FILED
AUG 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LUMBERLAND, INC., a corporation,	)	
Plaintiff-Appellee,	)	Filed August 30, 1983
vs.	)	
TURNER AND TURNER ENTERPRISES, LTD., a corporation; RICHARD L. TURNER and LaVONNE K. TURNER, husband and wife,	)	
	)	3-119 / 2-69356
Defendants-Appellants,	)	
and	)	
IOWA BANKERS MORTGAGE CORPORATION,	)	
Defendant.	)	

Appeal from Linn District Court - Larry J. Conmey, Judge.

Defendants appeal from summary judgment for plaintiff in this action on a promissory note. AFFIRMED AND REMANDED.

James W. Affeldt of Eells, Blackstock, Affeldt & Harms, Cedar Rapids, for defendants-appellants.

Minor Barnes and Matthew G. Novak of Pickens, Barnes & Abernathy, Cedar Rapids, for plaintiff-appellee.

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

DONIELSON, J.

Defendants Turner and Turner Enterprises, Ltd., Richard L. Turner, and LaVonne K. Turner appeal from summary judgment for plaintiff Lumberland, Inc. We affirm and remand.

Defendants in this action signed a promissory note with plaintiff as payee. The note called for three payments coming due in April, July, and December. Defendants made only small partial payments for April and July and both were late. When plaintiff invoked the acceleration clause and brought this action for judgment on the note, the defendants claimed that plaintiff's right to accelerate the payments had been waived by its acceptance of the late payments.

The question before us is whether it was error for the trial court to sustain plaintiff's motion for summary judgment, finding no genuine issue of material fact. We find no error.

Defendants Richard L. Turner and LaVonne K. Turner are the president and secretary, respectively, of Turner and Turner Enterprises, Ltd. (hereafter Turner and Turner), a corporation engaged in the general construction business in Cedar Rapids. Turner and Turner was indebted to Lumberland, a lumberyard in Cedar Rapids, and plaintiff in this action, for supplies and materials, obviously used in various construction projects.

When payment was not made, the lumberyard filed a mechanic's lien against property owned privately by Richard and LaVonne Turner. This real estate was subject to a first mortgage to Iowa Bankers Mortgage Corporation.

On December 11, 1981, Turner and Turner, by its president, signed a promissory note in the amount of $33,682.10, the total of accounts owed Lumberland. Its president, Richard L. Turner, guaranteed payment of the first $7,500, including interest. The note was secured by a second mortgage on the real estate owned by Richard and LaVonne Turner. Lumberland, upon receiving the

promissory note, released the mechanic's liens against the property.

The payments called for by both the promissory note and the real estate mortgage consisted of the following: $5,000 including interest on April 11, 1982, $2,500 including interest on July 11, 1982, and the balance including interest in full on or before December 11, 1982. The Turners' first payment was not made until June 17 and this payment was only in the amount of $500. The second and final payment by defendants was made July 13 and again was for only $500. Both payments went to the interest on the note.

Both the note and the mortgage included an acceleration provision which Lumberland exercised on August 19, 1982, and then brought this action for judgment on the note and to foreclose the mortgage.

On September 13, 1982, defendants filed an answer admitting the execution of the note but alleged that Lumberland had waived its right to accelerate the balance due by accepting note payments. Two days later, Lumberland moved for summary judgment. Attached to its motion was the affidavit of Vincent Bading, Vice President and Secretary of Lumberland, which stated inter alia, that various demands had been made for payment, which had been refused or neglected.

The trial court, finding no genuine issue of material fact, sustained the motion for summary judgment.

Rule 237(c), Rules of Civil Procedure, provides in part:

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The purpose of the summary judgment is to enable a party with a just cause of action to obtain judgment promptly without the expense of a trial when there is no material issue to try. Davis v. Comito, 204 N.W.2d 607, 608 (Iowa 1973). However, if a material fact issue is found in the pleadings, depositions,

affidavits, or other instruments before the court a motion for summary judgment should not be sustained. Davis, at 608.

I.

