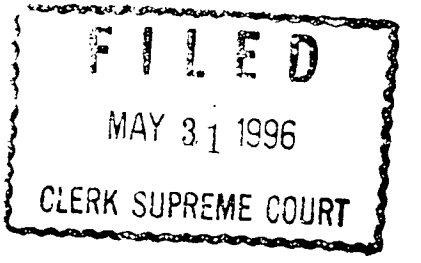
IN THE COURT OF APPEALS OF IOWA

No. 6-165 / 95-0523



LAURENCE D. GOODWIN and ELLINOR GOODWIN GREEN,

Plaintiffs-Appellants,

vs.

WARDWAY PLAZA PARTNERS; MERIDITH IOWA CODE; MERIDITH IAC COMPANY; LAWRENCE E. FEIDLER; NATIONWIDE REDEVELOPERS II; BARRY M. KLEIN; and LOUIS STRAUSS, JR.,

Defendants-Appellees.

and

BALCOR REAL ESTATE HOLDINGS, INC. f/k/a BALCOR REAL ESTATE FINANCE, INC.,

Intervenor-Appellee.

Appeal from the Iowa District Court for Johnson County, Larry J. Conmey, Judge.

Laurence Goodwin and Ellinor Goodwin Green appeal the district court's order granting Balcor's motion for summary judgment on their action to terminate a ground lease. **AFFIRMED.**

William L. Meardon and Timothy J. Krumm of Meardon, Sueppel, Downer & Hayes, P.L.C., Iowa City, for appellants.

William E. Rattner and Rebecca D. Ward of Hopkins & Sutter, Chicago, Illinois, and John C. Monroe, Cedar Rapids, for intervenor-appellee.

No appearance for Wardway Plaza Partners and remaining appellees.

Heard by Sackett, P.J., and Cady and Streit, JJ. Vogel, J., takes no part.

SACKETT, P.J.

Plaintiffs-appellants Laurence D. Goodwin and Ellinor Goodwin Green appeal in this equity action following the trial court's order granting the motion for summary judgment of intervenor-appellee Balcor Real Estate Holdings, Inc., et al., in plaintiffs' action to terminate a lease for property located in Iowa City. We affirm.

Plaintiffs hold title in fee simple to real estate in Johnson County. Plaintiffs' parents leased the property under a written lease in 1964 for the purpose of constructing a shopping center. The shopping center was constructed. The leasehold rights have been transferred several times. Intervenor Balcor currently owns all the leasehold interest. Wardway Plaza Partners, et al., named as defendants, have transferred all interests they may have in the leasehold interest and are not parties to the appeal.

Plaintiffs filed a petition in four counts alleging the lease should be terminated because (1) lessee failed to make payments on the first mortgage; (2) lessee failed to amortize the first mortgage as required in the lease; (3) lessee made an assignment for the benefit of creditor in violation of the terms of the lease; and (4) a default judgment was entered against the property. In considering the motion for summary judgment, the trial court found plaintiffs had failed to create a fact issue on any of the four issues and dismissed plaintiffs' petition.

The basic undisputed facts that lead to this controversy are: On May 29, 1964, plaintiffs' parents leased the property to Hermel, Inc., and consented to a first

mortgage in the amount of $800,000, entered May 20, 1966, encumbering the fee. The principal secured was amortized over thirty years and the original lessees agreed the mortgage principal would remain current. This mortgage ultimately was assigned on October 31, 1986, to intervenor Balcor.

Hermel assigned its leasehold interest to Wardway Plaza Partners. Wardway gave a mortgage for $733,255, ultimately assigned to Balcor in November 1986. A third mortgage was given to Balcor by Wardway in January 1987 and recorded in the same month. In June 1987, Wardway gave Balcor an agreement that consolidated the three mortgages, including the first mortgage encumbering the fee, and secured debt in the amount of $2,500,000. The consolidated mortgage encumbered the improvements, not the fee. The consolidated mortgage did not call for principal payments. Wardway did not make payments on the principal amount of this mortgage.

Wardway defaulted on the consolidated mortgage, and in May 1990, Balcor filed a petition for foreclosure of the real estate mortgages. On August 24, 1990, a default judgment was entered against Wardway and other defendants. The judgment provided for personal judgments and established Balcor's mortgage lien against the mortgage property and directed the Clerk of Court to issue an execution for sale. A receiver was appointed. In September 1991, a special execution issued and in February 1992 a second execution issued. The property was scheduled to be sold at a sheriff's sale. The sale was canceled when Wardway entered into an agreement for a deed in lieu of foreclosure of mortgage property. A deed was then delivered to

Balcor by Wardway conveying all of Wardway's interest in the real estate, including improvements, personal property, leases, warrantees, and contracts. At all times all rent due under plaintiffs' lease has been paid in full.

