IN THE COURT OF APPEALS OF IOWA

No. 5-169 / 94-1011

ERIC STEWART,

Plaintiff-Appellant,

vs.

DIAMOND PRODUCTS CO., d/b/a DIAMOND VOGEL PAINTS,

Defendant/Third Party Plaintiff-Appellee.

FILED
AUG 17 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Johnson County, Thomas M. Horan, Judge.

Stewart brought suit against Diamond Products, claiming it provided him with defective paint. **AFFIRMED.**

Steven E. Gill of the John C. Wagner Law Offices, P.C., Cedar Rapids, for appellant.

Thomas J. Shields and John D. DeDoncker of Lane & Waterman, Davenport, for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

SACKETT, P.J.

Plaintiff-appellant Eric Steward appeals a trial court ruling sustaining a motion for summary judgment filed by defendant-appellee Diamond Products Co. d/b/a Diamond Vogel Paints. Plaintiff sued defendant contending it had provided him with defective paint. Diamond Vogel Company sells paint in retail stores. Before plaintiff sued defendant, it settled a claim with Gibson-Homans Company, the manufacturer of the allegedly defective paint. Defendant filed a motion for summary judgment advancing several reasons why the motion should be sustained. Plaintiff did not resist the motion. The motion for summary judgment was granted and the suit was dismissed. We affirm.

Plaintiff first contends the trial court erred in granting summary judgment because he did not resist the motion. We agree with plaintiff that a failure to resist a summary judgment motion is fatal only if the moving party has met the necessary burden of proof. *See Ferris v. Anderson*, 255 N.W.2d 135, 137 (Iowa 1977). When the evidence does not support an absence of a genuine material fact, summary judgment should be denied. *See First Nat'l Bank v. Mackey*, 338 N.W.2d 361, 363 (Iowa 1983). The trial court, while finding the motion was not resisted, went on to find defendant's motion established no material facts were in dispute and when plaintiff settled with Gibson-Homans and negotiated a settlement check, he was

releasing Gibson-Homans and its agents. The trial court found the undisputed affidavits established defendant was an agent of Gibson-Homans and the document supporting the motion pointed out to plaintiff the release statement on the check also applied to defendant.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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); *see Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact. *Milne*, 424 N.W.2d at 423, and the evidence must be viewed in the light most favorable to the resisting party. *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986). The procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. *Id.*; *Sherwood v. Nissen*, 179 N.W.2d 336, 339 (Iowa 1970). A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Milne*, 424 N.W.2d at 423; *Gott*, 387 N.W.2d at 343. If the motion is properly supported, however, the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e). The

language of our rule and case law are substantially similar or identical to that of rule 56 of the Federal Rules of Civil Procedure, *see, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88, 106 S. Ct. 1348, ____, 89 L. Ed. 2d 538, 551-53 (1986), from which we may draw for guidance in interpreting our own rule. *Sherwood*, 179 N.W.2d at 339.

We agree with the trial court that the undisputed facts present one conclusion and that is the settlement with Gibson-Homans included a release of defendant Diamond Products Co. d/b/a Diamond Vogel Paints. We affirm on this issue.

Plaintiff also contends defendant did not have a defense under Iowa Code section 613.18 (1991). The trial court did not sustain defendant's motion on this basis. Having affirmed the trial court, we find it unnecessary to address plaintiff's argument on this issue.

AFFIRMED.