a motion to correct error, which the trial court denied. The Defendants now appeal.

I.

The Defendants first argue that the trial court erred by entering judgment against both Hendrickson, individually, and against Family Farm Seeds as a corporation.

The parties did not request the trial court to enter special findings, and the trial court entered a general judgment in favor of Kerkhoff and against Hendrickson and Family Farm Seeds without entering specific findings. Thus, we will treat the judgment as a general verdict and will affirm it if it can be sustained upon any legal theory consistent with the evidence. *Benge v. Miller*, 855 N.E.2d 716, 719 (Ind. Ct. App. 2006). In reviewing the trial court's judgment, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom. *Id.* We will neither reweigh the evidence nor assess the credibility of the witnesses. *Id.*

This issue, however, involves interpretation of a contract. As explained in *Evans v. Medical and Professional Collection Servs., Inc.*, 741 N.E.2d 795, 797-98 (Ind. Ct. App. 2001):

> When interpreting a written contract, our goal is to determine the intent of the parties at the time of execution as revealed by the language they chose in expressing their rights and responsibilities. Where the terms of a contract are unambiguous, the meaning of the contract is determined as a matter of law. Thus, interpretation of the contract is a question to which this court owes no deference.
>
> On the other hand, when the meaning of the contract cannot be gleaned from the four corners of the instrument, the intention of the parties becomes a question of fact, and resort to extrinsic evidence is proper. Under that scenario, our review of a court's findings is deferential. In any event, the threshold question of whether a contract is ambiguous is also a question of law. The test for determining if a contract is ambiguous is whether reasonable persons would find the agreement subject to more than one interpretation.

(Citations omitted).

The Defendants acknowledge that there was a contract for seed corn—specifically, 03-FFS-01—and an addendum to that contract and that there is liability by the buyer for that contract and addendum. The Defendants, however, argue that only Family Farm Seeds is liable because it was the party to the contract and contend that the trial court erred by determining that Hendrickson was personally liable under the seed contract.

Kerkhoff contends that the individual judgment against Hendrickson should be affirmed because Hendrickson signed the contract and because the parties intended to bind an individual buyer—Hendrickson—rather than a corporate buyer—Family Farm Seeds. Kerkhoff also suggests that the contract was not with the corporation because Family Farm Seeds was not designated in the contract as a corporation, given the fact that Family Farm Seeds did not include the "Inc." after its name. In support of its argument, Kerkhoff cites to *Evans*. Kerkhoff then argues that the trial court's joint and several judgments against both Hendrickson and Family Farm Seeds should be affirmed.

In *Evans*, a cable company, TSI, entered into a contract with "Evans Ford"—which was a car dealership owned by Rich Evans and was incorporated under the name Evans Lincoln Mercury Ford, Inc.—for TSI to provide cable advertising to Evans Ford. *Evans*, 741 N.E.2d at 796. TSI, who prepared the contract, designated the dealership's name on the contract as "Evans Ford" and placed the dealership's business address on the contract. *Id.* at 796-97. Evans signed the contract, and in the space denominated "Title," he wrote "President." *Id.* at 797. TSI sent invoices to Evans Ford at its business address, but the dealership did not pay the advertising fees incurred. *Id.* TSI then sent invoices to Evans at his residence and still did not receive payment. *Id.* TSI assigned its right to collection of the debt to a collection service, which filed suit against Evans personally. *Id.* Following a bench trial, the trial court found that Evans contracted with TSI and that he was personally liable for the unpaid balance plus interest and fees. *Id.*

Evans appealed, arguing that the trial court had erred by finding him personally liable for the debt incurred by his business. *Id.* We agreed with Evans and concluded that the contract unambiguously stated that it was between TSI and "Evans Ford." *Id.* at 798. We noted that TSI, who prepared the contract, had itself designated the business of Evans Ford, *not* Evans, as the party with whom it was contracting and that TSI had listed Evans Ford's business address as the relevant address of the contracting party. *Id.* We further noted that Evans had signed the contract in his representative capacity and not in his personal capacity. *Id.* We concluded that although the dealership's official name of Evans Ford Lincoln Mercury, Inc. was not written on the contract, the intent of the parties was clear that Evans Ford, not Evans was the contracting party. *Id.* Because Evans was

not a party to the contract, we held that he could not be held personally liable for the corporate debt. *Id.* Thus, we reversed the trial court's judgment against Evans.

