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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CITIZENS SAVINGS BANK,	)	
Plaintiff-Appellant,	)	Filed May 28, 1987 43
vs	)	
SAC COUNTY CONSERVATION BOARD,	)	7-73
Defendant-Appellee	)	86-678

Appeal from the Iowa District Court for Sac County (1621), Louie F. Beisser, Judge

Plaintiff appeals judgment for defendant in an action seeking specific performance of a contract for the purchase of real estate **AFFIRMED.**

Charles A Schulte of Schulte & Graven, Sac City, Iowa, for plaintiff-appellant

David P Jennett, Sac County Attorney, Sac City, Iowa, for defendant-appellee

Considered by Snell, P J , and Schlegel, and Sackett, JJ.

SCHLEGEL, J.

Plaintiff appeals judgment for defendant in an action seeking specific performance of a contract for the purchase of real estate. We affirm.

On December 4, 1980, Citizens Savings Bank purchased approximately fifty acres of land which it divided into two tracts. On June 22, 1981, the Bank sold the northern thirty-one acres to Michael and Jean Green. The Bank reserved to itself an easement of ingress and egress across the north acres to the southern parcel. The easement was not specifically described in the deed.

On August 31, 1982, the Bank entered into a purchase agreement with the Sac County Conservation Board which contained several conditions precedent to the performance of the contract. One of those conditions was that the purchase was subject to an "easement over present access." Another condition provided that the balance of the sum owed was payable on or before March 15, 1983.

During January 1983, both the Bank and the Conservation Board became aware that the adjoining landowners, the Greens, were not happy with the use of an access across their land to the southern parcel. In February, Mr. Green wrote a letter of protest to the Conservation Board strongly indicating his opposition to their purchase of the property. The parties to the contract agreed to a thirty-day extension of closing until April 15, 1983. On April 10, 1983, the Bank's president called the Board to inquire into the status of the agreement and he was told the Board was going to make a decision in the near future. The date for closing passed; the Bank did not demand payment or deliver a warranty deed. The easement problem had not been cleared up with the Greens.

In January 1984, the Bank contacted the executive director of the Board and suggested that "We have been holding off on this matter because I felt in my conversations with you throughout last year that possibly you would be inter-

ested in buying it in 1984." In a February meeting between the Bank and the Conservation Board members, further discussions were held concerning the Bank's future actions to overcome the Greens' objections. On April 1, 1984, the Board informed the Bank that the Board felt it was not bound by the purchase agreement due to the failure of the settlement of the easement problem and the failure of the Bank to deliver the property by March 15, 1983. On July 26, 1984, the Bank filed its petition for specific performance in this matter. On March 1, 1985, an easement agreement was finally entered into between the Bank and the Greens.

An action for specific performance of a contract is reviewed de novo; we give weight to the findings of the trial court but are not bound by them. McCarty v. Jeffers, 261 Iowa 470, 473, 154 N.W.2d 718, 721 (1967); Iowa R. App. P. 14(f)(7).

Specific performance of a contract is not a remedy which is available as a matter of right; rather its availability rests in the sound discretion of the court. Youngblut v. Wilson, 294 N.W.2d 813, 817 (Iowa 1980). Specific performance is available when the contract involves property which is unique or possesses special value; real estate is assumed to possess that necessary quality. Moser v. Thorp Sales Corp., 256 N.W.2d 900, 907 (Iowa 1977). The existence of vagueness as to any of the essential terms of an agreement is adequate reason for refusal to direct specific performance. Tri-States Investment Co. v. Henryson, 179 N.W.2d 362, 363 (Iowa 1970). A contract is not binding under Iowa law so as to entitle plaintiff to specific performance where the contract is subject to conditions the failure of which would nullify one of the parties' assent to the contract. See Fairway Center Corp. v. U.I.P. Corp., 502 F 2d 1135, 1142 (8th Cir. 1974). One who seeks recovery on a contract has the burden to plead and prove the contract and his performance. Roland A.

Wilson & Associates v. Forty-O-Four Grand Corp., 246 N.W.2d 922, 955 (Iowa 1976).

We think the evidence clearly establishes that although the Bank had reserved a right of ingress and egress over the servient property, the Greens had not acquiesced in the terms of the use of the easement. The Bank at all times was aware of the desire of the Board to have the easement problem settled before purchasing the second parcel. The correspondence, meetings, and conversations between the parties illustrate the importance to the Board of having the problems relating to the easement clarified before proceeding with the purchase agreement. Since the condition that the easement situation be resolved before April 15, 1983, did not occur, we do not believe the Board ever had the absolute duty of immediate performance.

Furthermore, after the closing date was extended to April 15, 1983, the Bank did not then demand payment on April 15, 1983. No warranty deed was delivered to the Board. The Bank suggested to the Board that perhaps the Board would be interested in buying the property in 1984. The Bank did not obtain the "easement over present access" until March 1985. Under these circumstances, we conclude that the trial court was correct in determining that the Bank never fulfilled the conditions precedent to creating an absolute duty on the part of the Conservation Board to perform under an enforceable contract. Therefore, the Bank was not entitled to specific performance of the contract.

We also agree with the trial court's conclusion that specific performance should be denied on the separate and distinct ground of default by the plaintiff in bringing an action to enforce a contract since it is a cardinal rule that in an action to specifically enforce a contract, the one seeking enforcement must act promptly. See 71 Am. Jur. 2d Specific Performance § 93 (1973). Absent an express agreement to abandon a contract, an examination must be made

of both the acts of the parties and the contract itself to determine whether the parties unequivocally and decisively relinquished their rights under the covenant Iowa Glass Depot, Inc v Jindrich, 338 N W 2d 376, 380 (Iowa 1983). The acts of the Bank show the requisite intent to abandon The Bank failed to negotiate the terms of the easement, failed to demand payment at the time specified, failed to specify a new closing date after April 15, 1983, and inquired, after the old closing date had passed, if the Board would be interested in buying the land at a future date We believe this evidence sufficient to determine that the Bank had indeed abandoned the contract

AFFIRMED.