

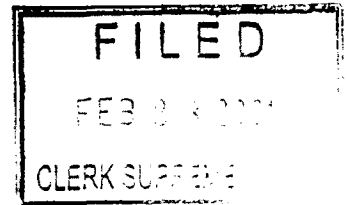
IN THE COURT OF APPEALS OF IOWA

No. 0-618 / 99-1885
Filed February 28, 2001

**ESSEX CORPORATION,
Plaintiff-Appellee,**

vs.

**WESLEY HERRALD and CAROLYN HERRALD,
Individuals, MARY ELLEN DENNERT-BURMAN,
RICHARD S. DENNERT and NATIONS BANK N.A.,
As Co-Trustees of the WALTER G. DENNERT
RESIDUARY TRUST,
Defendants-Appellants.**



Appeal from the Iowa District Court for Boone County, William C. Ostlund,
Judge.

The defendants appeal from the district court's ruling ordering specific performance of a real estate contract by selling and conveying the subject property to the plaintiff. **REVERSED.**

James A. Brewer of Newbrough, Johnston, Brewer, Maddux & Sotak,
L.L.P., Ames, for appellants.

Mark McCormick of Belin, Lamson, McCormick, Zumbach, and Flynn, a
professional corporation, Des Moines, for appellee.

Heard by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

VAITHESWARAN, J.

Essex Corporation filed an action for specific performance of a real estate contract against Wesley Herrald and the Walter G. Dennert Residuary Trust ("Herrald and Dennert"). The district court granted the petition and ordered Herrald and Dennert to sell the real estate to Essex. On appeal, Herrald and Dennert contend Essex is foreclosed from obtaining the equitable remedy of specific performance because the corporation's representative did not disclose that the ultimate purchaser of the property was the Fareway grocery store chain, a buyer disfavored by the sellers. We agree and accordingly, reverse the decree for specific performance.

1. Background Facts and Proceedings

Herrald and Dennert owned a parcel of land in Boone. Over the years, they sold portions of the property for non-commercial development. In 1992, Essex, which was in the business of constructing senior living facilities, exercised an option to purchase a tract from Herrald and Dennert to construct retirement housing. In late 1997, Essex's president, Bart Votava, approached Herrald about purchasing another tract of land to build townhomes. Herrald indicated he was interested.

In late March or early April 1998, Votava was contacted by the president of the Fareway grocery store chain, Robert Cramer, about purchasing a portion of Herrald and Dennert's land. On April 17, 1998, Votava met with Herrald and presented him with an option to purchase a nine to ten acre tract. The parties discussed land uses and agreed a small portion of the tract might be used for light retail space or something similar. Votava made no mention of Fareway's

interest in the property. That day, Herrald signed an option agreement to sell the land for \$40,000 an acre. The option agreement contained a representation by Essex that it wished to acquire the property "for the construction of a middle income, non-subsidized, retirement housing facility."

Either on the same or the next day, Votava met with Cramer to negotiate the sale of the land to Fareway. After seeing the option agreement, Fareway expressed concern that the previously quoted language in the agreement might bind Fareway to construct retirement housing and prevent it from building a grocery store. Essex and Fareway then drafted an amendment to the option agreement providing that a portion of the property would be used for multi-family residential purposes if developed within five years. According to the amendment, if that portion was not developed within the specified time frame, the agreement to use the tract for multi-family residential purposes would become null and void. Correspondence concerning this amendment made reference to the need to keep Fareway's name out of any conversations with Herrald and Dennert.

Votava sent the amendment to Herrald on June 6, 1998, advising him it needed to be executed to obtain financing. Again, he did not mention Fareway's interest in purchasing the property or its involvement in drafting the amendment. Herrald signed the amendment, as did a representative of Dennert.

On August 17, 1998, Essex entered into a real estate purchase agreement with Fareway for the Herrald and Dennert property. Pursuant to the agreement and other documents executed on the same day, Essex intended to

sell the entire parcel to Fareway for \$55,000 per acre but retain an option to repurchase a portion within five years.

Two days after signing this real estate purchase agreement with Fareway, Essex exercised its own option to purchase the Herrald and Dennert property. Drawings attached to the option exercise document revealed the site of a "proposed store." Herrald immediately called Votava and was told the store was to be built by Fareway. Herrald expressed disappointment and perturbation.

The option to purchase the Herrald and Dennert property was to close or expire within forty-five days after it was exercised. During this period, Herrald and Dennert's attorney prepared three sets of deeds, the first of which addressed Essex's originally expressed intent to build multi-family housing on at least a portion of the property.

The closing did not take place within the prescribed time frame. Following expiration of the forty-five day period, Herrald and Dennert advised Essex the option had expired. Essex attempted to reexercise the option, but Herrald and Dennert refused.

