

IN THE COURT OF APPEALS OF IOWA

No. 1-85 / 90-1317

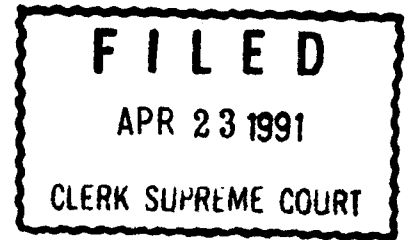
GLENN L. STEWART and SHIRLEY A. STEWART,

Appellees,

vs.

FIRST BANK,

Appellant.



183

Appeal from the Iowa District Court for Scott County,
James R. Havercamp, Judge.

The bank appeals a district court order granting the
Stewarts' motion for summary judgment and awarding them
damages for the bank's breach of a real estate agreement
and of a covenant of good faith. **AFFIRMED.**

John A. Hellstrom and Robert D. Lambert of Carlin,
Hellstrom & Bittner, Davenport, for appellant.

Joseph C. Creen of McDonald, Stonebraker & Cepican
P.C., Davenport, for appellees.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

OXBERGER, C.J.

On July 17, 1989, the Stewarts made a written offer to purchase real estate in Davenport from First Bank. On July 18, 1989, First Bank, through its vice-president Mr. Oetzmann, accepted the offer. The agreement provided for a purchase price of \$26,000 with closing set for on or before August 15, 1989. Donald Schnoor, of the Mel Foster Company, was the real estate agent involved in the sale. The purchase agreement indicated that the real estate agent served as the seller's (First Bank's) agent. On July 19, 1989, Tom Caudle presented an offer to First Bank to purchase the real estate for \$35,500. First Bank, through Mr. Oetzmann, accepted this offer on July 21, 1989, as a back-up offer to the Stewarts' offer.

Prior to closing on the Stewarts' agreement, Don Schnoor approached First Bank about extending the time for closing to August 25, 1989. Oetzmann was on vacation when Schnoor approached First Bank about the extension. First Bank, through its vice-president, Mr. Manville, accepted this extension. First Bank subsequently refused to sell the property to the Stewarts because they failed to close on August 15, 1989, and instead sold the property to Caudle. Caudle later sold the property to the Stewarts on August 28, 1989, for \$35,500.

The Stewarts then filed this action seeking damages for First Bank's refusal to sell them the property. The

Stewarts eventually filed a motion for summary judgment which the district court granted as to its claims of breach of contract and breach of the covenant of good faith and fair dealing. The Stewarts voluntarily dismissed their remaining claim against First Bank and the district court entered judgment against First Bank for \$12,886.25 plus interest. First Bank appealed.

We review this case for correction of errors at law. Iowa R. App. P. 4.

Summary judgment is appropriate only if no genuine issue of material fact exists. Farm Bureau Mutual Insurance Co. v. Miline, 242 N.W.2d 422, 423 (Iowa 1988). The moving party bears the burden of showing the nonexistence of a material fact. Id. The evidence must be viewed in the light most favorable to the nonmoving party. Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). This procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the the evidence should be afforded the nonmoving party. Id. A fact issue is generated if reasonable minds can differ on how the issue should be resolved. Id. If the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper. Farm Bureau Mutual Insurance, 424 N.W.2d at 423.

However, the nonmoving party may not simply rest on its pleadings and allegations once a motion for summary judgment is filed.

When a motion for summary judgment is made and supported as provided in [Iowa R. Civ. P. 237], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Iowa R. Civ. P. 237(e)

Involved here is the basic purpose of summary judgment procedure. Every trial court has on its docket some pleaded claims and defenses which are actually without substance and exist only on paper. To obviate the labor and expense of trial to expose those empty vessels, summary judgment procedure was conceived. By proper motion, a party can compel his adversary to come forth with specific facts which constitute competent evidence showing a prima facie claim or defense. Paper cases and defenses can thus be weeded out to make way for litigation which does have something to it.

The language of our rule on summary judgments is very strong. Rule 237(e) Rules of Civil Procedure. Affidavits cannot merely be based on what someone has reported to affiant: "Supporting and opposing affidavits shall be made on personal knowledge". Conclusions and beliefs are insufficient: "shall set forth such facts as would be admissible in evidence". The person making the statements must know whereof he speaks: "shall show affirmatively that the affiant is competent to testify to the matters stated therein." When the motion itself is substantiated, the opposing party cannot simply rely upon his pleadings, for the pleadings are the very instruments that the procedure is designed to pierce: "an adverse party may not rest upon the mere allegations or denials of his pleading". Neither can the opposing party assert only generalities in resistance: "his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." ([Emphasis] added.)

Gruener v. City of Cedar Falls, 189 N.W.2d 577, 580 (Iowa 1971); accord Iowa Civil Rights Commission v. Massey-Ferguson, Inc., 207 N.W.2d 5, 8 (Iowa 1973).

