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IN THE COURT OF APPEALS OF IOWA

MAX GIFFORD and JA NETA GIFFORD,)

Plaintiffs-Appellants,) Filed August 26, 1980

vs.)

CHARLES L. DAVISSON and BARBARA A. DAVISSON,) 0-148 / 2-62562

Defendants-Appellees.)

Appeal from Linn District Court - Robert O. Osmundson, Judge.

Plaintiffs appeal dismissal of their petition that sought recovery from defendant for breach of oral and written contracts for purchase of laundromat business and wrongful conversion of improvements. REVERSED AND REMANDED.

Robert R. Rush of Terpstra, Wilkinson & Van Horne, Cedar Rapids, for plaintiffs-appellants.

Scott E. McLeod of Lynch, Dallas, Smith & Harman of Cedar Rapids, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Plaintiffs, Max and Ja Neta Gifford, appeal dismissal of their petition that sought recovery from defendants, Charles L. and Barbara A. Davisson, for breach of oral and written contracts for purchase of laundromat business and wrongful conversion of improvements. On appeal, plaintiffs assert trial court erred in ruling the doctrine of election of remedies barred recovery because of their earlier forfeiture proceeding. We reverse the judgment of the trial court and remand this case for further proceedings in accordance with our decision.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

On April 5, 1977, plaintiffs filed a petition seeking recovery for damages arising out of the contract sale of business property. Division I of the petition alleged a breach of the written contract for sale of real estate from plaintiffs to defendants; division II alleged a breach of the oral contract for purchase of a laundromat business located on the real estate being sold; and division III alleged wrongful conversion of business property and fixtures from the real estate being sold. Defendants answered and moved for summary judgment on the grounds plaintiffs were barred from recovery by their prior forfeiture action. The court sustained the motion as to divisions I and III.

On June 13, 1978, plaintiffs filed a motion to file a recast and amended petition, which was sustained June 14, 1978. Division I of the recast and amended petition alleged defendants breached an oral agreement to purchase a laundromat business; division II alleged defendants' wrongful conversion of business property; and division III alleged defendants' breach of a written agreement to purchase a laundromat business. Defendants moved for summary judgment on divisions II and III of the recast and amended petition based on the res judicata effect of the prior summary judgment. This motion for summary judgment was overruled.

The matter came for trial before the court on August 30, 1979. At the conclusion of plaintiffs' case, the court sustained defendants' motion for directed verdict as to division I, but overruled it as to divisions II and III. On September 8, 1978, the court entered judgment for defendant and dismissed plaintiffs' petition. The court found plaintiffs' prior forfeiture action barred recovery under the doctrine of election of remedies.

II.

The central issue of this appeal is whether the doctrine of election of remedies bars plaintiffs' recovery for the alleged contract breach or wrongful conversion. Applicability of the doctrine is a question of law for the court to decide. Bolinger v. Kiburz, 270 N.W.2d 603, 605 (Iowa 1978). Election of remedies is an equitable defense, which is not favored and applied narrowly. Id. (citing Friederichsen v. Renard, 247 U.S. 207, 213, 38 S. Ct. 450, 452, 62 L. Ed 1075, 1084 (1918) ("At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended . . . .")); see Stroh Corp. v. K & S Development Corp., 247 N.W.2d 750, 753 (Iowa 1976). The purpose of the doctrine is to protect a person from the vexation of contradictory claims by a single party. Bolinger, 270 N.W.2d at 605. A party relying on the doctrine must establish three elements: Existence of two or more remedies; inconsistency between or among the remedies; and a choice of one of the remedies. Id.; Stroh Corp., 247 N.W.2d at 753.

The first element is satisfied here since when a vendee defaults in the performance of a real estate contract, the vendor has available various appropriate remedies. Abodeely v. Cavras, 221 N.W.2d 494, 497-98 (Iowa 1974). In such a circumstance a vendor has the right to elect whether: to validate the tender of performance, demand the balance of the purchase price, and sue for specific performance; to terminate the contract because of vendee's breach, keep the land, and sue for damages for the breach; to rescind the contract completely; or to enforce a forfeiture. Id. Here, plaintiffs chose initially to obtain a forfeiture and then in this action sought damages.

