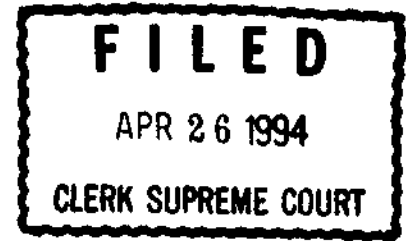


IN THE COURT OF APPEALS OF IOWA

No. 3-350 / 92-954



RUTH ANN EHRHARDT,

Appellee,

vs.

MAMAWA J. SMITH,

Appellant.

Appeal from the Iowa District Court for Linn County,
Lynne E. Brady, Judge.

Defendant appeals a district court judgment requiring her to specifically perform a real estate contract and awarding damages to plaintiff. **AFFIRMED AS MODIFIED AND REMANDED.**

Robert A. Wright, Sr., of Wright and Wright,
Des Moines, for appellant.

Randall A. Nazette of Nazette, Hendrickson, Marner &
Good, Cedar Rapids, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Ruth Ann Ehrhardt and Mamawa and Lloyd Smith lived on the same side of 6th Avenue Southeast in Cedar Rapids. A vacant lot separated their houses. Ehrhardt and the Smiths decided to buy the lot at a tax sale. The Smiths purchased the lot for \$1000 on May 13, 1987. On May 15, 1987, the parties executed an offer and acceptance, and Ehrhardt paid the Smiths \$500 for one-half of the lot.

The parties could not conclude the sale until the 2-year-and-120-day redemption period passed. In 1988 they erected a chain link fence down the middle of the lot. Each used one-half of the lot in 1987 and 1988. In 1988 the Smiths separated.

In 1989 Ehrhardt planted trees and a privacy hedge on her portion of the lot. Lloyd Smith told Ehrhardt the sale should not be completed until the Smiths' dissolution action was finalized. In 1990 the dissolution was finalized, and the lot was awarded to Mamawa.

On June 14, 1990, Ehrhardt wrote Mamawa and offered to pay her one-half of the taxes and expenses and to finalize the sale. On August 5, 1990, Mamawa responded that she would not go through with the sale and attempted to give Ehrhardt \$650. Ehrhardt refused to accept the money.

Subsequently, Mamawa seeded Ehrhardt's garden, tore out her privacy hedge, and moved the fence to place the entire lot within Mamawa's land. As a result, Ehrhardt filed a petition requesting specific performance of the parties'

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agreement. The district court ordered specific performance and awarded damages, after allowing certain set-offs, in the amount of \$4451.50.

Mamawa appeals, claiming the district court erred in awarding specific performance and interest on damages from commencement of the action.

I. Specific Performance. Specific performance of a contract is a remedy resting in the equitable discretion of the court. We review cases in equity de novo. Iowa R. App. P. 4; Berryhill v. Hatt, 428 N.W.2d 647, 657 (Iowa 1988). We give great weight to the fact findings of the trial court, especially when considering the credibility of the witnesses. Iowa R. App. P. 14(f)(7).

Specific performance is available when the contract involves property which is unique. Berryhill, 428 N.W.2d at 657 (citation omitted). Real estate is presumed to possess this necessary quality. Moser v. Thorp Sales Corp., 256 N.W.2d 900, 907 (Iowa 1977). The record indicates this lot provided the only way for Ehrhardt to add to her homestead property.

There is sufficient evidence in the record showing the parties entered into an enforceable real estate contract. Ehrhardt paid the Smiths \$500 pursuant to their agreement as consideration for half of the lot. She has been ready to close on this deal since spring of 1989. She offered to pay half of the taxes and to settle expenses.

The object of specific performance is to best effectuate the purposes for which a contract was made, and it should be granted upon such terms and conditions as justice requires. Berryhill, 428 N.W.2d at 657. We deem specific performance to be an appropriate remedy, and we affirm the district court on this issue.

II. Interest on Damages. Mamawa argues Ehrhardt is not entitled to interest on damages from the date of the commencement of this action.

Iowa Code section 535.3 (1991) provides that interest on judgment shall accrue from the date of the commencement of the action. Ehrhardt filed her original petition on May 2, 1991. On November 27, 1991, she amended the petition and added a claim of \$1,713 for damages to the hedges which Mamawa ripped out in the summer of 1991.

The trial court ordered Mamawa to pay interest on the full amount of \$4,451.50 (\$2738.50 for expenses plus the \$1,713 for damages) from the commencement of the action. We disagree. A plaintiff is not entitled to interest in advance of the injury. See Sedco Int'l, S.A. v. Cory, 522 F. Supp. 254, 331 (S.D. Iowa 1981), aff'd, 683 F.2d 1201 (8th Cir.), cert. denied, 459 U.S. 1017 (1982) (construing Iowa Code § 535.3); Rowan v. LeMars Mut. Ins. Co. of Iowa, 347 N.W.2d 630, 641 (Iowa 1984).

Interest on the \$2738.50 for expenses should accrue from May 2, 1991, to November 27, 1991, the date of the amendment to the petition. Interest on the full \$4,451.50

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should accrue from November 27, 1991. We follow the procedure on appeal of modifying the judgment to comport with the amount which should have been entered and remanding the case to the district court for entry of the proper judgment. Kimmel v. Iowa Realty Co., Inc., 339 N.W.2d 374, 384 (Iowa 1983).

III. Appellate Attorney's Fees. Ehrhardt requests attorney's fees for this appeal. Ehrhardt's counsel provided the court with an affidavit of appellate attorney's fees in the amount of \$2,016.96.

Attorney fees are recoverable when the contract allows for such recovery. Lickteig v. Iowa Dept. of Transp., 356 N.W.2d 205, 212 (Iowa 1984) (citations omitted); Iowa Code § 625.22 (1991). The original contract between the parties provided for attorney's fees. The same rationale justifies awarding attorney's fees on appeal. Bankers Trust Co. v. Woltz, 326 N.W.2d 274, 284 (Iowa 1982) (citations omitted). We order Mamawa Smith to pay Ehrhardt's appellate attorney's fees. .

For the above reasons, we affirm the district court as modified and remand with directions. Costs are assessed to Mamawa Smith.

AFFIRMED AS MODIFIED AND REMANDED.