FILED
OCT 2 4 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-339 / 88-1465

IOWA STATE BANK & TRUST COMPANY, f/k/a IOWA STATE BANK & TRUST COMPANY, IOWA CITY, IOWA,

Appellee,

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vs.

JOHN F. LEE,

Appellant,

MARIAN L. LEE, CITY OF IOWA CITY, IOWA, STATE OF IOWA, TIM N. THATCHER, and **FIRST NATIONAL BANK, IOWA CITY, IOWA,**

Defendants.

JOHN F. LEE,

Counterclaimant-Appellant,

MARIAN L. LEE,

Counterclaimant,

vs.

IOWA STATE BANK & TRUST COMPANY,

Defendant to Counterclaim-Appellee.

Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge.

John F. Lee appeals and Iowa State Bank & Trust Company cross-appeals a district court order foreclosing two real estate mortgages. **AFFIRMED.**

Marlyn S. Jensen, Osceola, for defendants Lee.

Daniel W. Boyle of Phelan, Tucker, Boyle & Mullen, Iowa City, for Iowa State Bank.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

PER CURIAM

The Lees appeal a district court order foreclosing two real estate mortgages based on defaults of two notes and rejecting the Lees' legal and equitable counterclaims. The Bank appeals from that portion of the order that entered judgment of foreclosure on the line of credit note solely against John Lee and his interest in a real estate mortgage and not against Marian Lee. Our scope of review in such equity matters is de novo. Iowa R. App. P. 4. We affirm.

The Lees were long-time customers of the Iowa State Bank & Trust (Bank) and have borrowed money from the Bank over that period of time. Mr. William Richard Summerwill (Summerwill), who became the Bank's president during the period involved, was the Bank's officer who primarily dealt with John Lee over the years. Until the late 1970s the Lees had always repaid their debts.

In September 1977 the Lees signed a note and mortgage for a $30,000 loan to construct a house on land they owned for purposes of sale. This loan was extended sixteen times over the next eight years. The last extension was November of 1984, and final due date was May 22, 1985. In July 1981 the Lees applied for and received a $75,000 line of credit loan with the Bank. The note was secured by a mortgage on land the Lees owned in Iowa City.

Between 1981 and 1982 the line of credit note was completely paid off. The mortgage was never released and

by 1984 the Bank had again lent out the full amount. In December 1984 John Lee, but not Marian, signed a promissory note for the $75,000.

Eventually, the Lees defaulted on their two loans and the Bank filed this foreclosure action.

In 1977 John Lee acquired the patent rights to the Clute Machine, which was designed to break matter into fine particles. Lee's exclusive rights to the Clute patent expired in June 1983. Lee unsuccessfully attempted to market the Clute Machine on his own. On two occasions Summerwill, in an effort to assist Lee, arranged meetings for demonstrations of the machine. On another occasion in January 1984 Summerwill arranged a meeting between Lee and Mr. Allen Wiley (Wiley), a customer of the Bank's who was involved in the energy business. Between January and June 1984, Lee and Wiley met ten to twenty times to discuss applications of the machine to the energy business. Lee and Wiley never reached an agreement and Wiley eventually built his own machine.

On February 16, 1984, Lee applied for a $25,000 loan to build a larger machine for the production of limestone to sell to feed mills and to develop complete production facilities for such a machine. Since this was a new venture, as Lee's prior efforts were limited to attempting to market the machine, the Bank requested further information. The application was later marked as withdrawn when Lee failed to supply the requested information.

The trial court rejected numerous defenses and counterclaims filed by Lee in response to the Bank's foreclosure action. The trial court entered a decree of foreclosure against the Lees. Because the 1981 line of credit note was paid off and only John Lee signed the promissory note, the trial court entered judgment against only John Lee and his interest in the mortgage. John Lee and the Bank have appealed.

I. Motion To Amend

Lee claims the trial court erred in denying the Lees' pretrial motions to amend their counterclaims.

The scheduling conference was held on June 12, 1987. The Bank appeared by counsel and the defendant John Lee appeared personally and with counsel Marlyn Jensen. On that same date, the trial court entered an Order and Scheduling Conference Order. The Scheduling Conference Order directed all pleadings be closed by October 1, 1987.

