

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:

In Proceedings

Under Chapter 13

GARY W. ABMEYER and
DEBORAH L. ABMEYER,

No. BK 88-30189

Debtor(s).

ORDER

This matter is before the Court on Motions for Relief from Stay and Objections to Chapter 13 Plan of Reorganization filed by Verna Scharf ("Scharf") and Magna Bank of Columbia ("Magna") against debtors Gary and Deborah Abmeyer ("debtors"). Debtors are alleged to be personally obligated to Scharf and Magna for debts they incurred on behalf of their closely held corporation. The corporation, which operates a restaurant in Columbia, Illinois, is currently in Chapter 11 reorganization. See, In re Abby Enterprises, Inc., d/b/a Eberhard's, BK No. 88-30131 (Bankr. S.D. Ill.).

The Court will first address each of the motions for relief from stay and then address the objections to the Chapter 13 Plan.

Verna Scharf's Motion for Relief from Stay.

At a hearing on the motion, all the material facts were stipulated to by the parties. On March 4, 1986, debtors entered into an Agreement for Warranty Deed with Scharf under which debtors were to purchase, on installment payments, the restaurant property from Scharf for \$150,000.00 at a rate of 13% interest. The agreement required debtors to pay \$1,897.87 per month from April 4, 1986 until March 4, 1991, at which time all unpaid principal and accrued interest was to be paid in full. The agreement

contained both "forfeiture" and "time is of the essence" clauses.

Debtors defaulted on their monthly payment in November 1987. On January 12, 1988, Scharf served debtors with a Demand for Strict Compliance which provided, inter alia, that debtors were to cure the default within thirty days or the Agreement would be forfeited and terminated and a forcible entry and detainer action would be instituted against them for possession of the property.

Thirty-one days later, on February 12, 1988, Scharf served debtors with a Notice of Forfeiture. The Notice stated that since debtors had failed to cure their default under the Agreement and that more than thirty days had elapsed since the Demand for Strict Compliance had been served, the Agreement for Warranty Deed was "forfeited and extinguished." The Notice of Forfeiture also stated that Scharf would retain all payments debtors had made to her since prior to the forfeiture as provided for under the Agreement.

On February 16, 1988, Scharf served debtors with a demand for immediate possession of the property. The next day, February 17, 1988, Scharf filed a Forcible Entry and Detainer action in the Circuit Court of Monroe County, Illinois. Also on February 17, 1988, debtors' corporation, Abby Enterprises, Inc., filed a Chapter 11 petition in this Court. Debtors were apparently of the opinion that the Chapter 11 petition stayed the forcible entry and detainer action because they filed a suggestion of bankruptcy with the Circuit Court. The Circuit Court found that the debt owed to Scharf was personal in nature and not a debt of the corporation and that, therefore, the forcible entry and detainer action was not stayed by the Chapter 11 filing.¹ On March 9, 1988, debtors overcame this problem by filing their Chapter 13 petition, thereby staying the state court proceedings.

¹The circuit court also held that the debt owed to Magna (See page 9, infra.) was a personal obligation and that Magna's foreclosure action against debtors was not stayed by Abby Enterprises' Chapter 11 filing.

In her Motion for Relief from Stay, Scharf claims that the Agreement for Warranty Deed was terminated upon service of the Notice of Forfeiture after debtors failed to cure their default within thirty days of the Demand for Strict Compliance. She further claims that since the Agreement was terminated prior to the filing of the bankruptcy petition, debtors have no interest in the property and the stay should be lifted in order to allow her to retain possession of the property.

In response, debtors argue that the Agreement has not been terminated because it has not been officially terminated by the circuit court and because possession of the restaurant property has not been obtained by court order. Debtors also argue that the amount of time given them to cure the default was not reasonable and that there must be a determination by the circuit court that the time was reasonable before the Agreement can be said to have terminated.

Illinois courts do not look with favor on forfeiture of contracts. Kirkpatrick v. Petreikis, 44 Ill. App. 3d 575, 358 N.E.2d 679, 680, 3 Ill. Dec. 281, 282 (1976). However, they will enforce forfeiture clauses incorporated into installment contracts by competent parties and will give effect to such clauses whenever declared in the manner described by contract. Ferrara v. Collins, 119 Ill. App. 3d 819, 457 N.E. 2d 109, 112, 75 Ill. Dec. 319, 322 (1983).

