IN THE COURT OF APPEALS OF IOWA

No. 9-304 (97-1447)
Filed October 15, 1999

FILED

CLERK

HARRISON SHAW DAVIS,
Plaintiff-Appellant,

vs.

CITY OF DES MOINES, DOUG PHILIPH, JACK ZOHN, CITY OF DES MOINES ZONING BOARD OF ADJUSTMENT, MIDAMERICAN ENERGY COMPANY, MARY GERTRUDE HELLWEG, TERRY LEE DAIKER, JAMES MACGREGOR, DALE LATHUM, CONNIE RIDGE, ANDREW HENNESY, TOM VLASSIS, ALFRED WICKER, and JON RALEIGH,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer, Judge.

Plaintiff Davis appeals from a ruling dismissing the claims of plaintiff Safe Loan, Inc., and from two rulings which together granted all defendants summary judgment. **AFFIRMED.**

Harrison Shaw Davis, Des Moines, pro se.

Mark Godwin, Des Moines, for appellees City of Des Moines, Doug Philiph, Mary Gertrude Hellweg, Terry Lee Daiker, James Macgregor, Dale Lathum, Connie Ridge, Andrew Hennesy, Tom Vlassis, and Jon Raleigh. ("Des Moines").

David W. Hibbard, Assistant County Attorney, for appellee Jack Zohn.

Terry Fox, Des Moines, for appellee MidAmerican Energy Company.

David J. Erbes, Des Moines, for appellee Alfred Wicker.

Considered by Sackett, C.J., and Zimmer and Miller, J.J.

MILLER, J.

Plaintiff Harrison Shaw Davis (Davis) appeals from a ruling dismissing the claims of plaintiff Safe Loan, Inc., and from two rulings together granted all defendants summary judgment. We affirm.

Safe Loan, Inc.'s claims were dismissed for failure to have an attorney appear and represent it. No party states or suggests what the appropriate scope of review is. We believe our review is for correction of errors at law concerning whether Safe Loan, Inc. could be represented by someone other than an attorney, and for an abuse of discretion as to the amount of time allowed by the trial court for Safe Loan, Inc. to secure an attorney. *See Hawkeye Bank & Trust Nat'l Assoc. v. Baugh*, 463 N.W.2d 22, 23 (Iowa 1990).

We review a summary judgment ruling for correction of errors at law. *Gerst v. Marshall*, 549 N.W.2d 810, 811 (Iowa 1996).

One of the grounds urged by Davis for reversal is that the trial court improperly denied his request for additional time in which to respond to certain discovery requests from the defendants. Those portions of the summary judgment rulings which were based on Davis' discovery responses (actually a lack of discovery responses) were based almost entirely on matters deemed admitted by Davis' failure to timely respond to requests for admissions. Accordingly, in addressing this ground we focus on the scope of review related to the trial court's decisions concerning requests for admission.

Courts do not distinguish between a motion for an extension of time to respond to requests for admission (Iowa R.Civ.P. 127) and a motion to withdraw an admission (Iowa R.Civ.P. 128). *Allied Gas v. Federated Mut. Ins. Co.*, 332 N.W.2d 877, 879, (Iowa 1983). No right exists to file a late response to requests for admission. *Id.* Decisions concerning extensions of time to respond to requests for admission and withdrawal of admissions rest in the district court's discretion which will not be disturbed on appeal unless the discretion is abused. *Id.* Accordingly, we review a district court's denial of an extension of time to respond to requests for admission for an abuse of discretion.

Factual and procedural background. Davis filed his petition in this case and, pursuant to court order, filed a recast petition on October 25, 1996. Named as defendants were the City of Des Moines and certain present and former employees (hereafter collectively referred to as "the City"), Polk County Real Estate Property Tax Acquisitions (hereafter "Tax Acquisitions"), and Assistant Polk County Attorney Jack Zohn (Zohn).

