FILED
AUG 2 6 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MILLS COUNTY STATE BANK,

Plaintiff-Appellee and Cross-Appellant,

vs.

STANLEY FISHER,

Defendant-Appellant and Cross-Appellee.

Filed August 26, 1982 317

2-139
2-66533

Appeal from Mills District Court - E. F. Hanson, Judge.

Both parties appeal in action involving suit by plaintiff bank on promissory note and counterclaim by defendant alleging that false representations of plaintiff bank caused him to purchase an unprofitable business. Trial court's order and judgment is affirmed on plaintiff's appeal, reversed in part on defendant's appeal, and a portion of defendant's appeal is dismissed.

Raymond R. Pogge of Pogge, Root & Steege, Council Bluffs, Iowa, for defendant-appellant and cross-appellee.

Clayton Shrout, Omaha, Nebraska, for defendant-appellant and cross-appellee.

Greg Barntsen and Robert Laubenthal of Smith, Peterson, Beckman and Willson, Council Bluffs, Iowa, for plaintiff-appellee and cross-appellant.

Michael Johanns, Lincoln, Nebraska, for plaintiff-appellee and cross-appellant.

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

This case is before this court for the second time. It has also been considered by the supreme court in Mills County State Bank v. Fisher, 282 N.W.2d 712 (Iowa 1979). The case has now been tried three times in the district court and unless the order of the trial court on a posttrial motion following the third trial is reversed, it will result in a fourth trial of the issues. Unfortunately, we are unable to resolve the issues in a manner which precludes the necessity of further litigation.

The nature of the action is a suit on a promissory note executed by defendant Fisher in favor of the plaintiff bank. By way of affirmative defense, setoff, and counterclaim, the defendant alleges that the plaintiff bank knowingly made false and misleading representation which induced him to purchase a tavern and dance hall business and that contrary to such representation, the business had not been and was not profitable. As a result of the latest trial, the plaintiff obtained judgment against defendant for $31,917 on the promissory note and the defendant obtained a jury verdict against the plaintiff for $22,500 on his counterclaim. As to the latter award, the trial court granted a conditional new trial which became a final order for new trial upon defendant's failure to file a remittitur. Both parties have appealed.

I. Plaintiff's Appeal. The primary issue presented on plaintiff's appeal is its contention that the trial court erred in denying plaintiff's posttrial motion for judgment notwithstanding the verdict. The ground of that motion which is relied upon as the basis for such claim, relates to defendant's proof of damages on his counterclaim. The grounds of a motion for judgment notwithstanding the verdict under Iowa R. Civ. P. 243 may be considered only to the extent that the same grounds have been previously advanced in a motion for directed verdict. Jensvold v. Chicago G. W. Ry. Co., 236 Iowa 708, 715-16, 18 N.W.2d 616, 620 (1945). Our review of the record convinces us that the ground of the motion for judgment notwithstanding the verdict being urged on appeal was never included in plaintiff's

motion for directed verdict in the court below. Accordingly, the trial court was correct in denying the motion on this ground.

II. Defendant's Appeal. Initially, we must consider the rather perplexing procedural problems engendered by defendant's appeal. In his notice of appeal, the defendant designates the following matters as having been appealed from:

> . . . the ruling of Honorable Harold Martin, District Judge, sustaining Plaintiff's Motion for Summary Judgment, judgment entry entered February 3, 1981; and each and every ruling of the Court adverse to the Defendant during the trial which terminated with a jury verdict on the 4th day of February, 1981, and the Remittitur of the Court filed on or about February 27, 1981.

While an appellant is not required to limit the issues in the notice of appeal, the notice may have that effect when specific matters are designated. Sayre v. Andrews, 259 Iowa 930, 936, 146 N.W.2d 336, 340 (1966). We feel compelled to review the matters designated in defendant's notice of appeal in order to verify the existence of a final judgment. In this regard, we consider separately those matters which relate to the order sustaining plaintiff's motion for summary judgment and the resulting judgment entered on such ruling, and those matters relating to the trial of defendant's counterclaim.

A. Appeal from Ruling on Plaintiff's Motion for Summary Judgment and Judgment Entered Thereon. On June 24, 1980, the trial court granted plaintiff's motion for summary judgment as to the amount owing under the promissory note upon which plaintiff's claim is based. On February 3, 1981 (prior to the conclusion of the trial of defendant's counterclaim), the court entered judgment in favor of the plaintiff and against the defendant on the basis of the liability established in the June 24, 1980, order. For purposes of appellate review, the June 24, 1980, order was interlocutory. It should have remained interlocutory until final disposition of defendant's counterclaim. This is so for two reasons: (1) the counterclaim is compulsory, thus precluding entry of an appeallable judgment on

plaintiff's claim under the rule established in Farmers Coop Elevator Co. v. Knapp, 259 N.W.2d 762, 764 (Iowa 1978), and (2) the issues to be litigated in the trial of defendant's counterclaim may provide a setoff against amounts which might be owed to plaintiff by defendant on the promissory note. See Hedinger v. Herweh, 239 Iowa 1146, 1148, 34 N.W.2d 202, 203 (1948).

Notwithstanding the fact that determinations of the plaintiff's motion for summary judgment should be viewed as an interlocutory ruling, we believe that the February 3, 1981, judgment entry may be considered as a final judgment for the sole purpose of granting defendants relief from execution on the judgment thus entered. If such were not the case, defendant could be subjected to the perils of an execution or improper lien against his real estate with no right of appeal therefrom. For the reasons thus specified, we reverse the entry of judgment of February 3, 1981, and direct that on remand said judgment order be rescinded until conclusion of the other issues presented in the litigation. Our consideration of the February 3, 1981, judgment for this limited purpose confers no ancillary jurisdiction to consider other issues urged on appeal.

B. Appeal of Issues Relating to Defendant's Counterclaim. As a result of the new trial granted by the trial court on defendant's counterclaim, there exists no final judgment on that claim except for the order granting a new trial which is a type of order designated as a final judgment under Iowa R. App. P. 1(a). Defendant's notice of appeal does not specifically designate the order for new trial as a matter from which appeal is taken. We will assume, however, that this is what is meant by reference to "the Remittitur of the Court filed on or about February 27, 1981." But even with this assumption we conclude that the portion of defendant's appeal relating to issues on the counterclaim should be dismissed.

Defendant does not seek reinstatement of the jury verdict and entry of judgment thereon. He specifically states in his written argument on appeal that he does not want this result. He is thus content with the grant of the new trial

and complains only of the reasons for which the trial court granted a new trial. The reasons upon which the trial court predicated the grant of new trial are matters unlikely to arrive again on retrial. We therefore decline to review an order which if reversed would produce a result (reinstatement of the verdict) which defendant has expressly argued against. Because we find that the appeal from the new trial order has been improvidently taken with no claim being made for direct relief from that order, we find no ancillary jurisdiction to consider the other issues urged in the absence of a final judgment on defendant's counterclaim.

The cause is affirmed on plaintiff's appeal, reversed on defendant's appeal from the judgment entry of February 3, 1981, and dismissed as to the other issues on appeal. Costs of appeal shall be taxed equally between the parties.