IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

RAYMOND P. GOTTSCHALK and CATHERINE JANAAN GOTTSCHALK,

Plaintiffs-Appellees,

vs

PAUL SIMPSON,

Defendant-Appellant.

Filed October 28, 1987

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86-887

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Appeal from the Iowa District Court for Jackson County (No. 21706), Max R Werling, Judge.

Defendant appeals from judgment for plaintiffs in a foreclosure action. **AFFIRMED.**

D Michael King of Clemens & King, Dubuque, and Michael J. Coyle and Norman J. Wangberg of Fuerste, Carew, Coyle, Juergens & Sudmeier, P C , Dubuque, for defendant-appellant.

James A. Trannel of Hughes & Trannel, Dubuque, for plaintiffs-appellees.

Considered by Oxberger, C.J., and Donielson, Schlegel, Hayden, and Sackett, JJ. Snell, J., takes no part.

OXBERGER, C.J. 85

In this appeal, defendant Simpson challenges an adverse judgment in a foreclosure action. Simpson asserts: (1) that a forfeiture of his vendor's contract occurred which terminated his obligation to make payment; (2) that if no forfeiture occurred, his payment obligation terminated because his contract had been terminated or mutually rescinded; and (3) that plaintiffs elected the remedy of forfeiture against the Preglers and were, therefore, barred from pursuing the foreclosure action. We affirm.

We note this is an equitable proceeding brought pursuant to Iowa Code § 654.1. Our review, therefore, is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings but are not bound by them. Freese Leasing, Inc. v Union Trust & Savings Bank, 253 N.W.2d 921, 925 (Iowa 1977).

In 1980, plaintiffs, the Gottschalks, sold their farm on an installment contract to the Preglers. The Preglers then entered into separate installment contracts with various third parties, including the defendant Simpson. Under the Pregler-Simpson contract, Simpson would purchase a portion of the realty the Preglers were buying from the Gottschalks.

The Preglers, in early 1985, failed to make the necessary payment under their contract with the Gottschalks and defaulted. On January 17, 1985, the Gottschalks, in an attempt to pressure the Preglers, had a Notice of Forfeiture prepared and served on the Preglers. The Notice was also served on the various third-party vendees. The Preglers and Gottschalks then began negotiating in an attempt to reach an agreeable solution. Although the record is unclear as to how these negotiations progressed, the result was a Deed in Lieu of Forfeiture given by the Preglers to the Gottschalks. The Deed also contained an assignment of the Preglers' rights under the Pregler-Simpson contract. The Preglers also assigned their rights under the other contract they had entered.

On April 25, 1985, Simpson received a letter informing him of the Preglers' assignment and demanding payment as required under the contract. Simpson refused to pay since he felt his rights and payment obligations had ended upon the expiration of the thirty-day statutory grace period. Consequently, on June 3, 1985, the Gottschalks initiated foreclosure proceedings.

Simpson's first two arguments on appeal are that since the Gottschalks completed a forfeiture of the Gottschalk-Pregler contract, his rights and obligations under the Pregler-Simpson contract were terminated; and, by virtue of the forfeiture, the Gottschalks elected their remedy as to him and could not pursue this foreclosure action. The Gottschalks argue that a forfeiture was never completed because they had not served all the statutorily-required parties. We believe a forfeiture did not take place, but on different grounds then urged by the plaintiff and relied upon by the trial court. Faukell v. Schober, 350 N.W.2d 219 (Iowa App. 1984) (Appellate court obligated to affirm on any proper basis for a trial court's ruling, even though it is not one upon which the court based its holding).

The record reveals that after the Gottschalks served the Notice of Forfeiture, their attorney, Van Etten, contacted the Preglers and their attorney. No agreement was reached within the thirty-day grace period; however, the decision of whether to complete the forfeiture had not been made either. The Gottschalks were waiting to see if the Preglers' vendors would perform under their contracts. They, therefore, did not record the Notice of Forfeiture. The Gottschalks also discussed the problems with Simpson. Simpson informed them he was not going to perform under his contract. After learning this, the Gottschalks spoke with Van Etten and discussed how they should proceed. The decision was made to take a Deed back from the Preglers rather than completing the forfeiture. Van Etten then contacted the Preglers' attorney

and received permission to send the Deed to the Preglers. The Deed and assignment were executed on April 18, 1985.

We feel that the evidence is sufficient to show a forfeiture did not occur. Simpson argues the forfeiture occurs automatically and irrevocably at the expiration of the thirty-day period. He has cited no authority for this position and the court has not found any. We conclude that the forfeiture does occur automatically after thirty days; but, the vendor has the right to extend the statutory grace period if he so chooses and does so within the thirty-day period. The statute does not prohibit the vendor from negotiating a different solution with the vendee. We feel that is what happened in this case. The Gottschalks began negotiating with the Preglers prior to the lapse of the thirty-day period and the result was the Deed in Lieu of Forfeiture. These negotiations were an effective extension of the statutory grace period. We, however, do not hold that such negotiations will always serve to extend the grace period, but, in this particular case, equity dictates such a result. We hold, therefore, that no forfeiture occurred in this case.

