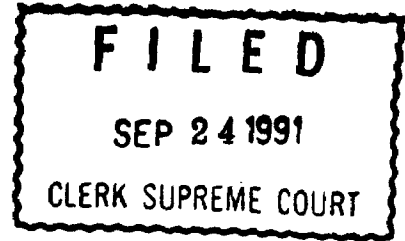


IN THE COURT OF APPEALS OF IOWA

No. 1-132 / 90-1318



GATEWAY STATE BANK,

Appellant,

vs.

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DAVID D. DULANY,

Appellee.

Appeal from the Iowa District Court for Clinton County,
Edward B. De Silva, Jr., Judge.

The Gateway State Bank seeks to impose personal liability on Dulany who signed various promissory notes and extension agreements. The district court concluded that neither the notes nor the extension agreements imposed personal liability on Dulany. On appeal the bank argues that: 1) the extension agreement constitutes a novation under which Dulany became personally liable for the loan; 2) Dulany is estopped from asserting the defense of no personal signature; and 3) the extension agreement constitutes an accommodation paper on which Dulany is personally liable. The bank seeks attorney fees in accordance with the terms of the note. **AFFIRMED.**

David E. Schoenthaler, Maquoketa, for appellant.

Richard W. Farwell of Farwell & Bruhn, Clinton, for appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

PER CURIAM

David D. Dulany and James Marshall joined in a business venture which consisted of \$300,000 in accounts receivable and a used computer, desk, and chair. They attempted to incorporate this business under the name of Account Recovery Corporation. On February 27, 1985, they met with Robert Wede, the former owner of Gateway State Bank, and obtained a line of credit set at \$25,000 by signing a promissory note. This note indicated that the borrower was "ARC" By: David D. Dulany and James D. Marshall." The note was unsecured.

Because the business name they had chosen was similar to another Iowa corporation, the Secretary of State requested another corporate name. Dulany and Marshall then formed a corporation named Clinton Account Recovery Corporation which became incorporated on March 14, 1985.

On January 9, 1986, the first note (February 27, 1985) was rewritten and an additional \$10,000 was loaned by the Bank. The borrower was "CARC by David D. Dulany and James D. Marshall."

On January 4, 1987, David D. Dulany signed an extension agreement in the amount of \$35,000 to extend the time for paying the January 9, 1986 note for another year. Behind his signature he wrote "--V.P.". The following day, August 5, 1987, David D. Dulany signed another extension agreement with the Bank for \$40,000. An additional \$5,000 was loaned but no new promissory note was made of record.

On the August 5 extension agreement, Dulany's signature does not indicate his official representative capacity. The notation "V.P." does not appear following his signature as it does on the other instruments.

The corporation was unable to repay the loan and the Bank brought this action to impose liability on Dulany individually. Dulany seeks to avoid liability by arguing, first, that his signature on the notes was in a corporate capacity, and second, the extension agreement did not control the liability of the parties for the promissory note.

The matter was submitted to the district court who heard testimony. The court found that the promissory note was signed by Dulany in a representative capacity as an officer of the corporation, and that the loan extension agreements extinguished the date on which the original debt was due, not who was liable on the note. In looking to the actual notes, the court concluded that the January 9, 1986, note controlled and, on that note, only the corporation was liable. The Bank appeals.

This case was tried to the court. The scope of our review is for correction of errors of law. Iowa R. App. P. 4.

I. Error Preservation. The Bank, first, argues the district court erred in failing to find the third extension agreement, dated August 5, 1987, was a contract of novation under which Dulany assumed personal liability for the

loan. The Bank, next, argues the district court erred in failing to find that Dulany either waived or is estopped from asserting the defense of no personal signature on the first and second notes. Finally, the Bank contends the district court erred in failing to find the third extension agreement to be accommodation paper on which Dulany is personally liable. Dulany contends these issues were not properly preserved for appeal. We agree. We find nothing in the record on appeal to suggest that these theories were properly raised or preserved.

The theory under which a case is tried in the trial court will be the theory upon which any appeal must be based. Shill v. Careage Corp., 353 N.W.2d 416, 420 (Iowa 1984). In our effort to determine the theory of recovery asserted by the Bank, we first examine the pleadings. See id. Iowa Rule of Civil Procedure 69 does not require that specific theories be pled in the plaintiff's petition. Christensen v. Shelby County, 287 N.W.2d 560, 563 (Iowa 1980). However, notice pleading requires a "'fair notice of the claim asserted to allow that party to make an adequate response." Goshe v. Woller, 288 N.W.2d 329, 331 (Iowa 1980)(quoting 1 A. Vestal & P. Willson, Iowa Practice § 1301, at 56-57 (Supp. 1977)). For the purpose of determining the Bank's theory of recovery, the Bank's petition is sufficient to have put Dulany on notice of only its general breach of contract theory of recovery. Our inquiry does not end at the pleadings, however.

Questions not presented to and not passed on by the trial court cannot be raised or reviewed on appeal. Shill, 353 N.W.2d at 420. We next look to the issues presented to the trial court. The trial court neither addressed nor ruled on the Bank's alternative theories. The record in this case discloses no reason the court should have. The Bank asserts that its posttrial brief presents a solid understanding as to its theories of recovery. Our review of the record in this case, including the Bank's posttrial brief, discloses no indication of the arguments the Bank now asserts on appeal.

The Bank's posttrial brief indicates that it sued Dulany on two specific theories. First the Bank asserted that Dulany is liable under Iowa Code section 554.3403(2)(b) because he did not sign the note in a representative capacity. Second, the Bank asserted that Dulany is liable because the extension agreement signed on August 5, 1987, contains an independent promise to pay and was signed by Dulany personally and not in a representative capacity.

Furthermore, the Bank, in its 179(b) motion did not request that the trial court enlarge or amend its findings to include a ruling on the issues upon which it now appeals. A rule 179(b) motion, pointing out any legal theory the court failed to resolve, is essential in preserving those issues for appeal. Farmers State Bank v. United Central Bank, 463 N.W.2d 69, 72-73 (Iowa 1990). The

court was never given the opportunity to address these issues.

The Bank admits in its appellate brief that the trial court made no express finding as to whether the third extension agreement was a novation. The Bank also admits that it did not raise the issue of waiver and estoppel in the trial court. The Bank does assert that it argued Dulaney was an accommodation party, but does not explain the trial court's failure to address the issue or the Bank's failure to bring the issue to the court's attention in its 179(b) motion.

We find that the arguments asserted by the Bank on appeal are not properly before us, and therefore, we will not address them. Finally, in its appeal, the Bank has abandoned the arguments it asserted at trial. We consider arguments not raised on appeal to be waived. Iowa R. App. P. 14(a)(3). Thus, the only issue remaining for our review is the Bank's claim for trial and appellate attorney fees.

II. Attorney Fees. Iowa Code section 625.22 (1991) provides "When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as a part of the costs a reasonable attorney's fee to be determined by the court." The Bank prevailed in neither the trial court nor the appeal. We affirm the trial court's denial of the Bank's request for trial attorney fees, and we, likewise, deny its application for appellate attorney fees.

The costs of this appeal are taxed to the appellant,
Gateway State Bank.

For all the reasons stated, the district court's
judgment is affirmed.

AFFIRMED.