FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

324

ROBERT F. HUTCHINSON AND RUBY B. HUTCHINSON, Plaintiffs-Appellees,	)	Filed February 21, 1984
vs.	)	
LESTER SCHMIDT, Defendant/Third-Party Plaintiff/Appellant,	)	3-412 / 83-40
and	)	
JOHN D. MERRELL, Third-Party Defendant.	)	

Appeal from the Iowa District Court for Marshall County - Carl D. Baker, Judge.

Defendant appeals from a judgment for the plaintiffs in this action on a promissory note. AFFIRMED.

William Lorenz and Roger E. Harrison of Welp, Harrison, Brennecke & Moore, Marshalltown, Iowa, for defendant-appellant.

James C. Ellefson of Lundy, Butler & Lundy, Eldora, Iowa, for plaintiffs-appellees.

Michael J. Moon of Cartwright, Druker & Ryden, Marshalltown, Iowa, for third-party defendant.

Heard by Oxberger, C.J., and Snell and Schlegel, JJ.

SCHLEGEL, J.

Defendant, Lester Schmidt, appeals from a judgment for the plaintiffs in this action on a promissory note. The promissory note was executed by the defendant Schmidt and delivered to the third-party defendant Merrell pursuant to an agreement for the sale of Merrell's interest in a real estate contract. Third-party defendant Merrell subsequently assigned the promissory note and agreement to the plaintiffs, Robert and Ruby Hutchinson, in payment for certain real estate previously owned by the Hutchinsons. Schmidt asserts that the language contained in the original agreement for the sale of Merrell's interest to him [Schmidt], subsequently assumed by the Hutchinsons, creates an obligation by the Hutchinsons to pay the balance of the real estate contract. As a result, Schmidt asserts that the trial court erred in not allowing him to offset the amount of the promissory note against that obligation and in not allowing him to recover the remaining amount of that obligation from the Hutchinsons in his counterclaim.

Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4; Metropolitan Transfer Station, Inc. v. Design Structures, Inc., 328 N.W.2d 532, 535 (Iowa Ct. App. 1982). The trial court's findings of fact have the force of a special verdict and are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1); R.E.T. Corporation v. Frank Paxton Company, Inc., 329 N.W.2d 416, 419 (Iowa 1983). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 311 (Iowa 1978). We view the evidence in the light most favorable to the judgment. Muchmore Equipment, Inc. v. Grover, 315 N.W.2d 92, 101 (Iowa 1982).

I. Balance Due on the Promissory Note. Schmidt asserts on appeal that the trial court erred in holding the full amount due on the note. The appellant failed to cite to any authority in support of his argument. Failure in the brief to state, to argue, or to cite authority in support of an issue may be deemed waiver

of that issue. Iowa R. App. P. 14(a)(3); Miller v. International Harvestor Co., 246 N.W.2d 298, 304 (Iowa 1976).

In any event, the defendant's contention that the full amount of the promissory note is not due is without merit. The evidence undisputedly shows that defendant has missed several interest payments and one principal payment. As stated above, the promissory note was originally given by Schmidt to Merrell in partial payment for Merrell's legal rights in a real estate contract. The amount of the promissory note was $28,500. Principal payments on the promissory note were tied to payments being made by a third party (the Stainbrooks) on the real estate contract. The third party owed $126,726.23 on the real estate contract at the time Schmidt gave Merrell the promissory note. The three principal payments on the promissory note were due when the real estate contract balance had been reduced to $118,226.43, $108,226.43 and $98,226.43.[1] The promissory note also required monthly payments of eight percent annual interest. Further, the note provided that it would be due in full, at the payee's option, if any payment of either principal or interest was missed. The real estate contract balance had been amortized to $108,467.88 by February, 1980. Schmidt had not made the first principal payment of $8,500 and he stopped making interest payments. Plaintiffs filed this action on October 22, 1980.

The trial court concluded that the acceleration clause of the note permitted plaintiffs to demand payment on the entire amount owing. The trial court concluded that Schmidt had failed to pay interest totaling $4,809.51 when due. The evidence also clearly shows that the first payment of $8,500 principal is due and owing. Defendant does not challenge the validity of the acceleration clause. See Dunn v. General Equities of Iowa, Ltd., 319 N.W.2d 515 (Iowa 1982); Commercial Savings Bank v. Schaffer, 190 Iowa 1088, 181 N.W. 492 (1921). The trial

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1 The principal payments were $8,500, $10,000 and$10,000 respectively.

court's conclusion that the full amount of the promissory note was due is supported by substantial evidence.

