FILED
MAY 31 1979
IOWA SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

KINSEY LLOYD FOUST,

Plaintiff-Appellant,

vs.

DENNIS WALKER, DONALD RUSSELL, JAMES DAVIES, THE PEOPLES COMPANY OF INDIANOLA, IOWA, ROBERT HUNGET, JAMES HUNGET, and FRANCES L. DAWSON,

Defendants-Appellees.

Filed May 31, 1979

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2-61590

Appeal from Warren District Court - M. C. Herrick and Robert O. Frederick, Judges.

Plaintiff appeals from trial court's order overruling his motion for summary judgment and subsequent order sustaining defendants' motion for summary judgment in action for damages resulting from termination of a farm lease. Plaintiff alleges insufficiency of notice of termination. AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Theodore Duffield of Patterson, Lorentzen, Duffield, Timmons, Irish & Becker, Des Moines, Iowa, for plaintiff-appellant.

James Fowler of Wilson, Goodhue & Fowler, Indianola, Iowa, for defendants-appellees.

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

Plaintiff, Kinsey Lloyd Foust, appeals from order of trial court overruling his motion for summary judgment in an action for declaratory judgment and damages based on an allegedly insufficient notice of termination of a farm lease and subsequent sustaining of defendant's motion for summary judgment. Defendant's motion was sustained as to all counts of plaintiff's petition; however, the parties agree that the trial court erred in so ruling as to Division III. Therefore, we reverse the trial court as to Division III of plaintiff's petition alleging slander and willful, malicious interference with a contractual lease agreement and remand for further proceedings on the merits.

As to Division I of plaintiff's petition seeking declaratory relief and Division II seeking damages, the plaintiff raises two primary arguments in his assertion that trial court erred: 1) that the notice sent to him failed to comply with the requirements of section 562.7(3), The Code 1975, and that proper notice to his wife does not constitute notice to him; 2) that language in the notice stating it was "friendly" was qualified, did not indicate the land would not be leased to plaintiff and, thus, did not comply in substance with section 562.7, The Code 1975. We affirm trial court's judgment with regard to Divisions I and II.

I. Plaintiff, Lloyd Foust, and his wife, Patricia Foust, who is not a party to this action, each signed a written lease for rental of farm land owned by defendant Frances L. Dawson and managed by defendant, The Peoples Company of Indianola, Iowa. The initial lease ran from March 1, 1974 to February 28, 1975 and was renewed by operation of law for March 1, 1975 to February 28, 1976. On August 15, 1975, The Peoples Company sent, by restricted certified mail, separate but identical notices of termination to plaintiff and his wife. The notice stated:

> Please take notice that your tenancy of the farm premises owned or managed by the undersigned and occupied by you, will be terminated on the above March 1, [1976] and that on said March 1st, you are required to quit and surrender the possession of said premises to the owner. This notice is given you in order to comply with the provisions of chapter 562 and 648 of the Code of Iowa, and in order to terminate the above tenancy and obtain possession of said premises. It is a friendly notice and does not necessarily, of itself, indicate that the above premises cannot be leased to you for the coming year, if terms can be agreed upon. You must not, however, depend upon any further tenancy, occupancy or possession of said premises after March 1st unless a written lease is executed by all interested parties, and actually submitted to you, agreed upon, and signed by all the interested parties. (emphasis in original)

Dated this 15th day of August, 1975 at Indianola, Iowa.

Frances Dawson Farm
Peoples Company
of Indianola, Agent
By /s/ Dennis Walker
Farm Representative

The undersigned each approve the above termiantion of the above tenancy, occupancy, and possession, and each acknowledge due, timely and legal service of the above notice at Indianola, Iowa on or as of ____ day of _____, 19___.

_____
_____
_____
_____
(Tenants)

(In order that there be no misunderstanding about the above termination, it will be appreciated if each person to whom this notice is addressed will sign at the above blanks marked "tenants" and return one of the signed copies.)

Patricia Foust admitted picking up her notice of termination on or about August 19, 1975. Plaintiff did not pick up his letter[1] but admitted having subsequent knowledge of the notice's contents[2] and that he acted upon those contents by appearing in person at The Peoples Company to negotiate a new lease. Plaintiff did not remember the exact date on which he had knowledge or went to defendant's place of business.[3]

In overruling plaintiff's motion for summary judgment the trial court determined that section 562.7, The Code 1975, "only requires a mailing of a notice terminating the lease, addressed to the tenant at his last known address by restricted certified mail and does not require a showing of the actual receipt or delivery of the same to the tenant." (App. p. 66). Upon plaintiff's subsequent application to adjudicate law points, trial court found the notice sufficient in form and substance.[4]

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[1] The affidavit of the Postmaster of Carlisle, Iowa, stated that the notice addressed to plaintiff was never claimed and ultimately was returned to the sender (defendant Peoples Company).

