

IN THE COURT OF APPEALS OF IOWA

No. 6-223 / 94-2146

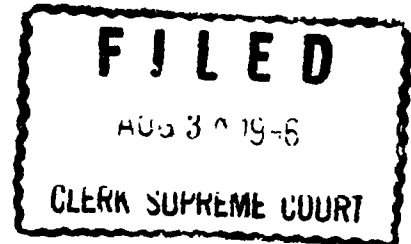
**RUSSELL TOOTHMAN, Trustee,
Washburn Water System,**

Plaintiff-Appellant,

vs.

**MARJORIE DAVIS, Shareholder and Operator
of Washburn Water Company, and Individually,**

Defendant-Appellee.



Appeal from the Iowa District Court for Black Hawk County, George L. Stigler,
Judge.

Plaintiff, Russell Toothman, as successor trustee for a private residential water system appeals from the district court's ruling dismissing his replevin action seeking possession of computer software and hardware held by defendant who had operated and owned a company utilizing assets to provide water service under the trust.

AFFIRMED.

Robert J. Hearity of Hearity Law Firm, Waterloo, for appellant.

Jay Roberts and Eric W. Johnson of Beecher, Rathert, Roberts, Field, Walker
& Morris, P.C., Waterloo, for appellee.

Heard by Cady, P.J., and Huitink and Vogel, JJ.

HUITINK, J.

Plaintiff, Russell Toothman, as successor trustee for a private residential water system appeals from the district court's ruling dismissing his replevin action seeking possession of computer software and hardware held by defendant who had operated and owned a company utilizing assets to provide water service under the trust. We affirm .

In 1956 DuBois Homebuilders developed the land which now includes the city of Washburn. DuBois 's financing for this project was contingent on its guarantee of a reliable water supply for the homes built within the development. DuBois met this requirement by building a water supply and distribution system to serve the development. DuBois transferred all of the land, wells, treatment facilities and pipeline comprising this system to Home Savings and Loan Association (n/k/a Mid America Savings Bank) as trustee for the benefit of the homeowners served by the system. The purpose of the transfer to Home Savings was to guarantee the perpetual operation and maintenance of the water system. DuBois as grantor of the trust property retained the obligation to operate and maintain the system. Paragraph four of the trust deed authorized the trustee to take possession of the property specified in the trust agreement if DuBois failed to meet its operational obligations described in the trust agreement. This property included certain real estate, wells, storage and distribution facilities. The trust deed made no reference to any other personal property used by DuBois in the operation of the system.

For thirty-five years following this transfer, the water system was operated by the Washburn Water Company. Washburn Water Company is a corporation separate from

either DuBois or the trustee. The defendant Marjorie Davis is a Washburn Water Company shareholder and served as its manager at all times relevant to this case.

In 1993 the system was no longer able to serve its customers, and Washburn Water Company refused to make the repairs needed for its continued operation. Upon learning of the trust arrangement, Toothman initiated a declaratory judgment action seeking removal of Mid America as trustee and to enforce the provisions of paragraph four of the trust agreement.

The district court granted Toothman's motion for summary judgment and appointed him successor trustee to Mid America Savings. The court also ordered Mid America to transfer all of the trust assets to Toothman including all of the property specified in the trust deed and:

“any and all additional property whether real, personal or mixed which has come into possession or is under the control of the defendant trustee.”

Neither Washburn Water Company nor Marjorie Davis were parties to the declaratory judgment action.

Toothman subsequently initiated this replevin action to recover possession of certain computer equipment from the defendant Marjorie Davis. Toothman cited paragraph four of the trust agreement and the provisions of the district court's declaratory judgment requiring the trustee to transfer all of the trust assets to him as the basis for his demand. Davis disputed Toothman's claim citing the water company's separate legal entity, ownership of the computers and the absence of any provision in either the trust deed or the declaratory judgment requiring her to transfer this property to the trustee.

At the close of the plaintiff's evidence, the district court granted Davis' motion for a directed verdict and dismissed Toothman's claims. The district court in ruling on the motion stated:

"The trust deed established that there are two types of property that rightly belong to the trust ... That property is described as being certain in real estate and the wells, plant chemical treatment facilities, storage and distribution facilities and the like These assets [the computers] are properly the property of the Washburn Water Company ... At all times this property [the computers] was paid for by the Washburn Water Company, and at all times this property belonged to the Washburn Water Company. It [Washburn Water Company] was not an entity of the grantor [DuBois]. It was not an entity of the trustee [Mid America]. It was a separate operating company, a separate legal entity..."

On appeal Toothman reasserts his argument that he is entitled to recover the computers by virtue of the trust deed and declaratory judgment's transfer provisions. He also argues that neither Washburn Water Company's corporate status or Davis' shareholder status are sufficient to defeat his right to recover trust property.

This case reaches us following entry of a directed verdict. We review a ruling on a motion for directed verdict for the correction of errors at law. *Spaur v. Owens Corning Fiberglass Corp*, 510 N.W.2d 854, 858 (Iowa 1984). We consider the evidence in the same light as the district court. *Toney v. Casey's General Stores, Inc*, 460 N.W.2d 849, 852 (Iowa 1990). A motion for directed verdict is properly granted where there is no evidence to sustain the claims and reasonable minds could reach only one conclusion. See *Federal Land Bank of Omaha v. Woods*, 480 N.W.2d 62, 68 (Iowa 1992). We are obligated to view the evidence in the light most favorable to the non-moving party. Iowa R. App. 14(f)(2).

Replevin actions are highly specialized proceedings carefully designed for a narrow purpose; to restore the property to the party entitled to its immediate possession. *Ankeny Community School District v. Van Gorp*, 501 N.W.2d 506, 507 (Iowa 1993). The party asserting the right to possession has the burden to prove that it is entitled to possession of the property at the time the claim is made. *Marx Truck Line, Inc. v. Fredericksens*, 150 N.W.2d 102, 105 (Iowa 1969). If a plaintiff is not entitled to immediate possession, he or she cannot prevail. *Senior Class of Pekin High School v. Tharp*, 154 N.W.2d 874, (Iowa 1967). When both parties claim ownership, the right of possession depends on ownership and if nothing further appears it is presumed that owner is entitled to possession, *Rick v. Boegel*, 205 N.W.2d 713, 716 (Iowa 1973). After considering the evidence in the light most favorable to Toothman's claim, we find it is insufficient as a matter of law to sustain his burden of proof. The district court correctly determined from Toothman's evidence that Washburn Water Company was the purchaser and owner of the disputed property. We, like the district court, are unable to extend the provisions of paragraph four of the trust deed beyond the expressly described property subject to the trustee's possession. Likewise, there is nothing more to be found in the district court's declaratory judgment order granting Toothman possession of this property. The court's order simply stated that the former trustee was to transfer trust assets in its possession or control to Toothman.

We accordingly affirm the district court. Costs are assessed to Toothman as trustee of Washburn Water System.

AFFIRMED.