IN THE COURT OF APPEALS OF IOWA

No. 1999-382 (9-635) / 98-2109
Filed April 28, 2000

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CLERK SUPREME COURT

NORWEST BANK IOWA, N.A.,
Plaintiff-Appellant,

vs.

WENDELL COREY,
Defendant-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart Scoles, Judge.

Norwest Bank appeals a district court ruling granting Corey's motion for summary judgment dismissing its action to enforce a security agreement assigning Corey's interest in a business partnership. **REVERSED AND REMANDED.**

Richard R. Winga and John L. Duffy of Laird, Heiny, McManigal, Winga, Duffy & Stambaugh, Mason City, for appellant.

Larry S. Eide of Pappajohn, Shriver, Eide & Nicholas, P.C., Mason City, for appellee.

Considered by Huitink, P.J., and Streit and Miller, JJ.

HUITINK, P.J.

I. Background Facts and Proceedings.

On May 28, 1998, Norwest Bank of Iowa (Norwest) filed this action to enforce a December 30, 1983, security agreement assigning Wendell Corey's partnership interest in North Central Iowa Storage Company taken as security for loans Norwest made to Corey in 1984. Corey denied liability and moved for summary judgment, claiming Norwest's action was barred by the ten-year statute of limitations on written contracts. Norwest also moved for summary judgment citing revival of its claim by Corey's written admission of Norwest's security interest in North Central made within ten years before this action was commenced. The parties conceded the nonexistence of any material factual disputes. The fighting issue below was the legal consequences of the following undisputed facts.

Norwest's claim originated in a series of loans made to Corey in 1984, the last of which was due on November 5, 1984. On December 21, 1984, Norwest initiated a replevin action against Corey. On January 25, 1985, Norwest obtained a consent order for possession of a portion of Corey's property, the sale proceeds of which were applied to Corey's loan balances. On February 11, 1987, Corey filed a voluntary Chapter 7 bankruptcy, and a discharge order including Corey's personal liability to Norwest was entered on May 29, 1987. Although Norwest was granted relief from the automatic stay attending Corey's bankruptcy proceedings on October 8, 1987, the trustee was not compelled to

abandon Corey's interest in North Central until January 6, 1989. A termination order was entered in the bankruptcy proceedings on January 12, 1989.

On June 2, 1998, Corey signed a new partnership agreement with the partners in North Central, which provided:

> WHEREAS, the rights and interests of Corey in the Original Partnership and in any specific property of the Original Partnership, whether before or after such dissolution [of the original partnership due to Corey's bankruptcy], are subject to a security interest and collateral assignment in favor of Norwest Bank Mason City, N.A. . .
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> . . .
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> 3. The parties to this agreement hereby acknowledge and confirm that the rights and interests of Corey in the New Partnership are subject to a security interest and collateral assignment in favor of Norwest Bank Mason City, N.A.; and Corey agrees that all distributions of partnership assets to which Corey would be entitled if such security interest and collateral assignment did not exist instead shall be made directly to Norwest Bank Mason City, N.A. pursuant to such collateral assignment.

The district court's ruling granting Corey summary judgment provides:

> A security agreement is merely an agreement which creates or provides for a security interest. Iowa Code § 554.9105(1)(l). In this case, it means that Norwest's entitlement to be repaid on the underlying promissory notes was secured by Corey's interest in North Central Iowa Storage Co. II. If the underlying obligation is barred by the statute of limitations, however, then the security agreement does not provide any independent claim for recovery. In *Burns v. Burns*, 11 N.W.2d 461 (Iowa 1943), the court stated:
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> > "It is a general rule that, if there be no debt, there is no mortgage, and consequently, *if action for the debt be barred, an action to foreclose the mortgage is also barred.*" *Id.* at 463. (Emphasis in original.) (Citing *Fitzgerald v. Flanagan*, 135 N.W. 738 (Iowa 1910).)
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> > . . .
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> In this case, it is clear that the "whereas clause" and paragraph 3 of the June 2, 1988, agreement recognized the validity of Norwest's security interest in Corey's interest in the partnership.