"[T]he proper method of declaring a forfeiture is to follow the provisions in the contract." Tobin v. Alexander, 63 Ill. App. 3d 397, 380 N.E. 2d 45, 48, 20 Ill. Dec. 368, 371 (1978). See also Dahm, Inc. v. Jarnagin, 133 Ill. App. 3d 14, 478 N.E. 2d 641, 643, 88 Ill. Dec. 326, 328 (1985); Bocchetta v. McCourt, 115 Ill. App. 297, 450 N.E. 2d 907, 909, 71 Ill. Dec. 219, 221 (1983). The language in a contract on which the right to forfeiture is based must be strictly and narrowly construed against the party seeking to enforce it. Allabastro v. Wheaton National Bank, 77 Ill. App. 3d 359, 395 N.E.2d 1212,

1216, 32 Ill. Dec. 831, 835 (1979). It is not the default itself but rather the exercise of the seller's option to declare a forfeiture after purchaser's default which serves to terminate the contract. Lang v. Parks, 19 Ill. 2d 223, 166 N.E. 2d 10, 12 (1960); Brown v. Jurczak, 397 Ill. 532, 74 N.E. 2d 821, 826 (1947); Bouchetta v. McCourt, supra.

A declaration of forfeiture must be clear and unambiguous and carry an unquestionable purpose to insist on forfeiture. Brown v. Jurczak, supra. 74 N.E. 2d at 826-27; Dahm, Inc. v. Jarnagin, supra. The notice of forfeiture must give a reasonable amount of time before the declaration of forfeiture, but what constitutes a reasonable length of time depends on the facts of the case. Forest Preserve Real Estate Improvement Corporation v. Miller, 379 Ill. 375, 41 N.E. 2d 526, 529 (1942). Generally, however, a thirty-day warning of the seller's intention to declare a forfeiture is reasonable. Aden v. Alwart, 76 Ill. App. 3d 54, 394 N.E. 2d 716, 720, 31 Ill. Dec. 514, 518 (1979); Kirkpatrick v. Petreikis, supra, 358 N.E. 2d at 681, 3 Ill. Dec. at 283.

A declaration of forfeiture following default, under a contract for sale of land which permits such declarations, puts an end to the interest of the purchaser. Brown v. Jurczak, supra, 74 N.E.2d at 825; Forest Preserve Real Estate Improvement Corporation v. Miller, supra; Illinois Fair Plan Association v. Astirs, Inc., 89 Ill. App. 3d 422, 411 N.E. 2d 1050, 1053, 44 Ill. Dec. 684, 687 (1980). If the forfeiture was properly declared, no subsequent performance or offer to perform, no matter how strictly in compliance with the terms of the contract, will relieve the offending party from a forfeiture. Kingsly v. Roeder, 2 Ill. 2d 131, 117 N.E. 2d as 82, 85 (1954); Ferrara v. Collins, supra, 457 N.E. 2d at 112, 75 Ill. Dec. at 322; Allabastro v. Wheaton National Bank, supra, 395 N.E. 2d at 1216, 32 Ill. Dec. at 835; Miles Homes, Incorporated of Illinois v. Mintjal, 17 Ill. App. 3d 642, 307 N.E. 2d at 724, 727 (1974).

Among the factors considered significant in granting relief from a forfeiture are the following: The prior acceptance of late payments and whether the buyer had been given a reasonable warning that the seller was going to insist on prompt payment in the future; the length of time involved in the delay and whether the default had been repeated; whether substantial payment had been made on the whole contract; whether the purchaser had substantially improved the property; and whether there had been merely a delay rather than suspension of the payments. See, Allabastro v Wheaton National Bank, *supra*, 395 N.E. 2d at 1217-18, 32 Ill. Dec. 836, 37, and Aden v. Alwardt, *supra*, 394 N.E. 2d at 719, 31 Ill. Dec. at 517, and cases cited therein.

In the present case, the Agreement for Warranty Deed contained the following provision:

4. It is expressly understood by and between the parties that in case of a default of Vendee to make any of the payments or any part thereof, or to perform any of the covenants herein specified, within thirty days after the same are due to be paid or performed, Vendor shall have the right to declare a forfeiture of all rights of Vendee under this agreement after proper service of notice of intention to forfeit has been served upon Vendee, and upon such forfeiture, this agreement shall be null and void and all payments under this agreement shall be forfeited and retained by Vendor as liquidated damages, in full satisfaction of the damages sustained, and Vendor shall have the right to re-enter and take possession of the premises.

The Agreement also contained a "time is of the essence" clause.

Debtors do not dispute the following facts: That they failed to make any of the monthly payments due under the Agreement from November, 1987 through March, 1988; that they were served with the Demand for Strict Compliance on January 12, 1988, which was more than thirty days after their initial default; that they were given thirty days to cure the default but did not do so; and that they were served with Notice of Forfeiture on February 12, 1988. Furthermore, there was no evidence that Scharf had ever

accepted late payments from the debtors, which may have waived her right to declare a forfeiture. Nor is there any evidence that debtors attempted to cure the default or that they asked for additional time in which to do so. Based on the foregoing facts, it appears that the Agreement was terminated when Scharf served the debtors with the Notice of Forfeiture.

Debtors argue that the Agreement was not terminated because Scharf has not obtained possession of the restaurant property by order of any court. However, that position is not supported by the previously cited Illinois case law which holds that service of a notice of forfeiture under a contract for the sale of land puts an end to the interest of the purchaser, effectively terminating the contract.²

Debtors' remaining argument, that a court must determine whether the time given debtors to cure the default was reasonable, is also without any support under Illinois law. Debtors have failed to cite any authority requiring judicial approval of the amount of time given to a purchaser to cure a default. Also, as previously noted, a seller's thirty days notice of an intent to declare forfeiture absent curing of the default has been held to be reasonable.

Debtors have not raised any of the other arguments against forfeiture, such as waiver,³ so the Court will assume that those arguments are inapplicable to the present case. Accordingly, the Court concludes that Scharf's declaration of forfeiture is valid and that the Agreement for Warranty Deed was terminated

²Once a forfeiture is declared, the seller of the property can file a forcible entry and detainer action, as Scharf has done in this case, in order to regain possession of the property. See, Ill.Rev.Stat., ch. 110, ¶9-102.5. However, there is no support for debtor's position that a court must turn over possession of the property to the seller before termination of the contract can occur.

³Although not argued by debtors, the Court notes that Scharf's acceptance of payments from debtors starting in April, 1988 (after the declaration of forfeiture) did not relieve the debtors of forfeiture because, as noted earlier, subsequent performance will not relieve an offending party from a properly declared forfeiture.

upon service of the Notice of Forfeiture. Since debtors no longer have any rights under the Agreement, Scharf has the right to have the stay lifted to allow her to pursue her forcible entry and detainer action to regain possession of her property.

Magna Bank's Motion for Relief from Stay.

Magna is listed on debtor's schedules as a secured creditor on a restaurant fixture loan. The loan is secured by furniture, fixtures, machinery, equipment, inventory and accounts receivable at debtors' restaurant business, along with similar after acquired property. At the time of the hearing there was an unpaid loan balance of \$23,527.16.

Deborah Abmeyer testified that the value of the restaurant's machinery, fixtures and equipment securing the loan was \$86,350.00 and the value of the inventory was \$17,000.00. Magna disputes the accuracy of these figures arguing that if the items were appraised at their current fair market value debtors would have no equity in its collateral. Magna asks for relief from stay to permit it to foreclose on its security interest in order to prevent what it claims will be irreparable injury, loss and damage.

Under 11 U.S.C. §362(g)(1), a party seeking relief from the stay of an act against property has the burden of proof on the issue of debtor's equity in the property. In the present case, Magna failed to submit any evidence to support its claim that debtors lacked equity in the property. Therefore, the Court will deny Magna's Motion for Relief from Stay.

Objections to Confirmation.

Scharf and Magna argue that debtors' monthly expenses exceed their projected monthly income and that the Plan is, therefore, not feasible. They note, inter alia, that a \$45,000.00 debt to Centerre Bank, on which debtors currently make interest-only payments of \$400.00 per month, is neither listed on debtors'

schedules nor provided for in the Plan.

In light of its decision to lift the stay as to Scharf, the Court finds it unnecessary to address the specific objections to the Plan made by Scharf and Magna. Since the Agreement for Warranty Deed is terminated and debtors' continued occupation of the restaurant premises is in doubt, the present Plan, which partially relies on \$1,500.00 a month income from the restaurant, clearly needs to be revised.

Debtors urge the Court to consider the Chapter 13 Plan together with the Abby Enterprises' Chapter 11 Plan. The court has examined both cases but does not see how either Plan, as presently set forth, can overcome the termination of the Agreement for Warranty deed which occurred before either bankruptcy petition was filed.

Accordingly, the Court will give debtors twenty days to amend their schedules and to either file an Amended Chapter 13 Plan or convert their case to Chapter 7.

IT IS THEREFORE ORDERED that the Motion for Relief from Stay filed by Verna Scharf is GRANTED.

IT IS FURTHER ORDERED that the Motion for Relief from Stay filed by Magna Bank of Columbia is DENIED.

IT IS FURTHER ORDERED that the Objections to Confirmation filed by Verna Scharf and Magna Bank of Columbia are SUSTAINED. Debtors are given twenty (20) days to amend their bankruptcy schedules and to either file an amended Chapter 13 Plan or to convert to Chapter 7 or their case will be dismissed.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: September 8, 1988