AUG 31 1978
CLERK SUPREME COURT



IN THE COURT OF APPEALS OF IOWA

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| MARY E. SEDLACEK, | ) | |
| Appellant, | ) | Filed August 31, 1978 |
| vs. | ) | |
| SHIRLEY MARIE MATHENY, aka SHIRLEY MARIE PURSEY, WILLIAM V. YILEK, CORAH A. YILEK, JACK D. BRANDMILL, PATRICIA E. BRANDMILL, AND EDWARD REDFORD, | ) | 542<br>2-60697 |
| Appellees. | ) | |

Appeal from Linn District Court - Harold D. Vietor, Judge.

Plaintiff appeals from judgment denying her petition to set aside a forfeiture of a real estate contract. - Reversed and remanded.

Gerald J. Kucera, Cedar Rapids, for Appellant.

Guy P. Booth, of Dumbaugh, Booth, Gross & Chapman, Cedar Rapids, for Appellees.

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

PER CURIAM

Plaintiff Mary Sedlacek appeals the trial court decree in favor of defendants on her petition requesting the setting aside of a forfeiture of a real estate contract and for damages for loss of personal property. Defendants William and Corah Yilek counterclaimed for damages for waste and deterioration of the forfeited property. However, the trial court found in favor of plaintiff Sedlacek on the counterclaim and the Yileks have not cross-appealed. On appeal, plaintiff alleges the trial court erred in finding that a valid notice of forfeiture was served on the parties in possession and after balancing all the equities, that the forfeiture was valid and enforceable.

Plaintiff's first contention is that the trial court erred in holding that there was a valid notice of forfeiture served upon the parties in possession. Sedlacek argues the intent of the second notice of forfeiture was to serve notice upon the two tenants in possession, Ted Oster and Mrs. Ted Oster; that Mrs. Ted Oster was in reality Julie Danly; that Julie Danly was a party in possession, and that the incorrect naming of a party in a notice of forfeiture of a real estate contract invalidates the notice and deprives the court of jurisdiction as in the case of an original notice. See e.g. Boye v. Mellerup, 229 N.W.2d 719 (Iowa 1975).

Section 656.2, The Code, provides that the notice of forfeiture shall be served on the party in possession of the real estate together with the vendee or his successor in interest, if known. Failure to serve the party in possession makes the notice ineffective and no question of forfeiture is then before the court. Fulton v. Chase, 240 Iowa 771, 773-4, 37 N.W.2d 920 (1949). See also Warren v. Yocum, 223 N.W.2d 258, 260-1 (Iowa 1974).

A review of the evidence indicates the trial court did not err in finding that Ted Oster was the only party in possession. Possession of real estate for the purposes of receiving notice of forfeiture under § 656.2, The Code, is defined in Warren v. Yocum, supra. Under that definition, Ted Oster, the only legally recognized tenant, was the only person capable of exercising sole control over the premises to the exclusion of all others. Although Julie Danly was a frequent visitor, she did not have such control or right of control over the property that she

could legally enjoy it to the exclusion of others having no better right than herself. See Warren, supra. She was not in possession within the meaning of § 656.2 and was therefore not entitled to notice.

Plaintiff's second contention is that after balancing all the equities, the trial court erred in finding a valid and enforceable forfeiture. Generally a party seeking relief from a forfeiture must tender full performance of his defaulted obligations, otherwise the forfeiture is enforceable. Babb's, Inc. v. Babb, 169 N.W.2d 211, 215 (Iowa 1969). Section 656.2 gives a defaulting party thirty days in which to cure the defaulted obligations. However, the statutory notice of forfeiture, § 656.2, is not intended in all cases to preclude the right to additional time within which to bring previously waived payments to current status. Bettis v. Bettis, 228 N.W.2d 193, 195 (Iowa 1975). Forfeitures are neither favored in law nor equity and they are enforced only when it is shown the equities clearly require forfeiture. Babb's, Inc, supra; Collins v. Isaacson, 261 Iowa 1236, 1242, 158 N.W.2d 14, 17-18 (1968).

In the instant case, Sedlacek purchased the property in question on contract from Shirley Matheny a/k/a Shirley Pursey who had earlier purchased the property from defendants Yilek. Sedlacek purchased the property from Pursey in October of 1961 and the second notice of forfeiture occurred in December of 1974. She sent monthly payments of $80 to Pursey who in turn endorsed them and sent the payments to the Yileks in fulfillment of the original contract, the payments being in the same amount.

When the first notice of forfeiture was sent, Sedlacek borrowed money to pay the 2 1/2 years back taxes and the monthly payments for August and September. The Yileks retained the August and September payments and together with the October payment returned all three to Shirley Pursey in late November or early December of 1974 claiming the original contract to be in default. Pursey did not return these payments to plaintiff and advised Sedlacek that any future payments would be retained and not forwarded to the Yileks.

When Sedlacek received the second notice of forfeiture in December, 1974, she was unable to timely cure the defaulted demands which included $400 in monthly payments for the period from August through December, 1974, part of

which she had already paid. There was also testimony that a demand for an unreasonable amount of attorney's fees may have further complicated the problem. Finally, the evidence shows that the monthly installment payments were frequently late in part due to the intermediary role of defendant Shirley Pursey.

From a review of all of the evidence, we find the trial court erred in finding that the second notice of forfeiture filed on December 5, 1974, was valid and enforceable without the allowance of additional time in which plaintiff Mary Sedlacek could cure any defaults. Although the trial court found the forfeiture in question related only to the Yilek-Pursey contract, the result was also a forfeiture of the Pursey-Sedlacek contract. Plaintiff Sedlacek had been making payments on the property for almost thirteen years and the Yileks were aware of, if not in acceptance of, Sedlacek's third-party position. It would be inequitable to allow such a forfeiture to occur under the circumstances of this case without the allowance of additional time for Sedlacek to attempt to cure the forfeiture. See Bettis, supra.

Any rent received by the Yileks shall apply to reduce the amount of the payments in default at the time this decision is entered. Any excess of rents during the period of default remain the property of the Yileks. The trial court shall execute the necessary documents to return Mary Sedlacek to the position of a real estate contract vendee. Costs shall be divided equally between Sedlacek and the Yileks.

REVERSED AND REMANDED.

All judges concur, except Carter, J., who dissents.

CARTER, J. (dissenting)

I dissent. It is the ordinary rule that a party seeking relief from forfeiture must tender full performance of the defaulted obligations. Cassiday v. Adamson, 208 Iowa 417, 421, 224 N.W. 508, 510 (1929). There is an exception to this rule where the party seeking to invoke forfeiture has by words or deeds waived the right of forfeiture. Babb's Inc. v. Babb, 169 N.W.2d 211, 215 (Iowa 1969).

Here there has been no tender of full performance of the defaulted obligation by either Yileks' vendee, Pursey (against whom the forfeiture is invoked) or by plaintiff. Nor is there evidence of any conduct by the Yileks from which any waiver of the vendors' right of forfeiture may be inferred.

Indeed, the Yileks returned the partial payment received in order to avoid any inference that they were willing to accept less than full tender of the defaulted obligation. I submit that they were within their rights in so doing. They also acted properly in returning these checks to Pursey, to whom they were made payable and who had last endorsed them. Whether Pursey acted properly in retaining plaintiff's checks is a matter in no way chargeable to the Yileks or by which they should be prejudiced. I would affirm the trial court.