IN THE COURT OF APPEALS OF IOWA

No. 9-395 / 98-0440
Filed October 27, 1999

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JOHN A. BROWNER,
Plaintiff-Appellant,

vs.

CAVITY COMPANY, L.C. and
KAIZEN COMPANY OF AMERICA, L.C.,
Defendants-Appellees.

Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Jr., Judge.

Plaintiff appeals from the district court's summary judgment ruling in favor of defendants on plaintiff's action to set aside a forfeiture and for an accounting. Plaintiff contends the trial court erred in granting summary judgment because there were genuine issues of material fact in dispute. **AFFIRMED.**

John A. Browner, Davenport, pro se.

Michael P. Byrne of Lane & Waterman, **Davenport, for appellees.**

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

HECHT, J.

Plaintiff John A. Browner ("Browner") appeals from the district court's summary judgment ruling in favor of defendants Cavity Company, L.C., and Kaizen Company of America, L.C. (collectively, "defendants") in Browner's action to set aside a forfeiture and for an accounting. Browner contends the district court erred in granting summary judgment because there were genuine issues of material fact for trial. We affirm the district court.

I. Factual Background and Proceedings. Browner and his wife ("Browners") owned a parcel of property at 4508 Brady Street in Davenport, Iowa. On October 10, 1994, they executed an agreement pursuant to which they agreed to sell the property to Ruhl Development Company, L.L.C. ("Ruhl"), for $225,000 as part of a section 1031 exchange. The exchange agreement provided Browners would take ownership of two lots located along Welcome Way in Davenport, where an office building would be built for them.

On March 28, 1995, in furtherance of the section 1031 exchange, Browners executed a real estate contract for the purchase of the two Welcome Way lots from Kaizen Company of America, L.C. ("Kaizen").[1] Kaizen agreed to construct an office building for Browners on the lots. The total cost of the lots, construction of the new building, and "extras" approved by Browner was $167,885.

[1] Kaizen is Ruhl's assignee for purposes of the Section 1031 exchange.

At the time of closing on March 28, 1995, Browners applied the net proceeds ($88,957) from the sale of their Brady Street property on the purchase price of the Welcome Way property. They agreed to pay the contract balance of $78,928 to Kaizen in monthly installments. Kaizen subsequently assigned its interest in the contract to Cavity Company, L.C. ("Cavity"). The office building was constructed, and Browners took possession of it.

Browners defaulted twice on the real estate contract. The first default occurred when they failed to make payments from October of 1995 through December of 1996. Browners cured that default after defendants served a notice of forfeiture. Browners defaulted a second time when they failed to make payments due between January of 1997 and March of 1997. They were again served with a notice of forfeiture on April 17, 1997.

Browners failed to cure the second default within the statutory thirty-day time period. Defendants filed an action for forcible entry and detainer ("FED action") in the Small Claims Division of the Scott County District Court. On May 29, 1997, while the FED action was pending, Mr. Browner filed suit in district court seeking a declaratory judgment. He requested the court to (1) vitiate the notice of forfeiture; (2) strike an affidavit in support of the forfeiture; and (3) determine the principal amount due on the real estate contract. Browner did not request the district court to stay the pending FED action.

On July 3, 1997, the magistrate who presided in the FED action entered findings of fact and ruling. The court found Browners had been properly served with a notice of forfeiture and they failed to cure the default within thirty days. The magistrate further ordered Browners to vacate the Welcome Way premises on July 17, 1997. Browners did not appeal from the ruling in the FED action.

Defendants filed a motion for summary judgment in the declaratory judgment action on September 2, 1997. They argued Browner's declaratory judgment action was barred by claim preclusion as a result of the adjudication in the FED action. On September 24, 1997, the district court granted defendants partial summary judgment, ruling the doctrine of claim preclusion permitted no relitigation of the merits of the FED action from which Browner took no appeal. The ruling denied defendants summary judgment on Browner's request for an adjudication of the contract balance, and held a fact question existed as to the principal amount due on the contract.

