IN THE COURT OF APPEALS OF IOWA

No. 8-797 / 08-0577
Filed January 22, 2009

JACK HUDSON,
Plaintiff-Appellant,

vs.

WILLIAMS, BLACKBURN & MAHARRY, P.L.C.,
Defendant-Appellee.

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

Plaintiff appeals from a district court ruling granting summary judgment in favor of the defendant. **AFFIRMED.**

John Brown, Emmetsburg, and Patrick W. O'Bryan, Des Moines, for appellant.

Rodney K. Maharry and Timothy Williams of Williams, Blackburn & Maharry, P.L.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

MILLER, J.

Jack Hudson appeals from a district court ruling granting summary judgment in favor of his former law firm, Williams, Blackburn & Maharry, P.L.C. We affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

Jack Hudson was a member of Williams, Blackburn & Maharry, P.L.C. (Williams) from January 1, 1998 through October 12, 2006, when his license to practice law was suspended by order of our supreme court. Hudson filed a petition against Williams in April 2007 seeking recovery of fees he earned while a member of the firm and a return of his capital investment in the firm.

Williams filed an answer denying the allegations contained in Hudson's petition and a counterclaim seeking a judgment against Hudson for (1) "[e]xpenses paid on Hudson's behalf after October 1, 2007, mainly health insurance premiums," totaling $1951.27; (2) "Hudson's portion of the lease of the firm's office space from October 1, 2006, to May 31, 2008," totaling $26,672.80; and (3) a "large fee . . . in the amount of $37,500.00" that Hudson did not deposit in the firm's trust account. Williams requested that a judgment be entered against Hudson for those amounts less Hudson's interest in the firm valued at $13,859.86, earned fees of $1637.61 from October 1, 2006, through January 22, 2007, and Hudson's "share of any fees received after January 22, 2007." Hudson filed an answer admitting all of the allegations contained in the counterclaim and asserting as an affirmative defense that Williams "failed to mitigate its alleged loss by not re-leasing the subject office."

Williams then filed a motion for summary judgment, asserting the undisputed facts as admitted by Hudson in his answer to the firm's counterclaim together with the affidavit of the firm's bookkeeper and legal assistant, Robin Conklin, established it was entitled to judgment as a matter of law. Conklin's affidavit set forth the net amount of fees due to Hudson since he left the firm with a spreadsheet documenting her calculations. Hudson filed a resistance to the motion for summary judgment with no supporting memorandum of authorities and a statement of disputed facts that was not supported by any affidavits or other evidence. Prior to the hearing on the summary judgment motion, Williams filed a supplemental brief and affidavit of James Blackburn, a member of the firm. The affidavit concerned Hudson's occupation of his office at the firm after he stopped practicing law in October 2006 and the firm's inability to locate a "replacement tenant" for Hudson's portion of the firm's office space lease.

A hearing on the summary judgment motion was held on February 11, 2008. The district court entered a ruling on February 14, granting the firm's motion and finding Hudson owed Williams $1951.27 for health insurance premiums, $26,672.80 for the office space lease, and $37,500 for the fee Hudson did not deposit into the firm's trust account. The court further determined that Hudson should receive a credit for his interest in Williams, valued at $13,859.86, and the net fees due to him, totaling $28,544.76. The court accordingly entered judgment against Hudson in the amount of $23,719.45.

After the district court entered its ruling in favor of Williams, both parties filed additional documents with the court. On February 15, 2008, Hudson filed an affidavit signed by him on February 14 regarding his use of his office at the firm

after his license to practice law was suspended. On February 18, Williams filed an affidavit of Rod Maharry, a member of the firm. That affidavit, which was dated February 11, referred to unanswered requests for admission propounded to Hudson by Williams. On February 25, Hudson filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). Attached to that motion was an unsigned affidavit of Hudson that was otherwise identical to the one he had filed on February 15. A third affidavit of Hudson, which was also filed on February 25, listed specific fees, with supporting documentation, that Hudson believed were due to him from Williams. The district court entered an order denying Hudson's 1.904(2) motion "for all reasons stated in the original ruling."

Hudson appeals. He claims the district court erred in granting the firm's summary judgment motion and entering damages against him.

II. SCOPE AND STANDARDS OF REVIEW.

We 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); *Walderbach v. Archdiocese of Dubuque, Inc.*, 730 N.W.2d 198, 199 (Iowa 2007). We review the record in the light most favorable to the party opposing the motion. *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 238 (Iowa 2006).

III. MERITS.

We begin our discussion by noting that both parties' appellate briefs contain factual assertions and arguments regarding matters that were not part of the summary judgment record. Hudson filed several affidavits, which he relies on in arguing that he generated a genuine issue of material fact, after the district court entered its summary judgment ruling. Williams likewise filed an affidavit after the court's ruling that it refers to throughout its brief on appeal. Attached to that affidavit was a copy of unanswered requests for admission the firm propounded to Hudson.[1] Under our rules of appellate procedure, we are not permitted to consider material that was not before the district court when it entered summary judgment. *See* Iowa R. App. P. 6.10(1).

Hudson nevertheless argues that we should consider his late-filed affidavits because "[g]iven that both sides filed affidavits it is reasonable to assume that at the unreported [summary judgment] hearing the trial court allowed and invited them to supplement their respective positions." There is nothing in the record to support this contention, which Williams disputes. *See In re Marriage of Ricklefs*, 726 N.W.2d 359, 362 (Iowa 2007) (stating the appellant has the duty to provide a record on appeal affirmatively disclosing the alleged error relied on); *see also* Iowa R. App. P. 6.10(3) (allowing appellant to prepare and file a statement of the evidence for inclusion in record on appeal when no report was made in district court).