[2] In deposition testimony plaintiff stated: "I don't really recall reading it [notice to his wife]. If I didn't, she read it to me. I don't actually recall sitting down and reading it. I mean, if she read it to me, why it was just her and I probably sitting at the table and she read it word for word."

[3] During the taking of depositions, defendants' attorney referred to September 2, 1975 as the date plaintiff and his wife went to defendant's place of business; however, this was not established by other testimony and was, in fact, challenged by plaintiff's counsel as being unsubstantiated. Plaintiff's wife testified she thought it was "towards the middle of September . . . ."

[4] Plaintiff's application for interlocutory appeal from this order was denied by the Supreme Court of Iowa on June 2, 1976.

Defendants filed amendments to their answer and counterclaim on May 5, 1976, alleging that plaintiff had knowledge of the notice, recognized the import of its contents and was equitably estopped by his acts or omissions from asserting noncompliance with the statutes providing for termination of farm tenancies or insufficiency of the notice. On June 24, 1976 discovery depositions were taken of Patricia Foust and Kinsey Floyd Foust with attorneys for all parties present. The parties stipulated that the original transcript need not be filed with the clerk of court but was to be retained by counsel for the defendants.[5] On November 4, 1977 defendants moved for summary judgment. After a review of all the pleadings, affidavits, depositions and prior rulings, trial court sustained defendant's motion on January 23, 1978.

II. Summary judgment may be rendered when the pleadings, depositions, answers to interrogatories, admissions and affidavits in support of the motion show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 237(c). In ruling on such a motion the court views all material before it in the light most favorable to the non-moving party and determines if reasonable minds would differ as to undisputed facts. Brody v. Ruby, 267 N.W.2d 902, 904 (Iowa 1978); Daboll v. Hoden, 222 N.W.2d 727, 731-733 (Iowa 1974). On review this court determines only if a genuine issue of material fact exists and whether the law was correctly applied; its review is guided by the same principles utilized by trial court upon the motion. Drainage District No. 119 v. City of Spencer, 268 N.W.2d 493, 500 (Iowa 1978).

III. The specific statutory section under scrutiny, section 562.7(3), The Code 1975, requires written notice of termination of a farm lease to be given "by either party sending to the other at his last known address before September 1, a notice by restricted certified mail." In two cases decided subsequent to trial court's rulings in this case, the

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[5] Defendants contend in their brief that because the discovery depositions of plaintiff and his wife were not filed, they were not a part of the record before the trial court and, thus, should not be considered by this court on appeal. We cannot agree. Both parties stipulated to the non-filing. Subsequent use of the depositions was a matter within trial court's discretion. Daniels v. Bloomquist, 258 Iowa 301, 313, 138 N.W.2d 868, 876 (1965).

supreme court construed subsection 3 to mean that a notice becomes effective upon proof of a tenant's refusal to accept the notice, Long v. Crum, 267 N.W.2d 407, 411 (Iowa 1978). Absent a showing of refusal, service of notice is incomplete where it is not delivered to the addressee and is returned unclaimed to the sender. Escher v. Morrison, No. 65-62067 (Ia. S.Ct. April 25, 1979). We, therefore, find trial court erred in ruling that the notice addressed to plaintiff was legally sufficient.

The remainder of this segment of plaintiff's argument is that the defendant's motion for summary judgment cannot be sustained by reason of his wife's receipt of notice. He first challenges defendant's allegation that she is a co-tenant but also contends, even if she is determined to be a co-tenant, that fact alone does not establish her as his agent for receipt of notice. Chamberlain v. Brown, 141 Iowa 540, 552, 120 N.W. 334, 339 (1909). We conclude that it is unnecessary for us to determine whether two persons who jointly sign a lease of property acquire all the rights and obligations generally accorded by law to co-tenants.

Plaintiff and his wife are simply lessees who acquired interest in property from the owner by contractual agreement. Jensen v. Nolte, 233 Iowa 636, 639, 10 N.W.2d 47, 49 (1943). Whether this interest entitles each of them to the requisite statutory notice for termination of their interest in the leased farmland has not been addressed by the Iowa cases.

