

IN THE COURT OF APPEALS OF IOWA

No. 1-816 / 11-0170
Filed December 7, 2011

**HUGO NEGRELE-PULE, MOISES
ALEGRIA, and ARMONDO GONZALEZ,**
Plaintiffs-Appellants,

vs.

**JAMES HARMEYER, INC.,
d/b/a TYLER HOMES,**
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Glen E. Pille, Judge.

Plaintiffs appeal from the district court's grant of defendant's motion for summary judgment and subsequent dismissal of their wrongful termination of employment lawsuit. **REVERSED AND REMANDED.**

Robert A. Wright Jr. of Wright Law Office, Des Moines, for appellants.

Louis R. Hockenbergh and Benjamin M. Clark of Sullivan & Ward, P.C.,
West Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Plaintiffs were employed as laborers by James Harmeyer, Inc. d/b/a Tyler Homes (Tyler Homes). After their employment was terminated on May 19, 2008, plaintiffs filed suit seeking damages and alleging Tyler Homes fired them on the basis of race or in retaliation for having made previous complaints to James Harmeyer about the racially derogatory treatment they received from their supervisor. Tyler Homes denied the allegations and later filed a motion for summary judgment asserting plaintiffs were unable to show a causal connection between any alleged protected activity and their termination. After striking as untimely plaintiffs' statement of disputed facts, affidavits, and memorandum, the district court concluded plaintiffs' claims failed as a matter of law. The court granted summary judgment in favor of Tyler Homes and dismissed plaintiffs' lawsuit. Although we find the district court did not abuse its discretion in striking as untimely plaintiffs' statement of disputed facts, affidavits, and memorandum, we conclude the court did err in granting summary judgment to Tyler Homes.

I. Background Facts and Proceedings.

Plaintiffs filed their petition on July 10, 2009, claiming their discharge was retaliatory and in breach of an employment contract and therefore in violation of 42 U.S.C. § 1981. Tyler Homes answered, denying the allegations. On November 23, 2009, the court entered an order setting trial for October 4, 2010,

and August 5, 2010, as the filing deadline date for motions for summary judgment.¹

Tyler Homes filed its motion for summary judgment on the deadline date of August 5, 2010. Filed with the motion was a statement of undisputed facts and memorandum of law, with four pages of plaintiffs' deposition testimony attached thereto. The gist of the motion was that plaintiffs had provided no evidence to support their allegations that they were terminated for engaging in protected behavior. On August 23, plaintiffs filed a resistance and motion for additional time to file supporting documents.² Plaintiffs did not address the merits of Tyler Homes' motion, but instead attacked the motion as procedurally deficient for failure to make specific references to the record in violation of rule 1.981(8). Plaintiffs gave no reason for their request for additional time to file supporting documents. Tyler Homes filed its reply on September 1.

An order filed on September 9 set hearing on the motion for summary judgment for September 27, a Monday, one week before trial was to begin. The

¹ Iowa Rule of Civil Procedure 1.981(3) provides a "motion [for summary judgment] shall be filed not less than 60 days prior to the date the case is set for trial, unless otherwise ordered by the court."

² The certificate of service affixed to the resistance certified it was served by mail on August 23. The resistance was not actually filed in the clerk's office until August 25 at 4:28 p.m., two days later. Unless otherwise ordered by the court, a party resisting a motion for summary judgment shall file the resistance within fifteen days from the time when a copy of the motion has been served. Iowa R. Civ. P. 1.981(3). The motion was mailed to plaintiffs' counsel on August 5. Service having been made by mail, three days were added to the prescribed fifteen-day period, thus giving plaintiffs eighteen days, or until August 23 to file a resistance. See Iowa R. Civ. P. 1.443(2). Plaintiffs served their resistance upon defendant's counsel by mail on August 23rd. Service by mail is complete upon mailing. Iowa R. Civ. P. 1.442(2). The time requirement for filing with the clerk of court is tolled when service is made, provided the actual filing is done within a reasonable time thereafter. Iowa R. Civ. P. 1.442(4). Based upon the certification that the resistance was mailed on August 23, and the fact it was filed with the clerk two days later, plaintiffs' resistance was timely filed within the eighteen-day deadline.

order made no mention of plaintiffs' motion for additional time. On the Friday before the hearing, September 24, at 9:24 and 9:25 a.m., affidavits of each plaintiff were filed. No certificates of service were affixed to the affidavits. Later that day, at 3:39 p.m., plaintiffs filed an amended resistance to the motion for summary judgment, and a statement of disputed facts with various attachments,³ including a memorandum of law in opposition to the motion for summary judgment. The certificates of service indicate the documents were served by mail on September 24.