Following a September 4, 1996 hearing, in a ruling and order of September 27, 1996, the court noted that Davis was not a lawyer, stated that he would not be permitted to represent Safe Loan, Inc., a corporation, in this lawsuit, and ordered that Safe Loan, Inc. appear through counsel on or before Friday, October 11, 1996, or its claims as a plaintiff would be dismissed. Although the record is not clear on the point, it appears that another order was entered on October 11, 1996 which extended the time for appearance of counsel. *See Appendix*, p. 400. When as of January 10, 1997, no attorney had appeared for Safe Loan, Inc., the court dismissed its claims on or about that date.

The City filed an answer on February 5, 1997, as did Zohn and Tax Acquisitions. On that same day, the City propounded nine requests for admissions to Davis and Zohn propounded twenty requests for admissions to him.

Davis did not respond to the defendants' requests for admission within the 30 days allowed by Iowa R.Civ.P. 127(b), and the matters set forth in the requests for admission were thus deemed admitted on or about March 10, 1997. On March 17, Davis filed a motion to expand to May 1, 1997 the time "by which to forward completion of documents to the various Defendants." The City filed its motion for summary judgment on March 18, 1997. A hearing was held April 9, 1997 and the court filed its ruling on April 11, 1997. It sustained the City's motion for summary judgment on grounds of *res judicata* (claim preclusion), Davis' lack of standing, and a determination that Davis' lawsuit was both objectively and subjectively frivolous. In its ruling, the court noted Davis' motion to expand the time to respond to the discovery requests, as well as the reasons urged by him in his motion and noted an additional reason raised at the time of hearing. In granting summary judgment the court implicitly overruled the motion to expand time, apparently finding the claimed reasons for additional time to be without merit.

Zohn and Tax Acquisitions filed a motion for summary judgment on April 23,

1997. A hearing was held June 26, 1997 and the court filed its ruling on July 11, 1997. It sustained the motion as to Tax Acquisitions on the ground that no such entity existed. It sustained the motion as to Zohn on grounds of absolute immunity, qualified immunity, and claim and issue preclusion.

Issues on Appeal. Davis raises five issues in his brief. For convenience we will address them in reverse order.

A. Davis claims that he should have been allowed to represent Safe Loan, Inc. It is undisputed that Davis is not licensed to practice law and that Safe Loan, Inc. is a corporation (whose stock is apparently owned by Davis). The general rule is that a corporation may not represent itself through non-lawyer employees, officers, or shareholders. *Hawkeye Bank & Trust, Nat'l Assoc., v. Baugh*, 463 N.W.2d 22, 25 (Iowa 1990). Such is true even of a closely held corporation such as was involved in *Baugh*.

The trial court gave Safe Loan, Inc. over three months, from September 27, 1996 to January 10, 1997, to secure an attorney to represent it and have that attorney file an appearance. The court's dismissal of Safe Loan, Inc.'s claims for failure to have an attorney appear to represent it does not constitute error. A period of over three months to secure counsel is not so short a period as to constitute an abuse of discretion.

B. Davis states one issue as, "[h]as there been selective prosecution of Davis; undue harassment of Davis; and willful and wanton conduct in either supplying or withholding information from the court?" He states that he "feels he can support a petition for 'selective prosecution'," citing *State v. Mathisen*, 356 N.W.2d 129 (N.D. 1984).

For several reasons this claim is without merit and serves as no basis for reversing the trial court's grants of summary judgment. First, it makes no distinct claim of error on the part of the trial court. Instead, it does nothing more than claim some merit to Davis' lawsuit. It thus indirectly claims the trial court erred in granting summary judgments, an issue discussed below. Second, to make out a case of selective enforcement (a doctrine most commonly applicable to criminal prosecutions and various actions brought by the government, and not to civil lawsuits such as this one and the related underlying lawsuits brought by Davis which are involved in the summary judgment rulings) one must claim and show that the government's actions are based on an unjustifiable standard such as race, religion, other similar arbitrary classifications, or the exercise of protected rights. *Matter of Kaster*, 454 N.W.2d 876,880 (Iowa 1990); *State v. Apt*, 244 N.W.2d 801, 804 (Iowa 1976). Davis makes no such claim or showing. Third, Davis does not appear to have raised this issue and had it ruled on by the district court in the summary judgment proceedings. An issue must be presented to and passed on by the district court before it can be raised and decided on appeal. *See e.g., Davidson v. Van Lengen*, 266 N.W.2d 436 (Iowa 1978). Because it was not, we will not further address it.