Essex sued Herrald and Dennert for specific performance.¹ Following trial, the district court entered a decree requiring Herrald and Dennert to perform on the contract. This appeal followed.

II. Scope of Review

Review of this equity action is de novo. We examine the entire record and determine anew all issues presented to the district court. Iowa R. App. P. 4.

¹ Fareway also sued Essex but dismissed its lawsuit and joined Essex's lawsuit against Herrald and Dennert. Prior to trial, Fareway dismissed its action against Herrald and Dennert.

While we give weight to the district court's findings, especially where witness credibility is involved, we are not bound by them. *Bauman v. Nutter*, 328 N.W.2d 354, 356 (Iowa Ct. App. 1982).

III. Specific Performance

Specific performance is an equitable remedy requiring exact fulfillment of a contract in the specific form it was made or according to the precise terms agreed upon. Black's Law Dictionary 1138 (6th ed. 1990). Specific performance is generally unavailable where there appears "any trace of unfairness or fraud." *New York Brokerage Co. v. Wharton*, 143 Iowa 61, 64, 119 N.W. 969, 972 (1909). It is an appropriate remedy upon a showing of irreparable harm. *Breitbach v. Christenson*, 541 N.W.2d 840, 843 (Iowa 1995). Specific performance may be denied on the following grounds: hardship; an unconscionable or oppressive result; inequitable consideration; mistake; inequitable conduct or innocent misrepresentations. *Nutter*, 328 N.W.2d at 356. Specific performance also may be denied for failure to disclose the identity of the true purchaser in a real estate transaction. *Dergo v. Kollias*, 567 N.W.2d 443, 444 (Iowa Ct. App. 1997).

Herrald and Dennert contend Essex is not entitled to specific performance of the contract because it concealed the identity of the ultimate purchaser of the land. Essex responds: (A) the concealed identity cases cited by Essex are inapposite because they are based on a principal-agent relationship which, it maintains, was not present here; (B) Herrald and Dennert did not object to a commercial use for a portion of the property and, therefore, were foreclosed from complaining about the proposed grocery store; and (C) Herrald and Dennert

affirmed the agreement after learning of the proposed store, thereby losing the right to avoid the transaction.

A. Concealed Identity. Herrald and Dennert maintain that because Essex concealed the fact that the land would ultimately be sold to Fareway, the district court should not have ordered the equitable remedy of specific performance.

Herrald and Dennert cite to *Dergo v. Kollias*, 567 N.W.2d 443 (Iowa Ct. App. 1997) in support of this proposition. In *Dergo*, Kollias received an offer to purchase her home from Dergo, conditioned on a zoning change. *Id.* at 444. When Kollias learned Dergo was an agent for the owners of a grocery store adjacent to her property, she refused to close. *Id.* Dergo sued for specific performance. *Id.* This court reversed the district court's grant of specific performance reasoning Dergo failed to disclose the true purchaser to an unsophisticated and poorly educated seller. *Id.* at 445. Our court noted that although Iowa law does not require a principal to be disclosed, when the remedy of specific performance is sought, the failure to disclose the principal may be inequitable. *Id.*

Dergo is in accord with prior decisions of the Iowa Supreme Court. In *Ellsworth v. Randall*, 78 Iowa 141, 42 N.W. 629 (1889), a land agent sought specific performance from the land owner. *Id.* at 143, 42 N.W. at 630. The owner refused to complete the transaction because the agent had led the owner to believe he was to sell to a particular party and then procured replacement buyers without notifying the owner. *Id.*, 42 N.W. at 630. The court refused to

grant specific performance because the owner was misled as to the purchaser and had a right to refuse the conveyance. *Id.*, 42 N.W. at 630.

Similarly, in *New York Brokerage Co. v. Wharton*, 143 Iowa 61, 119 N.W. 969 (1909), the court rejected a grant of specific performance in a transaction between a seller and a buyer when the seller purported to be the owner of the goods to be exchanged in the contract, but was actually an agent for a corporation, the true party to the contract. *Id.* at 66, 119 N.W. at 969. The court held the buyers had a right to contract with the person they believed to be the party of interest. *Id.* at 66, 119 N.W. at 971.

In *Vermeulen v. Meyer*, 238 Iowa 1033, 29 N.W.2d 232 (1947), the court refused to decree specific performance of a real estate agreement when the broker for the sale sold the property to a buyer other than the prospective purchaser represented to the seller. *Id.* at 1043, 29 N.W.2d at 233. The court found the seller had been misled by the broker as to the nature of the transaction and the identity of the purchaser. *Id.* at 1041-1042, 29 N.W.2d at 237.

