FILED
AUG 26 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JERRY W. McBRIDE,

Plaintiff-Appellee,

vs.

LANCE LeROY HAMMERS and RITA MAE HAMMERS,

Defendants-Appellants.

Filed August 26, 1987

174

7-132
86-1086

Appeal from the Iowa District Court for Mills County (20105), Paul H. Sulhoff, Judge.

Defendants appeal from judgment for plaintiff in an equitable action seeking recovery of the purchase price due under a contract for the sale of a business and real estate, asserting forfeiture of a real estate contract precluded the recovery sought and the evidence was insufficient to establish the amount of actual damages. **REVERSED.**

Kasey W. Kincaid and Thomas W. Foley of Nyemaster, Goode, McLaughlin, Emery & O'Brien, Des Moines, for defendants-appellants.

Mark J. Eveloff, Council Bluffs, for plaintiff-appellee.

Considered by Snell, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Defendants appeal from a judgment for plaintiff in an action seeking recovery of the purchase price due under a contract for sale. They contend the original sellers' forfeiture of the real estate contract precluded any recovery sought for the purchase price. We agree and reverse.

On December 28, 1981, plaintiff, Jerry McBride, entered into a real estate contract with James and Barbara Schoening (hereafter referred to as sellers) for the sale of a cocktail lounge in Glenwood, Iowa. Plaintiff ran the business for approximately two years before the sellers initiated a forfeiture proceeding against him. As a result of sellers' actions, plaintiff made arrangements to enter into a purchase agreement with defendants, Lance and Rita Hammers.

Plaintiff and defendants entered into a purchase agreement for the purchase of plaintiff's interest in the lounge on February 6, 1984. As consideration, defendants agreed to pay plaintiff on May 1, 1984, a lump sum and also agreed to assume all of plaintiff's outstanding obligations under the 1981 contract between plaintiff and sellers. These outstanding obligations consisted of monthly installment payments on notes owed by plaintiff under the prior real estate contract or assumed by him in that transaction. Defendants also agreed to assume plaintiff's obligations under a promissory note executed by plaintiff on behalf of the Mills County State Bank in Glenwood.

Defendants were unable to profitably run the business. They failed to pay plaintiff on May 1, 1984, and missed their April and May payments to sellers. On June 11, 1984, a Notice of Forfeiture of Real Estate Contract was served upon defendants by sellers' attorney. After the thirty-day grace period, sellers went forward with the forfeiture of the real estate contract, and defendants

relinquished their rights to the property. Plaintiff initiated this action on August 23, 1984.

The case was submitted to the trial court on the court file, the parties' written briefs, and their joint statement of fact. No hearing or formal trial was held. On July 2, 1986, the trial court entered judgment in favor of plaintiff in the amount of $45,300. From this defendants have appealed.

Defendants present two contentions on appeal. Since we reverse on the first of these contentions, we do not find the second allegation relevant, and therefore do not address it. Defendants argue the sellers' forfeiture of the underlying real estate contract precluded plaintiff's recovery under the purchase agreement.

Our review is de novo. While we are not bound by the findings of the trial court, we give weight to them, especially where credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

As with most contract interpretation cases, we must first consider the instrument and then determine the meaning and intention of the parties as expressed in the language used. Mopper v. Circle Key Life Insurance, 172 N.W.2d 118, 124 (Iowa 1969). As mentioned earlier, the total purchase price involved defendants paying plaintiff $45,300 on May 1, 1984, and defendants assuming, on the first of January 1984, certain debts owed by plaintiff. These debts included promissory notes due to the sellers and a promissory note owed the Mills County Bank. The parties agreed that their agreement was "subject to the terms and conditions contained" in certain documents. These documents included the 1981 purchase agreement between plaintiff and sellers, and the promissory notes already mentioned. This clause provided, "Buyers agree to be bound by the obligations created in said documents and a default by Buyers

herein in any of the obligations created in said documents shall constitute a default of the Agreement."

Two identical clauses, found in both the 1981 and 1984 purchase agreements, were the foreclosure and the assignment paragraphs. The first paragraph of both foreclosure clauses provided:

> If Buyer fails to perform this Agreement in any respect, time being made the essence of this Agreement, then seller may forfeit this Agreement as provided by Chapter 656 of the Code of Iowa, and all payments made and improvements made on said premises shall be forfeited; or Seller may declare the full balance owing due and payable and proceed by suit at law or in equity to foreclosure this Agreement, in which event Buyer agrees to pay costs and attorney fees.

The assignment agreement on both purchase agreements provided:

> In case of the assignment of this Agreement by either of the parties, prompt notice shall be given to the other parties, who shall at the time of such notice be furnished with a duplicate of such assignment by such assignors. Any such assignment shall not terminate the liability of the assignor to perform, unless a specific release in writing is given and signed by the other party to this Agreement.

