IN THE COURT OF APPEALS OF IOWA

No. 1-443 / 91-30

FILED
NOV 26 1991
CLERK SUPREME COURT

607

STATE AUTOMOBILE & CASUALTY UNDERWRITERS, INC.,

Appellant,

vs.

IOWA LODGE, INC.,

Appellee.

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs, Judge.

State Automobile & Casaulty Underwriters, Inc. appeals from the district court's denial of its summary judgment motion. **REVERSED AND REMANDED WITH DIRECTION.**

Jaki K. Samuelson and David L. Phipps of Whitfield, Musgrave & Eddy, Des Moines, for appellant.

Gary S. Tucker, Chicago, Illinois, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

PER CURIAM

State Automobile & Casualty Underwriters, Inc. (State Automobile) issued a fire insurance policy which covered the business premises of Iowa Lodge, Inc. The property consisted of two buildings which were separately identified in the policy. Building no. 1 was a motel; building no. 2 was a restaurant and office. The policy expressly provided "business interruption" insurance coverage on building no. 1.

On December 16, 1987, a fire occurred in building no. 2. The parties subsequently adjusted the loss attributable to the fire damage to the building. Among its claims arising out of the fire, however, Iowa Lodge made an additional claim for loss of income under a theory that when building no. 2 was destroyed, the motel office was destroyed, thereby rendering the telephone equipment and electricity in building no. 1 unusable. Thus there was a "business interruption." State Automobile took the position that the lost income was not covered by the policy because building no. 1 was not damaged by fire.

The policy contained standard clauses providing that no suit shall be brought on the policy unless the suit was commenced within one year after the loss occurred.

State Automobile argues that its adjuster, Jim Mickelson, on February 10, 1988, and February 15, 1988, advised representatives of Iowa Lodge that the State

Automobile policy did not provide coverage for the loss of income.

Iowa Lodge initiated its first suit claiming coverage in the United States District Court for the Northern District of Illinois on June 28, 1989. This suit was dismissed for lack of subject matter jurisdiction. On January 17, 1990, State Automobile initiated the instant declaratory judgment action. When the district court refused to grant its motion for summary judgment, State Automobile applied for, and received, permission to take an interlocutory appeal.

Summary judgment is appropriate only if there exists no genuine issue of material fact. Farm Bureau Mutual Insurance Co. v. Miline, 242 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show 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.
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> 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 <u>specific facts</u> 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).

The language of our rule is substantially similar to Federal Rule of Civil Procedure 56. Sherwood v. Nissen, 179 N.W.2d 336, 339 (Iowa 1970). We may look to the interpretation of that rule by the federal courts for guidance in construing our own. Id.; see, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538, 551-53 (1986). See Adickes v. S. H. Kress & Co., 398 U.S. 144, 156-61, 90 S. Ct. 1598, 26 L. Ed. 2d 142, 153-56 (1970); see also Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (explaining Adickes).

"Of course, 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).

In this case, Iowa Lodge has presented no factual evidence, by affidavits or otherwise, to rebut State Automobile's substantiated claim the contractual statute of limitations has expired. Our supreme court has upheld the validity of contractual limitations provisions. Thomas v.

United Fire and Casualty Co., 426 N.W.2d 396, 398 (Iowa 1988).

Nor has Iowa Lodge offered any evidence, by affidavit or otherwise, to support its allegations of a waiver of the limitations provision by State Automobile. Hence, its resistance to the summary judgment motion depends solely on the evidence already before the trial court, presented by State Automobile. Des Moines Register & Tribune Co., 239 N.W.2d at 154. There is no evidence in the record to support Iowa Lodge's waiver argument.

We determine as a matter of law there is no genuine issue of material fact. State Automobile is entitled to summary judgment on the premise Iowa Lodge failed to file suit within the contractual limitations period.

We reverse the trial court. We remand this case for entry of summary judgment in favor of State Automobile.

REVERSED AND REMANDED WITH DIRECTION.