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IN THE IOWA COURT OF APPEALS

**W. J. MERRIAM, Individually and
MERRIAM'S PHARMACY, INC.,**

Filed November 24, 1981

VS.

1-193
2-65327

Defendants-Appellees.

Submitted to Oxberger, C.J., and Donielson, Carter, Snell, Johnson, JJ.

PER CURIAM

Plaintiff appeals from summary judgment for defendants in an action seeking damages as a result of an alleged breach of contract to purchase plaintiff's businesses. Plaintiff claims summary judgment was improper in that a genuine issue of material fact existed regarding whether plaintiff authorized their real estate agent to rescind the contract and return the defendant's downpayment. Plaintiff also questions whether the return of the defendants' downpayment by the real estate agent would operate as a waiver of plaintiffs' tort claim.

Plaintiffs, W. J. Merriam, individually, and Merriam's Pharmacy, Inc., contracted with the defendants, William Luppen and Larry Bell, for the sale of Merriam's businesses in Corwith and Goldfield, Iowa, on December 7, 1977. The written contract provided for a sales price of Merriam's Pharmacy of \$440,000, with \$5000 of that to be held as earnest money "by OK Realty, Seller's agent, pending delivery of final papers." The defendants, however, were unable to procure suitable financing and refused to complete performance of the contract. OK Realty, as agent for Merriam with respect to the sale of the businesses, returned, allegedly without authority, the \$5000 earnest money to the defendants. Subsequently, Merriam's businesses began to fail. Eventually the businesses were sold to the defendants at an execution sale for \$60,000.

Merriam brought this action for money damages for breach of contract claiming OK Realty was not authorized to return the defendants' money or to rescind the contract. On the basis of facts deemed admitted because of Merriam's failure to respond to a request for admissions, see, Iowa R. Civ. P. 127, the trial court granted summary judgment in favor of the defendants. Merriam is appealing the summary judgment, claiming there was an unresolved genuine issue of material fact of whether OK Realty was authorized to rescind the contract and return the defendants' downpayment.

I. In reviewing the grant of a summary judgment, we view the underlying facts contained in the pleadings and the inferences to be drawn from those facts in the light most favorable to the party opposing the motion. Frohwein v. Haesmeyer, 264 N.W.2d 792, 795-96 (Iowa 1978). We give to the party opposing the motion the benefit of any doubt as to the propriety of granting summary judgment. Id. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. Id. If we find an unresolved issue of material fact or an incorrect application of the law, we will reverse the grant of summary judgment. Our review of

the trial court's order becomes abnormally difficult in light of the fact the trial court did not state the grounds nor the rationale relied upon in granting summary judgment.

II. Both parties agree defendants entered into a written agreement on December 6, 1977, to purchase plaintiffs two businesses for \$440,000 and that defendants gave OK Realty \$5000 earnest money under the purchase agreement. The defendants now seek to avoid the contractual duty on essentially three grounds: (1) the defendants had no duty of immediate performance since a condition precedent to their duty had not occurred; (2) the parties had in fact abandoned the contract, and (3) the plaintiff's agent had the necessary authority to rescind and did, in fact, properly rescind the contract. We will address each of the defendants' theories.

To properly grant the summary judgment, the court must have found no genuine issue as to any material fact and that the movant was entitled to a judgment as a matter of law. Iowa R. Civil P. 237; Barnhill v. Davis, 300 N.W.2d 104,105 (Iowa 1980). Whether the parties have abandoned or rescinded a contract, see Severson v. Ebersson Elevator, Inc., 250 N.W.2d 417, 421-22 (Iowa 1977), and whether a purported agent has the authority to rescind a contract, see Mayrath Company v. Helgeson, 258 Iowa 543, 547, 139 N.W.2d 303, 305-06 (Iowa 1966); Fairway Center Corporation v. V.I.P. Corporation, 502 F.2d 1135, 1142 (8th Cir. 1974), are questions of fact to be decided by the trier of fact when there is evidence susceptible to differing inferences. See Walnut Hills Farms, Inc. v. Farmers Cooperative company of Creston, 244 N.W.2d 778, 780-81 (Iowa 1976); Pay-N-Taket, Inc. v. Crooks, 259 Iowa 719, 724, 145 N.W.2d 621, 624 (Iowa 1966); Gatzemeyer v. Vogel, 544 F.2d 988, 991-92 (8th Cir. 1976). The affidavits and supporting documents present evidence from which different inferences could be drawn on the issues of whether the contract had been abandoned and whether OK Realty possessed the necessary authority to rescind the contract and return the defendants' downpayment.

