

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

KENNETH R. CRANE and
JERRILYN J. CRANE,

Plaintiffs-Appellants,

vs.

WILLIAM H. CRANE, FLORENCE
CRANE and UNION BANK & TRUST
COMPANY, A Corp.,

Defendants-Appellees.

Filed February 26, 1985

UNION BANK & TRUST COMPANY,

Plaintiff-Appellant,

vs.

WILLIAM H. CRANE and
FLORENCE CRANE,

Defendants-Appellees.

4-519
84-258

Appeal from the Iowa District Court for Clayton County - L. John Degnan,
Judge.

Plaintiffs appeal with permission from judgment for defendants in a consolidated quiet title and declaratory judgment action. The trial court ruled that the plaintiffs, Kenneth and Jerrilyn Crane, had abandoned the real estate contract and the farm property; that the assignment of the real estate contract to Union Bank was ineffective as against William Crane, vendor; and that title should be quieted in William Crane subject to his exercise of his first option to purchase.
REVERSED IN PART AND AFFIRMED IN PART.

John Q. Swift of Swift & Swift, Manchester, for plaintiffs-appellants Crane.

E. Michael Carr of Carr & Carr, Manchester, for plaintiff-appellant bank.

Stephen D. Saunders of Clefish & Saunders, Elkader, for defendants-appellees.

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

PER CURIAM

Plaintiff Kenneth Crane is the son of defendant William Crane. William Crane, seeking to help his son get started in farming, sold Kenneth one of his farms in 1978. The two entered into an installment contract providing for the sale of the property at a price per acre which was lower than the market value and a low interest rate. In addition, the contract contained a clause providing William with a first option to purchase in the event Kenneth "decided to sell" the property within five years.

In 1981, Kenneth Crane listed the farm for sale with a local realtor. A sign was placed in the yard. From the record it is apparent that the father, William Crane, was aware of the listing but made no objection or offer to purchase at that time.

In 1980, Kenneth Crane obtained a loan from the other plaintiff, Union Bank & Trust Company. To secure the loan, he assigned the bank an interest in the farm. William testified that he did not learn of the assignment until January, 1982, when Kenneth sold some of his farm equipment at a public auction. William testified that the day after the sale he went to the bank to make financial arrangements for the items that he bought at the sale and while he was there, he was told of the assignment.

In January, 1982, Kenneth Crane failed to make the contract installment payment of \$6500 due on January 1, 1982, to William. William testified that Kenneth had informed him in December that he would be unable to make the payment. William told him that he did not have to make the payment and that they "could work it out somehow." However, on January 14, 1982, William Crane served a Notice of Forfeiture on Kenneth and his wife, Jerrilyn. Kenneth testified that he borrowed the \$6500 from his mother, Florence Crane of Arizona. He stated that he received a cashier's check in this amount and went to his father, William, to pay the installment. Although he was unsure whether he actually

showed the check to his father, he did testify that he went to his father, told him he had the money to make the payment, and that his father refused to take it: "He--his response to me was if I made the farm payment the bank would take the farm away from me."

William Crane denied that his son, Kenneth, ever offered him the money. However, he did testify that following the service of the forfeiture notice, he and Kenneth discussed the situation, and specifically clause 13 of the contract granting William a first option to purchase. William testified: that he offered to repurchase the farm shortly after Kenneth's farm equipment sale; that Kenneth and Jerrilyn accepted the offer; but that they left the state before signing the proper papers completing the agreement. Kenneth Crane acknowledges that they had the conversation, but claims that William did not offer any money for the land.

The record indicates that Kenneth and Jerrilyn moved all of their personal belongings out of the house, and went to Arizona in search of work. Kenneth testified that he asked William to keep an eye on the farm and to check it out to make sure everything was in order while they were gone. He claims that William agreed to this.

During the time that Kenneth and Jerrilyn were gone, William paid the phone and electric bills, the insurance premiums, and the real estate tax. Kenneth testified that he had asked William to send him the phone and electric bills but that he never received these.

William also certified the farm for ASCS purposes; he planted crops in 1982, and participated in the Payment-in-Kind program in 1983.