C. Davis states another issues as, "[w]as court's denial of expanded time requested by Davis in which to answer documents and interrogatories an abuse of discretion?"

In *Jones v. Iowa State Highway Comm.* 157 N.W.2d 86, 92 (Iowa 1968), the Iowa Supreme Court noted with favor language from *United States v. New Wrinkle, Inc.*, 16 F.R.D. 35, 37 (S.D.Ohio 1954) which states that requests for admission should be simple and direct, limited to singular relevant facts, and not so framed as to permit insertion of voluntary statements or unresponsive matter, and that they should contain statements of fact which may be specifically and clearly admitted or denied. The twenty requests served by Zohn clearly meet these criteria. The nine served by the City do also, except for being cast in the form of questions rather than statements of fact, and Davis made no complaint about the form of the City's requests.

In his motion to expand the time to respond to the discovery requests, Davis asserted that he

> ... is not set up on a computer system whereby reference to items can be brought up on a screen, but rather, can only retrieve items through the laborious process of digging through files.

This complaint may have had some bearing on Davis' ability to timely produce some documents, and even perhaps on his ability to timely answer some of the interrogatories asked by the defendants. However, it had very little bearing on his ability to timely respond to the requests for admission, most all of which merely asked for information which would be either readily known to him without reference to documents or readily available from the petitions and complaint which he had prepared and filed in this and other related lawsuits.

An abuse of discretion is shown only where such discretion was exercised by the court on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 543 (Iowa 1996). It was within the trial court's discretion to detérmine that the reason stated by Davis in his motion did not merit an extension of time to respond to requests for admission. No abuse of that discretion is shown.

At the April 9, 1997 hearing, Davis claimed illness as a reason for failing to respond in a timely manner to the requests for admission. In its ruling the court noted that Davis did not say when he was incapacitated. Davis thus failed to show that his illness and surgery had in fact kept him from responding to the requests for admission, which had been served on him more than two months earlier. The court did not abuse its discretion by declining to extend time for responses on this ground.

D. Davis states another issue as, "[h]as the Court's failure to allow a record of the proceedings and for Davis to make a record to be an abuse of discretion?" As best we can understand the rather prolix, confused and multiple claims and arguments made in Davis' brief and the motions, bills of exception, affidavits and other documents he has had included in the appendix, his complaint is that he requested that the summary judgment hearings which were held on April 9, 1997 and a June 26, 1997 be reported, they were not, and he was prejudiced by the lack of a verbatim record of those proceedings. For the reasons that follow we conclude that if in fact he requested such proceedings be reported and they were not, he has nevertheless demonstrated no prejudice.

Motions for summary judgment are usually submitted on a written record consisting of documents identified in Iowa R.Civ.P. 237(c), together with a memorandum of authorities pursuant to Iowa R.Civ.P. 237(h), either without court appearance or with court appearance consisting of oral argument only. In such cases the record is self sufficient and no purpose is served by having oral arguments reported. However, in this case Davis suggests two reasons why he believes the hearings should have been reported.

Davis claims that after the April 9, 1997 hearing he ordered his medical records which he "displayed" at the June 26, 1997 hearing. He complains that they were not included in the record as part of the June 26, 1997 hearing or mentioned in the court's July 11, 1997 ruling following that hearing. He reasonably appears to assume that such records did have or might have had a bearing on whether or not he had been unable to timely respond to the requests for admissions which had been served on him on February 5, 1997. However, he had made that claim at the April 9, 1997 hearing, had failed at that hearing to provide substantial evidence of when and to what extent he might have been incapacitated, and the court had accordingly declined to extend the time to respond to the requests for admission. If Davis in fact attempted to submit his medical records at the June 26, 1997 hearing, and the court in fact declined to receive or consider them, the court did not abuse its discretion by refusing to re-open an issue which had been decided and put to rest some two and one-half months earlier. Because Davis had no right to belatedly expand the record by having his medical records received and considered at such a late date, he was not prejudiced by any refusal of the trial court to have the June 26, 1997 hearing reported.

