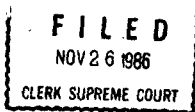


IN THE COURT OF APPEALS OF IOWA



GREAT WEST CASUALTY COMPANY)
and B & J TRUCKING,)

Plaintiffs-Appellees,)

v.)

INSURANCE COMPANY OF)
PENNSYLVANIA and INTERSTATE)
CONTRACT CARRIER CORPORATION,)

Defendants-Appellants.)

Filed November 26, 1986

6-224
85-978

99

Appeal from the Iowa District Court for Dallas County (No. 26630 - 0883)

- Jack D. Levin, Judge.

Defendants appeal from the trial court's order granting the plaintiffs' motion for summary judgment, contending that they were not given an adequate opportunity to engage in *discovery* before the motion was ruled upon. **REVERSED.**

Chester C. Woodburn III, of Hansen, McClintock & Riley, Des Moines, Iowa, for defendants-appellants.

James L. Pray, of Gamble, Riepe, Webster, Davis & Green, Des Moines, Iowa, for plaintiffs-appellees.

Considered by Oxberger, C.J., Snell, and Sackett, JJ.

OXBERGER, C.J.

The question presented in this appeal concerns the propriety of the trial court's order granting the plaintiffs' motion for summary judgment. The defendants contend that the court erred in sustaining the motion: (1) because they had not been allowed to complete discovery before the motion was ruled upon; and (2) because genuine issues of material fact existed in the case. We reverse.

I. STANDARD OF REVIEW

Our standard of review is an assigned error only. Iowa R. App. P. 4. Summary judgment is a procedural device available for the prompt and expeditious disposition of a controversy when there exists no dispute concerning either the material facts or the inferences drawn therefrom, or if a question of law alone is implicated. David v. Comito, 204 N.W.2d 607, 608 (Iowa 1973). In reviewing the grant or denial of a motion for summary judgment, we view the facts and inferences found in the pleadings in the light most favorable to the party opposing the motion. Meylor v. Brown, 281 N.W.2d 632, 634 (Iowa 1979). The moving party bears the burden of proving the absence of any genuine issue of material fact. Iowa R. Civ. P. 237(c); Northrup v. Farmland Insurance, Inc., 372 N.W.2d 193, 195 (Iowa 1985).

II. FAILURE TO ALLOW DISCOVERY/PROPRIETY OF SUMMARY JUDGMENT

The plaintiffs, Great West Casualty Company and B & J Trucking, commenced the underlying declaratory judgment action after a truck owned by the plaintiffs and allegedly leased to defendant Interstate Contract Carrier Corporation was involved in an accident. Two persons injured in the accident filed suit against B & J and the driver of the truck. The suit was defended by B & J's insurer, Great West. Great West settled the suit, and then commenced this action against Interstate and its insurer, alleging that Interstate was liable

for the accident because the truck was being operated under Interstate's authority and for Interstate's business purposes when it occurred. Interstate denied these allegations, stressing that the lease contract covering the truck in question had not yet been signed by Interstate's representatives at the time of the accident. On the basis of these facts, the trial court granted the plaintiffs' motion for summary judgment.

The pivotal issue in this appeal is whether the trial court erred in refusing to allow Interstate to depose William Miller, the owner of B & J and Janet Kirby, the driver of the truck, before ruling upon the motion. Iowa Rule of Civil Procedure 237(f) permits a party resisting a motion for summary judgment to seek delay in the trial court's disposition of the motion until the completion of such discovery as is necessary in order for the motion to be adequately resisted. Banks v. City of Ames, 369 N.W.2d 451, 453 (Iowa 1985). The language of rule 237(f) specifically provides:

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.

In the case at bar, the defendants filed two resistances to the plaintiffs' motion for summary judgment. In the first resistance, the defendants urged the court as follows:

These Defendants state that this case is not right [sic] for a Motion for Summary Judgment for the reason that these Defendants have requested the depositions of the [plaintiffs'] affiant, William F. Miller, and the driver of the vehicle in question, Janet Kirby.

On the basis of the above assertion, the defendants requested the court to enter

an order providing that the depositions of Miller and Kirby could be taken before the motion was ruled upon.

Similarly, in their second resistance the defendants reasserted their desire to depose Miller and Kirby and requested that the court refrain from hearing the motion until the depositions had been taken. Although the defendants' resistances made no specific reference to rule 237(f), we deem them the equivalent of a request made pursuant to that rule. The trial court never entered a separate ruling upon the defendants' request, but denied it in effect when the motion for summary judgment was sustained.

We have repeatedly recognized that, "Discovery matters are committed to the sound discretion of the trial court, and are reviewable only upon an abuse of discretion." State v. Webb, 309 N.W.2d 404, 413 (Iowa 1981). In Carter v. Jernigan, 227 N.W.2d 131, 135 (Iowa 1975), however, the supreme court expressed a partial limitation upon a trial court's discovery discretion by stating its preference for allowing a party against whom a motion for summary judgment has been filed to complete discovery before the motion is entertained. Moser v. Thorp Sales Corp., 312 N.W.2d, 881, 891 (Iowa 1981). The reasoning upon which this rule is predicated is summarized as follows:

A party whose necessary evidence rests in the bosom or files of his adversary can place the adversary on the stand at trial and seek to extract the facts from him. Before the day of discovery procedure, not infrequently this was the only avenue open to a party. But summary judgment proceedings come before trial, and a party faced with a summary judgment motion may have to use one of the discovery devices or suffer adverse judgment. See rule 237(e) and (f). Hence the modern decisions hold that a party against whom a summary judgment motion is made should first be allowed to discover the facts if he desires.

Carter v. Jernigan, 227 N.W.2d at 135; see also Miller v. Continental Insurance Co., No. 85-1262, slip op. at 6-7 (Iowa, August 20, 1986); Moser v. Thorp Sales

Co., 312 N.W.2d at 891; Iowa State Department of Health v. Hertko, 282 N.W.2d 744, 755 (Iowa 1979).

We find the defendants' request in the case at bar squarely within the purview of these principles. This is clearly a case where the facts which the defendants sought to discover in order to resist the motion rested within the plaintiffs' knowledge. Furthermore, the defendants contend that the testimony of Miller and Kirby would have confirmed their assertion that no contract had been executed. The plaintiffs, however, as Miller and Kirby's attorneys, refused to make them available. In these circumstances, we think that the court incorrectly ruled upon the motion before allowing the defendants to complete reasonable discovery. See Miller v. Continental Insurance Co., No. 85-1262, slip op. at 8. Accordingly, the granting of the motion for summary judgment is reversed.

REVERSED.