IN THE COURT OF APPEALS OF IOWA

No. 8-129 / 96-2139

JEFFREY P. HEDQUIST,

Plaintiff-Appellee,

vs.

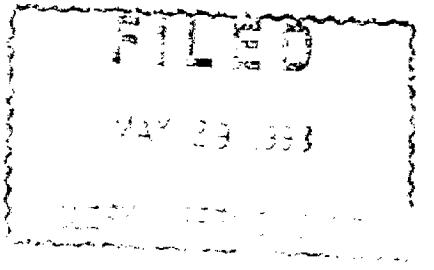
DONALD L. ZILLMAN,

Defendant-Cross-Claimant/Appellant,

and

DONALD M. ULM and CENTURY 21 HAYES REALTY,

Defendants to Cross Claim/Appellees.



Appeal from the Iowa District Court for Jefferson County, James P. Rielly, Judge.

Donald Zillman appeals from a district court order requiring specific performance of a real estate contract. **AFFIRMED.**

Michael C. Vinyard of Vinyard & Curran, Ottumwa, for appellant.

Kenneth J. Ketterhagen of Kenneth J. Ketterhagen, P.C., Fairfield, for appellee Hedquist.

Joel D. Yates of Clements Law Firm, Oskaloosa, for appellees Ulm and Century 21.

Heard by Sackett, P.J., and Streit and Mahan, JJ.

SACKETT, P.J.

Defendant-appellant Donald L. Zillman appeals from a trial court ruling in an action for specific performance ordering he perform under a real estate contract [1] to sell his homestead to plaintiff-appellee Jeffrey P. Hedquist and pay a commission to defendants-appellees realtor Donald M. Ulm and Century 21 Hayes Realty. Defendant contends he did not sign a contract to sell his home and, consequently, the trial court incorrectly ordered the sale and payment of real estate commissions. We affirm.

A request for specific performance of a contract is an action in equity and we review de novo. Iowa R. App. P. 4; *Breitbach v. Christenson*, 541 N.W.2d 840, 843 (Iowa 1995); *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. *Gildea*, 402 N.W.2d at 459. 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. *H & W Motor Express v. Christ*, 516 N.W.2d 912, 913 (Iowa App. 1994). The decision to grant specific performance is within our sound discretion; it is not to be granted as a matter of right. *Lange v. Lange*, 520 N.W.2d 113, 117 (Iowa 1994); *Berryhill v. Hatt*, 428 N.W.2d 647, 657 (Iowa 1988); *Youngblut v. Wilson*, 294

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[1] A copy of plaintiff's Exhibit 1, entitled Purchase Agreement, is attached to this opinion.

N.W.2d 813, 817 (Iowa 1980). It is to be granted only in extraordinary, unusual cases in which irreparable harm will result in its absence, not as a matter of grace. *Barbers Local 552 v. Sealy*, 368 Mich. 585, 588, 118 N.W.2d 837, 839 (1962). In determining whether to grant a request for specific performance, we must examine the particular facts of the situation and will generally grant the request when it would subserve the ends of justice and deny to do so where it would produce a hardship or injustice on either party. *Vermeulen v. Meyer*, 238 Iowa 1033, 1043, 29 N.W.2d 232, 237 (1947). We presume real estate possesses a unique quality such that mere monetary damages may not always constitute adequate remedy for a breach of contract. *See Moser v. Thorp Sales Corp.*, 256 N.W.2d 900, 907 (Iowa 1977); *Severson v. Elberon Elevator, Inc.*, 250 N.W.2d 417, 423 (Iowa 1977); *Dee v. Collins*, 235 Iowa 22, 24, 15 N.W.2d 883, 885 (1944). A homestead right is peculiarly favored and, as a general rule, there can be no operative conveyance unless the mode pointed out by the statute is pursued with reasonable strictness. *In re Estate of Gustafson*, 551 N.W.2d 312, 314-15 (Iowa 1996); *Sharp v. Bailey*, 14 Iowa 387, 390 (1862).

The facts basically are without dispute. Defendant contracted with defendant Donald L. Ulm, a licensed real estate broker, to sell his home for $49,900. Peter Wickliff, a licensed real estate broker, obtained an offer on June 15, 1995, from plaintiff to purchase defendant's home for $40,000. The offer expired if not accepted by June 16, 1995, and provided for $500 earnest money which plaintiff paid with a

check made payable to Century 21 Trust Account. The offer was contingent on plaintiff acquiring acceptable financing within thirty days.