> Norwest concedes, however, that the agreement was not intended to reaffirm any personal liability by Corey. (It is undisputed that Corey did not sign a reaffirmation agreement pursuant to § 524(c) of the Bankruptcy Code.) While the agreement recognizes that Norwest has a claim against partnership assets (and would have for another eight and one-half years), the court concludes that it does not constitute a recognition of an unpaid debt by Corey or a new promise to pay. That is, the court concludes that under the circumstances in this case, the agreement signed by Corey on June 2, 1988, does not constitute a "revival" of the underlying debt, which would otherwise extend the statute of limitations.
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> In summary, the court concludes that pursuant to the assignment given by Corey on December 30, 1983, Norwest had a valid security interest in Corey's interest in partnership assets. Norwest was entitled to enforce its security interest until the statute of limitations expired on the underlying promissory notes in November of 1996. The June 2, 1988, partnership agreement did not serve to revive or extend the statute of limitations. Accordingly, the instant action, filed on May 28, 1998, is barred by the statute of limitations and the defendants are entitled to summary judgment.

On appeal, Norwest challenges the district court's ruling granting Corey's motion for summary judgment. Norwest argues the district court erred in concluding its claim against Corey was not revived by the June 2, 1988, partnership agreement.

II. Scope of Review.

Our review of a grant or denial of summary judgment is at law. *Hill v. McCartney*, 590 N.W.2d 52, 55 (Iowa App. 1998). Summary judgment is only appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* We review the record in the light most favorable to the party opposing summary judgment as we would a motion for directed verdict. *Smith v. CRST Int'l, Inc.*, 553 N.W.2d 890, 893 (Iowa 1996). Under this standard, summary judgment is inappropriate if reasonable minds

would differ on how the issue should be resolved. *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996). Entry of summary judgment is proper if, under the entire record, the only conflict concerns legal consequences flowing from undisputed facts. *Brown v. Monticello State Bank*, 360 N.W.2d 81, 84 (Iowa 1984).

III. The Merits.

A security agreement is a written contract. Iowa Code § 554.1201(3) ("Agreement" means the bargain of the parties; whether an agreement has legal consequences is determined by applicable provisions of the Uniform Commercial Code; otherwise by law of contracts); Iowa Code §544.1201(11) (contract means the total legal obligation which results from the parties' agreement as affected by the Uniform Commercial Code and any other applicable rules of law) F.S. Credit Corp. v. Shear Elevator, Inc., 377 N.W.2d 227, 231 (Iowa 1985) (applying Iowa contract law permitting modification of written contracts to modification of written security agreements). Actions founded on a written contract must be commenced within ten years after the action accrues. Iowa Code § 614.1(5). A cause of action accrues and the time "for bringing an action to enforce a contract runs from the date of breach not from the date the agreement was executed." *Krotz v. Sattler*, 586 N.W.2d 336, 339-40 (Iowa 1998). A civil action is commenced and the applicable statute of limitations is tolled by filing a petition with the court. Iowa R. Civ. P. 48. The filing date of the petition determines whether an action has been commenced within the time allowed. *Id.* To determine whether an action was commenced within the time allowed, time is

measured from the date the cause of action accrued to its commencement less any time the running of the statute of limitations was tolled. *Harrington v. Toshiba Mach. Co., Ltd.*, 562 N.W.2d 190, 191-92 (Iowa 1997).

Iowa Code section 614.13 provides:

> When commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of such injunction or prohibition shall not be part of the time limited for the commencement of the action . . . .

11 U.S.C. § 108 provides:

> Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of –
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> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
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> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

In the absence of contrary authority, we believe the tolling provisions of section 614.13 are implicated by section 108(c)(1) and presumably apply when bankruptcy proceedings preclude commencement of a civil action in state court.

The parties' December 30, 1983, security agreement is a written contract subject to the ten-year statute of limitations. Iowa Code § 614.1(5). Norwest's cause of action to enforce the security agreement accrued and the statute of limitations began to run with Corey's default on the loan due November 5, 1984. The statute, however, was tolled by Corey's bankruptcy proceedings, and the

time of any resulting prohibition against commencement of an action to enforce the parties' security agreement does not count against the statute of limitations. Iowa Code § 614.13. Because the time elapsed between Corey's November 1984 default and commencement of this action in May 1998 clearly exceeds ten years, including time the statute of limitations was tolled by bankruptcy proceedings, Norwest's claim was time barred unless otherwise revived.

