FILED
JUN 25 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THORP CREDIT, INC.,	)	
Plaintiff-Appellant,	)	Filed June 25, 1986
vs.	)	220
FLOYD A. HIRSCH and LELA M. HIRSCH,	)	6-116 85-889
Defendants-Appellees.	)	

Appeal from the Iowa District Court for Polk County (No. 22-12757) - Richard A. Strickler, Judge.

Plaintiff appeals judgment denying plaintiff an injunction of a land contract forfeiture and a declaratory judgment setting forth the amount owing on the contract and declaring the notice of forfeiture null and void. **AFFIRMED.**

Harry T. Watts and Charles F. Becker of Dickinson, Throckmorton, Parker, Mannheimer & Raife, Des Moines, for plaintiff-appellant.

Richard H. Doyle IV of Verne Lawyer & Associates, Des Moines, for defendants-appellees.

Considered by Snell, P.J., and Schlegel and Sackett, JJ.

PER CURIAM 221

This case concerns the forfeiture of a land contract. In 1974 defendants Floyd and Lela Hirsch sold 225 acres of farmland to their son, Randall, on contract. A sales price of $180,000 was agreed upon and a real estate contract was entered into on February 1, 1974. The terms of the contract called for an initial down payment of $5,000, the remaining $175,000 to be paid as follows:

> 1. $1,000.00 on the first day of February of each year to be applied on the principal balance.
>
> 2. Interest on the unpaid balance at the rate of 9% per annum payable February 1st annually.
>
> 3. A balloon payment of all outstanding balances due on February 1, 1989.

After making the down payment, Randall failed to follow the payment schedule and instead made four sporadic payments between 1974 and 1981. In early 1982, Randall began negotiating with plaintiff Thorp Credit, Inc. for a loan to pay off a first mortgage with Production Credit Association and to cover operating expenses for the 1982 season. The amount settled upon was $190,000, and the date of closing on the loan was May 19, 1982. Randall assigned his interest in the real estate contract to Thorp as security for the loan. Randall represented to Thorp that the contract balance was $168,000. On May 19, Fred Sellers, manager of Thorp, went to Floyd and Lela's home with a letter for their signature to verify the contract balance. Floyd and Lela signed this letter at Sellers' request:

> Gentlemen:
>
> We understand that you have entered into a loan transaction with Randall L. Hirsch and Sandra J. Hirsch on May 19, 1982 (the "Borrowers" and/or the "Buyers") and may extend future advances to the Borrower ("extensions of credit"). In connection with such loans and extensions of credit, you will take a mortgage and an assignment of Buyer's equity in real property for security purposes covering certain real property subject to a real estate

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contract dated February 1, 1974 (the "contract") wherein we have agreed to sell certain real estate to Borrower.

According to the terms of the contract, we as sellers retain the right to place a real estate mortgage on the premises described in the contract at any time, and Buyer agreed to subordinate his interest in said real estate to said mortgage so as to permit the mortgage to become a first lien on the property.

We hereby warrant and covenant to you that we shall mortgage this property only in an amount not to exceed the outstanding principal balance of the contract. We further warrant that the outstanding principal balance at the present time of this real estate contract is $167,000.00.

In the event we do execute a mortgage covering this certain real property, we covenant to so notify the Buyer or his assignee. Moreover, in the event of a default under said mortgage, we hereby grant Buyer or assignee the right to cure said default. Any amounts so expended by Buyer or assignee to cure a default will be credited against the unpaid balance of the contract.

We understand that you are relying on these covenants and warranties in extending credit to the Borrower.

Very truly yours,

/s/ Floyd A. Hirsch
Floyd A. Hirsch

/s/ Lela M. Hirsch
Lela M. Hirsch

After this document was signed, Sellers went to his automobile, retrieved a $16,120 check made out to Floyd and Lela, and delivered it to them. No payments on the real estate contract were made after May 19, 1982.

