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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-224 / 89-986

H.O. HELGEN and LAVENA H. HELGEN,

Appellants,

vs.

WAYNE R. SMITH and MARCELLA T. SMITH,

Appellees.

Appeal from the Iowa District Court for Palo Alto County, Joseph Straub, Judge.

Helgens appeal from the district court's denial of their petition to quiet title because improvements on the real estate purchased by them belonged to the seller's tenants. **AFFIRMED.**

Joseph L. Hanson, Emmetsburg, for appellants.

Harold W. White of Fitzgibbons Brothers, Estherville, for appellees.

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

OXBERGER, C.J.

The Smiths leased and farmed a 320-acre farm owned by the Dutton family for thirty-three years. Throughout the thirty-three years either the Dutton family or Hertz Farm Management, serving as agents for the Duttons, managed the farm. Recent leases between the Duttons and the Smiths contained the following provision:

> all buildings, fences and improvements of every kind and nature that may be erected on the above-described land during the term of this lease by the Operator shall be deemed as rent and shall become a part of the premises and become the property of the Owner unless permission to erect and remove same shall be obtained in writing and made a part of the lease.

In spite of this provision, the Smiths and the Duttons mutually agreed to build and maintain their own respective improvements. Smith did build several improvements, including four grain bins, a bulk bin, and a garage built for grain storage, using his own funds, and for which he paid insurance and taxes on. In 1982 an employee of Hertz Farm Management compiled a list documenting the Smiths' ownership of the improvements.

In 1987 the Duttons contacted Dale Opheim to inquire if he would be interested in purchasing the farm the Smiths leased. Opheim knew of the Smiths' claims to their improvements. Because Opheim could not afford to purchase the entire 320 acres he contacted the Helgens. The Helgens agreed to purchase 80 of the 320 acres, and requested Opheim instruct the Duttons to execute the deed for the 80 acres

directly to the Helgens. The Duttons did convey the land to Opheim and the Helgens.

After the sale, the land was surveyed for division. The survey revealed that some of the Smiths' improvements sat on the Helgens' land. At the termination of the Smiths' tenancy, the Helgens refused to allow the Smiths to sell or remove their improvements. At that time, the Smiths could have sold their improvements for $6,155, with a cleanup cost of $750.

The Helgens filed a suit against the Smiths to quiet title in the real estate and the improvements. Following a bench trial, the district court found the Smiths damaged in the amount of $5,405 and held that upon payment of the damages, title to the 80 acres, excluding improvements, would be quieted in the Helgens. The district court also found that: (1) the lease was modified by the Smiths and the Duttons, (2) Opheim was an agent for the Helgens, and (3) Opheim's knowledge of Smiths' claims to the improvements was imputed to the Helgens. The Helgens appeal.

The Helgens contend that the Smiths' improvements are part of the real estate they purchased. First, the Helgens state the improvements are fixtures and as such are part of the real estate. Next the Helgens claim the clear language of the Dutton-Smith leases provide that the improvements are part of the real estate.

The Helgens further assert the court improperly reformed the written lease. The Smiths responded by stating the court merely interpreted the contract in light of the Smiths' and Duttons' oral modification of the written lease.

The Helgens also claim the list documenting the ownership of the improvements on the 320 acres constitutes an invalid conveyance of the improvements from the Duttons to the Smiths. The Helgens argue the list does not comply with the recording requirements of Iowa Code sections 558.44 and 622.41.

Finally, the Helgens contend they lacked knowledge of the Smiths' claims to the improvements. The Helgens further contend the public records lacked sufficient information to alert them about any potential claims of the Smiths.

We review this equitable action de novo. Iowa R. App. P. 4. We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

DID THE IMPROVEMENTS BECOME FIXTURES? In First Trust and Savings Bank v. Guthridge, 445 N.W.2d 401, 402 (Iowa App. 1989) (authorities omitted), we stated:

> Under common law personal property becomes a fixture when:
>
> (1) it is actually annexed to the realty, or to something appurtenant thereto;
> (2) it is put to the same use as the realty with which it is connected; and
> (3) the party making the annexation intends to make a permanent accession to the freehold.

"The intention of the party annexing the improvement is an important factor in assessing" whether that improvement becomes a fixture. Id. "The character of the attachment is important in determining the intent." Id. (Citation omitted). When some attachment exists, the party claiming the improvement is not a fixture carries the burden of proving its claim. Id.