Generally, a contractual right or obligation of two or more persons is a joint obligation or right and there should be distinct words of severance to produce a several responsibility or right. White v. Grovier, 237 Iowa 377, 382, 21 N.W.2d 769, 771 (1946). The California court, in Gentry v. Citron, 36 Cal. App. 288, 171 P. 1079, (1918) found that notice to quit the premises to one of two co-parties to a lease was sufficient as to both.[6]

However, we find language from Conrad v. Hawk, 122 Cal. App. 649, 10 P.2d 534, 536 (1932), quoting Ellis v. Lull, 45 N.H. 419, 420 (1864), to be of particular import. The court in Ellis said that "[w]here two or more persons are subject to a joint duty or obligation upon notice, and when other special notice is not made necessary by statute

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[6] The statute, section 1161(2), Code of Civ. Pro., required service of the notice upon "the tenant."

or by contract, a notice addressed to all and served on one is notice to all." (emphasis added). We believe that section 562.7 sets forth a special statutory requirement that notice be given to each farm tenant.[7] This position is strengthened by examining section 10162, The Code 1939, which provided:

> Notice - how served. When a tenant cannot be found in the county the notice [of termination] . . . may be given to any subtenant or other person in possession of the premises, or, if the premises be vacant, by affixing the notice to any outside door of the dwelling house thereon, or other building, if there be no dwelling house, or in some conspicuous position on the premises, if there be no building.[8]

In 1943 the legislature removed section 10162 to provide for the current methods of notice in section 562.7.[9]

Had the legislature intended notice to one co-party to be sufficient as to all, it could easily have included that provision as evidenced by the language of prior section 10162. Since a primary object of a written notice of termination to a lessee is to afford an opportunity to arrange for another farm for the succeeding year, North v. Kinney, 231 Iowa 951, 953, 2 N.W.2d 407, 408 (1942), we conclude section 562.7(3) requires notice to be given by restricted certified mail to each tenant under a farm lease.

IV. Despite the conclusions above, we find that plaintiff is estopped to deny the legal sufficiency of the notice of termination. The Iowa court has frequently approved the statement that "[a]n estoppel is based on the idea that one who has made a certain representation should not thereafter be permitted to change his position to the prejudice of one who has relied thereon." Wetzstein v. Dehrkoop, 241 Iowa 1237, 1243, 44 N.W.2d 695, 698 (1950), quoting Seymour v. City of Ames, 218 Iowa 615, 619, 255 N.W. 874, 876 (1934).[10] The estoppel is allowed to prevent fraud and injustice where a party,

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[7] Also, in this case, a separate notice was addressed to each tenant.

[8] See Welch v. Keeran, 233 Iowa 499, 501, 7 N.W.2d 809, 810 (1943).

[9] 1943 Session, 50th G.A., ch. 255, § 2. The third alternative in this amendment was by "registered mail with a return receipt demanded." This language remained unchanged until the 1957 Session, 57th G.A., ch. 267, § 83 amended section 562.7(3), The Code 1954, by inserting the "restricted certified mail" provision.

[10] Estoppel by conduct requires clear, convincing and satisfactory proof that there has been a false representation of a material fact, lack of knowledge of the fact by the injured party, intent of the representing party that the other party rely on the fact and actual reliance to a party's detriment. Bettendorf Education Ass'n. v. Bettendorf School District, 262 N.W.2d 550, 553 (Iowa 1978).

either by his declarations or conduct, has induced another to act in a particular manner upon a reasonable belief that he will waive certain rights. The party will be estopped to assert such rights to the injury of another who is misled. Wetzstein v. Dehrkoop, 241 Iowa at 1244, 44 N.W.2d at 698. It is not necessary that one have a fraudulent intent to be estopped. "It is sufficient if a fraudulent result would follow if the person were permitted to assert a position inconsistent with the previous declaration or conduct."[1] Id.

Estoppel ordinarily would be a question for the trier of fact; however, the court may enter judgment as a matter of law when there is no genuine issue of material fact and reasonable minds would not differ as to the conclusion to be reached based on those facts. Iowa R. Civ. P. 237(c). Here the undisputed facts, shown by careful review of all materials before the court, are that plaintiff's wife received written notice of termination before September 1, that plaintiff subsequently received actual notice and acted on it by personally contacting defendant, The Peoples Company, about drawing up a new lease, that plaintiff did not object at that time to the sufficiency of the notice and that a new lease was not drawn up. The property in question was thereafter rented to defendants, Robert and James Hunget.

