IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

127

LARRY D. JOHNSON,

Plaintiff,

vs

PCP MFG., INC.,

Defendant.

Filed March 31, 1986

5-638
85-235

PCP MFG., INC.,

Third-Party Plaintiff-Appellant,

vs

RICHCO PLASTIC COMPANY,

Third-Party Defendant, Appellee.

Appeal from the Iowa District Court for Cherokee County (No. CL 1112) Richard W. Cooper, Judge.

Third party plaintiff appeals from a summary judgment for third party defendant upon a claim for contribution or indemnity in an action for damages based on defective construction of a hog confinement facility. **AFFIRMED.**

David A. Scott, of Cornwall, Avery, Bjornstad & Scott, Spencer, Iowa, and William E. Kunze, Spirit Lake, Iowa, for third-party plaintiff-appellant.

Mark S. Brownlee, of Kersten, Opheim & Carlson, Fort Dodge, Iowa, for third-party defendant-appellee.

Dennis O. Green, of Miller, Miller, Miller & Green, Cherokee, Iowa for plaintiff.

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

Third party plaintiff appeals from a summary judgment for third party defendant upon a claim for contribution or indemnity in an action for damages based on defective construction of a hog confinement facility. We affirm.

The parties before the court executed a settlement agreement releasing Richco Plastics Company (Richco) "from any and all liability whatsoever" concerning Richco's sale of plastic hog slats to P.C.P. Manufacturing, Inc. (PCP), the third party plaintiff now before the court. This settlement, on review of this court, is found to be clear and unambiguous.

P.C.P. argues that summary judgment was inappropriate due to a factual question regarding the intent of the parties in the execution of the release. Ronald L. Dillon, President of P.C.P. testified in his deposition that he thought he was only releasing Richco from the claim that formed the basis for the lawsuit in federal court. He said he did not intend to release the claims of customers of P.C.P. against Richco. The intention of the parties, when clearly expressed in an agreement, controls over subsequent expression of intent by one of the parties, Mopper v. Circle Key Life Insurance Company, 172 N.W.2d 118, 124 (Iowa 1969). No secret intention of one of the parties can be advanced to substantially alter the clear terms of an agreement. First Northwestern National Bank, Denison v. Crouch, 287 N.W.2d 151, 153 (Iowa 1980).

Stanley E. Munger, attorney for P.C.P. at the time of the execution of the release testified the release was a full settlement of disputed issues between the parties and a clear expression of their intent. P.C.P. says that during the discovery depositions, Richco's attorney stated damages incurred by slat purchasers were irrelevant to the action between P.C.P. and Richco. We do not find such action sufficient to negate the clear and unambiguous language of the release.

For P C.P. to offer extrinsic evidence of its intent as foundation to dispute the executed agreement, it must show the contrary intent to be material to interpretation of the agreement. If such a fact question can be shown to be material, then "the question of intent is a fact question which cannot be disposed of on a motion for summary judgment." Brubaker v. Barlow, 326 N.W.2d 314, 316 (Iowa 1982)

Here we find no reason to accord appellant's contention of contrary intent the materiality which would render summary judgment inappropriate.

Appellee notes Rule 101 of the Iowa Rules of Civil Procedure which requires specific pleading by any party seeking to avoid the legal effect of a contract or writing Appellant carries the burden of proof in establishing a material, mutual mistake in the execution of the agreement. Stetzel v. Dickinson, 174 N W 2d 438, 439 (Iowa 1970).

We find from the record that appellant failed to specifically plead a mutual mistake and has not carried the burden of proof.

AFFIRMED.