

FILED

IN THE COURT OF APPEALS OF IOWA

JAN 28 1977

CLERK SUPREME COURT 1977

WILLIAM BUCHOLZ and
KATHLEEN BUCHOLZ,

Appellees,

vs.

RUSSELL CURTIS,

Appellant.

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2-57684

Appeal from Mills District Court - Harold L. Martin, Judge

Appeal from order sustaining motion for summary judgment.

Reversed and remanded.

Clarold E. Rogers, of Genung & Rogers, of Glenwood,
for appellant.

Robert L. Bray, of Council Bluffs, for appellees.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger
and Carter, JJ.

ALLBEE, C.J.

In this appeal defendant asserts trial court erred in sustaining plaintiffs' motion for summary judgment. We agree and, accordingly, reverse and remand.

The record on appeal from which factual information can be gained is limited to pleadings and answers to interrogatories.

We are guided in our review by familiar principles applicable to motions for summary judgment recently repeated in Meyer v. Nottger, 241 N.W.2d 911, 916-917 (Iowa 1976); Daboll v. Hoden, 222 N.W.2d 727, 731-736 (Iowa 1974).

From the sparse record we learn that in September 1972 plaintiffs Bucholz, husband and wife, rented a house in Bartlett, Iowa from defendant Curtis and his wife. A month later plaintiffs vacated the premises and defaulted in payment of rent. Thereupon defendant entered the residence and took possession of numerous items found on the premises including kitchenwares, appliances and furnishings; defendant also cleaned the house, made repairs and leased it to another tenant.

About six months later, plaintiffs sued for replevin of the personal property allegedly taken from the residence by defendant and also demanded damages for wrongful deprivation of such property. Plaintiffs further alleged defendant held the property pursuant to a statutory landlord's lien, which since had expired. In his answer defendant denied plaintiffs' allegations of ownership of the personal property listed in the petition and the values ascribed to the various items. Defendant, however, admitted that he held some of the property items listed in the petition which he specifically described. Once again, defendant denied plaintiffs' ownership of the detained property. He also acknowledged that the property was being held in satisfaction of a landlord's lien.

On March 25, 1974 plaintiffs filed a motion for summary judgment pursuant to rule 237, Rules of Civil Procedure, directed against defendant without joining his wife. The motion asserted " ... there is no material issue of fact as to their right to immediate possession of their property which defendant admittedly detains ... " since his landlord's lien right had expired, and also demanded possession of such items.

Following non-evidentiary hearing on April 10, 1974, trial court made a calendar entry sustaining the motion. Subsequently, by judgment order of July 31, 1974, filed August 7, 1974, trial court sustained the summary judgment motion, ordered issue of writ of replevin for all of the property items listed in plaintiffs' petition, awarded plaintiffs damages alleged in the petition for personal property items the sheriff was unable to recover, awarded \$500 damages for deprivation of the personal property in issue, and assessed costs against defendant.

At once apparent is the fact that trial court awarded relief beyond that asked in plaintiffs' motion, the motion having demanded only immediate possession of the property items which defendant admittedly detained and did not ask for damages. This excess, alone, requires remand. *Hemphill v. Ralston*, 123 A. 459 (Pa. 1924); see *State v. Weger*, 211 N.W.2d 322, 323 (Iowa 1973).

But in addition, there existed a genuine issue of fact of plaintiffs' right of possession of the items defendant detained; the motion should have been denied. Plaintiffs alleged they owned the personal property in controversy. Defendant's denial of plaintiffs' ownership placed upon them the burden of establishing ownership. Plaintiffs' right of immediate possession was dependent upon proof of their ownership of each item held by defendant, not upon any weakness in his claim. *Marx Truck Line, Inc. v.*

Fredricksen, 260 Iowa 540, 546, 150 N.W.2d 102 (1967). Resolution of ownership is an issue ordinarily decided by the trier of fact since credibility and weight to be given evidence cannot be decided as a matter of law. *Zig Zag Spring Co. v. Comfort Spring Corporation*, 89 F. Supp. 410 (D.N.J. 1950); see *Daboll v. Hoden*, 222 N.W.2d 727 (Iowa 1974) (negligence). Ownership should not be resolved summarily where, as here, the allegation of ownership is denied and neither party has offered evidence. Defendant's failure to resist the motion by affidavit or other means does not establish for the movants the absence of a genuine issue of fact. *Sherwood v. Nissen*, 179 N.W.2d 336, 339 (Iowa 1970).

Similar to this case, in *Zig Zag Spring Co. v. Comfort Spring Corporation*, supra, plaintiff sued to recover possession of machinery and asked damages for their wrongful detention. Plaintiff alleged: a right to immediate possession of the machinery; their wrongful detention; and damages. Defendant denied the allegations and affirmatively alleged ownership in a third party. Summary judgment for plaintiff was denied. The court stated:

"The defendant's denial of the essential allegations of the complaint raises an issue of fact. This denial casts upon the plaintiff 'the burden to establish ownership in itself, absolute or qualified, with a right of exclusive possession at the time of bringing the action.' [authorities] The evidence now before the Court, considered in the light most favorable to the plaintiff, may be legally sufficient to support the plaintiff's claim, but the legal sufficiency of the evidence may not be prematurely determined in advance of trial on a motion for summary judgment. The defendant's denial of the essential allegations of the complaint, even if there were no other defenses interposed, is a valid defense on which it has a right to be heard." *Zig Zag* at 413.

Hence, sustaining Bucholzs' motion for summary judgment was error.

The record further reveals to us other issues of fact: the items of plaintiffs' property which defendant detains; its value;¹ and damages,² if any.

Judgment in this case hereby is reversed and remanded for further proceedings, with directions to trial court to set aside its judgment order sustaining the motion for summary judgment. See 66 G.A., S.F. 1092, §6.

1 Section 643.16, The Code; Universal C.I.T. Credit Corporation v. Jones, 227 N.W.2d 473, 476-480 (Iowa 1975); Swets Motor Sales, Inc. v. Pruisner, 236 N.W.2d 299, 306-307 (Iowa 1975); rule 102, Rules of Civil Procedure.

2 Section 643.16, The Code; Universal C.I.T. Credit Corporation v. Jones, supra; rule 102, R.C.P.; Olsen v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975).