IN THE COURT OF APPEALS OF IOWA

No. 0-628 / 09-1856
Filed October 20, 2010

JASON KLINGE,
Plaintiff-Appellant,

vs.

LUANA SAVINGS BANK,
Defendant-Appellee.

Appeal from the Iowa District Court for Clayton County, Richard D. Stochl, Judge.

Plaintiff appeals from the district court order granting the defendant's motion for summary judgment. **REVERSED AND REMANDED.**

Peter C. Riley of Tom Riley Law Firm, Cedar Rapids, for appellant.

Dale L. Putnam, Decorah, for appellee.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

SACKETT, C.J.

Plaintiff, Jason Klinge, appeals from the district court order granting a motion for summary judgment in favor of the defendant, Luana Savings Bank. He contends the court erred in granting the bank's motion to strike Klinge's resistance to the motion for summary judgment finding it untimely. He also claims the court's summary judgment ruling is in error because there is a genuine issue of material fact as to whether the bank breached its contract with Klinge. We find summary judgment was granted in error and therefore reverse and remand for further proceedings.

I. BACKGROUND AND PROCEEDINGS. Viewing the record in a light most favorable to Klinge reveals the following facts. Klinge obtained a variable interest agricultural loan from the bank on June 30, 2000. The loan documents executed included a loan agreement stating the bank agreed to lend Klinge $250,000 and that the "interest rate to Borrowers will be 4% less than the Bank's base rate, which is currently 11.65%." There was also a promissory note where the bank stated the future rate would be equal to the announced base rate of Luana Savings Bank. In addition, the parties executed an "interest assistance agreement." The interest assistance agreement was signed by Klinge, a bank representative, and a representative from the Farm Service Administration of the United States Department of Agriculture (FSA). In it, the FSA agreed to reimburse the bank up to four percentage points of interest in exchange for the bank agreeing to pass this on to the borrower as a discount.[1] This agreement

[1] The interest assistance agreement provided in part,

also stipulated that the bank would comply with a federal regulation governing interest rates. This regulation provides that "[t]he lender may charge a fixed or variable interest rate, but not in excess of what the lender charges its average agricultural loan customer." 7 C.F.R. § 762.150(g). Reading the loan documents together, the interest rate on the loan was to begin at four percent less than 11.65%, the bank's base rate at the time, or 7.65%. Periodically, the interest rate would vary, but under the regulation it could not exceed the rate the bank charged its average agricultural loan customer. Over the course of the loan, the bank would give Klinge a four percent discount on the interest rate and the FSA program would reimburse the bank for this discount. Overall, the bank was to

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> In consideration of the lender's reduction of the interest charged the borrower's account, the United States of America, acting through the Farm Service Agency of the United States Department of Agriculture (FSA) pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) agrees that in accordance with and subject to the conditions and requirements in this agreement it will reimburse the lender for a maximum of 4 percentage points per annum of interest reduction. The full amount of interest assistance payments made by FSA to the lender will be passed on to the borrower.
>
> For the initial period of this agreement beginning 6/30/00 and ending 6/30/01 FSA agrees to reimburse the lender for ___ percentage points per annum of the average daily principal balance. The rate of Interest Assistance in future years will be adjusted annually in accordance with the conditions of this agreement.
>
> **11. CONDITIONS OF INTEREST ASSISTANCE**
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> a. Interest Rates
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> The lender may charge a fixed or variable interest rate which is specified in this agreement during the term of the interest assistance agreement. The type of rate must be the same as the type of rate in the underlying note.
>
> The interest rate that the lender will charge will be clearly indicated in the request for interest assistance. If a variable rate is charged, it will comply with 7 C.F.R. part 762.150.

charge Klinge an interest rate that was no more than its average agricultural loan rate.

Klinge filed a petition at law on March 18, 2008, alleging, among other things, Luana Savings Bank was in breach of contract by charging him a higher interest rate than was set forth in the loan documents. He claimed the bank had charged him a higher interest rate than its average agricultural loan rate in violation of 7 C.F.R. part 762.150(g). The bank filed an answer, asserted affirmative defenses, and filed a counterclaim for defamation.

On July 27, 2009, the bank filed a motion for summary judgment. It contended there was no genuine issue of material fact because the bank charged Klinge interest at the agreed rate and he received the proper discount throughout the term of the loan. Klinge filed a response the next day. He contended the bank inadequately responded to discovery requests and asked the court to order the bank to fully respond to requests for production and interrogatories. It also asked for an extension of time to respond to the motion for summary judgment.

