

FILED

APR 22 1987

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

AGRICULTURAL PRODUCTION)
CREDIT ASSOCIATION,)

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Plaintiff,)

Filed April 22, 1987

vs.)

8-M PIG, INC., an Iowa Corporation;)
DONALD LAFRENTZ; JOSEPH)
DeCONNICK; VIRGIL DENKER;)
RICHARD L. GROSS; NORBERT J.)
ROECKER; IRVIN HARM; CRAWFORD)
COUNTY TREASURER; CRAWFORD)
COUNTY, IOWA; and UPLAND)
LEASING, LTD.,)

7-18
86-368

Defendants.)

DONALD LaFRENTZ, JOSEPH)
DeCONNICK, VIRGIL DENKER,)
NORBERT J. ROECKER and IRVIN)
HARM,)

Third Party Plaintiffs-)
Appellees,)

vs.)

ALLAN ARKFELD,)

Third Party Defendant-)
Appellant.)

Appeal from the Iowa District Court for Crawford County (26896), Richard
F. Branco, Judge.

Third party defendant appeals from summary judgment for third party
plaintiffs upon a claim for indemnification. **AFFIRMED.**

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Joseph B. Reedy, Council Bluffs, Iowa, for appellant.

Reed H. Reitz of Reimer, Lohman & Reitz, Denison, Iowa, for appellees.

Considered by Donielson, P.J., Snell, and Sackett, JJ.

PER CURIAM**3**

All parties to the present action are shareholders in 8-M Pig, Incorporated. On April 8, 1983, 8-M Pig was in debt to the Agricultural Production Credit Association (A.P.C.A.) of Denison, Iowa, for the amount of \$477,265.16. In order to obtain an extension of the maturity date of this indebtedness, seven shareholders of 8-M Pig, including all parties to this appeal, personally guaranteed payment in the event that 8-M Pig was unable to pay upon the extended maturity date. In exchange for his release as a personal guarantor on the debt, Arkfeld entered into an indemnification agreement with the remaining six guarantors. Pursuant to the indemnification agreement, Arkfeld was to pay the other guarantors one-seventh of any amounts they became liable for to A.P.C.A. as a result of 8-M Pig's debt. A.P.C.A. brought a foreclosure action to recover on the debt and, pursuant to the personal guarantee given by those parties, sought judgment against the appellees to the extent that 8-M Pig's assets were insufficient to satisfy the judgment. A.P.C.A. also initiated a replevin action against 8-M Pig.

On April 25, 1984, appellees filed their third party petition seeking indemnification from Arkfeld for one-seventh of any judgment that might be rendered against them in the pending suit by A.P.C.A. A special meeting of 8-M Pig's board of directors met on April 16, 1984, and a special shareholders meeting was held on April 30, 1984. Affidavits on file establish that Arkfeld, who is both a director and shareholder of 8-M Pig, received notice of both meetings. Pursuant to action taken at these meetings, all assets of 8-M Pig were sold and the proceeds applied to the debt to A.P.C.A. The appellees paid the remaining debt owed to A.P.C.A. and, on January 14, 1986, filed their motion for summary judgment against Arkfeld. Arkfeld filed his resistance to the motion for summary judgment on February 4, 1986. The district court's order, judgment,

and decree granting appellees' motion was filed on February 5, 1986. This appeal followed.

Arkfeld maintains the district court erred in granting the appellees' 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 1984); 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 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).

Arkfeld contends the district court's grant of summary judgment is error. He asserts three grounds in support of this contention: (1) that the attorney who filed the summary judgment motion was authorized to represent only four of the five appellees; (2) that a factual issue remains with respect to the underlying settlement between A.P.C.A. and the appellees; and (3) that a factual issue remains with respect to the amount of indemnity owed the appellees by Arkfeld.

On May 20, 1985, attorney James D. Lohman of the law firm of Reimer, Lohman & Reitz, who had theretofore represented all appellees, withdrew his appearance on behalf of appellee Donald Lafrentz. Subsequent to that date attorney Reed H. Reitz of the Reimer, Lohman & Reitz firm proceeded on behalf of the appellees. Reitz filed the summary judgment motion on behalf of all appellees; notarized the supporting affidavits; and Arkfeld sent copies of the resistance and notice of appeal to Reitz as "attorney for third party plaintiffs." Arkfeld at no time objected to Reitz proceeding in this manner or called his authority to do so into question.

The relevant legal principles are set forth in 7 Am. Jur. 2d Attorneys at Law § 144 (1980) as follows:

The authority of an attorney to appear for the plaintiff can be challenged by the defendant only in that suit, and then the question must be raised in limine by a rule on the attorney to show his authority. The question cannot be raised after filing a demurer or an answer. By permitting plaintiff's attorney to conduct proceedings without challenging his authority promptly, the defendant waives any want of authority and consents to the appearance of the attorney. The question cannot be raised for the first time in the appellate court, nor can it be raised in a subsequent action by a collateral attack on a decree recovered by the attorney in the former litigation.

By allowing Reitz to proceed without objection Arkfeld waived, in the district court, any claim that appellees' counsel lacked the appropriate representative authority. Accordingly, this contention would not have prevented the grant of summary judgment, and does not render that result erroneous on appeal.

Arkfeld's second contention is that his resistance successfully called into question the propriety of the underlying settlement between A.P.C.A. and appellees. Arkfeld's resistance claimed that, as he was a shareholder of 8-M Pig, the November 15, 1985, settlement reached between the other shareholders, appellees here, and A.P.C.A. is defective because it was entered into without Arkfeld's knowledge or consent. The November 15, 1985, settlement referred

to consisted of the appellees' payment of the balance owed to A.P.C.A. in satisfaction of their obligations as personal guarantors of the debt. Arkfeld's contention here fails to appreciate the fact that this settlement was action taken by appellees in their private capacity as individual guarantors of the debt and not in their capacity as shareholders. The fact that Arkfeld is a shareholder of 8-M Pig is in no way relevant to either appellee's November 15, 1985, settlement of their private obligations or Arkfeld's obligations under the indemnity agreement. Accordingly, his second contention is without merit.

Finally, Arkfeld contends a factual issue remains as to the proper amount of recovery to be awarded appellees. That this issue remains is manifest, says Arkfeld, by the court's award of summary judgment in the amount of \$54,415.72, whereas the appellees originally sought \$71,393.87. We think this contention *disingenuous*. Subsequent to the appellees' initial damages claim, made by way of a January 3, 1986, affidavit, one of the original third-party plaintiffs dismissed his claim and an additional portion of the damages claim was withdrawn by the remaining petitioners. The district court took these factors into account and awarded damages accordingly. No factual issue remains with respect to damages.

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

AFFIRMED.