FILED
MAR 31 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
	)	69
Plaintiff-Appellee,	)	Filed March 31, 1986
vs.	)	
	)	
RICHARD LINCOLN,	)	5-618 / 84-1312
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Ringgold County (No. 3307) Richard D. Morr, Judge.

Defendant appeals with permission the district court's granting partial summary judgment in an action on several promissory notes. **AFFIRMED AND REMANDED.**

Robert A. Rolfe of Phipps & Rolfe, Lamoni, Iowa, for defendant-appellant.

Paul A. Zoss of Adams, Howe & Zoss, Des Moines, Iowa, for plaintiff-appellee.

Considered by Schlegel, P.J., Hayden, and Sackett, JJ.

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Defendant appeals with permission the district court's granting partial summary judgment in an action on several promissory notes. We affirm.

On January 23, 1978, appellant Lincoln and one Dean Yoder executed a Guaranty Agreement to original plaintiff, Tingley State Savings Bank[1] to enable D & D Farms, Inc. to obtain credit from the bank. In July, 1981, Yoder purchased Lincoln's interest in D & D Farms, Inc. Subsequently, Yoder, as president of D & D Farms, Inc., executed additional promissory notes to the bank on April 6, 1982, to enable D & D Farms, Inc., to obtain credit from the bank.

Apparently in November of 1981, D & D Farms was disqualified from doing business in Iowa by the Secretary of State. However, during the years of its existence D & D Farms, Inc., became indebted to the bank in the amount of over $200,000 based partially upon promissory notes executed after July 1981. D & D Farms, Inc., defaulted on the notes and the bank commenced this action against the guarantors.

Appellant is one of seven original defendants. In four counts, the bank sought relief from Lincoln as guarantor of certain obligations owed to it by D & D Farms, Inc. Lincoln answered the petition, denying liability under the guaranty and affirmatively alleged that any guaranty signed by him was effective only for indebtedness then existing or contemporaneously being undertaken by D & D Farms, Inc., or Dean Yoder. Thereafter, the bank moved for summary

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[1] By order of Justice Uhlenhopp it was determined that the judgment appealed from was not final but that permission to appeal should be granted. By separate order, the Federal Deposit Insurance Corporation was substituted for the bank as party plaintiff. The bank subsequently dismissed without prejudice claims against other parties originally named as defendants.

judgment supported by an affidavit from the bank's chairman of the board. Lincoln resisted the motion and furnished the affidavits of himself and Dean Yoder. The district court granted the bank's motion for summary judgment and Lincoln has appealed that decision.

In determining whether the district court properly granted a summary judgment, the task of this court "is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied." Froning & Deppe v. South Story Bank & Trust, 327 N.W.2d 214, 215 (Iowa 1982). Where the only conflict concerns legal consequences of undisputed, underlying facts, entry of summary judgment is proper. Goodwin v. City of Bloomfield, 203 N.W.2d 582, 588 (Iowa 1973).

Appellant contends the trial court erred in failing to find any issue of material fact on four specific findings and conclusions. They are: (A) Agri-Limited, Inc., an Illinois corporation, was doing business in Iowa as D & D Farms, Inc.; (B) the guaranty signed by Yoder and Lincoln on January 23, 1978, continued beyond the death of the corporation, D & D Farms, Inc.; (C) the guaranty signed by Yoder and Lincoln on January 23, 1978, was not released, revoked or in any manner cancelled; and (D) the subsequent guaranties signed by Yoder, individually, could not revoke, destroy or negate the guaranty signed by Lincoln on January 23, 1978. We will deal with each contention separately.

A. Doing Business in Iowa. The record shows this allegation was verified by an accompanying affidavit by the bank's chairman of the board. Appellant simply denied this allegation. He did not address this issue in either of his accompanying affidavits to his resistance. It was incumbent upon him, by affidavit or otherwise, to set forth specific evidentiary facts showing that there was a genuine issue for trial. Graham v. Kuker, 346 N.W.2d 290, 291 (Iowa 1976).

Moreover, the bank's claims against Lincoln were based upon his guaranty of the debts of D & D Farms, Inc., to the bank. Where D & D Farms did business was not relevant to the claims against Lincoln personally. In addition, we concur with the trial court when it said that although appellant was not a resident of Ringgold County, Iowa, he has not raised complaints of jurisdictional defects and has, in effect, waived such challenges by his general appearance in these proceedings.

