

FILED

JAN 29 1986

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

VALLEY NATIONAL BANK,)

Plaintiff-Appellee,)

vs.)

TRADE BROKERS, LTD., and)

PAUL REX COBLE,)

Defendants-Appellants.

Filed January 29, 1986 **389**

5-559
85-482

Appeal from the Iowa District Court for Polk County - Rodney J. Ryan,
Judge.

Defendants appeal from the trial court's order sustaining plaintiff's motion
for summary judgment in an action to collect on a promissory note. **REVERSED**
AND REMANDED.

Thomas C. Farr of Peddicord and Wharton, Des Moines, for defendants-
appellants.

Earl W. Sutton, Des Moines, for plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J.

Defendants appeal from the trial court's order sustaining plaintiff's motion for summary judgment in an action to collect on a promissory note, asserting that the trial court erred in finding that there was no genuine issue of material fact and that plaintiff was entitled to judgment as a matter of law. We reverse and remand.

This lawsuit arises from a promissory note given by Trade Brokers, Ltd. and Paul Rex Coble to Al J. Joyce and Maurine Joyce. The note was executed in July of 1982 pursuant to a settlement agreement in which the contract entered into in August of 1981 for the purchase of a business was terminated by Joyce and defendant (Coble). The note was assigned by the Joyces to Valley National Bank in December of 1983. The Bank subsequently demanded payment which Coble refused. Plaintiff filed this action in May of 1984.

The Bank's petition indicated that it was a holder of a promissory note signed by Coble and entitled to judgment. The Bank attached the "promissory note" and "assignment of promissory note" to the petition.

Coble answered and denied all material allegations. As an affirmative defense, he asserted that on July 28, 1982 the Joyces misrepresented the value of the business which induced him to assent to the transaction. Coble claims that because the business has failed, the promissory note lacked consideration and was based upon a unilateral mistake. Coble requested that the note be rescinded.

The Bank's reply denied the allegations contained in Coble's affirmative defense for lack of information. The Bank then moved for summary judgment. Attached to the motion for summary judgment was a document entitled "Settlement Agreement" which, in relevant part, provided:

THIS AGREEMENT is entered into this ____ day of July, 1982, by and between AL J. JOYCE and MAURINE JOYCE (hereinafter collectively called "Joyce"), and TRADE BROKERS, LTD., an Iowa corporation (hereinafter called "Trade Brokers"), and REX COBLE (hereinafter called "Coble").

W I T N E S S E T H:

WHEREAS, the parties previously entered into an Agreement to Purchase on the 22nd day of August, 1981, for the sale and purchase of the business known as "The Greater Iowa Trade Exchange" (hereinafter called "Trade Exchange"); and

WHEREAS, Joyce has claimed that Trade Brokers has defaulted under the terms of that agreement and has thereby forfeited all its interest in the business or that grounds for forfeiture have arisen pursuant to the Agreement to Purchase; and

WHEREAS, the parties are desirous of terminating the Agreement to Purchase pursuant to terms which would provide remuneration to Joyce, full possession and ownership by Trade Brokers, and full release of all obligations of the parties created pursuant to that agreement;

BE IT THEREFORE MUTUALLY AGREED:

1. Possession. Joyce agrees to transfer and return possession of the assets and business of the Trade Exchange to Trade Brokers upon execution hereof.

2. Termination of Agreement. The Agreement to Purchase entered into on August 22, 1981, is hereby terminated.

3. Consideration. In consideration therefore, Trade Brokers hereby agrees to pay Joyce the total sum of Ten Thousand Dollars (\$10,000) of which Three Thousand Dollars (\$3,000) has been paid herewith, receipt of which is hereby acknowledged by Joyce; and the balance of the consideration, Seven Thousand Dollars (\$7,000), shall be paid to Joyce

* * *

6. Release. Joyce hereby releases Trade Brokers and Coble and Trade Brokers and Coble hereby release Joyce from any contractual obligations which they might have, one to the other, as a result of the aforementioned Agreement to Purchase and from the Forfeiture Agreement

executed by the parties at the time of the execution of the Agreement to Purchase, which Forfeiture Agreement has been held in escrow since the execution thereof. Trade Brokers further releases Joyce from any liability assumed by Joyce upon their recent repossession of the business and operation thereof.

* * *

12. Entire Agreement. This instrument contains the entire agreement between the parties and both parties agree that no representations have been made that are not contained herein.

* * *

TRADE BROKERS, LTD.

Al J. Joyce

By /s/ Paul Coble
Rex Coble, President
Trade Brokers, Ltd.
8421 University - Suite 14
Des Moines, Iowa 50311

Maurine Joyce

/s/ Paul Coble
Rex Coble, Individually
8421 University - Suite 14
Des Moines, Iowa 50311

The trial court, after reviewing this document and the promissory note, found:

[T]hat the Defendants have not, in their Answer, denied the execution of the aforementioned Settlement Agreement; and, further, Defendant Paul Rex Coble's Affidavit does not deny either the Promissory Note or the Settlement Agreement.

