

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 26 1989

CLERK SUPREME COURT

WARREN L. GRANDIA,)
Plaintiff-Appellee,)
vs.)
JEROME T. BASSMAN,)
Defendant-Appellant.)

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JEROME T. BASSMAN,)
Counterclaimant and)
Cross-Petitioner,)
vs.)
WARREN L. GRANDIA,)
Defendant to Counter-)
claim,)
HAWKEYE BANK AND TRUST OF)
DES MOINES, f/k/a HAWKEYE-)
CAPITAL BANK AND TRUST,)
Defendant to Cross-)
Petition.)

8-580
88-421

Appeal from the Iowa District Court for Polk County
(CL 68-39922), Ray A. Fenton, Judge.

Defendant Bassman appeals from a district court
judgment awarding plaintiff Grandia monetary damages for
breach of a real estate contract. **AFFIRMED.**

Joseph L. Marks of Marks, Marks & Marks, Des Moines,
for defendant-appellant.

William D. Baker and David R. Elkin of Baker & Elkin,
Des Moines, for plaintiff-appellee.

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

HAYDEN, J.

On September 1, 1983, Grandia and Bassman entered into a written agreement whereby Grandia sold to Bassman certain real estate and other assets for the sum of \$173,250. The contract price was to be paid on an installment basis and Bassman was to be responsible for all taxes and assessments after September 1, 1983. The agreement set forth the rights of Grandia in the event of a default by Bassman. Grandia could forfeit the contract or he could enforce the contract by any action at law or in equity.

Bassman defaulted in his payments to Grandia and Grandia caused a Notice of Forfeiture of Real Estate Contract to be served upon Bassman on August 28, 1986. On September 24, 1986, Grandia served Bassman with a Notice of Cancellation and Waiver of Notice of Forfeiture of Real Estate Contract. On September 24, 1986, Bassman caused a Notice of Rejection of Notice of Cancellation and Waiver of Notice of Forfeiture of Real Estate Contract to be served upon Grandia. Bassman never cured the default after the service upon him of the Notice of Forfeiture.

In October 1986, Grandia filed a petition at law seeking damages for breach of the real estate contract. The district court granted Grandia's motion for summary judgment. The district court rejected Bassman's argument Grandia had elected his remedy when he served the notice of forfeiture. Instead, the district court concluded Grandia

had not elected his remedy since Grandia waived his right to proceed with the forfeiture within the thirty-day period provided in Iowa Code section 656.4. Bassman appealed. We affirm.

Our scope of review is on error at law. Iowa R. App. P. 4.

Bassman claims Grandia waived his right to sue on the contract when he served a notice of forfeiture of the contract on Bassman. This issue was addressed and answered by the Iowa Supreme Court in Gottschalk v. Simpson, 422 N.W.2d 181 (Iowa 1988). The holding in that case at page 184 is as follows:

It is clear that a forfeiture right under a contract may be waived by the seller. . . .

The thirty-day period provided by chapter 656 for curing of defaults, however, was not intended to automatically drop a curtain on any negotiations or settlement attempts undertaken by the parties during the thirty-day period, or to preclude a waiver of forfeiture by the seller. Nothing in the statute, or our cases, would suggest that. (Emphasis ours.)

Also, in that case, Simpson argued Gottschalk elected the remedy of forfeiture and could not therefore take a different tack by accepting a deed in lieu of forfeiture. The Iowa Supreme Court rejected this argument on its merits. The court held:

Election of remedies is a doctrine not favored by the law; it is ordinarily applied in a strict and limited way. Furthermore, when remedies are factually consistent, an election to pursue one does not preclude pursuit of another until the first is fully completed. . . . Gottschalk had not pursued forfeiture to its conclusion; it was

waived before the remedy was complete, Gottschalks could therefore not be bound to that decision. (Emphasis ours.)

Id. at 184-85.

In the instant case, Grandia notified Bassman before the end of the thirty-day period to cure the default he was waiving the forfeiture. We hold the contract vendor, Grandia, had a right to waive the remedy of forfeiture even though the notice of forfeiture had already been served on Bassman. After a notice of forfeiture is served on a defaulting vendee, the rights of the vendor remain identical to those before service of the notice. Here, Grandia served Bassman with a notice of cancellation and waiver of notice of forfeiture of real estate contract before the expiration of the thirty-day statutory period for curing defaults. Therefore, the forfeiture was never completed as it was effectively waived by the vendor, Grandia. We also hold, Bassman's service of notice of rejection of notice of cancellation and waiver of notice of forfeiture of real estate contract upon Grandia's is a nullity.

We do not compare, distinguish, or discuss cases decided before Gottschalk.

We hold Grandia waived the forfeiture upon Bassman before it was completed. No election of remedies occurred as a result of the service of the notice of forfeiture upon Bassman.

AFFIRMED.