B. **Death of D & D Farms, Inc.** On appeal, appellant alleges the trial court erred in determining the guaranty continued beyond the disqualification of D & D Farms, Inc., from doing business in Iowa.

First, we find no where in the trial court's opinion any reference to the disqualification of D & D Farms, Inc. Additionally, we once again fail to discover any reference to these alleged facts in appellant's two affidavits. We are left again with only appellant's denial in his answer. Iowa Rule of Civil Procedure 237(e) provides that an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue of fact for trial. This issue was never brought to the trial court's attention and, therefore, this claim comes too late and we do not entertain it. See Continental Ill. Nat. B. & T. Co. v. Security State Bank, 182 N.W.2d 116, 119 (Iowa 1970).

C. **Lincoln's Sale of His Interest in D & D Farms, Inc.** The bank alleged, and Richard Lincoln does not dispute, that the guaranty, which provides that the guarantors are liable for all indebtedness of D & D Farms, Inc. to plaintiff, "whether now owing or due, or which may hereafter, from time to time, be owing or due," constitutes a continuing guaranty to the bank of the indebtedness of D & D Farms, Inc. A guaranty is continuing if it contemplates a future course

of dealing over an indefinite period. Bankers Trust Company v. Woltz, 326 N.W.2d 274, 277 (Iowa 1982).

In its accompanying affidavit, the bank alleged it never released, and Lincoln had not revoked, the guaranty. Lincoln makes no contrary claim. Nor does Lincoln dispute the bank's allegations that he is jointly and severally obligated by the terms of the guaranty. One of Lincoln's primary allegations of fact is that he severed his relationship with D & D Farms, Inc., by the sale of his stock in the corporation and that he resigned from the corporation, all with the bank's knowledge. The bank does not dispute this statement.

The mere knowledge by the bank that Lincoln severed his relationship with D & D Farms, Inc., does not, as a matter of law, constitute a revocation of his obligation under the guaranty. A continuing guaranty remains valid until revoked by the guarantor or terminated by some rule of law. Maresh Sheet Metal Works v. NRG Limited and Gordon G. Russell, 304 N.W.2d 436, 440 (Iowa 1981).

D. **Subsequent Guaranties Signed by Yoder.** Lincoln's final contention stems from his statement in his accompanying affidavits that the subsequent guaranties signed by Dean Yoder, and acceptance by the bank, constitutes a release by the bank and a revocation by Lincoln of his liability under the original guaranty signed on January 23, 1978. The bank does not dispute the fact that it received the additional guaranties from Yoder. However, the remainder of Lincoln's statements contained in his accompanying affidavits are phrased in conclusory language, and should have instead been pled as an affirmative defense. Appellant has stated in his answer: "By way of an affirmative defense, Defendant alleges that any guaranty signed by him was effective only for indebtedness then existing or contemporaneously being undertaken by D & D and not for any subsequent indebtedness undertaken by D & D or Dean Yoder."

We do not interpret this assertion as the equivalent to an averment that the subsequent guaranty agreements were in essence, a revocation or release of appellant's original agreement with the bank. Therefore, because the averments have not been pled as an affirmative defense, they cannot be raised in this appeal. Graham v. Kuker, 246 N.W.2d 290, 292 (Iowa 1976).

The bank has also requested attorney fees associated with this appeal. Written contracts that allow attorney fees in the event of a suit also allow attorney fees on appeal. See Bankers Trust Co. v. Woltz, 326 N.W.2d 274, 278 (Iowa 1983). The bank has requested $9,500 be awarded in connection with this appeal. In view of the large amount requested, we prefer that the district court determine the reasonable amount of attorney fees that should be awarded on this appeal. Therefore, we remand the case to the district court for the limited purpose of an evidentiary hearing on and the fixing of appellate attorney fees.

We hold the appellant has either failed to raise a genuine issue of material fact in his affidavits, or that he has failed to properly plead his defense to plaintiff's action. Therefore, the trial court's granting of plaintiff's motion for summary judgment is affirmed.

AFFIRMED AND REMANDED.