IN THE COURT OF APPEALS OF IOWA

No. 9-856 / 09-0345
Filed January 22, 2010

U.S. BANK,
Plaintiff-Appellee,

vs.

ANNA M. WEEMS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd Gear, Judge.

Borrower in default on note appeals summary judgment in favor of bank. **AFFIRMED.**

Thomas P. Frerichs, Waterloo, for appellant.

Christopher K. Loftus of Gurstel, Stalock & Chargo, P.A., Golden Valley, Minnesota, for appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

EISENHAUER, P.J.

On March 25, 2003, Anna Weems signed a promissory note and mortgage for $32,738.96 with U.S. Bank. Weems made payments through March 31, 2004, but then defaulted. On July 30, 2004, U.S. Bank charged off the Weems loan and ceased assessing late fees. On January 23, 2008, U.S. Bank sued to collect the debt and subsequently sought summary judgment. Weems resisted and argued the doctrines of abandonment and estoppel by acquiescence prevent recovery. Weems's affidavit asserts:

> I last made a regular payment . . . in March of 2004. On July 30, 2004, [U.S. Bank] "charged off" said loan and quit assessing late fees against me and never made or attempted collection on said mortgage. At no time since 2004 has [U.S. Bank] made any effort to collect on said promissory note or mortgage.
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> I have had regular contact with U.S. Bank since prior to 1996. I have a home loan through U.S. Bank that is current at this time . . . . I have been late on that loan and the bank always made arrangements with me to continue my loan with separate payment arrangements. At none of the meetings concerning negotiations on my existing loan has anyone ever brought up the loan made in 2003.
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> I have done numerous volunteer training seminars with the bank for over ten years . . . . It has been my understanding since 2004 that U.S. Bank had forgiven the loan and I was no longer obligated to make any payments. No one with U.S. Bank ever questioned me about the loan despite my nearly weekly visits to the bank. I understood that the loan had been forgiven and all of the actions of the Bank confirmed what I believed.

The district court granted summary judgment to U.S. Bank and this appeal followed.

I. Standard of Review

We review rulings on motions for summary judgment for the correction of errors at law. *City of Cedar Rapids v. James Props., Inc.*, 701 N.W.2d 673, 675 (Iowa 2005). "Summary judgment is appropriate only when the entire record

demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007). We examine the record in the light most favorable to the nonmoving party and draw all legitimate inferences the evidence bears in order to establish the existence of questions of fact. *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 353 (Iowa 2005). "A party resisting a motion for summary judgment cannot rely on the mere assertions in his pleadings but must come forward with evidence to demonstrate that a genuine issue of fact is presented." *Stevens*, 728 N.W.2d at 827.

II. Merits.

Parties to a valid contract may abandon it, or by conduct inconsistent with the continued existence of the original contract, estop themselves from asserting contractual rights. *Severson v. Elberon Elevator, Inc*., 250 N.W.2d 417, 421 (Iowa 1977). Abandonment or estoppel may be evidenced by both words and conduct. *Id*. at 421-22. When the evidence is susceptible to differing inferences, the issue is for the trier of fact. *Id*. at 422.

Weems first argues a factual issue on abandonment is generated because U.S. Bank's actions of charging off her loan, posting a zero balance on its records, and making no further attempts at collection show it intended to abandon its rights to collect.

"Abandonment is the relinquishment, renunciation, or surrender of a right." *Kladivo v. Melberg*, 210 Iowa 306, 308, 227 N.W. 833, 835 (1929). "Abandonment involves an intent and purpose to surrender the right acquired, accompanied by acts indicating that purpose and intent." *Ray Coal Mining Co. v. Ross*, 169 Iowa 210, 217, 151 N.W. 63, 65 (1915). "The act of relinquishing must be unequivocal and

decisive." *Kladivo*, 210 Iowa at 308, 227 N.W. at 835. Importantly, "mere nonuser of a right acquired by contract does not, in itself, constitute an abandonment of that right." *Ross,* 169 Iowa at 217, 151 N.W. at 65. However, nonuse of contract rights "coupled with other circumstances and conditions which expressly show an intention to abandon," if acted on by the other interested party, constitutes abandonment. *Id.*

In her affidavit resisting summary judgment Weems did not assert she received any notice, written or otherwise, from the bank releasing her from the note and mortgage. However, in her briefing on appeal she states: "In 2004 US Bank provided to Weems, and presumably to appropriate tax collection agencies, formal documentation that there was a 'zero balance' on the loan." She makes no reference to the record to support this allegation. In fact the only reference to a zero balance is in an internal US. Bank document obtained during discovery in this litigation.

U.S. Bank brought suit within the applicable ten-year statute of limitations. *See* Iowa Code § 614.1(5) (2007). Therefore, the fact it was not aggressive in its collection efforts is not an action "expressly" showing intent to abandon. Weems could not reasonable believe U.S. Bank would never attempt to collect the debt. Additionally, a charge off and zero balance entry on internal bank documents only evidences a deduction for the bank's tax purposes and does not constitute "unequivocal and decisive" forgiveness of the Weems debt. *See* Black's Law Dictionary 227 (7th ed. 2002) (stating to "charge off" an account receivable is a recognition payment is unlikely). We find no error in the district court's conclusion, "there is no evidence U.S. Bank intended to abandon its rights to collect the loan."