Defendants filed a second motion for summary judgment on December 23, 1997. They again asked the court to dismiss the case on the ground no genuine issue of material fact remained for trial. In its February 3, 1998, ruling, the district court observed:

> the additional documentation provided by the Defendants demonstrates that no genuine issue of *material* fact exists that might affect the outcome of the suit, given the applicable law. . . . The Court also holds that Browner is not entitled to bring an action for breach of contract or for damages arising out of the forfeiture of the Welcome Way property even assuming that the amount listed in the Notice of Forfeiture did not represent the actual amount Browner owed Kaizen on the real estate contract,

Browner, proceeding pro se, appeals alleging the district court erred in granting summary judgment to defendants.

II. Standard of Review. Our scope of review is for errors at law. Iowa R. App. P. 4. The court will uphold summary judgment when the moving party shows no genuine issue of material fact exists and it is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *C-Thru Container Corp. v. Midland Mfg. Co.*, 533 N.W.2d 542, 544 (Iowa 1995). In order to decide whether the moving party has met this burden, we review the record in the light most favorable to the party opposing summary judgment. *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 811 (Iowa 1994).

III. Summary Judgment. In a motion for summary judgment, the moving party has the burden to establish there are no material facts in dispute. *Schlueter v. Grinnell Mut. Reins. Co.*, 553 N.W.2d 614, 615 (Iowa App. 1996). However, the nonmoving party cannot rely on their pleadings if the motion for summary judgment is properly supported; they "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e); ***Weinzetl v. Ruan Single Source Transp. Co.***, 587 N.W.2d 809, 810 (Iowa App. 1998). This requirement weeds out "[p]aper cases and defenses" in order "to make the way for litigation which does have something to it." ***Hoefer v. Wisconsin Educ. Ass'n Ins. Trust,*** 470 N.W.2d 336, 339 (Iowa 1991) (quoting *Gruener v. Cedar Falls*, 189 N.W.2d 577, 580 (Iowa 1971)).

A. Forcible Entry and Detainer Judgment. After Browners' failure to cure the second default within the statutory time period, defendants filed their FED action. Upon a buyer's default on a real estate contract, the seller has a right to elect whether (1) to keep good their tender of performance, demand the balance of the purchase price and sue for specific performance; (2) to terminate the contract because of the vendee's breach, keep their land and sue for damages for the breach; (3) to rescind the contract in toto; or (4) to enforce a forfeiture under the statute. *Pierce v. Farm Bureau Mut. Ins. Co.*, 548 N.W.2d 551, 556 (Iowa 1996). Defendants properly chose to bring the FED action against Browners to enforce a forfeiture and regain possession of the real estate.

B. First Motion for Summary Judgment. In his petition in equity in this declaratory judgment action, Browner repeats a claim he made before the magistrate in the FED action. Specifically, he alleges he was prevented from curing the second default on the 30th and 31st day after notice of forfeiture was served on him because the Lane & Waterman law office (the address to which the arrearage was to be delivered) was not open for business on the weekend. The magistrate did not find Browners' evidence in support of this claim credible, however, and resolved the fact issue against them in the FED ruling. If Browner wished to contest the magistrate's findings, his remedy was to appeal the FED ruling by giving oral notice to the court at the hearing or by filing a written notice of appeal within twenty days. *See* Iowa Code § 631.13 (1999). Browner failed to appeal from the FED ruling, and his attempt

to relitigate the validity of the forfeiture in this declaratory judgment action is precluded.

A valid and final judgment in an action brought to establish rights or legal relationships is conclusive in a subsequent action between the same parties based on the same claim. *Fournier v. Illinois Cas. Co.*, 391 N.W.2d 258, 260 (Iowa 1986). Under Iowa law, res judicata, or claim preclusion, bars the relitigation of the same claim between the same parties when a final judgment has been rendered on the merits by a court of competent jurisdiction. *Bennett v. M.C. No. 619, Inc.*, 586 N.W.2d 512, 516 (Iowa 1998). This theory is based on the principle a party should not be allowed to split or try a claim piecemeal, but must put forth the entire defense in the first action which proceeds to final judgment. *B & B Asphalt Co. v. T.S. McShane Co.*, 242 N.W.2d 279, 286 (Iowa 1976). Claim preclusion can prevent a party from relitigating a claim in district court if the claim has previously been litigated in small claims court. *Lonahue v. American Farmers Mut. Cas. Co.*, 380 N.W.2d 437, 439 (Iowa App. 1985).

The question to be decided in cases where claim preclusion is asserted is whether the two claims arise from the same transaction. *Tigges v. City of Ames*, 356 N.W.2d 503, 508 (Iowa 1984). A second claim is likely to be considered precluded if the acts complained of, and the recovery demanded, are the same or when the same evidence will support both of the actions. *Riley v. Maloney*, 499 N.W.2d 18, 20 (Iowa 1993). We note both the FED action against Browner and the declaratory judgment

action brought by Browner are a result of the same transaction --the forfeiture of the real estate contract for the Welcome Way property. In both actions, Browner asserted defendants were not entitled to forfeiture of the contract because he was unable to cure his default by delivering the amount of the arrearage on the 30th or 31st day after service of the notice of forfeiture; and, the delivery of the funds to the Lane & Waterman law office on the 32nd day after notice of forfeiture was sufficient. Browner unsuccessfully put on the same forfeiture defense in the FED action, and is not allowed to relitigate the same claim in the subsequent declaratory judgment action. The district court properly granted defendants partial summary judgment based on the doctrine of claim preclusion.

C. Second Motion for Summary Judgment. Browner claims the district court was bound by its ruling on the first motion for summary judgment wherein it found a genuine issue of material fact (the dispute as to the amount due on the contract at the time of the forfeiture) precluded dismissal of the entire case. Browner asserts, in ruling on the second motion for summary judgment, the district court was bound to take judicial notice of the earlier ruling, and deny the second motion for summary judgment on the same theory. Browner's contention, however, the district court had no power to revisit the subject of summary judgment is without merit. A district court's power to correct its own perceived errors has always been recognized by this court, as long as the district court has jurisdiction of the case and the parties involved. *Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393, 396 (Iowa 1988). The

action of one judge, sitting as the court, may have the effect of altering or setting aside a previous ruling by another judge sitting as the same court. *State v. Wrage*, 279 N.W.2d 4, 6 (Iowa 1979).

It is significant the ruling on the second motion for summary judgment was made with the benefit of new documentation provided by defendants in support of their second motion for summary judgment. In his resistance to the motions for summary judgment, Browner made a general denial as to the amount claimed by defendants at the time of the forfeiture, but he offered no affidavit or other documentary evidence of what he believed to be the correct amount. Even if defendants had been incorrect as to the exact amount owed by Browner at the time of the second notice of forfeiture (and the record does not support a finding they were), an excessive demand will not invalidate the forfeiture. *See Hampton Farmers Co-operative Co. v. Fehd*, 133 N.W.2d 872, 876 (Iowa 1965). The district court correctly concluded, after reviewing the supplemental documentation, there was no genuine issue of material fact as to the amount due on the real estate contract at the time of the forfeiture.

D. Alleged Incompetence of Trial Counsel. A significant portion of Browner's brief is devoted to alleged mistakes and incompetence of his attorneys in connection with the forfeiture proceedings. Browner pled no claim for relief against his counsel in this declaratory judgment action, however. Since there is no issue before us with regard to the competence of Browner's counsel, we will not respond to such

allegations here. Having considered all issues properly before us on appeal, we hereby affirm the judgment of the district court granting defendants' motions for summary judgment.

AFFIRMED.