These facts make the case inapposite to Leise v. Schiebel, 246 Iowa 64, 67 N.W.2d 25 (1954), cited by both parties. Leise involved an alleged oral tenancy, the landlord's observations of tenants' actions as indicating their desire to terminate the understanding and his reliance on these actions as his reason for failure to give any notice of termination as required by section 562.7, The Code 1950. In that case no detrimental reliance occurred to plaintiff-landlord; thus, he was prevented from asserting estoppel. In the case at bar, defendant uncontrovertedly attempted to submit written notice to plaintiff although such notice failed to actually arrive in plaintiff's hand. However, plaintiff, by his conduct, indicated to defendants that he had knowledge of the notice and led them to believe he had received same. Defendants then let the property to other parties. For these reasons we find plaintiff estopped from challenging defendant's

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[1] A contrary conclusion would result in a "constructive fraud" upon the injured person. Wetzstein v. Dehrkoop, 241 Iowa at 1245, 44 N.W.2d at 699.

failure to formally comply with the "receipt" requirements of section 562.7(3).[12]

V. Plaintiff's last argument, that the language "this is a friendly notice" negates the terminal quality of the whole communication, has no merit. Section 652.7 sets forth no mandatory form or language as to termination. Nor does it require that language of notice may not hold out some hope of renegotiation of the lease. Taken as a whole the notice in this case clearly informs plaintiff that, to stay eviction, new terms must be agreed upon by written lease, signed by the parties; if no new lease is signed, plaintiff must vacate the premises at the end of the farming year. Language that the notice is "friendly" can not be construed to negate the whole tenor of the document.

For the reasons stated, we affirm the trial court's judgment as to Divisions I and II of plaintiff's petition and reverse and remand as to Division III.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

All judges concur except Oxberger, C.J., who dissents, and Donielson, J., who specially concurs.

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[12] Liese held that the provisions of section 562.7 were found to be mandatory, not directory; however, section 562.7 is not a jurisdictional statute. 246 Iowa at 66, 67 N.W.2d at 26. We find plaintiff's reliance on Esterdahl v. Wilson, 252 Iowa 1199, 110 N.W.2d 241 (1961), to be misplaced. In that case the court did hold notice-in-fact to be insufficient where defendant's wife signed the receipt of notice sent by restricted certified mail but later gave the notice to defendant. However, Esterdahl is a non-resident motor case wherein the court found that service of process sufficient to acquire jurisdiction over non-resident defendant requires strict adherence to statutory procedures.

OXBERGER, C. J. (dissenting)

I disagree with the majority's conclusion that the record establishes estoppel as a matter of law. Estoppel was not mentioned by the trial court in its ruling. On appeal, neither of the parties focused arguments on the issue. In defendant's written brief, he concedes that ". . . the facts in the record concerning estoppel are sparse, . . ." I would remand the case to permit the trial court to review the evidence on the estoppel question and make an initial determination of this issue in its ruling on the defendant's motion for summary judgment.

DONIELSON, J. (specially concurring)

I specially concur with the majority's opinion. The majority indicates we are confronted with a choice between two polar positions as a result of this factual situation: either a determination that a husband and wife who jointly sign a farm lease are co-tenants and notice to terminate the lease given to one is sufficient as to the other, see 51C C.J.S. Landlord & Tenant §89(4) (1968), or that there was no legally sufficient notice but plaintiff is estopped from such an assertion. I believe we should adopt the compromise position that statutory notice of termination sent individually to tenants who are married cohabiters and received by at least one is legally sufficient notice to terminate the farm tenancy.

In the instant case, plaintiff's wife received notice addressed to her, and plaintiff admitted in a deposition that he either read it or had it read to him by his wife. It is obvious he did not go to the post office to pick up the restricted certified letter because he knew its exact contents. He proceeded with negotiations to renew the lease as if he had received the notice.

Under these circumstances, it would be impossible to obtain the "refusal" of notice to satisfy Escher v. Morrison, No. 65-62067 (Iowa filed April 25, 1979), and Long v. Crum, 267 N.W.2d 407, 411 (Iowa 1979). Allowing a tenant to ignore or return unclaimed notice and successfully assert that it was not received is destructive to farm tenancy law and invites fraud. We should not have to rely on estoppel to prevent plaintiff from defeating the lessor's termination of a farm lease.