Plaintiff's signed offer was then delivered to Ulm, who presented it to defendant. Defendant crossed out the sale price of $40,000 and wrote in $49,500. Defendant crossed out the date June 16, 1995 and wrote in June 19, 1995. Defendant placed his initials by each change but did not sign the purchase agreement after the words "The foregoing offer is accepted . . . ." on the line designated "Seller and Owner."

Ulm presented the purchase agreement to Wickliff. Wickliff met with plaintiff, who initialed the change to $49,500 and signed the offer as being accepted on June 16, 1995. Ulm received the agreement back from Wickliff about June 16, 1995. Ulm telephoned defendant, who was not home. Ulm left a message on the answering machine saying, "Congratulations. You have sold your home."

Later in the week, defendant told Ulm he did not want to sell. Plaintiff sued for specific performance on September 26, 1995, contending he had accepted defendant's counteroffer to purchase and he had a loan commitment, but defendant refused to perform under the terms of the purchase agreement and refused to sell the real estate to plaintiff. Plaintiff asked for specific performance of the contract.

Defendant answered affirmatively alleging he never accepted the counteroffer and told the realtor he would not accept it. Defendant also filed a cross-claim for

indemnity against cross-claim defendants Ulm and Century 21 Hayes Realty contending Ulm had told him the agreement could not be enforced against him unless he signed it. The cross-claim defendants subsequently included a claim for a six percent commission on the sale.

The trial court found the contract binding and held a signature could be made by the use of initials. The trial court found when plaintiff initialed the price change and signed it as Buyer, there was a completed contract. The court ordered specific performance of the purchase agreement. The court declined to award plaintiff attorney fees. It found defendant had not proven his cross-claim. Following the filing of a motion to amend and enlarge its finding, the trial court amended the decree to find that Ulm and Century 21 Hayes Realty should be entitled to a real estate commission on the sale.

Defendant contends the trial court erred in compelling him to sell his homestead because there was no written document signed by him as required by Iowa Code section 622.32. Defendant contends when the offer was not returned to him for a signature after plaintiff signed it, there was no valid contract. Plaintiff contends defendant presented a counteroffer which he accepted.

Defendant argues there is no evidence it was intended his initials at the points of clarification were intended to be considered his signature agreeing to the sale. Plaintiff contends defendant's initials meet the definition of a signature or writing.

Iowa Code section 4.1(39) provides:

> The words "written" and "in writing" may include any mode of representing words or letters in general use. A signature, when required by law, must be made by the writing or markings of the person whose signature is required.

Iowa Code § 4.1(39) (1995).

Defendant's initials were a sufficient writing or marking to serve as defendant's signature. *See Greenland v. Carter*, 219 Iowa 369, 373-74, 258 N.W. 678, 680 (1935); *see also Burns v. Burrows*, 196 Iowa 1048, 1056, 196 N.W. 62, 65 (1923) (court found an agent signed a writing by the use of his own initials).

Our inquiry does not end here. Defendant's initials appeared by the changes. Yet, the contract form, after setting out the terms of sale, provides, "If this offer is not accepted by the Seller on or before 6-19-95, it shall be null and void." Additionally, no signature or initial of defendant appears following the contract words, "The foregoing offer is accepted this 16 day of June 19 95." Defendant contends the absence of his mark or signature on this line defeats plaintiff's claim.

We disagree with defendant on this issue. It is not necessary the signature be at the foot of an instrument. *See Town of Grundy Center v. Marion*, 231 Iowa 425, 430, 1 N.W.2d 677, 679-80 (1942). Looking at the facts of the transaction and the placement of defendant's initials, we find the document is sufficient to meet the requirements of section 622.32. We affirm the trial court on this issue.

Plaintiff contends he should have had attorney fees because they were requested and provided for in the contract. He also asked for costs, expenses, and reasonable attorney fees in proving the truth of requests for admission which defendant had denied earlier. Plaintiff's brief fails to show where error was preserved in the trial on either issue. *See* Iowa R. App. P. 14(a)(5).

We find on our own review the trial court addressed the issue of attorney fees finding it was unable on the evidence to determine attorney fees that might be awarded. We review this finding for an abuse of discretion. *In re Marriage of Whalen*, 569 N.W.2d 626, 631 (Iowa App. 1997). The trial court did not abuse its discretion. The issue of expenses for proving the truth of requests for admission not having been presented to the trial court, we find error was not preserved and do not address it. *State v. McCright*, 569 N.W.2d 607, 607-08 (Iowa 1997).

We affirm.

AFFIRMED.