It is important to remember in this case that there are two separate contracts involved. Under Abodeely v. Cavras, 221 N.W.2d 494 (Iowa 1974), the lapse of the statutory thirty-day period without a cure would result in a forfeiture between the parties to the contract. A second real estate contract with rights derived from the first contract would also be affected. The buyer under the second contract would lose his claim to the realty. However, as we stated above, the parties to the contract can extend the thirty-day period, and, when this happens, a forfeiture does not automatically occur. Likewise, without a forfeiture, the second realty contract is unaffected and remains in force. Because there was no forfeiture in this case, Abodeely does not apply and the Pregler-Simpson contract remains unaffected by the negotiations between the Gottschalks and Preglers.

We also note that, while Simpson may not have been fully apprised of the negotiations between the Gottschalks and Preglers, he was in no way prejudiced by these actions. Once the assignment occurred, Simpson was in exactly the same position as he was prior to the negotiations. The Gottschalks were able to deliver full title to Simpson upon his full performance under the contract.

Because no forfeiture occurred in this case, the election of remedies argument set forth by Simpson is nondispositive. The Gottschalks succeeded to the Preglers' interest in the Pregler-Simpson contract by virtue of the assignment. Kintzel v. Wheatland Mut. Ins. Ass'n, 203 N.W.2d 799, 806 (Iowa 1973). They acquired all the rights and remedies available to the Preglers under the contract. Id. We also note, as did the trial court, that it is unclear whether Simpson can assert the election of remedies defense. His rights are derived from a separate contract, not the Gottschalk-Pregler contract. We, however, do not address that issue in this appeal.

We now turn to Simpson's final argument. Simpson argues the Pregler-Simpson contract was effectively terminated by Simpson, or mutually by the Preglers and Simpson. The Gottschalks respond by contending these issues were not raised at trial and, therefore, cannot be raised on appeal. We agree with the Gottschalks.

Iowa law requires that fair notice must be given in the pleadings. Iowa R. Civ. Proc. 69; Gosha v. Woller, 288 N.W.2d 329, 331 (Iowa 1980). The pleadings must be specific enough to allow the opposing party to make an adequate response. Id. The record reveals that in his answer, Simpson only asserts that the contract rights were terminated by the forfeiture. There is no mention of a mutual rescission or termination by Simpson. We feel the issue was not properly raised at trial and our review on appeal is precluded. Also, assuming arguendo, the issue was properly raised at trial, we note that the trial court

did not rule on the issue and that a Rule 179(b) motion was not made to preserve error as required by Iowa law when a trial court fails to resolve an issue. State Farm Mut Ins Co v Pflibsen, 350 N W 2d 202, 206 (Iowa 1984); Nowlin v. Scurr, 331 N W 2d 394, 396 (Iowa 1983)

In summary, because we find that the forfeiture of the Gottschalk-Pregler contract was not completed, and that the plaintiffs were assigned the rights under the Pregler-Simpson contract, the decision of the trial court is affirmed.

AFFIRMED.

Sackett, J , dissents

SACKETT, J. (dissenting)

I dissent.

The issue before us is one of election of remedies. Plaintiffs sold land on a real estate contract to Preglers. The contract provided for forfeiture if payments were not timely made. Preglers still had an obligation to plaintiffs when they entered into a contract with defendant to sell a portion of the real estate to defendant under a second contract.

On January 21, 1985, defendant was served with a notice of forfeiture of real estate contract advising defendant unless certain deficiencies in plaintiffs' contract with Preglers were paid defendant and Preglers would have no further claim to the property. At the time of the service of the notice defendant's contract with Preglers was current. The deficiencies were not remedied.

Defendant, who had been current under the contract, did not make a payment due March 11, 1985, on his contract with Preglers. On April 18, 1985, well after the thirty-day period, Preglers gave plaintiffs a deed in lieu of forfeiture and an assignment of their contract with defendant. Plaintiffs then sought foreclosure of the Pregler contract with defendant.

I would find plaintiffs elected their remedy when they forfeited their contract with the Preglers. First, when plaintiffs served defendant with notice of forfeiture of the plaintiffs' contract with Preglers and thirty days passed without payment of the amounts claimed, defendant lost his right to make claim against the real estate. Clearly, had defendant been the buyer under the plaintiffs' and Preglers' contract, plaintiffs would be held to have elected remedies and a foreclosure would be barred. See Abodeely v. Cavras, 221 N.W.2d 494, 498 (Iowa 1974).

Should the result be different because defendant's contract was with the Preglers? I find not. Were the Preglers seeking to foreclose at this point,

they would not be in a position to foreclose because they had not paid the delinquencies in thirty days. Consequently, their interest in the real estate was terminated and they could not show they could convey title in accordance with their contractual agreement.

I agree with the majority that plaintiffs and their buyers obviously had the right to renegotiate their contract or make an agreement in lieu of forfeiture. But what we must also recognize is they did so without notifying defendant. They did so after the thirty-day period following service of notice of forfeiture. I find no basis to now allow plaintiffs to alter their course. Plaintiffs elected the remedy. Defendant was served with a forfeiture notice on January 21, 1985. The payment defendant did not make for which foreclosure is claimed was due March 1, 1985, more than thirty days after defendant was served with notice of forfeiture. On March 1, 1985, defendant was not privy.

I note also there is no showing the failure of defendant to make his payment under the Pregler contract caused the Preglers to be unable to pay plaintiffs. When the notice was served on defendant on January 21, 1985, Simpson's contract with the Preglers was current. Defendant owed the Preglers no further payment until March 1, 1985, more than thirty days after the service of notice of forfeiture.

I would reverse the decree of foreclosure and dismiss plaintiffs' action at plaintiffs' cost.