IN THE COURT OF APPEALS OF IOWA

FILED
JUN 4 1986
CLERK SUPREME COURT

B & W LAND, INC., an Iowa Corporation,

Plaintiff-Appellant,

vs.

BCP ENTERPRISES, et al.,

Defendants-Appellees.

FILED JUNE 4, 1986

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85-997

Appeal from the Iowa District Court for Cerro Gordo County (48429) Paul W. Riffel, Judge.

Plaintiff appeals the trial court's granting of summary judgment in favor of defendants in this breach of contract action. **AFFIRMED.**

Jay M. Shriver of Pappajohn, Shriver, Eide & Nicholas, Mason City, Iowa; and Darrell J. Isaacson and M. Leroy Walters of Laird, Burlington, Heine, McMainville, *Walters & Linga, Mason City, Iowa, for plaintiff-appellant.*

Jon S. Scoles of Devries & Scoles, Mason City, Iowa, for defendants-appellees.

Heard by Oxberger, C.J., Schlegel, and Hayden, JJ.

HAYDEN, J.

Plaintiff appeals the trial court's granting of summary judgment in favor of defendants in this breach of contract action. It is claimed that there is an issue of material fact concerning whether the real estate contract was fully merged and extinguished by the deed conveying the real estate. We affirm.

Plaintiff, B & W Land, Inc., entered into an installment contract with BCP Enterprises to purchase real estate located in Mason City. The total purchase price was $42,000, consisting of a down payment of $12,000 and three equal annual installments of $10,000, with the final installment due August 1, 1983. By the terms of the contract, B & W Land would take possession of the property on November 1, 1980. Upon full performance by the plaintiff, BCP Enterprises would give the plaintiff the warranty deed conveying the property in fee simple and deliver an abstract showing marketable title.

Plaintiff's right to possession and ownership was not subject to any leasehold interest. There was evidence indicating that plaintiff's owner understood that North Iowa Oil Company had a right to use a portion of the property until August 1, 1983. The written contract, however, did not reflect this interest.

In June or July of 1983, the plaintiff became aware of a potential problem with obtaining possession of the property. The plaintiff learned that North Iowa Oil Company had a lease covering the property until August 1, 1985. After several unproductive discussions with one of the defendants regarding the problem and the obtaining of an abstract for the land, B & W Land was advised by its attorney not to pay the final contract installment until the plaintiff had received an abstract for determining the condition of the title.

On October 17, 1983, the defendants served the plaintiff a notice of forfeiture. The parties' attorneys had several communications regarding the

forfeiture proceedings, the failure of BCP Enterprises to provide the plaintiff with an abstract of title, BCP Enterprises' failure to provide full possession of the property to the plaintiff and other matters. One of the attorneys for BCP Enterprises asked plaintiff's attorney whether the plaintiff would release any claim it might pursue due to BCP Enterprises' failure to deliver full possession of the property on August 1, 1983. Plaintiff's attorney indicated that its client would not sign such a release and that some type of action was probable.

Subsequently, plaintiff received an abstract of title from BCP Enterprises and the plaintiff made the final contract payment. A warranty deed was forwarded to the plaintiff showing that the property was taken subject to the lease in question. On March 30, 1984, the deed was recorded. On the same date, the plaintiff filed this lawsuit against the defendants alleging that the defendants breached the contract between the parties and that defendants fraudulently or negligently made misrepresentations of fact in connection with the contract. The defendants answered, denying the material allegations of the petition.

On January 16, 1985, BCP Enterprises filed a motion for summary judgment on the basis that the plaintiff's cause of action on the contract was extinguished with its recording of the warranty deed covering the property. On March 6, 1985, the plaintiff filed a resistance to the motion asserting that a summary judgment was inappropriate because factual issues existed regarding the intentions of the parties since the deed was allegedly accepted independent of the contract. Both parties filed affidavits supporting their positions. Particularly, the plaintiff filed affidavits indicating that it intended to bring the action even though it accepted the warranty deed.

The trial court concluded that there was no genuine issue of material fact and defendants were entitled to judgment as a matter of law. An order was

entered on July 11, 1985, granting defendants' motion and dismissing the petition. This appeal followed.

In reviewing the grant or denial of a summary judgment motion, we view the underlying facts contained in the pleadings and the inferences to be drawn therefrom in the light most favorable to the party opposing the motion, and give to such party the benefit of any doubt as to the propriety of granting summary judgment. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied, and to reverse the grant of summary judgment if it appears from the record there is an unresolved issue of material fact. Meylor v. Brown, 281 N.W.2d 632, 634 (Iowa 1979); Frohwein v. Haesemeyer, 264 N.W.2d 792, 795-96 (Iowa 1978).

