IN THE COURT OF APPEALS OF IOWA

FILED
MAR 0 9 1988
CLERK SUPREME COURT

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PATRICK M. BERRYHILL, THOMAS A. POPA and NORTH AMERICAN MOTORSPORTS CORPORATION,

Plaintiffs-Appellees,

vs.

JOHN A. HATT,

Defendant-Appellant.

Filed March 9, 1988

7-558
87-432

PATRICK M. BERRYHILL and THOMAS A. POPA,

Plaintiffs-Appellants,

vs.

JOHN A. HATT and DORRIS V. HATT,

Defendants-Appellees.

7-547
87-199

Appeals from the Iowa District Court for Linn County (Nos. EQ8073 & LA12422) - William L. Thomas, Judge.

In the law case defendant appeals from a district court ruling upholding a jury verdict that awarded compensatory and punitive damages to the plaintiff. In the equity case plaintiffs appeal from a district court order rejecting specific performance on a real estate contract between the parties. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

John Riccolo, James A Piersall, and Diane B Gould, of Wenzel, and Piersall, Riccolo & Harms, P C , Cedar Rapids, for plaintiffs-appellants.

Keith Stapleton, Cedar Rapids, for defendants-appellees

Heard by Donielson, P J , and Hayden, and Sackett, JJ

SACKETT, J.

We have consolidated two cases involving a dispute over the same real estate purchase agreement. We reverse judgments for abuse of process, breach of contract, and punitive damages. We affirm the trial court's order denying specific performance.

The purchase agreement was signed on August 1, 1983, by Patrick M. Berryhill and Thomas A. Popa, plaintiffs-appellees in the first case and plaintiffs-appellants in the second case, as buyers, and John A. Hatt, defendant-appellant in the first action and defendant-appellee in the second action. John's wife Dorris V. Hatt, who did not sign the purchase agreement, is a defendant-appellee in the second action. Because of our holding we need not address the issue of the absence of the wife's signature.

The agreement provided buyers would buy and seller would sell 195 feet of Lot 16, Meadowdale 3rd addition in Cedar Rapids, Iowa. The agreement was prepared on a form adopted by the Cedar Rapids Board of Realtors. The property subject to sale was the north part of a large lot zoned for business use. The sale price was $47,000. The relevant words added to the agreement were:

> Buyer shall pay seller $13,500 at time of settlement. Balance of $33,500 to be executed by Uniform Sales Contract at 11% interest * * *. This offer subject to seller splitting property into two parcels with 15 foot easement across front parcel to rear parcel and buyer buying adjacent property to provide rear parcel with legal street frontage. Buyer to rent property for $320 per month commencing August 1, 1983, until closing or August 1, 1988, whichever occurs first.

Additionally, the contract provided for the balance to be payable $320 or more per month, beginning 30 days from settlement,

Buyers had been in possession of the property under a prior agreement and continued in possession. In March 1984, the Cedar Rapids Board of Adjust-

ment conditionally approved seller dividing the property and seller placed an easement over the front property for the back. Seller then notified the buyers and sought to close the transaction. Buyers did nothing. Seller's attorney then forwarded copies of a notice of forfeiture of real estate contract to buyers' attorney asking buyers to accept service. Buyers did not respond. When seller's attorney checked on the status of the notices, buyers requested the abstract of title. Buyer Popa was served with a notice of forfeiture of real estate contract on May 17, 1984; Berryhill on May 18, 1984.

On May 17, 1984, the abstract was delivered to buyers' attorney. On May 22, 1984, buyers' attorney sent an abstract opinion to buyers. The opinion showed the abstract had been examined and merchantable title was found to be in seller John A. Hatt, subject to (1) the necessity for a quit claim to cure a problem of a stray deed, (2) a judgment of less than $100, and (3) two mortgages to the Brenton Bank encumbering the property included in the purchase agreement, with other property. The first mortgage was given in December 1976, for a face amount of $75,000. The second mortgage was given in April 1984, for a face amount of $108,000. Buyers did nothing more.

