IN THE COURT OF APPEALS OF IOWA

No. 7-688 / 06-1550
Filed November 29, 2007

GREAT WESTERN BANK,
Plaintiff-Appellee,

vs.

STEPHEN D. CREGER,
Defendant-Appellant

FIRST CHOICE HEATING & COOLING CO., KATHY A. CREGER, CITY OF DES MOINES, IOWA, STATE OF IOWA, ABC SUPPLY CO., STATE OF IOWA DEPARTMENT OF REVENUE,
Defendants.

Appeal from the Iowa District Court for Polk County, David Christensen, Judge.

Stephen Creger appeals the district court's ruling finding summary judgment in favor of Great Western Bank. **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

Thomas Lenihan, West Des Moines, for appellant.

Thomas Burke and Nicholas Cooper of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Stephen Creger appeals the district court's ruling finding summary judgment in favor of Great Western Bank (GWB). Creger claims the district court erred by relying on the rebuttable presumption of the validity of a notarized signature, thus, improperly determining the sufficiency of the evidence when it granted GWB's motion for summary judgment. We reverse and remand for further proceedings.

I. Background Facts and Proceedings

GWB filed a mortgage foreclosure action against Creger, his ex-wife, and First Choice Heating & Cooling Co. (First Choice) on January 18, 2006.[1] The petition alleged that on September 3, 2004, the Cregers executed a personal guaranty and a mortgage in favor of GWB to secure a loan to First Choice. GWB was initially not able to obtain service upon Creger. Creger was eventually served by posting and first-class mail in February 2006 after the district court granted permission to GWB to serve by alternative service. Creger did not file an answer until June 15, 2006, after GWB filed a notice of intent to file a written default against him. His answer contained an affirmative defense that the signatures on the loan and mortgage documents were not actually his own.

GWB then filed a motion for summary judgment, claiming there were no genuine issues of material fact. In his resistance to GWB's motion for summary judgment filed July 6, 2006, Creger claimed the promissory note, security agreements, mortgage, and other documents allegedly executed by himself on

[1] First Choice and Kathy Creger do not appeal the summary judgment ruling.

September 3, 2004, were not, in fact, his signatures. He supported this contention with his own affidavit stating in part:

> 3. For the first time I had an opportunity to review the Exhibits which are attached to the Petition. When I first reviewed the Exhibits I was very confused. The signatures which are contained on those documents that are supposed to be mine in fact look very much like my signature. They look so much like my signature that I began to question myself.
> 4. However, I did not sign any documents on September 3, 2004. Despite the fact that the document [sic] may look to bear my signature, they are in fact not my signature.
> 5. I am confident that they are not my signature because on September 3, 2004, I was in Minnesota for the entire day and could not have signed any such documents.
> 6. Further, it is clear to me after reading some of the terms of the documents that these documents are different than the actual ones that I signed at Great Western Bank.
> 7. I give this Affidavit for purposes of clarifying that the signature [sic] which purports to be mine on Exhibit "A", "B", "C", and "E" do not bear my signature and any effort to suggest that these are my signatures is forgery.

In response, GWB filed the affidavit of Michael McCoy, vice president of GWB. McCoy stated that he was the notary public for Creger's signature on the documents, that to the best of his information and belief the documents were executed by Creger, and that it is not his nor GWB's practice or procedure to allow documents which require notarization to be executed outside the presence of a notary public. GWB also sought to have Creger's resistance to the motion for summary judgment stricken. The district court did not strike Creger's resistance, but ruled in favor of GWB on summary judgment, finding the mere assertion by Creger denying that his signature was on the documents was not clear evidence to overcome the presumption of validity afforded to notarized acts. This appeal followed.

II. Standard of Review

We review the district court's ruling on a motion for summary judgment for corrections of errors at law. Iowa R. App. P. 6.4; *General Car & Truck Leasing Sys., Inc. v. Lane & Waterman,* 557 N.W.2d 274, 276 (Iowa 1996). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Brown v. Monticello St. Bank,* 360 N.W.2d 81, 83-84 (Iowa 1984). The facts must be viewed in the light most favorable to the opposing party. *Bearshield v. John Morrell & Co.,* 570 N.W.2d 915, 917 (Iowa 1997). Summary judgment is not proper if reasonable minds could differ on resolution of the matter before the court. *Dickerson v. Mertz,* 547 N.W.2d 208, 212 (Iowa 1996). However, if the only conflict concerns the legal consequences flowing from undisputed facts, summary judgment is proper. *Brown,* 360 N.W.2d at 84.

