IN THE COURT OF APPEALS OF IOWA

No. 7-183 / 05-2023
Filed June 27, 2007

ALEXANDER TECHNOLOGIES EUROPE, LTD.,
Plaintiff-Appellee,

vs.

MACDONALD LETTER SERVICE, INC.,
Substituted Party for Amazing Products Co.
and Richard Westcott,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, James M. Drew, Judge.

Defendant appeals from the district court's grant of a summary judgment motion in favor of plaintiff in an action of replevin. **AFFIRMED.**

Mark C. Daggy, Des Moines, pro se, for appellant.

John L. Duffy of Heiny, McManigal, Duffy, Stambaugh & Anderson, P.L.C., Mason City, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

MILLER, J.

MacDonald Letter Service, Inc. (MacDonald) appeals from the district court's grant of summary judgment in favor of Alexander Technologies Europe, Ltd. (Alexander) in an action of replevin. We affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

The summary judgment record reveals the following undisputed facts. Alexander designs, manufactures, and distributes plastic containers for batteries and battery chargers. An initial step of the manufacturing process involves the fabrication of "molds," which are used to form the plastic containers housing the charging systems. Alexander designs the molds according to its customers' specifications. It brings the mechanical design of the mold to a "toolmaker" who builds the mold from steel or aluminum. Alexander then takes the completed mold to a "plastic supplier." The plastic supplier uses the mold to construct the plastic product for Alexander.

Amazing Products Co. (Amazing), which is owned by Richard Westcott, is a plastic product supplier for Alexander. Amazing leases space in the basement of Alexander's domestic office in Mason City, Iowa. Alexander allowed Amazing use of its molds so that Amazing could produce plastic products for Alexander. Alexander filed a petition for a writ of replevin, seeking immediate return of the molds and miscellaneous "mold components" (disputed property) in the possession of Amazing and Westcott. An itemized list of the disputed property Alexander sought possession of was attached to its petition. Amazing and Westcott filed an answer denying all of the allegations set forth in the petition.

On March 23, 2005, a hearing was held pursuant to Iowa Code section 643.7 (2005) due to Alexander's desire for immediate delivery of the disputed property. At the hearing, the parties stipulated Alexander was entitled to immediate possession of the disputed property. The only issue before the court was the amount of the bond Alexander would be required to post in order to obtain immediate possession. Following the hearing, the district court entered an order directing the clerk of court to issue a writ of replevin requiring the sheriff to deliver the disputed property to Alexander once it posted a bond in the amount of $758,800.

Before the writ was executed, Amazing and Westcott attempted to post a delivery bond pursuant to section 643.12 in order to retain possession of the disputed property. The district court denied their request, reasoning the parties' stipulation regarding Alexander's right to immediate possession of the disputed property precluded Amazing and Westcott from posting a delivery bond. Alexander thereafter posted the required bond and obtained possession of the property.

On May 25, 2005, Westcott assigned "all rights pertaining to this case now vested in either Amazing Products Co. or Richard Westcott" to MacDonald Letter Service, Inc. (MacDonald). Mark C. Daggy, chief executive officer of MacDonald, filed a "Substitution of Party and Appearance" on behalf of MacDonald, which gave "notice of Substitution of MacDonald Letter Service, Inc. as Defendant in this action."[1] Alexander filed a motion for summary judgment on November 8,

[1] It does not affirmatively appear from the record that Daggy is a licensed attorney. "[A] corporation may not represent itself through nonlawyer employees, officers, or shareholders." *Hawkeye Bank and Trust, Nat'l Ass'n v. Baugh*, 463 N.W.2d 22, 25 (Iowa

2005, asserting it was entitled to possession of the disputed property as a matter of law. On November 28, 2005, MacDonald filed a request seeking additional time to respond to the summary judgment motion and an indefinite continuance of the hearing on said motion.