Hearing commenced Monday, September 27, at 8:36 a.m. It appears from the record neither the court nor defense counsel received a copy of plaintiffs' amended resistance and statement of disputed facts until hand-delivered to them by plaintiffs' counsel at the hearing.⁴

In a September 30 order, the district court denied plaintiffs' motion for additional time to file supporting documents and struck as "blatantly untimely" the plaintiffs' affidavits, statement of disputed facts, and memorandum in opposition to the motion for summary judgment. The court did not address plaintiffs' rule 1.981(8) procedural deficiency argument. The court granted the motion for summary judgment for the reasons asserted by Tyler Homes. The court requested counsel for Tyler Homes submit a formal order consistent with the

³ The attachments included plaintiffs' answers to interrogatories (served on February 10, 2010), plaintiffs' answers to Tyler Homes' request for admissions (served October 2, 2009), and plaintiffs' three affidavits (each dated September 23, 2010).

⁴ In response to plaintiffs' affidavits, and at the conclusion of the hearing, Tyler Homes provided the court with an affidavit of James Harmeyer and requested it be considered by the court if plaintiffs' affidavits were allowed. Since the district court struck plaintiffs' affidavits and did not rely on those affidavits as a basis for its decision, the court also disregarded the Harmeyer affidavit. We therefore do not consider the Harmeyer affidavit in our review as it was not a part of the record considered by the district court.

court's ruling and the rationale submitted by Tyler Homes in its motion for summary judgment.

In a follow-up ruling filed on October 27, the district court reiterated its previous order denying plaintiffs' motion for additional time and the striking of plaintiffs' affidavits, statement of disputed facts, and memorandum. Again, plaintiffs' rule 1.981(8) procedural defect argument was not addressed. In granting Tyler Homes' motion for summary judgment, the district court concluded plaintiffs failed to establish unlawful employment discrimination through direct evidence because they did not provide any evidence that supported a connection between plaintiffs' previous complaint to James Harmeyer and the termination of their employment. Further, the court concluded, in the absence of direct evidence, plaintiffs failed to establish a prima facie case of discrimination under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and their retaliation claims related to 42 U.S.C. § 1981 failed as a matter of law. Similarly, the court found plaintiffs' breach of contract claim under 42 U.S.C. § 1981 failed as a matter of law. The court dismissed plaintiffs' petition.

Plaintiffs, pursuant to rule 1.904(2), then filed a motion to amend, enlarge, and modify the court's ruling. Tyler Homes resisted and hearing was held on December 16, 2010. The court denied plaintiffs' motion and in all respects confirmed its previous orders, except for one correction to its October 27 order. Also, the court found "no violations in any of the procedural rules by [Tyler Homes] that would justify amending, enlarging, or modifying the court's previous rulings." Plaintiffs appeal.

II. Scope and Standards of Review.

We review a district court's ruling on a motion for summary judgment for the correction of errors at law. See Iowa R. App. P. 6.907. Under Iowa Rule of Civil Procedure 1.981(3), summary judgment is proper only when the record shows no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smidt v. Porter*, 695 N.W.2d 9, 14 (Iowa 2005). A genuine issue of fact exists if reasonable minds can differ on how an issue should be resolved. *Walker v. State*, 801 N.W.2d 548, 554 (Iowa 2011). The court must look at the facts in a light most favorable to the party resisting the motion and must indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question. *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005).

The district court's refusal to grant additional time to resist a summary judgment motion is reviewed for abuse of discretion. *Kulish v. Ellsworth*, 566 N.W.2d 885, 889-90 (Iowa 1997). To prove an abuse of discretion, the plaintiffs must show the court exercised its discretion for clearly unreasonable or untenable reasons. *In re Estate of Olson*, 479 N.W.2d 610, 613 (Iowa Ct. App. 1991).