The trial court, in granting the defendants' motion for summary judgment, incorporated and relied upon the facts contained in the defendants' motion for summary judgment. The facts in the defendants' motion were deemed admitted by the plaintiffs due to their failure to respond the defendants' request for admissions concerning those facts. Those facts are as follows:

- a. That OK Realty of Clear Lake, Iowa, was Plaintiffs' agent with respect to the sale of Plaintiffs' farmacy businesses.

b. That on December 6, 1977, Plaintiff's agent received Five Thousand Dollars (\$5000.00) from Defendants as the downpayment with respect to said purchase agreement.

c. That said Five Thousand Dollar (\$5000.00) downpayment was paid by Defendants' check and that a true and exact photocopy of said check has been filed in this action.

d. That said check was paid by the bank upon which it was drawn, First State Bank, Britt, Iowa, on December 12, 1977.

e. That on April 7, 1978, Plaintiffs' agent returned the Five Thousand Dollar (\$5000.00) downpayment to Defendants.

f. That from December 6, 1977, to April 7, 1978, Plaintiffs were in possession of said farmacy businesses.

In the trial court's opinion, those facts are all of the pertinent facts necessary for the court to grant summary judgment.

If the trial court premised the summary judgment in favor of the defendants on the grounds that no genuine issue of material fact existed as to the agent's authority to rescind the contract or the parties' intent to abandon the contract, the trial court committed error. The plaintiffs' affidavit contained sufficient specific facts, which would engender a jury question on the existence and scope of the agency relationship between OK Realty and Merriam, and on the parties' intent to abandon the contract. The contract by its terms is ambiguous in defining the scope of the agent's authority and, therefore, the real estate agent's scope of authority is a question of fact. See Mayrath Company v. Helgeson, 139 N.W.2d 303, 305-06 (Iowa 1966). We cannot say as a matter of law OK Realty was authorized to rescind the contract or that the parties intended to abandon the contract. Severson v. Eleberon Elevator, Inc., 250 N.W.2d 417, 421-22 (Iowa 1977). Given summary judgments are appropriate only when a determination is made that the moving party is entitled to judgment as a matter of law and not as a consequence of resolving a factual issue, City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d 637, 640 (Iowa 1978), the trial court committed error in granting summary judgment in this case. If OK Realty in fact did not have the authority to rescind the contract and return the defendants' downpayment, and if the parties did not intend to abandon the contract, absent the existence of an unsatisfied condition precedent to defendants' performance, the defendants would not be entitled to judgment in their favor. In this case the defendants claim OK Realty was authorized to rescind the contract and that the plaintiff's acts of seeking alternative purchasers of the property indicate their intent to abandon the contract. The plaintiffs state facts indicating just the opposite conclusions. We conclude there is a genuine issue of

material facts. Since the existence and scope of an agency relationship and abandonment or rescission of a contract are critical fact questions, summary judgment in the absence of an unsatisfied condition precedent is error. Mayrath Company v. Helgeson, 258 Iowa 543, 547, 139 N.W.2d 303, 305-06 (Iowa 1966), and Severson v. Elberson Elevator, Inc., 250 N.W.2d 417, 421-22 (Iowa 1977). The court should have submitted the issues to the trier of fact.

III. The defendants also assert the contract contains a condition precedent to their duty to perform. The following language is relied upon by the defendants as establishing procurement of suitable financing as a condition precedent:

I—We hereby make you the following offer for your property located at or briefly described as follows: Merriams Pharmacy at Corwith, Iowa, and Goldfield, Iowa, and legally described as: per abstract, and agree to pay you therefor the sum of \$440,000.00 as follows: \$5,000.00 in cash with this offer as earnest money to be held by O. K. Realty, Seller's agent, pending delivery of final papers.

The balance of \$420,000.00 is to be paid as follows, to-wit: \$440,000.00 in cash to be paid upon delivery of warranty deed upon the form recommended by the Iowa Real Estate Association; or as follows:
Cash to Seller
Possession to be given on January 20, sooner or later as closing by S.B.A. & Banker dictates.

Since we conclude summary judgment on the defendant's theories of abandonment and rescission of the contract by the plaintiff's purported agent were not appropriate because of unresolved factual issues, to affirm the trial court we must conclude the contract contained a condition precedent. Although the exact meaning of the quoted contract language is unclear, and therefore must be determined by the trier of fact, Brammer v. Allied Mutual Insurance Company, 182 N.W.2d 169, 172-73 (Iowa 1970), we are quite certain the words do not inherently establish the defendants' procurement of suitable financing as a condition precedent to the defendants' duty to perform as a matter of law. We are of the opinion a determination of the parties' intent is necessary before a construction of that language can be effected by this court. General Casualty Company of Wisconsin v. Hines, 156 N.W.2d 118, 122-23 (Iowa 1968). Consequently, we reverse the trial court's grant of summary judgment for the defendants and remand for trial on the merits.

IV. Due to our finding error in the trial court's grant of summary judgment, we do not rule on the plaintiffs' issue of waiver of a tort claim.

REVERSED.