IN THE COURT OF APPEALS OF IOWA

No. 2-141 / 11-1162
Filed May 23, 2012

ROLLING HILLS BANK & TRUST,
An Iowa Banking Corporation,
Plaintiff-Appellee,

vs.

RICK VETTER,
Defendant-Appellant.

No. 2-142 / 11-1163

ROLLING HILLS BANK & TRUST,
An Iowa Banking Corporation,
Plaintiff-Appellee,

vs.

ROBERT A. VENNER,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Kathleen A. Kilnoski, Judge.

Debtors appeal district court rulings granting motions for summary judgment filed by the bank. **REVERSED AND REMANDED ON BOTH APPEALS.**

T. Randall Wright and Brandon R. Tomjack of Baird Holm, L.L.P., Omaha, Nebraska, and Gregory J. Siemann of Green, Siemann & Greteman, P.L.C., Carroll, for appellants.

Nathan R. Watson, James P. “Sam” King, and Steven J. Woolley of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O., Omaha, Nebraska, for appellee.

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

DOYLE, J.

Rick Vetter and Robert Venner each appeal from district court rulings granting motions for summary judgment filed by Rolling Hills Bank & Trust.[1] They claim the court erred in finding no genuine issues of material fact existed on the bank's actions seeking judgments on past due promissory notes. We agree and reverse the judgment of the court on both appeals. The cases are remanded for further proceedings.

I. Background Facts and Proceedings.

Rick Vetter executed two promissory notes and Robert Venner executed three promissory notes in favor of Southwest Iowa Cattle Feeders, L.L.C. (Southwest) for the purchase of cattle and feed. Each of the notes was tied to a designated cattle lot number and provided in general terms as follows:

> [T]he undersigned hereby grants to Feedyard [Southwest] a security interest in the following property . . . .
>
> Purchase Money/General Security Interest in ____ head of cattle, average weight of ____ pounds.
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> All cattle and other livestock, whether now owned or hereafter acquired, that may at any time be or have been in the possession of Feedyard or Feedyard's agent or agents, together with all accounts and other rights to payment arising out of a sale or other disposition thereof, however such right to payment may be evidenced . . . (all of which is hereinafter referred to as the "Collateral").
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> . . . .
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> Right is expressly granted to the holder, at its option, to transfer at any time to itself or its nominee, any of the Collateral, to exercise the rights of the owner thereof, and to receive the income and proceeds thereon and hold the same as security for

[1] Although not consolidated by formal order from the Iowa Supreme Court, we are considering these separate cases in a single opinion because the issues and facts are virtually identical. *See, e.g.*, *Benson v. Fort Dodge Police Pension Bd. of Trs.*, 374 N.W.2d 392, 392 (Iowa 1985); *Sisson v. Johnson*, 187 N.W.2d 745, 745 (Iowa 1971).

> Obligations, or, in the case of money, apply it on the principal and interest of any of the Obligations.

Contemporaneously with the defendants' execution of the notes, Southwest assigned its interest in the notes to Rolling Hills Bank & Trust. In the assignments, Southwest agreed

> to make checks, from proceeds of any cattle sold securing this Promissory Note, payable to Rolling Hills Bank & Trust. Amount payable to Rolling Hills Bank & Trust will never exceed outstanding principal and interest on this Promissory Note.
>
> . . . to furnish copy of the bill of sale of cattle securing this Promissory Note and all feed & yardage invoices.

The bank advanced money to Southwest for the purchase of cattle and feed on behalf of the defendants. After the notes matured, the bank filed petitions against Vetter and Venner, alleging they had failed to pay the amounts due on the notes. The bank sought judgment against Vetter in the amount of $329,377.64 and against Venner in the amount of $488,663.99, plus interest and attorney fees. The defendants filed answers, asserting the bank had "failed to properly account for payments" on the notes, which they contended were paid in full by Southwest's sale of the cattle securing the notes.

