FILED
SEP 30 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

46

DOROTHY M. CALDWELL and BUSTER CALDWELL,

Plaintiffs-Appellants,

vs.

C STREET FOODLAND, INC.,

Defendant-Appellee.

Filed September 30, 1987

7-300
86-1756

Appeal from the Iowa District Court for Black Hawk County (No. 65845), *Joseph C. Keefe, Judge.*

Plaintiffs in foreclosure proceeding appeal judgment contending the district court erred in finding they had failed to properly mitigate their damages. **AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

Isadore Nadler, Waterloo, for plaintiffs-appellants.

Robert C. Griffin of Gallagher, Langlas & Gallagher, P.C., Waterloo, for defendant-appellee.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

PER CURIAM

Appellants initiated the present action on October 26, 1984, seeking foreclosure of a real estate contract which they had entered into with appellee on September 14, 1983. The subject of the contract was property in Waterloo, Iowa. Following an October 14, 1986, trial to the court, judgment was entered against appellee and special execution issued for the sale of the real estate involved. The district court in its decree, however, reduced the amount due appellants under the real estate contract by fifty percent based upon its finding that appellants had failed to mitigate their damages. Appellants bring this appeal in order to challenge that reduction. As this case sounds in equity, our review is de novo. Iowa Code § 624.4 (1985); Iowa R. App. P. 4.

Appellants' contentions may be summarized into the following allegations of district court error: (1) error in applying the mitigation of damages doctrine to a real estate contract foreclosure action; (2) assuming the doctrine's application, error in finding that the appellants failed to mitigate their damages; and (3) error in reducing appellants' judgment in an amount not supported by the record.

Although the present case involves a vendor and a vendee under a real estate contract, for purposes of foreclosure such a situation is treated as identical to that involving a mortgagor and mortgagee. Junkin v. McClain, 221 Iowa 1084, 1090-91, 265 N.W. 362, 365 (1936); Iowa Code §§ 654.11, 654.12 (1985). Generally in such a foreclosure setting, a judgment is entered against the mortgagor or vendee for the entire amount due on the mortgage, deed of trust, or installment land contract. Koch v. Kostichek, No. 86-965, slip op. at 7 (Iowa July 22, 1987); see Iowa Code §§ 654.5, 654.12 (1985). The property is then sold to satisfy, to the extent it does so, the judgment. Koch, slip op. at 7; Iowa Code § 654.5 (1985).

The district court in the present case tempered these general principles with an application of the mitigation of damages doctrine. This doctrine is also known in Iowa as that of "avoidable consequences." R.E.T. Corp. v. Frank Paxton Co., Inc., 329 N.W.2d 416, 422 (Iowa 1983). This doctrine is codified at Iowa Code section 619.7 (1985) as follows:

> In any action brought to recover damages for an injury to person, character, or property, the defendant may set forth, in a distinct division of the defendant's answer, any facts, of which evidence is legally admissible, to mitigate or otherwise reduce the damages, whether a complete defense or justification be pleaded or not, and the defendant may give in evidence the mitigating circumstances, whether the defendant proves the defense or justification or not.

The duty to mitigate damages applies to parties in a contract action. DeWaay v. Muhr, 160 N.W.2d 454, 457 (Iowa 1968). A plaintiff's duty under this doctrine is one of reasonable diligence. R.E.T. Corp., 327 N.W.2d at 422. A plaintiff cannot recover for consequences which, in the exercise of reasonable diligence, could have been avoided. Shewry v. Hener, 255 Iowa 147, 154-55, 121 N.W.2d 529, 533 (1963). Our statutes treat the doctrine of mitigation of damages as a special defense which a defendant either must plead and prove or be limited to circumstances arising out of plaintiff's testimony. Id.; Iowa Code § 619.8 (1985).

Although the mitigation of damages issue was not raised by appellee's answer as required by section 619.7, appellee did move at the close of evidence to amend its answer so as to include the issue. While no ruling on the oral motion was made at trial, the district court, following further briefing, did apply the mitigation of damages doctrine in its decree. Accordingly, we assume it found merit in the motion. Cf. Rank v. Kuhn, 236 Iowa 854, 856, 20 N.W.2d 72, 74 (1945) (in construing district court decree effect is given to that which is implied). The matter of the amendment's allowance is of only academic interest in the present case, however, as appellee presented no evidence of its own at trial

and was resultingly limited to that educed by appellants. An identical result would follow from appellee's failure to properly plead. Iowa Code § 619.8 (1985).

Appellant contends the mitigation of damages doctrine should not apply to this case, and cases like it, as the doctrine's application would require appellant to commit a trespass on the property in order to care for it. We note the standard form real estate contract involved in this case expressly gave right of possession to the vendee, appellee here. Absent provision to the contrary, a real estate contract divests the vendor of all interest in the property except the right to collect the purchase price. Fellmer v. Gruber, 261 N.W.2d 173, 174 (Iowa 1978). While we agree that appellants are not required to commit a trespass, we do not find this to be a persuasive argument against the application of the mitigation of damages doctrine. Rather, we note merely that the proper application of that doctrine does not obligate a plaintiff to commit trespass. 22 Am. Jur. 2d Damages § 32 at p. 55 (1965). Phrased in the vernacular of our case law, a plaintiff's duty of "reasonable diligence" does not extend to the commission of a trespass. Id. To the extent the district court's decree may be read so as to require otherwise, it would be in error.

We believe, however, that the present record fails to demonstrate a violation of appellant's duty to mitigate damages. The district court's reduction of appellant's damage judgment was based upon the court's finding that appellant had failed both to diligently seek the appointment of a receiver and to timely prosecute this action. The foreclosure petition, we note, contained a request for the appointment of a receiver, the necessity for which was denied in appellee's answer. Although no hearing was set on this request, we find no reason to assume this the fault of the appellant. See Iowa Code §§ 680.1, 680.2 (1985). The appellee, the party in legal possession of the property, denied the necessity for a receiver. The equities of this case convince us that appellee should be bound

by that position. Likewise we note appellant was in violation of no rule of civil procedure pertaining to timely prosecution of his case. Given this, and noting that appellee was obligated by the real estate contract to not "commit waste of said premises," we do not agree that appellant should be faulted for proceeding in the manner allowed her by our rules. Even were we to assume appellant's failure to mitigate damages, there is nothing in the present record which even remotely tends to demonstrate the actual amount by which appellant's judgment should be reduced. The record is devoid of the type of reasonable basis which our cases require for approximating the amount of damages suffered by a plaintiff. E.g., Larsen v. United Fed. Sav. and Loan Ass'n of Des Moines, 300 N.W.2d 281, 288 (Iowa 1981). We think similar principles should guide our courts in cases such as the one at bar.

We vacate that portion of the district court's decree which reduced appellant's judgment. This case is remanded to the district court with directions to enter judgment in appellant's favor for the amount due on the real estate contract, $17,331.17. See Iowa Code § 654.5 (1985).

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.