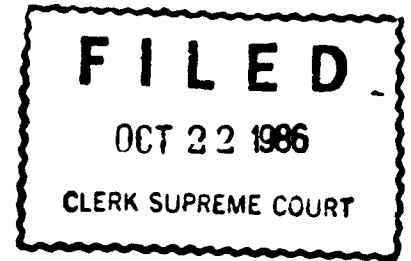


IN THE COURT OF APPEALS OF IOWA



BRENTON BANK AND TRUST
COMPANY,

Plaintiff-Appellee,

vs.

LEONARD D. BUNCH, FRANCES C.
BUNCH, KATHLEEN SIEDHOFF,
LEONARD F. SIEDHOFF,

Defendants,

HARRY B. TOKHEIM,

Defendant-Appellant,

and UNITED MISSOURI BANK OF MILAN,

Defendant-Appellee.

Filed October 22, 1986

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6-349
86-497

Appeal from the Iowa District Court for Madison County (22640) - Richard
D. Morr, Judge.

Defendant appeals a summary judgment adverse to him in a foreclosure
action in favor of plaintiff bank. **AFFIRMED.**

Ed Skinner and Donald G. Beattie of Skinner, Beattie & Wilson, Altoona,
Iowa; and Dennis W. Johnson of Brick, Seckington, Bowers, Swartz & Gentry,
Des Moines, Iowa; for defendant-appellant.

Randy V. Hefner of Van Werden, Hulse & Hefner, Adel, Iowa, for plaintiff-
appellee.

Jonathan M. Kimple of McDonald, Brown & Kimple, Dallas Center, Iowa,
for defendant-appellee.

Considered by Snell, P.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

Defendant Tokheim appeals a summary judgment adverse to him in a foreclosure action in favor of plaintiff bank. We affirm.

In 1980 the owners of certain real property conveyed it to defendants Bunch by warranty deed and the Bunches gave the sellers a mortgage to secure their payment of a portion of the purchase price. On the same day the Bunches conveyed legal title to defendant Kathleen Siedhoff by an installment contract permitting her to assign her interest to defendant Tokheim. In that event she was to be released from personal liability. The contract also stated that she would be released "without further act or agreement at such time as a written assignment or quit claim deed evidencing such assignment is recorded wherein Harry B. Tokheim assumes the obligations and agrees to pay the purchase price hereof." On the same day, she assigned her interest to Tokheim and delivered a quit claim deed to him.

The Bunches subsequently assigned to defendant United Missouri Bank of Milan their interest in the contract with the exception of the portions due and payable on the existing mortgage in favor of the original sellers. The Bunches later assigned to plaintiff bank any remaining interest in the contract. In two transactions the original sellers transferred the entirety of their interest to plaintiff bank, which commenced a foreclosure action in 1985.

The trial court entered a summary judgment which awarded both banks a personal judgment against Tokheim including attorney fees of \$13,883. The amount of attorney fees was determined after an unreported hearing. The trial court rejected Tokheim's arguments that the conveyance from the Bunches to Siedhoff absolved him of personal liability and that the contract was personal in a manner rendering the original sellers' assignment of the mortgage to plaintiff bank void as to him.

Tokheim claims that 1) there were genuine issues of material fact in dispute since he claimed not to be personally liable upon the real estate contract; and 2) the trial court erred in its award of attorney fees and costs. Plaintiff bank claims that 1) as a matter of law the defendant was liable upon the real estate contract; 2) the trial court did not err in its award of attorney's fees; and 3) that the notice of appeal on the issue of attorney fees was premature, that an amendment to it relates back to the original, and that the appeal should be dismissed as premature or, alternatively, that the issues on appeal should be limited to those specifically stated in the amended notice.

In reviewing the grant of summary judgment under Iowa Rule of Civil Procedure 237, the question is whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. Suss v. Schammel, 375 N.W.2d 252, 254 (Iowa 1985); Brown v. Monticello State Bank of Monticello, 360 N.W.2d 81, 83-84 (Iowa 1984). It can be fatal to the party resisting the summary judgment motion to rely alone on a perceived weakness in the movant's contentions. Suss v. Schammel, 375 N.W.2d at 254. The resisting party must set forth specific facts showing there is a genuine issue for trial. Iowa Civil Rights Commission v. Massey-Ferguson, Inc., 207 N.W.2d 5, 8 (Iowa 1973); Iowa R. Civ. P. 237(e). Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. Adam v. Mt. Pleasant Bank & Trust Co., 355 N.W.2d 868, 872 (Iowa 1984). The purpose of summary judgment is to enable a party to obtain a judgment promptly when there is no fact issue to try. Jensen v. Voshell, 193 N.W.2d 86, 88 (Iowa 1971); 59 A.L.R.3d 678. On appeal we examine the record in a light most favorable to the party opposing the motion for summary judgment to determine if movant met his or her burden. Matherly v. Hanson, 359 N.W.2d 450, 453 (Iowa 1984). We agree

with the trial court that plaintiff met the burden of showing no issue of material fact existed.

