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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-047 / 93-0203

FARM CREDIT BANK OF OMAHA f/k/a THE FEDERAL LAND BANK OF OMAHA,

Plaintiff-Appellee,

vs.

FIRST FARLIN COMPANY, JOHN F. TIFFANY a/k/a J.F. TIFFANY, JON V. TIFFANY, and LEROY ARMSTRONG,

Defendants-Appellants.

Appeal from the Iowa District Court for Boone County, Joel E. Swanson, Judge.

The defendants appeal from a judgment of the district court granting summary judgment in favor of the plaintiff on their counterclaims. **AFFIRMED.**

Marlyn S. Jensen, Osceola, for appellant.

Thomas H. Burke of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Heard by Donielson, C.J., and Sackett and Habhab, JJ. Cady, J., takes no part.

PER CURIAM

The defendants, First Farlin Company and Leroy Armstrong,[1] appeal from the district court order granting plaintiff Farm Credit Bank of Omaha's motion for summary judgment on defendants' counterclaims. We affirm.

In March 1989, First Farlin acquired a railroad right-of-way which was approximately one hundred feet wide and one-half mile long. The railroad right-of-way crossed over land owned by the Dunkelbergers. The right-of-way separated approximately nineteen acres of tillable farm land from the rest of the Dunkelberger property. In 1990, John F. Tiffany, president and secretary of First Farlin, conveyed the right-of-way by quit claim deed to Jon V. Tiffany. On June 1, 1990, John F. Tiffany gave Leroy Armstrong an exclusive option to purchase the right-of-way for five years, coupled with a nondisclosure agreement.

Farm Credit Bank of Omaha ("FCBO") had a real estate mortgage encumbering the Dunkelberger property. FCBO brought a foreclosure action against the Dunkelbergers and requested that a receiver be appointed. Following a sheriff's sale, FCBO received a sheriff's certificate of purchase. FCBO subsequently redeemed the sheriff's certificate for a sheriff's deed which FCBO recorded on

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1. John F. Tiffany and Jon V. Tiffany are also named defendants. John F. Tiffany is the president and secretary of First Farlin. He also may claim an interest in this action pursuant to a power of attorney given to him by Jon V. Tiffany. First Farlin conveyed the railroad right-of-way by quit claim deed to Jon V. Tiffany on February 14, 1990.

June 1, 1990.

The court appointed a receiver, who leased the Dunkelberger land to Greg Swecker. Mr. Swecker farmed the land during the 1989 and 1990 crop years. Mr. Swecker had also been a tenant of the Dunkelbergers for a number of years. During that time period, he had crossed the right-of-way to gain access to the remaining nineteen acres.

Once First Farlin obtained ownership of the right-of-way, it sent a bill to Swecker to the amount of $500 for the use of the right-of-way. Mr. Swecker sent the bill to the receiver. On December 13, 1989, John F. Tiffany, as credit officer for First Farlin, sent a notice to cure to the receiver. Counsel for the receiver wrote to Tiffany and denied the claim. On January 10, 1990, counsel for the receiver offered to purchase an easement right-of-way across the railroad right-of-way. First Farlin did not respond to this offer. The receiver then filed a request with the district court to institute litigation to establish an easement over the railroad right-of-way. The district court issued an order prohibiting the receiver from instituting litigation and also from paying any money to First Farlin for access rights in an action to close the receivership. The district court denied First Farlin's claims against the

receiver. The court stated that First Farlin's claims would have to be resolved in a separate litigation between First Farlin and FCBO.

On April 12, 1991, FCBO filed its petition to establish an easement across the railroad right-of-way. First Farlin filed a counterclaim for breach of contract. First Farlin sought damages and expenses it claims resulted from FCBO's failure to pay the $500 rental price for crossing the right-of-way. Leroy Armstrong also filed a counterclaim, alleging that by filing the suit, FCBO interfered with his option regarding the farm land.

In July 1992, FCBO voluntarily dismissed the petition to establish an easement. It also filed a motion for summary judgment against both counterclaims. Following a hearing, the district court granted FCBO's motion for summary judgment. First Farlin and Armstrong appeal.

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 material fact. Milne, 424 N.W.2d at 423. The evidence must be viewed in the light most favorable to the resisting party. Thorpe Credit, Inc. v. Gott, 367 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. 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. Gott, 387 N.W.2d at 343; Milne, 424 N.W.2d at 423. 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).

II.

We now turn to whether the district court correctly granted FCBO's motion for summary judgment against First Farlin. First Farlin's counterclaim is based on an alleged contractual relationship with FCBO. First Farlin argues it offered to lease a portion of the railroad right-of-way to FCBO for $500 per year, FCBO had accepted the offer, and FCBO had subsequently refused to pay the $500 rental price for crossing the right-of-way. FCBO argues there was never any agreement, express or implied, between FCBO and First Farlin for the payment of "access rights."

