IN THE COURT OF APPEALS OF IOWA

No. 4-054 / 93-499

FILED
MAR 24 1994
CLERK SUPREME COURT
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ROGER and **DOROTHEA DAHLEN**,
Plaintiffs-Appellees,

vs.

DECORAH STATE BANK, As Trustee of the James F. Ronan Charitable Remainder Annuity Trust and the William P. Ronan Charitable Remainder Unitrust,
Defendant-Appellant,

BILL KAYSER, DECORAH STATE AGENCY d/b/a **IOWA REALTY**,
Defendants-Appellees,

ARLIN FALCK,
Defendant,

LINUS and **MARGUERITE BARLOON**,
Defendants-Appellants.

Appeal from the Iowa District Court for Winneshiek County, John Bauercamper, Judge.

The Barloons and the Decorah State Bank appeal the district court decision ordering specific performance of a contract for sale of a farm between the bank and the Dahlens. **AFFIRMED.**

Richard O. Zahasky, Decorah, for appellants Linus and Marguerite Barloon.

James Burns of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.C., Decorah, for appellant Decorah State Bank.

000020

Jeff J. Goedken and Chris J. Scheldrup of Moyer & Bergman, Cedar Rapids, for appellees Bill Kayser and Decorah State Agency, d/b/a Iowa Realty.

Peter C. Riley of Tom Riley Law Firm, P.C., Cedar Rapids, for appellees Roger and Dorothea Dahlen.

Heard by Donielson, P.J., Sackett, J., and Critelli, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

DONIELSON, P.J.

In 1980 Linus and Marguerite Barloon and their four children began renting a 178 acre farm near Satre, Iowa from William and James Ronan. In December 1986 the Ronans transferred their respective half-interests in the farm to two separate trusts. Decorah State Bank was appointed trustee of each trust. The bank continued to lease the farm to the Barloons.

Paula J. Petersburg, the trust officer of the bank, considered the Barloons to be reliable tenants and wanted them to remain on the farm. In connection with the lease, Petersburg and the Barloons discussed a "first right of refusal" option to protect the Barloons if the trusts were to sell the farm. Petersburg prepared, signed, and delivered to the Barloons' attorney a document entitled "Right of First Refusal." The Barloons never signed the document and it was never filed in the office of recorder for Winneshiek County.

The bank concluded leasing the farm was not generating sufficient income to meet trust objectives. In August 1990 the farm was listed for sale with the real estate agency the bank owns, the Decorah State Agency.

In January 1991, Roger and Dorothea Dahlen contacted Bill Kayser, manager of the Decorah State Agency, about buying the Ronan farm. Subsequently, the Dahlens offered $97,000 for the farm. Kayser had a sales agreement

000032

prepared. The agreement did not mention a right of first refusal.

On February 16, Roger Dahlen signed the agreement and gave the Decorah State Agency a check for $500 earnest money. On February 19, Kayser met with Petersburg and she signed the agreement on behalf of the bank as trustee. She did not include any language in the agreement about a right of first refusal. Kayser contacted the Dahlens later that day to inform them the bank had accepted their offer.

The Barloons received notice of the offer and made a timely response. On March 11 the Barloons and the bank closed on the sale of the farm for an amount matching the Dahlens' offer. The Barloons paid the bank $17,000, and Alvin Falck, who had agreed to help the Barloons finance the purchase, paid the bank $80,000.

Kayser contacted the Dahlens and told them their contract was canceled, refunding their $500 check.

The Dahlens filed a petition requesting specific performance, damages, and attorney fees. The Barloons filed a cross-claim against all co-defendants in the event the Dahlens' request was granted.

After a trial, the district court found both the bank and the Barloons had consistently and frequently acknowledged the existence of the Barloons' right of first refusal. The court allowed the defendants to use parol evidence to attempt to show the Dahlens had notice of this right, but concluded the Dahlens did not have actual

notice. The court found the Dahlens did not have constructive notice since the right of first refusal was not recorded. See Iowa Code §558.41 (1991).

The court concluded the Barloons were not bona fide purchasers without notice because they knew about the Dahlens' contract and knew they had not signed their right of first refusal.

