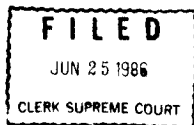


IN THE COURT OF APPEALS OF IOWA



26

CITIZENS STATE BANK,)

Plaintiff-Appellee,)

vs.)

THATCHER IMPLEMENT CO. and)

WILBUR THATCHER,)

Defendants-Appellants.)

FILED JUNE 25, 1986

THATCHER IMPLEMENT CO., WILBUR)
THATCHER, and MARY THATCHER,)

Counter Cross-Claimants,)

6-90
85-1072

vs.)

CITIZENS STATE BANK, JOHN E.)
BREWER, and DALE HEIDMANN,)

Defendants to)
Counter Cross-Claim.)

Appeal from the Iowa District Court for Wayne County (No. 20245) - James P. Denato and Harry Perkins, Judges.

Defendant Thatcher appeals the trial court's decision to grant plaintiff Citizens Bank's motion for summary judgment on its original claim and Thatcher's counterclaim. **REVERSED AND REMANDED.**

James Q. Blomgren and Randall C. Stravers of Clements, Blomgren & Pothoven, Oskaloosa, for appellants.

Robert L. Fanter and Kevin M. Reynolds of Whitfield, Musgrave, Selvy, Kelly & Eddy, Des Moines, and L. W. Rosebrook and William J. North of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, Des Moines, for appellees.

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

SCHLEGEL, J.

Plaintiff Citizens Bank brought an action against Thatcher Implement, Inc., and Wilbur Thatcher based upon two promissory notes executed by Wilbur Thatcher (hereinafter "Thatcher"), and for foreclosure of its security interest in Thatcher's personal property. Thatcher counterclaimed and alleged numerous tortious acts committed by Citizens. The trial court granted Citizens' motion for summary judgment on both the original claim and the counterclaims, and Thatcher appeals. We reverse and remand.

Wilbur Thatcher, as president of Thatcher Implement, Inc., dealt with Citizens for the necessary financial support for the business. Like many farm-related businesses, the implement company required several loans and extensions of credit during the late 1970's. On September 8, 1976, Thatcher signed a guaranty on behalf of the company with Citizens for "unlimited" credit. On that same day, Thatcher signed a security agreement with Citizens giving the bank an interest in, among other items, all of the equipment inventoried at the business. During the next few years, Thatcher, as president of the implement company, executed several promissory notes amounting to over \$200,000.00. In 1977 Thatcher obtained an SBA disaster loan which required a mortgage on his personal property. However, later that same year Thatcher Implement, Inc. was forced to auction off farm equipment to satisfy certain notes with Citizens.

In March 1980, Citizens returned a check to International Harvester unpaid. Shortly thereafter, International Harvester audited Thatcher's business and found it to be out of trust in the amount of approximately \$44,000.00 and eventually cancelled Thatcher's franchise. A month later, in April 1980, Thatcher executed a mortgage on his personal farm in order to obtain another SBA loan.

On October 10, 1981, Citizens filed this action to recover on the two promissory notes, a later agreement acknowledging those debts, and a personal guaranty. Thatcher answered alleging affirmative defenses of promissory and equitable estoppel. On December 5, 1981, Thatcher filed a counterclaim seeking damages on theories of intentional infliction of emotional distress, breach of contract, tortious interference with contractual relations and prospective business advantage, fraud, misrepresentation, conversion, and breach of fiduciary duty.

On August 23, 1984, Citizens filed for summary judgment on its claims against defendants. Thatcher filed several resistances and requested an extension of time to respond to Citizens' motion. The trial court allowed Thatcher an extension until October 12, 1984. On October 13, 1984, Thatcher filed an application for an additional seven days. Citizens opposed the additional time and again moved for summary judgment on its original claim. On April 5, 1985, the trial court sustained Citizens' motion to strike Thatcher's evidentiary affidavits due to their untimely filing. At the same time the trial court sustained Citizens' motion for summary judgment on its claims against Thatcher. Citizens also filed a motion for summary judgment on the counterclaim. On June 28, 1985, the trial court sustained the motion based on the fact that Thatcher had not responded with specific facts showing a genuine issue of fact for trial. On appeal, we are confronted with the issue of whether the trial court erred in sustaining the motions for summary judgment.