In February, 1982, shortly after Kenneth and Jerrilyn left the state, William served Notice of Forfeiture on the plaintiff, Union Bank & Trust Company. In March, Union Bank & Trust twice tendered payment of the \$6500 for the "sole

purpose of protecting the bank's loan in this matter." William Crane rejected both of these offers.

In April, 1982, Union Bank filed a Petition for Declaratory Judgment and Other Relief against William Crane asking the court to construe paragraph 13 of the sales contract between William and Kenneth Crane and to order that the bank's rights under that contract are for a security purpose only and do not constitute a sale.

In January, 1983, Kenneth and Jerrilyn Crane filed a Petition to Quiet Title and Recover the Real Estate. William Crane asserted the defense that Kenneth and Jerrilyn abandoned the farm. Outside of filing the Notice of Forfeiture, William Crane has not proceeded with that action.

The trial court consolidated Kenneth Crane's and Union Bank's cases into one. A hearing was held and the trial court issued a ruling finding that Kenneth and Jerrilyn Crane had abandoned the farm and that the assignment by Kenneth Crane to Union Bank was ineffective as against William Crane because he had no notice. The court ordered that title be quieted in William Crane subject to the exercise of the first option to purchase granted in paragraph 13 of the contract.

William Crane tendered \$17,770.16 to Kenneth Crane in satisfaction of the option to purchase; however, this was rejected pending plaintiff's motion for interlocutory appeal. The plaintiffs sought and were granted permission for interlocutory review of the district court's judgment. Both Kenneth and Jerrilyn Crane, and Union Bank filed briefs as appellants. Each asserts, on appeal: that the forfeiture proceedings constituted an election of remedies barring any right to relief under an abandonment theory; that there was no abandonment of the property; that William waived the rights granted by the contract; and that title should be quieted in Kenneth and Jerrilyn Crane. Additionally, the bank argues that its rights are superior to those of William Crane.

This is an action in equity and our review is de novo. Iowa R. App. P. 4.

Turning first to the issue of election of remedies, appellants argue that William is precluded from seeking recovery under both an abandonment theory and a forfeiture theory, and that the election of remedies doctrine bars recovery under both theories.

While the distinction between abandonment and forfeiture is sometimes cloudy, it is clear that these do represent two separate grounds for recovery:

[T]he term "abandonment" has occasionally been used as synonymous with, or the equivalent of, "forfeiture," and courts have pointed out that in attempting to apply these two terms to particular facts and circumstances the distinction between an abandonment and a forfeiture is often shadowy, or, as it has been expressed, "so thin as not to be distinguishable." Accurately speaking, however, there is a plain, fundamental distinction between the two concepts, in this, that abandonment is voluntary in character, and essentially a matter of intention, so that to effectuate it there must necessarily be an intention to abandon, while forfeiture is an enforced and involuntary loss of a right, and intention is not an essential element of it, but, on the contrary, a forfeiture may, and in the usual case does, occur against, and contrary to, the intention of the party possessing the right.

1 C.J.S. Abandonment § 2 (1936).

In Iowa, recovery under a forfeiture theory is purely statutory. See Iowa Code Chap. 656 (1983). Chapter 656 sets forth the specific requirements which must be complied with in order to perfect a forfeiture. The purpose of chapter 656 is to "limit the rights of a forfeiting vendor who might otherwise summarily remove a vendee upon default. It is designed to extend 'a little grace to a party in default who may be staggering under the load of his undertaking'." Jensen v. Schreck, 275 N.W.2d 374, 384 (Iowa 1979). The contract which Kenneth and William entered into contained a forfeiture and foreclosure clause stating that if the buyer failed to perform, the seller could forfeit the contract "as provided by Chapter 656."

The doctrine of election of remedies is applied when three elements are present: the existence of two or more remedies, inconsistency between remedies,

and choice of one of the remedies. Bolinger v. Kiburz, 270 N.W.2d 603, 605 (Iowa 1978). Although this claim of election of remedies is raised for the first time on appeal and we find no need to thoroughly discuss it because of the other issues raised, we do find that the trial court allowed inconsistent remedies basing its decision in part on the theory of abandonment and in part on the rights under the contract.

