**IN THE COURT OF APPEALS OF IOWA**

No. 7-213 / 96-0552



**PLEASANT VIEW FARMS, INC.,**
Plaintiff-Appellee,

vs.

**WALTER VINING and RANDI VINING,**
Defendants-Appellants.

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Appeal from the Iowa District Court for Mitchell County, Bryan H. McKinley, Judge.

The defendants appeal the district court ruling granting the plaintiff's motion for summary judgment and awarding plaintiff $55,169.47 based on the defendants' default on a contract and security agreement. **AFFIRMED.**

Roger L. Sutton of Sutton & Troge's Law Office, Charles City, for appellants.

Patrick J. Rourick, St. Ansgar, for appellee.

Heard by Sackett, P.J., and Vogel, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

**SCHLEGEL, S. J.**

Defendants Walter and Randi Vining appeal the order of the district court granting summary judgment in favor of plaintiff Pleasant View Farms, Inc. and awarding the plaintiff damages on its claim based on the defendants' default on a contract and security agreement. We affirm.

***I. Background Facts and Proceedings.***

Plaintiff Pleasant View Farms, Inc. (Pleasant View) is a Nebraska Corporation whose principal shareholder and president is Richard Stelling. Walter and Randi Vining are the principal shareholders of an Iowa corporation known as Vining Enterprises, Inc. The dispute between the parties arose out of a contract and security agreement executed for the purchase of two generator packages. The generator packages were installed on two railroad locomotives owned by Vining Enterprises.

In August 1988, Vining Enterprises entered into a contract and security agreement for the purchase of the generators with Gibbs-Cook Equipment Company in Des Moines. In addition, both Walter and Randi Vining separately executed a guaranty of payment personally guaranteeing the debt of Vining Enterprises. Later the contract and the guaranties were assigned to Caterpillar Financial Services Corporation in Arlington Heights, Illinois. Finally, in October 1990, the agreements were assigned to Pleasant View by a nonrecourse agreement in the amount of $55,169.47, plus interest accrued and accruing.

Vining defaulted on payment of the contract. The amount due as of January 1, 1991 included $55,169.57 principal, $62,077.60 accrued interest, plus interest accruing at the rate of $52.74 per day.

Pleasant View Farms filed an action in Mitchell County District Court seeking priority and recovery on four separate promissory notes and their corresponding security agreements. Pleasant View also sought recovery on two installment sales contracts and security agreements, including the contract and security agreement for the generators. In February 1994, Pleasant View Farms obtained a judgment on all claims and also received attorney fees and expenses in the amount of $20,000.

The court ordered that any proceeds resulting from the sale of the collateral, after payment of court costs and costs of sale, shall be next applied to the obligations bearing the earliest date on the face of the obligation until the obligation is paid in full and so on. Finally, the proceeds were to be applied to pay reasonable attorney fees until all sums due Pleasant View Farms were paid in full. The court also ordered that the collateral, which included three railroad cars and two locomotives, be sold free and clear of all liens except the secured interests of Stelling and/or Pleasant View Farms, and also the secured interests of the five other secured creditors named in the order. Vining Enterprises did not appeal this decision.

Pleasant View assigned two of the judgments, one in the amount of $48,871.26 based upon a September 1987 note, and another in the amount of $329,574.23 based upon a October 1986 note, to Tulsa Chief Creditors, L.C. Tulsa is a limited liability company in which Pleasant View and Stelling together hold a 48.8919 percent interest. Pleasant View did not assign the $77,537.63 judgment based on the installment sales contract assigned to the company in October 1990. All of the secured property was sold by execution sale in May 1994. Tulsa Chief purchased the collateral securing the four notes for $800,000. Pleasant View was allocated $422,718.96 of the $800,000 purchase price. Pleasant View's judgment on the contract for $77,537.63, plus accruing interest, remained unsatisfied. The Vinings stipulated in the present action that $55,169.57, plus interest, was owed to Pleasant View under the contract.