> A contract may be expressed or implied when the parties manifest their agreement by words, the contract is said to be express when it is manifested by conduct, it is said to be implied in fact. Both are true contract formed by a mutual

> manifestation of assent by the parties to the same terms of the contract. The differentiation arises from the method of proving the existence [of the contract].

Irons v. Community State Bank, 461 N.W.2d 849, 855 (Iowa App. 1990) (quoting Duhme v. Duhme, 260 N.W.2d 415, 419 (Iowa 1977).

We agree with the district court that all communications, transactions and demands for payment of rent to First Farlin were directed to either their receiver or the receiver's tenant, Mr. Swecker. There exists no contractual relationship between First Farlin and FCBO.

First Farlin argues that even if there is no contract between FCBO and First Farlin, in the action to close the receivership, FCBO agreed to allow First Farlin to direct any claim it might have against the receiver to FCBO in a separate action, in an effort to close the receivership quickly. We need not decide what concession, if any, FCBO made in the earlier hearing because we find as a matter of law, a contract did not exist between the receiver and First Farlin.

First Farlin also claims there was a contract implied in law.

> A contract implied in law is an obligation imposed by the law without regard to either party's expressions of assent either by words or acts. Such contracts are more properly called quasi or constructive contracts. Quasi contracts are imposed by law to prevent unjust enrichment. A person should not be allowed to enrich herself at the expense of another. Therefore, the law will order the person benefited to pay just value to prevent unjust enrichment.

Id. (citations omitted). In this case, we find no basis for a contract implied in law. We affirm the district court's granting of summary judgment for FCBO on First Farlin's counterclaim.

III.

We next turn to Leroy Armstrong's claim that the district court erred in granting FCBO's motion for summary judgment on his counterclaim. Armstrong argues that, by filing a "frivolous" lawsuit against him to establish an easement across the railroad right-of-way, FCBO caused him damages. Armstrong asserts his counterclaim included claims of malicious prosecution, tortious interference with prospective business advantage, and intentional infliction of emotional distress.

The elements of the tort of intentional infliction of emotional distress are: (1) outrageous conduct by the defendant; (2) the defendant's intentional causing or reckless disregard of the probability of causing emotional distress; (3) plaintiff suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Harsha v. State Sav. Bank, 346 N.W.2d 791, 800 (Iowa 1984) (quoting Powell v. Khodari-Intergreen Co., 334 N.W.2d 127, 129 (Iowa 1993)). For conduct to be "outrageous," it must be "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized

community." Id. (quoting Restatement (Second) of Torts § 46, cmt. d (1965)).

Armstrong's claim against FCBO is based on FCBO's filing a lawsuit to establish easement rights across land which Armstrong had an option to buy. This conduct does not approach the requisite standard of outrageousness which is necessary to create liability.

We also find Armstrong has failed to show a genuine issue of material fact existed with regard to his malicious prosecution claim.

> To prevail on a claim for malicious prosecution, the plaintiff must establish each of the following six elements: (1) a previous prosecution; (2) instigation of that prosecution by the defendant; (3) termination of that prosecution by acquittal or discharge of the plaintiff; (4) want of probable cause; (5) malice on the part of defendant for bringing the prosecution, and (6) damage to the plaintiff. Additionally, Iowa has adopted what is knows as the "special injury rule" which requires that the sixth element damages can only be sustained by proof of arrest, seizure of property, or other "special injury . . . which would not necessarily result in all suits prosecuted to recover for like causes of action."

Royce v. Hoening, 423 N.W.2d 198, 200 (Iowa 1988) (citations omitted).

> The . . . position . . . which we have adopted and still believe sound, is that the courts should be open to all who think they have a just cause of action, and it would deter many honest litigants from asserting their rights if they knew they were to be penalized by a counter-action for damages based on alleged malice if for any reason they failed in winning their cause.

Brody v. Ruby, 267 N.W.2d 902, 905 (Iowa 1978)(citation omitted).

We agree with the district court that, as a matter of law, the record does not support a malicious prosecution claim by Armstrong against FCBO.

In addition, we find Armstrong has failed to show a genuine issue of material fact existed with regard to his tortious interference with prospective business relationships. Interference with prospective business relationships is an intentional tort which requires a showing that the actor had a purpose to "injure or destroy" the plaintiff's business. Harsha, 346 N.W.2d at 799. We find nothing in the record to suggest FCBO filed its easement action to "injure or destroy" Armstrong's gensing business. The record shows Armstrong was named as a party defendant only because he had an interest in the real estate FCBO wanted an easement across.

We find the district court correctly determined that summary judgment was appropriate on both First Farlin's and Leroy Armstrong's counterclaims.

AFFIRMED.