The trial court ruled that Kenneth had voluntarily abandoned the contract and farm; that the assignment was valid only between Kenneth and Union Bank because William had no notice; and that title should be quieted in William upon payment "as provided in the contract at paragraph 13."

It is clear from the various pleadings and from the trial court's opinion, that William was seeking and ultimately received two inconsistent remedies: a forfeiture of the contract invoking paragraph 13 to grant him a priority over Union Bank's assignment; and an abandonment of the contract, nullifying the contract between himself and William and quieting title in Kenneth.

After examining the trial court's findings of fact and conclusions of law, we find that the court erred in holding that there had been an abandonment of the contract and property.

In Sioux City v. Johnson, 165 N.W.2d 762 (Iowa 1969), the supreme court set forth the factors which must be shown to establish abandonment:

Abandonment develops because the owner no longer desires to possess the thing. 1 C.J.S. Abandonment § 2a. In order to establish abandonment of property, actual acts of relinquishment accompanied by intention to abandon must be shown.

Id. at 767.

As was stated previously, the primary distinction between abandonment and forfeiture is that abandonment is a voluntary decision to rescind the contract in which a showing of intent is necessary, while forfeiture is an involuntary and enforced decision. 1 C.J.S. Abandonment § 2 (1936). Mere nonuse is not sufficient

to establish relinquishment of title or ownership. Sioux City v. Johnson, 165 N.W.2d 762, 767 (Iowa 1969). Similarly, the failure to make a payment does not in itself, work an abandonment of the contract. Westercamp v. Smith, 239 Iowa 705, 713, 31 N.W.2d 347, 351 (1948). Rather, we must examine all the circumstances to determine whether there was an intent to voluntarily surrender rights in the property.

After examining the record, we conclude that there was no such intent. Kenneth testified that they were forced by economic circumstances to leave the farm for awhile to seek work in another area. He testified that he asked his father to look after the farm and to send him the phone and electric bills. Before he left, he made arrangements to heat the home during the winter to prevent frozen pipes and he did not have the phone disconnected. A tractor worth approximately \$20,000 was left in the shed. After examining these facts, we cannot find a voluntary intent of Kenneth to abandon the property.

We also find that William waived his forfeiture rights under the contract. With regard to forfeiture for non-payment of the \$6500 January installment, William rejected three tenders of payment. He may not, therefore, claim forfeiture for non-payment. As to the claim based on the assignment to the bank in violation of William's first option to purchase, we find that no default has yet occurred. Paragraph 13 of the contract states:

At any time within five (5) years if Buyers decide to sell said described property the Buyers shall give the first option to purchase to the Sellers at the same described purchase price of this Contract.

We find that Kenneth has not yet "decided to sell" the property. The property has been listed with a real estate agent in July, 1981. The record indicates that William knew that the property was for sale but did nothing. We also find that William did not prior to the commencement of these proceedings exercise these rights under paragraph 13 by tendering to Kenneth the purchase

price referred to in the contract. No firm offers were received and thus there was no "decision to sell." The assignment to the bank did not involve a sale of the property. Title still remained with Kenneth.

Because there has been no forfeiture or abandonment of the contract, title should remain in Kenneth.

Finally, with regard to Union Bank's rights by virtue of being an assignee of the contract, we find that Union Bank's rights are subject to those rights of William. The general rule is that the assignee of a claim takes subject to all defenses, setoffs, and counterclaims to which his assignor was subject. Walters v. Iowa-Moines National Bank, 295 N.W.2d 430, 433 (Iowa 1980). In this case, no notice of the assignment was given to William. The bank had the opportunity to examine the contract before extending the loan and thus had notice of William's first option to purchase under paragraph 13. Because there has been no sale of the property yet, William has not waived this right. His interest as vendor is superior to that of Union Bank. See, 92 C.J.S. Vendor & Purchaser § 312(b) (1955) (unless notice of a contract vendee's assignment is given to the vendor, the vendor is not affected).

The findings of the trial court are reversed in part, and affirmed in part. We find no forfeiture or abandonment of the contract. Title is quieted in Kenneth Crane, and Union Bank as assignee, takes subject to all rights of William Crane in the contract.

REVERSED IN PART AND AFFIRMED IN PART.