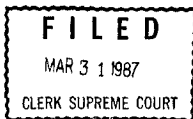


IN THE COURT OF APPEALS OF IOWA



3

AETNA LIFE INSURANCE COMPANY,)
A Foreign Corporation,)

Plaintiff-Appellee,)

vs.)

ELAINE POWERS FIGURE SALONS, INC.,)
A Delaware Corporation,)

Defendant-Appellant,)

and **ROBERT M. RICHARDS** d/b/a)
Elaine Powers Figure Salon,)

and the **T.S. COMPANY,** an Iowa)
Corporation,)

Defendants.)

Filed March 31, 1987

6-499
86-531

Appeal from the Iowa District Court for Dubuque County (No. 44713)

- T. H. Nelson, Senior Judge.

One defendant appeals from summary judgment for plaintiff in an action for breach of a lease agreement, asserting that genuine issues of material fact exist and that additional time should have been granted for the purpose of discovering material that would support a resistance to the motion for summary judgment. **AFFIRMED.**

James Q. Blomgren of Clements, Blomgren & Pothoven, Oskaloosa, for defendant-appellant.

Robert V. P. Waterman, Jr. of Lane & Waterman, Davenport, for plaintiff-appellee.

Jay P. Roberts of Swisher & Cohrt, Waterloo, for other defendants.

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

PER CURIAM**4**

On June 20, 1984, the appellee, Aetna Life Insurance Company, initiated the present suit alleging that the appellant, Elaine Powers Figure Salons, had breached its lease agreement. During the ensuing twenty months, Elaine Powers filed its answer and jury demand, both parties served and answered interrogatories, and a trial date and discovery deadlines were set. On February 19, 1986, Aetna filed a motion for summary judgment which was resisted by Elaine Powers on March 3, 1986. In addition to resisting Aetna's motion, Elaine Powers filed an application for additional time. On March 5, 1986, the district court denied Elaine Powers' application for additional time and sustained Aetna's summary judgment motion. Elaine Powers brings this appeal, challenging both aspects of the district court's order. Our review is limited to the correction of errors at law. Iowa R. App. P. 4.

Elaine Powers first contends the district court erred in denying its application for additional time which was requested in order for Elaine Powers to obtain affidavits in support of its resistance. In support of its argument, Elaine Powers notes that the district court's ruling on the summary judgment motion occurred approximately three and one-half weeks prior to the date established for the termination of discovery.

Iowa Rules of Civil Procedure 237(f) provides as follows:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

When a party claims that he or she has not been given enough time to gather and submit affidavits in resistance to a motion for summary judgment, it is within the discretion of the district court whether or not to wait for the affidavits

to be furnished. Moser v. Thorp Sales Corporation, 312 N.W.2d 881, 891 (Iowa 1981). Although our appellate courts have stated a preference for allowing the parties against whom a motion for summary judgment is made to complete discovery before summary judgment is entered, id., district courts are not required to do so. See United States Through Small Business Association v. Light, 766 F.2d 394, 397 (8th Cir. 1985) (interpreting analogous Federal Rule of Civil Procedure 56); see also Brody v. Ruby, 267 N.W.2d 902, 904 (Iowa 1978) (since state summary judgment rule patterned on federal rule, federal interpretations of rule are persuasive); Iowa R. Civ. P. 237(a) (summary judgment motion may be made "at any time" after appearance day or adverse party's summary judgment motion).

In the case at bar, however, we need not determine whether the district court abused its discretion under rule 237(f) as we think Elaine Powers failed to bring itself into the ambit of that rule. Rule 237(f) requires that a party support its request for continuance with affidavits setting forth reasons for that party's inability to obtain the desired evidence. Iowa R. Civ. P. 237(f). Elaine Powers submitted no such affidavits to the district court. Accordingly, the district court did not err in denying Elaine Powers' application for additional time. See Shirk Oil Company v. Peterman, 329 N.W.2d 13, 15-16 (Iowa 1983); cf. Banks v. City of Ames, 369 N.W.2d 451, 453 (Iowa 1985) (failure to proceed as provided for in rule 237(f) results in failure to preserve issue on review).

