

IN THE COURT OF APPEALS OF IOWA

No. 6-927 / 06-0490
Filed February 28, 2007

KENNETH W. TURNER,
Plaintiff-Appellant,

vs.

**IOWA STATE BANK & TRUST COMPANY
OF FAIRFIELD, IOWA and EARL WALLACE DICK,**
Defendants-Appellees.

Appeal from the Iowa District Court for Adair County, Paul R. Huscher, Judge.

Plaintiff appeals from the district court's dismissal of his lawsuit against defendants. **REVERSED AND REMANDED.**

Michelle L. Heller of Nepple Law, P.L.C., Muscatine, for appellant.

Myron L. Gookin of Foss, Kuiken, Gookin & Cochran, P.C., Fairfield, for appellees.

Heard by Sackett, C.J., and Huitink and Vogel, JJ.

SACKETT, C.J.

Plaintiff-appellant, Kenneth Turner, appeals from the district court's dismissal of his tort and contract claims against the defendants-appellees, former trustees of the Gene L. Turner Trust, a testamentary trust established by appellant's father. He contends the court erred in granting defendants' pre-answer motion to dismiss because his claims are independent of the defendants' actions as trustees. We reverse and remand for further proceedings.

I. Background Facts and Proceedings

On October 12, 2004, the district court in Van Buren County signed an order closing the trust and enforcing a family settlement agreement. On October 22, the trustees filed a supplemental final report, including a final accounting of the trust. Also on October 22, the court filed the order closing the trust and discharging the trustees. On October 24, 2005, Kenneth filed a petition in Adair County "to request damages to compensate him for the breach of contract, fraudulent misrepresentation, tortious interference with a contract, fraud and fraudulent conspiracy committed or caused by Iowa State Bank and Earl Wallace Dick." He also sought punitive damages. Defendants filed pre-answer motions for change of venue and to dismiss. The motion to dismiss alleged the action was an improper collateral attack on the trust proceedings and was untimely because it was filed more than one year after (1) Kenneth received the final report and accounting in the trust, which was mailed to Kenneth on April 9, 2004, (2) Kenneth filed objections to the final report on May 5, 2004, (3) Kenneth filed supplemental objections on September 3, 2004, (4) the court's ruling closing the trust and discharging the

trustees, dated October 12, 2004, and (5) the order closing the trust filed on October 22, 2004.

The district court ruled:

The court has attempted to divine the claims made by the plaintiff from the pleadings that are less than clear and concise. It is apparent that any causes of action stated by the plaintiff are collateral attacks on the trust proceedings . . . , barred by the statute of limitations, not against the parties named in this lawsuit, or not within the jurisdiction of the district court by virtue of the pending appeal. The defendants' Motion to Dismiss should be granted as to the entire Petition.

Because the entire Petition is subject to the grant of the Motion to Dismiss, the Motion for Change of Venue is moot.

II. Scope of Review

Our review of a district court's ruling on a motion to dismiss is for correction of errors at law. Iowa R. App. P. 6.4; *Mlynarik v. Bergantzel*, 675 N.W.2d 584, 586 (Iowa 2004). "A motion to dismiss is properly granted 'only when there exists no conceivable set of facts entitling the non-moving party to relief.'" *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004) (quoting *Barkema v. Williams Pipeline Co.*, 666 N.W.2d 612, 614 (Iowa 2003)). "Under notice pleading, nearly every case will survive a motion to dismiss." *Id.* (citing *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994)). "We view the plaintiff's allegation[s] 'in the light most favorable to the plaintiff with doubts resolved in that party's favor.'" *Id.* (quoting *Soike v. Evan Matthews & Co.*, 302 N.W.2d 841, 842 (Iowa 1981)). In *Cutler v. Klass, Whicher, & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991), the supreme court discussed "the special risks and problems [that] attend premature attacks on litigation by motions to dismiss," stating:

We recognize the temptation is strong for a defendant to strike a vulnerable petition at the earliest opportunity. Experience has

however taught us that vast judicial resources could be saved with the exercise of more professional patience. Under the foregoing rules dismissals of many of the weakest cases must be reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of summary judgment, or even by way of defense at trial. From a defendant's standpoint, moreover, it is far from unknown for the flimsiest of cases to gain strength when its dismissal is reversed on appeal.

The supreme court neither recommends “motions to dismiss in litigation, the viability of which is in any way debatable,” nor endorses “sustaining such motions, even where the ruling is eventually affirmed.” *Id.*

III. Claims on Appeal

Appellant contends the district court should have denied both the motion to dismiss and the motion for change of venue. Defendants seek attorney fees “related to the defense of plaintiff’s action and appeal.”

A. Motion to dismiss. Appellant raises several arguments in support of his claim the court erred in granting the motion to dismiss. He first argues the petition “clearly states numerous causes of action, especially when reasonable inferences are applied in favor of [appellant] and when he is allowed the benefit of doubt concerning any factual ambiguities.” Appellees argue all of the claims pled are related to the alleged “breach of some duty, negligent or intentional,” in their capacity as trustees and are barred by the one-year statute of limitations in Iowa Code section 633A.4504.

Accepting as true the allegations of appellant’s pleadings, with the limited record before us, we are unable to say “there exists no conceivable set of facts entitling [the plaintiff] to relief.” See *Rees*, 682 N.W.2d at 77. Accordingly, the district court should not have granted the pre-answer motion to dismiss. Our

decision, however, should not be viewed as a comment on the merits of the allegations in the petition.

B. Motion for change of venue. Having dismissed all of Kenneth's claims, the district court determined the motion for change of venue was moot. Kenneth argues the motion should have been denied because this action was not brought in the wrong county.

Because the district court did not rule on the motion for change of venue, there is nothing for us to review on appeal. See *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995).

C. Attorney fees. Appellees seek an award of attorney fees "related to the defense of plaintiff's action and appeal." They cite dissolution of marriage cases as support for their claim "the court should consider the respective financial positions of the parties and whether the party making the request was obligated to defend the district court's decision on appeal." See *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). The cases cited by appellees are inapposite. We find no basis for an award of attorney fees.

REVERSED AND REMANDED.

Vogel, J. dissents.

VOGEL, J. (dissents)

I respectfully dissent. The district court sorted through the plaintiff's petition and determined each claim was subject to dismissal. Most of the claims were dismissed because they were collateral attacks against the acts of the former trustees, which were time barred by the limitations provisions of Iowa Code section 633.4504 (2003). The claims did not appear to the district court to be anything more than a continuation of the plaintiff's discontent with the work of the trustees, repackaged into the newly asserted "independent contract and tort claims." I agree and would affirm the district court as to the dismissal of all claims.