[1] We note that although Williams referred to the unanswered requests for admission in its supplemental summary judgment brief that was filed before the district court issued its summary judgment ruling, a copy of those requests was not filed with the court until after the court entered its ruling.

Hudson additionally argues that "[w]ith or without a motion filed under [rule] 1.904(2) . . . the trial court has broad discretion to consider additional evidence such as the affidavits filed by Mr. Hudson, prior to appeal being brought." The case Hudson cites in support of his argument—*Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 634 (Iowa 1996)—does not stand for that proposition. *See Sun Valley Iowa Lake Ass'n*, 551 N.W.2d at 634 (stating the district court "has broad discretion to re-open the record and consider additional testimony" after the conclusion of a bench trial). Furthermore, Iowa Rule of Civil Procedure 1.981(3) requires that "[i]f affidavits supporting the resistance are filed, they must be filed with the resistance." *Cf. Schroeder v. Fuller*, 354 N.W.2d 780, 782 (Iowa 1984) (stating the court has discretion to permit the late filing of an affidavit upon motion by a party and a showing of excusable neglect). We therefore decline to consider the affidavits that were filed by Hudson after the district court entered its summary judgment ruling.

We also decline to consider the affidavit of Maharry with the attached unanswered requests for admission that was filed by Williams after the court's summary judgment ruling. Williams asserts Maharry's affidavit "was filed directly with the court on the day of the hearing, although it appears the court later filed it with the Clerk as part of the record." However, Iowa Rule of Civil Procedure 1.442(5) requires that

> [t]he filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that a judge may permit them to be filed with the judge, who shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Although Maharry's affidavit is dated February 11, 2008, the day of the summary judgment hearing, there is no indication on the affidavit itself that it was filed with the judge that day as required by rule 1.442(5). Based upon the foregoing, we will not consider either party's untimely affidavits and documents attached thereto in our review of the district court's summary judgment ruling.

This brings us to Hudson's claim that the district court erred in entering summary judgment against him because there were "material facts in dispute concerning the attorney fees owed to him and why [Williams] had not mitigated its damages with respect to the lease of office space." Williams responds by arguing that Hudson's statement of disputed material facts was "vague, unsupported by any evidence and factually misleading in that he had previously admitted all allegations of the counterclaim."

Because the firm's motion for summary judgment was properly supported as required by our rules of civil procedure, it was incumbent on Hudson to set forth specific facts showing there was a genuine issue for trial. *See Green*, 713 N.W.2d at 245 ("When a motion for summary judgment is properly supported, the nonmoving party is required to respond with specific facts that show a genuine issue for trial."); *see also* Iowa R. Civ. P. 1.981(5).[2] Upon review of the summary judgment record, we agree with the district court's conclusion that Hudson's resistance to Williams's motion was insufficient to avoid summary judgment.

[2] Rule 1.981(5) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered.

Hudson's statement of disputed facts was not supported by any affidavits or other documents. Nor did Hudson file a memorandum of authorities supporting his resistance to the summary judgment motion as required by rule 1.981(3). Instead, Hudson simply alleged in his statement of disputed facts that Williams "refused to pay to [Hudson] the sum of $85,000 earned by [him] as legal fees." Hudson further alleged that Williams "refused to return [Hudson's] capital account in the amount of $17,000." His statement of disputed facts also generally denied the firm's entitlement to the damages it sought.

The bare conclusory statements contained in Hudson's resistance and statement of disputed facts are not sufficient to defeat the motion for summary judgment. *See Schulte v. Mauer*, 219 N.W.2d 496, 500 (Iowa 1974) (stating it is well-settled that "a party must plead ultimate facts [by affidavits or otherwise] and cannot rely upon conclusions themselves" in resisting summary judgment). "Our rules require a nonmoving party to identify the *specific facts* that show the existence of a genuine issue for trial." *Green*, 713 N.W.2d at 245; *see also* Iowa R. Civ. P. 1.981(5). "To mount a successful resistance, the challenger must come forward with specific facts constituting competent evidence in support of the claim advanced." *Winkel v. Erpelding*, 526 N.W.2d 316, 318 (Iowa 1995). Although a nonmoving party is entitled to all reasonable inferences in a motion for summary judgment, that party must identify those facts that support the inference to be drawn. *Green*, 713 N.W.2d at 246. Hudson did not do so here in the documents properly before us on appeal.

We conclude summary judgment in favor of Williams was appropriate in this case. The damages sought by the firm in its summary judgment motion were

supported by the affidavit of the firm's bookkeeper, Robin Conklin, and by the affidavit of a member of the firm, James Blackburn. *See Hildenbrand v. Cox*, 369 N.W.2d 411, 413 (Iowa 1985) ("When the opposing party makes limited resistance, however, and rests upon the pleadings, the facts in the moving party's affidavits are accepted as true for purposes of the motion."). Hudson also admitted the majority of the damages sought by the firm in his answer to the firm's counterclaim. *See* Iowa R. Civ. P. 1.981(3) ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). We accordingly affirm the judgment of the district court.

IV. CONCLUSION.

Because our rules of appellate procedure do not permit us to consider material that was not before the district court when it entered summary judgment, we have not considered either party's untimely affidavits and attached documents in our review of the court's summary judgment ruling. Upon reviewing the documents properly before us on appeal, we conclude the district court did not err in finding that Hudson's resistance to Williams's properly supported motion was insufficient to avoid summary judgment. We accordingly affirm the judgment of the district court.

AFFIRMED.