IN THE COURT OF APPEALS OF IOWA

No. 9-217 / 08-0467
Filed May 6, 2009

HERBERT THOMPSON, JAMES PINDER, DORSET LIMITED, and SHERPAM INVESTMENTS LIMITED,
Plaintiffs-Appellants,

vs.

DELOITTE & TOUCHE, L.L.P.,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

The plaintiffs appeal from the district court's order granting summary judgment in favor of the defendant. **AFFIRMED.**

John Sprole, Des Moines, for appellants.

Hayward Draper and Debra Hulett, Des Moines, for appellee.

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

MANSFIELD, J.

The plaintiffs, former shareholders of Star Insurance Company (Star Insurance), appeal from the district court's order granting summary judgment in favor of the defendant, Deloitte & Touche, L.L.P. (Deloitte), in a suit regarding an appraisal of Star Insurance completed by Deloitte in July 2001.

The plaintiffs originally sued Deloitte in July 2007 for breach of oral contract and tort. Deloitte moved for summary judgment based on the statute of limitations. Deloitte pointed out that the plaintiffs' claims were barred by Iowa Code section 614.1(4) (2007), which provides for a five-year statute of limitations. Also, anticipating that the plaintiffs might try to assert breach of written contract, which normally has a ten-year statute of limitations, Deloitte brought the court's attention to the parties' written contracts. *See id.* § 614.1(5). According to Deloitte, those contracts consist of two two-page individualized signed engagement letters between Deloitte and Star Insurance *plus* two pages of accompanying boilerplate "General Business Terms." The "General Business Terms" contain the following language in numbered paragraph nine:

> Limitation on Actions. No action, regardless of form, relating to this engagement, may be brought by either party more than one year after the cause of action has accrued, except that an action for non-payment may be brought by a party no later than one year following the date of the last payment due to such party hereunder.

Thus, Deloitte maintained that any claim for breach of written contract would be time-barred by paragraph nine of the "General Business Terms."

However, it should be noted that the individualized engagement letters do not incorporate the standardized "General Business Terms" by reference—or even refer to them. Rather, each engagement letter states, just before Star

Insurance's representative was to sign, "If the *above* terms are acceptable to you . . . , please sign a copy of this letter in the space provided and return it to us." (Emphasis added.) The "General Business Terms," of course, are not part of the "above terms." However, when one gets to paragraph fifteen of the "General Business Terms," there is an integration clause, which provides, "These terms, and the engagement letter to which these terms are attached, . . . constitute the entire agreement between [Deloitte] and the Client with respect to this engagement . . . ."

In response to Deloitte's motion, the plaintiffs moved for leave to assert a breach of written contract claim, which the district court granted. The district court then granted Deloitte's motion for summary judgment on all claims based upon the statute of limitations, specifically finding the one-year limitation in the "General Business Terms" applicable to plaintiffs' breach of written contract claims. Plaintiffs challenge this ruling on appeal.

The summary judgment affidavits submitted by both parties were very limited. Deloitte supported its motion with an affidavit of its principal on the Star Insurance account. That affidavit merely identified the individualized signed two-page engagement letters plus the boilerplate two pages of "General Business Terms" as the parties' "agreements."

The affidavit of plaintiff Herbert Thompson also provided little information. Essentially, Thompson made only the obvious points that the engagement letters do not refer to the "General Business Terms" and that he did not sign, initial, or otherwise indicate his acceptance of the "General Business Terms."

The district court found Deloitte had carried its initial burden on summary judgment and plaintiffs had failed to discharge their burden in responding to it. Upon careful consideration, we agree. As the district court observed, it is not enough for the plaintiffs to point out that they did not sign the last two pages of the written agreement; rather, "[t]o create a fact issue the plaintiffs must state that *they did not agree to those terms*." *See* Iowa R. Civ. P. 1.981(5) (providing when a motion for summary judgment is made and supported, "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"). Absent from Thompson's affidavit is any statement that he did not understand the "General Business Terms" to be part of the parties' agreements.

This decision should be considered strictly limited to its procedural context. On a different record, we might have difficulty with the proposition that a provision in boilerplate "general terms" would be binding on a client when the individualized engagement letter does not refer to those terms (and in fact informs the client that his or her signature constitutes acceptance of the "above" terms—not any "following" terms). Also, we do not endorse Deloitte's arguments that it had only a burden of "production," not a burden of "proof," on summary judgment. Because the statute of limitations is an affirmative defense, especially when a party is relying on a special contractual statute of limitations, Deloitte had the burden of proof below. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986) (holding that the moving party's burden is only one of production when the non-moving burden would have the

burden of proof at trial). Because Deloitte met that burden, although just barely, and plaintiffs failed to sufficiently respond, we affirm the carefully reasoned decision of the district court.

Additionally, the plaintiffs assert the district court should have allowed additional time for discovery. Our review is for abuse of discretion. *Bitner v. Ottumwa Cmty.*, 549 N.W.2d 295, 302 (Iowa 1996). Pursuant to Iowa Rule of Civil Procedure 1.981(6), a party opposing summary judgment may request additional time to permit discovery, but this request must be supported by an affidavit that particularly specifies legitimate needs for discovery. *Bitner*, 549 N.W.2d at 302. The plaintiffs rely on a single statement in their motion resisting summary judgment. The plaintiffs did not file a motion requesting a continuance to permit discovery and did not file an affidavit in support of a request. Therefore, we find no abuse of discretion. *See id*. ("The failure to file a [rule 1.981(6)] affidavit is sufficient grounds to reject the claim that the opportunity for discovery was inadequate.").

The district court set forth a thorough recitation of the facts. Because we agree with the district court's reasoning and application of the law, we affirm pursuant to Iowa Court Rule 21.29(1)(*a*), (*c*), (*d*), and (*e*).

AFFIRMED.