Just as in *Evans*, despite the fact that the contract did not include the "Inc." at the end of Family Farm Seeds' name, the contract here is unambiguous and the language of the contract makes the intent of the parties clear. The contract unambiguously states that it is between Kerkhoff and Family Farm Seeds. When Kerkhoff prepared the contract, it designated Family Farm Seeds, *not* Hendrickson, as the buyer with whom it was contracting. Furthermore, Kerkhoff listed the relevant address of the buyer as Family Farm Seeds' business address in Chalmers and not Hendrickson's address in Brookston. Additionally, Hendrickson signed the contract in representative capacity. The signature block indicates that the contracting party was "Family Farm Seeds" and that the contract was signed for Family Farm Seeds "By" Henderickson. Exhibits at 8. Kerkhoff contracted with the corporation—Family Farm Seeds—to produce seed corn. Hendrickson is not a party to the contract, and he cannot be held personally liable for the corporate debt of Family Farm Seeds. Accordingly, we must reverse the trial court's individual judgment against Hendrickson.

II.

The Defendants next argue that the trial court erred by finding that they had not proven their breach of contract counterclaim. Because the Defendants are appealing from a negative judgment, they must demonstrate that the trial court's judgment is contrary to law; that is, they must show that the evidence of record and the reasonable inferences therefrom are without conflict and lead unerringly to a conclusion opposite that reached

by the trial court. *Infinity Prods., Inc. v. Quandt*, 810 N.E.2d 1028, 1031-32 (Ind. 2004), *reh'g denied*. We will not reweigh the evidence or judge the credibility of any witness, and we must affirm the trial court's decision if the record contains any supporting evidence or inferences. *Id.* at 1032.

The Defendants contend that Kerkhoff breached the contract by failing to deliver the seed corn on time and by delivering contaminated seed that had gravel in it. The Defendants suggest that the evidence regarding these breaches was "uncontradicted." Appellants' Brief at 17. On the other hand, Kerkhoff argues that the trial court's judgment on the Defendants' counterclaim was proper because the evidence was not uncontradicted.

In regard to Kerkhoff's alleged breach for failing to timely deliver the seed corn, the contract provided that the seed corn would be "shipped *in Buyer supplied truck* between 11/1/03 and 3/1/04." Exhibits at 7 (emphasis added). Hendrickson testified that he was "not sure" if Family Farm Seeds was able to get seed before April 1, 2004, and that he believed the first truck load was available on April 3rd or 4th. Transcript at 84. However, Dan Kerkhoff testified that he knew that Kerkhoff had the seed corn ready, and although he did not recall if every variety was ready, he was unaware that seed was withheld. Dan Kerkhoff also testified that he had difficulty with Family Farm Seeds wanting to delay pick up of the seed corn. He explained that Kerkhoff had corn ready in its corn towers and that he had to call Family Farm Seeds regarding pick up because Family Farm Seeds did not send a truck to his warehouse.

In regard to Kerkhoff's alleged breach for delivering contaminated seed, a farmer testified that one of the bags of Kerkhoff-produced seed corn that he bought from Family Farm Seeds contained some rocks and that these rocks caused minor damage to his planter box. The farmer testified that these rocks were not coated and were just plain rocks. Dan Kerkhoff testified about the process Kerkhoff uses to bag its seed corn and explained that Kerkhoff treats the seed by coating it with a colored insecticide and fungicide additive prior to bagging it. He testified that if a rock were to get into one of his bags of seed corn, it would be color coated.

The trial court heard this evidence and found that the Defendants did not prove their breach of contract counterclaim by a preponderance of the evidence. The Defendants argument on this issue is nothing more than an invitation to reweigh the evidence, which we will not do. Because the evidence presented at trial regarding the alleged breaches was not uncontradicted and did not lead unerringly to a conclusion opposite that reached by the trial court, we affirm the trial court's decision.

III.

Lastly, the Defendants argue that the trial court erred in its determination of damages. The trial court entered a general judgment against the Defendants for $40,296.27. Thus, we will affirm it if it can be sustained upon any legal theory consistent with the evidence. *Benge*, 855 N.E.2d at 719. Additionally, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom and we will not reweigh the evidence or assess the credibility of the witnesses. *Id.*

The parties agree that the trial court's entry of judgment in this amount stems from Kerkhoff's Exhibit 1, which indicated that Family Farm Seeds owed $36,604.69 ($25,687.50 balance due + $10,917.19 interest) on the 03-FFS-01 contract and $3,691.88 ($2,685.00 balance due + $1,006.88 interest) on the 03-FFS-02 contract.

