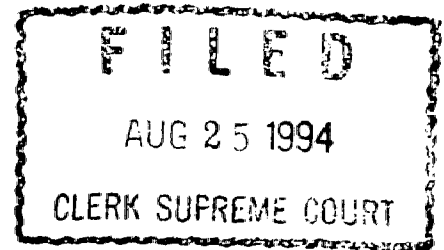


IN THE COURT OF APPEALS OF IOWA

No. 4-175 / 93-1342



GORDON L. WINKEL, Executor of the
Estate of A. N. Erpelding, Deceased,

Appellant,

vs.

ALPHONS ERPELDING a/k/a ALPHONS P.
ERPELDING, and VERA ERPELDING,

Appellees.

Appeal from the Iowa District Court for Kossuth County,
James L. McDonald, Judge.

The executor appeals the district court ruling granting
partial summary judgment to Alphons and Vera on two claims
the estate made against them. **REVERSED.**

P.D. Furlong and Thomas J. Gaul, Sioux City, for
appellant.

Todd A. Stowater of Cassel, McMahon, Courtney &
Stowater, Algona, and David C. Shinkle, Des Moines, for
appellees.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

HAYDEN, P.J.

A. N. and Alphons Erpelding were brothers who lived in Algona, Iowa, and engaged in farming operations together all their lives. As part of these operations, in March 1985, A. N. lent \$210,000 to Alphons and his wife, Vera. Alphons and Vera executed two promissory notes to A. N., one for \$200,000, and another for \$10,000.

In April 1986 A. N. signed both notes and surrendered them to Alphons and Vera. In February 1991 A. N. Erpelding died. Alphons's and Vera's claims against the estate were consolidated with the estate's claims against them.

Alphons and Vera moved for summary judgment on the claims related to the two promissory notes. They argued A. N. had canceled the notes both by signing them and writing "Pd in full" on them, and also by surrendering them. See Iowa Code § 554.3605(1)(a) and (b) (1993).

Gordon Winkel, the executor, was A. N.'s attorney for approximately twenty years and assisted drafting the two promissory notes in question. Winkel filed an affidavit in which he said, among other things, A. N. told him after April 1986 Alphons owed him \$210,000. The district court denied this motion, having found Winkel's affidavit raised an inference the notes had not been intentionally canceled or surrendered.

Alphons and Vera had a handwriting expert examine the notes. They filed the expert's deposition in which he testified A. N.'s signature was genuine and redeposed

Winkel. After a hearing, the district court granted their renewed motion for partial summary judgment. The executor appeals.

To begin, summary judgment is appropriate only if there exists no genuine issue of material fact. Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988) (citations omitted). The moving party has the burden to show the nonexistence of a material fact. Id. (citation omitted). The evidence must be viewed in the light most favorable to the nonmoving party. Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). This procedure is functionally akin to a directed verdict, and every legitimate inference which reasonably can be deduced from the evidence should be afforded the nonmoving party. Id. A fact issue is generated if reasonable minds can differ on how the issue should be resolved. Id. (citation omitted). If the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper. Milne, 424 N.W.2d at 423 (citation omitted).

However, the nonmoving party may not simply rest on its pleadings and allegations once a motion for summary judgment is filed.

When a motion for summary judgment is made and supported as provided in [Iowa R. Civ. P. 237], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

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, and to reverse the grant of summary judgment if it appears from the record there is an unresolved issue of material fact." Meylor v. Brown, 281 N.W.2d 632, 634 (Iowa 1979) (quoting Frohwein v. Haesemeyer, 264 N.W.2d 792, 796 (Iowa 1978) (further citations omitted)).

With these principles in mind, we determine there is a genuine issue of material fact here. There is sufficient evidence to support an inference the notes were not intentionally canceled or surrendered. We reverse the judgment of the trial court.

The Uniform Commercial Code (UCC) provides,

1. The holder of an instrument may even without consideration discharge any party
 - a. in any manner apparent on the face of the instrument or the endorsement, as by intentionally canceling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature; or
 - b. by renouncing that holder's rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged.

Iowa Code § 554.3605(1)(a),(b) (1993).

Although it is not necessary to prove both cancellation and surrender of the instrument, Alphons and Vera Erpelding allege the facts here do satisfy the requirements to show cancellation and surrender. Simply put, the issue is

whether the notes were intentionally canceled or surrendered.

Winkel was the personal attorney for twenty years to A. N. Erpelding and was involved in the drafting of the notes. Winkel was intimately aware of the business affairs of A. N. Erpelding. Winkel stated in his affidavit his long-time client A. N. Erpelding never mentioned he had canceled the two notes.

Additionally, Joan Erpelding testified in her deposition A. N. Erpelding had told her twice his brother Alphons Erpelding still owed him ". . . a lot of money." At least one of these statements was made to Joan Erpelding in 1990, long after the notes were supposedly paid in full on April 24, 1986.

Trying to determine the intent of another is difficult, especially when that person is no longer living. However, Iowa courts have been willing to give the fact-finder broad discretion in examining whether a note was canceled, altered, or the terms renegotiated. See, e.g., Nickle v. Lewis, 272 N.W. 525 (Iowa 1937) (jury question as to whether new notes issued simply to replace destroyed notes constituted new contract); Hink v. Smith, 169 Iowa 101, 150 N.W. 1069 (Iowa 1915) (whether an agent of a holder of a note had authority to settle for less than amount due is a jury question); Fullerton Lumber Co. v. Snouffer, 139 Iowa 176, 117 N.W. 50 (1908) (agent's ability to extend time for payment of note is a jury question).

The testimony of Winkel and Joan Erpelding established enough for a jury to raise a reasonable inference of doubt as to whether A. N. Erpelding actually meant to cancel the two notes. We reverse the trial court's order granting partial summary judgment for the defendants Alphons and Vera Erpelding.

REVERSED.