The trial court found the Smiths paid for the improvements, the insurance on the improvements, and the taxes on the improvements which were designated as taxes for improvements on leased land. Additionally, the court found that prior to the construction of at least one of the bins, Orson Dutton, now deceased, suggested to Smith he purchase a government bin, pointing out to Smith that if he ever left the farm he could move the bin off the farm. Lastly, the trial court found a common practice developed, in spite of the lease provisions to the contrary, whereby the Duttons assisted their tenants in purchasing improvements jointly and then negotiated with the tenants over the improvements' value at the termination of the lease involved. In the Smiths' case, the tenant simply purchased the improvements and retained possession of them.

Applying the common law to the facts, we agree with the trial court that neither the Duttons nor the Smiths intended the improvements become fixtures even though the storage bins and garage were attached to poured concrete.

Rather, the improvements remained the personal property of the Smiths and consequently the trial court correctly refused to quiet title in the Helgens until they reimbursed the Smiths for damages they caused by not allowing the Smiths to remove and sell the improvements.

WAS THE LEASE REFORMED BY THE TRIAL COURT? The Helgens contend that regardless of the intention of the Smiths and the Duttons, the lease in effect at the time of the sale clearly provided:

> [A]ll buildings, fences and improvements of every kind and nature that may be erected on the above-described land during the term of this lease by the Operator shall be deemed as rent and shall become a part of the premises and become property of the Owner unless permission to erect and remove same shall be obtained in writing and made a part of the lease.

The Helgens argue this provision governed at the time they purchased the real estate upon which the improvements sat and the Smiths failure to obtain written permission or a written modification to the lease proves fatal to the Smiths' claims in light of the clear language of the lease. Additionally, the Helgens claim the trial court erroneously reformed the lease without the prerequisite showing of any of the exceptional grounds necessary for reformation. See Pathology Consultants v. Gratton, 343 N.W.2d 428, 437 (Iowa 1984).

An executory contract, not involving the rights of third parties, may be rescinded altogether or modified by the mutual consent of the parties to the contract. O'Dell

v. O'Dell, 238 Iowa 434, 456-457, 26 N.W.2d 401, 412 (1947); see also Mosebach v. Blythe, 282 N.W.2d 755, 760 (Iowa App. 1979). We find the trial court correctly construed the lease as modified by the parties to it, rather than reforming the lease. The trial court specifically found:

> It is clear from the evidence in this case that a practice had developed down through the years regarding not only Smith's claim for the improvements he made, but also the other tenants as well. It is clear that the parties to those leases mutually consented to modifying their leases.

After evaluating the record as a whole, we agree with the trial court the Smiths and the Duttons mutually consented to modify the lease provision requiring written permission prior to the placement of improvements, of which the tenant intended to retain possession. Evidence leading us to this conclusion includes the ongoing practice of the Duttons with their other tenants with the same lease agreement, the 1982 list made by a Hertz employee listing the improvements owned by the Smiths, as well as the parties' actions surrounding the purchase and maintenance of the improvements.

Since we find the improvements never left the possession of the Smiths and never became fixtures, we also find Helgens' argument that Iowa Code sections 558.1 and 558.44 apply to this case without merit. The improvements were never conveyed as real property or otherwise.

HELGENS' KNOWLEDGE OF THE SMITHS' CLAIMS OF OWNERSHIP. Lastly, the Helgens argue they were bona fide purchasers without notice of the Smiths' claims because a search of the real estate records did not uncover the Smiths' claims. The Helgens feel they appropriately relied on the real estate abstract and the "implicit" assurance of the Dutton agreement to sell, that no outstanding claims existed, and the tenant in possession had no claims to any of the improvements.

We do not agree. The Helgens knew or should have known after checking the land records that a leasehold existed between the Duttons and the Smiths. "Possession of real estate imparts notice to the world of the rights of the possessor which reasonable and proper inquiry of the possessor would reveal." Swab v. Appanoose Country Club, 203 N.W.2d 318, 320 (Iowa 1978). The Helgens cannot escape the Smiths' claims simply by refusing to contact the Smiths for fear of alerting other buyers about the availability of the property for purchase.

We agree with the trial court that Dale Opheim acted as the Helgens' agent with respect to the purchase of the real estate. As the Helgens' agent, Opheim's knowledge can be imputed to the Helgens under the theory of agency by implication.

"A relationship of agency may be created by express contract or by implication. An implied agency is an actual

agency which may be established by the surrounding circumstances and inferences arising therefrom." Walnut Hills Farms v. Farmers Co-op, 244 N.W.2d 778, 780-781 (Iowa 1976) (citations omitted). Substantial evidence must support a determination of implied agency; a mere scintilla will not support such a finding. Id. at 781.

We find substantial evidence in the record to find an implied agency relationship between the Helgens and Opheim. The actions of both the Helgens and Opheim negate the contention that Opheim was not actually "setting up" the deal for the benefit of both himself and the Helgens.

Consequently, we affirm the trial court in all respects.

AFFIRMED