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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

AMALIA A. MEYERHOFF,)
Plaintiff-Appellee,) Filed November 19, 1979
vs.)
LEO A. DVORSKY,) 235
Defendant-Appellant.) 2-63013

Appeal from Fayette District Court - Karl Kenline, Judge.

Defendant appeals summary judgment entered against him in a suit to collect money due on a promissory note. Reversed and Remanded.

Jean J. Didier & David G. Challed, Dubuque, for defendant-appellant.

R. L. Van Veldhuizen of O'Brien Law Firm, P.C., Oelwein, for plaintiff-appellee.

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

DONIELSON, J.

Defendant, Leo A. Dvorsky, appeals summary judgment entered against him in a suit to collect money due on a promissory note. For reversal, defendant contends there was a genuine issue of material fact as to whether the note had been altered, and summary judgment was thus not appropriate, particularly since he was attempting to complete discovery. We reverse the summary judgment granted by the trial court and remand this case for a new trial.

Our review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

Plaintiff brought this action on March 1, 1978, claiming defendant had executed a promissory note to plaintiff for $1,300, and the amount had not been paid when due. Defendant's answer generally denied the allegations of the petition, but admitted he had signed a promissory note for $680. Defendant asserted the note had been altered and three counterclaims. On September 12, 1978, defendant's attorney withdrew from the case; defendant's present attorneys filed an appearance on November 6, 1978.

Plaintiff's motion for summary judgment, which contained no assertions, was filed November 27, 1978. Accompanying the motion was plaintiff's affidavit in which she stated, inter alia, that $620 of the amount of the note was owed to her as wages for a period in 1974 when she "cared for the defendant . . . ." She claimed that certain sums had been paid "by the state to be paid to me as wages for this care." The affidavit also contained a contention that the note had not been altered. In her memorandum in support of the motion, plaintiff noted that since defendant had not denied his signature it should be taken as admitted, and that no valid defense had been alleged.

In his affidavit resisting the motion for summary judgment, defendant asserted the note had been altered or forged since the note he signed was only for $680. The affidavit also contained a statement that expert examination of the note was being arranged. The impropriety of granting summary judgment while discovery is in process was raised in defendant's memorandum in support of his resistance.

Defendant's motion to amend his answer to deny the authenticity of his signature was filed December 8, 1978. The motion for summary judgment was granted on December 19, 1978. The court held: The note was "valid . . . as a matter of law"

because defendant had not denied his signature; it was "apparent" from an examination of the note there had been no alteration; and no meritorious defense had been raised. Judgment for $1,383.42 was granted plaintiff. Defendant brings this appeal from that judgment.

II.

Our task on review is to determine whether a genuine issue of material fact exists and whether the law was correctly applied, the same principles that guide a trial court in making its determination. Daboll v. Hoden, 222 N.W.2d 727, 734 (Iowa 1974). The movant under a summary judgment motion[1] is asserting, that on the then-existing record, there is no genuine issue of any material fact and judgment on the merits is warranted as a matter of law. Drainage District No. 119, Clay County v. Incorporated City of Spencer, 268 N.W.2d 493, 499 (Iowa 1978). Movant is assigned the burden of demonstrating both the absence of any such issue and entitlement to judgment as a matter of law. Id. A trial court considering a motion for summary judgment is required to examine, in the light most favorable to the party opposing the motion, the entire record before it, including the pleadings, admissions, depositions, answers to interrogatories, and affidavits to determine for itself whether any genuine issue of a material fact is generated. Schulte v. Mauer, 219 N.W.2d 496, 500 (Iowa 1974). If, after this examination, the court determines no such issue is present, and the movant is entitled to judgment as a matter of law, entry of summary judgment is proper. Drainage District No. 119, 268 N.W.2d at 499; Lewis v. State, 256 N.W.2d 181, 186 (Iowa 1977); Daboll, 222 N.W.2d at 731; Davis v. Comito, 204 N.W.2d 607, 611-12 (Iowa 1973).

After viewing the whole record before the trial court, we find it incorrectly granted plaintiff's motion for summary judgment. A genuine issue of a material fact was present in the record. Defendant correctly raised his allegations regarding the material alteration of the note as his pleadings and affidavit set forth specific, ultimate

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[1] Rule 237(c), Iowa R. Civ. P., provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

facts supporting these allegations. Northwestern National Bank of Sioux City v. Steinbeck, 179 N.W.2d 471, 477 (Iowa 1970). Specifically, defendant denied executing a note for $1300, but admitted executing a note for $680, and affirmatively alleged that the note he signed for $680 was fraudulently and materially altered to the amount of $1300, making the note void. Defendant described the appearance and contents of the note and compared it to the different description given by plaintiff. The issue of material alternation of the note was clearly and substantially raised by defendant. The trial court even commented in its order granting the summary judgment that from its examination of the note, it was apparent "there has been no alteration on the note . . . ." The trial court is to decide whether or not genuine issues of fact exist, not to judge the merits of existing facts. Bauer v. Stern Finance Company, 169 N.W.2d 850, 853 (Iowa 1969). Certainly on the issue of alteration, reasonable minds might differ on this issue regarding a material fact; for this reason summary judgment was incorrectly granted. See Iowa Department of Transportation v. Read, 262 N.W.2d 533, 536 (Iowa 1978). The very essence of summary judgment is the notion no material factual issues exist. Brody v. Ruby, 267 N.W.2d 902, 904 (Iowa 1978).

Furthermore, the existence of this issue regarding a material fact prevents plaintiff from receiving a summary judgment since she would not be entitled to a judgment as a matter of law if the alteration claim were true. "If by examination of [the] records any allegations asserting evidentiary facts appear which if found to be true would constitute a good defense to the action, the court under this rule must assign the matter for trial and should not sustain the motion for summary judgment." Comito, 204 N.W.2d at 612. If the allegation that the note was materially altered is true, this would be a valid defense to plaintiff's claim. §§ 554.3307(2), .3407, The Code 1979. Thus, the trial court erred in granting plaintiff a summary judgment since a genuine issue of a material fact existed that, if true, would have provided defendant a valid defense to plaintiff's claim. See Daboll, 222 N.W.2d at 735.

III.

Defendant also argues summary judgment was incorrectly granted because he was still involved in discovery. A party faced with a summary judgment motion is entitled to discover the facts to be able to properly resist the motion. Carter v. Jernigan, 227

N.W.2d 131, 136 (Iowa 1975). We, however, choose not to rely on this ground for our reversal for two reasons. We have already found sufficient grounds for reversing the trial court's decision and one more reason would be merely cumulative. Moreover, defendant's "eleventh-hour" manuevers give the appearance of dilatory tactics used only to create delay. We appreciate the fact defendant's counsel entered the case quite late and do not attribute to them any deliberate attempt to delay the proceedings. We do not, however, wish to appear to be condoning attempts to delay through needless discovery; relief for such tactics may be found in rules 123, 134(c), and 237(g), Iowa R. Civ. P., which the trial court may want to consider for use here.

REVERSED AND REMANDED.

Oxberger, C. J., concurs specially.

OXBERGER, C.J. (specially concurring)

I concur in Divisions I and II of the majority opinion and in the result. However, I disagree with the majority's finding of delay in Division III. Defendant's counsel entered the case late and within 21 days deposed the plaintiff and filed the motion for summary judgment. His actions were proper and timely. No evidence establishes "eleventh-hour manuevers" or "dilatory tactics" on his part. Since no delay is involved here, discussion of methods to deal with delay is uncalled for and unnecessary.