IN THE COURT OF APPEALS OF IOWA

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PHILLIP A. GOWDY and JANE R GOWDY,)
Plaintiffs-Appellees,)
vs)
JOHN McKIBBEN and ESTHER McKIBBEN,)
Defendants-Appellants)

Filed May 28, 1987

7-82
86-900

Appeal from the Iowa District Court for Marshall County (No. 36171) - Carl D Baker, Judge

Defendants appeal from judgment rendered against them. **AFFIRMED.**

Gail E Boliver, Marshalltown, *for defendants-appellants.*

James L Goodman, of Welp, Harrison, Brennecke & Moore, Marshalltown, for plaintiffs-appellees

Considered by Snell, P J , and Schlegel, and Sackett, JJ.

SACKETT, J.

The issue before us is whether the trial court properly entered judgment against the buyers for one delinquent installment on an installment sale real estate contract. We affirm.

Plaintiffs sellers and defendants buyers entered into a contract on October 19, 1983, for the sale of real estate in Marshall County. The contract was an installment sale contract with a total purchase price of $42,000 and provided for the following payments:

$3,000 down
$2,000 on 12-15-83
$4,000 on 12-15-84
$4,000 on each 12-15 thereafter until 9-15-89 when balance is due in full.

Payments were to be applied first to interest which accrued at 6 percent.

Defendants did not make the $4,000 payment due December 15, 1984. Subsequently plaintiffs commenced an action in equity asking the trial court to order defendants specifically perform the agreement and pay $4,000 with interest from December 15, 1984, or for a judgment against defendants for the unpaid contract amount with interest and attorney fees.

Defendants' answered alleging plaintiffs are not entitled to specific performance because they have an adequate remedy at law and asking the petition be dismissed. Plaintiffs filed a motion for summary judgment. Defendants resisted the motion claiming plaintiffs failed to show an adequate remedy at law and the contract did not provide for specific performance.

The trial court found the defendants had defaulted and ordered them to pay $4,000 plus interest and attorney fees of $650. Additionally, the court ordered defendants to pay the judgment and if they failed to do so a writ of attachment should issue against their lands, goods, rights and credits. Defendants appeal contending (1) a summary judgment should not have been entered because defendants have an adequate remedy at law, (2) plaintiffs did not show summary judgment was proper, and (3) an award, including future attorney fees was not warranted.

Defendants argue, despite the fact plaintiffs filed a petition in equity and asked for specific performance or money damages, that plaintiffs in fact got a judgment for money damages and the trial court did not order an equitable remedy. Defendants contend the trial court's order issuing a writ of attachment merely gave plaintiffs an additional method to collect a judgment of damages at law. Plaintiffs argue the trial court's order was really not a decree of specific performance but rather a judgment for money damages based on buyers' failure to pay the underlying debt.

We agree with plaintiff the relief awarded was in fact a money award for an installment due on a real estate contract and is a legal not equitable remedy. Because the defendants admit the amount is in fact owed the only issue we must address is whether such a remedy is available to plaintiff to collect one installment. Obviously other remedies were available to plaintiffs.

When a buyer is in default on a real estate contract a seller has the right to elect from a number of remedies. Similarly, when a mortgagor/vendee has defaulted in the performance of a contract for the purchase of real estate, the mortgagee/vendor may elect from a number of remedies:

> (1) keep good their tender of performance, demand the balance of the purchase price, and sue for specific performance;
> (2) terminate the contract because of vendee's breach; keep their land, and sue for damages for the breach;
> (3) rescind the contract in toto; or
> (4) enforce a forfeiture.

Abodeely v. Cavras, 221 N.W.2d 494, 497-98 (Iowa 1974). Once the seller has elected a remedy he cannot, in respect to this same default, change his position and at that time or at another time thereafter proceed on a different theory.

Gray v. Bowers, 332 N.W.2d 323, 325 (Iowa 1983). However, the fact other remedies were available and the remedy plaintiffs elected here may preclude them at another time from proceeding on a different theory with reference to this default or this contract are not the issues currently before this court. The only issue is whether the $4,000 money judgment should stand.

Generally the Iowa courts have held upon breach by a vendee of an executory contract for sale of land, an ordinary action for the recovery of the contract price will not lie. Prichard v. Mulhall, 127 Iowa 545, 548, 103 N.W. 774, 775 (1905). However, in Hershey v. Hershey, 18 Iowa 24, 27 (1864) the court held an action would lie for installments of interest on a installment sale real estate contract if they fell due before the obligation to pay the principal sum matured. Later, in discussing a claim for unpaid interest and taxes under an installment sale real estate contract, the Iowa court said "[t]he rule is settled in this state that an action will lie for recovery of an installment of the purchase price which matures before the entire purchase price becomes due." Id. See Stephenson v. Neppel, 192 Iowa 246, 250, 182 N.W. 369, 370 (1921). Furthermore, in Dimon v. Wright, 206 Iowa 694, 696, 214 N.W. 673, 674 (1928), the court granted foreclosure where plaintiff prayed for the amount of the installment of principal and interest at that time matured but unpaid. We therefore determine the judgment for $4,000 should be affirmed.

Finally, defendants do not object to attorney fees being awarded but contend the trial court awarded future attorney fees which was not proper. Defendants argue the trial court's decree awarding "[a]ttorney's [f]ees (to date and estimated)" for $650 was a speculative award for "future" expenses and should be reversed. We disagree. In the decree for summary judgment the trial court ordered defendants pay the following:

> [A]ttorney's fees of Six Hundred Fifty and no/100ths ($650.00) which should draw interest in accordance with the terms of the contract at the rate of six percent per/annum from and after entry of this judgment. . .

There is nothing in the trial court's decree to indicate the $650 figure is for future attorney fees. The decree also states the $650 in fees is for services plaintiffs' attorneys "have rendered." The language in the decree indicates the trial court's award for attorney's fees to date and estimated refers to the preciseness of actual dollar amount awarded by the trial court and is not an award of future attorney fees.

We do not find the trial court abused its discretion in awarding plaintiffs' attorney's fees of $650. See generally Bush v. Iowa District Court for Sac County, 369 N.W.2d 424 (Iowa 1985); Mathison v. Young, 333 N.W.2d 477 (Iowa 1983).

AFFIRMED.