IN THE COURT OF APPEALS OF IOWA

No. 0-96 / 89-746

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JAMES L. MUFF, DANIEL L. MUFF and CARL J. MUFF,

Appellants/Cross-Appellees,

vs.

LINDA RICKERS,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Crawford County, Terry L. Huitink, Judge.

The Muffs appeal a district court judgment denying their demand for specific performance of a real estate contract and awarding Rickers $9945 as the fair rental value of the land. **REVERSED AND REMANDED.**

Reed H. Reitz of Reimer, Lohman & Reitz, Denison, for appellants.

Terry Rickers of Brierly Law Office, Newton, for appellee.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

The Muffs appeal a district court judgment denying their demand for specific performance of a real estate contract and awarding Rickers $9,945 as the fair rental value of the land. Linda Rickers cross-appeals claiming that the fair rental value awarded was inadequate.

Linda Rickers is the owner of farmland in Crawford County. On March 24, 1988, Rickers and the Muffs negotiated and signed a purchase agreement for the sale of this property. Linda's husband, Robert, has refused to sign the agreement. The agreement contained the following provision: "Sellers are planning that a tax-free exchange on the property will be approved by the seller's attorney."

The Muffs paid the down payment and have been in possession of the land since April 1988. However, the real estate transaction was never closed and the tax-free exchange also did not occur.

In February 1989, the Muffs brought this action seeking specific performance of the real estate contract. Following trial, the district court entered its judgment and decree. The court found the provision for a "tax-free exchange" a condition precedent to the contract. As such, the contract was not valid since this exchange did not take place. The court then determined that the fair rental value of the property was $85 per tillable acre and entered judgment accordingly. No attorney fees were awarded. The Muffs appealed and Rickers cross-appealed.

Our scope of review of an action for specific performance of a real estate purchase contract is de novo. Gildea v. Kapenis, 402 N.W.2d 457, 459 (Iowa App. 1987). In equity cases, especially when considering the credibility of witnesses, we give weight to the fact findings of the trial court, but we are not bound by them. Id. The plaintiff's burden in a suit for specific performance is to prove by clear, satisfactory, and convincing evidence the terms of the contract declared upon in his or her pleadings. Id. The availability of specific performance rests in the sound discretion of the court. Id.

Rickers contends, and the trial court held, that the following language included in the contract was a condition precedent to performance of the purchase agreement. The language reads: ". . . Sellers are planning that a tax-free exchange on a like property will be approved by Sellers' attorney." Our task is to determine whether the parties intended this language to create a condition precedent to the performance of the contract. When we are asked to interpret an agreement which the parties have entered into themselves, our object is to ascertain the meaning and intention of the parties as expressed in the language used. Chard v. Iowa Machinery & Supply Co., 446 N.W.2d 81, 83 (Iowa App. 1989). Our duty is to give effect to the language of the entire agreement in accordance with its commonly accepted and ordinary meaning and not make a new agreement for the parties by arbitrary judicial construction. Id. Doubtful language in a written instrument will be construed against the party which selected it. Gildea, at 459.

Conditions precedent are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, and before the usual judicial remedies are available. Id. A determination that a condition precedent exists does not, however, depend on the particular form of the words used, but rather depends upon the intention of the parties gathered from the language of the entire instrument. Id.

An examination of the record, the contract language, and the equities involved, show that the language was not a condition precedent to the performance of the contract. The language itself only reads, "sellers are planning a tax-free exchange." The sellers chose the language and if they did not wish to sell the land without a tax-free exchange taking place, they could have used any number of other terms. Based on the language used there is certainly no condition precedent.

The record shows that the Muffs were not aware the failure of a tax-free exchange would void the contract, therefore they could not have intended the language to be a condition precedent. In addition, while Rickers claimed to have intended the language to act as a condition precedent, her actions do not support this contention. Rickers allowed the Muffs to move onto the farm and to till the ground for over a year without protest. The Muffs did not slip onto the land unnoticed. They continued to call Rickers' agent to inquire about when the official transfer of ownership would take place. However, they got what appeared to be the "run around." Clearly, the record is devoid of any facts showing the parties intended the language to be a condition precedent to the performance of the contract.

Finally, equity is on the side of the Muffs. If we construe this language as a condition precedent, it will give Rickers the option of enforcing the contract or allow her the possibility of voiding the contract as she is now trying to do. This would give one party too much control over the viability of the contract. If Rickers truly intended the contract to be void without a tax-free exchange, she could have discovered whether such an exchange was possible before the contract was signed. Instead Rickers only wished to make it clear that she was "planning" on such an exchange. The language is mere surplusage and cannot constitute a condition precedent sufficient to void the contract. The Muffs are ready to live up to their end of the bargain and we remand to the trial court to require Rickers to live up to hers. We reverse the trial court and grant the Muffs' request for specific performance.

We note that the contract was not signed by Robert Rickers. We do not address the issue of Robert's remaining inchoate right of dower. Robert is not a party to this action. Our decision does not purport to extinguish his rights in the property.

The plaintiffs' request for attorney fees must also be granted. When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as part of the costs a reasonable attorney's fee to be determined by the court. Iowa Code § 625.22. The contract specifically provided for costs and attorney fees and, under section 625.22, they must be allowed. We are also required to grant reasonable attorney fees for this appeal. Based on the affidavit submitted by appellants, we grant $3,000 for attorney fees.

Rickers' cross-appeal for increased rental value is without merit as she is no longer entitled to any rental value. We vacate the trial court's judgment of $9,945 and reverse and remand to the trial court for action consistent with this opinion.

REVERSED AND REMANDED.