Tokheim argues that the real estate contract between the Bunches and Siedhoff prohibited the Bunches from assigning the contract without prior approval of Siedhoff or her assignee, Tokheim. The language in the contract referring to a prohibition on assignment is in reference to the mortgage and note conveyed to Richards, the original owner, by the Bunches. The language referred to states:

That mortgage and note may be paid as specified therein or prepaid but shall not be refinanced, amended or assigned without the written consent of the Buyer.

The court found, and we agree, that even if this language prohibits assignment, the assignment is valid. Iowa Code section 539.2 (1985), states:

Assignment prohibited by instrument. When by the terms of an instrument its assignment is prohibited, an assignment thereof shall nevertheless be valid, but the maker may make use of any defense or counterclaim against the assignee which the maker may have against any assignor thereof before notice of such assignment is given to the maker in writing.

Under this section, Tokheim could maintain an action for damages if he were in fact damaged by the assignment. Tokheim has not asserted any claim for damages.

It is well established that a contract term prohibiting the assignment of the contract bars only the delegation to an assignee of the performance by the assignor of a duty or condition. This prohibition against assignment does not prevent the assignment of the benefits of the contract. Restatement (Second) of Contracts § 322. All that the assignees United Missouri Bank and Brenton Bank received in this case was the right to receive payments. They had no personal duties or conditions to perform. The defendant has shown no damage by the assignment. His own payment obligations were not modified by the assign-

ment. Therefore, the no assignment clause does not provide Tokheim with a good defense to the claim for payment of the purchase price.

Tokheim claims that an exception to the rule that a contract is assignable, even though it is by its terms unassignable, occurs when the contract is a personal contract. However, in this state real estate contracts are not generally recognized as personal contracts. See Bull v. Weisbrod, 185 Iowa 318, 325, 170 N.W. 536, 538 (1919). In the real estate contract at issue here, there is no evidence that the seller had any unusual duties or obligation to the buyer the performance of which only the seller could carry out. Tokheim relies on Connolly v. Des Moines and Central Iowa Railway Co., 246 Iowa 874, 68 N.W.2d 320 (1955), to support his contention that the contract at issue here was a personal one. However, in Connolly the issue was an option in which the optioner and optionee were to agree upon the purchase price, and if they could not, a third party would be named to determine the price. The court in Connolly said this type of option demonstrated that the contract was intended to be a personal contract. 246 Iowa at 888. However, in this case, Tokheim has produced no facts that there were any unusual duties or obligations owing to the buyer by the seller.

Therefore, since the real estate contract in question was not a personal contract and since the assignment of this contract did not alter Tokheim's duty to make payments on the contract, there are no material facts in dispute and the trial court's entering of summary judgment against Tokheim was correct.

Plaintiff bank has raised jurisdictional issues on appeal concerning attorney fees. Justice Harris of the Iowa Supreme Court has previously overruled a motion to dismiss on the same jurisdictional issues. We have no jurisdiction to review the action of a single justice of the supreme court. Iowa R. App. P. 22(f).

Iowa Code section 625.22 (1985) permits an award of attorney fees when judgment is recovered upon a written contract containing an agreement to pay

an attorney's fees. Both the mortgage and the contract in this action had provisions for the payment of reasonable attorneys fees in case of any action in court to collect any sums payable or secured. When determining costs, the court is permitted to determine a reasonable attorney's fee. A court of equity has discretion in the matter of assessing costs and a reviewing court will ordinarily not interfere with such assessment. Wymer v. Dagnillo, 162 N.W.2d 514, 519 (Iowa 1968). Since the court heard the trial and was aware of the work counsel had done in the case, we acknowledge its expertise on ascertaining reasonable fees and find no error in the assessment. See Home Federal Savings and Loan Association of Algona v. Campney, 357 N.W.2d 613, 622 (Iowa 1984).

AFFIRMED.