FILED
MAY 23 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-117 / 91-325

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CITY OF URBANDALE, IOWA,
Plaintiff-Appellee,

vs.

ROBERTA WHITSON; ROBERTA WHITSON and LEORA MAYO, As Trustees for the Nicodemus Trust,
Defendants-Appellants.

ROBERTA WHITSON; ROBERTA WHITSON As Trustee for the Nicodemus Trust,
Counter-Plaintiffs,

vs.

CITY OF URBANDALE, IOWA,
Counter-Defendant.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Appellants challenge various rulings made by the district court in their dispute with the City concerning what structures they may build on their property. **AFFIRMED.**

Robert W. Reynoldson of Reynoldson, Van Werden, Kimes, Reynoldson & Lloyd, and Marlyn S. Jensen, Osceola, for appellants.

Teresa A. Beyer and Robert H. Layden of Hyland, Layden & Pearson, P.C., Des Moines, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

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PER CURIAM

Whitsons bought land in Urbandale, Iowa, by two separate purchases, Out Lot 24 in 1956 and Out Lot 25 in 1957. The two adjoining tracts made an acreage of 8.346 acres and were abutted on the south and west by residential properties. The existing zoning ordinance at the time of the purchases allowed for certain agricultural and business uses. Subsequent zoning ordinances were enacted by the City. Under those ordinances, Whitsons were allowed to keep certain structures on their property as nonconforming uses.

Whitsons and the City have had disagreements over the years concerning the uses to which Whitsons may make of their property. Those disputes have resulted in a stipulation of facts, two declaratory judgment decrees, and a contract for deeds without condemnation.

In 1987 the City wanted Whitsons to stop construction of a home and a poleshed building on their property. The City notified Whitsons the necessary permits had not been applied for. The City also alleged the construction violated the City's building codes, zoning ordinances, flood plain regulations, and encroached upon a sanitary sewer easement. The City instituted actions for injunction and mandamus. Whitsons filed counterclaims for breach of contract, violation of federal rights under 42 U.S.C. § 1983, intentional infliction of emotional distress, violation of the federal anti-racketeering R.I.C.O.

legislation, loss of consortium and marital rights, and prima facie tort.

After years of legal maneuvers by both parties, and several attempts at interlocutory appeal, the district court granted the City's motions for summary judgment on its mandamus and injunction petitions. The court dismissed Whitsons' counterclaims based on intentional infliction of emotional distress and the R.I.C.O. legislation.

A jury trial was held on the remaining counts of Whitsons' counterclaims. The jury rendered a verdict in favor of the City on all counts except the one relating to a breach of quiet enjoyment. The court ordered a retrial on that issue. The second jury returned a verdict in favor of the City. Whitsons appeal, challenging several rulings of the district court.

Whitsons first contend the district court erred in sustaining the City's motion for summary judgment on its claims for injunction and mandamus. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c); see Farm Bureau Mut. Ins. Co. v. Miline, 242 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact, Miline, 242 N.W.2d at 423, and the evidence must be viewed in the light most favorable

to the resisting party, Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). The procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. Id.; Sherwood v. Nissan, 179 N.W.2d 336, 339 (Iowa 1970). A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. Gott, 387 N.W.2d at 343; Miline, 242 N.W.2d at 423. If the motion is properly supported the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e).

The district court found "as uncontroverted fact that structures in addition to those in existence in 1979 have been erected on the Whitson property without compliance with the applicable zoning laws." Whitsons assert the district court failed to give effect to all language set forth in the declaratory judgment actions and documents incorporated therein. Whitsons also assert because the intent of the parties was not clearly expressed in the relevant documents, extrinsic evidence should have been considered by the district court in reaching this finding. We disagree.

Where the intent of the parties is expressed in clear and unambiguous language, a court will not resort to

construction. Federal Land Bank of Omaha v. Bollin, 408 N.W.2d 56, 60 (Iowa 1987). The 1979 declaratory judgment makes clear Whitsons had the right to continue certain nonconforming uses and to maintain such uses without the City requiring a permit therefor. However, the declaratory judgment also makes clear the Whitsons had the duty "not to construct or locate outside [of the distinguishable area in Out Lot 25] any additional buildings." Therefore, any new structures built on the property must conform to existing zoning requirements, which includes the City's requirement of necessary permits. We hold the district court properly granted the City's motion for summary judgment on this issue.

Whitsons also contend the district court abused its discretion by refusing to allow Whitsons to amend their counterclaim to add a fraud claim. Whitsons filed six counterclaims in response to the City's petition for mandamus and injunction. Two of Whitsons' counterclaims were dismissed by summary judgment. The remaining counterclaims were submitted to the jury. The jury rendered a verdict in favor of the City on all counts but was unable to reach a decision on the breach of covenant of quiet enjoyment claim. Before retrial on that issue, Whitsons attempted to amend their counterclaim to add a fraud count. The district court denied Whitsons' motion to amend.

We accord considerable discretion to the trial court's ruling on motions to amend. Bennett v. City of Redfield, 446 N.W.2d 467, 474 (Iowa 1989). We reverse only when a clear abuse of discretion has been shown. Id. Here, Whitsons' motion to amend was made more than six months after the first trial. The district court found "no showing that any of the information now alleged was not or could not be known by the Defendants at the time of the original trial. Most, if not all of the allegations made in the Defendants' [fraud counterclaim] were matters presented to the Court previously." We hold the district court did not abuse its discretion in denying the motion to amend.

We have considered all other issues raised on appeal. We find those issues are without merit. We affirm the district court in all respects.

Costs of appeal are taxed to Whitsons.

AFFIRMED.