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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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VERDA MAE MILLER,)
Appellee,) Filed August 31, 1978
vs.)
AMERICAN WONDERLANDS, INC., et al.,) 551
Appellant.) 2-60965

Appeal from Fayette District Court - Joseph C. Keefe, Judge.

Defendant-vendee appeals from an adverse judgment quieting title to a farm which was the subject of an installment sales contract in plaintiff-vendor, asserting that trial court erred in failing to find that plaintiff's acceptance of partial payment of the contractual obligation in default constituted a waiver of her right to forfeiture.
REVERSED.

James S. Updegraff, of Donohue Law Office, of West Union, counsel for appellant.

Alice T. Koempel, of Traeger & Koempel, of West Union, counsel for appellee.

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

DONIELSON, Acting C. J.

Defendant-vendee American Wonderlands, Inc. appeals from an adverse judgment quieting title to a farm which was the subject of an installment sales contract in plaintiff-vendor Verda Mae Miller. Defendant (hereinafter also referred to as "American") contends that the trial court erred in failing to find that plaintiff's acceptance of a partial payment of the contractual obligation in default subsequent to the service of notice of forfeiture constituted a waiver of her right to a forfeiture.

A presentation of the factual scenario in this case is essential to an understanding of the legal issue presented. On October 26, 1972, plaintiff, the owner in fee simple of a 107 acre farm in Fayette County, entered into a written contract for the sale of that property to defendant for $30,000, with a down payment of $5000 and the deferred balance payable in ten $1000 annual installments beginning in October, 1973, with a balloon payment of the remainder due in October, 1983. Unpaid balances were to bear interest at the rate of six percent per year. American was to pay one-fourth of the 1972 real estate taxes due in 1973 and all real estate taxes for subsequent years.

The contract also specified that the vendor could pay delinquent taxes and that such sums so advanced were due and payable on demand, or, at the election of vendor, could be added to the principal amount due under the contract. Delinquent amounts and cash reasonably advanced by either party were to draw interest at the highest applicable legal rate. The contract recited that time was of the essence and provided for forfeiture proceedings in accordance with chapter 656, The Code.

Donald L. Kimball, president and chief executive officer of American since its inception in October, 1972, executed the contract on behalf of the corporation. Plaintiff moved to Florida shortly after the contract was signed and did not see the farm again until April, 1977.

Performance of the contractual provisions by both parties proceeded smoothly until May 6, 1975, when plaintiff was notified by the county treasurer that defendant had failed to pay the 1973 real estate taxes totaling $672.78, including penalty. Plaintiff promptly forwarded a check for this amount to her attorney, who in turn paid these taxes.

On May 21, 1975, plaintiff served upon defendant a notice of forfeiture which stated that vendee had failed to comply with the real estate contract by failing to pay the 1973 taxes, that vendor had advanced the amount of the taxes and penalty on May 13, 1975, and that vendor demanded payment of $672.78 with interest at nine percent as provided in the contract. The notice also stated that the contract would stand forfeited unless vendee cured this default and paid the reasonable costs of serving the notice within 30 days after the completion of service. Plaintiff had expended $4.25 in sheriff's fees for serving the notice of forfeiture and $35 in attorney's fees for preparing it.

At some time between the service of the notice on May 21, and June 16, 1975, Kimball telephoned Miller at her home in Florida and, according to his testimony, promised to pay her the delinquent taxes and accrued interest thereon. However, Miller testified that Kimball had agreed to pay both interest and the costs of serving the notice. This matter was somewhat clarified in the letter written by Kimball to Miller and dated June 16, 1975 which accompanied the $672.78 check, wherein Kimball promised to mail an additional check for the interest and cost of service as soon as his bookkeeper computed the interest and plaintiff's attorney informed him of the costs involved. Plaintiff received the check and letter on or about June 20, after which time she cashed the check and deposited the proceeds in her bank account.