Buyers testified they would do nothing about the purchase until the encumbrances were removed. The buyers also testified had it not been for the encumbrances they would have entered into the contract.

Seller filed an action for forcible entry and detainer on December 31, 1984. On March 4, 1985, judgment was entered against seller for costs.

Buyers and their corporation filed a petition at law on June 18, 1984, against seller seeking an injunction enjoining forfeiture of the contract and asking for money damages for seller's alleged improper use of the forfeiture provisions. Buyers' petition subsequently was amended to include a claim for

breach of the real estate contract. On October 10, 1984, buyers and their corporation filed a second petition seeking specific performance of the August 1983, agreement. These two actions which form the basis of this appeal were consolidated at the trial court level.

The law action was tried to the jury. The jury determined seller breached the contract and committed an abuse of process. The jury found buyers and their corporation should be awarded $2,000 in compensatory and $11,500 actual damages in the breach of contract action and $27,000 in compensatory and $27,000 punitive damage in the abuse of process action. Judgment was entered by the trial court which additionally awarded $5,000 to buyers for attorney fees. Seller appeals from these judgments.

Buyers and their corporation's claim for specific performance was rejected by the trial court which found specific performance to be inappropriate. The court found the buyers had been adequately compensated in the law case for breach of contract and punitive damages. Buyers and their corporation appeal from the trial court's refusal to order specific performance.

The buyers' claims are premised on the alleged failure of the seller to show he could convey merchantable title to the premises.

I.

The first issue is whether there was sufficient evidence to support a finding seller committed the tort of abuse of process when he served a notice of forfeiture of real estate contract and later sought a forcible entry and detainer. We find there was not substantial evidence and reverse the judgment for abuse of process. In determining whether the evidence was sufficient to satisfy the elements of abuse of process and engender a jury question, we view the evidence in the light most favorable to the party who received a favorable jury verdict. Grell v. Poulsen, 389 N.W.2d 661, 662 (Iowa 1986).

The Iowa court has adopted section 682 and comments a and b of the Restatement (Second) of Torts (1977). Section 682 states:

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

The Restatement (Second) of Torts section 682 is identical to the Restatement of Torts section 682 in all respects except for the addition of the word "primarily" in the second edition. This revision narrows the claim of abuse of process as explained in new comment b:

> b. "Primarily." The significance of this word is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose or benefit. . . .
>
> For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended. The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.

Grell, 389 N.W.2d at 663; Schmidt v. Wilkinson, 340 N.W.2d 282, 284 (Iowa 1983). See also Mills County State Bank v. Roure, 291 N.W.2d 1, 4 (Iowa 1980); Sarvold v. Dodson, 237 N.W.2d 447, 448-49 (Iowa 1976). The Iowa court has agreed with the additional commentary found in Restatement (Second) of Torts section 682 (app. 1981) which provides:

> Some act or threat directed to an immediate objective not legitimate in the use of the process is required, and the defendant is not liable if he has done no more than carry the process to its authorized conclusion, even with bad intentions.

Grell, 389 N.W.2d at 663; Schmidt, 340 N.W.2d at 284. With these principles in mind we look at the facts to determine whether substantial evidence of the tort was presented.

In abuse of process a prerequisite for recovery is evidence that the person committed some act in the use of process that was not proper in the regular

prosecution of the proceeding. Grell, 389 N.W.2d at 664. An act which is proper in the regular prosecution of a proceeding cannot be relied upon as a basis for an abuse of process claim. Id.; Holiday Magic Inc., v. Scott, 282 N.E.2d 452, 456-57 (Ill. Ct. App. 1972). Abuse of process is the intentional use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive in doing so. The improper use which is the essence of the tort is ordinarily an attempt to secure from another some collateral advantage not properly includable in the process itself, and is a form of extortion in which a lawfully used process is perverted to an unlawful use. Sarvold, 237 N.W.2d at 449.

