

**IN THE COURT OF APPEALS OF IOWA**

No. 9-720 / 09-0321  
Filed December 30, 2009

**REGIONS BANK,**  
Plaintiff-Appellant,

**vs.**

**CITY STATE BANK,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Polk County, Artis I. Reis, Judge.

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

Thomas H. Burke and Jonathan Kramer of Whitfield & Eddy, P.L.C., Des Moines, for appellant.

Thomas L. Flynn, Margaret C. Callahan, and Matthew C. McDermott of Belin McCormick, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

**SACKETT, C.J.**

Plaintiff, Regions Bank appeals from the district court ruling granting a motion for summary judgment in favor of defendant, City State Bank. Regions Bank contends the district court erred in (1) failing to grant its request for a continuance to conduct discovery prior to the summary judgment hearing, (2) finding that City State's notice of cancellation complied with the requirements of Iowa Code section 654.18 (2007), and (3) failing to consider whether other contractual agreements affected statutory foreclosure and redemption rights. We find the district court abused its discretion in denying Regions Bank's request for a continuance and remand for further proceedings.

**I. BACKGROUND AND PROCEEDINGS.** Kennybrook Development Company, L.C. borrowed funds from City State to purchase approximately 117 acres in Grimes, Iowa. The property was collateral for the mortgage. Kennybrook then borrowed additional funds in the form of two mortgages from Regions Bank to use in building a mixed use development on the property. Certain platted lots on the property served as collateral for these mortgages. According to Regions Bank, a portion of the funds advanced were also to be used toward the purchase price of the land. In an agreement between Kennybrook and City State, some of the funds loaned from Regions Bank were to be paid to City State in exchange for a partial release of certain lots from City State's mortgage. Regions Bank contends it was a third party beneficiary to this agreement, that partial releases were a standard practice of City State, and that it relied on the partial release agreement in deciding to loan Kennybrook funds.

Kennybrook defaulted on the mortgage to City State. City State, the senior lienholder, initiated proceedings under Iowa Code section 654.18 to arrange an alternative nonjudicial voluntary foreclosure. City State sent notice to Kennybrook informing it of Kennybrook's right to cancel the voluntary foreclosure agreement, as required by Iowa Code section 654.18. City State also sent a notice to Regions Bank, as required by Iowa Code sections 654.18 and 628.29, informing it that Regions Bank had a right to redeem the property as a junior lienholder. Regions Bank informed City State that it wanted to redeem one specific lot of the property and offered to pay the release price<sup>1</sup> to City State for the lot. Regions Bank claimed City State was obligated to accept this money for the lot due to a separate agreement between Kennybrook and City State. City State refused the offer.

On August 22, 2008, Regions Bank filed a petition seeking a declaratory judgment that the voluntary foreclosure was void because City State failed to provide proper notice under Iowa Code section 654.18 and interfered with Regions Bank's right of redemption. It also alleged the foreclosure should be set aside as inequitable. City State filed a motion for summary judgment. Regions Bank resisted the motion and filed a conditional motion for summary judgment on its claim that City State had been unjustly enriched. The matter came on for hearing on December 10, 2008. The court granted City's State's motion, finding it complied fully with the statute and the foreclosure was not void. The court denied Regions Bank's motion for summary judgment on its unjust enrichment

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<sup>1</sup> The release price is listed at two different prices in various places in the record. It is stated as \$35,000 in some places in the record, and as \$42,000 in others.

claim but clarified that the ruling “shall not prejudice Regions from pursuing a separate action based on the third party beneficiary or unjust enrichment claims it has advanced in this action.” On appeal, Regions Bank asserts the district court should have granted it a continuance to conduct further discovery and erred in concluding that other agreements cannot modify the requirements of section 654.18 and that proper notice was given under the statute.

**II. ERROR PRESERVATION AND STANDARD OF REVIEW.** City State first argues Regions Bank has not preserved error on its claim that the court should have granted Regions Bank a continuance to conduct further discovery. Regions Bank requested a continuance within its resistance and motion for summary judgment. The district court implicitly addressed the issue in its ruling. It rejected Regions Bank’s request finding that even if the additional evidence was obtained through discovery, it would not affect the outcome of the summary judgment proceeding. Error was therefore preserved.

We review a court’s ruling on a motion for continuance made pursuant to rule 1.981(6) for an abuse of discretion. *Kulish v. Ellsworth*, 566 N.W.2d 885, 889 (Iowa 1997). An abuse of discretion occurs when it is exercised “on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *Id.* (quoting *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 543 (Iowa 1996)). Even under an abuse of discretion review, we will correct erroneous applications of law. *Everly v. Knoxville Cmty. Sch. Dist.*, 774 N.W.2d 488, 492 (Iowa 2009).

**III. REQUEST FOR CONTINUANCE.** Iowa Rule of Civil Procedure 1.981(6) provides:

Should it appear from the affidavits of a party opposing the motion that the party for reasons stated cannot present by affidavit facts essential to justify the opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

This rule is designed for a party who “legitimately needs additional time to gather facts essential to justify its opposition when faced by a summary judgment motion.” *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 301 (Iowa 1996). All discovery need not be completed prior to ruling on a motion for summary judgment but generally, a nonmoving party should have the opportunity to make discovery before the hearing and ruling on the motion. *Id.* at 302. In order to be entitled to a continuance, the party must substantially comply with the rule’s requirements of providing, by affidavit, reasons why facts essential to a resistance cannot be presented, and what additional factual information is necessary. *Id.* at 301.

To support the request for continuance, Regions Bank’s attorney submitted an affidavit stating that the bank required additional time for discovery to produce evidence of the release agreement. The attorney stated he had not had the opportunity to depose a representative from City State. He also noted that he had sent a request for production of documents to City State, but that City State’s response to the request was due the same day that Regions Bank had to file its resistance. The district court below determined that more discovery was unnecessary stating:

Even if Regions had produced a witness affidavit or other competent evidence supporting the existence of a release agreement between City State and Regions, summary judgment on

the issue of the foreclosure would still be warranted, as City State has plainly complied with the terms of § 654.18.

We disagree with this finding. We cannot foretell what effect, if any, a release agreement would have on the foreclosure process without examining its terms. Furthermore, Regions Bank's affidavit in support of its request for continuance substantially complies with the requirements of rule 1.981(6). It asserted that Regions Bank, as of the date of the hearing, had not been able to depose witnesses needed to verify the existence of the release agreement, that the defendant had not responded to discovery requests, and that the release agreement was necessary to resist the motion. The district court abused its discretion in failing to grant Regions Bank's request for a continuance. Since Regions Bank is entitled to more time to conduct discovery before a hearing on summary judgment, we need not address the other arguments. We reverse the district court's ruling denying the bank's request for continuance and remand for further proceedings. We do not retain jurisdiction.

**REVERSED AND REMANDED.**