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303
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

NORWEST BANK OF SIOUX CITY, NATIONAL ASSOCIATION, a National Banking Association,	)	
Plaintiff-Appellee,	)	Filed February 26, 1985
vs.	)	
REX D. BARBER and **JEANETTE M. BARBER,**	)	4-530 84-430
Defendants-Appellants.	)	

Appeal from the Iowa District Court for Plymouth County - James P. Kelley, Judge.

Defendants appeal from summary judgment for plaintiff bank in a replevin action. AFFIRMED AND REMANDED.

J. Allen Orr, Sioux City, for defendants-appellants.

Jody A. Dible of Goldberg, Mayne, Probasco & Bernstein, Sioux City, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Snell, JJ.

SNELL, J.

Between January and April of 1983, the plaintiff, Norwest Bank, and defendants, Rex and Jeanette Barber, executed five promissory notes and three security agreements for loans which Norwest made to the Barbers to finance a sheep-raising operation. Defendants allegedly defaulted on the notes by: (1) failing to pay interest due; (2) failing to promptly notify the bank of a reduction in their net worth of $114,000 consisting of a claimed equity interest that defendants did not actually possess; (3) failing to make payment on demand; (4) failing to request or receive the bank's consent to a disposition of shorn wool alleged by the bank to constitute a sale of collateral; and (5) failing to notify the bank of indebtedness to HUD incurred subsequent to execution of the promissory notes. Norwest sent three demand letters advising the defendants of the defaults. The first two letters required defendants to cure the defaults within a specified period of time and reiterated defendants' obligations according to the written agreement, including the payment of interest due on certain promissory notes and the requirement that Norwest Bank be apprised of all sales of collateral prior to disposition. The third letter dated June 22, 1983, demanded that defendants voluntarily relinquish possession of collateral due to their failure to cure defaults and comply with the terms of the agreement. The letter advised defendants that Norwest Bank would exercise all of its available remedies if they failed to comply. Those remedies which were set forth in Section 8 of the security agreements executed between the parties included declaring all unmatured obligations immediately due and payable and the right to repossess collateral securing indebtedness upon the occurrence of a single event of default.

Norwest then filed a Petition for Replevin, seeking to obtain possession of the collateral securing the defendants' obligation on the promissory note. A hearing was held on whether a Writ of Replevin should be issued. Subsequently, the court ordered the writ issued requiring Norwest to post appropriate replevin

bonds. In July, Norwest went to the defendants' ranch and took possession of the collateral, including machinery and sheep. Defendants filed a motion to restrain Norwest from selling the sheep, which was denied. In November, Norwest filed a motion for summary judgment seeking immediate and final possession of all the collateral. Briefs were filed in support and in resistance to this motion and hearings were held on the question. The court then granted the motion for summary judgment and the defendants have appealed.

The standards governing review of the grant or denial of summary judgment were set forth in Frohwein v. Haesemeyer, 264 N.W.2d 792, 795-96 (Iowa 1978).

> In 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.

Section 7 of the security agreement signed by the defendants to secure the collateral for the loans sets forth the events of default which include: (1) failure to pay any obligation when due and (2) making false or misleading representations. Section 8 sets forth the remedies of default: (1) to declare all unmatured obligations immediately due and payable; and (2) to exercise all rights and remedies available under the Uniform Commercial Code including the right to take possession of any collateral and the right to sell, lease or otherwise dispose of any collateral within the manner set forth. The collateral securing the loans included: all equipment owned by the debtor; all farm products, including 2500 sheep; and accounts receivable owed the debtor.

The bank alleges five different grounds of default. We find that the trial court's rulings with regard to the issue of default were correct.

It is important to keep in mind that the party resisting a motion for

summary judgment must provide evidence in its resistance to the motion by affidavit or otherwise that shows that a genuine issue of fact exists. Colonial Baking Co. v. Dowie, 330 N.W.2d 279, 282 (Iowa 1983).

Interest on a promissory note for $25,000 became due on June 1, 1983. Although the defendants presented general denials of or explanations for the nonpayment, they did not present evidence sufficient to generate a genuine issue of material fact on the payment of interest. The testimony offered by Barber on this issue throughout the proceedings varied and conflicted. We find no evidence to show that they paid the interest, but rather general denials or explanations of nonpayment. This failure to pay interest due is a default under the terms of the security agreement.

Similarly, the failure to notify Norwest of the reduction in net worth of $114,000 as well as the misstatements with regard to the HUD loans also constituted defaults. On the original agreement, the defendants listed equity in a farm he was purchasing on contract at $114,000. When he cancelled the contract, the defendant did not inform the bank. One justification offered by the defendant was that the bank had considered the value of apartment houses he owned in determining his net worth and that this reduction in value was inconsequential. Outside of the defendant's statement, there is no other evidence to support the claim and even if there were, the argument is without merit. The failure to inform the bank of the decline in net worth due to disposal of property is an event of default. The indebtedness to the Federal Agency of Housing and Urban Development for $120,000 was incurred in November 1, 1982, before the loans were procured from the bank. The defendants had an obligation to inform the bank of these loans and the failure to do so constitutes a false or misleading statement. This, too, is a default for which the defendant offered no evidence to generate a genuine issue of material fact.

Other defaults set forth by the bank and supported by the record include the

disposition of wool without the bank's consent and the failure to make payment on demand. While all of these constitute defaults under Section 7 of the security agreement, Norwest need only show one default to invoke the remedies provided for in Section 8. Section 8 grants the bank specific remedies in the event of default including the right to take possession of the property and to sell or dispose of it. In view of the fact that the defendant offered no evidence to generate a genuine issue of material fact as to all the various defaults alleged, the trial court properly granted the motion for summary judgment granting the plaintiff immediate and final possession of the property.

The appellants set forth a number of arguments which were not raised in the pleadings nor ruled upon by the trial court. These issues include: Jeanette Barber's ownership of machinery and collateral; the sheriff's authority to conduct the replevin; a determination of damages to the property sustained by the manner of the replevin; the trial court's failure to increase replevin bonds. Because these were not raised or considered by the trial court, they cannot be raised for the first time on appeal to this court. Olberding Const. Co., Inc. v. Ruden, 243 N.W.2d 872, 879 (Iowa 1976).

Appellants argue that the trial court erred in failing to assess the value of the property replevined as required by Iowa Code section 643.16 and that this is a question to be presented to the jury. Iowa Code section 643.16 states that: "The jury must assess the value of the property and damages for the taking and detention thereof, whenever by their verdict there will be a judgment for recovery or return of the property, and when required so to do by either party . . . ." Iowa Code § 643.16 (1983). Here, there was no finding that any of the property be returned and thus the appellants are not entitled to an assessment of value under this section.

The appellants' arguments with respect to the failure to increase the amount of the replevin bonds, the release of the replevin bonds after judgment was

entered, and the issuance of the nunc pro tunc order are without merit.

The trial court order granting the motion for summary judgment is affirmed. Norwest is entitled to final and complete possession of the collateral which secured the loans on which the appellants defaulted. The judge's order granting the summary judgment required Norwest to submit an itemization of the damages incurred in taking, holding, and disposing of the collateral. Norwest filed this itemization on March 29, 1984. A notice of appeal had been filed on March 2, 1984, and therefore no final order was issued on the amount of damages. We remand to the trial court for the purpose of examining the amount of damages incurred by Norwest and to enter a final order on this issue.

The findings of the trial court are affirmed.

AFFIRMED AND REMANDED.