The material facts of this case are virtually identical to the concealed identity cases cited above. Credible evidence reveals Herrald had previously rebuffed Fareway's expressions of interest in this property. Herrald testified three representatives of Fareway, including Cramer, approached him about selling the property to the grocery store. Herrald told each of them the property was only available for housing. Although Cramer denied he spoke to Herrald, Dennert-Burman, the representative of Dennert Trust, confirmed the conversation stating Herrald "called me one time to tell me that Mr. Cramer had called him and was interested in buying it." She testified she was not in favor of

the purchase because she and Herrald wanted to use the property for housing. Additionally, the other two Fareway representatives to whom Herrald said he spoke did not testify and, therefore, could not refute Herrald's testimony. Therefore, the record establishes Fareway wanted Herrald and Dennert's land but Herrald and Dennert did not want to convey it to Fareway.

Essex nevertheless maintains we cannot apply the reasoning in the precedent discussed above because those cases turned on a principal-agency relationship not present here. The district court agreed with this assertion, concluding "[t]he business negotiations between plaintiff and Fareway were separate, distinct and for different purposes." We disagree.

Agency is a fiduciary relationship in which one person acts on behalf of another. *Walnut Hills Farm, Inc. v. Farmers Co-op Co.*, 244 N.W.2d 778, 780 (Iowa 1976). An agency relationship may be created by express contract or by implication. *Id.*; *Popejoy v. Eastburn*, 241 Iowa 747, 751, 41 N.W.2d 764, 768 (1950); *Nutter*, 328 N.W.2d at 357. In *Popejoy*, our highest court held that principles of good faith and fair dealing required a real estate agent to disclose the actual purchaser to the seller, stating:

[i]t is the right of a party to a contract to know with whom he deals unless he consents to deal with an agent in behalf of an undisclosed principal. He has a right to rely on the representations made as to the identity of the other party to the contract.

Popejoy, 241 Iowa at 760, 41 N.W.2d. at 770.

Even when a principal purchaser is known to the seller, the representations of the agent are relevant to the enforcement of specific performance. In *Nutter*, this court found the misrepresentations and wrongful acts of the agent could be attributed to the party seeking to enforce the contract,

particularly when the purchaser acquiesced in such actions. *Nutter*, 328 N.W.2d at 357-58. *Cf. Menzel v. Morse*, 362 N.W.2d 465, 475 (Iowa 1985) (holding an agent for both the buyer and seller in a real estate contract has a duty to disclose dual representation).

The facts here reveal Essex acted as an implied agent for Fareway. Essex came to Herrald with the option contract within a month after Fareway expressed an interest in the property. Essex went to Fareway with the signed option contract within two days after obtaining Herrald's signature. At the behest of Fareway, Essex obtained an amendment to the option contract deleting references to its intended use of the property for residential purposes and authorizing unrestricted commercial use for most of the property. Two days before exercising its option with Herrald, Essex entered into a real estate contract with Fareway, essentially making Essex the purchaser in name only.

The record also establishes Fareway used Essex to indirectly obtain what it could not obtain directly. Votava met with Fareway before approaching Herrald with an option to purchase the land. Although there is no direct evidence Fareway representatives told Votava of Herrald and Dennert's unwillingness to sell the property to Fareway, the two parties' subsequent words and conduct suggest Essex knew of Herrald and Dennert's position. Almost immediately after obtaining the option from Herrald, Essex proceeded to consummate a transaction for the same land with Fareway. Despite extensive contacts with representatives of Fareway throughout 1998, Votava at no time voluntarily disclosed to Herrald and Dennert that Fareway had an interest in the property. Even when Essex exercised its option to purchase the real estate, it did not

identify Fareway as the builder of the "proposed store" and the ultimate purchaser of the entire parcel. Herrald obtained this information only after initiating a call to Votava to learn more about the proposed store in the drawings and to express his disappointment. According to Herrald, Votava "said something like Cramer got to me."

We are convinced Essex's failure to disclose the identity of the true purchaser was not inadvertent. In a letter dated June 2, 1998, Fareway insisted its involvement in the transaction not be disclosed to Herrald and Dennert, stating "we want to make sure that the entire transaction does not go down the drain by raising too many flags with the current owners." True to its word, Fareway had no contact with Herrald and Dennert after Essex obtained the option, despite its significant involvement in drafting the amendment permitting commercial use of the property and its ultimate signature on a contract that left Essex as only a putative and momentary purchaser.

