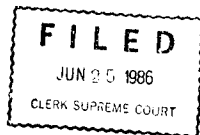


IN THE COURT OF APPEALS OF IOWA



JOHN DEERE LEASING COMPANY,)

Plaintiff-Appellee,)

Filed June 25, 1986 97

vs.)

STANLEY L. FRAKER,)

Defendant-Appellant.)

6-159
85-1218

Appeal from the Iowa District Court for Polk County (No. CL56-33011)

- Glenn E. Pille, Judge.

Defendant appeals the grant of summary judgment for plaintiff in an action for a deficiency judgment in connection with the repossession of farm machinery.

AFFIRMED.

Alfredo G. Parrish of Parrish & Kruidenier, Des Moines, for defendant-appellant.

Craig R. Hastings of Clark, Clark & Hastings, Ames, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Hayden, JJ.

SNELL, J.

38

Plaintiff John Deere Leasing Company and defendant Stanley Fraker entered into a leasing agreement on April 29, 1982, whereby a combine and attachments were to be provided to Fraker for five years in exchange for periodic payments. Fraker failed to make one of the scheduled payments in the spring of 1983, and a John Deere employee requested that Fraker surrender possession of the machinery. Fraker voluntarily returned the combine in May of 1983. John Deere sent a notice of private sale to Fraker in December of 1983. Bids were requested and received from implement dealers only. The combine was sold on January 20, 1984, for \$63,227.00. Fraker was notified at that time of the sales price and advised of a \$25,045.21 deficiency. On April 18, 1985, John Deere filed an action for deficiency judgment and a motion for summary judgment. Fraker resisted, alleging that John Deere did not sell the combine in a commercially-reasonable fashion in bypassing the harvest season market and waiting until the dead of winter to arrange the sale. The trial court granted the summary judgment in favor of John Deere concluding that Fraker failed to generate a genuine issue of material fact regarding the commercial reasonableness of the time of sale.

On appeal, Fraker contends that the trial court erred in granting John Deere's motion for summary judgment because a genuine issue of material fact exists as to the commercial reasonableness of the sale of the combine.

We recently set forth the principles governing our review of the grant or denial of a motion for summary judgment:

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). In reviewing the grant of a summary judgment motion, we must determine whether a genuine issue of material fact exists and whether the law was correctly applied. Adam v. Mt. Pleasant Bank & Trust Co., 355 N.W.2d 868, 872

(Iowa 1984). In Daboll v. Hoden, 222 N.W.2d 727 (Iowa 1974), the Iowa Supreme Court stated:

The purpose of the rule is to avoid useless trials. Where there is no genuine issue of fact to be decided, the party with a just cause should be able to obtain a judgment promptly and without the expense and delay of a trial. [citations] In ruling on a motion for summary judgment, the court's function is to determine whether such a genuine issue exists, not to decide the merits of one which does.

Id. at 731.

In order to rule upon such motion, the trial court must examine the entire record before it, including the pleadings, admissions, depositions, answers to interrogatories, and affidavits, if any. Drainage Dist. No. 119 v. Incorporated City of Spencer, 268 N.W.2d 493, 499 (Iowa 1978). The burden to show the absence of any genuine issue of material fact is upon the moving party. The record is viewed in the light most favorable to the opposing party. Swets Motor Sales, Inc. v. Pruisner, 236 N.W.2d 299, 304 (Iowa 1975). However, to successfully resist a motion for summary judgment, the resisting party must set forth specific evidentiary facts showing the existence of a genuine issue of material fact. Liska v. First Nat. Bank, 310 N.W.2d 531, 534 (Iowa Ct. App. 1981). He cannot rest on the mere allegations or denials of the pleadings. Id.; Iowa R. Civ. P. 237(c).

Becker v. Star Auto, Inc., 376 N.W.2d 645, 646-47 (Iowa Ct. App. 1985). A party opposing a motion for summary judgment is not entitled to rely "on the hope of a subsequent magical appearance at trial of genuine issues of material fact." Prior v. Rathjen, 199 N.W.2d 327, 331 (Iowa 1972) (quoting United States Steel Corp. v. United States, 305 F. Supp. 508, 513 (S.D. N.Y. 1969)).

