IN THE COURT OF APPEALS OF IOWA

No. 5-653 / 94-1718

RODNEY WINKER and JILL WINKER,

Plaintiffs-Appellees,

vs.

JANET IRENE MYOTT, JOANNE DUSATKO a/k/a JOANNE DUSATKA and TONY DUSATKO, Wife and Husband,

Defendants-Appellants,

and

ELAINE K. JOHNSON,

Defendant.

FILED
APR 23 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Sac County, Joel E. Swanson, Judge.

Defendants appeal a district court ruling granting plaintiffs' motion for summary judgment and awarding plaintiffs an $8000 credit toward the purchase price of defendants' property. **AFFIRMED.**

David P. Jennett, Storm Lake, for appellants.

Warren L. Bush of the Bush Law Office, Wall Lake, for appellees.

Heard by Sackett, P.J., Habhab, J., and Schlegel, S.J.*

* Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

SACKETT, P.J.

The sole issue in this appeal is whether the trial court correctly held the vendees under a real estate contract should have credit against the balance due on their contract for insurance proceeds the vendors received after a barn on the premises sold under the contract burned to the ground. We find the trial court correctly decided this issue on summary judgment. We affirm.

Plaintiffs-appellees Rodney Winker and Jill Winker signed the real estate contract agreeing to purchase from defendants-appellants Janet Irene Myott, Joanne Dusatko, and Tony Dusatko, and defendant Elaine K. Johnson an improved tract of land in Sac County. The contract called for a purchase price of $25,000 with a down payment of $100. The $100 down payment was made. Plaintiffs were to be given possession of the property October 1, 1992. The final payment on the contract was to be made October 1, 1993.

This was a family transaction. It is undisputed there were title problems because the land was considered an asset of a bankruptcy. It is also undisputed the buildings were in bad repair and it was the intention that plaintiffs live rent free on the premises between October 1, 1992 and October 1, 1993.

On May 26, 1993, the barn burned. Neither party was responsible for the fire. Defendants had paid for and maintained the insurance on the premises despite a clause in the contract that said:

> Sellers shall maintain existing insurance upon the Real Estate until the date of possession. Buyers shall accept insurance proceeds instead of Sellers replacing or repairing damaged improvements. After possession and until full payment of the purchase price, Buyers shall keep the improvement on the Real Estate insured against loss by fire, tornado, and extended coverage for a sum not less than 80 percent of full insurable value payable to the Sellers and Buyers as their interests may appear. Buyers shall provide Sellers with evidence of insurance.

The insurance company paid defendants $8000 for the fire loss on the barn. Plaintiffs advanced that the $8000 less the amount of insurance premium paid by defendants should be a credit against their obligation to defendants under the contract.

The contract did not close on October 1, 1993. Defendants were not able to deliver merchantable title. A title opinion of Kurt T. Pittner, an attorney in Fort Dodge, made a number of objections to the title. The objections included judgments that were not released for child support; a federal lien in a substantial amount; unpaid real estate taxes; and a need for a showing the property was not included in a bankruptcy estate. There is no evidence these objections to title have ever been corrected.

Plaintiffs were notified they would be served with a notice of forfeiture of real estate contract sometime before March 10, 1994. In the notice prepared but not served, defendants claimed plaintiffs had failed to comply with the contract in that they had not paid the $24,900 by October 1, 1993. The prepared notice also claimed both rent and interest from October 1, 1993.

Plaintiffs sought an injunction to preclude forfeiture contending the issue of the insurance proceeds was in dispute. The trial court denied the temporary injunction but ordered that plaintiffs not be served the notice of forfeiture and determined defendants would be in contempt of court if they did serve it.

Plaintiffs then filed a motion for summary judgment contending the court should declare they receive a credit on the purchase price for the fire insurance proceeds. Plaintiffs contended the law provided for such a result. Attached to the motion was an affidavit by plaintiff Jill Winker they had offered to pay $16,900 to settle the contract. This would represent the difference between the balance due on the contract and the insurance proceeds received by defendants.

Defendants resisted the motion for summary judgment contending in not paying the fire insurance plaintiffs breached the contract and there had been no tender of any part of the purchase price or interest or rent. They further contended, because of the breaches, the contract was null and void.

The trial judge entered summary judgment for plaintiffs holding they were entitled to an $8000 credit less insurance proceeds against the purchase price of the acreage. It is from this holding three of defendants appeal.