Essex suggests the confidentiality language in the June 2 letter represented Fareway's routine practice of using confidentiality clauses. It further suggests a confidentiality clause was particularly important here because Fareway was concerned a leak would upset Boone civic leaders who wanted Fareway to build its store downtown rather than in a more rural location such as the Herrald and Dennert site. However, Cramer conceded Fareway had not used a confidentiality provision in its previous twenty-eight transactions. Additionally, Cramer testified Fareway had conducted ongoing, fairly public negotiations for about six sites and had discussed the proposed store extensively with Boone's civic leaders. In light of the evidence of broad-based

community discussions about the store, we can discern no need for Fareway's insistence on keeping this particular transaction confidential from Boone's civic leaders. Indeed, the confidentiality language makes no mention of these leaders, citing instead the need to conceal this information from the owners. For these reasons, we are not persuaded by Fareway's explanation of the confidentiality clause.

Overwhelming circumstantial evidence establishes Fareway did not want Herrald and Dennert to know of its intentions because that knowledge would have derailed the entire transaction. *Cf. Wilden Clinic, Inc. v. City of Des Moines*, 229 N.W.2d 286, 292 (Iowa 1975) (noting circumstantial evidence may be utilized where fraud is alleged in equity cases). This is a case in which Essex purposefully concealed the true identity of the ultimate purchaser. *See Popejoy*, 241 Iowa at 760, 41 N.W.2d at 771 (stating, "[i]t is a salutary rule that one selling has a right to know who is buying."); 37 Am. Jur. Fraud § 29 (2000).

B. No Objection to Commercial Use. Essex nevertheless maintains it is entitled to specific performance because Herrald and Dennert did not object to a commercial use for part of the property. We disagree. Herrald believed Essex was exclusively interested in the development of residential housing. The language Essex included in its original option agreement supports his belief, as it makes no mention of any land use other than development of residential housing. Essex, however, points to a verbal agreement between Herrald and Votava that a portion of the property might be put to commercial uses. While Herrald conceded the existence of this verbal agreement, he testified Votava only told him, "there might be a little of the south end that he wouldn't be able to

build houses on, but he'd put in non-traffic, light office space, or something like that." According to Herrald, "that was agreeable with us because it wouldn't be extra traffic on the street." Even Votava admitted he did not discuss construction of a grocery store with Herrald. He stated, "I talked about alternative uses for the site which would be either officing, small retail, some commercially related uses on a piece that was the southern piece I wasn't going to use." Neither Herrald's nor Votava's testimony, therefore, lends support to Essex's contention that Herrald agreed to have a large grocery store placed on the property. Therefore, we reject Essex's contention that Herrald and Dennert acceded to a commercial use for a portion of the property and that such a concession entitles Essex to specific performance.

C. Affirmance of Agreement. Next, Essex contends Herrald and Dennert affirmed the agreement after learning of the proposed store, precluding them from now contending they were misled. Essex cites to the Restatement Second of Contracts, section 380, which provides:

The power of a party to avoid a contract for mistake or misrepresentation is lost if after reason to know of the mistake or of the misrepresentation if it is non-fraudulent or knows of the misrepresentation if it is fraudulent, he manifests to the other party his intention to affirm with respect to anything that he has received in a manner inconsistent with disaffirmance.

Restatement (Second) of Contracts § 380 (2) (1981).

We are not convinced Herrald and Dennert affirmed the agreement. Immediately upon learning of the proposed store, Herrald told Votava he was disappointed and perturbed. He also advised his first and second attorneys he was unhappy with the transaction and believed he had been misled. Although Herrald did not refuse to close the transaction, his attorney subsequently drafted

at least one deed containing a restriction that Essex would use the property "for construction of middle income, non-subsidized retirement housing facilities", as contemplated in the original option agreement. Additionally, Votava acknowledged that the parties continued to negotiate "the duration and qualities of a restrictive covenant to be placed upon the land" after Essex exercised its option to purchase. Therefore, by Essex's own admission, Herrald and Dennert did not affirm the contract after learning of the proposed store.

In the end, however, it matters little whether Herrald and Dennert affirmed the contract because a court sitting in equity need not, and indeed, will not, reward a party by ordering specific performance of a contract where that party conceals a material fact. See *Vermeulen*, 238 Iowa at 1042, 29 N.W.2d at 237; *Ellsworth*, 78 Iowa at 144, 42 N.W. at 630 (rejecting claim that party's acceptance of offer required specific performance). Essex not only concealed Fareway's involvement in the transaction but also concealed the fact that it agreed to sell the property to Fareway for \$15,000 an acre more than it agreed to pay Herrald and Dennert. Cf. *Vermeulen*, 238 Iowa at 1040-1041, 29 N.W.2d at 237 (noting property worth much more than price at which it was sold to undisclosed principal). Fareway's identity, if not the price, went to the heart of the transaction. Equity should not sanction concealment of this key fact.

We find it unnecessary to address the remaining arguments raised by the parties. The district court's decree ordering specific performance of the contract between Essex and Herrald and Dennert is reversed.

REVERSED.

Mahan, J., concurs; Huitink, P.J., concurs in the result only.