IN THE COURT OF APPEALS OF IOWA

MERLYN V. BOYKEN,)

Plaintiff-Appellee,) Filed August 26, 1982 236

vs.)

RICHARD D. FECKERS, and)
FARMERS STATE BANK, JESUP,)

Defendants-Appellants.) 2-210 / 2-66688

Appeal from Buchanan District Court - William G. Klotzbach, Judge.

Defendant appeals from a judgment for plaintiff in this action to reform the payment terms of a real estate contract. REVERSED AND REMANDED WITH DIRECTIONS.

Robert J. Pattee, Independence, Iowa, for defendant-appellant.

Roger H. Ivie and Paul E. Horvath, Des Moines, Iowa, for plaintiff-appellee.

Considered en banc.

PER CURIAM

Defendant Feckers appeals from a judgment for plaintiff in this action to reform the payment terms of a real estate contract. He claims that plaintiff failed to establish either fraud or mistake as a basis for reformation and that, since plaintiff was in default under the contract terms, defendant's request for rescission of the contract should have been granted. Since this is an action in equity, our review is **de novo.** Iowa R. App. P. 4. We reverse the decision of the trial court and remand with directions to dismiss plaintiff's petition.

Boyken filed his petition in equity on February 25, 1980. In it he alleged that he was the high bidder in a December 29, 1979, auction sale of Feckers' farm land on a 160-acre tract—$2,025 per acre, or a total bid of $324,000. According to the terms of the sale, Boyken made a 10% down payment on the sale date, which was to be followed by an additional 15% down payment on March 1, 1980, the closing date. He was then to make payments of $7,500 on March 1 of each succeeding year (with the unpaid balance drawing annual interest of 9%) until 1993 when the remaining principal and interest would be due. Boyken wrote the check covering the initial 10% down payment to defendant Farmers State Bank; he was told that check would be held in escrow.

According to the record below, Boyken was aware that Feckers had previously purchased this tract from one Price and that he (Feckers) was still paying on that contract. After the sale, however, Boyken discovered that the sum of the down payments required of him by the terms of the sale ($81,000) exceeded Feckers' own equity in the Price contract. In addition, because of the size of the required down payments, it happened that the balance on Boyken's contract would be less than that of Feckers on his contract with Price. Both contracts were to be paid in full in 1993. Boyken's attorney contacted Feckers' attorney in an attempt to alter the terms of the sale contract so that Boyken would not have to pay to Feckers more than the latter's equity in the Price contract. Boyken was also apparently concerned about the difference in unpaid balances on the two contracts. Because Feckers will owe more on his contract in 1993 than Boyken will on his, Boyken feared that Feckers might not be able to give him good title at that time. Feckers refused to alter the terms of the sale; Boyken refused to make the 15% payment due March 1, 1980. On February 19, 1980, Boyken learned that defendant bank used the 10% down payment made by him on the date of the sale to pay off Feckers' obligations to the bank instead of holding it in escrow.

In his petition, Boyken alleged that Feckers was guilty of fraudulent conduct in failing to disclose his equity in the 160-acre tract and that the bank was guilty of breaching its fiduciary duty by using the initial 10% payment to pay off Feckers' obligations contrary to the bank's alleged representations that such funds were to be held in escrow. Boyken stated his willingness and ability to follow through on the contract, but requested reformation of the agreement so that Feckers would assign his interest in the Price contract to Boyken and so that Feckers himself would receive no proceeds in excess of his equity.

The trial court issued its findings, conclusions and decree on January 13, 1981. The court concluded that Boyken had established by clear, satisfactory and convincing proof that the contract did not reflect the real agreement between him and Feckers and that Boyken did not have to jeopardize his financial position by paying to Feckers more than the latter's own equity. The court also ruled that the bank breached its duty as escrow agent to Boyken, but he sustained no damages as a result. Finally, the court reformed the contract by ordering Boyken to deposit with the bank the difference between $324,000 (the contract price) and the amount Feckers owed on the Price contract. Feckers was then to convey his interest in the tract to Boyken by special warranty deed so that Boyken could then assume the Price contract. At that point, the deposited funds were to be paid over to Feckers. After Feckers' motion for a new trial was overruled, he brought this appeal in which the bank takes no part.

I. Although the parties had not reduced their agreement to a writing signed by both parties, it is clear that the sale advertisements combined with the auction and Boyken's successful bid constitute an enforceable contract. Skubal v. Meeker, 279 N.W.2d 23, 27 (Iowa 1979). While the rules of law relating to reformation of contracts have largely developed with respect to written instruments, no claim is made that these rules are different with respect to oral agreements.

