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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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KENNETH PHIPPS,)

Plaintiff-Appellant,) Filed March 31, 1987

vs.)

RAYMOND ROSENBERG,) 7-27
86-698

Defendant-Appellee.)

Appeal from the Iowa District Court for Polk County (CE 20-11852) - Glenn E. Pille, Judge.

Plaintiff appeals the dismissal of an action, following an evidentiary hearing, seeking both damages and specific performance of a lease agreement. **REVERSED AND REMANDED.**

Dennis L. Eaton, Des Moines, Iowa, for plaintiff-appellant.

Robin L. Goodman of Hopkins & Huebner, Des Moines, Iowa, for defendant-appellee.

Considered by Oxberger, C.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

Plaintiff appeals the dismissal of an action, following an evidentiary hearing, seeking both damages and specific performance of a lease agreement. The district court found that the plaintiff had no interest in the lease in question and accordingly, no standing to pursue this action. We conclude that the plaintiff does have standing to pursue the action. The remaining issues are remanded for trial.

In 1982, Phipps and Rosenberg entered into a five-year written lease for premises that Phipps used as an adult bookstore. On March 4, 1983, Phipps entered into a contract with Daryl Shiber to sell Shiber the bookstore. Phipps, as required by the terms of his lease with Rosenberg, obtained Rosenberg's approval in assigning Phipps' leasehold interest to Shiber. However, there was a subsequent disagreement whether Phipps and Shiber had entered into a subsequent contract on May 6, 1983. This alleged contract called for the formation of a corporation, with Phipps and Shiber as shareholders. Plaintiff Phipps, claiming Shiber had defaulted on the March 4 contract, eventually took possession of the premises without obtaining a written reassignment of the lease.

Shiber commenced a separate action against Phipps to enforce the alleged May 6, 1983, contract. Phipps counterclaimed, requesting a rescission of all contracts between the two parties. The district court dismissed Shiber's action and Phipps' counterclaim.

On January 11, 1984, a fire in the bookstore damaged the landlord's building. On May 7, 1984, the landlord sent notice of termination of the lease to Shiber and Phipps, designating them as persons claiming an interest in the premises. Phipps then commenced an action seeking specific performance of the lease.

In an earlier appeal it was determined that the action was not barred by issue preclusion as the result of the judgment in the action between plaintiff

and the purchaser of the business. Phipps v. Rosenberg, No. 176/85-70, slip op. (Iowa August 21, 1985).

By motion for summary judgment, defendant asserted that plaintiff had no interest in the property and, consequently, lacked standing to sue. On January 6, 1986, the court overruled defendant's motion for a summary judgment as well as plaintiff's cross-motion for summary judgment finding there to be facts in dispute. The court scheduled an evidentiary hearing on February 27, 1986, to determine whether the plaintiff was the proper party to bring the lawsuit. Following the evidentiary hearing, at which the parties stipulated that the court was to be the trier of fact and determine plaintiff's interest in the lease, the court issued its findings. The court ruled that the plaintiff had no standing to pursue the action. Plaintiff appeals this decision of the court.

Our scope of review in equity cases is de novo. Iowa R. App. P. 4. In equity cases we give weight to the fact finding of the trial court but we are not bound by them. Iowa R. App. P. 14(f)(7).

The plaintiff presents two arguments in support of his contention that he has an interest in the lease in question. First, he claims that in exercising his creditor's remedy of rescission of the contract to purchase with Shiber, the assignment of the lease to Shiber was discharged. Plaintiff, therefore, concludes that because he asserted a creditor's remedy against Shiber he did not have to obtain a written reassignment of the leasehold interest. He then asserts that because the defendant Rosenberg was aware or should have been aware that Phipps had reasserted his claim on the bookstore and reestablished his tenancy, defendant Rosenberg is estopped from subsequently claiming that Phipps has no interest in the lease.