Randall requested an extension for the loan in January of 1983. The extension was granted without Thorp contacting Floyd and Lela. Again in January of 1984, Randall requested an extension. He filled out a financial statement showing the balance of the contract to be $160,000. Before granting the extension, one of Thorp's loan officers directed Randall to obtain written verification of the balance from Floyd. At that time Floyd and Lela were wintering in Texas;

Randall called Floyd, and Floyd mailed a note to Randall stating, "Jan. 1 - 1984 - $160,291.62." Randall submitted this note to Thorp.

In December of 1984, Randall's attorney contacted Floyd and Lela to inform them that they would be getting their farm back and they should initiate forfeiture proceedings. Floyd and Lela then engaged the services of an attorney and filed a notice of forfeiture on both Randall and Thorp. An amended notice of forfeiture was later served on Thorp, claiming $15,336.28 for the 1984 annual payment, as well as over $94,512.93 in accrued and unpaid interest. In February 1985 Thorp brought this action in equity against Floyd and Lela, seeking to enjoin the operation of the forfeiture and requesting that a declaratory judgment be entered setting forth the amount owing on the contract and declaring the notice of forfeiture null and void.

After trial, the court dismissed Thorp's petition, rescinded the temporary injunction, and allowed Thorp thirty days from the date of the decree in which to pay Floyd and Lela the amount stated in the amended notice of forfeiture; failing such payment, the contract would stand forfeited. After Thorp filed its notice of appeal, the trial court entered an order granting a temporary injunction to prevent forfeiture of the land contract during the pendency of the appeal.

On appeal, Thorp contends the trial court: 1) erred in finding that the Hirsches were not equitably estopped from claiming accrued interest in their amended notice of forfeiture; 2) erred in finding that the Hirsches' amended notice of forfeiture complied with Iowa Code section 656.2(1)(b) which requires the vendor of a real estate contract who desires to forfeit a vendee to "specify the terms of the contract with which the vendee has not complied," because the Hirsches failed to present evidence that any accrued interest was owing and incorrectly stated the amount of accrued interest in their amended notice of forfeiture; 3) erred in finding that the Hirsches, by their actions, did not

waive any past-due amounts under the contract; and 4) erred in concluding that the land contract would stand forfeited thirty days from the date of the decree unless the default was cured within that time.

This action is in equity. When considering the credibility of witnesses, we give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

Equitable Estoppel. Initially we note that there is no dispute between the parties that the principal payment for 1985 and some amount for the 1985 annual interest must be paid by Thorp to cure the default. However, Thorp contends that the Hirsches are estopped from recovering the $94,512.93 in past due accrued interest because they failed to inform Thorp that any such interest was owing at the time Thorp received Randall's interest in the real estate contract as security for Randall's loan.

In order to constitute equitable estoppel, four elements must be shown:

> 1) false representation or concealment of material facts must exist; 2) the party to whom it was made must have been without knowledge of the real facts; 3) that representation or concealment must have been made with the intention that it should be acted upon; and 4) the party to whom it was made must have relied thereon to his prejudice and injury. There can be no estoppel in any event, if any of these elements are lacking. (citations omitted)

Khabbaz v. Swartz, 319 N.W.2d 279, 286 (Iowa 1982). "The doctrine of equitable estoppel or estoppel in pais is founded upon principles of morality and fair dealing and is intended to subserve the ends of justice." Keokuk State Bank v. Eckley, 354 N.W.2d 785, 792 (Iowa Ct. App. 1984). The party asserting the doctrine of equitable estoppel has the burden of establishing all of these essential elements by clear, convincing, and satisfactory evidence. Incorporated City of Denison v. Clabaugh, 306 N.W.2d 748, 754 (Iowa 1981).

We find that Thorp failed to meet its burden of establishing the first and

third elements of estoppel in this case by clear, convincing, and satisfactory evidence. Therefore, no ground exists to estop Floyd and Lela from demanding payment of accrued interest to cure the default.

Thorp argues that Floyd and Lela either falsely represented the contract balance or knowingly concealed the fact that accrued interest was owing. Thorp bases its argument on the fact that: 1) Floyd told Thorp before May 19, 1982, that the contract balance was $168,000 and that $16,120 would bring the contract current; 2) Floyd and Lela signed the May 19, 1982, letter providing that the contract balance was $167,000; and 3) Floyd signed the January 1, 1984, note stating that the contract balance was $160,291.62.