On June 25, Miller sent the letter which Kimball had written her to her attorney and advised him that she had received the check for $672.78 for the taxes but had not as yet received payment for the interest and costs. By the latter part of July, plaintiff had still not received a check for the interest and costs and on July 22, plaintiff's attorney mailed a letter to Kimball demanding payment of $4.25 for the sheriff's fee, $6.23 for accrued interest, and $35 for the attorney's fee, and advising him that unless payment of the $45.48 was made by August 1, 1975, the notice of forfeiture would be filed with the county recorder. On August 6, the notice of forfeiture and affidavit in support thereof were recorded and that same day, plaintiff's attorney mailed Kimball a letter informing him of these facts and demanding immediate peaceful possession. Although it was established that the letters written to Kimball July 22 and August 6 were prepared and mailed by plaintiff's attorney, Kimball denied ever receiving them and testified that he had no knowledge of the recording of the forfeiture until so

informed by an internal revenue agent on May 4, 1976. He stated that upon receiving this information, he contacted plaintiff's attorney to inquire about the matter. The attorney responded by sending Kimball photocopies of the July 22 and August 6, 1975 letters on May 5, 1976. In its findings of fact, the trial court indicated that Kimball's credibility in this area was questionable.

The record also reflects that on April 28, 1976, plaintiff, believing that the farm had been vacated, entered into a contract for the sale of the property to a third party for $38,000. However, during some of the time subsequent to the service of notice of forfeiture on vendee, Kimball, in an individual capacity and not on behalf of the corporation, kept some livestock on the farm and permitted various people to reside in the house located thereon in exchange for farm labor, purportedly in the mistaken belief that no forfeiture had ever been filed. [1]

It also appears from the record that American has experienced substantial financial difficulties since 1974. In October, 1974, a mechanic's lien in the amount of $4400 was filed against the premises. During the years 1975 and 1976, default judgments totaling in excess of $6900 were entered against the property and a federal tax lien of more than $2000 was filed for delinquent taxes for the years 1974 and 1975.

This cause was tried as an equitable proceeding and therefore our review is de novo. Rule 4, Rules of Appellate Procedure. Although we give weight to the trial court's findings of fact, we are not bound by them. Rule 14(f)(7), R. App. P.; Wemer v. Long, 185 N.W.2d 243, 246 (Iowa 1971).

Defendant argues that the trial court erred in failing to find that plaintiff had waived her right to forfeiture by accepting the $672.78 check for the tax delinquency and that equity should not allow the forfeiture of a $30,000 contract and the accompanying windfall to plaintiff because of a $10.48 deficiency.

[1] We note in passing that although Kimball claims he had no prior knowledge of any forfeiture, he did not tender payment of principal and interest due in October, 1975. His explanation that he thought he had thirty days to make the payment as long as no forfeiture was filed is not satisfactory in light of the fact that there is no evidence that defendant ever made this payment.

Initially, plaintiff contends that the actual amount of the deficiency is $45.48 because the $35 attorney fee charge for preparing the notice of forfeiture constituted a "reasonable cost" within the meaning of § 656.2(3), The Code. Although our disposition of this case does not turn upon the resolution of this issue since there are other specific items appearing in the notice, i.e., the interest and costs of service, which are sufficient to justify the forfeiture action, we wish to resolve this matter in order to clarify any confusion which may exist regarding the relative rights of the parties under chapter 656, The Code. See Hampton Farmers Co-op Co. v. Fehd, 257 Iowa 555, 561, 133 N.W.2d 872 (1965).

Section 656.2(3), The Code, provides that in order to avoid forfeiture, vendee must within thirty days after the completion of service of notice, pay "the reasonable costs of serving the notice." Upon our review of the statute, we do not believe that the legislature intended that "reasonable costs" include attorney fees for the preparation of the notice, nor do we believe that a fair reading of the statute permits such a categorization. If the legislature had intended attorney fees to be recoverable, it could have so provided by an express provision. In the absence of such statutory language, we refuse to adopt plaintiff's interpretation of this phrase. See Walters v. Bartel, 254 N.W.2d 321, 322-323 (Iowa 1977); Frost v. Cedar County Board of Supervisors, 163 N.W.2d 432, 434 (Iowa 1968). Consequently, the amount of the deficiency with which we are presently concerned is $10.48. [2]

Forfeitures are not favored in either law or equity and they are enforced only when it is shown that the equities clearly require forfeiture. Babb's, Inc. v. Babb, 169 N.W.2d 211, 213 (Iowa 1969). Further, a vendor effecting, or attempting to effect, a forfeiture may waive the same, or he may be estopped to enforce it by subsequent conduct inconsistent with his intent to rely upon the forfeiture. Wemer v. Long, supra,

