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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SAMUEL H. KATELMAN,

Plaintiff-Appellant,

vs.

THE CITY OF COUNCIL BLUFFS, IOWA, and THE IOWA DEPARTMENT OF TRANSPORTATION,

Defendants-Appellees.

Filed April 30, 1985

5-158
84-998

Appeal from the Iowa District Court for Pottawattamie County - E. F. Hanson, Judge.

Plaintiff appeals from an order dismissing the plaintiff's action for denial of access rights against the defendant. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Raymond E. Pogge of Pogge, Root and Steege, Council Bluffs, Iowa, for plaintiff-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merrell M. Peters, Assistant Attorney General, for defendants-appellees.

Considered by Oxberger, C.J., Donielson, and Hayden, JJ.

HAYDEN, J.

As a result of the construction of a new four-lane street, "Washington Avenue Bypass" in Council Bluffs, access to Katelman's business property was cut off. Erection of a barrier permanently blocked entrance to the property from North 6th Street.

Katelman filed suit against the Iowa Department of Transportation (DOT) and the City of Council Bluffs alleging that the defendants had constructed the bypass and thereby denied him access to his property. The petition also alleged other tortious claims, including denial of full use and enjoyment of the property and requested a judgment of $100,000. Defendant DOT filed a motion to dismiss claiming that it was not a proper party and also that a tort claim against the State was barred since plaintiff had not complied with the provisions of Iowa Code section 25A.5, which requires a written claim be filed with the State Appeal Board. The motion asserted that the proper way to proceed was a condemnation procedure according to Iowa Code chapter 472. Plaintiff subsequently amended his petition praying for a Writ of Mandamus commanding defendants to comply with chapter 472. Defendant filed a motion to dismiss the amended petition reasserting it was not a proper party.

Counsel for all three parties agreed to, and on May 14, Judge Paul Sulhoff ordered a 60-day continuance for hearing on the motion. On May 15, Judge E. F. Hanson entered an order dismissing plaintiff's action against the DOT. The basis of the ruling was that the State was not a proper party because the petition did not allege involvement of access rights onto a state right-of-way. Plaintiff appeals from the dismissal of his claim against the DOT.

Actions of mandamus are equitable and our review is de novo. Iowa Code § 661.3; Iowa R. App. P. 4.

Plaintiff contends dismissal of the DOT due to improper pleading was error. Both parties present extensive arguments concerning what types of "facts" must

be pleaded. Explanations and attempts to differentiate "ultimate facts, conclusions of fact, operative facts, and investitive and divestitive facts" result in fine distinctions. Defendant particularly relies on Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642 (Iowa 1973), and other cases cited therein, to support dismissal. The Bailey court discussed in detail the types of facts to be pleaded and held that doubtful pleadings challenged by a motion to dismiss would be resolved against the pleader. Id. at 647-48. Bailey, however, was decided in 1973 under the old pleading rules[1] and its distinctions are no longer necessary under the mandates of "notice pleading" adopted in 1976. The new rule requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . [and] [n]o technical forms of pleadings or motions are required." Iowa R. Civ. P. 69. The Comment to Acts 1976 (66 G.A.) ch. 1264, in explaining the new rule, noted that:

> It will no longer be necessary to determine whether the rigid requirements of a "cause of action" have been pleaded. Distinctions under the former rule between "ultimate facts" which were required to be pleaded and "evidence" and "conclusions of law" which were prohibited in pleadings are abolished.

See also Schmidt v. Wilkinson, 340 N.W.2d 282, 283-84 (Iowa 1983).

The parties' and courts' confusion in categorizing facts and determining which are to be pleaded is the problem that notice pleading was designed to eliminate. Factual distinctions are no longer necessary; all that is required is a statement of facts sufficient to inform the defendant of the claim asserted. Id. at 283.

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[1] Iowa R. Civ. P. 69, prior to 1976, stated:

> "Pleadings" as used in this Division, do not include motions. They are the parties' written statements of their respective claims or defenses. They shall be clear, concise, and avoid repetition or prolixity.