I. **Scope of Review.** In Knapp v. Simmons, 345 N.W.2d 118, 121 (Iowa 1984), the supreme court cited the well-known legal principles applicable to this case:

Summary judgment is proper when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c). The burden of showing the nonexistence of a material fact is upon the moving party. Colonial Baking Co. of Des Moines

v. Dowie, 330 N.W.2d 279, 282 (Iowa 1983). While an adverse party generally cannot rest upon his pleadings when the moving party has supported his motion, summary judgment is still not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. Id. In this respect, summary judgment is functionally akin to a directed verdict, Sherwood v. Nissen, 179 N.W.2d 336, 339 (Iowa 1970); every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved. Henkel v. R & S Bottling Co., 323 N.W.2d 185, 187-88 (Iowa 1982).

Under rule 237, Rules of Civil Procedure, summary judgments are granted when there is no genuine issue as to any material fact. The matters come up on affidavits, pleadings, answers to interrogatories, admissions on file, and affidavits. Rule 237(c), R. Civ. P. The court may, . . . , permit oral testimony to supplement the record. Rule 237(e), R. Civ. P. Tasco, Inc. v. Winkle, 281 N.W.2d 280, 282 (Iowa 1979).

II. Claims Based on the Promissory Notes. Citizens argues strenuously in its brief that Thatcher's mere conclusory pleadings and statements characterized as "affirmative defenses" do not, in and of themselves, create a material fact question. We agree that Thatcher has not raised any "new" fact questions in his answer or affirmative defenses. We are confronted with essentially undisputed facts in the record. However, summary judgment is still not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. Knapp v. Simmons, 345 N.W.2d at 121. The record shows that Citizens gave Thatcher "unlimited" credit in September of 1976. And yet four years later, a check was returned to International Harvester unpaid. The record also shows that most of Thatcher's financial downfall occurred after the return of that check. Thatcher offered, in his depositions, plausible, though not necessarily persuasive, explanations concerning his relationship with Citizens, his reliance on the unlimited credit, and the subsequent behind-the-scenes dealings with the bank's officers when his business began to deteriorate. These matters

are significant and are entitled to consideration by the trier of fact. See Tasco v. Winkle, 281 N.W.2d at 282. When every legitimate inference that can reasonably be deduced from the evidence is given to Thatcher, reasonable minds could differ on how the issue should be resolved. Thus, a fact question is generated. See, Henkel v. R & S Bottling Co., 323 N.W.2d 185, 187-88 (Iowa 1982). Therefore, we hold the trial court erred in granting Citizens' summary judgment motion on the promissory notes.

III. Thatcher's Counterclaims. As with the preceding issue, we must determine whether summary judgment was proper when no new facts have been alleged by the nonmoving party. It appears that despite Thatcher's numerous claims within his counterclaim regarding Citizens and its officers' alleged tortious conduct, they are still simply inferences or *allegations stemming* from undisputed facts in the record. Therefore, the legal principles applicable to the previous issue also apply to the counterclaim, and we need not repeat them here.

As we have stated, the specific allegations in Thatcher's counterclaims stem from the same undisputed facts applicable to Citizens' original claim. Thatcher is also in the same position in this issue in that he is the nonmoving party concerning the motion for summary judgment. We note also that Thatcher's various allegations are perhaps plausible although not readily persuasive. However, because we have held that reasonable minds could differ on the outcome of the previous issue, we are similarly convinced that reasonable inferences from these same undisputed facts could support the allegations in the counterclaims. We choose to forego the analysis of each claim in Thatcher's counterclaim because any decision by the trier of fact on Citizens' original claim could have a direct affect on the viability of one or more of Thatcher's counterclaims.

We do not intend anything we have said to be taken as an opinion as to what the resolution of this case should be. We say only that a genuine issue

of material fact exists and Thatcher should have a trial on the merits. Therefore, we reverse and remand this case for trial.

REVERSED AND REMANDED.