The court ordered that the request for an extension of time to resist the motion for summary judgment, along with Klinge's request to compel discovery and other matters, should be set for hearing. On September 15, 2009, following the hearing, the court entered an order addressing a number of matters but made no mention of Klinge's request for an extension. There is no transcript of this hearing in the record to determine whether it was discussed during the hearing.

On October 30, 2009, four days before the scheduled hearing on the motion for summary judgment, Klinge filed a resistance to the bank's motion for summary judgment. On November 3, 2009, immediately before the hearing, the bank filed a motion to strike Klinge's resistance. It argued the resistance was untimely because Iowa Rule of Civil Procedure 1.981(3) requires a resistance to a motion to be filed within fifteen days after the motion for summary judgment is filed unless a court orders otherwise. The court took the matter under advisement and proceeded with the hearing on the merits of the summary judgment motion.

The court issued its ruling on November 4, 2009. It concluded Klinge's resistance was not timely filed and Klinge never obtained an extension from the court even though he had the opportunity to do so. It granted the bank's motion to strike Klinge's resistance. It also determined that even if it did not strike the resistance and considered it in its decision, the bank was still entitled to summary judgment. Klinge appeals, contending the court abused its discretion in striking the resistance and erred in granting the bank's motion for summary judgment.

II. ERROR PRESERVATION. The bank first argues Klinge has failed to preserve error on his claims. It claims Klinge filed a notice of appeal before obtaining a ruling on a motion to enlarge, thereby abandoning the claims raised in the motion to enlarge. Klinge responds by explaining that he filed both a motion to enlarge and an application for determination of final judgment or for

interlocutory appeal to protect his right to appeal in a timely fashion.[2] We have reviewed the filings and arguments and conclude error was preserved on Klinge's claims.

III. RULING ON RESISTANCE. We review for an abuse of discretion a court's ruling on a motion to strike a pleading because it was filed too late. *Theis v. James*, 184 N.W.2d 708, 710 (Iowa 1971). An abuse of discretion occurs when the district court's decision rests "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *Kulish v. Ellsworth*, 566 N.W.2d 885, 889 (Iowa 1997) (quoting *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 543 (Iowa 1996)).

Our rules require a party to file a resistance within fifteen days after being served a copy of the motion for summary judgment, unless the court orders otherwise. Iowa R. Civ. P. 1.981(3). The bank filed its motion for summary judgment on July 27, 2009. The next day Klinge filed a motion requesting,

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[2] If a district court fails to rule on an issue raised by a party, a motion to enlarge is generally required to preserve error. *See Teamsters Local Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 713 (Iowa 2005); *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002). But filing a motion to enlarge and amend under rule 1.904(2) is only required if a summary judgment ruling renders a final decision on the entire case. Iowa R. Civ. P. 1.981(3) ("If summary judgment is rendered on the entire case, rule 1.904(2) shall apply."). Klinge states that the district court's summary judgment ruling did not clearly dispose of the entire case because it made no mention of the bank's counterclaim for defamation. Klinge was in a predicament of either (1) not filing a motion to enlarge but filing a notice of appeal assuming the order disposed of the entire case at the risk of not preserving error, or (2) filing a motion to enlarge and awaiting a ruling before filing a notice of appeal. Under the second scenario, if Klinge waited to appeal but the court determined the motion to enlarge was inappropriate because the ruling did not dispose of the entire case, Klinge risked not appealing within the required time limits. Klinge sought advice by filing an application with the supreme court asking it to determine whether the district court's ruling should be treated as a final judgment or interlocutory and if necessary, to remand the matter to the district court for a final ruling. The supreme court issued an order declaring the district court ruling a final judgment and treating Klinge's application as a notice of appeal.

among other things, an extension to resist the motion for summary judgment. The court set the matters for hearing, which was continued at the request of the parties. The hearing was held on September 15, 2009. Thereafter the court entered an order setting a hearing date of November 3, 2009, for the motion for summary judgment and resolving discovery matters. Its order made no mention of Klinge's request for an extension. Klinge filed a resistance on October 30, four days before the summary judgment hearing.

At the hearing on the motion for summary judgment the bank argued Klinge did not obtain an extension of time to file the resistance from the court. From our review of the record, Klinge never officially received an extension and never demanded the court rule on his request. The district court found no reason for the late filing, and Klinge does not advance one in the brief before us. We find no abuse of discretion in the court's ruling and will not consider Klinge's resistance in evaluating whether the court erred in granting the bank's motion for summary judgment.

