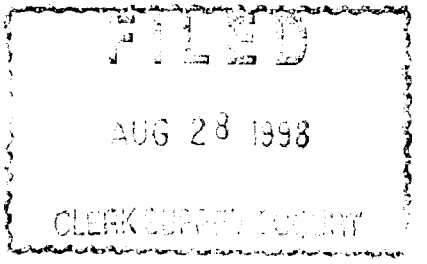
IN THE COURT OF APPEALS OF IOWA

No. 7-730 / 96-1444
Filed August 28, 1998



FIRST NATIONAL BANK OF OMAHA,
Appellee,

vs.

ROBERT CLAUSS,
Appellant.

Appeal from the Iowa District Court for Polk County, Robert D. Wilson, Judge.

Robert Clauss appeals a district court ruling granting summary judgment in favor of First National Bank of Omaha and dismissing Clauss's counterclaim.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Robert Clauss, Des Moines, pro se.

Francis P. Hurley of Bertroche Law Offices, Des Moines, for appellee.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

HUITINK, J.

Robert Clauss appeals from summary judgment entered in favor of First National Bank of Omaha for delinquent credit card debt and dismissal of his counterclaim against the bank. We reverse and remand with instructions.

I. Background Facts and Proceedings.

First National sued Clauss to recover delinquent credit card debt. Clauss filed an answer, including a counterclaim alleging First National's violation of prohibited state and federal debt collection practices. *See* 15 U.S.C. § 1692, et seq.; and Iowa Code § 537.7101, et seq.

The district court, citing Clauss's failure to show genuine issues of fact for trial, granted First National's motion for summary judgment on its claim against Clauss. Clauss's counterclaims were also dismissed with prejudice in the same ruling.

On appeal, Clauss contends summary judgment was precluded by his potentially offsetting counterclaim. He argues the court was obligated to protect him from execution by withholding judgment entry or staying its execution pending resolution of his counterclaim. He also argues it was error for the district court to dismiss his counterclaim in the absence of a dispositive motion requesting such relief.

II. Standard of Review.

We review for errors of law. Iowa R. App. P. 4. 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). 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).

III. The Merits.

Clauss does not dispute the district court's determination that there were no genuine issues of material fact precluding summary judgment on First National Bank's claim for delinquent credit card debt. His appellate contention is limited to the district court's obligation to withhold entry of judgment or stay its execution pending resolution of his counterclaim.

First National's motion for summary judgment was limited to its claim against Clauss for delinquent credit card debt. The record indicates First National requested the district court "set the Defendant's [Clauss's] counterclaim for trial." We find no authority supporting the court's sua sponte dismissal of Clauss's counterclaim in the absence of any pleading or record supporting summary disposition. The district court erred when it concluded otherwise.

As already noted, Clauss's counterclaim was based in part on alleged violation of the *Iowa Debt Collection Practices Act. See* Iowa Code § 537.7101, et seq. A consumer has a private cause of action for damages against anyone who engages in prohibited debt collection practices. Iowa Code § 537.5201(y).[1] Iowa Code section 537.5202 provides:

> Damages or penalties to which a consumer is entitled . . . may be set off against the consumer's obligation and raised as a defense to a suit on the obligation . . . .

Iowa Rule of Civil Procedure 225 provides:

> A claim and counterclaim shall not be set off against each other except by agreement of both parties or unless provided by statute. . .

If the district court sustains a plaintiff's motion for summary judgment, leaving an undisposed of counterclaim, the district court is obligated to employ an appropriate procedural device to protect the defendant against execution until disposition of the counterclaim. *Farmers Coop Elevator Co., Panora v. Knapp*, 259 N.W.2d 762, 764 (Iowa 1997). Because Clauss's counterclaim is a statutorily provided set off, the district court was obliged to protect Clauss from execution of First National's judgment pending resolution of his counterclaim. *Id.*

We accordingly reverse the district court's judgment dismissing Clauss's counterclaim and remand for further proceedings on Clauss's counterclaim. The court

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[1] 15 U.S.C. § 1692, et seq., the federal *Fair Debt Collections Act,* provides for similar relief.

is also instructed to enter an appropriate order staying execution of First National's judgment against Clauss pending resolution of his counterclaim.

REVERSED AND REMANDED WITH INSTRUCTION.