



IN THE COURT OF APPEALS OF IOWA

FORREST M. McCLURE,	)	
Plaintiff-Appellant,	)	Filed September 20, 1979
vs.	)	
LAWRENCE E. GARDNER,	)	172
Defendant-Appellee.	)	2-62671

Appeal from Polk District Court - Theodore H. Miller, Judge.

Plaintiff appeals from judgment for defendant in action to set aside forfeiture involving real estate contract. Affirmed.

James H. Waters, Ankeny, for appellant.

Terry L. Monson, Paul F. Ahlers, and H. Richard Smith, of Ahlers, Cooney, Dorweiler, Haynie & Smith, Des Moines, for appellee.

Submitted to Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Plaintiff Forrest M. McClure appeals from judgment for defendant Lawrence E. Gardner in action to set aside forfeiture involving a real estate contract. On appeal, plaintiff asserts: The breach of contract leading to the forfeiture was immaterial and partially due to defendant's confusion-creating conduct at the time plaintiff tendered payment; defendant's retention and use of plaintiff's tax and insurance escrow account constituted an acceptance of a partial payment waiving any forfeiture rights; and plaintiff's presentation of evidence was improperly disrupted by the trial court's examination and intimidation of witnesses. We affirm.

I. Our review of this equitable proceeding is *de novo*. Iowa R. App. P. 4. We are bound to review the facts and law and determine anew from credible evidence all properly presented and preserved contentions of the parties. Miller v. American Wonderlands, Inc., 275 N.W.2d 399, 402 (Iowa 1979). We give weight to the trial court's findings of fact, especially when the credibility of witnesses is involved. Recker v. Gustafson, 279 N.W.2d 744, 748 (Iowa 1979); Severson v. Elberson Elevator, Inc., 250 N.W.2d 417, 420 (Iowa 1977); Iowa R. App. P. 14(f)(7).

II. On May 5, 1978, plaintiff-vendee was served with a notice of forfeiture resulting from a breach of a real estate contract. The notice listed as grounds for forfeiture various failures to keep the property in good repair and make monthly payments. The need for repair was partially due to damage caused by a renter ejected on March 23, 1978. On the last day of the statutory redemption period, June 5, 1978, plaintiff twice tendered to defendant all sums due and owing, but conditioned on waiver of the forfeiture right arising from the items of disrepair. Defendant did not accept the money due to this condition and refused plaintiff's request for an extension of time to make repairs. Defendant also asked plaintiff to sign a receipt acknowledging that acceptance of the payment did not constitute a waiver of defendant's right to declare a forfeiture for other reasons. Plaintiff refused to sign and withdrew his tender. After declaring the forfeiture, defendant paid a special assessment of \$9.75 from a tax and insurance escrow account and retained the balance, \$18.16.

On June 16, 1978, plaintiff filed a petition in equity seeking to set aside the forfeiture. The trial court entered judgment for the defendant, finding that plaintiff

failed in numerous and substantial respects to keep the property in good repair and to make contractual payments, and that payment out of or retention of the tax and insurance escrow account did not constitute an acceptance of payments waiving the right to forfeiture.

III. The primary issue in this case is whether valid grounds existed for forfeiture of the real estate contract. Although forfeitures are not favored, this does not mean they will never be enforced when it is shown that the equities clearly require it. Miller v. American Wonderlands, Inc., 275 N.W.2d at 402; Babb's, Inc. v. Babb, 169 N.W.2d 211, 213 (Iowa 1969); Collins v. Isaacson, 261 Iowa 1236, 1242, 158 N.W.2d 14, 17 (1968). We must determine whether the breach of the contractual terms was sufficiently material to justify forfeiture and whether defendant waived the forfeiture by his conduct. It cannot be denied that a breach must be material to justify a forfeiture. However, the amount involved is only one factor to be considered as a part of equity's abhorrence of forfeiture. The fact that the default was trifling must be balanced against the showing that the default was deliberate and that an opportunity was given for correcting it. Miller v. American Wonderlands, Inc., 275 N.W.2d at 403.

The notice of forfeiture listed eight items of disrepair. These items of disrepair, plaintiff contends, are frivolous or inconsequential and do not breach the contract's requirement that the plaintiff keep the house in good reasonable repair. We agree that where disrepair is relied on as a condition of default in an attempted forfeiture, the alleged breach must be scrutinized more carefully than nonpayment of moneys due. The latter type of default ordinarily involves a sum certain or one that by computation can be made certain. An alleged act of disrepair may frequently lead to differences of opinion involving either the necessity of making repairs or whether, if undertaken, the repairs are adequate. Because the vendee is the equitable owner of the property, the demands of the vendor must reasonably relate to his right to security for the unpaid balance. Fairness dictates that such disputes not be determined solely on the basis of the vendor's subjective judgment. Applying these principles to the present dispute, we conclude that the items of disrepair relied on were substantial enough to support a forfeiture of the contract on the vendee's failure to correct same.

Individually, the items may not have constituted a breach. Collectively, however, the items breached the good and reasonable repair provision of their contract. Plaintiff admitted that two items listed were as important and material as major structural problems he claimed to be working on. Plaintiff's failure to correct the items of disrepair, which he had reasonable time to accomplish, within the statutory period was a substantial and significant enough breach to sustain the forfeiture of the contract.