IV. SUMMARY JUDGMENT. We review an appeal from a summary judgment ruling for the correction of errors at law. *Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 181, 185 (Iowa 2007). The motion should be granted only if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Iowa R. Civ. P. 1.981(3); *Rucker v. Humboldt Cmty. Sch. Dist.*, 737 N.W.2d 292, 293 (Iowa 2007). There is a "genuine" issue of fact, and summary judgment is inappropriate if the evidence is such that reasonable minds could differ in how to

resolve the factual issue. *Moore v. Eckman*, 762 N.W.2d 459, 461 (Iowa 2009). The fact issue is "material" if, given the applicable law, it will affect the outcome of the suit. *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006). In reviewing the decision, we view the evidence in the light most favorable to the party opposing the motion for summary judgment. *Murtha v. Cahalan*, 745 N.W.2d 711, 713-14 (Iowa 2008). We also consider every legitimate inference that can be reasonably deduced from the record favorable to the non-moving party. *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000). A legitimate inference is one that is "rational, reasonable, and otherwise permissible under the governing substantive law." *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001). By contrast an inference is not legitimate if it is "based upon speculation or conjecture." *Id.*

The moving party has the initial burden of proving the material facts are undisputed. *Kolarik v. Cory Int'l. Corp.*, 721 N.W.2d 159, 162 (Iowa 2006). "If the moving party can show that the nonmoving party has no evidence to support a determinative element of that party's claim, the moving party will prevail in summary judgment." *Parish*, 719 N.W.2d at 543. Once the moving party establishes support for the motion for summary judgment, the opposing party must respond with specific facts constituting competent evidence showing there is a genuine issue of fact for trial. *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 245 (Iowa 2006). The opponent "may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is

a genuine issue for trial." Iowa R. Civ. P. 1.981(5); *Hlubek v. Pelecky*, 701 N.W.2d 93, 95-96 (Iowa 2005). "If the adverse party does not so respond, summary judgment, if appropriate, shall be entered." Iowa R. Civ. P. 1.981(5).

A. Breach of Contract. To establish a claim of breach of contract, Klinge would have to prove,

> (1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach.

Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 224 (Iowa 1998). "A breach of a contract is a party's failure, without legal excuse, to perform any promise which forms a whole or a part of the contract." *Magnusson Agency v. Public Entity Nat. Co.-Midwest*, 560 N.W.2d 20, 27 (Iowa 1997). The parties agree there was a binding contract so the only dispute is whether the bank breached the terms and whether Klinge suffered damages thereby.

The bank argues there is no genuine issue of material fact because the loan agreement and an affidavit from the bank's vice president show the bank abided by the terms of the agreement and the pertinent federal regulations applicable to the interest assistance agreement. Klinge contends there is a genuine issue of material fact even if his resistance is excluded and the court only considers the evidence produced by the bank. He directs us to the loan documents and the history of the bank's base rate and average interest rates charged to agricultural loan customers. Analysis of this evidence, he contends,

shows he was charged an interest rate higher than that permitted by the interest assistance agreement and regulations.

The affidavit from the bank's vice president, Carol Jensen, states:

> There were three different types of loan rates offered by Luana Savings Bank pending the life of [Klinge's] loan, either a fixed rate, a variable rate, or the Luana Savings Bank base rate. Mr. Klinge, in taking out the loan in question, requested the Luana Savings Bank base rate. At all times material[ ] hereto he has been charged the Luana Savings Bank base rate. This in fact is the rate he requested and received . . . .

Jensen also stated that attached to the affidavit "is a cover sheet showing the loan rates for the years 1999 and 2000, and printouts of the actual bank loan reports showing the loans corresponding to the printouts." We do see some loan reports in the record but do not see any cover sheet showing the base rates for 1999 and 2000. There is a document on Luana Savings Bank letterhead listing the base rates from 2002 through 2006.

The file also contains portions of the deposition of the bank president, David Schultz. He testified that it was his understanding that the bank's practice was to charge all of the customers who had variable rate loans through the interest assistance program, the base rate less four percent. He also testified that to his knowledge, Klinge was consistently charged the base rate less four percent. Klinge acknowledged in his deposition the bank had provided him with a copy of his loan file and there were no indications in it that he had been charged an incorrect base rate.