II. Offset and Counterclaim. Schmidt's primary argument for reversal is based upon his claim that the Hutchinsons were obligated as guarantors of the real estate contract and, therefore, must pay him the amount due on that contract. This claim is the basis for his asserted right to offset and his counterclaim for the remaining amount due. Prior to determining this issue, however, we find it necessary to more fully state the facts upon which Schmidt bases this claim.

The events which lead up to this action began in September of 1970 with the contract sale of real property by the Fosters (who are not parties) to the Stainbrooks (who also are not parties). The contract set a sale price of $150,000, with a down payment of $20,000 and monthly payments of $1,100. The unpaid principal balance was to be paid on or before October 1, 1980. Thereafter, the Stainbrooks retained possession of the property and were required to make the monthly payments.

The Fosters sold their legal interest in the real estate contract in April, 1972, to Merrell, the third-party defendant in this action. Merrell, in turn, sold his interest in the real estate contract to Schmidt, the defendant in this action, in September, 1972. Part of the consideration for the sale of Merrell's interest included the promissory note which is the basis for this suit. The promissory note, described more fully in division I above, was given by Schmidt to Merrell. Merrell and Schmidt, as part of the transaction, also entered into a Memorandum of Agreement.

The Memorandum of Agreement provided, in pertinent part, as follows:

> It is specifically agreed between the parties that in the event the contract purchasers of such contract [Stainbrooks] shall default in the payment of said contract, that Second Party [Schmidt] shall have the right to apply so much of the principal of said note as an offset to the contract balance and that upon such default, First Party [first Merrell, then Hutchinsons by assignment] shall

> assume the remaining obligation of said contract purchasers and shall fully comply with the terms of said contract and shall pay Second Party in full after offset of the remaining principal balance on said note. [emphasis added]

Merrell, in another real estate transaction, assigned the promissory note and the Memorandum of Agreement to the Hutchinsons. As part of that transaction, the Hutchinsons specifically agreed to accept the Memorandum of Agreement. Schmidt, as a result of this transaction, made all interest payments on the promissory note directly to the Hutchinsons.

The Stainbrooks, vendees under the real estate contract, defaulted on their contract obligations in February, 1980. Merrell sent the Hutchinsons a notice, on July 28, 1980, which stated that the Stainbrooks were in default on the real estate contract and that Schmidt had served a notice of forfeiture upon the Stainbrooks. The notice to the Hutchinsons further provided that in the event the Stainbrooks failed to cure their deficiencies, the Hutchinsons would be required to cure the deficiencies no later than August 31, 1980, or the assignment of agreement and note would stand "forfeited and canceled." However, it is clear from the record that no notice of forfeiture was sent to the Stainbrooks at that time.

Merrell and Schmidt entered into an agreement on August 15, 1980, whereby Schmidt agreed to serve notice of forfeiture upon the contract purchasers and the tenants of the real estate. Merrell agreed to assume the obligation of the contract purchasers, to give Schmidt credit for the $28,500 promissory note, and to hold Schmidt harmless for any amounts he would be required to pay by reason of the promissory note. Merrell and Schmidt also specifically agreed that the notice of forfeiture served upon the contract purchasers would in no manner affect the liability of Merrell for the full performance of the real estate contract. The Hutchinsons did not join in this agreement.

The notice of forfeiture, signed by the attorney for Schmidt, was served upon the Stainbrooks on August 16, 1980. The Stainbrooks turned over possession

of the real estate to Schmidt on August 17, 1980, pursuant to a written agreement waiving the thirty-day waiting period allowed to them to perform the terms and conditions in the contract in default. See Iowa Code §656.2(3)(1979). The attorney for Merrell sent the Hutchinsons a proposed agreement on September 8, 1980, whereby the Hutchinsons would assume the contract obligations defaulted on by the Stainbrooks. However, the agreement was never entered into by the Hutchinsons.

Thereafter, Merrell sent the Hutchinsons another notice on September 25, 1980, which noted that the Stainbrooks had failed to cure their deficiencies and requested that they [the Hutchinsons] assume all obligations and liabilities under the real estate contract. This action on the $28,500 promissory note was filed on October 12, 1980, by the Hutchinsons.

The trial court held that although Schmidt had the right to seek payment on the real estate contract from the Hutchinsons, his election to forfeit the real estate contract released the Hutchinsons from their obligation to guarantee the Stainbrooks performance. We agree.

