IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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IN THE MATTER OF
LLOYD E. LINDSLEY,

Plaintiff-Appellant,

vs

WILLARD D. ANDERSON and MARY T. ANDERSON,

Defendants-Appellees.

5-390
84-1760

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

Plaintiff appeals from trial court's ruling dismissing his action for specific performance of a real estate contract. **REVERSED AND REMANDED.**

M Wayne Oltooge, Clear Lake, for plaintiff-appellant.

Herman P. Folkers and David M. Nelsen of Nelsen and Folkers, Mason City, for defendants-appellees.

Considered by Oxberger, C.J., Snell, and Sackett, JJ.

SACKETT, J.

Plaintiff Lloyd E. Lindsey[1] brought suit claiming he and the defendants Willard D. and Mary T. Anderson had entered into an agreement whereby plaintiff and defendants were to be 50-50 owners in a business and real estate known as the Family Bowl. Defendants denied the contract.

This matter was tried to the court. Plaintiff's evidence was introduced by way of stipulated testimony[2] of a Mr. Burkheimer, a realtor and former employee of Lindsley, and the introduction of exhibits. Defendant Mary Anderson also testified as a plaintiff witness. Defendants presented no evidence.

The stipulated testimony and exhibits show plaintiff Lloyd E. Lindsley purchased a bowling alley in August of 1981 on an installment contract from defendant Willard D. Anderson.[3] The purchase price was $250,000. The contract provided for $10,000 down; five monthly payments on September 15, October 15, November 15, and January 15, of $2,100; a $30,000 payment plus interest on October 1, 1981; and a schedule for the remaining balance. Willard D. Anderson was still purchasing the property on contract from a Severson, and the installment contract between Anderson and Lindsley provided the $2,100 monthly payments were to be delivered to Severson. An addendum outlining the Andersons' obligations to Severson was made a part of the Anderson-Lindsley contract.

After the purchase Lindsley operated the business and made improvements on the property. His intent was to fix up the property and then sell it.

On October 15, 1981, the Anderson caused Lindsley to be served with a notice of forfeiture of real estate contract. The notice alleged Lindsley had failed to comply with the contract in the following particulars:

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[1] Lindsley is now deceased but his estate has been substituted as plaintiff.

[2] Defendant's objection to the stipulated testimony will be discussed later in the opinion.

[3] Defendant Mary T. Anderson did not own the property but joined to release her dower interest.

(1) The $30,000 plus accrued interest payment due October 1, 1981, was not made,
(2) The $2,100 payment due October 15, 1981, was not made.

On October 20, 1981, Lindsley entered into a contract with Richard and Phyllis Fausnaugh wherein Lindsley would sell and the Fausnaughs would buy the bowling alley for $400,000.[4]

On November 16, 1981, Lindsley paid Severson $2,100. Anderson then filed an affidavit in support of forfeiture and sold the property to the Fausnaughs for $400,000.

The evidence of oral negotiations between Lindsley and Anderson are in the record by virtue of the stipulated testimony from Burkheimer. After all the stipulated testimony was entered in the record, defendant made an objection to all the testimony contending that the statute of frauds rendered it inadmissible. The trial court did not rule on the issue of the admissibility of the testimony. The court did determine there was insufficient evidence in the record to determine the duties of each party, including the consideration to be paid by plaintiff and the terms under which it would be paid. The trial court dismissed plaintiff's petition.

We first determine whether there was sufficient admissible evidence in the record to establish a contract for 50-50 ownership. Oral contracts are not prohibited or void; if objection is interposed they are merely unprovable unless an exception applies. Meylor v. Brown, 281 N.W.2d 632, 634 (Iowa 1979). The statute of frauds does not forbid oral contracts or render them invalid. It relates merely to the manner of proof. Recker v. Gustafson, 279 N.W.2d 744, 748 (Iowa 1979).

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[4] Anderson would not consent to the contract because he wanted to get back in the bowling alley business.

Lindsley in argument contends that he relied on the terms of the oral agreement, which would ultimately assure him of 50 per cent ownership, in that he did not exercise his rights to resist the forfeiture and he made a $2,100 payment to Severson. He asserts that a payment of purchase money renders Iowa Code section 622.33 applicable and thus takes the agreement out of the statute of frauds.

The term purchase money as used in the statute means the consideration received in whatever form it may exist. Devin v. Himer, 29 Iowa 297 (1870). The true basis of the doctrine of part performance, according to the overwhelming weight of authority, lies in the principles of equitable estoppel and fraud. Davis v. Davis, 261 Iowa 992, 1002, 156 N.W.2d 870, 876 (1968). It would be a fraud upon the plaintiff if the defendant were permitted to escape performance of his part of the oral agreement after he has permitted the plaintiff to perform in reliance upon the agreement. Id. "It has been a long-recognized rule of this court that any conduct, acts, or circumstances offered to show 'part performance' in order to bring a case within the exception of the statute of frauds must be referable exclusively and unequivocally to the contract." Id. at 1002-03, 156 N.W.2d at 877; see In re Estate of Lindsey, 254 Iowa 699, 711, 118 N.W.2d 598, 605 (1962).