Defendants contend there are genuine issues of material fact as to whether or not they delivered merchantable title, whether plaintiffs are in default for nonpayment, and whether to allow the credit is unjust enrichment.

The sole issue presented by plaintiffs on the motion for summary judgment was they should have credit for the $8000 insurance proceeds. The trial court found this the issue and determined in summary judgment that plaintiffs should have the credit.

The issues of title and rent were not before the court on the summary judgment motion. If the issues are a part of the action appealed from, then defendants' appeal was an interlocutory appeal for which no permission to appeal was granted.

The trial court did not resolve the title problems. The only holding made by the trial court and the one from which appeal was taken was that plaintiffs be given credit for the insurance proceeds for the balance due under the contract. This is the only holding we address. The trial court found it was not plaintiffs' responsibility to obtain insurance until October 1, 1993, as they were living there rent-free prior to that time. We need not decide whether this was a contested issue. The premises were insured and, prior to the fire, there was no demand on plaintiffs to obtain the insurance. While defendants in their affidavits contended plaintiffs' failure to pay for the insurance was a breach, the issue of whether the contract had been breached was not an issue put before the court in the motion for summary judgment.

The only issue is whether plaintiffs should have the credit. There are no factual disputes on this issue. Rather, it is a question of whether the trial court applied the correct law. Clearly the trial court did.

Both plaintiffs and defendants have an insurable interest in property sold under a contract. When the sellers entered into the contract, they agreed to convey their interests in the property for $25,000. To the extent that money has not been paid, they are entitled to insurance proceeds. A seller is only entitled to one satisfaction of his or her debt. *Farmers & Merchants Sav. Bank v. Farm Bureau Mut. Ins. Co.*, 405 N.W.2d 834, 838 (Iowa 1987). A vendor's interest in insurance proceeds is measured by the unpaid balance of the installment contract. *Id.; Risken v. Clayman*, 398 N.W.2d 833, 837 (Iowa 1987).

The fire diminished the property plaintiffs were buying and they bore the loss of destruction. The only correct result is to give plaintiffs credit on the contract for the insurance proceeds defendants received. *See Gard v. Razanskas*, 85 N.W.2d 612 (Iowa 1957); *Brady v. Welch*, 200 Iowa 44, 204 N.W. 235 (1925); *Kelly v. Iowa Valley Mut. Ins. Ass'n*, 232 N.W.2d 330, 332 (Iowa 1983).

The other disputes over the contract are not before us and we do not by this holding resolve any of them.

AFFIRMED.

Schlegel, S.J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I do not believe summary judgment is appropriate for, in my opinion, there are genuine issues of material fact.

Summary judgment is appropriate only if there exists no genuine issue of material fact. *Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact. *Id.* The evidence must be viewed in the light most favorable to the nonmoving party. *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986). This procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. *Id.* A fact issue is generated if reasonable minds can differ on how the issue should be resolved. *Id.* If the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Milne*, 424 N.W.2d at 423.

However, the nonmoving party may not simply rest on its pleadings and allegations once a motion for summary judgment is filed.

> When a motion for summary judgment is made and supported as provided in [Iowa R. Civ. P. 237], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Iowa R. Civ. P. 237(e).

I am inclined to agree with Judge Schechtman's earlier ruling of April 18, 1994, when he observed, "There appears to be a justiciable controversy over the ownership of the proceeds of the insurance policy. That controversy may well include the justiciable issue as to the plaintiffs' and defendants' interest in the real estate and the present status of the land contract."

I conclude there are genuine issues of material fact as it relates to the status of the parties' real estate contract. Since the determination of those fact questions may bear upon the ownership of the proceeds of the insurance policy and may very well create additional fact questions concerning such ownership, I would either stay the declaratory judgment action until the contract dispute is resolved or deny the motion for summary judgment.

I, of course, form no opinion as to how the fact questions concerning the status of the real estate contract or the ownership of the land itself are to be resolved. In the event the contract is upheld and it is determined the seller must sell and the buyer must buy, then I would agree with the majority's opinion that the Winkers should be given an $8000 credit towards the purchase price; that appears to be the established law in this state. But until the validity of the contract is determined, I would either stay the declaratory judgment action or deny the summary judgment motion.