"[A] party may elect to stand on the record as made by his opponent but he must then succeed, if he succeeds at all, not on the strength of his own case, for he has made none, but on the weakness of his adversary's." McCarney v. Des Moines Register & Tribune Co., 239 N.W.2d 52, 154 (Iowa 1976).

First Bank contends the trial court erred in concluding it was bound by the extension which changed the closing date to "on or before August 25, 1989." First Bank bases this contention on its assertion the extension was not valid because it was obtained as a result of misrepresentations made by real estate agent Schnoor. First Bank then argues Schnoor's misrepresentations were attributable to the Stewarts because Schnoor was acting as an agent for the Stewarts when he made them.

First Bank's claim rests completely on its assertion the extension was procured by fraud and that fraud was attributable to the Stewarts. We need not reach the issue of whether or not the extension was procured through fraud or misrepresentation because First Bank failed to plead the affirmative defense of fraud.

Iowa Rule of Civil Procedure 101 provides:

Any defense that a contract or writing sued on is void or voidable, or was delivered in escrow, or which alleges any matter in justification, excuse,

release or discharge, or which admits the facts of the adverse pleading but seeks to avoid their legal effect, must be specially pleaded.

Nowhere in First Bank's answer to the Stewarts' petition did it make any allegation of fraud or misrepresentation. Additionally, in its pleadings, First Bank lists several affirmative defenses, none of which make any reference to fraud or misrepresentation. First Bank alleges the Stewarts breached the original contract, but fail to address the issue of the extension in its pleadings. First Bank only addresses the extension in affidavits by Manville and Oetzmann in which the affiants both state Manville would never have granted the extension if he had been aware of the whole situation. Further, the affiants make several conclusory statements about the motivations of the Stewarts and Schnoor as well as stating several legal conclusions.

Under the requirement of Rule 101, if First Bank sought to avoid the legal effect of the extension of the written real estate purchase agreement it was required to specially plead the defense of fraud. First Bank does not deny the original contract's formation, nor does it deny Manville granted the extension of the closing date. First Bank did not plead fraud as a defense, consequently, the trial court had no obligation to consider it. See Federal Land Bank of Omaha v. Steinlage, 409 N.W.2d 173, 174 (Iowa 1987). In the absence of pleading and proof of fraud, the Stewarts

were entitled to recover for breach of contract. See Carter Steel Supply & Fabrication, Inc. v. Iowa Mutual Insurance Company, 174 N.W.2d 647, 649 (Iowa 1970).

Additionally, First Bank places much emphasis on the trial court's finding "real estate agent Donald Schnoor, on behalf of [the Stewarts], requested that the closing date be extended." First Bank argues the trial court found Schnoor was acting as the Stewarts' agent when he contacted First Bank. We disagree. First Bank presented no evidence supporting a finding that Schnoor acted as the Stewarts' agent other than bald assertions in Manville's and Oetzmann's affidavits making such a claim. Further, the Stewarts' do not deny Schnoor approached First Bank about the extension. In light of the provision in the purchase agreement that the real estate agent was an agent of First Bank, the mere fact that Schnoor approached First Bank regarding the extension is insufficient standing alone to prove Schnoor was acting as the Stewarts' agent.

First Bank urges the trial court improperly entered summary judgment against it before it completed discovery. First Bank failed to file any interrogatories, deposition notices, requests for admissions, or requests for production of documents. It also did not make any requests to the trial court to allow for further discovery. Because First Bank failed to raise the issue of incomplete discovery to the trial court, we will not address the issue

on appeal. Stalter v. Freight Sales Co., 357 N.W.2d 38, 42-43 (Iowa App. 1984).

First Bank also complains the trial court erred in entering summary judgment on count II of the Stewarts' petition. Count II requested punitive as well as actual damages under the theory First Bank violated its covenants of good faith and fair dealing with the Stewarts. First Bank argues that no covenant of good faith exists, and even if it does, the Stewarts breached the covenant with respect to the Bank. We find First Bank's arguments to be without merit. Although the trial court entered summary judgment in favor of the Stewarts on counts I and II, in its ruling it found only that First Bank's failure to sell the property at issue to the Stewarts was a breach of the real estate contract. The trial court awarded damages of \$12,886.25 plus interest. This amount equals the actual damages claimed by the Stewarts. Consequently, we need not address First Bank's arguments any further because the Stewarts' were only awarded the actual damages arising from First Bank's breach of the real estate contract.

AFFIRMED.

Hayden, J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I concur with the majority's decision in all respects. Defendant entered into a contract with plaintiffs to sell defendant's real estate. The defendant never forfeited the contract as required by statutory dictates. Defendant just sold the property to someone else. Defendant's arguments are without merit.