FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

180

ISG CORP., An Assumed Name for **ECONOMY HOMES, INC.**,

Plaintiff-Appellee,

vs.

CEDAR RIDGE INVESTMENT PARTNERSHIP,

Defendant-Appellant.

8-650
88-632

Appeal from the Iowa District Court for Polk County (CE27-16030), Rodney J. Ryan, Judge.

Defendant appeals from a district court ruling determining plaintiff had properly forfeited the defendant's interest in a shopping area and directing the defendant to turn over certain rents collected from the tenants of the property. **REVERSED.**

Michael P. Mallaney and Roger J. Hudson of Wimer, Hudson, Flynn & Neugent, Des Moines, for defendant-appellant.

Michael J. Green, West Des Moines, for plaintiff-appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

Defendant, Cedar Ridge Investment Partnership, appeals from a district court ruling determining the plaintiff, ISG Corporation, had properly forfeited the defendant's interest in a shopping area and directing the defendant to turn over certain rents collected from the tenants of the property. We reverse.

I.

In December 1983, defendant purchased from plaintiff the Cedar Ridge Shopping Center for $3,000,000. Defendant made a down payment and was required to pay monthly installments of just over $28,000. The contract provided forfeiture was the only remedy for breach of contract.

Commencing with the October 1986 installment, plaintiff served notices of forfeiture on defendant in order to induce payment. This practice continued through the middle of 1987.

On June 17, 1987, plaintiff served a notice of forfeiture on defendant unless payment of $29,911.44 was made. On July 13, 1987, plaintiff served another notice of forfeiture demanding payment of over $29,911.44. On July 16, 1987, defendant sent plaintiff a check for $29,911.44. On August 18, 1987, plaintiff filed this petition for writ of possession alleging the contract had been forfeited by the July 13, 1987, notice. The tenants of the shopping center were never served a notice of the forfeiture.

On January 6, 1988, the district court entered a ruling and order that a writ of possession be issued to plaintiff. The district court found the tenants were not "parties in possession" for purposes of being given a notice of forfeiture pursuant to Iowa Code section 656.2. On January 15, defendant filed a posttrial motion. Plaintiff resisted the motion on January 20 and requested the January order be amended to show possession of the property in plaintiff from August 26, 1987. The district court rejected defendant's motion but did modify its order reflecting possession in plaintiff from August 18, 1987. The district court also directed defendant to turn over all rents it collected from that date. Following this order, defendant filed this appeal.

II.

As grounds for appeal, Cedar Ridge argues the district court erred in determining the tenants were not "persons in possession" entitled to notice of forfeiture under Iowa Code section 656.2; the district court erred in determining defendant had failed to make the contract payment after notice of forfeiture; and the district court erred in ordering defendant to turn over rents to plaintiff based on an untimely posttrial motion. This is a proceeding in equity. Our review therefore is de novo. Iowa R. App. P. 4.

III.

Initially, Cedar Ridge argues the tenants of the property in question should have been considered "persons in possession" entitled to notice of forfeiture under Iowa Code section 656.2, and further, the failure to provide such notice to those tenants with written leases renders the forfeiture ineffective. It is a well-established principle in this state that equity abhors a forfeiture. Roshek Realty Co. v. Roshek Brothers Co., 249 Iowa 349, 358, 87 N.W.2d 8, 13 (1957). "In adherence to that rule, forfeiture statutes are to be construed strictly against a forfeiture, with the burden to show full and strict compliance with the statutory procedures upon the party seeking the forfeiture." Jamison v. Knosby, 423 N.W.2d 2, 5 (Iowa 1988).

Real estate contract forfeitures are regulated by Iowa Code chapter 656. The notice provision of section 656.2 requires service of a notice of forfeiture on the contract vendee as well as the "person in possession" if different from the vendee.

Our supreme court has outlined principles which should be considered in determining whether a party is a "person in possession":

> Possession requires an act of dominion or control over the property in question. . . . In determining what acts demonstrate possession of land, our cases have referred to "conduct which gives notice" to the party claiming title to the property. . . . Frequently, that conduct has been actual entry onto the land or somewhat

> objectively observable use or care made of the land. (Citations omitted.)

Jamison v. Knosby, 423 N.W.2d at 5.

It is undisputed ISG failed to serve the tenants with notice of forfeiture. The evidence indicates ISG was aware and acknowledged there were tenants in possession of the property. When ISG sold the property, twenty-three tenants occupied the rental space. In addition, the contract between the parties made specific reference to the tenants and further, the petition for writ of possession specifically requested the writ of possession be issued subject to the rights of the tenants who were presently in possession. Thus, we determine the evidence is clear the tenants were "persons in possession" for the purposes of Iowa Code section 656.2.

ISG argues the only consequence of not serving the tenants was that it simply took possession of the property subject to the outstanding leases. We believe this assertion flies in the face of the supreme court's holding in Jamison v. Knosby, which in clear language held failure to serve the tenants as person in possession renders the forfeiture ineffective. We therefore hold, because ISG failed to strictly comply with the statutory procedures spelled out in Iowa Code chapter 656, the forfeiture is ineffective. Thus, we reverse the decision of the trial court.

Because we reverse on the foregoing issue, it is not necessary to review Cedar Ridge's additional arguments.

REVERSED.

Schlegel, P.J., concurs; Habhab, J., specially concurs.

HABHAB, J. (specially concurring)

I specially concur. The result reached by the majority appears to be consistent with the ruling in Jamison v. Knosby, 423 N.W.2d 2 (Iowa 1988). It is clear under section 656.2 that a tenant in possession is entitled to notice of forfeiture and that if such tenant does not receive the notice of forfeiture, the forfeiture as to him is ineffective. The Jamison opinion seems to say that even though a contract vendee in default receives proper notice of forfeiture, that the notice of forfeiture as to him is nonetheless void for his tenant in possession did not receive notice as required by statute. If we are correct in our interpretation of Jamison as it relates to the contract vendee in default who receives proper notice, then I believe that Jamison should be reviewed.