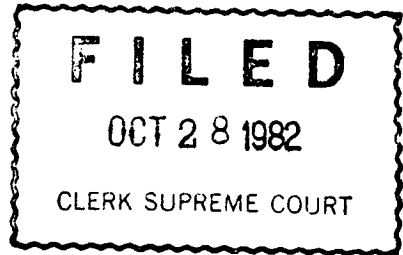


IN THE COURT OF APPEALS OF IOWA



LEONARD FRANTZ,

Appellant,

vs.

JULIUS S. CONNOR,
M.D., M.P.H., ROGER V.
GRUNOW, STEVEN GUNSON,
FRANK HARMON, CITY OF
DES MOINES DEPARTMENT
OF PUBLIC HEALTH AND
CITY OF DES MOINES,

Appellees.

Filed October 28, 1982

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2-238
2-67569

Appeal from Polk District Court, Anthony M. Critelli, Judge.

Plaintiff appeals from trial court's ruling that sustained defendants' motion for summary judgment. REVERSED AND REMANDED.

David S. Wiggins, West Des Moines, for appellant.

Thomas J. McSweeney and Loren J. Brand, Assistant City Attorneys, for appellees.

Considered en banc.

Plaintiff Leonard Frantz kept a colony of rats for breeding purposes in his residence in Des Moines. He was in the process of developing a new strain of nonbiting rat for commercial use. Beginning in July 1975, the Des Moines City Health Department attempted to remove the rats from plaintiff's home due to alleged unsanitary conditions in violation of Iowa Code § 413.80 (1975)(repealed by Act of May 26, 1980, ch. 1126, § 3, 1980 Iowa Acts 444). These attempts culminated in an October 21, 1975, warrant issued by a Des Moines judge ordering that the rats be removed. When the Health Department officials tried to execute the judge's order, however, the plaintiff eluded them. It was not until the next day that the officials located the rats, then in plaintiff's van, and seized and destroyed them. The seizure of the rats took place in Ames, Iowa. The rats were taken from there to Des Moines, Iowa, and destroyed in the decompression chamber at the Animal Shelter.

Plaintiff filed a petition in the district court against the City and several Health Department officials and employees alleging that the defendants acted illegally and negligently in depriving plaintiff of his property. The plaintiff sought monetary damages from the defendants.

The defendants in their answer generally denied plaintiff's allegations. No further proceeding was conducted in the district court until three years later when the plaintiff filed a motion for partial summary judgment. The defendants resisted plaintiff's motion and also filed a motion for summary judgment. After a hearing on the cross motions for summary judgment, the court granted the defendants' motion and dismissed plaintiff's petition. Plaintiff appealed.

I. Material Facts

Initially we note that

[i]n reviewing the grant or denial of summary judgment motions, we view the underlying facts contained in the pleadings and the inferences to be drawn therefrom in the

light most favorable to the party opposing the motion, and give to such party the benefit of any doubt as to the propriety of granting summary judgment. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied, and to reverse the grant of summary judgment if it appears from the record there is an unresolved issue of material fact.

Meylor v. Brown, 281 N.W.2d 632, 634 (Iowa 1979)(quoting Frohwein v. Haesemeyer, 264 N.W.2d 792, 795-96 (Iowa 1978)) (emphasis added). Our examination of the record reveals that the plaintiff's petition, the defendants' original and amended answer, and the plaintiff's and defendants' motions for summary judgment with supporting memoranda constitute all the pleadings filed in this case. The record also contained a deposition and affidavits, properly considered by the courts in ruling on summary judgment motions. Iowa R. Civ. P. 237(c). When the pleadings and other documents are "view[ed]... in the light most favorable to the [plaintiff] and [when plaintiff is given] the benefit of any doubt as to the propriety of granting summary judgment," we are not convinced that genuine issues of material facts do not exist. The plaintiff claimed that the defendants were negligent in removing and destroying the rats. He also claimed that the warrant was invalid because false and perjurious statements were made to the issuing magistrate. Lastly, the plaintiff claimed that the defendants were capricious and negligent in destroying the rats instead of transferring them to an animal research facility. We hold that these and other factual issues are material facts that cannot be resolved by examining only the pleadings and other documents properly considered under Iowa R. Civ. P. 237(c).

II. Burden on Summary Judgment Movant

"In order to obtain a summary judgment, the moving party is required to show that there is no genuine issue of material fact involved in the case and that he is entitled to a judgment as a matter of law. In considering such a motion, a court is required to examine the record in the light most favorable to the party opposing the motion to determine whether the movant has met his burden." Anita

Valley, Inc. v. Bingley, 279 N.W.2d 37, 40 (Iowa 1979)(emphasis added); accord, Meylor, 281 N.W.2d at 634 (reviewing court examines whether law was correctly applied). Our analysis in Division I, supra, demonstrates that defendants have failed to bear the burden of showing absence of any genuine issue of material fact. Even if we were to hold that there is no genuine issue of material fact, however, we conclude that defendants have failed to show that they are entitled, as a matter of law, to a summary judgment in their favor.

The guiding principle in summary destruction of property was enunciated in Walker v. Johnson County, 209 N.W.2d 137 (Iowa 1973):

Where police power is properly exercised in limited situations it is well settled affected property owners are not entitled to prior notice and hearing, even where total destruction of the property is required to protect public health and public property. Narrowing the focus specifically to nuisance, summary abatement is ordinarily permissible only when foundationed on emergency circumstances. Mere public convenience or expediency will never justify denial of an individual's constitutional right to due process.

