FILED
FEB 22 1979
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IOWA DES MOINES NATIONAL BANK,	)	
Plaintiff-Appellee,	)	Filed February 22, 1979
vs.	)	
CYNTHIA K. MILLER,	)	741 2-61707
Defendant-Appellant.	)	

Appeal from Polk District Court - Dale S. Missildine, Judge.

Defendant appeals from deficiency judgment awarded plaintiff bank for money owed on loan. Affirmed.

Dennis J. Kirkwood, of Des Moines, counsel for appellant.

S. Joseph Rubenstein, of Des Moines, counsel for appellee.

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

DONIELSON, J.

Defendant Cynthia Miller appeals from an adverse judgment in a law action for deficiency judgment by plaintiff Iowa-Des Moines National Bank under the Uniform Commercial Code. We affirm the trial court.

On November 17, 1972, Miller executed a promissory note in the amount of $7,740.72 to Iowa-Des Moines, payable over six years. As collateral for the loan, Miller executed a security agreement on the same date giving Iowa-Des Moines a secured interest in her 1969 Volkswagen automobile and 1966 Ponderosa mobile home.

In July or August 1975 Miller informed the bank that she was ill and would be unable to continue her monthly installment payments on the note. She asked the bank to sell her mobile home for her. When Miller failed to make her August 1975 payment, the bank sent her notice of right to cure in accordance with § 537.5110 and § 537.5111, The Code 1975. This notice was sent to the location of the mobile home, which was the address supplied by Miller at the time of execution of the security agreement. The security agreement provided that in the event of default, proper notice could be given by mail to the address on the note, or to such new address as might be provided in writing. Miller testified that she gave the bank only oral notice of change of address and all correspondence from the bank was sent to the mobile home.

When Miller failed to cure the default, the bank took possession of the mobile home in September 1975. On September 16, 1975, Iowa-Des Moines sent the following notice of private sale to Miller:

CERTIFIED MAIL NOTICE OF PRIVATE SALE

September 16, 1975

Miss Cynthia K. Miller
6901 S. E. 14th, Lot #86
Des Moines, Iowa 50320

Ref: Account No. 10172-5

You are hereby notified that pursuant to a default under the terms and provisions of that certain security agreement executed on November 17, 1972, signed by Cynthia K. Miller, the undersigned Iowa-Des Moines National Bank, being the holder of said security agreement and the indebtedness secured thereby, will dispose of the following described collateral:

One (1) 1966 Ponderosa 60 x 12 2 bedroom Mobile Home
Serial No. 1065

The disposition will be at one or more private sales on or after September 26, 1975.

If, prior to the above date, arrangements are made to the satisfaction of the Iowa-Des Moines National Bank, the sale will not be held and said mobile home will be released to Cynthia K. Miller.

IOWA-DES MOINES NATIONAL BANK

By:
F. J. KOPPOLD, Collection Manager
Installment Loan Department

Since Iowa-Des Moines had a policy of not selling vehicles which were not titled in it, steps were taken to transfer title into the bank's own name. On October 28, 1975, a bank employee executed an "affidavit of foreclosure" as required by § 321.47, The Code 1975, for the transfer of motor vehicle title to a security holder. The employee checked box (b) on the form as follows:

2. Check the appropriate box:

a. ( ) That said secured party sold, or caused to be sold, said vehicle at foreclosure sale pursuant to the laws of the State of Iowa, and conveyed all right, title, and interest in and to said vehicle to the following named person(s) for the sale price of
$ _____

_____ _____
(Name of Purchaser) (Sale Date)

b. (XX) That the vehicle has been retained by
Iowa-Des Moines National Bank
(Name of Secured Party)
in satisfaction of the obligation and that written notice of such retention has been sent to the debtor.

Iowa-Des Moines solicited bids on the mobile home from several dealers, and sold it on November 5, 1975 for a high bid of $2300. The bank then commenced this action for the $2,259.54 deficiency.

On appeal, defendant Miller contends that the checkmark by the bank on the affidavit of foreclosure constituted an election of its remedy to retain the security in full satisfaction of defendant's obligation under § 554.9505, The Code 1975. The trial court found the "Notice of Private Sale" sent by the bank to Miller served as an election of remedy under § 554.9504, The Code, and the checkmark on the affidavit of foreclosure had no effect.

In a law action tried to the court, our review is not **de novo** but only on errors assigned. Rule 4, Rules of Appellate Procedure. The findings of the trial court, if

supported by substantial evidence and justified as a matter of law, are binding on us and the judgment will not be disturbed on appeal. Herman Ford-Mercury, Inc. v. Betts, 251 N.W.2d 492, 493 (Iowa 1977).

Article 9 of the Uniform Commercial Code sets out the specific procedures for exercising the alternative and inconsistent remedies provided in §§ 554.9504 and 554.9505, The Code. We must look, however, to general principles of law and equity outside these statutory provisions to determine at which point a secured party has elected between remedies, and the effect of such an election. Section 554.1102, The Code 1975.

The doctrine of election of remedies applies in a strict and limited way when three elements are present: (1) existence of two or more remedies, (2) inconsistency between the remedies, and (3) a choice of one of the remedies. Stroh Corp. v. K & S Development Corp., 247 N.W.2d 750, 753 (Iowa 1976). It is "not intended either as a trap or as a penalty for a mere mistake." Stroh Corp. v. K & S Development Corp., supra; Sackett v. Farmers State Bank, 209 Iowa 487, 493, 228 N.W. 51, 54 (1929). When the party alleged to have made the election actually brings an action, or by some other decisive act, with knowledge of the facts, indicates a choice between inconsistent remedies, the party is bound by that choice. Culligan Soft Water Service v. Berglund, 259 Iowa 661, 666, 145 N.W.2d 604, 608 (1966). It is the first election of remedies, not a subsequent one, which is binding on the party. Miller v. Hartford Fire Ins. Co., 251 Iowa 665, 675, 102 N.W.2d 368, 375 (1960).

It seems clear from the record that Iowa-Des Moines elected to pursue its remedy under § 554.9504 of sale and subsequent suit for deficiency when it notified Miller on September 16, 1975 of its intention to dispose of the mobile home by private sale. Miller makes no contention that that notice was not in conformity with the requirements of § 554.9504(3). The bank cleaned and prepared the mobile home, and solicited bids on the unit. It is the bank's election to proceed by sale that is binding upon it. Miller v. Hartford Fire Ins. Co., 251 Iowa at 675.

Further, the affidavit of foreclosure fails to meet the notice requirements of § 554.9505(2), The Code. It is addressed not to the debtor, Miller, but to a disinterested third party, the State of Iowa. Nothing in the record indicates that a copy was sent to

Miller. It does not directly inform the debtor of the bank's intention to retain the mobile home in full satisfaction of the obligation, nor inform her of her rights of objection. We do not see how the filing of the affidavit in this case operates as an election to proceed under § 554.9504. We affirm the trial court's order finding Iowa-Des Moines National Bank entitled to a deficiency judgment against Cynthia Miller in the amount of $2,529.54 together with interest and costs.

AFFIRMED.