On November 25, 1987, and on July 8, 1988, the Lees filed motions for leave to amend their petition. On February 8, 1988, and July 22, 1988, the trial court denied both motions as being in violation of the Scheduling Conference Order.

We find that the trial court acted within its discretion in rejecting the Lees' proposed amendments. The Iowa Supreme Court has stated:

> Iowa Rule of Civil Procedure 88 provides guidelines for deciding whether amendments to pleadings should be allowed. It states:

> A party may amend the pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty days after it is served. Otherwise, a party may amend the pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

Allowance or disallowance of amendments to pleadings is also a matter for the exercise of trial court discretion.

Chao v. City of Waterloo, 346 N.W.2d 822, 825 (Iowa 1984). Since the Bank had filed a responsive pleading, Lee's time for amendment of the petition as a matter of right had passed. See Farm-Fuel Prods. v. Grain Processing, 429 N.W.2d 153, 162 (Iowa 1988).

It is within the court's discretion as to whether an amendment should be allowed, and the court's decision will be reversed only if there is a clear abuse of that discretion. Willson v. City of Des Moines, 386 N.W.2d 76, 83 (Iowa), cert. denied, 479 U.S. 948 (1986). The bounds of fair discretion are exceeded if the ruling lacks a sound legal basis. Johnston v. Percy Constr., Inc., 258 N.W.2d 366, 371 (Iowa 1977). Although allowance of an amendment is the general rule and denial the exception, we are reluctant to find an abuse of discretion in a trial court ruling granting or denying a party leave to amend. Id. at 370-71.

Based upon the record in this case, we see no reason to disturb the trial court's ruling. We find no abuse of discretion in denying the Lees' motions to amend.

II. Directed Verdict

Next, Lee contends the trial court erred in directing the verdict on three counterclaims and legal and equitable affirmative defenses. A question involving the sufficiency of evidence to generate a submissible jury issue in the face of a motion for a directed verdict presents an issue of law. Wolfe v. Graether, 389 N.W.2d 643, 651 (Iowa 1986). To grant a directed verdict, a trial court must find that the evidence, when considered in the light most favorable to the opposing party, is insufficient as a matter of law to sustain the allegations brought. Nash v. Schultz, 417 N.W.2d 241, 243 (Iowa App. 1987). A directed verdict is appropriate if there is no substantial evidence in support of each element of the claim. Woodruff Constr. Co. v. Mains, 406 N.W.2d 783, 789 (Iowa 1987); Oberreuter v. Orion Indus., 398 N.W.2d 206, 209 (Iowa App. 1986). A mere scintilla of evidence is not sufficient to require denial of a motion for directed verdict. Oberreuter, 398 N.W.2d at 209. The trial court is vested with considerable discretion in determining whether evidence is sufficient. Id.

A. Counterclaims. Lee alleged that the Bank and Wiley conspired to convert his ideas concerning the Clute

Machine. "The principal element of conspiracy is an agreement or understanding between two or more persons to effect a wrong against another. Conspiracy involves some mutual action coupled with an intent to commit the act which results in injury." Bump v. Stewart, Wimer & Bump, P.C., 336 N.W.2d 731, 737 (Iowa 1983).

A review of the record reveals no evidence upon which a jury could find the existence of a conspiracy to convert Lee's ideas concerning the machine. Any such determination would be mere speculation. We find no element of conspiracy supported by substantial evidence in the record which would allow the trial court to submit the issue of conspiracy to a jury.

Further, we agree with the trial court that Lee's conversion claim was not supported by substantial evidence allowing submission to a jury. In Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235 (Iowa 1988), the Iowa Supreme Court defined conversion as an "act of wrongful control or dominion over another's personal property in denial of or inconsistent with that person's possessory right to the property." Id. at 247. The court cited the Restatement (Second) of Torts section 222A(2) for the factors to be considered in determining the seriousness of the interference. Those factors include:

(a) the extent and duration of the actor's exercise of dominion or control;
(b) the actor's intent to assert a right in fact inconsistent with the other's right of control;

(c) the actor's good faith;
(d) the extent and duration of the resulting interference with the other's right of control;
(e) the harm done to the chattel;
(f) the inconvenience and expense caused to the other.

Kendall/Hunt, 424 N.W.2d at 247 (citing Restatement (Second) of Torts § 222A(2)). The record does not reveal substantial evidence to support any element of Lee's conversion claim. We find no error by the trial court in directing a verdict on defendant Lee's counterclaim of conspiracy to convert.