The forfeiture notice was intended to terminate any interest the buyers had in the real estate contract. Buyers' evidence shows no more than the existance of a factual dispute between the parties over whether there were grounds to terminate the contract. There is not substantial evidence to support an abuse of process claim.

Seller has not raised the issue whether serving a notice of forfeiture of a real estate contract is an irregular use of the court process. See Grell, 389 N.W.2d at 664; Brody v. Ruby, 267 N.W.2d 902, 906 (Iowa 1978). Therefore that issue is not before us. We note, however, the purpose of Iowa Code chapter 656 is to limit the rights of a forfeiting vendor who might otherwise summarily remove a vendee upon default. It is designed to extend a little grace to a party in default who may be staggering under the load of his undertaking. Jensen v. Schreck, 275 N.W.2d 374, 384 (Iowa 1979). Chapter 656 is a statute enacted to limit the forfeiture rights of a contract vendor; it is not intended to grant any powers to the vendor or the State to deprive a vendee of a property interest. Id. See also Skubal v. Meeker, 279 N.W.2d 23, 26 (Iowa 1979). Finding insufficient evidence to support a claim for abuse of process, we reverse the judgment.

II.

Seller claims there is not substantial evidence to show he breached the contract. Buyers claim seller breached the contract because seller presented an abstract showing seller's title was subject to certain liens and encumbrances.

Buyers rely on these facts as evidence of seller's breach. The abstract certified two mortgages had been put on the property in question with other property. The abstract shows at the time the mortgages were given they secured obligations in excess of the value of the property being sold. The abstract does not show the current balance due on the obligation secured by the encumbrance. Buyers presented no evidence the encumbrances could not be released. The acts to be performed by buyers and seller were mutual and dependent. Seller was required to show merchantable title when buyers paid the $13,500 and delivered a contract for the balance. There is no evidence buyers offered to tender the money and a sales contract. The issue was could seller provide title when buyers performed. There is no evidence seller could not. The only evidence dealing with the release of the liens indicates they would have been released upon buyers' performance.

Seller testified the liens would have been released at the appropriate time. By the time of trial the liens were released. Buyers' attorney testified seller had told him the mortgages covered several properties and all the buyers had to do was say "yes" and the property involved would be released. Seller's financial statement entered into evidence at trial showed him to have a net worth of over $250,000.

Buyers contend seller breached the contract. Buyers however never indicated they were ready to perform if the encumbrances were removed. Some notice of buyers' readiness to perform was necessary. See Goudeau v. Daigle,

124 F.2d 656, 657-58 (5th Cir.), cert. denied, 316 U.S. 695 (1942). We find no circumstance to excuse buyers' failure to tender performance. See Lyon v. Willie, 288 N.W.2d 884, 891 (Iowa 1980). We find insufficient evidence to support a claim for breach of contract. Therefore we reverse the awards of compensatory and punitive damages based on that theory. See, e.g., Interfirst Bank, Dallas, Texas v. Hanson, 395 N.W.2d 857, 861 (Iowa 1986); Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108, 120 (Iowa 1984). We remand to the trial court for entry of judgment in appellant's favor in the law action.

III.

Buyers claim the trial court should have ordered the contract be specifically performed. Specific performance is an equitable remedy and our review is de novo. Moser v. Thorp Sales Corp., 256 N.W.2d 900, 907 (Iowa 1977). We concluded in division II buyers failed to present sufficient evidence of a breach of contract by seller. One of the essential requisites to the right to specific performance of contracts is the ability of the plaintiff to show that he has performed, offered to perform, or is ready, able, and willing to perform, acts on his part which formed the consideration of the undertaking on the part of the defendant. 71 Am. Jur. 2d Specific Performance §65, at 93 (1973). See Youngblut v. Wilson, 294 N.W.2d 813, 817 (Iowa 1980). We hold buyers do not meet this requirement and are not entitled to equitable relief. We affirm the judgment of the district court denying buyers' request for specific performance.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.