In May 1994, Pleasant View filed the present action seeking judgment against the Vinings in the amount of $57,019.54, plus interest at eighteen percent per annum from January 1, 1991, based upon the personal guaranties executed by both Walter and Randi on the debt of Vining Enterprises. The Vinings denied liability asserting several defenses.

The district court issued an order in February 1996 entering judgment in favor of Pleasant View in the amount of $55,169.47, plus $1850.07 accrued interest.

The Vinings appeal asserting that Pleasant View is barred from recovery based on the doctrine of election of remedies. They also contend Pleasant View's bid at the sheriff's sale was sufficient to satisfy the prior judgment including all obligations

Pleasant View sought in the present action. The Vinings claim that Pleasant View failed to provide proper notice regarding the disposition of the collateral and also failed to apply the proceeds from the sale to the indebtedness on the contract pursuant to Iowa law. The company is therefore prohibited from receiving damages in the second suit. Finally, the Vinings submit that the doctrines of claim and issue preclusion bar any recovery by Pleasant View in the present litigation.

***II. Standard of Review.***

Our review of the court's summary judgment motion is for correction of errors at law. Iowa R. App. P. 4. Summary judgment is appropriate only when the entire record before the court shows there are no genuine issues of material fact in dispute and that the court correctly applied the law. Iowa R. Civ. P. 237(c); *Fischer v. UNIPAC Service Corp.*, 519 N.W.2d 793, 796 (Iowa 1994) (citations omitted).

***III. Election of Remedies.***

The Vinings argue Pleasant View's present action is barred by the doctrine of election of remedies. They submit that because Pleasant View chose not to include them as parties to the original action on the contract, the company forfeited the opportunity to bring a later action based on the guaranties.

The Vinings have the burden of establishing the defense of election of remedies by proving three elements: (1) the existence of two or more remedies; (2) inconsistency between them; and (3) a choice of one of the remedies. *First Security*

*Bank of Brookfield v. McClain,* 403 N.W.2d 788, 790 (Iowa 1987) (citing *Bolinger v. Kiburz,* 270 N.W.2d 603, 605 (Iowa 1978)).

Inconsistency depends on whether the facts relied on as the basis for one remedy are repugnant and contradictory to the facts relied on as the basis for another remedy. *Bolinger,* 270 N.W.2d at 607. When the remedies are factually consistent, an inconsistency does not arise until one of the remedies is satisfied. A party may pursue consistent remedies concurrently, even to final adjudication, until one of the claims is satisfied. *Id.*

The district court concluded the present action based on the Vinings' personal guaranties "constitutes a ground that is independent from and consistent with [Pleasant View's] prior cause based upon the debtor's default on the contract." We agree. Pleasant View's action is "not a suit on the primary obligation which the guaranty contract secures." 38 Am.Jur2d § 115. Moreover, we note the Vinings conceded that $55,169.57 remained due on the contract and security agreement. Because the prior action did not result in satisfaction of the entire judgment, Pleasant View is permitted to pursue its action on the personal guaranties. *See First Security Bank of Brookfield,* 403 N.W.2d at 790. The Vinings assert Pleasant View was required to bring the claims against the corporation and the Vinings as individuals together in the same action as the claims arose out of the same transaction. The

Vinings cite no authority in support of this proposition and accordingly, we reject their arguments on this issue. The judgment of the district court is affirmed.

***IV. Sheriff's Sale Proceeds.***

The Vinings argue that by accepting the proceeds from the sale of the collateral constituting the security for the contract, Pleasant View foreclosed its opportunity to seek a personal judgment against the individual guarantors. They assert the bids of Pleasant View and others were sufficient to satisfy the indebtedness on the generators.