The Defendants acknowledge that Family Farm Seeds is liable for the unpaid balance from the 03-FFS-01 contract and its addendum, *see* Appellants' Reply Brief at 9, but they challenge the unpaid balance of the 03-FFS-02 contract and the 15% interest applied to both accounts. The Defendants suggest that no interest should have been applied because Kerkhoff had not charged Family Farm Seeds interest in prior years when it was late on its payments to Kerkhoff. The Defendants then contend that if there is to be any prejudgment interest, the trial court should have applied the statutory rate of 8% interest provided in Ind. Code § 24-4.6-1-103.[4]

Kerkhoff argues that the trial court's calculation of damages is supported by an account stated theory because Kerkhoff repeatedly billed Family Farm Seeds the amounts due, each of these invoices clearly stated that interest would be charged on the amounts

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[4] Ind. Code § 24-4.6-1-103 provides:

> Interest at the rate of eight percent (8%) per annum shall be allowed:
>
> (a) From the date of settlement on money due on any instrument in writing which does not specify a rate of interest and which is not covered by IC 1971, 24-4.5 or this article;
>
> (b) And from the date an itemized bill shall have been rendered and payment demanded on an account stated, account closed or for money had and received for the use of another and retained without his consent.

past due, and Family Farm Seeds did not object to these invoices within a reasonable time.

As we explained in *B.E.I., Inc. v. Newcomer Lumber & Supply Co., Inc.*, 745 N.E.2d 233, 236-37 (Ind. Ct. App. 2001):

> An account stated is an agreement between the parties that all items of an account and balance are correct, together with a promise, expressed or implied to pay the balance. It operates as a new contract without the need for renewed consideration, and the plaintiff does not need to plead and prove the creation and performance of each contract underlying the account.
>
> An agreement that the balance is correct may be inferred from delivery of the statement and the account debtor's failure to object to the amount of the statement within a reasonable amount of time. When the underlying facts are in dispute, the question of what constitutes a reasonable amount of time is a question of fact and law.
>
> The amount indicated on a statement is not conclusive, but it is prima facie evidence of the amount owed on the account. Once a prima facie case is made on an account stated, the burden of proof shifts to the account debtor to prove that the amount claimed is incorrect.

(Quotations and citations omitted).

Here, Kerkhoff sent multiple invoices to Family Farm Seeds for the balance due on the seed corn hybrids that Family Farm Seeds received pursuant to the 03-FFS-01 and 03-FFS-02 contracts. Indeed, the Defendants do not contend that Family Farm Seeds did not receive the seed hybrids listed on these invoices. Furthermore, the invoices contained a notation explaining that a "Finance charge of 15% APR (1.25% per mo.) will be incured [sic] on all invoices 30 days past due." Exhibits at 10. Family Farm Seeds received the invoices and did not object to them upon receipt. There was sufficient evidence of probative value to support the conclusion that an account stated existed. *See*,

e.g., *B.E.I.*, 745 N.E.2d at 237 (holding that the evidence was sufficient to conclude that an account stated existed where the seller sent monthly statements to the buyer and the buyer did not object); *Auffenberg v. Bd. of Trustees of Columbus Regional Hosp.*, 646 N.E.2d 328, 331 (Ind. App. 1995) (explaining that a debtor's failure to object to liability on an account until a suit is filed constitutes failure to object to the account within a reasonable time and supports the inference of an agreement that the account balance is correct).

In their reply brief, the Defendants contend that if an account stated theory applies, then no interest should be charged before June 9, 2004, because this invoice did not include the listed 15% in the calculation of the total amount due and would not have given them an opportunity to object to the 15% interest rate. We conclude that such argument amounts to nothing more than a distinction without a difference. Each invoice sent to Family Farm Seeds provided that a 15% annual interest rate applied to past due amounts, and yet Family Farm Seeds never objected to this term contained therein. Therefore, the evidence supports the trial court's use of a 15% interest rate applied to the underlying principal due on the accounts. *See e.g.*, *Roy A. Miller & Sons, Inc. v. Industrial Hardwoods Corp.*, 775 N.E.2d 1168, 1174 (Ind. Ct. App. 2002) (explaining that Ind. Code § 24-4.6-1-103 did not compel the trial court to award the subcontractor the 8% prejudgment interest rate provided by statute rather than the 30% service charge rate provided on the invoices sent to the contractor); *Weisman v. Hopf-Himsel, Inc.*, 535 N.E.2d 1222, 1234 (Ind. Ct. App. 1989) (affirming the trial court's award of 18% interest where that interest rate was included on the monthly account statements), *disapproved on*

other grounds by Songer v. Civitas Bank, 771 N.E.2d 61 (Ind. 2002); *McClure Oil Corp. v. Murray Equipment, Inc.*, 515 N.E.2d 546, 554 (Ind. Ct. App. 1987) (holding that the trial court did not err by awarding prejudgment interest at the rate of 18% per annum rather than the statutory 8% where the invoices sent to the debtor stated that there was a 1½ % service charge per month on all past due amounts), *reh'g denied*.

Finally, Kerkhoff requests that we remand this case to the trial court for a determination of whether appellate attorney fees are appropriate but makes no cogent argument supporting such request. Accordingly, we decline Kerkhoff's request for appellate attorney fees.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., and DARDEN, J., concur.