FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

285

MID-CONTINENT LUMBER DEALERS SUPPLY, INC.,

Plaintiff-Appellant,

vs.

CITY OF FORT DODGE, IOWA, DONALD HERR and SUZANNE HERR,

Defendants-Appellees.

8-312
87-1629

Appeal from the Iowa District Court for Webster County (No. 51039), Ronald H. Schechtman, Judge.

Plaintiff appeals a district court ruling dismissing its petition to set aside the sale of vacated property. **AFFIRMED.**

Dan T. McGrevey, of McGrevey & Sherman, Ft. Dodge, for plaintiff-appellant.

Maurice C. Breen, City Attorney, for defendant-appellee City.

Kurt L. Wilke, of Bennett & Wilke, Ft. Dodge, for defendants-appellees Herr.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ. Habhab, J., takes no part.

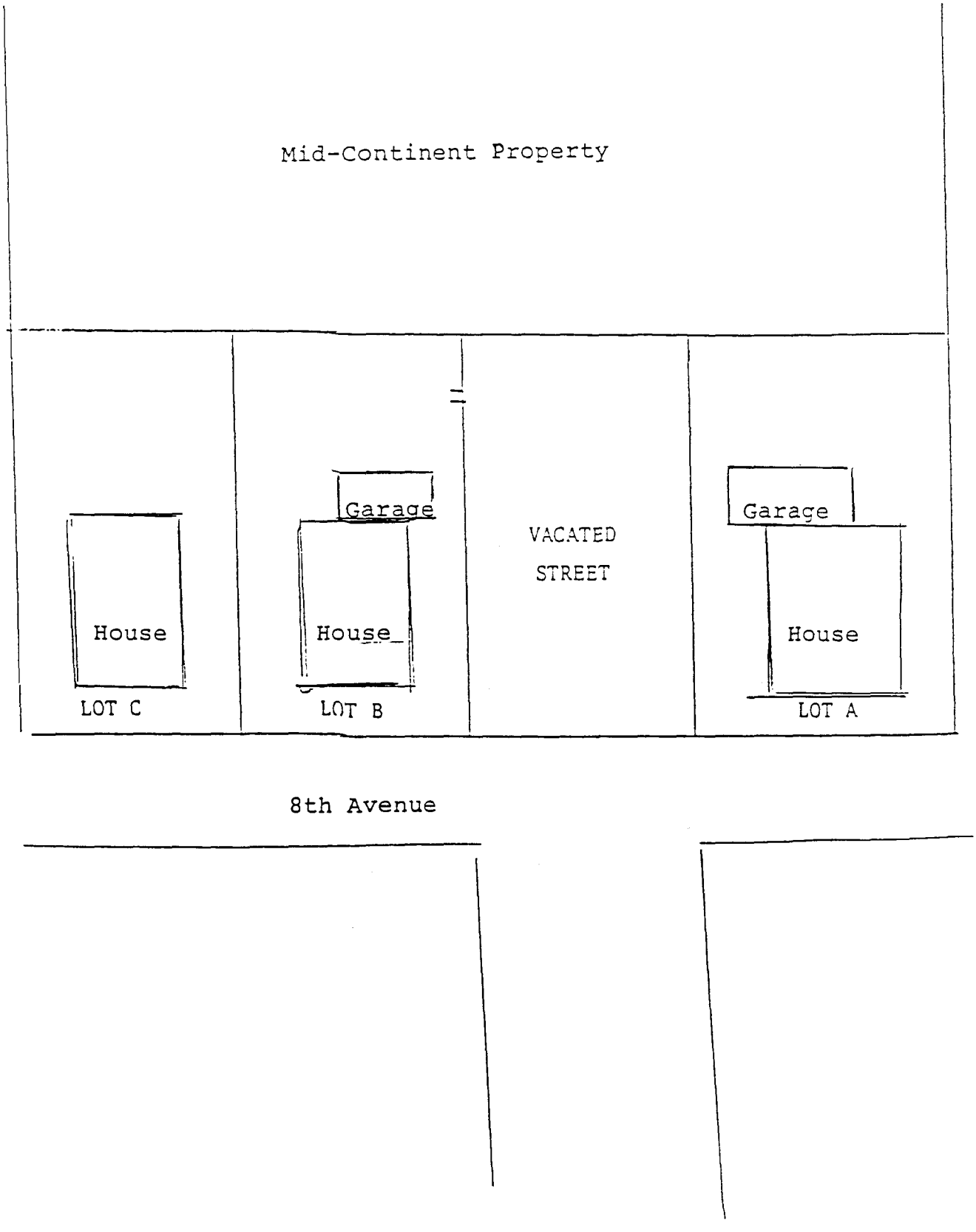
OXBERGER, C.J.