Still another rationale is rooted in the exigent situation but speaks in terms of unquestionable health or safety nuisance (thereby being per se immediately detrimental):

"[A] property owner is entitled to due process of law. Except as to those things which are by common law or statute law declared to be nuisances per se, or which are in their very nature palpably and indisputedly such, public authorities who have been given the power to abate nuisances have no legal right summarily to compel the abatement of a particular thing or act as a nuisance without reasonable notice to the person alleged to be maintaining or doing the same, of the time and place for hearing and determining whether such thing or act does in law constitute a nuisance."

Id. at 139 (citations ommitted)(emphasis added). Applying the Walker standard, we are not convinced that the circumstances in the instant case satisfy the "emergency circumstances" requirement. The Walker court further stated that mere public convenience or expediency cannot justify denial of due process rights.

Id. at 139. The defendants in this case merely provided the court with notes from

Health Department officials which indicated that plaintiff's neighbors complained of unpleasant odors. See generally Brody v. Ruby, 267 N.W.2d 902, 904 (Iowa 1978)("[i]f reasonable minds could draw different inferences and reach different conclusions. . . , the issues must be reserved for trial and summary judgment is improper."). We are likewise not convinced that plaintiff's peculiar stock of breeding rats is in the very nature palpably and indisputedly nuisance per se. See generally Bader v. Iowa Metropolitan Sewer Co., 178 N.W.2d 305, 306-07 (Iowa 1970)(nuisance per se is "a structure or activity which is a nuisance at all times and under any circumstances regardless of location or surroundings"). Thus, on the basis of the record, we conclude that a genuine issue of material fact exists as to whether the circumstances justified the seizure of the rats and their subsequent destruction without affording the plaintiff an opportunity to be heard in court. A reasonable factfinder could find that at the time of the seizure, no "emergency circumstances" existed, since the rats had been transported to Ames, Iowa, where they were finally located and seized. We find that defendants are not "entitled to judgment as a matter of law," see Anita Valley, Inc., 279 N.W.2d at 40, and accordingly reverse the trial court's decision granting defendants' motion for summary judgment.

III. Resistance

Defendants also claim that the plaintiff has inadequately resisted defendants' motion for summary judgment. See generally Iowa R. Civ. P. 237(e)("adverse party may not rest upon the mere allegations or denials of his pleading, but. . . must set forth specific facts showing that there is a genuine issue for trial."). We find defendants' claim to be without merit.

In Ferris v. Anderson, 255 N.W.2d 135, 137 (Iowa 1977), the supreme court held that "failure to adequately resist a summary judgment motion. . . becomes

fatal only if the summary judgment movant has met the burden of proof imposed upon it by rule 237, R.C.P." Because the defendants in the case at bar failed to meet their burden of showing absence of material factual issues and entitlement to judgment, plaintiff's failure, if any, to resist defendants' motion adequately would not resurrect the impropriety of the district court's granting of defendants' summary judgment.

IV. Conclusion

The trial court erred in granting the defendants' motion for summary judgment. On remand, the plaintiff should be allowed to proceed with his case in a manner not inconsistent with this opinion.

REVERSED AND REMANDED.

OXBERGER, C.J., (dissenting).

The events leading to the seizure and destruction of the rats owned by Mr. Frantz took place from the end of July until the latter part of October, 1975. Neighbors had complained of a very strong urine like odor coming from Frantz's apartment, they had seen rats crawling on the screens of his apartment at night, various inspections, warnings, and court orders had been issued, and Frantz had on a number of occasions either disobeyed or attempted to evade such orders. Frantz had given rats to children in a public park, and he managed to escape execution of a warrant by leading officials in an auto chase through the streets of Des Moines. An inspection of his apartment revealed that there was "very strong odor and a great amount of sawdust, rat droppings, and dog droppings on the floor. " Three hundred and thirty-nine rats were removed from Frantz's car when it was finally located in Ames.

On the record before us, it is evident to me that there was no genuine issue of material fact. The trial court properly concluded that Frantz was maintaining a public nuisance, that there was a clear and compelling emergency, and that the city officials were fully justified under the law in executing the warrant that had been given to them and seizing and destroying Frantz's rats in accordance with the authority granted to them by it. The law is clear that a property owner who maintains a nuisance per se, or one which is in its very nature palpably and indisputably such, is subject to having that nuisance abated without notice. When there is a palpable health nuisance per se, or a clear and compelling emergency, city officials are fully justified in exercising their police power to protect the public. See Walker v. Johnson County, 209 N.W.2d 137, 139-140 (Iowa 1973).

Rats are disease carriers. The evidence in the case makes its clear that Frantz's rats were kept in exceedingly unsanitary conditions conducive to the

development and spread of potentially dangerous diseases. The record also clearly establishes the fact that Frantz was given ample opportunity to abate the nuisance himself, but that he deliberately and willfully failed to do so, Frantz, in his deposition, admitted that his rats were prone to bite, yet he was giving rats to children at a nearby park.

In view of all of these facts, and the law applying to public nuisances, I would affirm the court's summary judgment against the plaintiff.