III. Merits

Creger claims the district court erred by using the rebuttable presumption of the validity of notarized signatures in ruling on the motion for summary judgment. He claims this constituted an improper weighing of the evidence that is to be reserved for the fact finder after a trial on the issues. He claims he should be afforded the opportunity to overcome the presumption by presenting additional evidence at trial.

The district court relied on Iowa Code section 9E.10(3) (2005) for its finding that a notarized document is valid. However, our case law establishes this presumption. *See e.g. Waitt Bros. Land, Inc. v. Montange,* 257 N.W.2d 516, 520 (Iowa 1977). Section 9E.10(3) states that "[t]he signature and title of a

person performing a notarial act are prima facie evidence that the signature is genuine and that the person holds the designated title." Section 9E.10 is identical to Uniform Law on Notarial Acts section 3(c) (2005). The comment to that uniform law leads us to believe that the section refers to the authority of the notary, not the validity of the document. Unif. Law on Notarial Acts § 3, cmt. Because the notary's authority was not challenged, we fail to see the statute's applicability to the issues in this case.

"Where the certificate of the notary is in due and legal form, the instrument is admissible in evidence without further proof, and the burden is upon the person challenging the truth of its contents to prove his contention by clear and convincing evidence." *Waitt Bros. Land,* 257 N.W.2d at 520. The "clear and convincing evidence" required to meet this burden of rebutting the presumption is equivalent to "clear, satisfactory and convincing evidence." *Raim v. Stancel,* 339 N.W.2d 621, 624 (Iowa Ct. App. 1983). Great weight is given to a notary's acknowledgment. *Quaas v. Quaas,* 250 Iowa 24, 33, 92 N.W.2d 427, 432 (1958); *see Waitt Bros. Land,* 257 N.W.2d at 519. However, if there is a disputed issue with regard to the presumed material fact, summary judgment cannot be granted. *See Laufert v. Wegner,* 245 Iowa 472, 474, 62 N.W.2d 758, 760 (1954).

> [A] summary judgment should not be granted if the affidavit of defense shows a substantial issue of fact. *And this is true though the affidavit is disbelieved.* If the facts stated in the affidavits are directly opposed the case must be tried.

Eaton v. Downey, 254 Iowa 573, 577, 118 N.W.2d 583, 585 (1962) (emphasis added).

In *Laufert* a grantor sought to set aside deeds of conveyance as fraudulent. *Id.* at 473, 62 N.W.2d at 759. The grantor was the ward of a guardianship when the deeds were executed, and thus the deeds were presumed fraudulent, just as Creger's signatures are presumed authentic in this case. *Id.* Our supreme court stated, "*This appeal presents strictly a fact question.* Is the proof offered by the defendants so clear, satisfactory, and convincing as to overcome the presumed fraud?" *Id.* at 474, 62 N.W.2d at 760 (emphasis added).

In the case of *In re Hasselstrom's Estate,* 257 Iowa 1014, 135 N.W.2d 530 (1965), the proponents of a lost will had the burden to prove the essential elements of their claim by clear, convincing, and satisfactory evidence. Our supreme court stated:

> Defendants' chief complaint about the sufficiency of the evidence is, it is so thin and contradictory as well as being based to a large degree on the testimony of proponent that it is not clear, convincing and satisfactory. *Whether or not evidence meets that test, except in rare cases, is for the determination of the trier of facts, it involves credibility, weight and preponderance of the evidence.*

Hasselstrom's Estate, 257 Iowa at 1021, 135 N.W.2d at 535 (emphasis added).

In ruling on the motion for summary judgment, the district court was required to determine the facts in the light most favorable to Creger. *Bearshield,* 570 N.W.2d at 917. GWB alleged that Creger executed the documents and then failed to perform under their terms. Undisputed, these facts were sufficient to warrant a grant of summary judgment in favor of GWB. However, Creger then presented a sworn affidavit disputing the authenticity of his signature on the documents. Except in rare cases, the question of whether evidence constitutes

the clear and convincing evidence necessary to rebut a presumption presents a fact question. We believe that Creger's affidavit raises a genuine issue of material fact, and it is up to the finder of fact to determine whether facts presented in support of the allegations of the affidavit constitute such clear and convincing evidence as to rebut the presumption involved in this case.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.