IN THE COURT OF APPEALS OF IOWA

No. 4-004 / 92-1724

FILED
APR 26 1994
CLERK SUPREME COURT

DAVID P. HIGMAN and
JOAN M. HIGMAN,
Plaintiffs-Appellees,

vs.

FLOYD OAKEY and MARGARET OAKEY,
Husband and Wife; JAY VANDER POL
and MARLYS VANDER POL, Husband and Wife,
Defendants,

GARY L. TAPPER and MARCIA L. TAPPER,
Husband and Wife,
Defendants-Appellants,

JOHN NIES and RUTH NIES, Husband and Wife;
JAY W. VOIGT and LORI J. VOIGT, Husband and
Wife; and UNITED STATES OF AMERICA, ACTING
THROUGH THE INTERNAL REVENUE SERVICE,
DEPARTMENT OF TREASURY,
Defendants.

Appeal from the Iowa District Court for Plymouth County, Robert Clem, Judge.

Defendants Gary and Marçia Tapper appeal the district court's order foreclosing their interest in a real estate contract. **APPEAL DISMISSED.**

Jeffrey T. Myers of Myers Law Firm, Sioux City, for appellants.

Gregory N. Lohr of Baron, Sar, Goodwin, Gill, Lohr & Horak, Sioux City, for appellees.

No appearance by other parties.

Heard by Schlegel, P.J., Habhab, J., and McCartney, S.J.*, but decided by Donielson, C.J., and Hayden, Sackett, Habhab, and Cady, JJ. Huitink, J., takes no part.

*Senior judge from the 2nd judicial district serving on this court by order of the Iowa Supreme Court.

PER CURIAM

On June 13, 1980, David and Joan Higman entered into a real estate contract to sell certain property in Plymouth County to Floyd and Margaret Oakey for $65,000. The contract gave the Oakeys the right to assign their interest at any time during the term of the contract, which was to run for thirty years. The contract provided:

> FORFEITURE AND FORECLOSURE. If Buyers fail to perform this agreement in any respect, time being made the essence of this agreement, then Sellers may forfeit this contract as provided by Chapter 656 of the Iowa Code and all payments made and improvements made on said premises shall be forfeited; or Sellers may declare the full balance owing due and payable and proceed by suit at law or in equity to foreclose this contract, in which event Buyers agree to pay costs and attorney fees and any other expense incurred by Sellers.

In 1981 the Oakeys sold the property by quit claim deed to Jay and Marlys Vander Pol. In 1983 the Vander Pols in turn sold the property by quit claim deed to Gary and Marcia Tapper. In 1988 the Tappers sold the property by real estate contract to John and Ruth Nies. The Tappers regained the property, however, and in 1990 sold it by real estate contract to Jay and Lori Voigt.

Property taxes which were due on April 1, 1991, were not paid. The Higmans paid the delinquent taxes on June 11, 1991. On July 24, 1991, the Higmans filed a petition in equity naming all of the subsequent purchasers of the property as defendants. The Higmans declared the full balance of the contract, $49,118 plus interest, due and owing. They sought to foreclose the contract and asked

for a sale of the property. In addition to an in rem judgment based on the sale of the property, the Higmans sought an in personam judgment only against the Oakeys, the original purchasers. Plaintiffs subsequently amended their petition to allege that the property taxes due October 1, 1991, and April 1, 1992, had not been paid. They also claimed defendants had allowed insurance coverage on the property to lapse.

The Oakeys and Vander Pols had moved from the State, and their whereabouts were unknown. They were served notice of the suit by publication but did not appear. The Nies and Voigts filed a motion for summary judgment, claiming they had no interest in the property. Plaintiffs consented to the motion. The district court granted the motion for summary judgment as to the Nies and Voigts.

The district court entered its decision on September 25, 1992. The court found defendants had defaulted under the real estate contract by failing to pay real estate taxes when due. Plaintiffs then had the right under the contract to accelerate the payments. The court foreclosed the real estate contract. The court determined plaintiffs were entitled to judgment in personam against the Oakeys and to judgment in rem against the real estate. Plaintiffs were awarded judgment for the balance of the contract, $49,118 plus interest, delinquent property taxes of $1,659 paid by plaintiffs, and attorney fees and costs of $8,995. The court ordered the real estate sold at a sheriff's sale. The Tappers appealed.