Plaintiffs first advance when no principal payments were made on the consolidated mortgage, the terms of the lease were violated and the lease should be forfeited. The lease provided lessee pay before delinquent all principal and interest on the first mortgage, and any default in making the payments constituted a default under the terms of the lease. Plaintiffs argue the first mortgage encumbered plaintiffs' fee and continued to cover the fee when consolidated with the other mortgages. Plaintiffs contend Wardway's failure to make any principal payments on the consolidated mortgage was a failure to make payments on the first mortgage. Intervenors contend the first mortgage was released by the consolidated mortgage. At oral argument, intervenors represented the first mortgage had been released and the consolidated mortgage did not encumber the fee.

The trial court, in granting summary judgment, said, "The Court finds further that Plaintiffs were not injured by the former defaults, and since the first mortgage no longer encumbers Plaintiffs' fee interest, no harm to Plaintiffs can occur."

Plaintiffs contend the lease should be regarded as written and the fact rent due then was current does not resolve the issue. Plaintiffs question whether the first mortgage has, in fact, been released.

Plaintiffs have the burden of proving the existence of facts which entitle them to forfeiture under the terms of the contract. *Lane v. Crescent Beach Lodge & Resort, Inc.*, 199 N.W.2d 78, 81 (Iowa 1972); *Tait v. Reid*, 158 Iowa 466, 472, 139 N.W. 1101, 1103 (1913).

Equity abhors forfeitures. *Lett v. Grummer*, 300 N.W.2d 147, 149 (Iowa 1981); *Roshek Realty Co. v. Roshek Bros. Co.*, 249 Iowa 349, 358, 87 N.W.2d 8, 13 (1957); *Keokuk State Bank v. Eckley*, 354 N.W.2d 785, 787 (Iowa App. 1984).

The record made for the hearing on the motion for summary judgment shows plaintiffs have received all rents due under their lease and the leasehold improvements made to the fee have substantially increased the value of the fee. If there is a technical violation of the lease, it is minor and is not of the type that should support a forfeiture. We affirm the trial court on this issue.

Additionally, it would appear if plaintiffs had a complaint on this issue, it was waived when they continued to receive rent after the consolidated mortgage was established without complaint. In *Janes v. Towne*, 201 Iowa 690, 207 N.W. 790 (1926), the supreme court said:

> A waiver once made cannot be recalled. Hence, after a party has acquiesced in a breach of the contract, he cannot thereafter urge a forfeiture because of such breach, unless he has given reasonable notice of an intention thereafter to enforce the contract according to its terms. * * * Where a stipulation for performance at a particular time has been waived, the party in whose favor the waiver operates is thereafter bound only to perform within a reasonable time, except in a case where there has been a specific extension of time, in which case it is held that

> the new time fixed becomes of the essence, as was the case in the original contract. So, where the time fixed by the contract for performance is permitted to pass, both parties concurring, the time of performance thereafter becomes indefinite, and one party cannot rescind *until full notice and a reasonable time for performance is given.* (quoting 13 C.J. 609, 690.)

Janes, 201 Iowa at 694, 207 N.W. at ___.

Furthermore, we find, as did the trial court, the consolidated mortgage released the first mortgage on the fee. We find neither intervenors nor their predecessors in interest hold any mortgages that encumber plaintiffs' fee.

Plaintiffs next contend the lease was breached because the first mortgage was not amortized as provided for in the lease between plaintiffs and Hermel over the term of Wardway's lease. Intervenor Balcor contends the mortgage was effectively released. This contention of plaintiffs' has already been addressed and does not form a basis for reversal.

Plaintiffs' third contention is the lease was breached because there was an assignment for the benefit of creditors when the deed in lieu of foreclosure was given.

The lease said:

> Insolvency and Bankruptcy. In the event Lessee files a petition in bankruptcy or is adjudicated a bankrupt or if Lessee makes an assignment for the benefit of creditors . . . or a writ of execution is issued against this lease, this lease shall terminate and cease. Provided, however, Lessor expressly agrees that any sub-lease made by Lessee prior to termination of its lease shall survive such termination and continue in full force and effect. Provided further, however, nothing contained herein shall be constructed to relieve Lessor's title of any mortgages of record.

We agree with intervenors there is not evidence in the record to find this provision of the lease violated.

Plaintiffs' fourth contention is when a default judgment was entered in favor of intervenor Balcor and against Wardway on the consolidated mortgage, the judgment was "declared and decreed to be the first lien upon the leasehold and fee interests." This language as to establishing a first lien upon the leasehold and fee interests concerns several lots then owned by Wardway Plaza Partners, et al., and not by plaintiffs. We affirm the trial court on this issue.

We have considered plaintiffs' other issues and find them to be without merit.

AFFIRMED.