The bank filed motions for summary judgment in both cases. Vetter and Venner resisted. Following a hearing, the district court issued rulings granting the bank's motions for summary judgment. These appeals followed.

II. Scope and Standards of Review.

We review the district court's summary judgment rulings for the correction of errors at law. *Koeppel v. Speirs*, 808 N.W.2d 177, 179 (Iowa 2011). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue

of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Koeppel*, 808 N.W.2d at 179. We review the record in the light most favorable to the party opposing the motion. *Koeppel*, 808 N.W.2d at 179.

III. Discussion.

A. Timeliness of Supplemental Affidavits.

Like most cases involving motions for summary judgment, our decision focuses on the sufficiency of the resistances to the motions rather than on the sufficiency of the motions themselves. *See Gruener v. City of Cedar Falls*, 189 N.W.2d 577, 580 (Iowa 1971). The bank's motions were supported by affidavits from its vice president and chief financial officer, who was responsible for overseeing the loans made to the defendants. Those affidavits set forth the amounts advanced to Southwest on behalf of the defendants, the dates of those advancements, and the amounts remaining due on the notes. The notes themselves, and the assignments of the notes from Southwest to the bank, were attached to the petitions filed by the bank.

When a motion for summary judgment is properly supported, as here, the nonmoving party must respond with specific facts that show a genuine issue for trial. *See* Iowa R. Civ. P. 1.981(5); *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 245 (Iowa 2006); *see also Schulte v. Mauer*, 219 N.W.2d 496, 498 (Iowa 1974) (finding a similarly supported summary judgment motion sufficient under our summary judgment rules). The resistance must be filed

> within 15 days, unless otherwise ordered by the court, from the time when a copy of the motion has been served. The resistance shall include a statement of disputed facts, if any, and a memorandum of

> authorities supporting the resistance. If affidavits supporting the resistance are filed, they must be filed with the resistance.

Iowa R. Civ. P. 1.981(3).

The bank served the defendants with the motions for summary judgment on April 15, 2011, well before the trial scheduled for December 13, 2011. The defendants each filed a resistance, with a statement of disputed facts and a memorandum of authorities, within the fifteen-day period prescribed by rule 1.981(3). The resistances were supported by affidavits from each defendant.

Shortly before the hearing on the motions, and after the time to resist had expired, the defendants filed supplemental affidavits with supporting documentation. They did not request permission from the court for these late submissions. *See* Iowa R. Civ. P. 1.981(5) (stating the "court may permit affidavits to be supplemented . . . by further affidavits"); *see also* Iowa R. Civ. P. 1.443(1)(b) (stating that when "an act is required or allowed to be done at or within a specified time, the court for cause shown may . . . . [u]pon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect"). The district court found the supplemental affidavits were "untimely submitted for the record," though it went on to state that "even if the court considers these untimely affidavits . . . they do not raise an issue of fact, precluding summary judgment."

"The court has discretion to refuse to consider an untimely affidavit or to consider it, based on the circumstances in a particular case." *Schroeder v. Fuller*, 354 N.W.2d 780, 782 (Iowa 1984). We do not believe consideration of the

supplemental affidavits was an abuse of the court's discretion because the trial was more than six months away, the bank did not seek to strike the supplemental affidavits as untimely, and the controversy concerned factual, rather than legal, questions. *Cf. Kulish v. Ellsworth*, 566 N.W.2d 885, 889-90 (Iowa 1997) (finding court did not abuse its discretion in denying plaintiffs' request for additional time to file affidavits in resistance to summary judgment motion where trial was imminent and only question presented by motion was legal). Even without these late filings, however, we believe the defendants established genuine issues of material fact existed, thereby precluding entry of summary judgment against them.