Lee also alleged a conspiracy to tortiously interfere with prospective business advantage. In Gordon v. Noel, 356 N.W.2d 559 (Iowa 1984), the supreme court addressed the tort of intentional interference with prospective business advantage. The court stated:

> The tort of intentional interference with prospective business advantage imposes liability on a person who intentionally and improperly interferes with the claimant's business expectancies "whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation."

Id. at 563 (citations omitted).

We agree with the trial court that

> [i]n this case, there is no evidence . . . [the Bank] intentionally interfered with the Lees' business expectancies. In fact, there is no evidence the Lees had any business expectancies relating to the Clute patent. Further, there is no evidence there was any third person who was interested in the Clute patent or who was interested in doing business with the Lees.

Accordingly, we find no error by the trial court in directing a verdict on Lee's counterclaim of conspiracy to tortiously interfere with prospective business advantage.

Additionally, Lee asserts trial court error in directing the verdict on the breach of implied contract claim. He alleged that the Bank had an implied contract to continually lend him money.

In order for a contract to be formed, there must be mutual assent to the terms of the contract or a "meeting of the minds." Fairway Center Corp. v. U.I.P. Corp., 502 F.2d 1135, 1141 (8th Cir. 1974); Kristerin Dev. Co. v. Granson Inv., 394 N.W.2d 325, 331 (Iowa 1986). Whether a "meeting of the minds" has occurred depends on the intention of the parties as determined from words and actions viewed within the context of the situation and surrounding circumstances. Fairway, 502 F.2d at 1141. The nonperformance of a duty under a contract is a breach. Metropolitan Transfer v. Design Structures, 328 N.W.2d 532, 537-38 (Iowa App. 1982).

The Lees signed a mortgage note on September 29, 1977, for the $30,000 loan. The Bank renewed and extended the loan sixteen times. The last extension occurred on November 23, 1984, and was accompanied by the Lees' execution of an Agreement for Extension of Real Estate Mortgage Note. The loan was due May 22, 1985. Contrary to Lee's contention, we find no evidence of an agreement by the Bank to always renew the Lees' notes.

On July 24, 1981, the Bank approved a $75,000.00 line of credit loan for the Lees. The Lees executed a real estate mortgage as security for the loan. The full line of credit agreement was exhausted in 1984 when the Lees refused to make any additional payments or negotiate with the Bank. We find no evidence the Bank owed the Lees any further contractual obligations under the line of credit loan. We agree with the trial court that "there is no proof of the existence of a contract relating to automatically renewing the notes." We find no error in the trial court in directing a verdict on Lee's breach of implied contract counterclaim.

B. Affirmative Defenses. Finally, Lee contends the trial court erred in directing the verdict on legal and equitable affirmative defenses.

On July 22, 1988, the trial court granted the Bank's motion to separate the legal and equitable issues. The trial court granted this motion and ordered that the Lees' legal defenses to equitable claims be tried in equity. A joint evidentiary trial was held before a jury and the trial court sitting in equity on August 1-2, 1988.

A defendant has no right to a trial by jury of law issues raised in the answer to an action properly brought in equity. In re Marriage of Stogdill, 428 N.W.2d 667, 670 (Iowa 1988). "Once equity has obtained jurisdiction of a controversy the court will determine all questions material

or necessary to accomplish full and complete justice between the parties, even though in doing so the court may be required to pass upon certain matters ordinarily cognizable at law." Id. There is no right to a jury trial on legal defenses made to an equitable cause of action. Grandon v. Ellingson, 259 Iowa 514, 518, 144 N.W.2d 898, 901 (1966).

The Lees were not entitled to a jury trial for their legal and equitable affirmative defenses to the Bank's equitable causes of action for foreclosure. The trial court did not error in not submitting the Lees' legal and equitable affirmative defenses to the jury.

III. Foreclosure Decree

In its cross-appeal, the Bank contends the trial court erred in failing to enter a decree of foreclosure against Marian L. Lee. We disagree. The Bank argues it has a valid security interest in real estate as the result of the mortgage given by the Lees for $75,000 to secure a line of credit loan.