Elaine Powers next maintains that the district court erred in granting Aetna's motion for summary judgment. In reviewing the grant of summary judgment under Iowa Rule of Civil Procedure 237, the question is whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. Suss v. Schammel, 375 N.W.2d 252, 254 (Iowa 1985); Brown v. Monticello State Bank

of Monticello, 360 N.W.2d 81, 83-84 (Iowa 1984). The resisting party must set forth specific facts showing there is a genuine issue for trial. Iowa Civil Rights Commission v. Massey-Ferguson, Inc., 207 N.W.2d 5, 8 (Iowa 1973); Iowa R. Civ. P. 237(e). The resisting party may not rely solely on legal conclusions to show there is a genuine issue of material fact justifying denial of summary judgment. Byker v. Rice, 360 N.W.2d 572, 575 (Iowa Ct. App. 1984). Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. Adam v. Mt. Pleasant Bank & Trust Co., 355 N.W.2d 868, 872 (Iowa 1984). We examine the record in a light most favorable to the party opposing the motion for summary judgment to determine if movant met his or her burden. Matherly v. Hanson, 359 N.W.2d 450, 453 (Iowa 1984).

In support of its resistance to Aetna's motion for summary judgment, Elaine Powers alleged that the following issues of fact remained for trial determination: (1) whether correspondence and conversations between Aetna and Elaine Powers' assignee resulted in a new agreement with respect to the rental default; (2) whether Aetna had complied with the lease's notice provisions when it failed to timely alert Elaine Powers of its assignee's rental default; and (3) whether Aetna had failed to mitigate the damages it was claiming. With respect to the first of these issues, we note that the lease agreement between Aetna and Elaine Powers contains the following provisions:

Owner may collect rent from the assignee, subtenant or occupant, and apply the net amount collected to the rent herein reserved, but no such assignment, subletting, occupancy or collection shall be deemed a waiver of this covenant, or the acceptance of the assignee, subtenant or occupant as tenant or a release of tenant from the further performance by tenant of covenants on the part of tenant herein contained. Notwithstanding any assignment or sublease, tenant shall remain fully liable on this lease and shall not be released from performing any of the terms, covenants and conditions of this lease.

* * *

No waiver of any default of tenant hereunder shall be implied from any acceptance by owner of any rent or other payments due hereunder or any omission by owner to take any action on account of such default if such default persists or is repeated, and no express waiver shall effect default other than as specified in said waiver.

As a result of these provisions, any agreement between Aetna and Elaine Powers' assignee, even assuming its existence, would have no effect on Elaine Powers' obligations under the lease agreement. We therefore reject Elaine Powers' first contention. As concerns the second of Elaine Powers' claims, it is clear from the lease that Aetna was under no duty to provide written notice to Elaine Powers informing it that its assignee was in arrears. Although the lease provides that Aetna's rights to terminate the lease, to bring an action to collect rent without terminating the lease, and to bring an action to collect rent prior to terminating the lease are contingent upon Aetna giving ten days' notice, nowhere does the lease provide that this ten days' notice needs to occur immediately following the initial default. In fact, the lease provides that "[n]o waiver of any default of Tenant hereunder shall be implied from any . . . omission by Owner to take any action on account of such default if such default persists or is repeated," Aetna was free to forebear until it determined its best interests lie in bringing suit, and then give Elaine Powers its notice. Elaine Powers does not contend that it was not given notice ten days prior to suit.

As to Elaine Powers' claim that Aetna failed to mitigate its damages, the record establishes, and Elaine Powers concedes, that within sixty days of the date the premises were vacated, they were re-leased by Aetna. The lease agreement provides as follows:

In the event that the leased premises are vacated as a result of the actions of either the Landlord or the Tenant, Landlord shall have an affirmative duty to mitigate any damages it might suffer and shall undertake a reletting

of the leased premises on the best terms available and any rental so received shall diminish the liability, if any, of Tenant.

Although Elaine Powers contends in its resistance that "at least one year expired" between the assignee's first failure to pay rent and Aetna's re-lease of the premises, we think Aetna was under no duty to elect to force the assignee to immediately vacate the premises upon default. Aetna's contractual duty to mitigate its damages began at the point the property was vacated. Elaine Powers did not present the district court with facts in its resistance which would tend to support a claim that Aetna breached its post-vacation duty to mitigate.

We have examined the record and are of the opinion that the district court was correct in granting Aetna's summary judgment motion. Accordingly, we affirm that judgment.

AFFIRMED.