B. Sufficiency of Resistances.

Vetter's initial affidavit in resistance to the bank's summary judgment motion stated:

> I wondered why I was sent a letter from Rolling Hills Bank in early 2009 . . . questioning me about my notes. After I received this letter I went down to Southwest Iowa Cattle Feeders yard and inquired about the close outs on my cattle. I was informed that my cattle were properly accounted for and that the proceeds had been properly applied to my notes at the bank. I know that my cattle were there and accounted for based on earlier communications I had with Southwest.
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> . . . .
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> I believe that the bank misapplied the proceeds from my cattle sales such that my notes were not properly credited with the proceeds from the cattle sales. It is my further belief from examining the records that they have produced so far in discovery that the bank operated under a first-in/first-out method with regard to the Southwest Cattle Feeders account such that the bank would apply proceeds from cattle sales as they came in to the most delinquent Southwest Feeder notes at the bank without regard to how the proceeds should have been properly applied. I feel that the bank was acting as an agent for Southwest at all times material with reference to my notes such that the bank should be responsible for any problems at Southwest.

Venner's initial affidavit was much the same, though it additionally stated:

> I know of my own personal knowledge that I inspected said cattle at the Southwest Iowa Cattle Feeders yard from early to mid 2009 and said cattle were present in said feed yard and in good condition. I personally conducted a count of the cattle by comparing the ear tags and lot numbers such that I fully accounted for all of my cattle that were in the possession of the feed yard. I further know said cattle were marketed by Southwest when fed out and that the proceeds from the sale of said cattle were deposited in the Plaintiff's bank, Rolling Hills Bank & Trust. The proceeds of each of the sales of the cattle should have been sufficient to pay my notes in full.
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> . . . .
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> I further believe that we will be able to determine exactly where the proceeds from the sales of my cattle went at Rolling Hills Bank . . . .

In arguing these affidavits were not sufficient to avoid summary judgment, the bank focuses on the affiants' use of the words "belief" and "believe." *See Gruener*, 189 N.W.2d at 580 ("Conclusions and beliefs are insufficient."). While it is true that conclusions, beliefs, or generalities are inadequate in resisting summary judgment, we think the affidavits set forth more than that here. The statements in the defendants' affidavits were based on their personal knowledge of their cattle at Southwest—cattle which they specifically inquired about and accounted for after being informed of the delinquency on their notes with the bank. *See Winkel v. Erpelding*, 526 N.W.2d 316, 318 (Iowa 1995) ("To mount a successful resistance, the challenger must come forward with specific facts constituting competent evidence in support of the claim advanced."). Further, defendants timely asserted in their initial affidavits that the bank misapplied their cattle sales proceeds by operating under a first in/first out basis, that is, applying sales proceeds as they came in to the most delinquent Southwest notes, without

regard as to how the proceeds should have been applied. Defendants' "belief" in this regard was based upon their examination of records produced in discovery. These assertions alone, made in defendants' initial affidavits, are sufficient to generate a genuine issue of material fact.

We also observe the notes and assignments support the defendants' claim that Southwest was to apply the proceeds from the sale of their cattle to the debts owed to the bank. As related in the background facts, the notes granted the holder thereof the right to apply any proceeds received from the sale of the cattle to the principal due on the notes. And in Southwest's assignments of the notes to the bank, Southwest agreed to "make checks, from proceeds of any cattle sold securing [these notes], payable to Rolling Hills Bank & Trust."

The supplemental affidavits and supporting documentation raise an additional question of fact as to whether the cattle that secured the defendant's notes were sold by Southwest. Vetter's supplemental affidavit stated:

> About four weeks ago, I was able to start reviewing bank records and accounting records relating to the Plaintiff Bank's loans to Southwest Iowa Cattle Feeders, LLC . . . and relating to the loans made by Southwest to me, which were apparently assigned to Plaintiff.
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> . . . I have in my possession some 16,000 pages of feedyard, banking and accounting records. My daughters have been working with me to review these records. . . . However, I need more time because the records are so numerous.
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> . . . Southwest was the feeder for my cattle, which were housed in its feedyard and identified by pen number and ear tag. I signed various promissory notes in favor of Southwest which obligated me to pay for the cost of the purchase of those cattle and for feeding them. I have been to see my cattle at the Southwest feedyard several times, and each time I went, I would see that the ear tags and pen numbers matched up with my records. As the cattle became ready for market, Southwest would sell the cattle and it was supposed to credit my loan with the proceeds, so that once the cattle were sold, my loans would be paid in full. The bank

> records which I have reviewed clearly indicate that in fact my cattle existed and were sold more than a year ago, and that proceeds were sufficient to pay most, if not all of the loans that the Bank is now claiming were not paid. It appears that the bank applied my cattle proceeds not to my loans, but rather to some other cattle feeders' loans at the Bank.
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> . . . Attached to this affidavit as Exhibit A are two memos . . . about the bank's firing of Jon Foley, who was the Bank's loan officer dealing with my loans. . . . The memos make it clear that Mr. Foley had an obligation to oversee deposits from Southwest, to properly credit the loans, and that he failed to find out how those deposits should be applied to outstanding notes at the Bank. I believe that my notes, which are the subject of this case, were among those notes.
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> . . . The assignment of my note to the Bank by Southwest clearly indicates that Southwest was responsible for providing the Bank with the cattle proceeds and information as to the sale of the cattle. I attended a trial on a related lawsuit . . . and at the trial, Jon Foley, the bank's former loan officer, testified that Southwest was responsible for informing the Bank as to the status of the notes, what cattle proceeds were to be applied to which borrower's notes, and other related matters. . . .
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> . . . In February or March of 2009, I first heard from the Bank that my loans were supposedly in default. In fact, however, my cattle had been sold months before that, and the proceeds had been paid to the bank by Southwest—it appears that those proceeds were applied to some other borrower's notes.

Venner's affidavit contained the same information.

Providing yet more support for the defendants' claim their notes were not properly credited with the proceeds from sale of their cattle are affidavits from Vetter's daughter, which stated that she had been reviewing

> loan payment records, accountant records, deposit slips and related documents from Rolling Hills Bank & Trust, Southwest Iowa Cattle Feeders, LLC, and from an accountant Mr. Mullinex, in an effort to determine what those records reflect with regard to proceeds of [the defendants'] cattle which were fed by Southwest Iowa Cattle Feeders, LLC in 2008 through 2009.

She prepared two spreadsheets summarizing this information, which she asserted showed when the defendants' cattle were sold and the amount of the proceeds:

> Those funds then were transferred to the Bank. However, it appears that [the loans] were never credited by the Bank with those proceeds. . . . The two spread sheets can be read together to show that [the defendants'] cattle were sold, that the proceeds were paid to the Bank but that the Bank credited the proceeds to the wrong loans.

While we are unable, from our reading of the spreadsheets, to discern whether the proceeds were applied to the wrong loans, we do believe the information contained in the spreadsheets raises a genuine issue of material fact as to whether all of the proceeds from the Vetter and Venner cattle sales were applied to the Vetter and Venner loans.

One of the spreadsheets listed the cattle lot numbers securing the notes, the date cattle from the particular lot were sold, the amount of the proceeds received by Southwest, and the date the proceeds were deposited with the bank. For example, a November 5, 2008 note executed by Venner was secured by cattle in lot numbers B119 through B121. Cattle in those lot numbers were sold on February 20, March 10, and August 13, 2009, for a total of $290,929.05. The proceeds were deposited with the bank on February 25, March 13, and August 28, 2009. But the second spreadsheet, which lists payments made on various borrowers' notes with the bank, does not show any credits were made to Venner's account on those dates. Instead, in February 2010, Venner's November 5, 2008 note was credited with only $1015.40 for the sale of cattle from those lot numbers.

