IN THE COURT OF APPEALS OF IOWA

No. 3-652 / 12-2305
Filed October 23, 2013

WESTCO AGRONOMY COMPANY, LLC,
Plaintiff-Appellant,

vs.

WILLIAM S. WOLLESEN a/k/a BILL WOLLESEN, KRISTI J.WOOLESEN, WILLIAM S. AND KRISTI J. WOOLESEN REVOCABLE TRUST, JOHN W. WOLLESEN, IOWA PLAINS FARMS and CHAD A. HARTZLER,
Defendants.

CARROLL COUNTY STATE BANK,
Intervenor-Appellee.

Appeal from the Iowa District Court for Story County, Michael J. Moon, Judge.

Westco Agronomy Company (Westco) appeals the district court order granting Carroll County State Bank's (Bank) motion for summary judgment. **AFFIRMED.**

Thomas W. Polking of Wilcox, Polking, Gerken, Schwarzkopf, Copeland & Williams, P.C., Jefferson, for appellant.

Thomas H. Walton of Nyemaster Goode, P.C., Des Moines, for appellant.

Andrew J. Boettger of Hastings, Gartin & Boettger, L.L.P., Ames, for Chad Hartzler.

Mark McCormick of Belin McCormick, P.C., Des Moines, for Iowa Plains and Willeson.

Jon Peter Sullivan of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for intervenor-appellee.

Heard by Potterfield, P.J., and Mullins and Bower, JJ.

BOWER, J.

Westco Agronomy Company (Westco) appeals the district court order granting Carroll County State Bank's (Bank) motion for summary judgment. Westco argues the district court improperly ruled the Bank is entitled to possession of two checks representing the proceeds from the sale of grain, and erred in failing to apply the doctrine of marshaling, which would require the Bank use other funds to satisfy a debt. We find Westco has failed to preserve error on the applicability of Iowa Code section 554.1309 (2011) concerning acceleration clauses and has not raised a genuine issue of material fact on the issue of marshaling. We affirm.

I. Background Facts and Proceedings

This appeal is the result of a disagreement involving several entities over who is entitled to two checks representing the proceeds of grain sales. The Bank is an intervenor in the underlying suit between Westco and Iowa Plains Farms (IPF), the entity which grew, harvested, and sold the grain.[1]

For purposes of this appeal, the facts are as follows: IPF is an agricultural operation. The operation is financed on a yearly basis with an operating loan from the Bank. Each year IPF executes a promissory note known as the yearly operating note. To protect its interests the Bank executes a security agreement perfecting its rights in the proceeds of the grain, which is grown as part of the

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[1] In the underlying suit Westco alleges it has not been paid for agricultural supplies Westco supplied to IPF. IPF responds by relying on certain pre-paid contracts negotiated with a former Westco employee, who is a co-defendant in the suit. The claims and present status of the underlying suit are not in issue in this proceeding. The Wollensens and Chad Hartzler, all parties to the underlying suit, are not parties to this appeal.

operation. On February 23, 2011, IPF took out the 2011 operating note, due on March 1, 2012. The Bank executed a security agreement for the proceeds of the grain. The same process was repeated for the 2012 crop with a loan date of December 22, 2011, and a due date of January 10, 2013. A new security agreement was filed for the 2012 operating note. In each instance, the security agreement contained a future advances clause, as did a financing statement previously filed by the Bank with the Iowa Secretary of State on May 7, 2002.[2]

Westco filed a financing statement perfecting an interest in the proceeds of the sale of the same grain on September 22, 2011, with an amendment following the next day. The financing statement was related to agricultural supplies provided by Westco to IPF. Westco notified certain entities of their security interest in the grain.

On November 3, 2011, IPF sold grain to DFS, Inc. A check was written by DFS to pay for the grain and was made payable to Westco, IPF, and the Bank. Because Westco had notified DFS of their security interest in the proceeds of the grain, the check was delivered to Westco. A second check, from a subsequent sale of grain to DFS, was issued in the same manner on January 3, 2012. Both grain sales were conducted during the pendency of the underlying suit.

The Bank intervened in the underlying suit after Westco refused to indorse the checks to the Bank. A motion for summary judgment was filed by the Bank claiming it is entitled to immediate possession of the checks under various theories.

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[2] The Bank asserts appropriate continuation statements have been filed for the 2002 financing statement.

II. Standard of Review

We review rulings on motions for summary judgment for errors at law. *Mueller v. Westmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012). "Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id*. We view all evidence in the light most favorable to the non-moving party, who is required to respond with specific facts if the motion is properly supported. *Id.*

III. Discussion

Westco argues the district court erred in two ways when granting the motion for summary judgment.[3] First, Westco contends the clause in the security agreement giving the Bank a superior security interest to the checks is an acceleration clause which, under section 554.1309 of the Iowa Code, requires a showing of good faith before the debt may be accelerated. Second, Westco argues the doctrine of marshaling requires the Bank first rely on other possible sources of security to satisfy the debt before using a fund in which both parties have a security interest.