Iowa Code section 614.11 provides that a written admission signed by the party to be charged that a debt is unpaid or a like new promise to pay the debt will revive a contract claim barred by the statute of limitations. *McClure v. Smeltzer*, 222 Iowa 732, 734, 569 N.W. 888, 889 (1936). Either an admission or new promise is sufficient to revive a claim. *Id.* In *Kleis v. McGrath*, 127 Iowa 459, 462-63, 103 N.W. 371, 372 (1905), the court stated:

> It is an accepted doctrine that an acknowledgment of the existence of a debt is allowed to remove the bar of the statute, because such acknowledgment or admission carries with it an implied promise to pay. For that reason the acknowledgment must be express, clear, and direct, for it will not do to infer or imply the acknowledgment, and therefrom imply the promise to pay; thus piling implication upon implication.

The amount and items of the indebtedness and the fact the writing relates to the indebtedness sued on may be established by extrinsic evidence. *Schroedl v. McTague*, 256 Iowa 772, 776, 129 N.W. 19, 21 (1964). It is only necessary that the admission appear with reasonable certainty to relate to the debt in question. *Id.* at 776, 129 N.W. at 22. An admission or new promise sufficient to revive a claim may be made prior to expiration of the statute of limitations. *In re Sleezer's Estate*, 209 Iowa 56, 58, 227 N.W. 644 (1929). Although traditional contract law

provided for enforcement of a new promise to pay an antecedent debt discharged in bankruptcy, *Beneficial Fin. Co. of Waterloo v. Lamos*, 179 N.W.2d 573, 579 (Iowa 1970), the enforceability of such a promise is now limited to those agreements in literal compliance with the affirmation provisions of 11 U.S.C. section 524(c).

As noted earlier, the district court's ruling is premised on the notion that the parties' security agreement provides no independent claim or recovery if an action on the underlying debt is barred. We disagree.

Corey's bankruptcy discharge of personal liability on the underlying promissory notes did not affect or prevent Norwest's foreclosure or enforcement of its surviving claims based on the security agreement. *See* 11 U.S.C. § 522(c)(2); *Johnson v. Home State Bank*, 501 U.S. 78, 82-83, 111 S. Ct. 2150, 2153, 115 L. Ed. 2d 66, 74 (1991) (*in rem* and *in personam* claims distinguished); *Conklin v. Iowa Dist. Court*, 482 N.W.2d 444, 447 (Iowa 1992); *Moad v. Neil*, 451 N.W.2d 4, 8 (Iowa App. 1989). We are unable to reconcile the district court's underlying legal premise with the foregoing authorities recognizing survival of a distinct *in rem* claim following a discharge of an underlying debt in bankruptcy. The notion that the viability of an *in rem* claim is dependent on the viability of a claim on the underlying obligation also conflicts with the distinct remedies available to a secured party on a debtor's default. *See* Iowa Code § 554.9501 (secured party may reduce claim to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure). To the extent the district court read *Burns v. Burns*, to say otherwise, it was an extension of the precedent

therein recited beyond the context of the real estate mortgage foreclosure involved in that case. We see no justification in denying the holder of a distinct and recognized *in rem* claim the relief that party would have enjoyed but for the fortuity of an intervening bankruptcy. Such a denial would frustrate rather than advance the equitable principles embodied in section 614.11.

We conclude any reasonable construction of the express terms of the North Central partnership agreement Corey signed on June 2, 1988, includes a written admission of Norwest's right to enforce its security agreement. Because this action to enforce the parties' December 30, 1983, security agreement was commenced within ten years of the requisite written admission, it is not barred by the ten-year statute of limitations on written contracts. The judgment of the district court is therefore reversed and this case is remanded to the district court for further proceedings in conformity with our opinion.

REVERSED AND REMANDED.

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