At trial one of Thorp's loan officers, Mike Rude, testified that he telephoned Floyd on April 5, 1982, to verify the contract balance, and Floyd told him the original amount of the loan, the payment schedule, the interest rate, the date last paid, and that the present balance was $168,000. Rude also claimed that Floyd reported that the contract was not current and $16,120 would be required to bring the contract current. Rude had no personal recollection of the exact telephone call to Floyd but relied on a notation of Floyd's phone number on Randall's loan application and standard office procedure. Floyd and Lela, however, both testified unequivocally that they never received a phone call from Rude or made the above representations regarding the contract to anyone from Thorp. We will not second guess the trial court's assessment of credibility regarding this disputed evidence.

There is no dispute that Floyd and Lela signed the May 19, 1982, letter; however, we will not view the signature in a vacuum. That letter was drafted by Thorp and signed at Thorp's request in the kitchen of the Hirsch home. Floyd and Lela had no advance warning that Fred Sellers, Thorp's manager, would arrive at their house that morning or that their signatures were required on

any document concerning a loan. It is evident that Fred and Lela were confused regarding the entire transaction, including the contents of the letter and the purpose for their signatures. Their main concern at the time was for Sellers to understand that they did not want to borrow any money. Sellers testified, "I had to explain it to them, basically that it was not they that went into the loan agreement but it was Randall and his wife." While Thorp claims that no funds would have been disbursed to Randall without the Hirsches signatures, the letter does not so indicate. Floyd and Lela cannot be held to know what criteria Thorp uses to determine whether or not a loan will be made.

At this time, Floyd and Lela were seventy-four years old. The contract with Randall was the first installment contract the Hirsches had been involved with, and they were not familiar with borrowing money or lending practice. There was also no mention in the letter or during the parties' limited discussion on May 19 of accrued interest. It is obvious from the Hirsches' tax returns and from Floyd's testimony that their understanding of the allocation of contract payments between principal and interest varied from Thorp's. Thorp made no reasonable effort to clarify the terminology used in its letter or to verify the method employed by Floyd and Lela to determine the principal balance. In fact, Floyd and Lela testified that they had never calculated a balance on the contract. Moreover, the pertinent language of the May 19 letter reads:

> We hereby warrant and convenant to you that we shall mortgage this property only in an amount not to exceed the outstanding principal balance of the contract. We further warrant that the outstanding principal balance at the present time of this real estate contract is $167,000.

This paragraph essentially constitutes an agreement with Thorp that the Hirsches would not mortgage the underlying real estate in an amount exceeding $167,000. Because they had no intention of borrowing money at any time, this paragraph reasonably lost its significance for the Hirsches. Floyd and Lela did not compre-

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hend that these terms would have any effect on their pursuit of full payment on their contract with Randall.

Furthermore, regarding the January 1, 1984, note, it is undisputed that Thorp made no direct contact with Floyd regarding the contract balance at this time. Floyd's note was provided to Randall at Randall's request, and nothing in the record indicates that Floyd knew or had reason to know that the note would go to Thorp.

Given the deference we afford to the trial court's assessment of credibility and the context in which the Hirsches' alleged representations occurred, we cannot find by clear, convincing, and satisfactory evidence that Floyd and Lela falsely represented or knowingly concealed material facts from Thorp. Neither can we find by clear, convincing, and satisfactory evidence that Floyd and Lela made any representation or concealment with the intention that it should be acted upon by Thorp. Because the first and third elements are not established, we conclude that the Hirsches cannot be estopped from claiming accrued interest.

Compliance with Chapter 656. Thorp contends that the trial court erred in finding that the Hirsches' amended notice of forfeiture complied with Iowa Code chapter 656 because it incorrectly stated the amount of past-due interest.