A. Section 554.1309 and Acceleration

Section 554.1309 of the Iowa Code places limitations upon the use of acceleration clauses in security agreements. The section, taken from the Uniform Commercial Code, requires a display of good faith when a party has the

[3] The parties agree the Bank has the superior security interest in the checks. We do not review the issue of priority based upon their agreement, which was accepted as correct by the district court.

ability to accelerate a debt "at will" or when the party has deemed itself insecure. *Id.* Good faith is presumed. *See* Iowa Code § 554.1309.

Westco argues the security agreement giving the Bank a superior right to the checks is such an acceleration clause, which reads:

> **Sale of Collateral.** The following provisions relate to any sale . . . or other disposition of crops, livestock, or other farm products included as all or part of the Collateral:
> . . . .
> (3) All proceeds of any sale, consignment, lease, license, exchange, transfer, or other disposition shall be made immediately available to Lender in a form jointly payable to Grantor and Lender . . . all accounts and other proceeds of the Collateral shall be immediately indorsed, assigned and delivered by Grantor to Lender as security for the Indebtedness. At any time before or after the occurrence of an Event of Default, Lender may collect all proceeds of the Collateral without notice to Grantor. All proceeds of the Collateral, when received by Lender, may at Lender's sole discretion be applied to the Indebtedness.

Under Westco's interpretation of the clause, the Bank would need a good faith belief that performance or payment would be impaired before it would be able to utilize the clause to take an immediate possessory interest in the checks. Westco presented this argument in its resistance brief during the summary judgment proceedings, and the Bank has argued the section does not apply because the clause is not an acceleration clause. The district court, however, did not rule on this portion of the dispute.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012). When the district court fails to rule on an issue properly before it the party is required to file a motion requesting a ruling to preserve error on the issue. *State Farm Mut.*

Auto. Ins. Co. v. Pflibsen, 350 N.W.2d 202, 207 (Iowa 1984). The parties both assert error was preserved when Westco raised the issue in its resistance brief. The fact the issue is presented in briefing does not make it part of the record on appellate review. *See Tolander v. Farmers Nat'l Bank*, 452 N.W.2d 422, 424–25 (Iowa 1990); *State v. Higginbotham*, 351 N.W.2d 513, 516 (Iowa 1984). The district court did not address the issue leaving us to guess as to the basis for the ruling.[4] We do not reach the merits of Westco's argument on the applicability of this provision of law.

B. Marshaling

Westco argues the district court erred in failing to use the doctrine of marshaling, which would require the Bank resort to other secured assets rather than collecting on the checks, which are security for debts held by Westco and the Bank. The district court declined to do so and held the marshaling of assets in this case would work to the prejudice of the Bank as the senior lienholder.

The doctrine of marshaling has rarely been addressed by our supreme court in the last century. The general rule is when a creditor has a lien on two funds, one of which is also serving as security for the debt of another, the creditor should "take [their] satisfaction out of that fund upon which another creditor has no lien." *Dickson v. Chorn*, 6 Iowa 19, 28 (1858). Fundamental to application of

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[4] Westco did file a motion to enlarge on other issues in the case, though not on applicability of section 554.1309. Because the district court order does not explain how the court disposed of the issue, we are left to guess as to the court's rationale. It is possible the district court found the clause to be an acceleration clause but presumed good faith, or it is possible the district court determined the clause was not an acceleration clause. Without a record which we can review for errors at law, it is impossible for us to examine the merits of Westco's claim.

the doctrine, however, is the concept that it cannot be employed where it would work to the injustice of the senior creditor. *Tolerton & Stetson Co. v. Anderson*, 78 N.W. 822, 823 (Iowa 1899). Courts will not force the senior lienholder to resort to the second fund if it will result in delay, if collection of the second fund is less certain, or if they stand to otherwise suffer injury in some way. *See Wolf v. Smith*, 36 Iowa 454, 457 (Iowa 1873). Application of the doctrine is an equitable issue. *Iowa Title & Loan Co. v. Clark Bros.*, 237 N.W. 336, 338 (Iowa 1931).

We agree with the district court Westco has failed to raise a genuine issue of material fact as to the absence of injustice or potential prejudice marshaling would work on the Bank. The second fund Westco seeks to impose upon the Bank consists of other crop inventory, which would have to be located and sold, or the proceeds located and seized, before the Bank could effectively rely upon that form of security. Westco has failed to raise a fact question as to the certainty of using other proceeds to repay the note. Absent such a showing, the district court properly granted the motion for summary judgment.

AFFIRMED.