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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THIELKING LEASING, INC.,	)	
Plaintiff-Appellee,	)	Filed September 24, 1985
vs.	)	488
LEON R. JAGIM and **SHARON K. JAGIM,**	)	5-408 85-114
Defendants-Appellants.	)	

Appeal from the Iowa District Court for Polk County - Van Wifvat, Judge.

Defendants appeal from summary judgment for plaintiff in an action seeking replevin of certain property and damages for wrongful detention. **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

Michael J. Schroeder of Brick, Seckington, Bowers, Swartz & Gentry, P.C., Des Moines, for defendants-appellants.

Paul M. Thielking, Des Moines, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Sackett, JJ.

Plaintiff Thielking Leasing, Inc. leased video games to Alan Brotman. Thielking filed financing statements with the Secretary of State which provided that the transaction was a true lease, and the filing was only intended to make the lease a matter of public record and not intended to perfect a security interest. Brotman sold six of the video games to defendants Jagims for $6,000. This sales transaction is evidenced by a bill of sale. Brotman defaulted on his rental payments to Thielking. Thielking filed suit against Jagims seeking a writ of replevin and damages for wrongful detention of property. Thielking filed a motion for summary judgment which the Jagims resisted. The trial court sustained Thielking's motion for the reasons urged in the motion. The Jagims have appealed from the trial court's order. The Jagims contend that the court erred in finding that no issue of material fact existed and incorrectly applied the law to the facts.

Summary judgment is proper when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c). In reviewing the grant of a summary judgment motion, we must determine 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). In Daboll v. Hoden, 222 N.W.2d 727 (Iowa 1974), the Iowa Supreme Court stated:

> The purpose of the rule is to avoid useless trials. Where there is no genuine issue of fact to be decided, the party with a just cause should be able to obtain a judgment promptly and without the expense and delay of a trial. [citations] In ruling on a motion for summary judgment, the court's function is to determine whether such a genuine issue exists, not to decide the merits of one which does. [citation]

Id. at 731.

In order to rule upon such motion, the trial court must examine the entire record before it, including the pleadings, admissions, depositions, answers to interrogatories and affidavits, if any. Drainage Dist. No. 119 v. Incorporated City of Spencer, 268 N.W.2d 493, 499 (Iowa 1978). The burden to show the absence of any genuine issue of material fact is upon the moving party. The record is viewed in the light most favorable to the opposing party. Swets Motor Sales, Inc. v. Pruisner, 236 N.W.2d 299, 304 (Iowa 1975). However, to successfully resist a motion for summary judgment, the resisting party must set forth specific evidentiary facts showing the existence of a genuine issue of material fact. Liska v. First Nat. Bank, 310 N.W.2d 531, 534 (Iowa Ct. App. 1981). He cannot rest on the mere allegations or denials of the pleadings. Id.; Iowa R. Civ. P. 237(c). Issues of fact must be material. In other words, fact issues remaining undecided must be such that, if decided in defendant's favor, would provide a good defense to the action. Orcutt v. Hanson, 163 N.W.2d 914, 918 (Iowa 1969).

Thielking's verified petition alleges that: (1) Thielking is the owner of and is entitled to possession of six video games; (2) Thielking leased these video games to Brotman pursuant to written leases; (3) Brotman defaulted on his rental payments entitling Thielking to possession of the video games; and (4) the Jagims are in present possession of the video games and refused to relinquish possession upon Thielking's demand.

The Jagims answered specifically denying all of the allegations of Thielking's petition except that they are in possession of the six video games. The Jagims impleaded Brotman as a third party defendant alleging that they purchased the video games in reliance upon Brotman's representations of title.

Thielking filed its motion for summary judgment supported by an affidavit of the Vice President of Thielking. That affidavit corroborated the allegations

of Thielking's petition. The Jagims' resistance to the motion for summary judgment states generally that the pleadings are not dispositive of whether Thielking is entitled to possession of the video games. This resistance is supported by an affidavit of Leon Jagim asserting that he believes that title to the video games belongs to the Jagims by virtue of the bill of sale from Brotman.

On appeal, the Jagims claim that Thielking failed to show who owned the video games. They contend that they have raised a defense: that Brotman was a merchant, that the video games were entrusted to Brotman, and that Jagim was a buyer in the ordinary course. The Jagims claim that Thielking did not meet its burden to show the absence of any genuine issue of material fact because these facts present genuine issues which should be determined by the trier of fact.

In making their defense, the Jagims rely on Iowa Code section 554.2403(2), (3) (1981), which provide:

> 2. Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
>
> 3. "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

The questions of whether Brotman is a merchant, whether Thielking entrusted the video games to Brotman, and whether the Jagims purchased the video games as buyers in the ordinary course are factual in nature. See Bauer v. Curran, 360 N.W.2d 88, 90 (Iowa 1984) (whether farmer is a merchant within the meaning of § 554.2403(2) is a question of fact); American Standard Credit v. National Cement Co., 643 F.2d 248, 270 (5th Cir. 1981) (whether entrustment occurred within the meaning of U.C.C. § 2-403(2) is a question of fact). For

example, whether one is a buyer in the ordinary course necessitates inquiries into the good faith and knowledge of the purchaser, and if the goods were purchased from one in the business of selling goods of that kind. Iowa Code § 554.1201(9) (1985). Moreover, whether one is a merchant involves determining if the person deals in goods of the kind sold or holds himself out as having knowledge or skill peculiar to the goods involved. Iowa Code § 554.2104(1) (1985). These matters do not lend themselves to categorical proof sufficient to support a ruling of the trial court here as a matter of law.

We, therefore, cannot uphold the trial court's determination that there was no genuine issue of material fact. Assuming that the video games were entrusted to Brotman, Brotman was a merchant and sold the video games to the Jagims as buyers in the ordinary course, the Jagims' interest in the video games would be a superior to that of Thielking. Therefore, Thielking would no longer be considered the owner of the video games and would not be entitled to immediate possession of the video games under a writ of replevin.

Viewing all of the evidence in the light most favorable to the Jagims, we conclude that Thielking did not meet its burden to show the absence of a genuine issue of material fact.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.