Moreover, we find plaintiff did not make a legally effective tender of payment on June 5, thus there was a failure to make the contractual payments. An effective tender by a vendee in a real estate contract to avoid forfeiture must be made unconditionally. In re Estate of Zach, 257 Iowa 234, 239, 131 N.W.2d 484, 486 (1964); Schwab v. Roberts, 220 Iowa 958, 970, 263 N.W. 19, 25 (1935). Where the tender is made on a condition that tenderor has no right to make, it is invalid. Swanson v. Baldwin, 250 Iowa 342, 345, 93 N.W.2d 740, 742 (1958). Plaintiff had no right to insist that defendant waive his right of forfeiture before tendering his payment as defendant was merely standing on his contractual rights. Plaintiff's tender was conditional, accordingly, the tender was legally ineffective and exists as an additional ground for forfeiture. See Gibson v. Thode, 209 Iowa 368, 372, 228 N.W. 91, 92 (1929). Plaintiff seeks to excuse this failure by pointing to defendant's conduct at the time he tendered the payments as creating so much confusion that the contract became impossible to perform, thus making tender unnecessary. We find nothing confusing about defendant's conduct on June 5 and considering plaintiff's experience in these matters fail to see how he was confused; tender was not unnecessary.

There need be only one valid item of default listed in the notice of forfeiture to sustain the forfeiture. See Hampton Farmers Coop. Co. v. Fehd, 257 Iowa 555, 561, 133 N.W.2d 872, 876 (1965); Gibson v. Thode, 209 Iowa at 372, 228 N.W. at 92; Westerman v. Raid, 203 Iowa 1270, 1275, 212 N.W. 134, 136 (1927). Plaintiff's failures to correct the items of disrepair in the notice and pay the delinquent amounts were material breaches of his contractual obligations and exist, individually or in combination, as valid grounds supporting forfeiture.

Plaintiff contends even if there was a forfeiture it was waived by defendant's disbursing escrow funds held in trust to pay taxes and retaining the balance. Such

conduct, plaintiff claims, acts as a receipt and retention of partial payments and a windfall to the defendant. Concerning the standard of review of this question, the Iowa Supreme Court has stated:

[W]here a vendee claims waiver of forfeiture by implication from the conduct of acts of a vendor, the vendee must establish by a preponderance of the evidence unequivocal conduct on the part of the vendor, clearly establishing the vendor regards the contract as in full force and effect subsequent to the forfeiture. The question of waiver is ordinarily a question of fact to be determined from all of the facts and circumstances shown by the record evidence in the case.

Wemer v. Long, 185 N.W.2d 243, 247 (Iowa 1971), quoted in Miller v. American Wonderlands, Inc., 275 N.W.2d at 402.

The general rule is that a forfeiture is waived where the vendor, after notice of forfeiture has been served, accepts some payment on the contract; waiver being the voluntary and intentional relinquishment of a known right. Babb's, Inc. v. Babb, 169 N.W.2d at 213. However, there may be instances where the record shows an intent to pursue the forfeiture even though a partial payment has been accepted. Id. at 214-215.

The record shows no unequivocal conduct by the defendant clearly establishing his regarding the contract in full force and effect subsequent to the forfeiture. Defendant refused to waive any items of default specified in the notice of forfeiture even when asked to do so by plaintiff. The money involved was not a received payment but a payment out of and retention of the tax and insurance escrow account that defendant thought was permitted under the terms of the contract. No clear evidence in the record exists that defendant regarded the contract in full force; there was no waiver of forfeiture. Miller v. American Wonderlands, Inc., 275 N.W.2d at 402. Hansen v. Chapin, 232 N.W.2d 506, 510 (Iowa 1975); Wemer v. Long, 185 N.W.2d at 247-48. See generally Comment, Remedying the Inequities of Forfeiture in Land Installment Contracts, 64 Iowa L. Rev. 158, 175 (1978).

IV. Lastly, plaintiff contends his presentation of evidence was improperly disrupted by the trial court's examination and intimidation of witnesses. We must determine, therefore, whether the trial court interjected itself into the interrogation of the witnesses to the point of intimidation and abuse of discretion, which had an adverse effect on the making of a full and complete record. In re Marriage of Meier, 267

N.W.2d 46, 47 (Iowa 1978). The trial court has broad discretion in questioning of witnesses. Hackman v. Beckwith, 245 Iowa 791, 805, 64 N.W.2d 275, 283 (1954) (expedite or assist witness in giving of testimony); State v. Eggleston, 201 Iowa 1, 2-3, 206 N.W. 281, 282 (1925) (elicit answers from hesitant or evasive witness); Pothast v. Chicago Great W. Ry. Co., 110 Iowa 458, 461-62, 81 N.W. 693, 694 (1900) (clarify witness' testimony).

Our perustration of the record evidences no abuse of discretion by the trial court in the number or nature of the questions asked. A large number of the trial court's questions sought to either clarify answers that it had not heard clearly or on which further information was desired. Other questions were an attempt by the trial court to assist the plaintiff in making an adequate record or elicit answers from evasive witnesses. While the large number of questions by the trial court may not be desirable in every case, we find no abuse of discretion here. We also do not accept plaintiff's assertion that his presentation of evidence was improperly disrupted by the court's questions. The trial court, sitting as the trier of fact, would hardly be confused by any disruption caused by its own questions. The court's questioning allowed the obtaining of necessary information expeditiously.

The trial court properly dismissed plaintiff's action to set aside this forfeiture.

AFFIRMED.