Upon a vendee's default, one of the options the vendor may elect is to rescind the contract. Schumacher v. McDonald, 320 N.W.2d 640, 642 (Iowa

Ct. App. 1982). Retaking of possession is ordinarily considered by law to be an act of rescission. Id. at 643. One of the major elements of rescission is that the parties be restored to the status quo. Boeck v. Logan 480 Dairy Farm, 606 F. Supp. 868, 873 (Iowa 1985). A contract may be rescinded by acts of one of the parties and does not require court action. Binkholder v. Carpenter, 260 Iowa 1297, 1302, 152 N.W.2d 593, 596 (1967). The record shows that plaintiff acted on the advice of his lawyer in taking back possession of the bookstore from Shiber and attempting to rescind the contract. The defendant Rosenberg did not, at trial or on appeal, dispute plaintiff's right to rescind the contract with Shiber. We must conclude, therefore, that plaintiff Phipps, after rescinding the March 4 contract with Shiber and after Shiber's suit for specific performance of the May 6 contract failed, successfully reacquired the ownership of the business. Shiber did not institute an action at law to restore the status quo as he may have thought necessary after Phipps' rescission of the March 4 contract. See Binkholder v. Carpenter, 152 N.W.2d at 596. The fighting issue, then, is what effect the plaintiff's successful rescission of the contract had on the claimed reassignment or reassumption of the lease.

The district court held, and defendant maintains on appeal, that no reassignment or reassumption of the lease could take place absent written consent from assignee Shiber or a court decree.

We recognize that a lease creates two sets of rights and obligations: one arising from privity of estate and one arising from privity of contract. Seeburger v. Cohen, 215 Iowa 1088, 1091, 247 N.W. 292, 293 (1933). The tenant has a possessory estate in the leased premises and the landlord has a reversionary interest in the same premises. Since an assignee has the same interest in the premises that a tenant had, the assignee is in privity of estate with the landlord. Therefore, the landlord may enforce real covenants of the lease against an

assignee. Id. However, an assignment of a lease transfers a tenant's entire interest without retaining a reversionary interest. Berg v. Ridgway, 258 Iowa 640, 646, 140 N.W.2d 95, 100 (1966). It may be argued, therefore, that even in the case where the contract was successfully rescinded, as in the present circumstances, the privity of estate between Phipps and Rosenberg was not restored. See, e.g., Flynn v. Mikelian, 208 Cal. App. 2d 305, 25 Cal. Rptr. 138 (1962). On the other hand, there is authority which tends to support plaintiff's contention that when a breach of contract is so substantial as to defeat the object of the parties in making the contract, a subsequent rescission of the contract requires that both privity of contract and estate may be restored between the original tenant and the landlord in order that equity be served. See, e.g., Maytag Company v. Alward, 253 Iowa 455, 465, 112 N.W.2d 654, 660 (1962) (" 'Equity will not permit a party to enjoy the fruits of a contract when he deliberately refuses or makes impossible of performance the obligations imposed therein.' ") However, we need not resolve that issue here, since we believe the landlord in this case knew or should have known that Phipps had reasserted his tenancy.

One who goes into possession of the real estate of another is presumed to be a tenant, in the absence of evidence to the contrary. Heddleston v. Stoner, 128 Iowa 525, 526, 105 N.W. 56 (1905). Possession of real estate imparts notice to the world of the rights of a possessor which a reasonable and proper inquiry of the possessor would reveal. Swab v. Appanoose County Club, 203 N.W.2d 318, 320 (Iowa 1973). The record in this case shows that Phipps had informed Rosenberg that Phipps had locked Shiber out of the store due to the dispute between Phipps and Shiber. The record shows that Rosenberg accepted checks from Zodiac Enterprises, the trade name used by Phipps, after the lockout of Shiber by Phipps. It is true that Phipps was awaiting the outcome of the litigation