III. Discussion.

The first issue we address is plaintiffs' contention the district court abused its discretion in striking plaintiffs' affidavits, statement of disputed facts, and memorandum in opposition to defendant's motion for summary judgment. Plaintiffs' resistance was filed on the deadline. It was not accompanied by a statement of disputed facts, memorandum of authorities supporting the

resistance, or any affidavits or other supporting documents. Filed with plaintiffs' resistance to the motion for summary judgment was a motion for additional time to file supporting documents. No reason was given as to why plaintiffs were unable to timely file documents responsive to the motion for summary judgment.⁵

It was not until September 24, some thirty-two days later, that plaintiffs filed an amended resistance, statement of disputed facts with supporting documents and affidavits, and memorandum. Under the circumstances presented, and particularly in view of the fact trial was scheduled to start in one week, we find no abuse of discretion by the district court in striking, as untimely, plaintiffs' statement of disputed facts, affidavits, and memorandum. We therefore do not consider them in our review.

The second issue we address is plaintiffs' claim the district court erred in granting Tyler Homes' motion for summary judgment. They assert Tyler Homes failed to meet its burden to show the absence of any genuine issue of material fact. We agree.

The burden is on the party moving for summary judgment to prove it is entitled to judgment as a matter of law. *Hunter v. City of Des Moines Mun. Hous. Auth.*, 742 N.W.2d 578, 584 (Iowa 2007). The movant has the burden to prove the facts are undisputed. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001).

⁵ Plaintiffs did not request a continuance to permit discovery under rule 1.981(6). In any event, the rule would not have been any assistance to plaintiffs. See *Kulish*, 566 N.W.2d at 889-90 (finding no abuse of court's discretion in denying plaintiffs' request for additional time to file affidavits opposing summary judgment when plaintiffs furnished no reasons, by affidavits or otherwise, supporting their claimed need for additional time to respond).

To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law. To affirmatively establish uncontroverted facts that are legally controlling as to the outcome of the case, the moving party may rely on admissions in the pleadings, affidavits, depositions, answers to interrogatories by the nonmoving party, and admissions on file.

McVey v. Nat'l Org. Serv., Inc., 719 N.W.2d 801, 802 (Iowa 2006) (internal citations omitted). "When a motion for summary judgment is *properly* supported, the nonmoving party is required to respond with specific facts that show a genuine issue for trial." *Green v. Racing Ass'n. of Cent. Iowa*, 713 N.W.2d 234, 245 (Iowa 2006) (emphasis added). Failure of the nonmovant to properly resist the motion does not relieve the movant of its obligation to show the district court that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. See *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 27 (Iowa 2005).

On review of a ruling on summary judgment, we examine the record that was before the district court. *Robinson v. Fremont Cnty.*, 744 N.W.2d 323, 325 (Iowa 2008). Except as it may carry with it express stipulations, the statement of undisputed facts by the moving party does not constitute part of the record from which the absence of genuine issues of material fact may be determined. *McVey*, 719 N.W.2d at 803. So, the record before the district court was: plaintiffs' petition, defendant's answer, defendant's motion for summary judgment, memorandum of law with four pages of plaintiffs' deposition testimony

attached, plaintiffs' resistance, defendant's reply, and plaintiffs' amended resistance.⁶

The only evidence before the court was plaintiffs' deposition testimony indicating they did not inquire as to why they were fired and did not know why they were fired. These statements alone do not defeat plaintiffs' claims. The mere filing of a summary judgment motion does not serve to limit the extent of plaintiffs' proof at trial. Plaintiffs are not precluded from proffering other evidence at trial to establish their allegation that they were wrongfully discharged in violation of 42 U.S.C. § 1981. The record on the motion for summary judgment at issue here does not show that plaintiffs' potential proof at trial had yet been limited to that which was contained in a few pages of depositions taken by plaintiffs' opponent. "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) (citation omitted). The evidence tendered in support of the motion for summary judgment does not affirmatively establish uncontroverted facts that could sustain Tyler Homes' right to judgment.

Because the record before us does not affirmatively establish that there is no genuine issue for trial, the district court erred in granting summary judgment in favor of Tyler Homes. We accordingly reverse the district court's grant of

⁶ In its ruling, the district court stated it relied on the "pleadings, depositions, answers to interrogatories, and admissions on file." Other than the pages of plaintiffs' testimony attached to Tyler Homes' statement of undisputed facts, no discovery was on file. Generally discovery materials are not filed with the clerk of court. Iowa R. Civ. P. 1.502.

summary judgment and remand for further proceedings. In view of our decision, we need not address the plaintiffs' other arguments on appeal.

REVERSED AND REMANDED.