IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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FARMERS STATE BANK OF JEWELL,	)	
Plaintiff-Appellant,	)	
vs.	)	
MOEHL MILLWORK, INC.,	)	8-642 88-563
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Polk County (CL 67-39800), Glenn E. Pille, Judge.

Plaintiff Bank appeals from a district court judgment granting defendant's motion for summary judgment and thereby dismissing the Bank's claim for damages. **AFFIRMED.**

Bertrand E. Gionet of Neiman, Neiman, Stone & Spellman, P.C., Des Moines, for plaintiff-appellant.

Craig S. Shannon of Grefe & Sidney, Des Moines, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J.

The Bank appeals from a district court judgment granting defendant's motion for summary judgment and thereby dismissing the Bank's claim for damages. The Bank contends that: (1) Moehl's failure to deliver the goods paid for or to return the money received to Cornwell Lumber created an obligation to the Bank covered by a security agreement given by the lumber company to the Bank; (2) the Bank's acceptance of a deed from James Cornwell pursuant to a voluntary foreclosure procedure did not prevent this action seeking restitution from Moehl; and (3) the district court erred in granting summary judgment for Moehl since there were material facts in dispute.

In 1985, the Bank loaned James Cornwell and his wife $69,000 for the construction of a home. The loan was secured by their real estate on which the home was to be constructed. In 1986, Moehl Millwork gave two estimates totaling approximately $3,000 for the purchase of certain millwork. At this time, Cornwell owed Moehl Millwork approximately $10,000. The Bank then advanced Cornwell Lumber Company the funds necessary to purchase the millwork. In 1984, Cornwell Lumber executed a security agreement in favor of the Bank for all accounts and inventory now owned or hereafter acquired.

After the Bank advanced the money for the millwork, but prior to delivery, the Cornwell's financial situation

deteriorated. Cornwell did not pay its open account with Moehl and Moehl did not deliver the millwork. Instead, Moehl applied the approximate $3,000 advance from the Bank to Cornwell's account. Cornwell and his wife then signed an agreement for a nonjudicial voluntary foreclosure proceeding with the Bank transferring the real estate and home to the Bank in satisfaction of the $69,000 note.

The Bank, then filed this action seeking restitution from Moehl Millwork for its recovery of the approximate $3,000 advance. The district court granted defendant's motion for summary judgment stating that the Bank's security agreement did not attach to the millwork and that the Bank's decision to cancel Cornwell's debt precluded the Bank from maintaining this action

I.

The Bank contends the trial court erred in overruling plaintiff's motion for summary judgment on the basis that defendant's failure to deliver the goods paid for or its failure to return the money received did not create an obligation covered by the duly forfeited security agreement given by Cornwell Lumber Company to plaintiff Bank. The Bank asserts that it was not relying solely on the merchandise as security, but also on the "account," "contract rights" or "general intangibles" that resulted from defendant's failure to deliver the merchandise after being paid for it. The Bank cited no authority for this theory of "account."

The trial court found there was no sale of goods to which the Bank's security interest could attach. Without delivery of the goods, title never passed to Cornwell. The Bank's security interest in the goods never attached. Iowa Code § 554.2401(2) provides:

> 2. Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes the seller's performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading
>
> a. if the contract requires or authorizes the seller to send the goods to the buyer but does not require the seller to deliver them at destination, title passes to the buyer at the time and place of shipment; but
>
> b. if the contract requires delivery at destination, title passes on tender there.

The original contract between Moehl Millwork and Cornwell indicated that the millwork would be shipped to the construction site. The goods were neither shipped or delivered; therefore title did not pass from Moehl Millwork to James Cornwell. The trial court correctly found that there was no sale and that the security agreement did not attach.

II.

The Bank next contends the lower court erred in sustaining defendant's motion for summary judgment by holding the Bank, by entering into an "agreement for alternative nonjudicial voluntary foreclosure" and taking a deed from the debtor, gave up the right to seek restitution

from a third party on a theory of unjust enrichment. The Bank claims the conduct of the defendant in refusing to deliver the merchandise which was paid for or to return the funds advanced, constitutes malicious and fraudulent acts on the part of the defendant against the Bank. This conduct deprived the Bank of additional security on its financing and allegedly resulted in defendant's unjust enrichment.

The Bank has cited no authority for its argument besides the definition of unjust enrichment. "A person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust." Gard v. Razanskas, 248 Iowa 1333, 1336, 85 N.W.2d 612, 614 (1957).

Unjust enrichment is a doctrine that rests on the equitable principle that one shall not be permitted to unjustly enrich himself/herself at the expense of another. Glass v. Minnesota Protective Life Ins. Co., 314 N.W.2d 393, 397 (Iowa 1982). Moehl Millwork has not been unjustly enriched. It merely retained some of the money that it was owed by Cornwell. There is no factual support for the Bank's claim. We find no error was made regarding the Bank's claim of restitution and unjust enrichment.

III.

The Bank contends the court erred in sustaining defendant's motion for summary judgment inasmuch as the

court recognized that there were fact questions raised and then proceeded to resolve the fact issue raised. Specifically, the Bank claims there were factual questions regarding the distinction between doing business with Cornwell personally and doing business with Cornwell's companies. The court determined that the Bank was dealing with Cornwell personally.

Summary judgment is properly granted only where there is no issue as to a material fact and the moving party is entitled to judgment as a matter of law. Froning & Deppe, Inc. v. South Story Bank, 327 N.W.2d 214, 215 (Iowa 1982). Our task on appeal is to determine only whether a genuine issue of material fact exists. Id.

Reviewing the entire record in this case in the light most favorable to the party opposing the motion, we find there is no issue of a material fact. The documents executed by the Bank were with Cornwell personally. The Bank financed Cornwell's home in Ames. James Cornwell signed a note to the Bank and gave a mortgage to secure the same. James Cornwell approved all loan advances. James Cornwell deeded the secured property back to the Bank and the Bank canceled the note. The Bank dealt only with James Cornwell on this transaction. Two years earlier Cornwell Lumber Company gave the Bank a security agreement in its assets. There is no genuine issue of material fact concerning with whom the Bank was dealing. Therefore, summary judgment was properly granted.

Finally, the Bank argues that summary judgment is improper where malice and fraud is alleged. Malice and fraud were pled as part of the claim for restitution and unjust enrichment. However, having found no actual damages to the Bank, there is no need to consider the allegations of fraud and malice. See Suss v. Schammel, 375 N.W.2d 252, 255 (Iowa 1985).

Summary judgment is affirmed.

AFFIRMED.