Plaintiff-appellant Mid-Continent Lumber Dealers Supply, Inc. (Mid-Continent) appeals the district court ruling dismissing its petition to set aside the defendant-appellee City of Ft. Dodge's sale of vacated property to defendants-appellees, the Herrs, and awarding the Herrs $3,000 damages on their counterclaim.

Mid-Continent contends the sale should be rescinded because (1) it was an illegal deprivation of its right to have reasonable access to its abutting property, and (2) the city only approved the sale on the condition the Herrs give Mid-Continent easements when the transfer was made and such easements were not provided.

Mid-Continent's petition was heard in equity. Our review of equity claims is 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 those findings. Iowa R. App. P. 14(f)(7). Having reviewed the record, we agree with the trial court's findings as follows.

Mid-Continent, in furtherance of expansion plans, purchased three city lots bordering its southern property line. On July 1, 1981, they requested the city vacate a portion of a street which separated two of these lots as shown in the following diagram.


Mid-Continent Property
Garage
House
House
VACATED
STREET
Garage
House
LOT C
LOT B
LOT A
8th Avenue

In late 1981 or early 1982 the city changed its policy regarding the sale of vacated property from selling such property only to adjacent landowners to allowing open bidding. The testimony at trial reveals Mr. Geagan, general manager of Mid-Continent, as well as other representatives from the company were well aware an open bidding procedure would be used before the property was vacated by ordinance on February 22, 1983. Mid-Continent bid $1,000 for the property. The Herrs bid $5,000. The property had been appraised at $5,500. Mid-Continent wrote a letter to the city approximately two days after the August 15, 1983 deadline for accepting bids asking the city to rescind the vacation and reopen the property as a street. The city council discussed its options regarding the property at two meetings on August 23, and August 30, 1983. Mr. Geagan and Mr. Herr were present at both meetings. At the August 30, 1983 meeting the council voted to accept the Herrs' bid with proposed ingress and egress easements for Mid-Continent's adjoining property.

On September 13, 1983, Mid-Continent sought and received a stay order regarding the sale to be effective upon posting of a $5,000 bond. A bond was not posted and the city conveyed the property to the Herrs by warranty deed recorded October 11, 1983. Mid-Continent posted bond on October 17, 1983, and an injunction restraining the Herrs from altering the property was issued on October 26,

1983. On December 16, the injunction was dissolved and Mid-Continent's Writ of Certiorari to rescind the sale was changed to a Petition in Equity. Due to the freezing of the ground the Herrs were not able to begin construction as planned and counterclaimed for damages caused by this delay.

I.

We find Mid-Continent's contention the sale of the vacated property to the Herrs illegally deprived the company of access to its property without merit. As the trial court noted, if any action by the city deprived Mid-Continent of such access it was the vacation process. Mid-Continent initiated the vacation, was aware of the bidding procedure which would apply to the purchase of the property, and yet did not oppose the vacation. The record indicates prior to the vacation Mid-Continent changed personnel and decided to cancel expansion plans. The city council was not told of the change in plans. Following the vacation, Mid-Continent did not seek damages claiming a loss of access or "taking" the property. See Iowa Code section 364.15 (1983) and Strom v. City Council Bluffs, 189 N.W.2d 522 (1971). Instead, Mid-Continent chose to enter a low bid for the property. We find no evidence the city failed to follow proper procedures when vacating the property or when seeking and accepting bids. Based on these facts, we cannot say the city acted illegally when it

vacated the property and, not suprisingly, accepted the Herrs' larger development bid. See generally Bucker v. Iowa County Bd. of Supervisors, 240 N.W.2d 686 (Iowa 1976).