The second element is also established here. The remedy of damages involves proceeding on the contract, while forfeiture involves terminating or cancelling it. Id. When a vendor exercises the option provided under the contract to declare a forfeiture upon the vendee's default and terminate the contract, the vendor cannot, regarding the same default, then later change position and proceed on a theory of affirming the contract by suing for damages for breach of the contract. Id. at 498. The election of remedies doctrine bars such a pursuit of inconsistent remedies. Since plaintiffs previously elected to declare the contract terminated by the forfeiture action, they could not ordinarily seek to press their inconsistent claim for damages for breach of the same contract. See Moser v. Thorp Sales Corp., 256 N.W.2d 900, 906 (Iowa 1977).

The third element of the doctrine, however, has not been established by defendants. The idea of choice means an informed and clear understanding of the nature of the remedies available. Allied Concord Financial Corp. v. Hawkeye Lumber Co., 172 N.W.2d 264, 267-68 (Iowa 1969) (citing 25 Am. Jur. 2d, Election of Remedies §22, at 664 (1966)). Such choice entails knowledge of alternatives with an opportunity for an intelligent and intentional choice. Bolinger, 270 N.W.2d at 607; Hull v. Padgett, 207 Iowa 430, 447, 223 N.W. 154, 161 (1929); see Lindburg v. Engster, 220 Iowa 1073, 1084, 264 N.W. 31, 37 (1935). An opportunity for an intelligent choice is required since the doctrine is not intended "either as a trap or as a penalty for a mere mistake." Sackett v. Farmers State Bank of Boone, 209 Iowa 487, 493, 228 N.W. 51, 54 (1929), quoted in Smith v. State Farm Mutual Automobile Insurance Co., 248 N.W.2d 903, 906 (Iowa 1976).

When the Notice of Forfeiture was served on defendants, plaintiffs did not know for a certainty defendants would remove the washing machines, pop machine, and money changer they had brought to the property after the execution of the real estate contract. Plaintiffs had discussed this possibility with their lawyer, who in turn contacted defendants to remind them of their obligation under the contract not to remove improvements placed upon the premises. But, plaintiffs at this point did not have sufficient knowledge to bring an action for breach or wrongful conversion of the business property. In effect, they had no reason not to choose forfeiture as a remedy for defendant's default.

Accordingly, the doctrine of election of remedies cannot correctly or fairly be used to bar recovery by plaintiffs on their claim. Bolinger, 270 N.W.2d at 607; see Hull, 207 Iowa at 446-47, 223 N.W. at 161. The forfeiture action was complete upon service of notice and required no further actions. We do not view plaintiffs' three-year delay in filing this action as a bar to recovery since defendants have shown no conditions of injury to themselves warranting estoppel. See Matheson v. Matheson, 139 Iowa 511, 515-17, 117 N.W. 755, 757-58 (1908). But see Berger v. State Farm Mutual Automobile Insurance Co., 291 F.2d 666, 668-69 (10th Cir. 1961); Bowker Fertilizer Co. v. Cox, 106 N.Y. 555, 557-59, 13 N.E. 95, 96 (1887). See generally Annot., 6 ALR2d 19 (1949).

Our holding requires we reverse the judgment of the trial court and remand this action for further proceedings on plaintiffs' claims.

III.

Our decision on the election of remedies issue precludes the need to address the

issues plaintiffs raise concerning any ambiguity in the agreement or damages. We, however, find it appropriate to answer plaintiffs' claim the trial court erred in excluding evidence concerning the parties' intent as to the value each assigned to the laundry equipment at the time of sale. The evidence plaintiffs claim was excluded was later admitted. Plaintiffs suffered no prejudice due to the alleged error and thus do not present a valid ground for reversal. Kengorco, Inc. v. Jorgenson, 176 N.W.2d 186, 189 (Iowa 1970).

REVERSED AND REMANDED.