IN THE COURT OF APPEALS OF IOWA

FILED
JUN 26 1990
CLERK SUPREME COURT

No. 0-164 / 89-1101

TRI-STATE LIVESTOCK AUCTION CO.,

Appellant.

285

vs.

NORTHWESTERN STATE BANK OF ORANGE CITY, IOWA,

Appellee.

Appeal from the Iowa District Court for Sioux County, Richard J. Vipond, Judge.

Appellant appeals the district court's granting of appellee's motion for summary judgment. **AFFIRMED.**

John J. Greer of Greer, Montgomery, Barry & Bovee, Spencer, and Mark F. Marshall of Bangs, McCullen, Butler, Faye & Simmons, Rapid City, South Dakota, for appellant.

Ned Stockdale and Francis Fitzgibbons of Fitzgibbons Brothers, Estherville, and Marvin Klass and Roger Carter of Klass, Hanks, Stoos & Carter, Sioux City, for appellee.

Heard by Donielson, P.J., and Schlegel and Habhab, JJ.

HABHAB, J.

Appellant Tri-State Livestock Auction Company (Tri-State) appeals the district court's granting of appellee's motion for summary judgment. We affirm.

Tri-State was a livestock auction business located in Sioux Center, Iowa. Elkton Livestock Company (Elkton) was a South Dakota company which acted as an order buyer for cattle. Elkton's agent, David Mulso, purchased cattle on Elkton's account and then shipped the cattle to Tri-State for sale. Upon the sale of the cattle, Tri-State would issue a check for the proceeds. David Mulso's wife, Susan Mulso, would drive to Sioux Center, Iowa, to pick up the check and then return to deposit the check in Elkton's account at the Corn Exchange Bank in Elkton, South Dakota.

In the fall of 1982, Tri-State altered this process in order to facilitate Elkton's purchase of livestock. At that time, Tri-State's owner and president, Paul Den Herder, authorized Tri-State's bookkeeper, Sturgis Van Vugt, to obtain a "draft book" from appellee Northwestern State Bank of Orange City, Iowa (Northwestern) and instruct Susan Mulso on how to complete these drafts. Van Vugt telephoned Northwestern and talked with Cliff Korver. Van Vugt requested several draft books. Van Vugt did not inform Korver of the intended use of these drafts. Subsequently, Northwestern delivered two pads of blank drafts to Van Vugt. Van Vugt then inspected the drafts and found them to be satisfactory.

Van Vugt later instructed Susan Mulso on how to properly complete the drafts and prepared a sample draft. These drafts were to be made payable to Elkton and signed "Tri-State Livestock by David Mulso." These instructions were consistent with Tri-State's use of identical instruments on prior occasions. When these drafts were presented for payment, Northwestern called Den Herder for authorization.[1]

Approximately twenty such drafts were executed to Elkton and deposited in Elkton's bank account.[2] Den Herder authorized payment on the first seventeen drafts, but refused authorization on the last three. Northwestern honored Den Herder's request and refused payment as to the last three instruments.[3] These drafts, however, had already been deposited in Elkton's account at the Corn Exchange Bank, and immediate credit had been given by the bank to Elkton. The Corn Exchange Bank thereafter sued Tri-State and obtained a judgment for the amount of the returned checks. See Corn Exchange Bank v. Tri-State Livestock Auction Co., 368 N.W.2d 596 (S.D. 1976).

Tri-State then initiated this lawsuit against Northwestern alleging in substance that it should have been

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1. This procedure had to be followed for neither Susan nor David Mulso's names appear on the bank's signature card.

2. These checks were in excess of $5,000,000.00.

3. The last three checks totalled $1,012,850.59.

furnished non-negotiable drafts instead of the negotiable checks. It seeks to recover under the theories of breach of contract, breach of fiduciary duty, and negligence.[4] Northwestern subsequently filed a motion for summary judgment. In granting Northwestern's motion for summary judgment, the district court found no issue of material fact as to the first two theories and additionally found no genuine issue of material fact to exist as to Tri-State's negligence claim because of a lack of admissible evidence stating Tri-State had requested that Northwestern provide Tri-State with non-negotiable drafts. Tri-State appeals from that determination.