between himself and Shiber for the judicial declaration of the rights of the respective parties. The court's decision determining ownership was not made until after the fire in this case. However, it is equally clear from the record that unless Shiber was able to make good the contract following Phipps' act of rescission and during and until that time, Phipps considered himself the tenant. The evidence reveals that Phipps considered himself and conducted himself as a tenant under the lease during the period in question. It is unlikely, if any of the material provisions of the lease had been violated during this period, that Rosenberg would not have been able to hold Phipps liable for such violation. See Wright v. Zachgo, 222 Iowa 1368, 1372, 271 N.W. 512, 514 (1937). The record shows that Rosenberg knew of the dispute between Phipps and Shiber, about the lockout of Shiber, and about the pending litigation. Rosenberg knew that Phipps was running the bookstore and paying the rent on the Zodiac account. A reasonably prudent man would have been put on notice in these circumstances that Phipps was asserting the rights of a tenant and not merely as a manager for Shiber, as Shiber was then litigating with Phipps over the very issue of ownership. In fact, in Rosenberg's notice of termination of the lease following the fire, he addressed both Shiber and Phipps as persons claiming an interest in the premises and Rosenberg claimed that both Shiber and Phipps were in violation of the lease agreement. Furthermore, the Iowa Supreme Court in its per curiam opinion on the matter of issue preclusion between the Shiber-Phipps suit and the Phipps-Rosenberg suit, stated that Phipps, after claiming Shiber had defaulted, "subsequently took possession and operation of the bookstore." Phipps v. Rosenberg, No. 176/85-70, slip op. at 2. We believe that the facts of this case do show that Phipps took possession and operated the bookstore as a tenant. Under these circumstances, Mr. Rosenberg knew or should have known that Phipps was reassuming his rights as tenant under the written lease. If Rosenberg

did not want Phipps as a tenant, he could have refused Phipps' reentry or impeached the transaction. See Corsiglia v. Summit Center Corp., 348 N.W.2d 647, 650 (Iowa Ct. App. 1984). Where a person knows or ought to know that he is entitled to enforce a right or to impeach a transaction or neglects to do so for such a time that would imply he intended to waive or abandon a right, this amounts to acquiescence and the transaction, although originally impeachable, becomes unimpeachable. Davidson v. VanLengen, 266 N.W.2d 436, 438 (Iowa 1978); 28 Am. Jur. 2d Estoppel and Waiver § 57 (1966). Defendant Rosenberg took no steps to refuse Phipps' reentry into the premises or impeach the reassumption of the tenant-landlord relationship. Consequently, we find plaintiff Phipps does have an interest in the lease in question and, accordingly, has standing to pursue this action.

The trial court rejected as meritless plaintiff's assertion that partial performance and acceptance of the lease by plaintiff alleviated any statute of fraud problems. Defendant asserted at the evidentiary hearing that pursuant to the statute of frauds, no reassignment of the lease could have taken place unless it was in writing. Defendant does not further argue that claim on appeal save for the restatement that the only way a reassignment could take place would be upon a written agreement by all three individuals or by a court decree. We find that this case is without the statute of frauds. While it is true that, with certain exceptions, past performances such as taking possession of property or payment of rent under an oral lease for a term of more than one year will not take the case out of the statute of frauds, see, e.g., Snater v. Walters, 250 Iowa 1189, 1199, 98 N.W.2d 302, 308 (1959), the instant circumstances cannot support a conclusion that the application of the statute of frauds is relevant in this case. We note that the impact of the statute of frauds is not to void a contract but to render incompetent oral proof of its existence. Recker v.

Gustafson, 279 N.W.2d 744, 748 (Iowa 1979). There was a written lease in this case. We have found that plaintiff resumed his tenancy under this written lease. The landlord in this case alleged, on his notice of termination of the written lease, that Phipps, as a party claiming interest in the premises, had violated the terms of the written lease. We have found that defendant was put on notice that the plaintiff was reasserting his rights in the property under the terms of the written lease and that Rosenberg knew or should have known that Phipps was reassuming such rights. In these circumstances, we certainly cannot agree with the argument that the application of the statute of frauds as a rule of evidence should here result in the reassumed lease agreement being rendered unprovable.

We reverse and remand the matter for a trial on the remaining issues.

REVERSED AND REMANDED.