

STATE OF MICHIGAN
COURT OF APPEALS

CAPFINANCIAL PROPERTIES, L.L.C.,

Plaintiff-Appellee,

v

VAN BUREN OIL, L.L.C., d/b/a VAN BUREN
OIL & GAS, INC., and EXPRESS OIL
COMPANY,

Defendants-Appellants.

UNPUBLISHED

August 13, 2009

No. 282984

Wayne Circuit Court

LC No. 07-703132-CK

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendants appeal by right the trial court's order granting plaintiff 60 days to redeem property that defendants purchased at a foreclosure sale, either by tendering \$60,000 to the Wayne County Register of Deeds for the benefit of defendants, or by tendering the payment directly to defendants or their counsel. We conclude that defendants waived their right to appeal the trial court's order by accepting and cashing plaintiff's check for \$60,000. Accordingly, we dismiss the appeal.

"Waiver is a mixed question of law and fact. The definition of a waiver is a question of law, but whether the facts of a particular case constitute a waiver is a question of fact." *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006) (citation omitted). A waiver has been defined in various contexts as a "voluntary and intentional abandonment of a known right." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003).

In the context of a litigant pursuing an appeal, a waiver has been recognized by a course of conduct, such as acceptance of satisfaction of a favorable judgment for money or property in a common-law action. *Wohlfert v Kresge*, 120 Mich App 178, 180; 327 NW2d 427 (1982). A waiver has also been found in an ejectment action where a plaintiff, after enforcing a judgment entitling it to part of property through a writ of possession and execution, argued on appeal that the entire judgment should be reversed. *Clairview Park Improvement Co of Grosse Pointe, Ltd v Detroit & Lake St Clair R*, 164 Mich 74, 79; 129 NW 353 (1910). As our Supreme Court explained in *Clairview Park Improvement*, 164 Mich at 79, "[i]t is an established rule of procedure that a party to an action cannot receive a benefit under a judgment, and then appeal

from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by a reversal of the judgment.”

The reasoning applicable to a plaintiff’s acceptance of satisfaction of a judgment has been applied with equal force to a defendant’s conduct in satisfying a judgment. *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 27-28; 684 NW2d 391 (2004). For example, a waiver has been found where the defendant, a defaulting vendee under a land contract, satisfied a judgment for restitution in the plaintiff’s favor by making payment under protest, and then sought to appeal the judgment. See *Horwitz v Rott*, 235 Mich 369; 209 NW 131 (1926). Although there existed a statutory period for the defendant to redeem the property, the Supreme Court in *Horwitz* held:

When the judgment was rendered two courses were open to defendant. He could satisfy the judgment or review it in this court. He could not do both. He chose by his voluntary act to satisfy it. When the judgment was satisfied the case was at an end. [*Id.* at 371-372.]

The circumstances of this case are similar to those of *Horwitz*, except that plaintiff’s waiver claim in this case is not based on a defendant’s act of redemption, but rather on defendants’ act of cashing the check that plaintiff tendered to redeem the property. Defendants do not dispute that they accepted and cashed the \$60,000 check tendered by plaintiff. The trial court’s order did not require defendants to accept plaintiff’s tender of payment. Defendants here had a choice. They could have refused the \$60,000 check tendered by plaintiff and pursued this appeal. Alternatively, they could have accepted and cashed the \$60,000 check, thereby receiving the benefit of the trial court’s order and waiving their right to appeal. Because defendants’ chose to accept the tender, we hold that defendants waived their right to appeal the trial court’s order. See *id.* at 371-372. Accordingly, we dismiss the appeal.

Appeal dismissed. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Cynthia Diane Stephens

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder