IN THE COURT OF APPEALS OF IOWA

No. 8-166 / 07-1800
Filed June 25, 2008

AMY ERICKSON,
Plaintiff-Appellant,

vs.

JOSEPH ISENHART,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Amy Erickson appeals from the district court's ruling granting Joseph Isenhart's motion for summary judgment. **REVERSED AND REMANDED.**

Thomas G. Fisher Jr. of Parrish Kruidenier Dunn Boles Gribble Cook Parrish Gentry & Fischer, L.L.P., Des Moines, for appellant.

Alexander R. Rhoads of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellee.

Heard by Huitink, P.J., Miller, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

HUITINK, P.J.

Amy Erickson appeals from the district court's ruling granting Joseph Isenhart's motion for summary judgment. We reverse and remand.

I. Background Facts and Proceedings

In May 2005 Amy Erickson and Joseph Isenhart purchased as joint tenants the following legally described real estate: "Lot Seven (7) in Pine Ridge Estates Plat 3, an Official Plat, now included in and forming part of the City of Polk City, Polk County, Iowa."

On April 28, 2006, Erickson and Isenhart entered into a real estate contract that transferred their joint tenancy interest exclusively to Isenhart. The contract states in relevant part:

> 1. . . . Buyer[ ] shall pay the balance to Seller[ ] at US Bank Home Mortgage acct 6912 . . . or as directed by Seller[ ], as follows: $1,245.93, principal and interest, shall be due on the first of each month, and continuing each month thereafter for a period of 350 months, commencing May 1, 2006.
>
> . . . .
>
> 18. Buyer is assuming the balance due on the mortgage with US Bank Home Mortgage, account #6912 . . . , with said mortgage being under the name of Amy M. Erickson. Buyer shall pay property taxes and insurance into an escrow account in an amount as determined by US Bank Home Mortgage.

On June 6, 2006, Erickson sued Isenhart to recover her interest in the earlier-described real estate. Erickson alleged Isenhart procured her interest by means of fraud or duress. She requested the district court to determine the parties' respective interests in the property, order it sold, and order the sale proceeds divided accordingly.

After the contract was signed, US Bank Home Mortgage adjusted the amount of the mortgage payment to $1798 per month. Isenhart, however,

continued to make the original $1245.93 monthly payment. As a result, Erickson, on or about April 1, 2007, served a notice of forfeiture of the real estate contract for failure to make the adjusted monthly mortgage payment. The notice provided "[t]he contract shall stand forfeited unless the parties in default, within 30 days after the completed service of this notice, shall perform the terms and conditions in default . . . ." Before the expiration of the thirty-day period, Isenhart cured the default by paying the amount he had underpaid.

On December 15, 2006, Erickson filed an amended petition adding Division II requesting additional relief in the form of "Rescission at Law." On April 13, 2007, Erickson filed a second amended petition requesting additional relief in separate divisions, including "Recovery of Real Estate," "Breach of Contract," "Fraud," and "Breach of Fiduciary Duty."

On July 25, 2007, Isenhart filed a motion for summary judgment, arguing Erickson "cannot prove the real estate contract between plaintiff and defendant is invalid because plaintiff admitted the validity of the contract by attempting to enforce the contract when plaintiff served defendant with notice of forfeiture of the contract." Erickson filed a resistance but did not file a statement of disputed facts in part because she did not dispute Isenhart's rendition of the facts.

The district court's September 18, 2007 ruling granted the motion because no genuine issue of material fact existed and, based on the undisputed facts, Isenhart was entitled to judgment as a matter of law on all counts alleged in the petition. According to the district court,

> [b]y pursuing forfeiture of the subject real estate contract, Plaintiff has affirmed the validity of same and therefore has taken a position inconsistent with her other claims pled in Counts I, II, III, V, and VI

> . . . and, by virtue of the doctrine of election of remedies, is now precluded from pursuing same. . . . As to Count IV ("Breach of Contract"), Plaintiff does not dispute that Defendant has cured any default of the instant contract arising from the upward adjustment of the mortgage payment.

On appeal, Erickson claims the district court erroneously granted summary judgment as a matter of law on all of her claims because no completed forfeiture occurred; therefore, the doctrine of election of remedies does not apply, and she may pursue all of her claims.

II. Standard of Review

Our review of a ruling on a motion for summary judgment is for correction of errors at law. Iowa R. App. P. 6.4; *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 840-41 (Iowa 2005). Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). "When the facts are undisputed and the only dispute concerns the legal consequences flowing from those facts, [we] must determine whether the district court correctly applied the law." *Perkins v. Dallas Center-Grimes Cmty. Sch. Dist.*, 727 N.W.2d 377, 378 (Iowa 2007).