The motion for summary judgment was heard by the court on December 5, 2005. MacDonald filed a resistance to the summary judgment motion on the day of the hearing and withdrew its request to continue the hearing. The district court denied MacDonald's motion for additional time to respond to the summary judgment motion and declined to "consider the defendant's resistance except to the extent it constitutes legal argument." The district court determined no genuine issue of material fact existed on the "question of plaintiff's right to permanent possession of the property." The court accordingly entered summary judgment in favor of Alexander. Alexander filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), requesting the court modify its ruling by entering an order discharging its bond. The district court granted the motion and entered an order exonerating the bond posted by Alexander.

MacDonald appeals. It claims the district court erred in granting the motion for summary judgment. MacDonald argues the district court should have considered its resistance to the motion. It further argues summary judgment was inappropriate due to pleading deficiencies in the petition and Alexander's failure to satisfy its burden of proving there was no genuine issue of material fact. MacDonald also claims the district court erred in denying Amazing and

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1990). However, Alexander does not contest Daggy's representation of MacDonald. We will therefore consider the briefs filed by Daggy on behalf of MacDonald, although Daggy's purported representation is highly improper if he is in fact not a licensed attorney.

Westcott's request to post a delivery bond and in entering the order discharging Alexander's bond.

II. SCOPE AND STANDARDS OF REVIEW.

An action for a writ of replevin is an ordinary proceeding. Iowa Code § 643.2. Accordingly, our review is for correction of errors at law. Iowa R. App. P. 6.4; *Prenger v. Baker*, 542 N.W.2d 805, 807 (Iowa 1995).

We also review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005). 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); *Grinnell Mut. Reins. Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002). A fact question arises if reasonable minds can differ on how the issue should be resolved. *Grinnell Mut. Reins.*, 654 N.W.2d at 535. No fact question arises if the only conflict concerns legal consequences flowing from undisputed facts. *Id*.

We review the district court's refusal to grant additional time to resist a summary judgment motion for abuse of discretion. *Kulish v. Ellsworth*, 566 N.W.2d 885, 889-90 (Iowa 1997). To prove an abuse of discretion, MacDonald 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) (citations omitted).

III. MERITS.

A. Timeliness of Resistance.

We first address MacDonald's claim that the district court was incorrect in failing to consider its resistance to the summary judgment motion. Alexander filed its motion for summary judgment on November 8, 2005. MacDonald filed a request for additional time to resist the motion on November 28, 2005. The proof of service on the request for additional time to resist indicates it was mailed on November 22, 2005. MacDonald filed a resistance to the summary judgment motion on December 5, 2005. Iowa Rule of Civil Procedure 1.981(3) requires that "[a]ny party resisting the motion shall file a resistance within 15 days, unless otherwise ordered by the court. . . ." Relying on rule 1.981(3), the district court determined the resistance was due on November 23, 2005. The court concluded MacDonald's resistance should be disregarded because MacDonald did not offer a "compelling reason for being unable to file a timely resistance. More importantly, no request for an extension was made until after the deadline expired."

MacDonald argues its request for extension of time was made before the expiration of the period set forth in rule 1.981(3). We agree. Iowa Rule of Civil Procedure 1.443(2) provides that when a party is required to respond "within a prescribed period after the service of a notice or other paper upon the party . . . three days shall be added to the prescribed period." Therefore, MacDonald had until November 28, 2005, to file a resistance to the summary judgment motion.[2]

[2] The fifteen-day deadline expired on November 26, 2005, which was a Saturday. MacDonald's time for filing the resistance was accordingly extended to the next day the clerk of court's office was open. *See* Iowa Code § 4.1(34).

The request for extension of time was thus made before the time to resist the summary judgment motion expired.

