

IN THE COURT OF APPEALS OF IOWA

PETER G. MEULPOLDER, NELLIE J. MOORE,
JEAN N. TERPSTRA, JOHANNA S. VAN EE,
HELEN VAN VARK, and GARDENA VAN VARK,

Plaintiffs-Appellees,

vs.

RAYMOND G. MEULPOLDER and DONNA J.
MEULPOLDER,

Defendants-Appellants.

Filed May 25, 1982

CLERK SUPREME COURT

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2-89
2-66552

Appeal from Marion District Court, Thomas S. Bown, Judge.

The defendants appeal from a judgment for the plaintiffs in an action to
forfeit a real estate contract. REVERSED AND REMANDED.

Terry L. Wilson of Mick & Wilson, Knoxville, and Ann Marie Williams of
Belin, Harris, Helmick & Heartney, Des Moines, for defendants-appellants.

Patrick W. Brick of Scalise, Scism, Gentry, Brick & Brick, for plaintiffs-
appellees.

Fred Kreykes, Pella, for third-party defendant.

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

PER CURIAM

The defendants appeal from a judgment for the plaintiffs in an action to forfeit a real estate contract. We reverse and remand.

The plaintiffs and defendant Raymond are sisters and brothers. Their parents owned a farm in joint tenancy. Raymond worked with his father on the farm. In 1968, the elder Meulpolders sold the farm to Raymond and his wife by executing a written installment contract for \$60,000. The defendants made the downpayment, but only sporadic payments of interest thereafter. The elder Meulpolders moved to a nursing home in 1973, and Mrs. Meulpolder died in 1974. There was no administration of her estate. In 1977, Mr. Meulpolder assigned the installment contract to his seven children. After the assignment, the defendant Raymond continued to make no payments. After his siblings pressured him, Raymond made a partial payment of interest. The parties discussed the possibility of a division of the farm. Finally, on March 10, 1979, the plaintiffs served a Notice of Forfeiture on Raymond. On March 12, 1979, Raymond's attorney stated in a letter to the plaintiffs' attorney that the defendant was "ready, willing, and able" to pay off the contract. A request was made for the abstract for submission to the Farmer's Home Administration as part of the loan process. A preliminary title opinion stated that the contract of sale had not preserved the sellers' joint tenancy, that therefore joint tenancy was not preserved, and that since Mrs. Muelpolder was legal title holder to one-half of the property, it was necessary to have an administration of her estate.

The plaintiffs' attorney began this administration in order to clear title. For the next few months, the parties' attorneys negotiated the amount due the plaintiffs under the contract. It appears that the parties never agreed on the correct amount owed. By October the title defect had been cleared and a new

title opinion asked for a warranty deed signed by the seven Meulpolder children. Soon thereafter, the plaintiffs discharged their attorney, hired a new one, filed an affidavit of forfeiture on December 7, 1979, and brought this action to quiet title and to partition the farm on December 12.

The trial court held that the contract had been forfeited and ordered that title be quieted in equal shares among the plaintiffs and defendant, Raymond. The trial court further ordered that the property be sold.

The defendants, Raymond and his wife, appeal from this order. They assert that the trial court erred (1) in holding that the defendants' offer to pay off the contract within thirty days after service of the notice of forfeiture was an insufficient tender to cure the default because the offer was conditioned on plaintiffs' provision of marketable title; and (2) in holding that the plaintiffs through the conduct of their attorney had not waived their right to insist on forfeiture of the contract.

Chapter 656, Iowa Code 1981, provides the procedure to be followed in forfeiture cases. The chapter is "construed strictly as against the forfeiture, and with liberality towards those opposing it." Jensen v. Schreck, 275 N.W.2d 374, 386 (Iowa 1979). Section 656.4 provides that the forfeiture is terminated if within 30 days of service of the notice of forfeiture, the buyer performs the terms and conditions as to which he is in default.

In this case, the plaintiffs served notice on March 10, informing the defendants they were in default for (1) failure to make payments, the total amount being due was \$83,835.31; (2) failure to maintain the property in good repair; and (3) failure to farm in a good and husbandlike manner. On March 12, the defendant's attorney wrote to the plaintiff's attorney and stated the defendants had obtained sufficient funds to pay off the contract, which funds could be released once marketable title was shown.

The plaintiffs could not deliver good title. The plaintiffs argue, and the trial court held, that this tender of performance was inadequate because the buyer could not condition his offer of payment on receipt of good title. We disagree. The general rule is that a tender of performance must be unconditional. Swanson v. Baldwin, 250 Iowa 342, 93 N.W.2d 740 (1958). However, "where the promise to pay is conditioned upon concurrent performance by the vendor, an offer to pay, on condition that the vendor concurrently perform his part by executing a deed, is a good and sufficient tender where it is coupled with an ability to pay." 77 Am. Jur. 2d Vendor and Purchaser § 305.

The evidence showed that the defendants' loan had been approved and a check was waiting to be delivered as soon as title was cleared. Therefore, we hold that the defendants' offer to pay off the contract was a sufficient tender to cure the default and prevent forfeiture.

The plaintiffs argue that the tender was insufficient because it failed to address the defaults of failing to keep the premises in good repair and failing to farm in a good manner. There was evidence in the case that there had been deterioration of the buildings and fences on the farm. From 1968 to 1978, no demand was made on the defendant to perform these two conditions of the contract. Of course, just because the sellers waived these conditions does not mean they could not later withdraw their waiver if they then afforded the defendants a reasonable opportunity to perform the conditions which were waived. Bettis v. Bettis. 228 N.W.2d 193, 195 (Iowa 1975). The notice of forfeiture was itself notice of withdrawal of the waiver. Id. The court in Bettis noted that the 30-day statutory notice does not in all circumstances allow "a reasonable opportunity for the performance of conditions previously waived." Id. This is certainly the case here. The condition of the buildings and fences has developed over a period of ten years, with no demand by the sellers that there be any compliance with the contract. A 30-day period to make the repairs is not a

reasonable opportunity to perform these conditions. Therefore, the notice did not operate to forfeit the defendant's interest. See Bettis at 196. In addition, if the vendor is in default, "equity dictates a cancellation of the forfeiture." Skubal v. Meeker, 279 N.W.2d 23 (Iowa 1979).

A court sitting in equity has jurisdiction to cancel a forfeiture. Id. Therefore, the order of the trial court is reversed. This case is remanded to the trial court with instructions to cancel the forfeiture and to determine the amount due the plaintiffs by the defendants.

Because we have determined the tender of performance by the defendants stopped the forfeiture, it is unnecessary to address the second issue raised by the defendants-appellants.

REVERSED AND REMANDED.