With reference to this loan, the trial court found:

> In this case, Marian and John Lee signed a mortgage to secure a line-of-credit loan for $75,000. This loan was paid off on at least two separate occasions prior to John Lee executing a note in 1984 for $75,000.
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> * * *
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> There was no open-end or dragnet clause in the mortgage, and the only evidence of the line-of-credit loan is the testimony of Richard Summerwill and John Lee relating to their agreement. There is no evidence in the record relating to Marian Lee's acceptance of this oral agreement. . . . The mortgage contains no language

> which expressly pledges the interest of John and Marian Lee as security for future indebtedness of the mortgagors or either of them. . . . The debt which was secured by the mortgage dated July 24, 1981, was paid in full prior to John Lee signing a note for $75,000 on December 5, 1984. Unless there is evidence in the record which shows Marian Lee understood and agreed to the future payments, the mortgage cannot be foreclosed as to her interest.

On our review of the record, we agree with these findings. There is no basis for holding the ownership interest of Marian should be foreclosed against. See In re Simpson, 403 N.W.2d 791, 793 (Iowa 1987); Van Dusseldorp v. State Bank of Bussey, 395 N.W.2d 868, 871 (Iowa 1986); Farmers Trust & Sav. Bank v. Manning, 311 N.W.2d 285, 288-89 (Iowa 1981).

In summary, we find no abuse of discretion in denying the Lees' motions to amend and we find no error by the trial court in directing the verdict on the Lees' counterclaims, and legal and equitable affirmative defenses. We find the trial court was correct in failing to enter a decree of foreclosure against Marian Lee. The judgment of the trial court is affirmed in all respects.

Costs of this appeal are to be taxed one-half to each party.

AFFIRMED.

Habhab, J., concurs; Oxberger, C.J., concurs in part and dissents in part.

OXBERGER, C.J. (concurring in part and dissenting in part)

I respectfully dissent from Division III regarding the foreclosure decree against Marian L. Lee.

I would find the holding in Van Dusseldorp v. State Bank of Bussey, 395 N.W.2d 868 (Iowa 1986) controls in this case.

In Van Dusseldorp a husband and wife were mortgagors and both executed an original mortgage securing a $60,000 loan. Although the mortgage included an open-end advance clause, the court determined the clause was rendered inoperative from its inception because the word "NONE" was inserted in the accompanying space. Additional loans were made to the mortgagors, and over a period of time repayments and renewals took place. The last renewal was evidenced by a promissory note executed only by the husband. The court determined the original mortgage executed by the husband and wife was valid as to each and held the wife's interest in the mortgaged property was subject to foreclosure. Id. at 871. The court stated two reasons why the wife's mortgage to the bank remained valid. One was the balance on the original note never actually reached a zero balance, and "[s]econdly, even if the accounts had been reduced to zero during the life of the mortgage, the mortgage was not released." Id.

In the case at hand, Summerwill completed the Lees' loan application for a $75,000 line of credit loan on

July 24, 1981. All information contained in the loan application was supplied by John Lee. On that same day Marian and John Lee signed a mortgage to secure the $75,000 loan. Summerwill and John Lee both testified they had agreed this loan was to be a line of credit loan. The purpose of this loan was, for living expenses, working capital for the Lees' business ventures, as well as to pay overdue delinquencies on other bank loans. The mortgage did not include an open-end advance clause. On two separate occasions this loan was completely paid off, the last time in May, 1982. The mortgage was never released and by 1984, the Bank had again lent out the full amount. In December 1984, John Lee, but not Marian, signed a promissory note for the $75,000.

The trial court concluded that there was no evidence in the record relating to Marian Lee's acceptance of the line of credit agreement. It determined that the Bank was only entitled to a foreclosure decree against John Lee's interest in the mortgaged real estate. I disagree. Marian Lee signed the mortgage securing the line of credit loan on the same day the loan application was completed. The purpose of the loan remained the same throughout all advances made to the Lees under the line of credit. She received direct benefit from all advances under the line of credit as the funds were used to provide the Lees with living expenses, working capital for their business ventures, and to renew existing debt on another loan.

Furthermore, the mortgage was never released. Consequently, I would find that Marian Lee understood and agreed to the line of credit loan. I would reverse the trial court's decision on this issue and conclude that the Bank is entitled to a judgment of foreclosure against the ownership interests of both John Lee and Marian Lee in the mortgaged real estate.