FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

FRANCIS COLLINS,	)	Filed March 20, 1984
Plaintiff/Appellee/Cross-Appellant,	)	
vs.	)	4-16 83-556
EGBERT AND VIRGINIA R. TRENARY,	)	
Defendants/Appellants/Cross-Appellees.	)	

Appeal from the Iowa District Court for Lucas County—Thomas W. Mott, District Associate Judge.

Defendants appeal and plaintiff cross-appeals from a judgment for plaintiff in which he was awarded $40,500 for breach of a contract for the sale of land. AFFIRMED.

William L. Shelton and Richard L. Ambelang of Shelton, P.C., Chariton, for plaintiff-appellee/cross-appellant.

James D. Meyer of Meyer Law Firm, Chariton, for defendants-appellants/cross-appellees.

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

Defendants appeal and plaintiff cross-appeals from a judgment for plaintiff in which he was awarded $40,500 for breach of a contract for the sale of land. On appeal, defendant asserts that: (1) plaintiff's damages should have been limited to the value of the consideration (which was in services) he gave for the land, because (a) there was not an enforceable contract, (b) a condition precedent was not performed, (c) defendant Trenary was innocently unable to convey, (d) equity should not allow plaintiff to benefit unduly from an allegedly one-sided contract, and (d) that damages should be based on a rescission theory; (2) plaintiff suffered no measurable damage at all under the return of consideration standard, so the court should have awarded none; and (3) as there allegedly was no enforceable contract, attorney fees should not have been awarded under it.

On cross-appeal plaintiff asserts that he was entitled to substantially greater damages. We affirm both appeals.

Plaintiffs and defendants each owned part of a parcel of land on the west edge of Chariton, bordering on a major highway. Plaintiff built a restaurant on part of his land; the rest of both parcels was vacant. After it rained, it appears that defendants' land received most of the runoff and was wet and swampy.

Plaintiff and defendant Trenary entered into a sale of land agreement in which plaintiff agreed to use dirt to fill part of defendants' land in exchange for a portion of Trenary's property. Plaintiff performed, but defendants refused to deed him the portion agreed to. Plaintiff sued for specific performance, damages for breach of contract, or a quantum meruit recovery. The court held that specific performance could not be granted because defendant Virginia Trenary had not joined the sale contract, but awarded plaintiff $40,500, the value of the portion of defendant's land Trenary had agreed to deed to plaintiff as consideration and $6,500 in attorney fees.

I. Enforceability of Contract

Defendant Trenary contends, first of all, that the contract was not enforceable because of its indefiniteness and uncertainty. In support of this contention, defendant states that a contract must be definite and certain in order to be given legal effect. Davis v. Davis, 261 Iowa 992, 1001, 161 N.W.2d 870, 876 (1968). However, this rule should not be carried to extreme lengths nor should it be used to defeat the intent of the parties. Palmer v. Albert, 310 N.W.2d 169, 172 (Iowa 1981). Contract terms are "sufficiently definite if the court can determine with reasonable certainty the duty of each party and the conditions relative to performance." Severson v. Elberon Elevator, Inc., 250 N.W.2d 417, 420 (Iowa 1977).

The evidence indicates that the contract terms were handwritten according to both parties' wishes. There was discussion prior to the signing of the contract between the parties as to what kind of work was to be done on Trenary's property. When the parties signed the contract, there was nothing in the record suggesting that the contract, as it stood, was partial or incomplete. Nor did appellant Trenary voice any disapproval to Collins about the terms of the contract or the work being done until after the work was completed.

In deciding whether there is an enforceable contract, we consider not only the language used but also the surrounding circumstances and the conduct of the parties. Palmer at 172. We find there is ample evidence that this contract was sufficiently definite and certain so as to give it legal effect.

Trenary next asserts the contract was unenforceable because his wife, Virginia, did not sign the agreement. He uses Josperson v. Bohnert, 243 Iowa 1275, 55 N.W.2d 177 (Iowa 1952) for the proposition that real estate contracts, in usual form, reciting the names of co-owners as vendors, are joint and if all do not sign, those who do are not bound. Id. at 179. However, that was a case where the trial

court granted specific performance to deliver two-thirds interest in the land in question; the supreme court held that no contract had been established by the record upon which a decree for specific performance could be based.

We agree that a decree of specific performance cannot be based upon this contract. However, that is not to say that the contract is unenforceable. One who enters into a contract for the conveyance of lands with spouse owning and holding legal title must be content with a conveyance of such interest as that spouse has a right and power to convey. Noecker v. Wallingford, 133 Iowa 605, 611, 111 N.W. 37, 39 (Iowa 1907). Collins never elected to accept only the half of the property which was Egbert Trenary's as co-owner. As such, any remedy Collins has under this contract lies elsewhere than in an action for specific performance. See id. at 611, N. W. at 39.

