IN THE COURT OF APPEALS OF IOWA

No. 2-571 / 92-622

FILED
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CLERK SUPREME COURT
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ERNEST W. MILLER, J. LAND CO., and N.I.P., LTD.,
Plaintiffs-Appellants,

vs.

PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS,
Defendant-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Gilbert K. Bovard, Judge.

Plaintiffs appeal from the district court's grant of summary judgment in defendant's favor in this breach of contract suit. **AFFIRMED.**

David M. Nelson and Charles H. Biebesheimer of the Nelson Law Office, Mason City, for appellants.

Dale L. Putnam of the Putnam & Strand Law Office, Decorah, for appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

OXBERGER, C.J. 000120

In 1988 Ernest W. Miller entered into a real estate contract with Production Credit Association of the Midlands (PCA) to purchase eighty acres of land in Cerro Gordo County. The property contains a hog confinement facility. Under the contact, a balloon payment of $305,331 was due in November 1990.

The property was leased to N.I.P., Ltd. Miller and Sam Kennedy were equal owners of in N.I.P. Miller was a resident of North Carolina. Sam conducted most of the business concerning the hog confinement operation.

Miller did not pay the balloon payment when it came due. The contract was forfeited on April 18, 1991. However, PCA agreed to give Miller an extension until April 19, 1991, to pay $335,000 to obtain the property.

Sam contacted Clear Lake Bank & Trust Company to obtain financing. The Bank expressed interest in giving Miller a loan if he could present sufficient collateral. Miller gave the Bank a financial statement. He agreed to assign a lease which paid $5,000 per month to the Bank. He also agreed to give the bank a security interest in farm land owned by N.I.P. and in property owned by Cornerstone Development, another company owned by Miller and Sam.

The Bank found out there was a lien against Miller on the hog confinement property. The Bank then sought to have Miller assign the purchase option for the property to a corporation, J. Land Company. Under this plan, the

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corporation would hold the title to the property, and thus the lien could be avoided. Charles Kennedy, Sam's father, owned all of the stock in J. Land. Charles agreed to sell all the corporate stock to Miller. PCA was initially unwilling to sell the property to the corporation.

The Bank was unable to obtain title opinions to the proposed collateral properties prior to April 19, 1991. PCA extended a second purchase option to Miller, giving him until April 24, 1991, to pay $345,000 for the property. Miller traveled to Iowa on April 24, 1991. All aspects of the deal were to be closed on that day--the sale of the property, the loan from the bank, and the transfer of the J. Land stock.

At 9:45 a.m. on April 24, 1991, the Internal Revenue Service filed a lien against the property owned by N.I.P., which was to be used as collateral for the loan. The parties were initially unaware of the lien, and at about noon that day, PCA agreed to recognize an assignment of the purchase option to J. Land. Shortly thereafter, the Bank became aware of the IRS lien, and was unwilling to proceed with the loan. The sale of the property and the transfer of J. Land stock to Miller did not take place.

Miller, J. Land, and N.I.P. filed suit against PCA. In Count I plaintiffs alleged PCA breached the purchase option contract by refusing to convey the real estate to Miller's assignee, J. Land. In Count II plaintiffs alleged PCA breached its covenant of good faith and fair dealing.

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While this case was pending, PCA initiated a separate forcible entry and detainer action against N.I.P. After PCA regained title to the property, N.I.P. refused to pay the rent due on May 1, 1991. The district court concluded PCA was entitled to a judgment of removal pursuant to Iowa Code section 648.22.

PCA filed a motion for summary judgment in the present suit. Plaintiffs filed a resistance and a brief, but no responsive affidavits. The district court entered its ruling on December 26, 1991, granting the motion for summary judgment. The court found Charles, the sole shareholder of J. Land, had not authorized suit and that J. Land did not have standing to bring suit. The court also found that because of the previous forcible entry action, N.I.P. did not have any interest in the property, and did not have a claim against PCA.

Additionally, the court concluded there was no adequately substantiated showing that any acts of PCA prevented the closing. The court found PCA had satisfied the initial burden of production by showing the closing was forestalled by the filing of the IRS lien. The burden then shifted to plaintiffs to show there was a genuine issue of fact. The court found plaintiffs failed to set forth any specific facts showing a genuine issue. Finally, the court determined there was no independent cause of action for breach of an implied covenant of good faith and fair dealing.

Plaintiffs filed a motion to reconsider and a brief in support of the motion. The brief contained arguments based on two depositions which had not been filed with the court. PCA filed a resistance and a motion to strike the references to the depositions which were not a part of the record.

The district court issued a ruling on the post-trial motions on March 20, 1992. The court denied the motion to reconsider. The court did not specifically rule on PCA's motion to strike. The court did state that it had carefully reviewed plaintiffs' brief and arguments. Plaintiffs appealed.

In reviewing the grant or denial of a summary judgment motion, we view the underlying facts contained in the pleadings and the inferences to be drawn therefrom in the light most favorable to the party opposing the motion, and give to such a party the benefit of any doubt as to the propriety of granting summary judgment. Harrington v. Chicago & Northwestern Transportation Co., 452 N.W.2d 614, 615 (Iowa App. 1989). Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied, and to reverse the grant of summary judgment if it appears from the record there is an unresolved issue of material fact. Id.

Plaintiffs contend there was a genuine issue of material fact concerning whether PCA interfered with the closing of the purchase option by refusing to recognize an

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assignment of the purchase option by Miller to J. Land. Plaintiffs state that under Iowa law, Miller had a right to assign the purchase option.

Under Iowa Rule of Civil Procedure 237, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Seidler v. Vaughn Oil Co., 468 N.W.2d 474, 478 (Iowa App. 1991). The moving party has the burden to show the nonexistence of a material fact. Id. If the motion for summary judgment is properly supported, the resisting party must set forth specific facts showing that there is a genuine issue for trial. Id. A fact issue is generated if reasonable minds can differ on how the issue should be resolved. Id. If the evidence is such that a reasonable jury could return a verdict for the non-moving party, summary judgment will not lie. Behr v. Meredith Corp., 414 N.W.2d 339, 341 (Iowa 1987).

We, like the district court, find PCA met its burden to show the nonexistence of a material fact. PCA showed that the closing did not take place because of the IRS lien filed on April 24, 1991, the day the proposed closing was to take place. Plaintiffs argue that if PCA had been more agreeable the closing could have potentially taken place earlier. However, the evidence shows the Bank did not

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receive until April 24, 1991, all of the title opinions for the property to be used for collateral. Thus, the Bank was unprepared to proceed with closing prior to April 24, 1991.

Plaintiffs, as the resisting party, had the burden to set forth specific facts showing there was a genuine issue for trial. Plaintiffs filed only a resistance and brief. They did not file any responsive affidavits. Plaintiffs did not meet their burden to show there were any genuine issues of material fact. We affirm the decision of the district court granting summary judgment to PCA.

In their brief, PCA again argued that certain portions of plaintiffs' argument should be stricken because it is based on depositions which were not a part of the record. We did not rely upon this testimony in reaching our decision. Therefore, this argument is now moot.

Costs of this appeal are assessed to plaintiffs.

AFFIRMED.