The property was sold at a sheriff's sale on November 19, 1992, to the Higmans, who bid $69,177. The Tappers approached the Higmans about acquiring the deed to the property because they had potential purchasers, Jackie and Mary Sadler, for the property. The Higmans sought full payment of their judgment before they would transfer the deed. The Tappers agreed to these terms.

On January 6, 1993, the Higmans delivered a warranty deed to the Tappers. The deed stated:

> This Deed given in fulfillment of that certain Real Estate Contract dated June 13, 1980 and recorded October 7, 1981 in File #1981, Card #2160.

The Tappers transferred the property by warranty deed on the same day to the Sadlers. The Sadlers paid $72,000 for the property, which they financed by a mortgage through Pioneer Bank. Pioneer Bank issued a check to the Higmans for payment of their judgment against the property.

On March 18, 1993, the Higmans filed a motion to dismiss the appeal. They claimed that the payment of the in rem judgment constituted a voluntary and knowing waiver of the Tappers' right to appeal. They also claimed that because their judgment was in rem, the conveyance of the property, the res, deprived the court of jurisdiction to consider the appeal. The Tappers admitted the judgment had been paid in full. They claimed the appeal should proceed because they believed they were entitled to a refund of interest, court costs, and attorney fees. By an order

dated April 27, 1993, the supreme court ordered the motion to dismiss submitted with the appeal.

The supreme court has consistently held that the payment of a judgment signals a litigant's acquiescence in the court's ruling and operates as a waiver of the right to appeal. Hense v. G.D. Searle & Co., 452 N.W.2d 440, 443 (Iowa 1990). The party relying on the appellate waiver doctrine has the burden to demonstrate a voluntary and knowing waiver. Neylan v. Moser, 400 N.W.2d 538, 541 (Iowa 1987). Waiver is the voluntary relinquishment of a known right. Hegvedt v. Prybil, 223 N.W.2d 186, 188 (Iowa 1974).

Formerly the supreme court was quite strict about waiver upon paying a judgment, but more recently the waiver rule has been relaxed. Wederath v. Brant, 319 N.W.2d 306, 310 (Iowa 1982). Thus, the payment of court costs alone is not considered an acquiescence in a judgment. Vermeer v. Sneller, 190 N.W.2d 389, 396 (Iowa 1971). Partial payment of a judgment combined with an express reservation of the right to appeal does not waive the right to appeal. Schwennen v. Abell, 471 N.W.2d 880, 882 (Iowa 1991); Wederath, 319 N.W.2d at 311; Starke v. Horak, 260 N.W.2d 406, 408 (Iowa 1977). Also, payment of a judgment under compulsion of a court order in a different proceeding does not amount to waiver of the right to appeal. Hegvedt, 223 N.W.2d at 189.

The Higmans have the burden to show the Tappers made a voluntary and knowing waiver of their right to appeal. We

note the the Tappers paid the entire judgment, not just the court costs or only those amounts which were not in dispute. Further, they did not expressly reserve the right to appeal. Additionally, there is no showing the Tappers were under compulsion of a court order to pay the judgment.

The Tappers allege only that they wanted to obtain the deed to the property because they had found a purchaser, and the Higmans would not deliver the deed until they had paid the judgment in full. They claim the payment was not voluntary because it was made in order to mitigate damages.

We find the Tappers paid the judgment in full because they felt it was to their economic advantage. We find the payment was voluntary. Such a voluntary payment may be considered a voluntary and knowing waiver of the right to appeal. See Adams by Adams v. Johnson, 445 N.W.2d 422, 423-24 (Iowa App. 1989).

We conclude the Tappers have waived their right to appeal. Therefore, we grant the Higmans' motion to dismiss the appeal. Costs of this appeal are assessed to the Tappers.

APPEAL DISMISSED.