Iowa Code section 656.2(1)(b) provides that the written notice served on the vendee shall "Specify the terms of the contract with which the vendee has not complied." The party seeking a forfeiture must fully and strictly follow the statutory procedure. Kilpatrick v. Smith, 236 Iowa 584, 593, 19 N.W.2d 699, 703 (1945).

In this case, the amended notice of forfeiture states that the terms of the contract with which Randall had not complied were three: 1) the annual principal payment due 2/1/85, 2) the annual interest payment due 2/1/85, and 3) past-due interest payments. What Thorp protests is that the Hirsches also

set forth the exact amounts claimed due. Section 656.2 does not require that the specific amounts claimed due be stated in the notice. See also Gibson v. Thode, 209 Iowa 368, 369-70, 228 N.W. 91, 92 (1929) (notice of forfeiture is sufficient even where it states no particular amounts due). We find that the Hirsches' amended notice satisfies the conditions of Chapter 656. We will not hold the notice invalid because it specifies more than is required by statute.

Waiver. Thorp also asserts that Floyd and Lela waived their right to recover accrued interest under the contract by failing to pressure Randall to make payments, allocating some part of each of Randall's payments to principal on their tax returns from 1976 to 1982, and representing the contract balance to have been reduced to $160,291.62 as of January of 1984.

It is well established that contract rights can be waived. "Waiver is the voluntary or intentional relinquishment of a known right. It can be express or implied. The essential elements are the existence of a right, actual or constructive knowledge of it, and an intention to give it up." Matter of Guardianship of Collins, 327 N.W.2d 230, 234 (Iowa 1982). "'Long sufferance' of one entitled payments [does] not forbid his subsequent demand for his money since he had waived only the punctuality, not the payment." Bettis v. Bettis, 228 N.W.2d 193, 195 (Iowa 1975); see also Keokuk, 354 N.W.2d at 793.

Floyd and Lela testified that they did not forgive any past-due amounts nor did they make gifts to Randall of these amounts. They realized that Randall suffered some poor crop years and figured he would pay when he had the money. The Hirsches' patience with Randall does not demonstrate that they intended to relinquish their right to collect arrearages. Furthermore, even if the Hirsches waived the time of payments under the contract, their filing of notice of forfeiture is itself a notice of withdrawal of previous waiver or forbearance. See Bettis, 228 N.W.2d at 195. Additionally, we find that the allocation of principal

and interest on the Hirsches' tax returns and the January 1, 1984, notice from Floyd do not establish that the Hirsches knew of their right to recover accrued interest and intentionally gave up such right. We, therefore, conclude the trial court properly found that Floyd and Lela did not waive any amounts due and owing under the contract.

Period to Cure. Thorp asserts that even if the Hirsches are entitled to demand payment of accrued interest, they have waived their right to forfeit with only thirty days' notice. Thorp argues that because the Hirsches failed to demand payment for over ten years, Thorp should be entitled to a longer period of time to cure the alleged default.

Iowa Code section 656.5 (1985) provides:

> If the terms and conditions as to which there is default are not performed within said thirty days, the party serving said notice or causing the same to be served, may file for record in the office of the county recorder a copy of the notice aforesaid with proofs of service attached or endorsed thereon (and, in case of service by publication, a personal affidavit that personal service could not be made within this state), and when so filed and recorded, the said record shall be constructive notice to all parties of the due forfeiture and cancellation of said contract.

The Iowa Supreme Court has established an exception to the thirty-day notice requirement where the circumstances indicate that a thirty-day period will not provide reasonable opportunity for the performance of contractual conditions previously waived. Bettis, 228 N.W.2d at 195. "'We do not hold that 30 days' notice and time to perform would in all cases be reasonable, where because of absence or waiver of time of essence clauses reasonable opportunity to perform must be afforded' . . . [t]he statutory notice of forfeiture was not intended to preclude in all cases the right to additional time within which to bring previously waived payments to current status." Id.

While it is true that Floyd and Lela failed to demand timely payment from Randall for an extended period, the record does not show that Thorp needs additional time to cure the default. We, therefore, find that the trial court's decree requiring that default be cured within thirty days or the contract will stand forfeited is reasonable.

AFFIRMED.