We examine plaintiff's amended petition to determine if the notice pleading requirements have been met.[2] Paragraphs 3 and 4 alleged:

> 3. That the Iowa Department of Transportation is an agency of the State of Iowa empowered and authorized to construct and maintain highways and thoroughfares within the State of Iowa.
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> 4. That the Iowa Department of Transportation engineered and drew plans for the construction of a thoroughfare within the City of Council Bluffs, Iowa, known as the "Washington Avenue Bypass." Said plans and engineering were approved by the City of Council Bluffs, Iowa. That the exact agreement between the Iowa Department of Transportation and the City of Council Bluffs is unknown to the plaintiff, but alleges that Council Bluffs and the Iowa Department of Transportation cooperated, agreed upon and approved the planning, engineering and construction of said Washington Avenue Bypass. (Emphasis added.)

In paragraph 6, the petition alleged the erected barrier, constructed as part of the Washington Avenue Bypass, denied access to plaintiff's property from North 6th Street.

Defendant relies on Iowa Code section 306.4(3) as establishing the jurisdiction of roads and streets in the State, but argues that plaintiff's allegations do not even suggest that any of the requirements of this section have been established as to the DOT. Section 306.4(3) provides that:

> Jurisdiction and control over the municipal street system shall be vested in the governing bodies of each municipality; except that the department and the municipal governing body shall exercise concurrent jurisdiction over the municipal extensions of primary roads in all municipalities. The parties exercising concurrent jurisdiction shall enter into agreements with each other as to the kind and type of construction, reconstruction, repair and maintenance and the division of costs thereof. (Emphasis added.)

Comparing the concurrent jurisdiction agreements of section 306.4(3) and the allegations of cooperation and agreements between the City and DOT, we find

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[2] The amendment changed only paragraph 7 and the relief sought; the remainder of the original petition was unchanged.

sufficient facts to allege jurisdiction and control by the DOT over the roads in question.

Curtis v. Bd. of Supervisors of Clinton County, 270 N.W.2d 447, 448 (Iowa 1978), explained the standard for review under these circumstances.

> A motion to dismiss is sustainable only when it appears to a certainty the pleader has failed to state a claim upon which any relief may be granted under any state of facts provable under the allegations. The motion admits the allegations and waives any ambiguity or uncertainty in the pleading. The allegations are construed in their light most favorable to the pleader, and doubts are resolved in his favor. (Emphasis added.)

Id.[3]

Plaintiff's petition alleged sufficient facts to state a claim upon which relief may be granted—dismissal was in error.

Plaintiff also argues the dismissal was error because an order had been entered continuing that motion.

Why the trial court ordered dismissal on May 15 after another judge had ordered a 60-day continuance on May 14 is unclear. The DOT contends that the order was proper because Iowa Rule of Civil Procedure 117(b) allows the court to hear and rule on any motion prior to motion day, and thus encourages courts to rule quickly on motions. Defendant also states that the continuance was for the benefit of plaintiff and the city; and therefore, dismissal of the DOT would have no effect on the other parties. However, defendant had apparently agreed to a continuance as evidenced by a letter dated May 2 from DOT's counsel to the other parties. The letter stated:

> I am still willing to hold any further proceedings on this matter (including any hearing on our reasserted Motion [to dismiss]) in abeyance for a while until we find out if a

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[3] Prior to the rule change, doubtful pleadings were construed in favor of the challenging party. Bailey, 213 N.W.2d at 647.

> settlement can be effected. I am assuming this would be for a period of two or three months. You can inform the court of our position. If we will need a stipulation of some sort, let me know.

While we are inclined to question the authority and propriety of a dismissal order within 24 hours of a continuance order agreed to by all parties, because of our determination that the dismissal was in error for other reasons, we do not address the issue at this time. The DOT is reinstated as a defendant in this action.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.