

IN THE COURT OF APPEALS OF IOWA

FILED

APR 27 1982

CLERK SUPREME COURT

ESTHER A. SHULTZ, Individually and as)
Executor of the Galen G. Shultz, Sr. Estate,)

Plaintiff-Appellee,)

vs.)

DONALD GLEN SHULTZ,)

Defendant-Appellee,)

JOYCE A. SHULTZ,)

Defendant-Appellant.)

154

Filed April 27, 1982

2-117
2-67085

Appeal from Floyd District Court - Ray E. Clough, Judge.

Defendant-lessee appeals from judgment for plaintiff-lessor in this forcible entry and detainer action involving a farm lease. AFFIRMED.

Richard W. Vickers, Greene, Iowa, for defendant-appellant.

Alfred A. Beardmore, Charles City, Iowa, and Norman R. Graven of Graven & Graven, Greene, Iowa, for defendant-appellee.

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

Defendant-lessee, Joyce A. Shultz, appeals from judgment for plaintiff-lessor in this forcible entry and detainer action involving a farm lease. On appeal, defendant asserts (1) that the lessor's action was barred by section 648.18, The Code, because the lessee had peaceable possession of the farm with the lessor's knowledge for thirty days after the lessor's cause of action accrued; (2) that the lessor was estopped from bringing the action because she had acquiesced in the lessee's practice of making late rent payments; and (3) that the lessor did not present the rent check for payment within a reasonable time and that the trial court should have admitted the testimony of a banker that thirty-five days was not a reasonable time.

Defendant Donald Glen Shultz and his wife, defendant Joyce A. Shultz, leased a farm from Donald's parents, Galen G. Shultz and plaintiff Esther A. Shultz, in 1977. The lease provided for annual rent of \$12,640, payable half on March 1 and half on October 1. Galen Shultz died sometime after the lease was signed. Donald and Joyce separated in early 1981, and Donald moved in with his mother, leaving Joyce on the farm.

When the first half of the 1981 rent became due, Donald's mother (plaintiff) was in California. Joyce had received no instructions for the rent payment, so she delivered the \$6,320 check to plaintiff's attorney on March 1. Plaintiff returned to Iowa on March 30. On April 4, she took the rent check to the bank to cash it but was told there were insufficient funds in Joyce's account to cover it. Plaintiff telephoned the bank several days later and was again told there were insufficient funds. On April 7, she again took the check to the bank and was told for a third time there were insufficient funds. She made no further attempts to cash the check.

On April 11, plaintiff wrote Joyce a letter terminating the lease for nonpayment of rent; Joyce did not respond to the letter. On April 28, plaintiff

served Joyce with a three-day notice to quit, and on May 7, she filed the petition in the present forcible entry and detainer action.

Joyce never re-tendered the rent payment. Her checking account record shows that the balance was insufficient to cover the rent check on March 3, 4, and 5 and April 1, 2, 3, 6, 7, and 8, but sufficient on the remaining days in March and April. Her rent payments before 1981 had each been from one to nine days late.

Joyce called a banker to testify that, with his knowledge of bank practices and people's banking habits, he felt the rent check was not presented within a reasonable time. However, plaintiff's objection that his testimony would be immaterial was sustained, and the testimony was not allowed.

I. We first consider Joyce's claim that the action is barred by section 648.18, The Code, because of her peaceable possession of the leased premises for more than thirty days after the cause of action accrued. In resolving this claim, the chronology of relevant events is as follows:

<u>Date</u>	<u>Event</u>
March 1, 1981	The rental payment became due under the lease; Joyce issued a check for the rent and gave it to plaintiff's attorney.
April 4, 1981	Plaintiff took the check to the drawee bank and was informed that Joyce's bank balance was not sufficient to cover the check. A telephone call to the bank within the next two days confirmed that Joyce's balance was still insufficient to cover the check.
April 7, 1981	Plaintiff again took the check to the drawee bank and was informed that the bank balance was still insufficient to cover the check.
April 11, 1981	Plaintiff served a notice of termination of the lease on Joyce.
April 28, 1981	Plaintiff served a three-day notice to quit on Joyce.
May 7, 1981	The petition was filed.

In order for Joyce to be able to rely on the bar of section 648.18, the cause of action must have accrued prior to April 7, 1981. In this regard, Joyce urges that the cause of action accrued on either March 1, 1981, the date the rent was payable, or April 4, 1981, the first time plaintiff became aware that there was an insufficient balance in Joyce's account to cover the check. We disagree. Under paragraph 17 of the lease, the provision for termination based on nonpayment of rent is not self-executing. It requires some affirmative act by the lessor (here plaintiff) to manifest an election to terminate. In the present case, plaintiff delayed such election at least until April 7, 1981, the date upon which the check was taken to the bank for the second time. The situation thus presented is therefore distinguishable from Thomas v. Brodsack, 215 N.W.2d 503 (Iowa 1974), where the lease was terminated by operation of law upon the death of a life tenant lessor. We conclude that the present action was not barred by section 648.18.

II. Joyce next asserts that the plaintiff is estopped from terminating the lease because she had acquiesced in the lessee's prior practice of paying the rent somewhat late. We find no merit in this contention. There is no issue of late payment of rent in the present case. Payment was attempted to be made on the date the rent was due with a check which was not sufficiently covered by the funds in the drawee bank at the time it was presented. No prior conduct of the parties serves to work an estoppel against terminating the lease for the reason that the check was not honored.

III. We next consider Joyce's contention that the trial court erred in not allowing expert testimony that the check had not been presented in a reasonable time. Because no offer of proof was made, error is not preserved on this issue. In addition, our review of the record indicates that while such testimony might well have been received by the trial court, the questions asked of the witness related to general practice and customs and were not sufficiently related to the facts of the present case to be of much assistance to the court. We find from the record

as a whole that Joyce failed to establish that the check in question was not presented for payment in a reasonable period of time.

We have considered all issues presented, including Joyce's claims of inequitable hardship and impossibility of performance, and find no basis to reverse the judgment of the trial court.

AFFIRMED.