The Vinings acknowledge $55,169.57 is still owed on the contract, therefore their argument urging that the bids were sufficient to satisfy the indebtedness is without merit. Moreover, they cite to no authority in support of their assertion that Pleasant View's recovery is limited to the proceeds obtained from the sheriff's sale. We conclude Pleasant View's acceptance of the sheriff's sale proceeds does not bar action on the guaranties to satisfy the deficiency.

***V. Notice of Sale and Application of Proceeds.***

The Vinings contend Pleasant Farms did not apply the proceeds of the sale of the equipment to the indebtedness or provide the Vinings with notification of the time of sale pursuant to Iowa law. *See* Iowa Code §§ 554.9501, 554.9504(1), and 554.9504(3) (1995). They submit these violations render the personal guaranties invalid and also trigger the absolute bar rule that prevents Pleasant View from suing to recover any alleged deficiency.

Iowa Code section 554.9504(1) dictates the order of disposition of the proceeds from the sale of the collateral. Section 554.9504(3) states that the secured party must provide the debtor with reasonable notification of the time and place of a public sale of the collateral. Guarantors are entitled to such notice before any deficiency judgment can be brought against the guarantor. *See A.L.C. Financial Corp. v. Ray,* 437 N.W.2d 593, 595 (Iowa App. 1989). Failure to notify the guarantor forfeits the secured party's ability to obtain a deficiency judgment against the guarantor. *Id.*

The trial court correctly concluded that neither section 554.9504(1) concerning the disposition of proceeds or the notice provisions of Iowa Code section 554.9504(3) apply where the sale of the collateral results from a judicial sale. *See Klooster v. North Iowa State Bank,* 404 N.W.2d 564, 571 (Iowa 1987); 68A Am.Jur2d § 574. Accordingly, the Vinings were not entitled to the protections afforded by the notice and disposition provisions. Finally, we agree with the trial court's reasoning that where a guarantor is an officer of the corporate debtor, a notice of sale served on the corporate debtor will be "deemed known" by the guarantor. 68A Am.Jur.2d § 657. We conclude the manner in which Pleasant View sold the collateral and disposed of the proceeds is not a bar to the second action to recover the deficiency.

***VI. Claim and Issue Preclusion.***

The Vinings' final argument asserts that the doctrine of claim preclusion bars the litigation of the present suit. They contend both actions arise out of the same transaction or occurrence, that is, the default by the corporation on the contract and secured agreement. The Vinings also argue the doctrine of issue preclusion bars a second claim as the issues raised in the present suit are identical to the issues raised in the original default action.

Under the doctrine of res judicata, claim preclusion bars further litigation on the same claim or cause of action, and issue preclusion bars further litigation on the same issue. *Suehl v. Suehl,* 544 N.W.2d 642, 644 (Iowa App. 1995) (citing *Riley v. Maloney,* 499 N.W.2d 18, 20 (Iowa 1993)). Claim preclusion applies when a litigant has brought an action, an adjudication has occurred, and the litigant is thereafter foreclosed from further litigation on the claim. *Riley,* 499 N.W.2d at 20.

Before a case may be properly dismissed upon issue preclusion grounds, the party urging dismissal must establish four things: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *Stanley v. Fitzgerald,* 509 N.W.2d 454, 457 (Iowa 1993).

The prior cause of action was based on the underlying contract and security agreement for the purchase of the generators. The present action is based upon the

Vinings' personal guaranties. Accordingly, the doctrine of claim preclusion does not bar the second action.

We also reject the Vinings' argument asserting issue preclusion. The issue in the prior cause of action concerned the liability of the corporate enterprise on the underlying contract and security agreement. The present action concerns the personal liability of the corporate officers who signed separate contracts guaranteeing the security agreement. The elements of issue preclusion cannot be established. We affirm the trial court's decision.

We have considered the Vinings arguments challenging Pleasant View's ability to bring a second action based upon the Vinings' personal guaranties. We find they are all without merit. Pleasant View's motion for summary judgment was properly granted by the district court and we affirm.

**AFFIRMED.**