Iowa Rule of Civil Procedure 1.443(1)(*a*) allows the court "in its discretion" and for "cause shown" to order the "period enlarged if request therefor is made before the expiration of the period originally prescribed. . . ."[3] MacDonald requested additional time to file a resistance due to on-going settlement negotiations between the parties. However, Daggy testified the failure to timely file a resistance was "partly my fault . . . I hadn't seen my son that lives in Arizona and I spent a week down there when I probably should have been working on this." Under the circumstances, we find MacDonald did not establish that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Kulish*, 566 N.W.2d at 889 (internal quotation omitted). We therefore conclude the district court did not abuse its discretion in denying MacDonald's request for additional time to file a resistance to the summary judgment motion and in refusing to consider the untimely resistance.

B. Summary Judgment Motion.

"Although our rules of procedure allow a nonmoving party to resist summary judgment, the burden is still on the moving party to show the district court that there was no genuine issue of material fact and that it was entitled to a judgment as a matter of law." *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 27 (Iowa 2005) (citations omitted). A party confronted with a

[3] The parties contend the district court should have applied the "excusable neglect" standard set forth in rule 1.443(1)(*b*). That subsection does not apply due to our conclusion that MacDonald's request for additional time was made before the "expiration of the specified period." *See* Iowa R. Civ. P. 1.443(1)(*b*) ("Upon motion made *after* the expiration of the specified period" the court may extend the period of time to respond "where the failure to act was the result of excusable neglect. . . ." (emphasis added)).

summary judgment motion can accordingly rely on the district court to correctly apply the law and deny summary judgment when the moving party fails to establish it is entitled to judgment as a matter of law. *Id.* at 27-28.

MacDonald claims the district court did not correctly apply the law by granting summary judgment where the petition failed to comply with the pleading requirements set forth in Iowa Code sections 643.1(1) and (3). At the summary judgment hearing, MacDonald asserted the "motion for summary judgment is deficient on its face" because Alexander did not "plead facts showing his right to the property" as required by section 643.1(3).[4] The district court construed MacDonald's argument as an untimely motion to dismiss, which it refused to consider pursuant to Iowa Rule of Civil Procedure 1.441(1). We question the court's characterization of MacDonald's argument as a motion to dismiss. MacDonald did not argue the petition should be dismissed due to its deficiencies. Instead, MacDonald argued summary judgment was improper because the petition failed to comply with the pleading requirements set forth in section 643.1(3). Assuming arguendo the challenge to the pleading was properly raised, we find the claimed deficiencies in the petition did not preclude entry of summary judgment.

A petition for a writ of replevin must state, inter alia, "a particular description of the property claimed" along with "facts constituting the plaintiff's right to the present possession thereof, and the extent of the plaintiff's interest in the property. . . ." Iowa Code §§ 643.1(1), (3). The petition in this case contains

[4] MacDonald argues for the first time on appeal that summary judgment was improper because the petition also failed to comply with section 643.1(1). Alexander does not raise any error preservation issues. We will therefore address MacDonald's argument under both subsections.

an itemized list of the property Alexander sought possession of. We therefore reject MacDonald's argument that the petition failed to comply with section 643.1(1). MacDonald is correct the petition does not set forth facts stating Alexander's right to the possession of the property and the extent of its interest as required by section 643.1(3). We conclude the failure of the petition in this regard is not fatal. *See, e.g., Roger's Backhoe Serv., Inc. v. Nichols*, 681 N.W.2d 647, 651 (Iowa 2004) (finding failure to comply with rule requiring the pleading of special matters with respect to a contract claim does not render the petition fatally defective); *Berg v. Ridgeway*, 258 Iowa 640, 644, 140 N.W.2d 95, 98 (1966) (determining failure to comply with a pleading requirement in a contract claim is not fatal and can be remedied by requesting a more specific statement or engaging in discovery).

