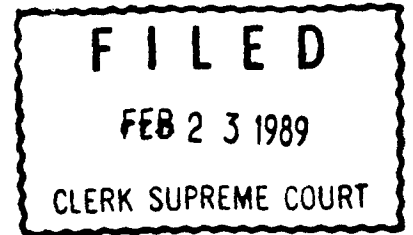


IN THE COURT OF APPEALS OF IOWA



ROBERT C. PRYOR and)
KAY J. NEDDERMEYER, As)
Co-Executors of the)
Estate of ROBERT L.)
PRYOR, Deceased,)

Plaintiffs-Appellants,)

vs.)

ROYAL D. RITZ and)
EMMA RITZ,)

Defendants-Appellees.)

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8-631
88-331

Appeal from the Iowa District Court for Monona County
(No. 20360), Michael S. Walsh, Judge.

Plaintiffs appeal a district court judgment granting
defendants' motion for summary judgment and dismissing
plaintiffs' petition to have the forfeiture of the subject
real estate declared void. **AFFIRMED.**

Donald H. Molstad of Shuminsky, Shuminsky & Molstad,
Sioux City, for plaintiffs-appellants.

James A. Schall, Storm Lake, for defendants-appellants.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

SACKETT, J.

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In this case we are asked to determine whether the trial court was correct in ruling on summary judgment as a matter of law plaintiffs' petition to set aside a forfeiture of a real estate contract should be dismissed. We affirm.

Decedent, Robert C. Pryor, at the time of his death was purchasing farmland in Monona County on contract from defendants-appellees Royal D. Ritz and Emma Ritz. There was a balance due on the contract. After decedent's estate was opened, defendants on May 11, 1987, filed a claim in probate for the contract installment of \$8,173.27 alleged to be due on a February 3, 1987, plus interest.

On May 13, 1987 and May 18, 1987, the coexecutors were served with a notice of forfeiture of real estate contract claiming unless the February 3, 1987 installment with interest through April 30, 1987, was paid within thirty days after completed service of notice the contract would be forfeited. The amounts claimed due in the forfeiture notice were not paid by June 29, 1987, when defendants filed an affidavit in support of forfeiture stating the amounts claimed due had not been paid. Defendants entered in possession of the premises.

On September 25, 1987, plaintiffs-appellants filed a petition seeking to have the forfeiture held null and void. The petition alleged defendants' attorney made

contact with the attorney for the estate and they discussed a proceeding where defendants would forfeit the contract and agree to transfer the property to the heirs of the estate at an agreed price. Plaintiffs further alleged out of the total purchase price of \$78,918.40 only \$8,500 was owing and it was due three weeks after decedent's death. Plaintiffs also claimed in filing a claim in probate defendants elected their remedy and they could not then proceed with the inconsistent remedy of forfeiture.

Defendants filed a motion for summary judgment contending plaintiffs had no cause of action and plaintiffs' petition should be dismissed. The motion was supported by the affidavit of defendant Royal Ritz setting forth facts relating to the filing of the claim in probate and forfeiture. Plaintiffs amended their petition to allege defendants were not correct in the amount claimed as a remaining payment and the only remaining payment on the \$79,918.40 contract was \$4,624.74. Defendants contended because the forfeiture claimed sums in excess of the amount unpaid, it was void. Plaintiffs resisted the motion and filed an affidavit claiming the balance due was as alleged in their amended petition. The trial court sustained defendants' motion holding the fact the amount claimed in the notice of forfeiture may be incorrect is not sufficient to defeat the forfeiture.

I.

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The only disputed fact question was to whether \$4,624.74 was due as plaintiffs claimed or \$8,173.27 was due as claimed in defendants' forfeiture notice and affidavit. We determine the trial court was correct in holding as a matter of law the forfeiture notice was not defective because it claimed a balance due on the contract of more than may have been due. Plaintiffs were notified the February 1987 installment had not been made. The fact a vendor may have asked for something in a notice of forfeiture he or she is not entitled to receive does not necessarily defeat the forfeiture if the notice contains one matter on which he or she is entitled to forfeiture. Hampton Farmers Co-Operative Company v. Tehd, 133 N.W.2d 872, 876 (Iowa 1965). This is particularly true where no effort has been made to reinstate the contract and there is no claim of fraud, misrepresentation or other equitable defense to the notice. Id. See also Gaston v. Horn, 158 Iowa 674, 678, 138 N.W.2d 925 (1913).

II.

Plaintiffs next claim defendants elected their remedies when they filed the claim in probate and they could not then proceed to forfeit the contract. Plaintiffs direct us to Abodeely v. Cavaras, 221 N.W.2d 494, 497-98 (Iowa 1974) where the Iowa court said:

Various appropriate remedies were open to plaintiffs as vendors when defendant defaulted. They had a right to elect whether (1) to keep good

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their tender of performance, demand the balance of the purchase price and sue for specific performance; (2) to terminate the contract because of 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.

* * *

When the vendee defaults in the performance of a contract for the purchase of real estate the vendor may elect which of the foregoing remedies he wishes to pursue. When he exercises the option given him under the contract to declare a forfeiture and thus terminate the contract, the vendor cannot, in respect to this same default, thereafter change his position and at the same time or at another time proceed on a theory based on affirmance by suing for damages for breach of the contract or for specific performance since one is precluded from pursuing inconsistent remedies. The remedy of the vendor by way of forfeiture of the contract and the continued liability of the purchaser for the purchase money are totally inconsistent and may not both be pursued.

Abodeely is not dispositive because as the Abodeely court said at 498, the vendor could not seek to enforce the contract that had already been forfeited.

The claim in probate has not been paid. While the forfeiture operates as a bar to the claim in probate, that is not the issue. We determine plaintiffs had no basis for relief on this ground.

III.

Plaintiffs next contend the motion should have been denied because there were discussions about plaintiffs individually assuming the contract after forfeiture. Plaintiffs cite no authority to support their position the forfeiture should be null and void on these grounds. We find no basis to void a forfeiture because a discussion of

possible settlement precedes the service of the forfeiture notice. We affirm the trial court.

AFFIRMED.