Attached to the 1984 purchase agreement was an addendum which provided in pertinent part:

> For, and in consideration of the settlement of pending contract forfeiture proceedings instituted by James J. Schoening and Barbara M. Schoening, husband and wife, hereinafter referred to as "Schoenings," Seller and Buyer hereby agree, for the benefit of Schoenings, as follows:
>
> 1 Seller, Jerry W. McBride, hereby designates Buyer, Lance LeRoy Hammer and Rita Mae Hammer, . . . as his agent and designee for purposes of service of any and all future Notices of Forfeiture under Chapter 656, Code of Iowa, with the intent and understanding that no notice thereof need be given the said Jerry W. McBride in the event of any default under this Agreement or the Agreement of Sale dated December 23, 1981, between Schoenings as Seller and McBride and Leiber as Buyer.

When interpreting a contract, the court must seek to give effect to the language of the entire contract. Home Federal savings and Loan Association v Campney, 357 N.W.2d 613, 617 (Iowa 1984). The courts have a duty to give

effect to the language of the contract in accordance with its plain and ordinary meaning, and not make a new contract for the parties. Mopper, 172 N.W.2d at 124. A court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language. Allen v. Highway Equipment Co., 239 N.W.2d 135, 139 (1976). A contract should be read and interpreted as an entirety rather than in the order of clauses and the position of clauses in such instrument is not material or controlling. Id.

Regarding the assignment of a land purchase agreement we find the following informative:

> It is generally recognized that a purchaser of real estate, prior to a conveyance to him and prior to full performance on his part, has by virtue of his contract an interest which he may assign or transfer, or contract to transfer, where the particular contract by its terms or special nature is not personal to the vendee or exclusive of the particular assignee. The transfer of the purchaser's interest may be in the form of an ordinary assignment, or in the form of a conveyance of the land.
>
> * * *
>
> The assignment of a contract for the purchase of land is a sufficient consideration for the assignee's promise to pay an agreed consideration for the assignment, and the obligation of the assignee to pay is enforceable although he loses all rights under the contract by his failure to make the payments called for by the contract.

77 Am. Jur. 2D Vendor and Purchaser, §§ 387 & 388 (1975), see also 92 C.J.S. § 314 (1955). With this in mind, we find plaintiff validly assigned his purchase agreement to the defendants.

Through the contract dated February 6, 1984, defendants agreed to pay plaintiff a lump sum and assume plaintiff's debts in consideration for the assignment of the land contract. The assignment did not terminate the liability of plaintiff (assignor) to perform since no written release was signed by the sellers. Other rights were preserved for the sellers in the agreement, e.g., the right to forfeiture if plaintiff failed to perform the purchase agreement.

the existence of this right was made apparent on two occasions: first, prior to the February 6, 1984, agreement when sellers instituted a forfeiture action against plaintiff; and in June of 1984, when sellers forfeited the contract and obtained possession of the property. In the June, 1984 forfeiture action sellers were not required to provide notice to plaintiff, a procedure provided for in the addendum to the 1984 purchase agreement. This was done to provide a direct action for sellers against defendants.

On appeal defendants rely upon Gray v. Bowers, 332 N.W.2d 323 (Iowa 1983), in which the supreme court held a vendor could not recover the amount owed him under a promissory note executed by a purchaser where the vendor had previously forfeited the purchaser's interest in the entire transaction under a general forfeiture clause contained in two real estate contracts. The court in Gray observed:

> We conclude that under our holdings, plaintiff's recovery is precluded by a substantive legal doctrine which is separate and distinct from the common law doctrine of election of remedies.
>
> This conclusion has reference to our holding in Abodeely v. Cavras, 221 N.W.2d 494, 497-98 (Iowa 1974) that when a vendor exercises a right of forfeiture against a defaulting vendee, the liability of the latter for the unpaid purchase money is extinguished. While it is true that this result is triggered by the election of a remedy, i.e., the forfeiture of the contract, the end result is not dependent on the doctrine of election of remedies. Such result instead flows from the fact that the contract between the parties has been terminated, thereby extinguishing any right to recover the unpaid purchase price. The same result has been reached in cases involving abandonment or rescission of the contract. See First National Bank v. LaBarron, 201 Iowa 853, 855-56, 208 N.W. 364, 366 (1926); Stephenson v. Neppel, 192 Iowa 246, 252-53, 182 N.W. 369, 371-72 (1921). We are reluctant to permit circumvention of this result by means of contract clauses which reserve to the vendor a right to receive additional payment after forfeiture.

332 N.W.2d at 325. Through the sellers' action of forfeiting the sales contracts, both the 1981 and the 1984 purchase agreements were terminated. Any right

by either sellers or plaintiff to recover the unpaid purchase price was extinguished by this termination.

Plaintiff attempts to rebut the Gray case by alleging the existence of two separate contracts and reference to out-of-state case law. Plaintiff contends two contracts existed, one between sellers and plaintiff, and another between plaintiff and defendants. If this construction is accepted, sellers' forfeiture only terminates the first contract and plaintiff may proceed to collect the purchase price on the second contract. Although this argument appears attractive on first blush, a reading of the 1984 purchase agreement makes it clear the parties intended the formation of but one contract. Through the existence of the forfeiture clause, the assignment clause, and the addendum, plaintiff agreed to sellers' right to elect the appropriate remedy upon default, one of which was forfeiture. The sellers' action terminated the contract. Plaintiff's attempt to enforce the purchase agreement was based upon the existence of an underlying contract. Since no contract existed after the June 11, 1984 forfeiture, the trial court erred, as a matter of law, in allowing plaintiff to collect on the 1984 purchase agreement.