The district court found "[b]ased on Defendant's affidavits and supporting documents, the bank charged Plaintiff interest in compliance with the June 30,

2000 agreement." It noted that the documents did "indicate that some banking customers were charged a different rate than the plaintiff" but those documents did not prove Klinge was charged an incorrect rate according to the terms of the loan agreement. The court did not reference the interest assistance agreement, nor the requirement that Klinge's interest rate not exceed the average interest charged for an agricultural loan.

During a deposition, the bank asked Klinge why he believed he was charged an inaccurate base rate. Klinge gave several reasons including that the bank president told him he had been overcharged interest; that after he approached the bank about the interest rate, it lowered it by two-and-a-half percent; and he received the impression that he was overcharged from general conversations with his accountant and other loan customers. Schultz, the bank president, testified in a deposition that Klinge was charged the correct rate. He admitted to reducing Klinge's interest when accused of overcharging interest. However, Schultz explained the interest reduction was made only because Klinge was threatening a lawsuit and he unilaterally decided to give a 2.5% interest rate reduction in an attempt to satisfy Klinge.

We conclude the bank has failed to meet its burden of proving there is no genuine issue of material fact. While Jensen's affidavit and Schultz's deposition provided testimony that Klinge was charged the *base* interest rate at all times, there is no showing that the base rate was equivalent to the average agricultural loan rate. In other words, the record does not affirmatively show the rate

charged to Klinge complied with 7 C.F.R. part 762.150 as required by the interest assistance agreement.

The bank's president admitted in his deposition that the federal regulation referred to in the interest assistance agreement was incorporated as a term of the loan. Part of this regulation provides, "The lender may charge a fixed or variable interest rate, but not in excess of what the lender charges its average agricultural loan customer." 7 C.F.R. § 762.150(g). In its answers to interrogatories, the bank listed the interest rates charged to its average agricultural loan customers from 1999 to 2007. It categorized the loans as FSA guarantee loans, farmland loans, or agricultural loans. The average interest rates for all three types of loans ranged from 5.1% to 9.2% between 1999 and 2007. Between 1999 to 2007, for the category of agricultural loans alone, the average interest rate varied between 6.5% and 9.2%. If at all times during the loan Klinge was charged the 11.65% rate provided in the loan agreement, minus the four percent discount agreed to, Klinge's rate was 7.65%. This rate would have been higher than the average agricultural loan interest rate from 2002 through 2007.[3] The bank was permitted to adjust the interest rate, but the applicable regulation required the rate to be no more than the average agricultural loan rate. Jensen's affidavit and Schultz's deposition provide

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[3] The rate charged to Klinge appears to be higher than the average agricultural loan rate regardless of whether we interpret Klinge's interest rate before or after the four percentage point discount. Even using the lower figure of 7.65%, it is higher than the average agricultural loan rates the bank reported in answers to interrogatories for years 2002 to 2007. The average agricultural loan rates were: 1999: 8.73%; 2000: 9.26%; 2001: 8.10%; 2002: 7.46%; 2003: 6.72%; 2004: 6.56%; 2005: 6.90%; 2006: 7.31%; and 2007: 7.31%.

testimony that Klinge was always charged the bank's base rate. However, there is nothing in the record to show whether the base rate was equal or lesser than the bank's average agricultural loan rate. When Schultz was asked how the base rate was set, he replied, "It's set off the cost of deposits and a certain spread put on and, you know, a certain amount of operating costs to come up with a base—standard lending rate."

The bank contends it was permitted to adjust or not adjust Klinge's interest rate under another regulation providing, "Variable rates may change according to the normal practices of the lender for its average agricultural loan customer, but the frequency of change must be specified in the loan or line of credit instrument." 7 C.F.R. § 762.124(a)(2). However, even this regulation provides "Neither the interest rate on the guaranteed portion nor the unguaranteed portion may exceed the rate the lender charges its average agricultural loan customer." 7 C.F.R. § 762.124(a)(3). We find the record lacks evidence to determine whether Klinge was charged a rate no higher than the bank's average agricultural loan customer. Even if the bank's evidence supports a finding that it charged an interest rate compatible with its base rate, this does not prove whether the base rate was the same, or less than, its average agricultural loan interest rate. This is a genuine issue of material fact that precludes summary judgment. "When the evidentiary matter tendered in support of the motion does not affirmatively establish uncontroverted facts that sustain the moving party's right to judgment, summary judgment must be denied even if no opposing evidentiary matter is presented." *Griglione v. Martin*, 525 N.W.2d 810, 813 (Iowa 1994). We reverse

the district court's ruling granting the bank's motion for summary judgment and remand for further proceedings.

REVERSED AND REMANDED.