Our review is on assigned errors of law. Iowa R. App. P. 4. In ascertaining whether summary judgment under Iowa Rule of Civil Procedure 237(b) is appropriate, we must apply the following well-established criterion:

> Summary judgment is proper when there is no genuine issue of fact and the moving party is entitled to the judgment as a matter of law. The burden of showing the nonexistence of a material fact is upon the moving party. While an adverse party generally cannot rest upon his pleadings when the moving party has supported his motion, summary judgment is still not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. In this respect, summary judgment is functionally akin to a directed verdict; every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved.

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4. The main thrust of appellant's appeal rests on its negligence theory. It is the sole issue referred to in its "Statement of Issues for Review."

Martinke v. H-N-W Associates, 393 N.W.2d 320, 321 (Iowa 1986) (quoting Knapp v. Simmons, 345 N.W.2d 118, 121 (Iowa 1984)).

As we stated in James v. Swiss Valley Ag Service, 449 N.W.2d 886 (Iowa App. 1989):

> The Iowa Supreme Court recently adopted the federal standard for summary judgment as set out in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 244, 106 S. Ct. 2505, 2508, 91 L. Ed. 2d 202, 209 (1986). See Behr v. Meredith Corp., 414 N.W.2d 339, 341 (Iowa 1987). In Anderson, the United States Supreme Court held that the standard for summary judgment is the same as upon directed verdict. 477 U.S. at 251, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. As the Court in Anderson further stated:
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> > The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.
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> 477 U.S. at 256, 106 S. Ct. at 2514, 91 L. Ed. 2d at 217.
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> When a movant for summary judgment satisfies the initial burden of production, the burden shifts to the party opposing the motion for summary judgment, who then must set forth specific facts showing that there is a genuine issue for trial. Anderson, 477 U.S. at 250, 106 S. Ct. at 2516, 91 L. Ed. 2d at 213. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265, 274 (1986).
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> In Catrett, the United States Supreme Court stated:
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> > The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the

> lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills its function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

477 U.S. at 327, 106 S. Ct. at 2555, 91 L. Ed. 2d at 276 (citations omitted).

The critical issue in the case sub judice concerns the affidavit of Den Herder filed by Tri-State as part of its resistance to Northwestern's motion for summary judgment. In his affidavit, Den Herder related a supposed conversation between Tri-State's previous president, Cliff Bogard, and unnamed individuals at Northwestern, wherein Bogard requested a non-negotiable financial document be supplied by Northwestern to facilitate Tri-State's providing advances to livestock purchasers. In response to this request, Northwestern supposedly furnished Tri-State with an item which Northwestern called a "draft."

Tri-State assumed throughout the twenty-odd years it used these drafts that these documents were non-negotiable. The issue which confronts us is whether the trial court erred in according Den Herder's affidavit nominal consideration because the affidavit did not meet the requirements of Iowa Rule of Civil Procedure 237(e).

Rule 237(e), Iowa Rules of Civil Procedure, provides in relevant part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

The portion of Den Herder's affidavit relating to the conversation between Bogard, who is now deceased, and someone at Northwestern constitutes hearsay and as such is not "admissible evidence" as required under rule 237(e). Cf. McCarney v. Des Moines Register & Tribune Co., 239 N.W.2d 152, 157 (Iowa 1976); Gutwein v. Edwards, 419 N.W.2d 809, 813 (Minn. Ct. App. 1988); Kalb v. Village of Oak Lawn, 128 Ill. App. 3d 481, 470 N.E.2d 1268, 1270-71 (1984). Nor does the affidavit state that the affiant was present at the time of the alleged conversation or how else he acquired this information to render it admissible as an exception to the hearsay rule. Because the affidavit fails to show that this evidence is admissible, the district court properly disregarded those portions of the affidavit. Absent those portions of the Den Herder affidavit, the record in this case fails to disclose the

existence of a material fact question as to Tri-State's negligence claim. Generally, resolution of issues of negligence and proximate cause turns on the reasonableness of the acts and conduct of the parties under all the facts and circumstances. But here, the issue becomes not whether there was negligence in the actions of the defendant, but whether there was evidence upon which liability could be found. The decision of the district court is affirmed.

AFFIRMED.