III. Failure to File Statement of Disputed Facts

We initially address Isenhart's argument that summary judgment was providently granted because Erickson failed to file a statement of disputed facts in support of her resistance. Iowa Rule of Civil Procedure 1.981(3) provides a party resisting a motion for summary judgment must file a resistance, including "a statement of disputed facts, if any . . . ." Rule 1.981(5) states in relevant part

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered.

We have stated "[i]t can be fatal to the party resisting the summary judgment motion to rely alone on a perceived weakness in the movant's contention." *Suss v. Schammel*, 375 N.W.2d 252, 254 (Iowa 1985).

We find Erickson's failure to file a statement of disputed facts is not fatal because there were no facts in dispute. In other words, the dispute concerns the legal consequences flowing from undisputed facts. *See Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 408 (Iowa 1993). Therefore, we find the district court was correct in not granting summary judgment on this basis. We affirm on this issue.

IV. Election of Remedies

When a vendee is in default under a real estate contract, the vendor has four remedies. *Pierce v. Farm Bureau Mut. Ins. Co.*, 548 N.W.2d 551, 556 (Iowa 1996). The vendor may

> (1) keep good its tender of performance, demand the balance of the purchase price, and sue for specific performance;
> (2) terminate the contract because of vendee's breach, keep the land, and sue for damages for the breach;
> (3) rescind the contract in toto; or
> (4) enforce a forfeiture.

Risse v. Thompson, 471 N.W.2d 853, 858 (Iowa 1991); *Risken v. Clayman*, 398 N.W.2d 833, 838 (Iowa 1987). However, a vendor may not pursue inconsistent remedies by proceeding with an action based on affirmance of the contract, such

as a suit for damages, and then use a theory based on disaffirmance of the contract, such as forfeiture. *Abodeely v. Cavras*, 221 N.W.2d 494, 498 (Iowa 1974). This is known as the election of remedies doctrine. *McBride v. Hammers*, 418 N.W.2d 60, 63 (Iowa 1988). Its purpose is "to prevent double recovery for a single injury, not to prevent recourse to alternative remedies." *Hartford-Carlisle Sav. Bank v. Van Zee*, 569 N.W.2d 386, 389 (Iowa Ct. App. 1977). It is also not favored by the courts. *Bolinger v. Kiburz*, 270 N.W.2d 603, 605 (Iowa 1978).

Another substantive legal doctrine that is separate and distinct from the election of remedies doctrine is illustrated in *Gray v. Bowers*, 332 N.W.2d 323, 324-25 (Iowa 1983):

> [W]hen a vendor exercises a right of forfeiture against a defaulting vendee, the liability of the latter for the unpaid purchase money is extinguished. While it is true that this result is triggered by the election of a remedy, *i.e.*, the forfeiture of the contract, the end result is not dependent on the doctrine of election of remedies. Such result instead flows from the fact that the contract between the parties has been terminated, thereby extinguishing any right to recover the unpaid purchase price. The same result has been reached in cases involving . . . rescission of the contract.

If the vendor does not pursue the forfeiture action to its conclusion, neither of these doctrines is implicated. *See Gottschalk v. Simpson*, 422 N.W.2d 181, 185 (Iowa 1988) ("[W]hen remedies are factually consistent, an election to pursue one does not preclude pursuit of another until the first is fully completed. For the reasons stated in Division I of this opinion, Gottschalks had not pursued forfeiture to its conclusion; it was waived before the remedy was complete.") (citation omitted). The same is true if the vendee cures the default in a timely manner. *See* Iowa Code § 656.4 (2007) ("If the vendee or a mortgagee of the real estate performs, within thirty days of completed service of notice, the

breached terms specified in the notice . . . , then the right to forfeit for the breach is terminated."); *cf. McLain v. Smith*, 201 Iowa 89, 94, 202 N.W. 239, 242 (1925) (noting the vendee made no effort toward complying with the contract after the notice of forfeiture was served on him).

Isenhart cured the default in a timely manner by paying the amount he had underpaid and continuing to timely make the adjusted monthly mortgage payment. Erickson's right to forfeit the April 2006 real estate contract for the default specified was accordingly terminated. Therefore, Erickson had the right to pursue other remedies, and the district court erred by concluding otherwise. Any other conclusion would result in Erickson not being able to pursue forfeiture of the contract (because of the cure in the default) or the remedies listed in the petition. Stated another way, Erickson would be left without a remedy.

We conclude the district court erred in granting Isenhart's summary judgment motion and accordingly reverse and remand for further proceedings in conformity with our opinion.

REVERSED AND REMANDED.