IN THE COURT OF APPEALS OF IOWA

No. 5-388 / 94-1249

GARY L. FORMARO and VICKI L. BARR,

Appellees,

vs.

NANCY M. RUSSELL f/k/a , NANCY M. FREDERICK and DONALD L. RUSSELL,

Appellants.

FILED
NOV 27 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Warren County, Richard D. Morr and Peter A. Keller, Judges.

Nancy and Donald Russell appeal from an order denying them unpaid rent allegedly due from Gary Formaro and Vicki Barr, and Attorney fees. **AFFIRMED IN PART AND REVERSED IN PART.**

Richard J. LaJeunesse and Ronald L. Hansel of Hansel & LaJeunesse, Des Moines, until their withdrawal, for appellants, and Donald and Nancy Russell, New Virginia, pro se.

Kristine D. Corcoran, Des Moines, for appellees.

Considered by Donielson, C.J., and Cady, and Huitink, JJ.

CADY, J.

This is an appeal from a district court order denying defendants, Nancy and Donald Russell, unpaid rent from plaintiffs, Gary Fomaro and Vicki Barr, and denying attorney fees. We affirm in part and reverse in part.

The Russells and Fomaro and Barr entered into real estate contracts in which each couple would sell their home to the other in January 1993. The contracts provided (1) the Russells would sell their Warren County home to Fomaro and Barr and (2) Fomaro and Barr would sell their Polk County home to the Russells. Each contract would become completed when certain conditions were met, including the Russells procuring a loan and a release of a mortgage. The contracts also contained clauses providing entitlements to reasonable attorney fees for the successful party in any action relating to the contracts.

Fomaro and Barr took possession of the Warren County property. The Russells similarly took possession of the Polk County property by having Nancy Russell's son and daughter-in-law, Tyler and Vicky Frederick, move into the property. Mutual rental agreements were established to allow the parties to take possession prior to the closing of the sale. The Fredericks were to pay $400 per month directly to Fomaro and Barr. Fomaro and Barr were to pay $350 per month to the Russells.

Both parties remained in possession of the home pursuant to the month-to-month rental agreement. They continued to occupy the homes even after the Russells

failed to get appropriate financing for the sale of the homes. However, neither the Fredericks nor Fomaro and Barr paid any rent from October 1993 to March 1994.

In November 1993, the Russells served a notice of termination of rental agreement on Fomaro and Barr, as well as a notice to quit for the Warren County property. Fomaro and Barr brought an action for specific performance on the purchase agreement and served the Russells with a notice of forfeiture for the Polk County property. The Russells subsequently filed a forcible entry and detainer action (F.E.D.) to remove Fomaro and Barr from the property. The F.E.D. and specific performance actions were consolidated in the district court.

The district court's first hearing determined the Russells were the owners of the Warren County property and Fomaro and Barr were guilty of detention of the real property for nonpayment of rent. The court also found the rental agreement was terminated.

At a second hearing, the district court dismissed Fomaro and Barr's claim for specific performance. The court further determined the rental agreement between the parties contained a contingency. The payment of rent to the Russells was contingent upon the receipt of rent from the Fredericks, who were occupying Fomaro and Barr's Polk County property. Since no rent had been paid by the Fredericks from September to March, the contingency failed. The district court dismissed the Russells' claim for rent. The court also denied Russells' claim for attorney fees.

The Russells appeal the district court's findings. They contend the trial court

erred in not awarding rent for the six months Fomaro and Barr occupied their home. They also claim the district court erred in not awarding attorney fees even though they prevailed on both the F.E.D. and the specific performance actions.

I. Standard of Review

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Past Rent

The Russells contend the trial court erred when it denied their claim for back rent for the six months Fomaro and Barr occupied the Warren County property without paying rent. The district court found two rental agreements existed between the parties which were mutually dependent upon each other for the payment of rent. The court further observed since the contingencies to pay rent to each other failed, the Russells were not entitled to back rent from Fomaro and Barr.

An agreement for tenancy may be written or oral and may be inferred from the situation and surrounding circumstances. *Sunset Mobile Home Park v. Parsons*, 324 N.W.2d 452, 455 (Iowa 1982). A landlord and tenant may include various conditions in a rental agreement which are not inconsistent with the Uniform

Residential Landlord and Tenant Act. Iowa Code § 562A.9 (1993). Here the district court concluded two rental agreements existed providing for Fomaro and Barr to pay rent to the Russells and the Fredericks to pay rent to Fomaro and Barr, with the payment of rent contingent upon the receipt of rent from the other party. Liability for rent may be made contingent on the happening of a condition, and if a promise to pay rent depends on an unperformed condition, no rent may be collected, unless the condition is waived. 52 C.J.S. *Landlord & Tenant* § 469 (1968).