The ruling of the trial court was based on the doctrine of merger. In this jurisdiction, a contract for conveyance of real estate, absent any showing to the contrary, is deemed to have merged in a subsequent deed. Lovlie v. Plumb, 250 N.W.2d 56, 62 (Iowa 1977). The deed speaks and the contract is silent concerning those matters of conflict between them. Tamm, Inc. v. Pildis, 249 N.W.2d 823, 836 (Iowa 1976). Where merger of the contract into the deed is denied, the burden of proof rests on the asserting party to show a merger was not intended. Lovlie, 250 N.W.2d at 62.

In the present case, the terms of the contract and deed are in conflict concerning encumbrances. The written contract does not reflect the property interest of North Iowa Oil Co. The deed, however, expressly provides that the conveyance is subject to certain lease rights held by North Iowa Oil Co. B & W Land argues it is entitled to maintain a suit based on the provisions of the contract since it did not intend the contract to be fully merged into the deed. Plaintiff claims that there is a factual issue concerning this intent and, as such,

the entry of a summary judgment was inappropriate. We are unpersuaded by this analysis.

Iowa courts have recognized three exceptions to the merger rule. A contract may be and is kept alive if 1) the deed is uncertain and ambiguous in its own terms, 2) a mistake in the deed is alleged and reformation is sought, and 3) the contract contains collateral agreements which are not inconsistent with the terms of the deed. Huxford v. Trustees, 193 Iowa 134, 136-37, 185 N.W. 72, 74 (1921). The record discloses no exceptions which are applicable. The deed unequivocally indicates that plaintiff's interest was subject to a leasehold interest. Plaintiff neither pled mistake nor sought reformation. Finally, there are no collateral terms in the contract which are not satisfied by the subsequently executed deed. See, e.g., Tamm, Inc., 249 N.W.2d at 836-37.

As we view it, B & W Land has not presented any facts which would rebut the presumption of merger. A subjective intent to sue on the contract, even if communicated to BCP Enterprises, would not be sufficient to avoid the doctrine of merger under any of the recognized exceptions. Nor are we inclined to carve out an additional exception today. Where the terms of the deed are such as to deny or conflict with a condition of the contract, the execution of the deed must be deemed a waiver of the condition. Huxford v. Trustees, 193 Iowa at 138, 185 N.W. at 75 (1921).

Contrary to plaintiff's claim, Dickerson v. Morse, 203 Iowa 480, 212 N.W. 933 (1927), does not support a different result. In Dickerson, the parties entered into a written contract concerning the conveyance of a parcel of real estate. Pursuant to the contract, the plaintiff was entitled to possession of the property on March 1, 1920, at which time defendants were to execute a warranty deed and furnish an abstract showing marketable title free from all liens and encumbrances.

On March 6, 1920, defendants executed and delivered to plaintiff their warranty deed. At that same time, plaintiff paid defendant $7,900 and executed a note and mortgage on said property in defendant's favor in the sum of $19,480. However, plaintiff retained $100 of the purchase price until the defendant furnished an abstract of title in accordance with the terms of the written contract. A suitable abstract was not furnished until the fall of 1922 at which time several title defects were discovered.

The supreme court held that the contract had not merged into the deed and plaintiff was entitled to rescind the contract. Id. at 483, 212 N.W. at 934. In reaching this conclusion, the court indicated that the plaintiff had accepted the deed with the mutual understanding that the delayed abstract of title would be furnished as per the original contract. Id. There was no waiver of this stipulation; at the time the deed was accepted the contract was still executory in purpose and nature. Thus, when the vendor failed to deliver the required abstract, and fulfill the conditions of the contract, plaintiff was entitled to resort to contract remedies. Id. at 483, 212 N.W. at 935. The vendor could not avoid this collateral agreement through the doctrine of merger.

The present case is factually distinguishable from Dickerson. First, although payments were delayed under the threat of foreclosure, B & W paid the contract price in full. Secondly, the abstract of title revealing the leasehold interest was furnished to B & W prior to the acceptance and recording of the deed. Furthermore, unlike Dickerson, the deed contained specific language relating to the encumbrance. In accepting the deed, B & W necessarily accepted its terms. No condition of the contract can be characterized as unfulfilled or executory in nature. To the extent that the deed is inconsistent with the contract, the terms of the deed are controlling.

Viewing the facts in a light most favorable to the plaintiff, we find that the defendants are entitled to a judgment in their favor as a matter of law. There is no evidence in the record which would rebut the presumption that the contract merged into the deed. Accordingly, we affirm the decision of the trial court.

AFFIRMED.