IN THE COURT OF APPEALS OF IOWA

No. 6-347 / 94-1718

FILED
NOV 27 1996
CLERK SUPREME COURT

IN RE THE MARRIAGE OF RAYMOND K. PETERSON

AND JOAN PETERSON

Upon the Petition of

RAYMOND K. PETERSON,

Petitioner-Appellant,

And Concerning

JOAN PETERSON,

Respondent-Appellee.

Appeal from the Iowa District Court for Boone County, Ronald D. Schechtman, Judge.

Raymond appeals the district court's decision denying his request to modify his alimony obligations. **AFFIRMED.**.

Charles F. Fairall of Fairall, Fairall, Kaplan, Hoglan, Condon & Klaessy, Marshalltown, for appellant.

Steven H. Lytle and Kristin Darnell Fyda of Nyemaster, Goode, McLaughlin, Voigts, West, Hansell & O'Brien, P.C., Des Moines, for appellee.

Considered by Cady, P.J., and Huitink and Streit, JJ.

HUITINK, J.

Petitioner Raymond Peterson appeals the district court's denial of his petition to modify his alimony obligations. We affirm.

Ray and Joan were married on September 1, 1961. They separated in August of 1990 and the marriage was dissolved on April 2, 1991. Joan is now 56 years of age and Ray is 55.

Joan has a high school education and nine months of business college. Throughout the marriage she held clerical positions but her primary role was as a homemaker and mother to the two children. At the time of the dissolution, Joan was working part-time at Harlan Enterprises as a bookkeeper earning $6.25 an hour and a net monthly income of $603.50. Joan later obtained full-time employment at Dekalb in Ames earning $6.40 an hour as a receptionist. She was employed there for three years until the business moved to Chicago. She then briefly worked as a receptionist in Ellsworth, Iowa, until that employer moved to Des Moines. She currently works for Kentucky Fried Chicken in Ames earning $6.75 an hour and averaging 38 ½ hours a week. Her gross monthly income is approximately $1125.

Ray has a high school education and two years of junior college. Since November 1962, he was employed by the Chicago-Northwestern Railroad. He now works for Union Pacific in Rapid City, South Dakota, where he earns a gross monthly income of $6550.

The original dissolution decree ordered Ray to pay Joan $1000 per month in alimony until she remarried or either party died. The award was based on the length of the marriage, the contributions made during the marriage by Joan as a homemaker and mother, and the substantial disparity in the incomes and job security of the parties.

In 1994, Joan began dating Lon Neese. She moved into his Stratford, Iowa home in October 1994. She does not pay rent but has purchased new carpeting and linoleum for the home. Lon purchases most of the groceries and Joan purchases most of the non-food items. She has no ownership in the home, and the parties have no other joint property or debts. They have no plans to marry.

In April 1995, Ray sought a modification of the original decree alleging a substantial and material change in circumstances that justified a reduction or elimination of alimony, to-wit, Joan's cohabitation with her boyfriend Lon Neese. Ray alleges that Lon provides partial support to Joan and the couple live as is if they are married.

In September 1995, the district court denied the modification for several reasons: [1] the original award was not restricted by cohabitation but rather only by remarriage or the death of either party; [2] there was no evidence that Lon financially supported Joan other than permitting her to live in his home and share expenses; [3] the substantial disparity between the respective incomes of Ray and Joan; [4] Joan's financial conservatism and continuing need for support; and [5] the length of the

marriage. Based on these findings the trial court dismissed the modification action. Attorney fees in the amount of $880 were awarded to Joan.

On appeal, Ray contends Joan's cohabitation with Lon constitutes a substantial change in circumstances. He also appeals the award of attorney fees to Joan.

Our review of a modification proceeding is de novo. Iowa R.App.P. 4; *see also In re Marriage of Guyer*, 522 N.W.2d 818, 820 (Iowa 1994). We give weight to the trial court's factual findings but we are not bound by them. Iowa R.App.P. 14(f)(7).