It is clear that the Hutchinsons' obligations, if any, as guarantors of the Stainbrooks' performance arose from the agreement made by the Hutchinsons with Merrell in 1973. The August, 1980 agreement between Merrell and Schmidt was not signed or acquiesed to by the Hutchinsons. See Iowa Code §554.3401(1); Service Employees International v. Cedar Rapids Community School District, 222 N.W. 2d 403, 406-07 (Iowa 1974)(although signatures are unnecessary to bind party to agreement where the parties have not made them necessary and in the absence of a statute making them necessary, there must still be mutual assent). Therefore, the issue becomes whether or not the Hutchinsons remain obligated as guarantors of the Stainbrooks' performance of the real estate contract pursuant to the provisions of the Memorandum of Agreement assumed by the Hutchinsons in 1973.

A guaranty is a contract by one person to another for the fulfillment of a promise of a third person. Andrews and Co. v. Tedford, 37 Iowa 314, 316 (1873). A guarantor may avail himself of any defense which was available to his principal. First National Bank v. Drake, 185 Iowa 879, 883, 171 N.W. 115, 117 (1919); See also State v. Bi-States Construction Co., Inc., 269 N.W. 2d 455 (Iowa 1978)(a surety may assert any defense available to the principal). Schmidt had several options available to him in this case. Upon the real estate contract vendee's default, he could elect (1) to keep good a tender of performance on his part, and demand the balance of the purchase price; (2) to terminate the contract because of the default of the purchaser, and recover his damages; (3) to recind the contract; or (4) to enforce a forfeiture under the statute. Abodeely v. Cavras, 221 N.W. 2d 494, 497-98 (Iowa 1974); First National Bank of Shenandoah v. LeBarron, 201 Iowa 853, 856, 208 N.W. 364, 366 (1926); Shumacher v. McDonald, 320 N.W. 2d 640, 641-42 (Iowa Ct. App. 1982). It is only by pursuing the first alternative that Schmidt would be entitled to recover the purchase price. First National Bank of Shenandoah v. LeBarron, 201 Iowa at 856, 208 N.W. at 366. If Schmidt chose to keep good his tender of performance and demand the balance of the purchase, he could also seek the balance of the purchase price from Merrell or the Hutchinsons as guarantors of the Stainbrooks performance.

In this case, Schmidt chose to exercise his option to forfeit the contract. His contention before us that the July 28, 1980, notice required the Hutchinsons to assume the Stainbrooks obligations under the real estate contract is without merit. The July 28, 1980, notice to the Hutchinsons was conditioned on the Stainbrooks not curing their default after receiving notice of forfeiture. No notice was sent to the Stainbrooks at that time. When a vendor exercises a right of forfeiture against a defaulting vendee, the liability of the latter for the unpaid purchase money is extinguished. Gray v. Bowers, 332 N.W. 2d 323, 325 (Iowa 1983). Abodeely v. Cavras, 221 N.W. 2d at 497-98. The contract between the

parties terminates, thereby extinguishing any right to recover the unpaid purchase price. Gray v. Bowers, 332 N.W. 2d at 325.

The contract assumed by the Hutchinsons provided that the Hutchinsons "shall assume the remaining obligation of said contract purchasers." It is clear that after the forfeiture the contract purchasers had no remaining obligation because their liability had been extinguished. Moreover, we do not believe the contract provision allowing an offset for the amount of the promissory note in the event of default by the contract purchasers permits Schmidt an automatic offset. In Gray the court was reluctant to permit circumvention of the principle that once the vendor exercises his right of forfeiture he may not recover the unpaid purchase price by means of contract clauses which reserved to the vendor the right to receive additional payment. Schmidt, by seeking the offset, is actually seeking to recover part of his purchase price.[2] The record reveals, however, that the parties intended that the right to offset the amount of the promissory note against the remaining amount due under the real estate contract was only to be exercised in the event the contract purchasers defaulted and the vendor chose to keep good his tender of performance and demand the balance of the purchase from Merrell or the Hutchinsons as guarantors. Therefore, Schmidt could not exercise his right to offset under the contract or recover the balance of the purchase price from the Hutchinsons after he exercised his right of forfeiture.

The trial court did not err in denying the defendant's counterclaim for the unpaid purchase money of the real estate contract. The trial court was also correct in denying the defendant's request to offset the amount of the promissory note from the amount of the unpaid purchase money.

Accordingly, the trial court's decision is affirmed in all respects.

AFFIRMED.

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[2] We reject defendant's contention that Merrell took possession of the real estate pursuant to his 1972 promise to guarantee the Stainbrooks' performance. The record reveals that Schmidt exercised his right of forfeiture and then Merrell assumed possession of the property pursuant to their August 17, 1980, agreement. While the Hutchinsons assumed Merrell's obligations under the Merrell's 1972 agreement with Schmidt, they were not parties to the August 17, 1980 agreement.