

FILED

MAY 20 1977

27

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LEONARD L. BRUMBAUGH,)

Appellee,)

Filed May 20, 1977

v.)

F. VAN AMPTING,)

Appellant.)

161
2-58771

Appeal from Clay District Court - Joseph P. Hand, Judge.

Appeal from summary judgment in an action involving written and oral contracts in a restaurant franchise dispute. Reversed and remanded.

Richard J. Barry of James, Greer, Hoover, Nelson, Bertell, Montgomery and Barry, of Spencer, for appellee.

W. Michael Shinkle of Dircks, Ridenour, Davis and Shinkle, of Davenport, for appellant.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Van Ampting appeals from a summary judgment granted plaintiff Brumbaugh in a dispute involving franchise contracts for Villager Restaurants. The defendants below were two corporations and Van Ampting who was the president of one of these corporations. Only Van Ampting appeals.

I. We initially discuss a jurisdictional issue not treated by the parties in their briefs but which we feel necessary to consider *sua sponte*. The appeal involves a ruling on a motion for *partial* summary judgment relating to two divisions of a three division petition. The motion was sustained. If we were only confronted with partial adjudication of the rights of the parties involving multiple claims arising from the same transaction we would be obliged to consider the ruling to be interlocutory and dismiss this appeal. *McGuire v. City of Cedar Rapids*, 189 N.W.2d 592 (Iowa 1971). But the trial court ordered that a money judgment be entered against the defendants based upon the adjudication of division I and division II. Such judgment has been entered of record. There were no limitations imposed against execution of this judgment. While we believe that it would have been better practice for the trial court to have withheld entry of judgment (as opposed to rendition of judgment) on division I and division II until disposition of the balance of the case we are faced with the fact that it did not. The plaintiff's ability to execute upon the judgment meets the test of finality imposed by rule 331, Rules of Civil Procedure. *See, e.g., Employers Group Insurance Companies v. Villhauer*, 254 Iowa 391, 118 N.W.2d 38 (1962); *Crowe v. DeSoto Consolidated School District*, 246 Iowa 38, 66 N.W.2d 859 (1954); *Wilson v. Corbin*, 241 Iowa 226, 40 N.W.2d 472 (1950).

II. Division I and division II of the petition both seek to recover money damages for the \$10,000 franchise fee paid by

plaintiff to secure a Villager Restaurant franchise. Division I is based upon a alleged failure of defendants to perform under the agreement and division II is based upon a written agreement to return the franchise fee. The material allegations of the petition are denied by Van Ampting.

The motion for summary judgment was supported by the affidavit of the plaintiff in which he attests to defendants' non-performance under the agreement and a subsequent written assurance that his \$10,000 franchise fee would be returned. With respect to Van Ampting's personal liability as a result to these transactions, the plaintiff, in his affidavit, states that (a) one Ernie George told him he was acting for Van Ampting when George accepted plaintiff's check for \$10,000; and (b) the letter agreeing to return the \$10,000 franchise was signed by Van Ampting with no indication that such signature was affixed in a capacity other than an individual capacity. In resistance to the motion for summary judgment Van Ampting filed an affidavit stating that at all times material he was acting as an officer of the corporate defendant, The Villager Restaurants, International, LTD. and not personally or individually.

Agency is ordinarily not established by out-of-court declarations of the agent. *Folsom v. Grove*, 233 Iowa 1140, 11 N.W.2d 368 (1943). The intention of the parties, to be ascertained from all of the facts and circumstances of the transaction, govern as to whether a party to a written instrument binds himself personally thereon or is acting only in a representative capacity. *E.g.*, 17A C.J.S. Contracts § 347.

Based upon the foregoing state of the record we conclude that the trial court erred in sustaining the motion for summary judgment as against Van Ampting. There remains a genuine issue as to the material facts surrounding his personal involvement in

the transaction upon which plaintiff's claim is based. *See* Sherwood v. Nissen, 179 N.W.2d 336, 338-40 (Iowa 1970); Daboll v. Hoden, 222 N.W.2d 727 (Iowa 1974).

Because Van Ampting on this appeal challenges only that portion of the trial court's order involving his personal liability to respond for the failure of the party or parties contracting with plaintiff to perform under the agreement, it shall be deemed upon remand that breach of this agreement, plaintiff's right to rescind the agreement, and plaintiff's right to recover the \$10,000 franchise fee have all been established. The only issue remaining to be tried on the merits under division I and division II of the petition shall be the facts and legal obligations relating to Van Ampting's personal liability, if any, for this claim either jointly with the corporate defendants or severally.

REVERSED AND REMANDED.