The Fredericks ceased payments to Fomaro and Barr. Because of this Fomaro and Barr ceased making rental payments to the Russells. Both parties had a potential claim for back rent. We find, however, viewing the situation as a whole, Fomaro and Barr's obligation to pay rent to the Russells was contingent upon their receipt of rent from the Fredericks. Since Fomaro and Barr never waived this contingency, and the Fredericks did not perform their condition, we find the Russells are not entitled to past rent on the Warren County property. We also conclude the contingency prevented the Russells from claiming rent from Fomaro and Barr as hold over tenants after commencing the F.E.D. proceedings since the Russells continued to maintain control of the Fomaro and Barr home.

III. Attorney Fees

The Russells further contend the trial court erred when it denied their request for attorney fees. The Russells contend since they prevailed on both the specific performance claim and the F.E.D., they are entitled to reasonable attorney fees

because of the contract provisions and statutory authority.

Attorney fees generally will be awarded to a prevailing party only if pursuant to a statute or written contractual provision. *Lara v. Thomas*, 512 N.W.2d 777, 786 (Iowa 1994). Attorney fees and costs under a statutory provision may only be awarded where the situation falls clearly within the terms of the statute. *Goodwin v. Iowa State Highway Comm'n*, 369 N.W.2d 816, 819 (Iowa 1985).

Iowa Code section 625.22 (1993) provides "when judgement is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as a part of the costs a reasonable attorney's fee to be determined by the court." The section has been applied to real estate contract actions. *Berryhill v. Hatt*, 428 N.W.2d 647, 657 (Iowa 1988).

Here the contracts between the parties contained a provision stating "[i]n any action or proceeding relating to this contract the successful party shall be entitled to receive reasonable attorney fees and costs as permitted by law." The Russells successfully defended the claim for specific performance of the real estate contract. As the specific performance claim relates directly to the real estate contract itself, we disagree with the district court and find the Russells are entitled to reasonable attorney fees as permitted under Iowa Code section 625.22 (1993).

The Russells further contend they are entitled to attorney fees under Iowa Code section 562A.32 (1993) which allows for an award of attorney fees when a rental agreement is terminated. The statute provides "[i]f the rental agreement is

terminated, the landlord *may have a claim for* possession . . . and a separate claim for actual damages for breach of the rental agreement and *reasonable attorney's fees* as provided in section 562A.27." Iowa Code § 562A.32 (1993)(emphasis added).[1] While the Russells were successful on their claim for possession of the Warren County property, the trial court found attorney fees were not warranted.

The language of section 562A.32 differs from section 625.22. Section 562A.32 grants a landlord a potential cause of action for attorney fees. It does not grant a landlord an absolute right to attorney fees where a rental agreement has been improperly terminated. Section 625.22 mandates a trial court to award attorney fees when the claimant has met certain requirements.[2]

We find attorney fees should not be awarded to the Russells in connection with the F.E.D. action. The determination of attorney fees is a matter entrusted to the discretion of the district court. *Mississippi Valley Broadcasting, Inc. V. Mitchell*, 503 N.W.2d 617, 619 (Iowa 1993). At the time of the F.E.D., the Fredericks remained in possession of the Polk County property without paying rent. The payments of rent

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[1] Iowa Code Section 562A.27 provides for a termination of a rental agreement for a tenants failure to pay rent.

[2] Section 625.22 requires a judgment to be recovered upon a written contract and the contract to contain an agreement for the payment of attorney fees. Once these conditions are met, the trial court "*shall allow and tax*. . . a reasonable attorney's fee to be determined by the court. *See In re Robinson's Estate*, 233 Iowa 613, 616, 10 N.W 2d 43, 46 (Iowa 1943) (award of attorney fees under statute permitting fees to be taxed against unsuccessful litigant where a written instrument contains an agreement to pay fees involves no element of judgment or discretion but is purely a formal act).

also had contingencies placed upon them. Moreover, the rental agreements in place between Fomaro and Barr and the Russells were temporary in nature, intending to terminate upon the completion of the sale of the home. While the Russells were entitled to possession of the Warren County property since the sale of the homes fell through, we find they are not also entitled to receive an award of attorney fees.

We award the Russells $1600 in attorney fees in connection with their defense of the specific performance action.

AFFIRMED IN PART AND REVERSED IN PART.