IN THE COURT OF APPEALS OF IOWA

No. 4-165 / 93-1171

FILED
MAY 26 1994
CLERK SUPREME COURT

**EMPLOYERS INSURANCE OF WAUSAU,
A Mutual Company,**

Plaintiff-Appellee,

vs.

LEMAR CONSTRUCTION,

Defendant-Appellant

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

The defendant-insured appeals from the district court's ruling granting the plaintiff-insurer summary judgment on its claim for an additional worker's compensation insurance premium from the defendant. **REVERSED AND REMANDED.**

William R. Stengel of Coyle, Gilman & Stengel, Rock Island, Illinois, for appellant.

David A. Morse of Garten and Wanek, Des Moines, for appellee.

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

SACKETT, P.J.

Plaintiff-appellee Employers Insurance of Wausau provided workers' compensation insurance coverage to defendant-appellant LeMar Construction under an assigned risk pool. After an audit, plaintiff sued for additional premiums. Plaintiff made a motion for summary judgment which the trial court sustained, and this appeal follows. We reverse the summary judgment and remand. We do not retain jurisdiction.

On June 29, 1992, plaintiff sued defendant on account for $25,232. Attached to the petition was a statement of the account issued by plaintiff showing charges and credits to defendant from November 14, 1989 through October 13, 1990. Included on the billing was an invoice for an audit showing a date of November 14, 1989 to November 14, 1990, and a charge of $23,860. Defendant answered generally denying the allegations of the petition.

Plaintiff filed a motion for summary judgment. In partial support of its motion for summary judgment, plaintiff filed the affidavit of Brian Peacock, a service field auditor for plaintiff. Brian swore he personally conducted and oversaw a physical audit of defendant's records for the period November 14, 1988 to November 14, 1989, and the proper classification for the audit period was that of "conduit contractor." Brian's affidavit further stated the audit for November 14, 1988 to November

November 14, 1989, the time frame subject matter of this litigation, showed a balance of $25,232 owed for November 14, 1988 to November 14, 1989. The memorandum attached to the motion shows plaintiff insured defendant under risk pool from November 14, 1989 to November 14, 1990.

Defendant resisted the motion for summary judgment and filed an affidavit by a licensed insurance agent stating there was negligence on the part of plaintiff in not reclassifying, and the National Council on Compensation Insurance of November 14, 1991, required reclassification on next renewal date and not a retroactive application of a premium increase.

The trial court granting summary judgment found the year in issue to be November 14, 1989 through November 14, 1990, and found no issue of the proper classification on those dates and no issue of material fact.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c); see Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact, Milne, 424 N.W.2d at 423, and the evidence must be viewed in the light most favorable to the resisting party. Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). The

procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. Id.; Sherwood v. Nissen, 179 N.W.2d 336, 339 (Iowa 1970). A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. Milne, 424 N.W.2d at 423; Gott, 387 N.W.2d at 343. If the motion is properly supported, however, the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e). The language of our rule and case law are substantially similar or identical to that of rule 56 of the Federal Rules of Civil Procedure, see, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-88, 106 S. Ct. 1348, 1355-57, 89 L. Ed. 2d 538, 551-53 (1986), from which we may draw for guidance in interpreting our own rule, Sherwood, 179 N.W.2d at 339. We now turn to the facts, all of which appear to be undisputed, as viewed in a light most favorable to the party resisting the motion for summary judgment.

The focal question is whether defendant owes plaintiff additional premiums because of a reclassification of the account.

Plaintiff has the burden to prove the account is owed and unpaid. We cannot from plaintiff's pleading and motion

gain a clear understanding of the time frame plaintiff claims it is owed additional premiums. A reading of its petition would suggest 1989-1990, but its supporting affidavit claims 1988-1989. We are not certain if plaintiff is confused or made an error. However, the time frame stated on the affidavit does not conform to the time frame judgment was entered and, consequently, does not support plaintiff's claim. Also, the insurance agent who obtained the policy approved the disputed classification. The facts do not show, as a matter of law, this agent was not an agent of plaintiff. This, coupled with the defendant's affidavit that National Council on Compensation Insurance on November 14, 1991, did not reclassify retroactively, generates a factual dispute. We reverse the summary judgment and remand. We do not retain jurisdiction.

REVERSED AND REMANDED.