Weems also argues the bank's actions generated a factual issue under the doctrine of estoppel by acquiescence. "Estoppel by acquiescence is based on an examination of the individual's actions who holds the right in order to determine whether that right has been waived." *Davidson v. Van Lengen*, 266 N.W.2d 436, 439 (Iowa 1978). Iowa law provides:

> Estoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such time as would imply an intention to waive or abandon the right. Although this doctrine bears an "estoppels" label, it is, in reality, a waiver theory. . . . Estoppel by acquiescence applies when (1) a party has full knowledge of his rights and the material facts; (2) remains inactive for a considerable time; and (3) acts in a manner that leads the other party to believe the act [now complained of] has been approved.

Markey v. Carney, 705 N.W.2d 13, 21 (Iowa 2005) (citations omitted). The intention of the party charged with waiver "must clearly appear." *Continental Cas. Co. v. G. R. Kinney Co*., 258 Iowa 658, 660, 140 N.W. 129, 130 (1966).

The 2003 note states: "If I default and [U.S. Bank] choose[s] not to exercise a remedy, [U.S. Bank does] not lose the right to treat the event as a default if it happens again." Therefore, the parties agreed U.S. Bank does not waive its rights by failing to act immediately upon a default by Weems. Additionally, U.S. Bank's filing suit within the statute of limitations and less than four years after the last payment is not an unreasonable delay "for a considerable time" evidencing a "clear" intention to waive payment. Accordingly, Weems has not generated a factual issue on the second element of the estoppel by acquiescence doctrine. *See Davidson*, 266 N.W.2d at 439 (finding estoppel after a nineteen-year acquiescence in nonpayment of child support). Weems's hope U.S. Bank would not attempt to collect

when she stopped her payments does not allow her to avoid her obligation for the debt.

AFFIRMED.

Huitink, S.J., concurs; Potterfield, J., dissents.

POTTERFIELD, J. (dissents)

I respectfully dissent. Considering the evidence in the light most favorable to Weems, I find the undisputed facts do not, as a matter of law, entitle U.S. Bank to judgment on Weems's defense of estoppel by acquiescence. The majority focuses on U.S. Bank's charge off of the loan secured by the mortgage just a year after the loan was approved. I agree that the charge off, even when accompanied by a four-year period during which U.S. Bank made no effort to collect the loan, is not sufficiently "unequivocal and decisive" to generate a fact question on abandonment.[1] *Kladivo v. Melberg*, 210 Iowa 306, 308, 227 N.W. 833, 835 (1929).

On the other hand, estoppel by acquiescence, or waiver, of U.S. Bank's right to bring a foreclosure action, is suggested by the record. The summary judgment facts include evidence of the course of conduct between Weems and U.S. Bank during the four years of inactivity by U.S. Bank, a pattern which depicts a closer than arms-length relationship between the customer and U.S. Bank. *See First Nat'l Bank in Lenox v. Brown*, 181 N.W.2d 178, 182 (Iowa 1970) (discussing the legal consequences of silence by a bank in a closer than arms-length transaction). According to her affidavit submitted in resistance to U.S. Bank's motion for summary judgment, Weems had regular and frequent contact with U.S. Bank about payments on her first loan secured by the same home, including accommodations for payments on that loan. U.S. Bank did not mention the second loan to Weems during these meetings. Presumably, U.S. Bank did

[1] Abandonment is a particularly difficult defense to a timely action filed to collect the debt claimed to have been abandoned.

not tell her that payments on the first loan were not protecting her home and that U.S. Bank could or intended to foreclose her second mortgage. Weems was current on her first loan at the time of summary judgment. Further, Weems was in the bank weekly and frequently came to U.S. Bank to train bank staff. These additional facts suggest a personal bank-customer relationship founded on the customer's trust rather than the "old predatory philosophies of business relationships" rejected by our supreme court. *See Miller v. Berkoski*, 297 N.W.2d 334, 340 (Iowa 1980).

My review of the record leads me to the conclusion that Weems has generated a fact issue on her defense of estoppel by acquiescence. The factors described in *Davidson v. Van Lengen*, 266 N.W.2d 436, 439 (Iowa 1978) are present here: knowledge by U.S. Bank of Weems's default on the second mortgage, a considerable time of inactivity, and actions by U.S. Bank that led Weems to believe U.S. Bank would not foreclose on her second mortgage. A jury might find that U.S. Bank waived its rights to foreclose on the second loan when it coaxed payments from Weems to apply to her first mortgage for four years while making no effort to collect her debt on the second mortgage secured by the same home. Weems has presented evidence "susceptible to differing inferences," making the issue one for the trier of fact. *Severson v. Elberon Elevator, Inc*., 250 N.W.2d 417, 421 (Iowa 1977). I would reverse the district court's grant of summary judgment as to Weems's defense of estoppel by acquiescence.