



151

IN THE COURT OF APPEALS OF IOWA CLERK SUPREME COURT

LAWRENCE BRINCKS and
LYNNE ANN BRINCKS,

Appellees,

v.

ANDREW MATTES and
ALMA MATTES,

Appellants.

FRANK HOFFMANN,

Intervenor-Appellee,

v.

ANDREW MATTES and
ALMA MATTES,

Appellants.

Filed November 10, 1977

254
2-58181

Appeal from Carroll District Court - James C. Smith, Judge.

Action in equity for specific performance of contract for sale of farm. From decree ordering specific performance damages for delay in possession, and payment of real estate commission both buyers and sellers appeal. Affirmed in part, reversed in part, modified and remanded.

Ronald H. Schechtman, of Carroll, for appellees.

Raymond O. Snook, of Glidden, for appellants.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This is an action in equity for specific performance of a contract for sale of a farm. Plaintiffs below were the buyers and defendants the sellers. The real estate broker who listed the property was an intervenor seeking to recover his commission. The trial court decreed specific performance and made an additional award to buyers for injury incurred from delay in performance. The intervenor was awarded his commission. Sellers appeal as against all parties and buyers appeal from the determination of the extent of the injury they incurred from delay. Our review is de novo on all issues.

L. Specific Performance.

1. Claimed alteration. The initial argument of the sellers in seeking to defeat specific performance is that there was an alteration of the written agreement between the parties after one of the sellers had signed it. The record reveals that the facts are in conflict as to whether revisions shown to have been made in the agreement were subsequent to the signing thereof by one of the sellers. The trial court found that the principal revision was drafted into the agreement before it was signed by any of the parties and that the only other revision (which came at a time not shown in the evidence) was simply adding the word "thousand" to make the written portion of the agreement consistent with the numerical consideration recited therein and to conform to what is conceded to be the intent of the parties. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court. Rule 14(f)(7), Rules of Appellate Procedure. On our de novo review of the record we find no basis to disturb these findings. We also note that the principal revision drafted into the agreement was entirely favorable to and in no way onerous to the sellers.

2. Claimed duress. Sellers also seek to avoid the agreement in question by claiming it was executed under duress. Their claim is not that the duress was exercised by the buyers or anyone acting for the buyers but rather that they were pressured by their own real estate broker. As to this claim the trial court found that "based on the record, there is not sufficient showing of any fraud, duress, misrepresentation or other type of pressure or coercion on the part of anyone here involved, as against defendants [sellers] or either of them." Written instruments affecting real estate may be set aside

only upon evidence that is clear, satisfactory and convincing. Rule 14(f)(12), R. App. P. Applying this standard to the record evidence we agree with the trial court's finding that the evidence of duress is insufficient to warrant rescission. This finding is also dispositive of the sellers "unclean hands" defense. Plaintiffs established their right to specific performance.

II. Awarding of Compensation to Buyers for Delay in Performance.

Both parties appeal from the result achieved by the trial court in awarding compensation or damages to the buyers for the delay in performance. The trial court found this sum to be \$4,688.35 and ordered that it be set off against payments owed by buyers under the agreement. Upon our review of the evidence we modify somewhat the result arrived at by the trial court on this issue.

In an equity action wherein specific performance of a contract to sell land is ordered, a monetary award may be warranted to compensate the purchaser for the loss occasioned by seller's refusal to surrender possession of the property at the agreed time. *Calbreath v. Borchert*, 248 Iowa 491, 81 N.W.2d 433 (1957); cf. *Moser v. Thorp Sales Corp.*, 256 N.W.2d 900, 913 (Iowa 1977). We believe the record shows that the buyers in the present case are entitled to such an award in the present case to be set off against the contract payments. The items which go toward establishing the amount of this adjustment in the present case are the following, which we find on our de novo review are sustained by sufficient evidence and according to law:

1. Rents, profits, and fair rental value of premises (excluding house) for 1974 crop year (\$11,500) reduced by amount of taxes (\$455.94) and insurance premiums (\$191) for this period paid by sellers \$10,853.06.¹
2. Interest on item (1) above at the rate of 7% per annum from October 1, 1974, until paid or credited.

¹ We reject buyers' contention that real estate taxes paid by sellers during the time in which buyers were to be in possession cannot be set off against buyers' claim for loss of use of the property. The overwhelming weight of authority is that they can be. See cases collected in Annot. 7 A.L.R.2d 1204, 1227 § 11. We do not believe that *Mitchell v. Mutch*, 189 Iowa 1150, 179 N.W. 440 (1920) is necessarily a holding contrary to this position. There the seller was not seeking to reduce the purchaser's claim for loss of use of the property for no such allowance was made to the purchaser in that case. Rather the seller in *Mitchell* simply sought to recover back from the buyer taxes paid during the time he enjoyed the rents and profits. The theory of that decision is thus inapposite to the present case. We also believe that insurance premiums paid by sellers during this period should be treated similarly, in view of buyers' obligation to make such payments under the contract.

3. Loss of use value of dwelling house on subject property subsequent to August 1, 1974 \$ 1912.50.
4. Interest on item (3) above at the rate of 7% per annum from August 1, 1974, until paid or credited.

Other items claimed by buyers (these being items 3, 4, 5, 6, 7, 8, 9 and 10 under "Brincks Adjustments" in supplemental decree of April 8, 1975, are specifically rejected as being either without support in the evidence or not sufficiently within the contemplation of the parties at the time of the making of the agreement. See, e.g., 71 Am. Jur. 2d Specific Performance § 218.

With respect to the findings under "Mattes Adjustments" contained in the trial court's supplemental decree above referred to, item (2) and item (3) of said adjustments are rendered moot by our action in reducing rental value by these amounts. Item (1) must be adjusted so as to give proper effect to buyer's tender of \$35,000 on March 1, 1974, and \$2,500 payment on March 1, 1975. See Mitchell v. Mutch, 189 Iowa 1150, 1153-54, 179 N.W. 440 (1920). Consistent with this recognition this interest adjustment must be 7 1/2 per cent per annum on the sum of \$110,000 from March 1, 1974, to March 1, 1975, and 7 1/2 per cent per annum on \$107,500 thereafter.

As a result of the foregoing modifications (and perhaps based upon any actions by the parties subsequent to the trial court's supplemental decree of April 8, 1975) we remand this aspect of the case with directions to the trial court to revise the decretal portion of said supplemental decree to correspond to the modifications which we make.

III. Recovery of Real Estate Commission.

The record supports sellers' claim that the initial trial of the issues was limited to the claim of specific performance and that the issue as to intervenor's right to recover a commission was not presented at that time. In spite of this fact the trial court, upon finding buyers were entitled to specific performance, also decreed that intervenor should recover from sellers a commission on the sale. On the state of the record existing we do not believe this issue was ripe for determination. Nor do we believe the court's decision on specific performance necessarily settles the commission issue which may involve circumstances between intervenor and sellers inter sese. We accordingly reverse that portion of the decree establishing intervenor's right to a commission and direct further hearing on this claim be held in the trial court.

The decree of the trial court is affirmed as to the granting of specific performance; reversed and remanded as to the recovery of a commission by intervenor; and modified and remanded on the compensation granted for delay in performance. Costs are taxed 80% to appellants, Mattes, and 20% to intervenor, Hoffman.