

IN THE COURT OF APPEALS OF IOWA

FRANKLIN A. REYNOLDS and **IONA DEE REYNOLDS,**	)	
Plaintiffs-Appellees,	)	Filed November 30, 1983
vs.	)	
GEORGE RICHARD LANCASTER, JR.,	)	3-314 / 83-167
Defendant-Appellant.	)	

Appeal from Cerro Gordo District Court - B. C. Sullivan, Judge.

Defendant appeals from an order in a forcible entry and detainer action. REVERSED.

John E. Buck of Buck Law Offices, Britt, for defendant-appellant.

R. Michael Sweesy, Mason City, for plaintiffs-appellees.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden, and Sackett, JJ.

SACKETT, J.

Defendant appeals from an order in a forcible entry and detainer action. We reverse.

The defendant, George Richard Lancaster, Jr., and his ex-wife, Karen, entered into an installment real estate contract wherein they purchased certain Cerro Gordo County real estate from plaintiffs, Franklin A. and Iona Dee Reynolds. Karen subsequently assigned her interest in the contract to the defendant and she is properly not a party to these proceedings.

Defendant did not comply with the terms of the contract and on January 7, 1982, he was personally served with notice of forfeiture of real estate contract providing that the contract would stand forfeited and cancelled by its terms unless the parties in default, within thirty days of service of notice, performed the terms and conditions in default. On March 26, 1982, there was filed with the Cerro Gordo County recorder an affidavit in support of Forfeiture of Real Estate Contract verifying that the defendant had not complied with the terms of the forfeiture notice. The forfeiture notice also was served on the United Central Bank and Trust of Mason City, but they are not a party to these proceedings. The forfeiture itself is not an issue here other than its relationship to the forcible entry and detainer proceeding.

The contract contained the following language:

> . . . and upon completion of such forfeiture, if the Buyer, or any other person or persons shall be in possession of said real estate or any part thereof, such party or parties shall at once peacefully remove therefrom, or failing to do so may be treated as tenants holding over, unlawfully after the expiration of a lease, and may accordingly be ousted and removed as provided by law.

On July 16, 1982, defendant was served with a notice addressed to him as tenant providing that his tenancy of the real estate in question would terminate after midnight on September 7, 1982; and telling him that September 7 was the periodic

rental date under the terms of his tenancy. On September 13, 1982, defendant was served with a notice to quit. Plaintiffs demanded possession because defendant was holding over after the termination of his lease.

On September 22, 1982, defendant was served with an original notice of suit and petition in this cause. The petition asked that defendant be adjudged guilty of forcible entry and detainer and that plaintiff be forthwith put in possession under execution as provided by chapter 648 of the Iowa Code. An appearance of defendant's attorney was filed October 15, 1982. On October 19, 1982, defendant filed a motion to dismiss, claiming that the defendant had been a tenant since February 7, 1982, and consequently he had more than thirty days' peaceable possession and that therefore Iowa Code section 648.18 (1981) bars this action.

The trial court ordered a hearing on the motion to dismiss and the petition in forcible entry and detainer for December 10, 1982. On December 10, 1982, the trial court overruled defendant Lancaster's motion to dismiss. The court overruled Lancaster's objection that under the Rules of Civil Procedure he should have ten days to respond to the merits. The trial court entered a decree in forcible entry directing defendant to forthwith remove from the premises in question.

Lancaster appeals, contending that the trial court erred in: (1) overruling his motion to dismiss and (2) in proceeding to hear the merits of the case over his objection.

Lancaster's motion to dismiss was predicated on the holding of the Iowa Supreme Court in Warren v. Yocum, 223 N.W.2d 258 (Iowa 1975). In the Warren case the court refused to allow the vendor in a contract forfeiture to utilize the forcible entry and detainer procedure because more than thirty days had passed since the thirty days following the service of the forfeiture notice.

In Warren, the vendors, the Yocums, caused the vendees, the Warrens, to be served with forfeiture notices on April 16th and April 26th, respectively. On May 20th, a declaration of forfeiture was filed with the county recorder. On

June 16th, a three-day termination notice was given. On June 30th, an action at law was commenced to remove the Warrens. The Warrens filed a motion to dismiss, claiming the vendors could not have the benefit of forcible entry and detainer since they did not commence an action for possession within thirty days of the accrual of the right.

The Yocums had agreed, in the event of forfeiture, to vacate the premises. They further agreed that, upon their failure to do so, they may be treated as tenants holding over unlawfully after the expiration of a lease and may be ousted and removed as such. The supreme court held that the Yocums were in peaceful possession of the premises so as to preclude the forcible entry of the Warrens.

Iowa Code section 648.18 provides:

> Thirty days' peaceable possession with the knowledge of the plaintiff after the cause of action accrues is a bar to this proceeding.

The supreme court in Warren found that there was "no need to consider other than the element of § 648.18 . . . regarding peaceable possession." Warren, 223 N.W.2d at 262. The court referred to 3 Thompson on Real Property, section 1036 (1959 ed.) where the author states, in relevant part:

> The cancellation of the contract merely terminates the relationship of vendor and vendee, but the relation of landlord and tenant may thereafter arise. The relationship of landlord and tenant does not arise where the vendee forfeits his interest under the contract unless there is an express stipulation in the contract that such relationship shall arise and since the character of an occupancy may be determined by a condition subsequent, so that the happening of a future event will determine whether the occupant of land holds in the capacity of a tenant or as a purchaser. An election may be given one party to choose whether the relationship shall be that of landlord and tenant or of vendor and vendee. On a contract for the sale of lands, the parties may, by express stipulation, agree that on default being made in the payment of the purchase money, the contract shall be treated as a lease, the option being reserved to the purchaser in the first instance, and passing to the vendor on his failure to elect. When an election is made to treat it as a lease, it relates back to the time when the contract was made, and creates the relation of landlord and tenant from that day with all its incidents.

The court in Warren found that the Warrens' notice to quit served to establish a leasehold relating back to the date of the executory contract, and the Yocums were thereafter tenants at sufferance. The court held that the Warrens' right accrued upon the expiration of the thirty days following the forfeiture notice.

The facts in the instant case differ only in that we have here a thirty-day notice not given in the Warren case. Lancaster argues that this fact makes this case vastly different from the Warren case. We disagree. The tenancy in question here was created by a written agreement between the parties, namely the real estate contract. The tenancy created was the same in both cases. Warren controls. The trial court should have sustained Lancaster's motion to dismiss. Lancaster came in possession as a tenant thirty days following the service of the forfeiture notice. He had had more than thirty days' peaceable possession prior to the commencement of the forcible entry action. Iowa Code section 648.18 (1981) bars this action. The Reynolds must bring another type of action to obtain possession of the property.

Having decided Lancaster's motion to dismiss should have been sustained, we need not address the second issue raised on appeal.

REVERSED.