Modification of the alimony provisions of a dissolution decree is justified only if there has been some material and substantial change in the circumstances of the parties, financially or otherwise, making it equitable that other terms be imposed. *Thayer v. Thayer*, 286 N.W.2d 222, 223 (Iowa App. 1979). The burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of the evidence. *Mears v. Mears*, 213 N.W.2d 511, 513 (Iowa 1973); *Thayer*, 286 N.W.2d at 223. Circumstances that have changed, to justify modification of alimony, must be those that were not within contemplation of the trial court when the original decree was entered. *In re Marriage of Full*, 255 N.W.2d 153, 159 (Iowa 1977). Such changes must be more or less permanent or continuous, not temporary. *In re Marriage of Carlson*, 338 N.W.2d 136, 141 (Iowa 1983).

The knowledge of the trial court at the time the award is made is the basis for determining whether there has been a change of circumstances. *Full*, 255 N.W.2d at

159; *Leo v. Leo*, 213 N.W.2d 495, 496 (Iowa 1973). The original decree is entered with a view to reasonable and ordinary changes that may be likely to occur in the relations of the parties. *Mears*, 213 N.W.2d at 514.

Cohabitation is not grounds for automatic denial or limitation of alimony payments. *See In re Marriage of Orgren*, 375 N.W.2d 710, 713 (Iowa App. 1985); *In re Marriage of Schober*, 379 N.W.2d 46, 47 (Iowa App. 1985). The dispositive issue is whether the recipient spouse needs continued alimony; not the spouse's present living arrangement. *Schober*, 379 N.W.2d at 47. However, the issue of cohabitation is clearly a "relevant factor" within the meaning of Iowa Code section 598.21(3)(1), and may well affect Joan's need for support. *Orgren*, 375 N.W.2d at 713.

As the district court noted in its order, the Peterson's original decree listed only remarriage or the death of either party as events automatically terminating the alimony obligation. Therefore, Ray bears the burden of establishing that there has been a material and substantial change in circumstances since the decree. *See Mears*, 213 N.W.2d at 513.

Upon de novo review of the record, we find that Joan's relationship with Lon has not substantially altered her financial needs. Testimony at trial indicated that Joan and Lon share living expenses and that Joan has contributed improvements to Lon's home in lieu of rent. The parties do not have joint checking accounts or any other joint property or debts. Furthermore, both parties indicated that they have no plans to marry.

We also note that Joan's earning capacity continues to be quite limited. Meanwhile, Ray enjoys a substantially higher standard of living earning a monthly income nearly six times that of Joan's. We are not persuaded by his contention that alimony should be reduced on account of Joan's decision not to transfer when her former employer relocated. The record contains no evidence to suggest that Joan would be earning more if she were employed by Dekalb or the company in Ellsworth.

Joan's testimony and financial affidavits reveal that she lives quite conservatively. Based on its own calculations, the trial court concluded that even including Joan's current alimony award, she nets approximately $1700 per month (after state and federal taxes and social security). After paying for modest living expenses she has only $200 left for other items. In light of these factors, and also the length of the marriage, we conclude the district court was correct in denying the modification.

We also deem it important to note the significance of Joan's testimony explaining why she does not intend to marry the man with whom she lives. She testified on direct examination by Ray's counsel as follows:

> Q: Is there any reason why you're not getting married? A: Yes.
>
> Q: And that would be the fact that you're receiving alimony? A: No. That's part of the reason. The rest of it's -- there's a bigger part than that.
>
> Q: Okay. We got part of the reason is that you're getting the alimony. Have you made statements to others that the reason you haven't married Mr. Neese is because of the alimony you're receiving? A: Sure. And I laugh about it.
>
> Q: I guess it is amusing. A: Yes. It's common sense.

In a similar circumstance it has been observed:

> It is unfortunate that the current status of Iowa law on modification of alimony precipitates the decision to engage in a meretricious relationship by cohabitating when marriage is the desire of the parties, so as not to jeopardize alimony payments.

In re Marriage of Schober, 379 N.W.2d 46, 48 (Iowa App. 1985). This case is another example of the advantage those alimony recipients with a more practical perspective enjoy over those who are burdened by more traditional notions of propriety.

Ray has also appealed the award of $880 in attorney fees to Joan. He asserts that the award was not justified in light of the minimal preparation required by the case. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). To overturn an award, the complaining party must show the trial court abused its discretion. *Id.* We do not find that the trial court abused its discretion in awarding the fees to Joan and accordingly, we affirm on this issue.

Joan has also requested appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the court's discretions and the parties' financial position. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). We order each party to pay their own attorney fees.

We affirm the district court's order in its entirety.

AFFIRMED.