Therefore, we find that an equitable decree for specific performance does not lie; we will not limit damages to consideration paid on the ground that the contract was unenforceable because Virginia Trenary did not sign the agreement; and we hold the contract to be enforceable against Egbert Trenary alone.

II. Recovery

Trenary contends that Collins' recovery must be limited to consideration paid because a contractual condition precedent was not performed. First of all, we do not believe that blank lines left unfilled on a preprinted contract form give rise to an express condition precedent. See Black's Law Dictionary 366 (rev. 4th ed. 1968). But even assuming that a condition precedent did arise by the printed section of the contract that stated: "If this offer is not accepted by Sellers on or before _____, 19__, it shall become null and void and all payments shall be repaid to the buyers," we find the condition precedent was performed. Egbert Trenary signed the agreement and he is the only seller liable on the contract. Therefore, we find no merit to this argument.

Trenary, secondly, contends that Collins' recovery should be limited to consideration paid because Trenary is innocently unable to convey because his wife would not sign the agreement. However, the evidence indicates that Trenary knew prior to the time the work had commenced that his wife was not going to sign the agreement. But yet, Trenary never suggested that the work not begin or that once commenced it be discontinued. Therefore, we find no merit in this contention either.

Thirdly, Trenary claims that equity should limit Collins' recovery to consideration paid as the contract should have been voided in equity in the first place. We need not consider the merits of this argument as we have already found the contract to be enforceable.

Fourth, Trenary states that if there was an enforceable contract, recovery should be limited to consideration paid because Trenary rescinded the contract. We do not agree. Rescission is only permitted where the breach is so substantial as to defeat the object of the contracting parties. Nora Springs Co-Op Co. v. Brandau, 247 N.W.2d 744, 749 (Iowa 1976). Since Collins did not breach the contract, rescission was not an alternative.

Therefore, we will not limit damages to consideration paid on any of the above-stated theories.

III. No Measurable Damages

Trenary claims that Collins is entitled to only nominal damages because he failed to show that he had in fact been damaged. We agree that if it is speculative and uncertain whether damages have been sustained, recovery is denied. Larson v. United Federal Savings & Loan Association, 300 N.W.2d 281, 288 (Iowa 1981). However, it seems clear that there was more than adequate evidence to support a finding that damages had been sustained.

> "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may be fairly and reasonably be considered arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

Metropolitan Transfer v. Design Structures, 328 N.W.2d 532, 536 (Iowa Ct. App. 1982) (quoting Mihills Manufacturing Co. v. Day Brothers, 50 Iowa 250, 252 (Iowa 1878)).

When this contract was made it was within the contemplation of the parties that Collins would perform work on Trenary's property in exchange for a portion of that property on the north side of the drainage ditch. The contract called for Collins to provide proper drainage of Trenary's property, not floodproofing. The weight of the evidence indicates that that had been done.

Under this contract, the land was to be paid for by the work performed. Since defendant Trenary failed to make payment of the land, Collins is entitled to recover as damages the value of the land at the time payment should have been made, with interest. See Bonnon's Estate v. Urton, 3 Green 228, 229 (Iowa 1851); 25 C.J.S. Damages § 79 (1966). Only one expert witness testified. He valued the land that Collins was supposed to receive at $40,500. Under Iowa law, the rule is that when a contract has been breached, the innocent party is generally entitled to be placed in the position he would have occupied had there been performance. Lakota Girl Scout Council v. Havey Fund-Raising Management, Inc., 519 F.2d 634, 639-40 (1975).

Therefore, we find the award of $40,500 with interest to be a correct measure of damages. We disregard other contrary arguments by both parties on damages as meritless.

IV. Attorneys Fees 22

The right to recover attorney fees as part of the costs of litigation does not exist at common law and such fees are not allowable in the absence of statute or some agreement expressly authorizing taxing attorney fees in addition to statutory costs. Frost v. Cedar County Bd. of Supervisors, 163 N.W. 2d 432, 434 (Iowa 1968). On the reverse side of the contract, paragraph 15(c) states in part: "the party at fault shall pay costs and attorney fees." Trenary argues that there was no reverse side to this agreement. However, Trenary pleaded paragraph 15(c) in his counterclaim.

We find paragraph 15(c) to provide the express authorization for attorney fees. Therefore, we affirm the allowance of such by the trial court.

AFFIRMED.