Initially, it may be well to point out what the equitable remedy of reformation of instruments does not entail. This remedy is not to be used to change the terms of a contract; instead, it "refers to a change in the instrument to reflect the real agreement of the parties." Kufer v. Carson, 230 N.W.2d 500, 503 (Iowa 1975). Thus, the remedy is not to be used to effect one party's desire to add new and material provisions to the agreement or to avoid old provisions that have produced unforeseen consequences. Instead, the remedy is premised on changing the agreement only to the extent of conforming it to what both parties originally intended. "[T]his requirement is a safeguard, to prevent the court from making contracts for the parties rather than making the written instrument, which is the subject of the controversy, speak the true contract." Akkerman v. Gersema, 260 Iowa 432, 438, 149 N.W.2d 856, 859 (1967). One who seeks to reform an instrument has the burden of proving that the instrument does not reflect the real agreement between the parties and must do so by clear, satisfactory and convincing proof. Kufer, 230 N.W.2d at 503. There is no absolute right to reform an instrument; instead, the decision lies within the discretion of the equity court and depends on whether reformation is necessary to serve justice. Id. at 504.

II. Boyken alleged in his petition that Feckers was guilty of fraud in not revealing the extent of his equity in the tract under the Price contract. There is no question but that fraud may be the basis for a proceeding to reform an instrument. Wilden Clinic, Inc. v. City of Des Moines, 229 N.W.2d 286, 292 (Iowa

1975). "Fraud may arise from facts and circumstances, and an intent to defraud may properly be inferred from circumstances, words and actions shown in evidence." State v. Johnson, 196 N.W.2d 563, 567 (Iowa 1972). In its decree, the trial court did not make any findings regarding the claim of fraudulent concealment. Because the case was heard in equity in the court below, our review is **de novo.** Iowa R. App. P. 4.

We conclude that Boyken did not sustain his burden of proving fraud. It is undisputed that he knew of Feckers' contract with Price before the auction took place. There was nothing to prevent Boyken from inquiring as to the remaining balance owed on the contract. There is no evidence whatsoever that Feckers made any fraudulent misrepresentations regarding the terms of the sale or that he attempted to conceal any facts about the Price contract. The mere fact that Feckers did not tell Boyken about the prior contract balance is not dispositive, especially in light of the fact that Boyken knew of that contract. The Iowa Supreme Court has quoted with approval the following language from 37 Am. Jur. 2d Fraud and Deceit, section 145 (1968):

> The law distinguishes between passive concealment and active concealment, or in other words, between mere silence and the suppression or concealment of a fact, the difference consisting in the fact that concealment implies a purpose or design, while the simple failure to disclose a fact does not. Mere silence is not representation, and a mere failure to volunteer information does not constitute fraud. Thus, as a general rule, to constitute fraud by concealment or suppression of the truth there must be something more than mere silence or a mere failure to disclose known facts. Where there is no obligation to speak, silence cannot be termed "suppression," and therefore is not a fraud. Either party may, therefore, be innocently silent as to matters upon which each may openly exercise his judgment.

Wilden Clinic, 229 N.W.2d at 292-93 (emphasis added). Feckers' conduct in this case comes under the concept of passive concealment. We find no fraud on his part; therefore, Boyken's claim for reformation of the agreement cannot be based on that ground.

III. In finding that the agreement should be reformed in this case, the trial court made the following conclusions:

> The plaintiff has by clear, satisfactory and convincing proof established that the agreement prepared by the Defendant does not reflect the real agreement between the parties.
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> * * *
>
> The contract should be reformed as seller is mistaken in the belief that the buyer has to pay more than the amount of seller's interest in the property.

We first note that Boyken did not plead mistake in his petition as a grounds for reformation. We will assume the issue was properly raised, however.

In discussing mistake as a grounds for reformation, the Akkerman court held as follows:

> [E] quity will reform a written instrument upon the ground of mistake occurring at the time the instrument was prepared, only when the mistake is mutual * * * [T] he necessity of mutual mistake arises out of the inability of the court to make a contract for the parties. Thus, if a reformation is desired, a mutual mistake must be shown. If the mistake is all on one side, then there was no meeting of the minds and the relief would be contract cancellation.

260 Iowa at 438, 149 N.W.2d at 859-60 (emphasis added). See also Wilden Clinic, 229 N.W.2d at 290 ("if the mistake is as to a collateral matter or is unilateral, reformation, as opposed to rescission, is not available" (emphasis in original)).

We cannot agree with the trial court that the necessary elements of mistake are present in this case so as to justify reformation. There was no confusion or misunderstanding regarding the terms of the auction sale—the purchase terms were advertised ahead of time and Boyken was fully aware of those terms and what was required of him when he submitted his successful bid. In fact, he made the initial 10% payment; he refused to make the next 15% payment only when he learned of Feckers' equity. The fact that the sum of the two initial payments exceeded Feckers' equity in the tract has no relevance to their agreement and is at most a collateral matter. Although Boyken may have legitimate concerns about the potential future effects of the parties' relative equities and may be entitled to some protection against adverse consequences, such concerns will not justify reformation.

IV. Because there was no fraud or mutual mistake, reformation is not available to Boyken as a remedy; the trial court erred in concluding otherwise, and its decree must be reversed. We remand with directions to dismiss Boyken's petition.

REVERSED AND REMANDED WITH DIRECTIONS.