[2] In her brief, plaintiff points out that subsequent to the service of notice of forfeiture, defendant violated certain other terms and conditions of the contract, thereby giving rise to additional grounds for forfeiture. However, for purposes of the instant case, we are only concerned with the specifications of default contained in the notice. See § 656.2(2) and (3), The Code.

at 247; see Bettis v. Bettis, 228 N.W.2d 193, 195 (Iowa 1975). However, where a vendee claims waiver of forfeiture by implication from the conduct or acts of a vendor, the vendee must establish by a preponderance of the evidence unequivocal conduct on the part of the vendor clearly establishing that the vendor regards the contract as in full force and effect subsequent to the forfeiture. The question of waiver is ordinarily a question of fact to be determined from all the facts and circumstances shown by the record evidence in the case. Wemer v. Long, supra, at 247; Hansen v. Chapin, 232 N.W.2d 506, 510 (Iowa 1975); see Comment, "Iowa Land Installment Contracts: Acceptance of Part Payment as Waiver," 55 Iowa L. Rev. 729 (1970).

In arguing that plaintiff, by the sole act of accepting the tax deficiency check, waived her right to forfeiture, defendant relies upon Babb's, Inc. v. Babb, supra, at 214, where the court held that in light of the circumstances of that case, the acceptance of partial payment of a contractual obligation constituted a waiver of the right to forfeiture. Although we conclude that the check was accepted as partial payment of the contractual obligation, plaintiff contends that our inquiry is not at an end because in Babb the court also stated that it did "not mean to indicate that there might not be some instances in which the entire record would show an intent to pursue the forfeiture even though a partial payment had been accepted." Id. at 214-215; see Hansen v. Chapin, supra, at 510. Accordingly, Miller argues that we must examine the record to see if it shows an intent on her part to pursue the forfeiture despite her acceptance of the partial payment.

In her brief, plaintiff cites several instances of conduct which, in her judgment, reflect her intention to pursue the forfeiture. After reviewing the record in light of her contentions, we conclude that there is sufficient evidence to establish that she intended to pursue forfeiture proceedings. However, in light of the facts of this case, we do not find such intention dispositive.

Sitting as a court of equity, we are obligated to review this case on the basis of equitable as well as legal principles, always keeping in mind that forfeitures are not favored. In the final analysis, we agree with defendant that the ultimate issue to be resolved is whether equity will permit the forfeiture of a $30,000 contract for a $10.48 deficiency. We conclude that it will not.

Until the default giving rise to the instant forfeiture, defendant had paid the $5000 down payment, the $1000 installments and interest in 1973 and 1974, and one-fourth of the 1972 real estate taxes. Consequently, American had already paid approximately 25 percent of the total contract price. Furthermore, since the service of the notice of forfeiture, vendee has expended approximately $1000 for improvements on the property.

Although defendant failed to pay $10.48, we do not believe that equity can countenance a forfeiture here for such a small deficiency, especially since the result of such forfeiture would be a windfall gain to plaintiff of the amounts already paid by defendant.[3] When the equities are considered, the Hansen case, which plaintiff contends is controlling here, is of no comfort to her because there, even though the vendor had accepted partial payments on two delinquent annual contract installments, a balance of $1700 remained delinquent and unpaid at the time of service of the notice of forfeiture.

In Watson v. Chapman, 244 Iowa 56, 63, 55 N.W.2d 555 (1952), the court, apparently troubled by a situation remarkably similar to the instant case, stated:

> This leaves only the matter of the cost of serving the notice, in the amount of $2.07. It seems unthinkable that a court of equity would permit the forfeiture of all rights of the purchasers, who had paid nearly $900 on their contract and had expended several hundred dollars in improving the property, because of this default. Forfeitures are not favored by the law, and a forfeiture such as defendants are attempting here has peculiarly little to recommend it.

On the basis of the record in this case, we conclude that equity will not permit forfeiture of this contract. We have reviewed the other contentions made by plaintiff and find them to be without merit. The judgment of the district court is reversed.

REVERSED.

[3] In reaching this conclusion, we are not unmindful of the trial court's finding with regard to the credibility of certain aspects of Kimball's testimony. However, we cannot help but wonder why he would make the effort of immediately paying the $672.78 in an attempt to avoid forfeiture and continue to run this same risk by failing to pay a mere $10.48, unless he was sincere in his testimony concerning his lack of knowledge of the forfeiture.