IN THE COURT OF APPEALS OF IOWA

No. 4-253 / 93-1191

FILED
SEP 16 1994
CLERK SUPREME COURT

THE GREAT WESTERN RAILWAY COMPANY OF IOWA, INC., An Iowa Corporation, As Assignee of Iowa Natural Heritage Foundation, An Iowa Nonprofit Corporation,

Plaintiff-Appellant,

vs.

IOWA SOUTHERN RAILROAD COMPANY,

Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith III, Judge.

The plaintiff appeals from the order dismissing its petition for specific performance of an option to purchase a railroad right-of-way. **AFFIRMED.**

Scott H. Hughes, Temple University School of Law, Philadelphia, Pennsylvania, and Lyle A. Rodenburg of Lyle A. Rodenburg, P.C., Council Bluffs, for appellant.

No appearance for appellee.

Considered by Sackett, P.J., and Cady and Huitink, JJ. Donielson, C.J., takes no part.

PER CURIAM

In this action for specific performance of an option to purchase, the question on appeal is whether the trial court should have ordered the defendant to convey to the plaintiff a seven-tenths mile tract of a railway right-of-way. The trial court refused to order the transfer and we affirm.

Plaintiff-appellant, The Great Western Railway Company of Iowa, Inc., took the option as an assignee of the Iowa Natural Heritage Foundation, Inc., an Iowa nonprofit corporation, to a seven-tenths mile right-of-way owned by defendant-appellee Iowa Southern Railroad Company. In 1988, defendant filed a petition with the Interstate Commerce Commission to abandon a sixty-three mile portion of right-of-way. The tract in question was not included in the sixty-three mile portion but was connected to it. Prior to the filing, the Iowa Natural Heritage Foundation attempted to convert the right-of-way to a nature trail under section 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d) and, in July 1988, filed a statement with the Interstate Commerce Commission that they were willing to assume financial responsibility for management of the trail in the right-of-way. The next month, Iowa Southern agreed to negotiate with the Foundation for the sale.

As a result of negotiations on May 31, and June 1, 1989, defendant and the Foundation signed a contract for a quit claim deed for the sale of the sixty-three mile

right-of-way and an option for the sale of the seven-tenths mile right-of-way subject to this litigation.

The provision for the seven-tenths mile right-of-way was:

> Seller grants to Buyer an exclusive option to purchase for $7,500.00 Seller's entire interest in that property between MP 407 and the west toe of the dike on the west side of Mosquito Creek in Council Bluffs for a period of 90 days from the aforesaid closing date; such conveyance to be made in accordance with Section 8(d) of National Trails System Act, 16 U.S.C. 1247(d).
>
> Seller shall cooperate in obtaining such an order from the Interstate Commerce Commission, or other pertinent authority. Closing and payment of purchase price shall occur within said 90 day period.

On June 7, 1989, the sale of the sixty-three mile tract was consummated. The seven-tenths mile was not transferred because the seven-tenths mile had not been included in the original Interstate Commerce Commission filing.

In attempting to exercise the option on August 1, 1989, an Associate Director of the Foundation sent a letter to defendant's president exercising the option to purchase the seven-tenths mile and directed defendant to obtain the necessary order from the Interstate Commerce Commission. The letter stated closing is dependent upon the Interstate Commerce Commission order.

Defendant immediately responded it did not intend to obtain an order from the Interstate Commerce Commission, stating the cost of obtaining the order exceeded $7500. The letter emphasized defendant had only contracted to

cooperate and the responsibility to obtain the order was the Foundation's. The letter also said, "We will expect that this transaction will close by that date [September 6, 1989] whether you have obtained the 'order' or not."

On September 6, 1989, the Foundation sent another letter to defendant enclosing a copy only of a $7500 check for payment. The letter said the Foundation was prepared to help with the cost of the Interstate Commerce Commission filing. On September 11, 1989, defendant responded it did not intend to participate further, and the option had expired.

Defendant had contended the Foundation did not tender performance of the option because the Foundation did not send as check but only a copy of a check for $7500 and the Foundation made the offer contingent on the Foundation's demand to defendant to "proceed to obtain the necessary order from the Interstate Commerce Commission."

The trial court found the contract provides at paragraph 5:

> Without further expense of Seller, Seller shall cooperate in obtaining such an order from the Interstate Commerce Commission or any other pertinent authority prior to closing.

And paragraph 8(c) provides:

> [S]uch a conveyance to be made in accordance with Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d). Seller shall cooperate in obtaining such an order from the Interstate Commerce Commission, or other pertinent authority.

The trial court then found the tender made by the Foundation was conditioned on defendant obtaining the

Interstate Commerce Commission order contrary to the option terms. The trial court dismissed plaintiff's petition.

Plaintiff appeals contending: (1) the language of the contract did not clearly impose on the Foundation the responsibility for obtaining the approval; (2) the trial court did not apply the correct rule of contract interpretation and erred in finding the Foundation had the responsibility to obtain approval of the Interstate Commerce Commission; (3) the trial court erred in interpreting the contract in isolation; and (4) the trial court erred in finding because the seller drafted the contract and as a result it should be interpreted against the buyer.

Plaintiff contends our scope of review is de novo because this case was tried in equity. Our scope of review is determined by the trial proceedings. See Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255, 257 (Iowa 1991). Objection to evidence was ruled on by the trial court. Our factual determinations agree with those of the trial court. Because our factual determinations are the same as those made by the trial court, we need not determine our scope of review.

Our review has been substantially hindered by defendant's failure to file an appellee's brief. The failure of the appellee to file a brief does not entitle appellee to a reversal as a matter of right but does provide a basis for sanctions. State ex rel. Buechler v.

Vinsand, 318 N.W.2d 208, 209 (Iowa 1982); Pierre v. Iowa Dep't of Social Servs., 334 N.W.2d 359, 360 (Iowa App. 1983). We limit our consideration to the issues raised in appellant's brief. Buechler, 318 N.W.2d at 209.

The intent of parties to a contract controls and, other than in cases where the contract is ambiguous, intent is determined from what the contract says. See Berryhill v. Hatt, 428 N.W.2d 647, 654 (Iowa 1988). We agree with the trial court that the contract clearly does not put the responsibility for obtaining the Interstate Commerce Commission order on defendant. In reaching this conclusion, we have considered and rejected plaintiff's contention the provisions concerning this responsibility is ambiguous. The test for ambiguity is an objective one: "Is the language fairly susceptible to two interpretations?" See Central Bearings Co. v. Wolverine Ins. Co., 179 N.W.2d 443, 445 (Iowa 1970). The only interpretation of the language of the contract was defendant would do no more than cooperate in obtaining the Interstate Commerce Commission order.

The only conclusions we can reach are the ones reached by the trial court:

> (1) the option established the duty to obtain the order was the Foundation's, and
>
> (2) the Foundation, in exercising the option, sought to impose this obligation on defendant.

The only conclusion we can reach is plaintiff did not exercise the option.

We have considered all of plaintiff's arguments whether specifically addressed or not and find they have no merit. We affirm.

AFFIRMED.