Plaintiff also cites Smith v. King, 106 Wash.2d 443, 722 P.2d 796 (1986), in support of his position. We recognize the facts of the case are similar to those presented here, however, we do not find the court's reasoning persuasive, particularly when in such direct opposition to well-founded Iowa precedent. We note Smith v. King, a 6-3 decision of the Washington Supreme Court, but do not adopt the reasoning found therein.

Through the contract of February, 1984, the sellers retained certain rights in the property. One of these rights was the ability to forfeit on the holder of the property. The existence of this right was made clear in the addendum to the agreement. Implicit in this right was the responsibility to

choose remedies, either forfeiture or specific performance, and by their election of forfeiture sellers terminated the purchase agreement. The addendum also reflects an acceptance by plaintiff of sellers' choice of remedies. Plaintiff, by allowing the forfeiture to occur, elected that remedy and is barred from recovering additional damages. Sellers' choice of forfeiture eliminated the contract of sale and thereby eliminated any right plaintiff had pursuant to the contract.

REVERSED.

Sackett, J., concurs; Snell, P.J., dissents.

SNELL, J. (dissenting)

As I cannot agree with the majority's determinative finding that only one contract existed in this case, I respectfully dissent.

The existence of two contracts follows, if for no other reason, simply from the majority's finding that "plaintiff validly assigned his purchase agreement to the defendants." Our law is clear that "[a]n assignment is a contract *between the assignor and the assignee.*" Broyles v. Iowa Dept. of Social Services, 305 N.W.2d 718, 721 (Iowa 1981). Accordingly, rules of construction applicable to contracts in general apply to assignments. Id.

There is, *in addition, no question in my mind* that McBride possessed an interest in the property in question sufficient to allow him to enter into an independent contract with the Hammers. As our supreme court stated many years ago in Durband v. Ney, *196 Iowa 574, 579, 191 N.W. 385, 388* (1923):

> An equitable estate in land or the right to become the owner of the land is as subject to sale as the land itself, and when such owner is so situated with reference to the land that he can acquire the legal title thereto, either by the voluntary act of the title holder or by action in court, he is then in a position to make a valid and enforceable agreement for the sale thereof.

It is this equitable interest—"the right to become the owner of the land"—which *McBride sold to the Hammers. The fact that the Hammers failed to exercise* that right, and were consequently subjected to forfeiture of the contract with the Schoenings, does not, in my view, terminate the contract by virtue of which they came to *possess the right. In fact, the majority's citation of authority,* 77 Am. Jur.2d, Vendor and Purchaser, §§ 388, at p.533 (1975), supports this proposition:

> The assignment of a contract for the purchase of land is a sufficient consideration for the assignee's promise to pay an agreed consideration for the assignment, and the obligation of the assignee to pay is enforceable although he loses all rights under the contract by his failure to make the payments called for by the contract.

(emphasis mine)

The majority's reliance on Gray v. Bowers, 332 N.W.2d 323 (Iowa 1982), is misplaced. Gray and the line of cases closely associated with it, see, e.g., Abodeely v. Carras, 221 N.W.2d 494 (Iowa 1974), are factually distinct as dealing clearly with only one vendor, one vendee, and one contract.

Similarly, I cannot agree with the majority's conclusion that "a reading of the 1984 purchase agreement makes it clear the parties intended the formation of but one contract." This conclusion is contradicted by the existence of two agreements between two separate sets of parties as well as the majority's own conclusion that a valid assignment was made. The majority's conclusion that only one contract exists is based upon the fact that, in an addendum to the 1984 agreement, McBride waived all future receipt of notices of forfeiture with respect to either the 1984 or the 1981 agreements. Initially, I wish to emphasize the parties' reference in the addendum to two separate agreements. Similar references are made by the parties throughout the 1984 agreement. In light of these numerous references made by the parties—and given the majority's statement of the task at hand as one of "determin[ing] the meaning and intention of the parties as expressed in the language used"—I do not agree with the majority's conclusion that it is "clear the parties intended the formation of but one contract." Moreover, I do not believe McBride's waiver of the notice required by Iowa Code 656 tends at all to support the existence "of but one contract." Such a waiver, which was expressly made as consideration for the settlement of the Schoenings' forfeiture proceedings against McBride with respect to the 1981 agreement, served only to further remove McBride from any interest in that agreement. This is consistent with McBride's intention, demonstrated by any reasonable interpretation of the 1984 agreement, to transfer all his rights in the 1981 agreement to the Hammers. It in no way tends to show that no 1984 agreement existed.

I would follow the limited authority on this issue, Smith v. King, 722 P 2d 796 (Wash 1986), and affirm the district court