FILED
DEC 23 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

362

JOHNSON COUNTY READY MIX, INC.,

Plaintiff-Appellee,

vs.

TOM F. O'LEARY, JR.,

Defendant-Appellant.

Filed December 23, 1980

0-336
64678

Appeal from Johnson District Court - Robert Osmundson, Judge.

Defendant takes interlocutory appeal from trial court's ruling on plaintiff's motion for judgment on the pleadings. - REVERSED.

John T. Nolan & Marc B. Moen, of Lucas, Nolan & Bohanan, Iowa City, for defendant-appellant.

William L. Meardon & Margaret T. Lainson, of Meardon, Sueppel, Downer & Hayes, Iowa City, for plaintiff-appellee.

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

PER CURIAM

Defendant takes an interlocutory appeal from the trial court's ruling on plaintiff's motion for judgment on the pleadings. We reverse.

In May, 1979, plaintiff brought an action to recover $18,798.63 plus interest and costs for concrete allegedly delivered to defendant. In October plaintiff filed an amended and substituted petition, and division II of this petition incorporated by reference a bill of particulars allegedly showing defendant's purchases, payments, and credits on an open account owned by plaintiff. Defendant's answer specifically denied every paragraph but one in division II of the petition. Plaintiff then moved for judgment on the pleadings with respect to the claim made in division II of the petition. See Iowa R. Civ. P. 222.

Plaintiff based its motion on Iowa R. Civ. P. 99, which provides:

> A pleading founded on an account shall contain a bill of particulars thereof, by consecutively numbered items, which shall define and limit the proof.... A pleading controverting such account, must specify the items denied, and any items not thus specified shall be deemed admitted.

The claim asserted in division II of plaintiff's pleading is founded on an account, and the pleading incorporates by reference a bill of particulars that contains consecutively numbered items. Defendant's answer did not specifically deny any of the numbered items contained in the bill. Therefore, plaintiff contended, under rule 99 the items in the bill of particulars should be deemed admitted and the motion for judgment on the pleadings with respect to the claim made in division II of plaintiff's petition should be granted.

Before the trial court ruled on plaintiff's motion for judgment on the pleadings, defendant moved to amend his answer. Defendant's amended answer did contain a specific denial of each item listed in the bill of particulars. In its rulings on plaintiff and defendant's motions, the trial court sustained defendant's motion to amend his answer and ordered that the contents of division II in plaintiff's petition be deemed established.

The basis for deeming the contents of division II of plaintiff's petition established is defendant's failure to satisfy rule 99 with his answer. Yet when the trial court sustained defendant's motion to amend his answer, defendant's amended answer, which we deem satisfied rule 99, eliminated the basis for ruling the contents of division II

established. We therefore reverse the trial court's ruling that division II of plaintiff's petition is established.

Judgment on the pleadings may not be granted when a material portion of the petition is controverted. See Friedman v. Colonial Oil Co., 236 Iowa 140, 145, 18 N.W.2d 196, 198 (1940).

REVERSED.