The Uniform Commercial Code allows a secured party to dispose of repossessed collateral by private sale. Iowa Code §§ 554.9504(3) (1985). Every aspect of such a disposition must be commercially reasonable, however, or the secured party may be prevented from recovering a deficiency judgment against the debtor. Herman Ford-Mercury, Inc. v. Betts, 251 N.W.2d 492, 496 (Iowa 1977); Federal Deposit Ins. Corp. v. Farrar, 231 N.W.2d 602, 605 (Iowa 1975); Twin

Bridges Truck City, Inc. v. Halling, 205 N.W.2d 736, 738-39 (Iowa 1973); Iowa Code § 554.9504(3) (1985). Iowa Code section 554.9507(2) explains commercial reasonableness as follows:

The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if the secured party sells at the price current in such market at the time of the secured party's sale or if the secured party has otherwise *sold in conformity with reasonable commercial practices* among dealers in the type of property sold the secured party has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

In the present case, John Deere met its initial burden by establishing its entitlement to summary judgment. Affidavits supporting its motion indicate that: 1) Fraker's combine was repossessed by John Deere pursuant to the parties' agreement following Fraker's default in making contract payments; 2) the combine was subsequently sold for \$63,277.00 after Fraker was notified that the combine would be sold by private sale on or after December 22, 1983, and a deficiency would be sought if the sales price did not cover the contract price; 3) an independent appraiser valued the combine at \$50,750.00; 4) farm equipment price lists indicated a \$64,000.00 price for similar equipment in the fall of 1983; and 5) a \$23,045.21 deficiency remains after applying the proceeds of the sale to the balance due under the lease.

To withstand John Deere's motion, then, Fraker was obligated to show

specific evidentiary facts by affidavit or otherwise indicating that the time of the combine's sale was not commercially reasonable. Fraker filed a resistance to John Deere's motion with the following affidavit:

COMES NOW Stanley L. Fraker, being duly sworn, upon oath, states as follows:

1. That I have been farming for over twenty (20) years.

2. I leased a John Deere Combine from Ewing Implement which was owned by Keith Wilson through the John Deere Leasing Company.

3. When I could no longer make any payments, I discussed working out an arrangement with both Randy Shaw, District Manager of John Deere, and Keith Wilson of Ewing Implement.

4. I was told that if I would voluntarily bring my combine in that John Deere Leasing Company would sell my lease and that my payment at the most would not exceed \$5,000.00. This was done in order to avoid the full payment on the lease.

5. I took the combine in voluntarily in May of 1983 and left it at Ewing Implement. I was assured by John Deere my deficiency payments would not exceed \$5,000.00.

6. The reason Randy Shaw asked me to bring the combine in voluntarily was that was the way I could avoid making the full payment and minimize my deficiency.

7. I was told that the lease would be sold and that I would only have a minimum deficiency.

8. During the next six months, I made 5 to 6 inquiries of John Deere Leasing Company and Keith Wilson, the owner of Ewing Implement, as to when the sale of the lease would take place. I was assured that it would be sold.

9. I rented the combine that I traded in for the one that is the issue of this litigation and never saw the leased one rented out. This would have decreased my deficiency.

10. The combine stayed at Ewing Implement throughout the harvest season and was not sold until January of the following year.

11. January is the most difficult time to sell a combine and would bring only the minimal price. Further, to sell a combine in January is not commercially reasonable. The combine was sold to another dealer and it is my belief that only dealers were contacted relative to the sale of this combine.

12. John Deere did not seek to sell the combine in a commercially reasonable manner and did not seek to minimize the deficiency.

Further, when I spoke with John Deere about the lease, I was advised that I would have to pay the full price of the lease if I kept the combine.

I was never advised that my deficiency would exceed \$25,000.00 once the combine was delivered to John Deere.

We find that the allegations in Fraker's affidavit, paragraphs 10, 11, and 12, constitute general statements unsupported by factual evidence. Fraker's opinion that the combine should have been sold in the fall of 1983 because prices would have been higher at that time is not specific evidentiary fact, but rather a bare formal conclusion.

In order to successfully resist summary judgment, Fraker needed to set forth specific facts revealing controverted factual issues. Fraker did not present a statement showing similar combines were sold in the fall of 1983 for higher prices than his brought in January of 1984. No facts were placed before the court to indicate that a sale in the fall of 1983 would have brought more than \$63,277.00 for the combine.

We conclude that under these circumstances, Fraker did not successfully resist the motion for summary judgment because he failed to set forth specific evidentiary facts showing the time of the sale of the combine was commercially unreasonable. Therefore, the trial court did not err in sustaining the motion.

AFFIRMED.