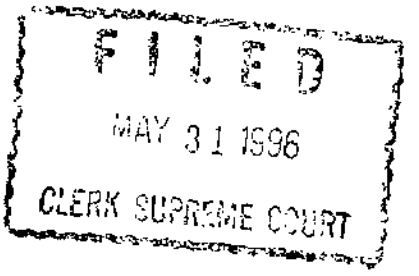
IN THE COURT OF APPEALS OF IOWA

No. 6-025 / 95-371



NANCY LEIGH STEIN and **LAWRENCE W. STEIN,**

Appellees,

vs.

DONALD K. WASHBURN and **DELORES WASHBURN,**

Appellants.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

The defendants appeal the district court's ruling awarding the plaintiffs damages on their breach of contract action against the defendants for a failed real estate sale. **AFFIRMED.**

Steven K. Warbasse, Cedar Rapids, for appellants.

Randall A. Nazette, Cedar Rapids, for appellees.

Considered by Sackett, P.J., and Cady and Streit, JJ. Vogel, J., takes no part.

PER CURIAM

This is an appeal by defendants claiming plaintiffs' suit should be barred due to the election of remedies doctrine. The district court found the doctrine did not apply and awarded plaintiffs damages. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

In January 1991, Nancy and Lawrence Stein entered into an agreement with Donald and Delores Washburn to purchase certain residential real estate in Cedar Rapids. The agreement provided that if the seller failed to fulfill the agreement, the buyer would have the right to have all payments returned, or to proceed by any action in law or equity.

Because the property was involved in other legal proceedings, the Steins were required to deposit $98,000 in earnest money with the clerk of court. The agreement was then amended to provide that if the parties failed to close the sale for any reason, the earnest money would be automatically refunded to the Steins.

In reliance on the purchase agreement, the Steins sold their house, and made arrangements to move on the proposed closing date for their purchase of the Washburn property. The parties did not close the sale, and the $98,000, plus interest, was refunded to the Steins. The Steins incurred expenses, such as renting a house, storage of their furniture, and attorney fees, due to the fact they were required to move out of their old home, but were not able to move into their expected new home.

The Steins filed an action against the Washburns seeking to recover damages which they alleged were incurred due to the Washburns' failure to close the sale. The district court awarded the Steins damages of $8,979.

The Washburns now appeal. They claim the Steins were barred from seeking legal damages because they had previously elected the remedy of rescission. The election of remedies doctrine is not favored by law; it is ordinarily applied in a strict and limited way. *Gottschalk v. Simpson*, 422 N.W.2d 181, 185 (Iowa 1988). In order for the defense of election of remedies to be available, three elements must be established: (1) the existence of two or more remedies; (2) an inconsistency between them; and (3) a choice of one of the remedies. *Reid v. Hansen*, 440 N.W.2d 598, 600 (Iowa 1989). The burden of establishing the defense of election of remedies is on the defendant. *First Sec. Bank v. McClain*, 403 N.W.2d 788, 790 (Iowa 1987).

The language of the original agreement gave plaintiffs a choice of remedies. However, the amendment required the return of the earnest money. Looking at the contract as a whole, the Steins had the right to have the $98,000 returned *and* to proceed by any action at law or in equity. We determine the doctrine of election of remedies does not apply under the facts of this case.

We affirm the decision of the district court. Costs of this appeal are assessed to defendants.

AFFIRMED.