The trial court in its findings determined there was no evidence of any consideration to be paid by Lindsley to Anderson. We agree that there was no evidence of additional consideration to be paid. However, the record clearly shows both plaintiff and defendant to have had substantial equities to contribute to the 50-50 arrangement at the time of agreement.

We look at what the uncontradicted evidence shows the parties' respective equities to be prior to forfeiture based on the Fausnaugh contract establishing

fair market value. The only evidence of the value of the property at the time of the agreement is the Fausnaugh offer. There is evidence that the offer was made and that the property ultimately was sold to the Fausnaughs at that price.

Lindsley

$250,000 purchase
10,000 down payment
2,100 principal 9-15-81
$237,900 Lindsley owed Anderson at time of alleged contract

$400,000 Fausnaugh contract
237,900 Lindsley owed Anderson
$162,100 Lindsley's equity at time of alleged contract

Anderson

$140,000 Anderson owed Severson
2,100 principal 9-15-81
$137,900 Anderson owed Severson at time of alleged contract

$237,900 Lindsley owed Anderson
137,900 Anderson owed Severson
$100,000 Anderson's equity at time of alleged contract.

The uncontroverted facts show when the notice of forfeiture was served Lindsley had substantial equity in the contract. Lindsley took no action to protect this equity. According to the alleged agreement, he was to take no action after the forfeiture. Lindsley performed his part of the bargain. He did not enforce his rights under the contract. Consideration is amply proven by his performance. See In re Estate of Lindsey, 254 Iowa 699, 709, 118 N.W.2d 598, 604 (1962). We determine that partial performance has been shown, and we should consider the evidence introduced as to the oral agreement. Id.

We must next determine whether on our de novo review we find that there was an oral contract. Anderson presented no evidence and none of plaintiff's evidence was contradicted. If evidence is uncontradicted, we must determine if the circumstances shown impeach the testimony. See First National Bank v. Dutton, 199 Iowa 462, 473, 202 N.W. 228, 231 (1925).

We have reviewed the entire record, especially the exhibits, and determine t supports the plaintiff's claim. Under the facts and circumstances, plaintiffs' laim is logical, and we determine the agreement *should be enforced.*

We therefore determine:

1. The land and property to be sold are readily definable. Lindsley and Anderson entered into a written contract which described the land. There is no question but that the property which was to be owned 50-50 was the property defined in the contract.
2. The parties were to own the equity 50-50 subject to Severson's interest. The parties were both advised as to the nature and extent *of the Severson interest, it having* been clearly defined in their written contract.

We therefore reverse the trial court and hold that as of October 15, 1981 the plaintiffs and defendant shall each own an undivided one-half interest in the real estate as tenants-in-common subject to the Severson contract. We remand to the trial court for further orders consistent with this opinion.

REVERSED AND REMANDED.

All judges concur except Oxberger,C.J., who dissents.

I dissent.

According to section 622.32(3) of the Code, oral evidence of the existence of a contract will not be competent when the contract involves conveyance of real estate, and instead the agreement must be in writing. The exception to the Statute of Frauds which plaintiff claims applies here is found at section 622.33 when part performance of the claimed agreement occurs. Plaintiff claims his action in paying the $2100 on the Severson contract after the forfeiture notice is part performance. He further says attempts to obtain a loan to pay for the remodeling and to obtain bookkeeping services are evidence of defendants' acknowledgment of the agreement.

As the court and defendants point out, it is far from clear the payment of $2100 was made because of an oral agreement, and not instead made as an attempt to avoid forfeiture or as a part of the original contract. When part performance is claimed, the acts by plaintiff must be unequivocally referable to the verbal contract. Fairall v. Arnold, 226 Iowa 977, 987, 285 N.W. 664, 669 (1939). If the acts are of a doubtful or equivocal character, and might have been done for a purpose other than part performance, the exception to the statute does not apply. In re Estate of Lindsley, 254 Iowa 699, 711, 118 N.W.2d 598, 605 (1962). I agree with the trial court that the actions of the parties are not unequivocal indications of part performance, and in fact are more likely interpreted as an attempt to avoid forfeiture.

The plaintiff here argued that his payment showed part performance of the oral contract to take it out of the statute of frauds. The majority finds, however, that it was plaintiff's failure to exercise his rights under the 30-day forfeiture period that was part performance. It is again not clear that this period expired because of any oral agreement between the parties. It is more likely

it expired because although he tried, there was nothing plaintiff could do to avoid the forfeiture. He would have had to remedy the default, which involved payment of over $37,000. All the evidence shows the plaintiff was not in a position to do this. His inaction during the 30-day period is not an act of such unequivocal character that it supports the claim of part performance of an oral contract.

The trial court expressed sympathy for the plaintiff, but found the evidence insufficient to allow the remedy sought. I would affirm the trial court.