We also consider memorandums from the bank regarding the termination of the loan officer in charge of Southwest's accounts. These memorandums were referenced in and attached to the defendants' supplemental affidavits. They state the loan officer was fired because he did not "oversee deposits that were made to [Southwest's] account in a diligent or timely manner," which resulted in "significant overpayments being made to customers when these funds should have been applied to outstanding loans." This occurred during the same time period the defendants' cattle were being sold by Southwest.

We finally consider a designation of expert witnesses filed by the bank. One of the witnesses listed was a "Certified Fraud Examiner and Forensic Accountant," who had "reviewed and analyzed the cattle feedlot operation records . . . the reorganized general ledger of the Feedlot . . . and the relevant records maintained by [the bank]." The bank expected this witness would testify

> regarding the Feedlot's failure to properly track receivables due from its various customers and that disbursements of cattle sale proceeds were made to customers based on nothing more than estimations and guesses. Mr. Kirchner will also testify regarding the amount of any overpayments made by the Feedlot to its customers, including specifically Defendant (with regard to promissory notes sued upon in this particular action, as well as with regard to promissory notes not sued upon in this particular action), without regard to those customers' promissory note obligations owed to [the bank], as well as improper payments made to the Feedlot's owners/members, inappropriate and potentially fraudulent accounting, reporting, and payment activities and practices of the Feedlot and its managers, directors, and officers, and ownership and tracing of cattle sale proceeds.

Drawing all reasonable inferences in favor of the defendants, we believe the aforementioned facts constitute sufficient circumstantial evidence to generate genuine issues of material fact as to (1) the amount due, if any, on the notes

involved in these lawsuits and (2) whether an agency relationship existed between Southwest and the bank,[2] such that the following rule would apply:

> [A] provision in an agency agreement that the agent endorse checks made payable to the agent in favor of the principal and deposit them to the account of the principal places no burden on the debtor to see to the proper application of the funds.

See Engelke v. Drager, 239 N.W. 569, 571 (Iowa 1931); *see also C & J Vantage Leasing Co. v. Outlook Farm Golf Club, L.L.C.*, 784 N.W.2d 753, 760 (Iowa 2010) (noting in denying a motion for summary judgment where an agency question was raised that the "existence of agency is ordinarily an issue of fact").

We accordingly reverse the district court's rulings granting summary judgment in favor of the bank and remand for further proceedings.

REVERSED AND REMANDED ON BOTH APPEALS.

Vaitheswaran, P.J., concurs; Danilson, J., concurs specially.

[2] We find no merit to the bank's hypertechnical error preservation argument on this issue, as the question of an agency relationship between Southwest and the bank was brought to the district court's attention and decided by it. *See Griffin Pipe Prods. Co. v. Bd. of Review*, 789 N.W.2d 769, 772 (Iowa 2010); *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006).

DANILSON, J. (concurring specially)

I concur specially to express my concern about the bank's attempt to "rush to judgment." The trials in both cases were scheduled six months in the future. Although neither Venner nor Vetter filed a motion to continue the hearing on the bank's motion for summary judgment, each made it abundantly clear in their filings that they needed more time. There are references to continuing discovery or specific requests for more time in their "statements of material facts in dispute, and briefs," their original affidavits, and in both of their two supplemental affidavits.

Our rules specifically permit a continuance to allow more time for discovery. Iowa R. Civ. P. 1.981(6). It should also not be assumed that a party is not actively participating in discovery simply by a review of the court file. The parties may be cooperating in discovery efforts without the need for court intervention. Where the trial date is not imminent, the contested issues are largely factual, and a need for more time is warranted; a short continuance to allow additional time for discovery may well promote justice and avoid a rush to judgment. A continuance may also permit the opposing party time to respond to supplemental affidavits. Notwithstanding Venner's and Vetter's expressed need for more time for discovery purposes in this case, I agree that they have raised sufficient facts to create a genuine issue of material fact.