We do not agree with MacDonald that *Lyons v. Sherman*, 245 Iowa 378, 62 N.W.2d 196 (1954), requires "a plaintiff in a replevin case [to] comply with the statutory pleading requirements or . . . the action will be dismissed." *Lyons* affirmed a district court's grant of a directed verdict in favor of the defendant in a replevin action where the plaintiff could not identify which steer he was entitled to possess. *Id.* at 381-82, 62 N.W.2d at 198. The decision in *Lyons* was not based on a pleading deficiency; rather, it was based on the failure of the plaintiff to prove an element of his claim. *Id.*; *see also Prenger*, 542 N.W.2d at 810 (affirming trial court's determination that the plaintiffs were not entitled to possession of ostriches where they failed to meet their burden of proof as to identification). We accordingly reject this assignment of error.

MacDonald next claims the district court erred in granting the motion for summary judgment because there is a genuine issue of material fact as to whether Alexander was entitled to possession of the disputed property at the time the action was filed. "Replevin is a specialized statutory remedy with a narrow purpose designed to restore possession of property to the party entitled to possession." *Roush v. Mahaska State Bank*, 605 N.W.2d 6, 9 (Iowa 2000). "The gist of a replevin action is enforcement of plaintiff's right to immediate possession of the property wrongfully taken or detained." *Flickinger v. Mark IV Apartments, Ass'n*, 315 N.W.2d 794, 796 (Iowa 1982). "A wrongful detention occurs when the defendant wrongfully withholds or retains possession of the property sought to be recovered." *Id.* The plaintiff bears the burden of proving by a preponderance of evidence that it was entitled to possession at the time the action was filed. *Marx Truck Line, Inc. v. Fredricksen*, 260 Iowa 540, 546, 150 N.W.2d 102, 105 (1967).

The undisputed facts in the summary judgement record reveal Alexander owned the disputed property. Jay Miller, senior vice president of sales and engineering for Alexander, testified at the March 23, 2005, bond hearing that the disputed property was owned by Alexander.[5] He further testified the majority of the disputed property in Amazing and Westcott's possession was designed and built by Alexander. According to Miller, Alexander allowed Amazing and Westcott use of the disputed property so that Amazing could produce plastic products for Alexander. The senior vice president of operations and finance for Alexander, Tania Cooper, likewise testified the disputed property was owned by

[5] A transcript of the hearing was admitted as evidence at the summary judgment hearing.

Alexander. She explained the itemized list attached to the petition is an "asset register," which "specifically lists tooling that [was] built and manufactured in-house over the years. . . ." In an affidavit submitted in support of the summary judgment motion, Westcott averred neither he nor Amazing had any "right of or claim to possession or ownership of any item of" the disputed property, and neither he nor Amazing "have been damaged in any way as a result of delivery of immediate possession of the" property to Alexander.[6]

"The fact of ownership draws with it the right of possession. If nothing further appears, the law raises the presumption the owner is entitled" to possession. *Varvaris v. Varvaris*, 255 Iowa 800, 804, 124 N.W.2d 163, 165 (1963). MacDonald disputes Alexander's ownership of the disputed property, arguing "[t]here is evidence in the record" that the disputed property "belonged to a company called Lexstar Technologies." We do not agree with MacDonald there is any such evidence in the summary judgment record. Furthermore, we have recognized it is no defense to an action of replevin that legal title to property is in a third party. *Corbitt v. Heisey*, 15 Iowa 296 (1863) (finding though "the outstanding title may have been in a third person . . . it does not follow from this that plaintiff could not recover."). We conclude the undisputed facts in the summary judgment record establish Alexander was entitled to permanent possession of the disputed property.

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[6] MacDonald argues the district court erred in relying on the affidavit because Westcott's statement in the affidavit regarding the absence of damages was inconsistent with his testimony at the March 23, 2005, hearing and the attempt to post a delivery bond. We find no support in the record for this contention. We further note damages in a replevin action are only available to the successful party as compensation for the wrongful taking or detention of the disputed property. Iowa Code §§ 643.16, 643.17; *Roush*, 605 N.W.2d at 9.