Davis claims that at the April 9, 1997 hearing he requested to cross-examine Mark Godwin, the City's attorney, but was not allowed to and if the proceeding had been reported, as he claims to have requested, the record would demonstrate the trial court's refusal to allow him to do so. However, he makes no claim or showing that Attorney Godwin testified at the hearing. Attorney Godwin would be subject to cross-examination only if he had in fact testified. It seems most likely that oral arguments, rather than testimony, occurred at that hearing. Because Davis has not shown that Attorney Godwin in fact testified at the hearing, he has shown no right to cross-examine him and has shown no prejudice by the absence of a verbatim record of the hearing.

E. Davis states the remaining issue as, "[a]ppellant Davis should be allowed to have cases set for trial and heard on their merits per offer of proof in the interest of justice." In substance this is merely a claim that the trial court erred in granting summary judgments.

By not timely serving answers or objections to the City's requests for admission, Davis admitted that the causes of action against the City in this case were the same as in the U.S. District Court case which had been decided adversely to Davis; that the causes of action against the City in this case were the same as in an Iowa district court case that had been decided adversely to Davis; that Safe Loan, Inc. (rather than Davis) was at all times relevant to Davis' causes of action the owner of the property in question; and that Davis' lawsuit in this case was a misguided attempt to seek revenge upon the City of Des Moines and some of its employees.

By not timely serving answers or objections to Zohn's requests for admissions, Davis admitted that there was no department or office in Polk County government called "Polk County Real Estate Property Tax Acquisitions," and by unrefuted affidavits the defendants established that there was no such entity as "Polk County Real Estate Property Tax Acquisitions". By not timely serving answers or objections to Zohn's requests for admission, Davis admitted that in both the prior forcible entry and detainer case which underlies Davis' numerous lawsuits, and in this lawsuit, all Zohn's actions of which Davis complains were undertaken in Zohn's official capacity as an assistant county attorney for Polk County, and that the claims made against Tax Acquisition and Zohn in this case are the same as those which had been made against them in an Iowa district court case (which had been decided adversely to Davis).

Summary judgment is appropriate if the record shows "no genuine issue as to any material of fact and that the moving party is entitled to a judgment as a matter of law." Iowa R.Civ.P. 237(c). Thus, we examine the record before the district court to decide whether a genuine issue of material fact exists and whether the court correctly applied the law. *Gerst*, 549 N.W.2d at 811-12. In doing so, we view the facts in the light most favorable to the party opposing the motion for summary judgment. *Gerst*, 549 N.W.2d at 812.

Davis' admissions and the affidavit referred to above established certain undisputed facts. Summary judgment was appropriate as to all defendants on grounds of claim preclusion because the causes of action in this lawsuit are the same as in the prior lawsuits. *Shumaker v. Iowa Dept. of Transportation*, 541 N.W.2d 850, 852 (Iowa 1995).

Summary judgment was appropriate as to the City because Safe Loan, Inc. owned the properties, the loss of which underlies Davis' various claims and lawsuits, and he thus lacked standing because he had no specific, personal, and legal interest in the litigation and was not injuriously affected by its loss. *See, e.g., In re Marriage of Mitchell*, 531 N.W.2d 132, 133, (Iowa 1995). Summary judgment was also appropriate as to the City because this lawsuit was both objectively and subjectively frivolous. *See, e.g., Cohen v. Iowa Dist. Court*, 508 N.W.2d 78, 82 (Iowa 1963).

Summary judgment was appropriate as to Tax Acquisitions because it was conclusively established that no such entity existed. It was appropriate as to Zohn on grounds of absolute immunity because he was pursuing a judicial action in his official capacity in the underlying litigation. *Imbler v. Pachtman*, 424 U.S. 409, 427

(1976). It was also appropriate as to Tax Acquisitions and Zohn on grounds of claim preclusion for the reasons stated above concerning the City.

We find each of the five issues raised by Davis to be without merit.

Affirmed.