The court ordered specific performance of the Dahlens' contract and found they were entitled to attorney fees under the terms of that contract. The court did not award the Dahlens consequential damages, however, finding their evidence of lost profits due to the delay in starting farming too speculative. The contracts and conveyances between the bank and the Barloons and Falck were declared void. The bank returned the money paid by Barloons and Falck.

We review cases in equity de novo. Iowa R. App. P. 4; Israel v. Farmers Mutual Ins. Ass'n of Iowa, 339 N.W.2d 143, 146 (Iowa 1983). We give weight to the findings of the trial court, especially concerning the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7); Maisel v. Gelhaus, 416 N.W.2d 81, 86 (Iowa App. 1987). "In reviewing de novo, we will affirm if there is a proper basis for the decree entered by the trial court, even though the reasons for affirming are different than those upon which the trial court relied." Israel, 339

N.W.2d at 146; see Citizen's First National Bank v. Hoyt, 297 N.W.2d 329, 332 (Iowa 1980).

Iowa Code section 558.41 (1991) is Iowa's recording statute for real estate:

> No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless filed in the office of the recorder of the county in which the same lies, as hereinafter provided.

Id. (emphasis added). There is no question the document intended as a right of first refusal was never filed pursuant to section 558.41. The question becomes whether the Dahlens had notice before purchasing the property such that the claimed right might be asserted against them equitably. Notice may either be actual or constructive.

Since there was no right of first refusal filed with the county recorder's office, Dahlens could not have notice as a result of a title search and opinion or have constructive notice imputed to them. The sales agreement made no mention of a right of first refusal. The testimony of the Dahlens disagrees with Kayser's testimony concerning Kayser's mention of the right of first refusal before the purchase agreement was completed. We, like the trial court, find the testimony of the Dahlens more credible. We conclude the Dahlens did not have actual notice before completing the agreement to buy the land.

Defendants argue the Dahlens should be charged with constructive notice because the Dahlens knew the Barloons were living on the property. Defendants argue this

knowledge created a duty to ask the Barloons what interest they had in the land. We disagree. The cases cited by defendants place a burden on prospective purchasers to make reasonable or proper inquiry. We cannot agree such inquiry requires purchasers to contact the party in possession directly, as defendants suggest. Real estate agents customarily act as intermediaries in transactions. Frequently the buyer never meets the seller (or the occupant). Under the circumstances, we cannot agree the Dahlens had constructive notice or should have discussed the sale with the Barloons. The Dahlens' inquiry revealed the Barloons were tenants who had tried unsuccessfully to purchase the farm in the past. An inspection of the property, which could give notice of easements or other such rights, would not reveal anything about a right of first refusal. We find the Dahlens did not have actual or constructive notice. Therefore, they qualify as bona fide purchasers for value without notice. The right of first refusal, enforceable between the bank as trustee and the Barloons, does not defeat the Dahlens' right under the sales agreement.

The district court determined specific performance was an appropriate remedy since the sale concerned real estate and money damages are not adequate. We agree. The district court correctly returned the Barloons and Falck to the position they were in before their purchase of the land and granted specific performance to the Dahlens.

000356

Barloons also appeal the district court's refusal to award them damages in addition to the return of their money with interest. The claim for damages was alleged in the Barloons' original cross-claim. They provided no evidence at trial concerning any damages sustained by them or to be sustained by them if the court granted specific performance, other than the money they paid for the farm. They did not meet their burden of proving additional damages. See Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981); B-W Acceptance Corp. v. Saluri, 258 Iowa 489, 497-98, 139 N.W.2d 399, 404 (1966). We may remand an equity case for further proceedings when essential to effectuate justice. Wolf v. Murrane, 199 N.W.2d 90, 101 (Iowa 1972). In this case, however, the Barloons failed to present evidence at trial and now assert their right to pursue the claim. The trial court awarded the damages supported by the evidence. The Barloons cannot now seek to retry the issue and present more evidence. See Sears, Roebuck & Co. v. Nelson, 230 Iowa 936, 940, 299 N.W. 398, 404 (1941).

For the reasons stated we affirm the decision of the district court in all respects. Having considered all the issues raised on appeal, we conclude any not addressed specifically are either covered by this opinion or are without merit. Costs of this appeal shall be divided between the Barloons and Decorah State Bank.

AFFIRMED.