C. Delivery Bond.

MacDonald claims the district court erred in denying Amazing and Westcott's request to post a delivery bond. Iowa Code section 643.12 allows a defendant in a replevin action to post a delivery bond in order to retain possession of the disputed property while the proceeding is pending. In denying Amazing and Westcott's motion, the court reasoned the parties' stipulation regarding Alexander's right to immediate possession of the disputed property at the March 23, 2005, section 643.7 bond hearing precluded the posting of a delivery bond. We agree with MacDonald that the district court erred in determining Amazing and Westcott could not post a delivery bond.

We first note the parties' stipulation regarding Alexander's right to immediate possession was clearly limited to the March 23, 2005, hearing. At the hearing, counsel for Amazing and Westcott stated:

> For the purposes of this hearing only though I want to make it clear that at the hearing that will occur later -- that just for this mere possessory hearing and the posting of the bond we are not resisting due to any lack of claim to ownership.

Moreover, there is nothing in section 643.12 indicating a defendant must establish it is entitled to possession of the disputed property before a delivery bond may be posted. The posting of a delivery bond simply allows the defendant to retain possession of the disputed property until the ultimate issue of possession is determined. Therefore, the district court was incorrect in basing its denial of Amazing and Westcott's request to post a delivery bond on the parties' stipulation at the March 23, 2005, hearing. Nevertheless, we conclude reversal on this ground is not warranted due to our determination the district court was correct in granting summary judgment in favor of Alexander. *See Shane v.*

Russell, 250 Iowa 44, 46, 92 N.W.2d 567, 568 (1958) ("A trial court will not be reversed unless it is shown the complaining party's rights were prejudiced by a court's action.").

D. Discharge of Bond.

After MacDonald filed a notice of appeal from the district court's summary judgment ruling, Alexander filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) requesting the court modify the ruling by entering an order discharging its bond. The district court found its failure to "mention the status of plaintiff's bond" was "an oversight" that "should be corrected." The court accordingly entered an order exonerating the bond posted by Alexander. MacDonald claims the district court "erred in entering an order releasing [Alexander] on the bond in this case after the notice of appeal had been filed."

When a notice of appeal is filed, sole jurisdiction of the matter is placed in the appellate court. *In re Estate of Tollefsrud*, 275 N.W.2d 412, 417 (Iowa 1979). The trial court thus loses jurisdiction over the merits of a controversy when an appeal is perfected. *Id.*; *see also Wolf v. City of Ely*, 493 N.W.2d 846, 848 (Iowa 1992) (finding the district court did not have jurisdiction to rule on a 1.904(2) motion that was filed after an appeal had been perfected). However, "a trial court retains jurisdiction to proceed as to issues collateral to and not affecting the subject matter of the appeal." *Tollefsrud*, 275 N.W.2d at 418. Citing *Tollefsrud*, Alexander argues the district court's order discharging the section 643.7 bond posted by Alexander was collateral to the subject matter of the appeal. We need not decide whether the order was collateral, however, because the district court's

grant of summary judgment was correct and error, if any, in the district court's exoneration of the bond has thus not prejudiced any rights of MacDonald.

IV. CONCLUSION.

We find the district court did not abuse its discretion in denying MacDonald's request for additional time to resist the summary judgment motion and in refusing to consider the untimely resistance. We conclude the district court properly granted summary judgment in favor of Alexander. Assuming arguendo MacDonald's challenge to Alexander's petition was properly raised, we find the claimed deficiencies in the pleading did not preclude entry of summary judgment. We further find the undisputed facts in the summary judgment record establish Alexander was entitled to permanent possession of the disputed property. We conclude the district court did err in denying Amazing and Westcott's request to post a delivery bond. However, reversal on this ground is not warranted due to our determination the district court was correct in granting summary judgment in favor of Alexander. Finally, because the district court correctly granted summary judgment, error, if any, in the court's exoneration of Alexander's bond did not prejudice MacDonald. We accordingly affirm the judgment of the district court.

AFFIRMED.