The Settlement Agreement contains certain provisions, i.e. the "Entire Agreement" of the parties and releases the claims of each party against the other.

The trial court found there was no genuine issue of material fact and granted the Bank's motion.

On appeal, Coble claims factual issues remain because the "Settlement Agreement" was neither dated nor executed and that no opportunity existed

to address this document in the answer because the document was filed with the summary judgment motion. Coble also claims the Bank may have been a "holder" but it is unclear whether the Bank was a "holder in due course" or otherwise which is relevant in determining the availability of certain defenses.

Under Iowa Rule of Civil Procedure 237, the burden is on the party moving for summary judgment to show that there are no genuine issues of material fact, and that he is entitled to judgment as a matter of law. Forning & Deppe v. South Story Bank & Trust, 327 N.W.2d 214, 215 (Iowa 1982). Further, summary judgment is not proper if reasonable minds could reach different conclusions from the facts. Walker Shoe Store v. Howard's Hobby Shop, 327 N.W.2d 725, 728 (Iowa 1982).

In ruling on a motion for summary judgment, the appellate court is to consider the whole record in a light most favorable to the non-moving party. Tasco, Inc. v. Winkel, 281 N.W.2d 280, 282 (Iowa 1979). Failure of a moving party to attach a supporting statement of the undisputed facts and a memorandum of authorities does not deprive the trial court of authority to rule on the motion for summary judgment. Toomer v. Iowa Department of Job Service, 340 N.W.2d 594, 597 (Iowa 1983). A motion for summary judgment may be supported by affidavits under Iowa R. Civ. P. 237(h), but they are not necessary. Brody v. Ruby, 267 N.W.2d 902, 904 (Iowa 1978).

While we agree with Coble's position that he could not address the settlement agreement in his answer, he could have addressed this document by affidavit in his resistance to the motion for summary judgment which he failed to do. See Iowa R. Civ. P. 100(a) (relating to pleadings). See also Anderson Construction Co. of Council Bluffs v. National Bank of Des Moines, 262 N.W.2d 563, 565 (1978) (involving adjudication of law points). The remaining contention involves the affirmative defenses and the Bank's status as a "holder." The only factual

issue raised by Coble is whether the Joyces misrepresented the value of the business which induced defendants to enter into the transaction.

The parties agree the Bank is a holder. See Iowa Code § 554.3104 (1983) (a promissory note is a negotiable instrument); Iowa Code § 554.3201 (1983) (transfer of an instrument vests in the transferee the rights of the transferor); Iowa Code § 554.3301 (1983) ("The holder of an instrument . . . may . . . enforce payment in his own name."). However, the Bank claims for the first time on appeal to have "holder in due course" status, not just "holder" status.

Iowa Code § 554.3302 (1983) provides:

- (1) A holder in due course is a holder who takes the instrument
 - (a) for value; and
 - (b) in good faith; and
 - (c) without notice that it is overdue or has been dishonored or of any defense against of claim to it on the part of any person.

If the Bank was a holder in due course, then Coble's allegations in the affirmative defense were immaterial because "a holder in due course . . . takes the instrument free from all claims to it on the part of any person." Iowa Code § 554.3305(1). None of the defenses enumerated in Iowa Code § 554.3305(2) would be applicable to this action. Thus, the Bank would be entitled to summary judgment if it was a holder in due course.

If the Bank was not a holder in due course, Coble's affirmative defenses would be material. See Iowa Code § 554.3306 (1983) ("Unless he has the rights of a holder in due course any person takes the instrument subject to (a) all valid claims to it on the part of any person; and (b) all defenses of any party which would be available in an action on a simple contract; and (c) the defenses of want or failure of consideration, nonperformance of any condition precedent, nondelivery, or delivery for a special purpose (Section 554.3408); . . .").

The Bank concedes that Coble's affirmative defenses would have been material under § 554.3306; however, the Bank submits, as the trial court found, that the settlement agreement effectively precludes Coble from raising the issue of misrepresentation. Even though the settlement agreement provided for a release of all claims and contained an integration clause, Coble's claim of misrepresentation is such that the settlement agreement itself could be voided if his assent to enter into the agreement was induced by misrepresentation. See Midwest Management Corp. v. Stephens, 291 N.W.2d 896, 906 (Iowa 1980) ("Fraud is a common-law doctrine, the violation of which gives rise to a right of rescission."); First National Bank in Lenox v. Brown, 181 N.W.2d 178, 182 (Iowa 1978) ("It is a well-settled principle of equity that misrepresentations amounting to fraud in inducement of a contract, whether innocent or not, gives rise to a right of avoidance on the part of the defrauded party.").

Viewing the evidence in the light most favorable to the non-moving party, in this instance Coble, it is apparent that genuine issues of material facts exist because the Bank could be subject to the provisions of § 554.3306 if it is not a holder in due course provided that the Joyces misrepresented certain facts which would void the terms of the settlement agreement.

If Coble's allegations are substantiated, then he could prevail. For this reason, we reverse and remand this case for further disposition.

REVERSED AND REMANDED.

Schlegel, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

396

I would affirm the trial court.