II.

Mid-Continent next contends the city approved the sale only on the condition the Herrs give written egress and ingress easements to Mid-Continent simultaneously with the transfer of the deed. This contention is based on the following minutes of the August 30, 1983 council meeting:

> . . . Moved by Councilman J. Snyder to amend motion [to accept Herrs' bid] to include easement propositions that Mr. Herr made and that he and the city attorney get together and the easement propositions and details spelled out in writing to accompany the transfer papers.

Mid-Continent contends because Mr. Herr did not file or give them written easements when the warranty deed was filed on October 11, 1983, a condition precedent was not fulfilled and the sale is invalid. National Farmers Org'n, Inc. v. Lias, 271 N.W.2d 751 754 (Iowa App. 1978). After carefully reviewing the minutes and transcript from the meeting and the testimony of the witnesses, we affirm the trial court's determination simultaneous transfer of written easements and title papers was not a condition precedent to the sale of the property.

When determining whether a condition precedent exists, the court must look at the intention of the parties as expressed in the entire transaction. Mosebach v. Blythe, 282 N.W.2d 755, 759 (Iowa 1979). See also Gildea v. Kapenis, 402 N.W.2d 457, 459 (Iowa App. 1987).

As representative of Mid-Continent, Mr. Geagan rejected all easement proposals by Mr. Herr right up to the passage of the motion to accept Mr. Herr's bid. The transcript of the August 30, 1983 council meeting indicates the city attorney told Mr. Geagan that with passage of the amended sale ordinance the proposed easements would have to be given to Mid-Continent if they wanted them. Mr. Geagan testified he did not ask for the easements until February 1984 at which time Mr. Herr provided written ingress and egress easements, substantially, if not exactly, like those proposed in the final council meeting.

Mid-Continent's original Petition of Certiorari filed September 14, 1983, asked only to rescind the sale or require its approval on easements to be given. At trial, Mr. Geagan agreed the easements discussed and made a part of the motion to sell were not subject to his approval. Mid-Continent's actions indicated a clear rejection of the proposed easements and no intention to wait and see what easements might be provided when transfer papers were filed. The trial court correctly determined under such facts Mid-Continent is estopped from claiming rights to easements it never expressed an interest in except to invalidate a contract. Keokuk State Bank v. Eckley, 354 N.W.2d 785, 792 (Iowa App. 1985).

Even if we were to agree with Mid-Continent that the sale is voidable for failure of a condition precedent, the

equities of this situation would not justify rescission of the sale. The Herrs have built a house upon the property, as required by their bid, and given Mid-Continent easements which allow access to the garages if sections of both properties are used. Courts of equity do not look favorably upon forfeitures of sales contracts. Chicago, R.I. & P. R.R. Co. v. City of Iowa City, 288 N.W.2d 536, 541 (Iowa 1980); Lovlie v. Plumb, 250 N.W.2d 56 (Iowa 1977). Mid-Continent was actively involved in the vacation and bidding process and was fully aware of the chance it could be outbid on the vacated property.

III.

The trial court awarded the Herrs approximately $3,443 for increased construction costs due to delays and attorney fees resulting from the injunction. Mid-Continent argues such damages should not be awarded as the Herrs failed to minimize or mitigate their damages. DeWaay v. Muhr, 160 N.W.2d 454, 456-57 (Iowa 1968). The basis of this argument is if the Herrs had filed their easements as required by the city council motion the injunction would not have been sought and the damages not suffered. We are not convinced the filing of easements would have stopped Mid-Continent from trying to invalidate the sale of the property or seeking the injunction. A stay order regarding the sale was sought before the transfer of title papers was made absent the easements. Having determined the sale ordinance

did not require simultaneous filing of written easements Mid-Continent's argument fails. The injunction was dismissed on grounds of failure to have proper notice and hearing. We find sufficient evidence in the record to support the trial court's award of damages. The trial court is affirmed and costs of the appeal awarded to defendants-appellees.

AFFIRMED.