FILED
JUN 30 1978
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

JANSEN WHOLESALE ROOFING AND SUPPLY CO.,

Appellant,

v.

MERRILL E. DERRINGTON, MARY H. DERRINGTON; JOHN TIMMINS, PARNELLA L. TIMMINS; JOHN TIMMINS and PARNELLA TIMMINS d/b/a MID-AMERICA BUILDERS; ROGER THORNTON, THELMA THORNTON; HOME CARPET, INC.; PLYWOOD MART, INC.; CAROL MAY, JERRY C. MAY AND DELLA M. MAY, and their unknown heirs, devisees, grantees, assignees, successors in interest and their unknown spouses and the following described real estate situation in Des Moines, Polk County, Iowa, to-wit: The East 72-1/2 feet of Lot 10 in Bell Place, an Official Plat, now included in and forming a part of the City of Des Moines, Iowa,

Appellees.

Filed June 30, 1978

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2-60435

Appeal from Polk District Court - J. P. Denato, Judge.

Plaintiff appeals from adverse decree in suit to quiet title to real estate. Defendants cross-appeal from trial court order requiring payment of plaintiff's attorney fees. Affirmed on plaintiff's appeal; reversed on defendants' appeal.

Louis R. Hockenberg and Fred L. Dorr, of Wasker, Sullivan, Wheatcraft & Ward, Des Moines, for appellant.

Carl Nielsen, Des Moines, for appellee Timmons.

Theron Grate, Des Moines, for appellee Thorntons.

Heard by Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiff appeals and defendants[1] cross-appeal from judgment and decree denying plaintiff's request for a decree quieting title to certain real estate. Plaintiff's appeal involves a de novo determination of the sufficiency of the evidence to establish its title to the property. Defendants' appeal challenges the authority of the trial court to award attorney fees to plaintiff in a case where the equitable relief which plaintiff had sought was denied. We review both issues de novo. Rule 4, Rules of Appellate Procedure; State v. Nichols, 241 Iowa 952, 44 N.W.2d 49 (1950).

I. With respect to the first issue, plaintiff's claim is dependent upon the validity of its effort, as successor in interest to the contract-vendors of the property, to forfeit the interest held by defendants as successors in interest to the contract-vendees. To accomplish this result, plaintiff, on or about April 23, 1976, caused a notice of forfeiture to be served upon defendants pursuant to § 656.2, The Code, specifying certain terms and conditions of the contract which allegedly had not been complied with.

The conditions specified to be in default in this notice were the following:

(a)	Failure to make March Contract payments	$ 85.00
(b)	Failure to make April Contract payment	$ 85.00
(c)	Allowing mechanic's liens to be filed against payments and not during this default in violation of paragraph 2 of said Contract	$7712.90
(d)	Making unauthorized alterations and improvements to the property in violation of paragraph 2 of said Contract	
(e)	Failure to pay 1/6th of real estate taxes	$ 100.00
	Total	$7882.90

The evidence in the court below, which we review de novo, establishes to our satisfaction that item (d) of the claimed conditions of default may be disregarded because of lack of proof of "material alterations" to the property as that term is employed in paragraph two of the real estate contract in issue. At most the evidence shows "improvements" to the property which are not shown to have detracted from the vendor's security.

[1] Defendants Timmins, Thornton, and Home Carpet, Inc. are the formal parties to this appeal adverse to the plaintiff. All take a common position vis-a-vis the plaintiff. The use of the term "defendants" in this opinion will refer collectively to defendants Timmins and Thornton, who share the vendee's right to the real estate in question.

As to the remaining items, defendants' tender to plaintiff of a cashier's check for $300 on the 28th day following service of the notice of forfeiture was sufficient to satisfy items (a), (b), and (c) of the conditions in default, and, to the extent shown by the record, the costs of serving the notice. In making this determination we note that the monthly payments required of the vendee under the contract are $65 per month, rather than the $85 per month figure specified in the notice of forfeiture. The defendants' tender was thus sufficient to cure the conditions in default save for item (c).

The trial court, in refusing to confirm the forfeiture, expressed doubt as to whether the placing of certain mechanics liens on the property was a condition authorizing forfeiture. We share this concern and on the facts of the present case conclude that such circumstance does not justify forfeiture.

The evidence establishes that at the time of the service of the notice of forfeiture the balance remaining unpaid and owing to the holder of the vendor's interest under the contract was approximately $4000. At this same time, the value of the property was approximately $42,000. Such circumstance does not necessarily preclude forfeiture for a condition of default. But, with respect to conditions not involving performance which can be satisified by interaction directly between vendor and vendee, the transaction must be carefully scrutinized before performance in favor of a third party may be exacted as a condition for avoiding forfeiture. Mechanics liens are easily filed and the disputes engendered thereby are not easily solved in the 30-day cure period provided in § 656.2(3), The Code. On the record in the present case we hold that the contract cannot fairly be construed to confer upon plaintiff the right to exact such performance. The trial court correctly adjudicated the forfeiture to be of no force and effect as defendants' tender in satisfaction of those conditions actually in default precluded forfeiture under the notice which stated additional violations not sustainable as proper conditions of forfeiture. See Hampton Farmers Cooperative Co. v. Fehd, 257 Iowa 555, 133 N.W.2d 872 (1965).

II. On their cross-appeal defendants assert the trial court erred in ordering that they pay the sum of $1500 toward plaintiff's attorney fees. Our attention has been directed to no statute which confers upon the trial court the power to exact payment of such fees, contrary to the ordinary rule that one litigant may not recover attorney fees

from an adversary litigant. See, e.g., Thorn v. Kelley, 257 Iowa 719, 134 N.W.2d 545 (1965). Neither § 625.25, The Code, nor § 649.5, The Code, referred to by the parties authorizes such relief.

While we recognize that in certain instances a court of equity has the power to make its granting of equitable relief dependent upon the performance of certain conditions by the party seeking the aid of the equity court,[2] and, that this may in certain instances include payment of attorney fees, this is not such a case. The equitable relief sought by plaintiff was denied because it was not legally entitled to such relief; not because of any affirmative equitable relief granted to defendants by the trial court. The trial court erred in requiring payment of attorney fees by defendants and that provision of the decree is reversed. Costs on appeal are taxed to plaintiff.

Affirmed on plaintiff's appeal; reversed on defendants' appeal.

[2] See, e.g., White v. Massee, 202 Iowa 1304, 211 N.W. 839 (1927); 27 Am. Jur. 2d, Equity § 134 at 664-65.