IN THE COURT OF APPEALS OF IOWA

No. 1-357 / 90-1950

FILED
JAN 29 1992
CLERK SUPREME COURT

JOHN R. GREENE and GERALD J. GREENE,

Appellants,

vs.

GALE J. CONRAD,

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Appellee.

Appeal from the Iowa District Court for Keokuk County, Richard J. Vogel, Judge.

Appellants challenge the district court's ruling which refused to compel specific performance of a contract to purchase a farm. **AFFIRMED.**

William L. Meardon and Timothy J. Krumm of Meardon, Sueppel, Downer & Hayes, Iowa City, for appellants.

Allan C. Orsborn of Keith, Orsborn, Bauerle, Milani & Neary, Ottumwa, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ.

OXBERGER, C.J.

Plaintiffs John R. Greene and Gerald J. Greene (the Greenes) brought this suit for specific performance of an alleged oral contract to purchase farmland in Keokuk County, Iowa. The land in question had been owned by the Schmidts, but in late 1988 it was obtained by Metropolitan Life Insurance. Metropolitan sought to sell the land.

Defendant Gale Conrad placed a bid on March 3, 1989, for $475,000. The Greenes were interested in purchasing only 410 acres of the 680-acre farm. Two members of the Schmidt family were interested in purchasing the rest of the land. Together this group placed a bid on March 6, for $480,000. However, Metropolitan informed the Greene-Schmidt group that the multiple party offer was not acceptable. Metropolitan proposed a telephone auction of the land.

In order to avoid a bidding war, the Greenes approached Conrad. Plaintiffs contend that an oral contract was then entered into with Conrad whereby the Greene-Schmidt group would withdraw their bid, and then after Conrad purchased the land for $475,000, he would sell it in three parcels to the Greenes and Schmidts for a total of $485,000. Furthermore, if either the Greenes or the Schmidts were unable to perform under the agreement, Conrad would retain that portion of the property.

Conrad testified he was never aware the Schmidts were to be involved in the proposed deal. He stated he believed the

terms of the agreement to be that the Greenes would pay him the full amount of the down payment on March 7, or the proposed deal would be off.

On March 7, 1989, the Greene-Schmidt group did withdraw their bid. The Greenes gave Conrad their portion of the down payment. However, the Schmidts were unable to get financing and they could not come up with their portion of the down payment. Metropolitan sold the land to Conrad. Conrad returned the Greenes' checks on March 9, 1989.

The Greenes then brought this suit seeking specific performance of the alleged oral contract. The district court found there was not the requisite mutuality of agreement to establish a contract due to a mutual mistake. The Greenes' case was dismissed. They now appeal.

Specific performance of a contract is a remedy resting in the equitable discretion of the court. Becker v. Central States Health & Life Co., 431 N.W.2d 354, 356 (Iowa 1988). Acting in equity, we review the district court judgment de novo. Id. We accord weight to the trial court findings of fact, especially when the credibility of witnesses is involved. Severson v. Elberon Elevator, Inc., 250 N.W.2d 417, 420 (Iowa 1977).

Specific performance is available when the contract involves property which is unique. Berryhill v. Hatt, 428 N.W.2d 647, 657 (Iowa 1988). Real estate is assumed to be unique. Id. Where specific performance of an oral

agreement affecting real estate is sought, plaintiffs have the burden to prove the contract by a preponderance of clear, satisfactory and convincing evidence. Recker v. Gustafson, 279 N.W.2d 744, 750 (Iowa 1979).

To enter into a contract, the parties must manifest a mutual, unequivocal assent to the terms of the contract. McCarter v. Uban, 166 N.W.2d 910, 913 (Iowa 1969). A court will not grant specific performance unless the terms of the contract are so expressed that the court can determine with reasonable certainty what is the duty of each party and the conditions under which performance is due. Tri-State Investment Co. v. Henryson, 179 N.W.2d 362, (Iowa 1970).

One of the grounds for denying specific performance is where there was mistake on the part of the defendants, even though such mistake was not such as to warrant invalidating the contract. Bauman v. Nutter, 328 N.W.2d 354, 356 (Iowa App. 1982). A mistake of fact is one of the fundamental grounds of equitable relief. Harding v. Willie, 458 N.W.2d 612, 614 (Iowa App. 1990). An agreement may be set aside because of a mutual mistake between the parties as to their relative and respective rights. Id. The mistake must be both mutual and material. Id.

In the present case, the parties were mutually mistaken as to the terms and conditions of the agreement. The Greenes believed they could pay only a portion of the down payment to Conrad on March 7, 1989, and the agreement would

still be effective. On the other hand, Conrad believed the agreement would not be effective if the Greenes did not pay the entire amount of the down payment to him on March 7. In view of this mutual mistake, we believe specific performance would not be appropriate in this case. We affirm the decision of the district court.

AFFIRMED.