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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

ERNEST A. POOLE,	)	
Plaintiff-Appellant,	)	Filed August 26, 1980
vs.	)	
ARNOLD PUTENSEN and **ROBERT SWASAND,**	)	0-239 2-64002
Defendants-Appellees.	)	

Appeal from Ida District Court - David J. Blair, Judge.

Plaintiff appeals summary judgment granted to defendants and ruling for defendants on their motion to adjudicate law points in his wrongful attachment action. AFFIRMED.

Morris C. Hurd of Hurd Law Firm, Ida Grove, for plaintiff-appellant.

Richard F. Branco of Branco, Boerner & Renegar, Holstein, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson, Carter, and Johnson, JJ. Snell, J., takes no part.

Plaintiff, Ernest A. Poole, appeals summary judgment granted to defendants, Arnold Putensen and Robert Swasand, and ruling for defendants on their motion to adjudicate law points in his wrongful attachment action. As grounds for reversal, plaintiff asserts: The trial court should not have struck his affidavit as untimely filed under Iowa R. Civ. P. 237(c) when it was filed on the day of the hearing and should not have struck his attorney's timely pleaded affidavit stating the contents of his own affidavit; the trial court erred in finding the evidence did not show the existence of issues of material fact rendering summary judgment inappropriate; and the trial court erred in ruling on defendant's motion for adjudication of law points and finding he was not the real party in interest.

I.

Plaintiff was president, manager, and sole stockholder of the Crawford Elevator Company, Inc. The company experienced financial difficulties, which were allegedly aggravated when defendants commenced separate actions as creditors and caused attachment of the company's real and personal property by asserting the company was attempting to convert its assets into money for the purpose of escaping the reach of creditors. On October 31, 1977, plaintiff filed his petition alleging the attachment was wrongful and malicious and sought recovery for damages resulting from unnecessarily accrued interest and legal fees, spoilage, and disappearance of grain. He also sought punitive damages.

Defendant filed a document entitled "Motion to Dismiss and Answer and Motion to Adjudicate Law Points." The motions asserted plaintiff was not the real party in interest and plaintiff's petition did not state a claim on which relief could be granted. The trial court ordered the petition dismissed because plaintiff's claim for indemnity would not accrue or become enforceable until his legal liability to the company's bonding company became fixed or certain, an event that had not occurred. On appeal, the supreme court reversed the trial court's order, holding the trial court could not consider the motion to dismiss since the motion was not filed before the answer. Poole v. Putensen, 274 N.W.2d 277, 279 (Iowa 1979). Subsequently, defendants filed a motion for summary judgment and a motion to adjudicate law points again raising the real party in interest issue and also asserting other grounds for dismissal. The trial court granted

the motion for summary judgment and made similar rulings in the motion for adjudication of law points. Plaintiff has appealed these rulings.

II.

Summary judgment is appropriate only when the moving party shows no genuine issues of material facts exist and entitlement to judgment as a matter of law. In re Eickman Estate, 291 N.W.2d 308, 311 (Iowa 1980); Anita Valley, Inc. v. Bingley, 279 N.W.2d 37, 40 (Iowa 1979); City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d 637, 640 (Iowa 1978). If reasonable persons could draw different inferences and conclusions from the undisputed facts, summary judgment is not proper. In re Eickman Estate, 291 N.W.2d at 311-12; Daboll v. Hoden, 222 N.W.2d 717, 733-34 (Iowa 1974). In ruling on a motion for summary judgment, the trial court and this court on review must examine, in the light most favorable to the nonmoving party, the entire record before it, including pleadings, admissions, depositions, answers to interrogatories, affidavits, and testimony. Meylor v. Brown, 281 N.W.2d 632, 634 (Iowa 1979) (quoting Frohwein v. Haesemeyer, 264 N.W.2d 792, 795-96 (Iowa 1978)); Drainage District No. 119 v. Incorporated City of Spencer, 268 N.W.2d 493, 499 (Iowa 1978); Brody v. Ruby, 267 N.W.2d 902, 904 (Iowa 1978); see Iowa R. Civ. P. 237. If, under these principles, an examination of the record discloses any allegation of ultimate fact, which if found true would be a basis for relief, a summary judgment motion must be overruled. Schulte v. Mauer, 219 N.W.2d 496, 500 (Iowa 1974).

In paragraph five of the summary judgment motion, defendants state the uncontroverted facts show plaintiff has not yet paid any money to the company's bonding company and his claimed damages are non-existent, unliquidated, and speculative. The trial court sustained the motion on this ground. In his petition, plaintiff alleges the bonding company as a consequence of the attachment and resulting receivership was forced to pay a large amount of money to the company's creditors. He further alleges the bonding company will apparently not be able to recoup all of these payments and has formally notified him of its intention to look to plaintiff for complete reimbursement as soon as its net loss is determined. It is uncontroverted that plaintiff has not yet been required to pay any money to the bonding company.

Plaintiff's claim on this matter is essentially one of subrogation. This claim will not accrue or become enforceable, however, until plaintiff's own liability to the bonding

company becomes fixed or certain, and plaintiff pays the obligation. See Leach v. Commercial Savings Bank, 205 Iowa 1154, 1161, 213 N.W. 517, 520 (1927). This allegation of damages does not yet present a claim upon which plaintiff may bring his cause of action.

Plaintiff also alleged in this petition as recoverable damages the loss of grain due to spoilage and lack of security, interest expenses, and legal fees. He claims he suffered these damages, but it is clear these damages were suffered by the company. Even though plaintiff is the company's sole stockholder, he may not claim these damages as his own since they belong to the company. State ex rel. Weede v. Bechtel, 244 Iowa 785, 811-12, 56 N.W.2d 173, 187 (1952). Since the cause of action belongs to the company, he may not bring it himself. See generally Dale v. City Plumbing & Heating Supply Co., Inc., 112 Ga. App. 723, 725, 146 S.E.2d 349, 354 (Ga. Ct. App. 1965). In the defendants' attachment action, the trial court ruled the wrongful attachment counterclaims were assets of the receivership of the company. The company's receiver is the real party in interest to proceed with an action to recover on these damages.

As a result of these considerations we affirm the granting of summary judgment for defendants. Our holding does not preclude plaintiff from bringing a subsequent action if and when the bonding company's indemnity claim against him becomes certain and fixed and is satisfied by payment on plaintiff's behalf.

III.

To the extent the trial court's ruling on the motion to adjudicate law points involved the same issues upon which we sustain the granting of the motion for summary judgment that ruling is also affirmed. We find it unnecessary to consider the other grounds for dismissal asserted by defendants in their motion for summary judgment and for adjudication of law points. Some of these grounds were also sustained by the trial court. Because we do not determine whether such rulings were correct, we direct they shall not be given preclusive effect in the event of subsequent litigation between the parties.

AFFIRMED.