Our first task is to determine whether a genuine issue of material fact existed. It has long been recognized that the burden is upon the movant for summary judgment to show absence of any genuine issue of a material fact. Furthermore, all material properly before the court must be viewed in a light most favorable to the opposing party. Continental Ill. Nat. B. & T. Co. v. Security State Bank, 182 N.W.2d 116, 118 (Iowa 1970).

Appellants assert the genuine issue of fact in this case arises from their allegation that the plaintiff by its statements and actions waived its right to accelerate the balance due under the terms of the promissory note and mortgage.

In support of this allegation, defendants rely on denials in their answer and Richard Turner's affidavit filed in resistance to the motion for summary judgment.

Rule 237(e), Rules of Civil Procedure, requires:

> . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond summary judgment, if appropriate, shall be entered against him.

Although it was Mr. Turner's impression that the plaintiff would not exercise its option to accelerate the balance due, we cannot find any specific facts supporting the conclusion that Lumberland had waived its right to accelerate.

Appellants argue that acceleration provisions are not self-executing, but that the holder of an instrument must take some positive action to exercise his option to declare payments due under an acceleration clause.

The very case cited to by appellants states that positive action includes the

commencement of an action for judgment on a note and an action of foreclosure. Weinrick v. Hawley, 236 Iowa 652, 656, 19 N.W.2d 665, 667 (Iowa 1945). Such was the procedure followed by plaintiff in this action.

II.

The second issue to address is defendants' allegation that accepting two partial payments provided a course of dealing which constituted a waiver of the right to accelerate.

Defendants rely almost exclusively on the Iowa Supreme Court decision of Dunn v. General Equities of Iowa, Ltd., 319 N.W.2d 515 (Iowa 1982). We recognize, as did the court in Dunn, that acceleration clauses are subject to the principles governing contracts generally. "Contract rights, of course can be waived and an option to accelerate a debt is one such waivable right." Id. at 516. Evidence of a general course of dealing between the parties can be used to prove waiver of contract provisions. Livingston v. Stevens, 122 Iowa 62, 69, 94 N.W. 925, 927 (1903).

Course of dealing as defined in the U.C.C. means "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expression and other conduct.

The first paragraph of the definition of course of dealing in Restatement (Second) of Contracts § 223 (1979), is quite similar to the UCC definition and the second paragraph provides:

> (2) Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies the agreement.

The Iowa Supreme Court in Dunn, held that the holder of an installment note who has failed to invoke an acceleration option on prior occasions may have established a course of dealing that would constitute a waiver of his right to

accelerate payments on subsequent occasions. Dunn, at 517.

The case at bar is distinguishable from Dunn on two counts. First, although the payments made on the note in Dunn were late, they were full payments. Here, both payments were not only late but also were insufficient to even cover the interest accrued. Secondly, the note in Dunn was payable over a period of ten years, with annual installments. At least three of the first four annual payments were late, yet when no acceleration was invoked because of these defaults, a course of dealing was established waiving that right. The note, in the case at bar, was for only one year, with a $5,000 payment due on April 11, $2,500 due on July 11, and the balance due on or before December 11, 1982. When this action was filed the only installment which had not come due was the balance to be paid at the end of the year.

If both payments to Lumberland had been paid in full leaving only the balance due in December, the defendants' argument would have been better received. However, such was not the case. Plaintiff's acceptance of the two small partial payments toward interest only provided for a reduction in the interest accrued. It was insufficient to be viewed as a course of dealing qualifying the parties agreement, specifically the right to accelerate.

After a thorough study of the record we conclude the trial court was correct in determining there was no genuine issue as to any material fact generated by the record before it and in entering judgment for plaintiff.

We also conclude that under the terms of both the promissory note and real estate mortgage, plaintiff is entitled to attorney fees in this appeal. Therefore, we remand the case to the district court for the limited purpose of determining appellate attorney fees. Public Finance Co. v. Van Blaricome, 324 N.W.2d 716, 726 (Iowa 1982).

AFFIRMED AND REMANDED.