FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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ERNEST RUCKL,	)	
Plaintiff-Appellee,	)	Filed August 9, 1979
vs.	)	
VERA F. FORNEY, Executrix of the Estate of Guy B. Forney, Deceased,	)	69
	)	2-62144
Defendant-Appellant.	)	

Appeal from Fremont District Court - Leo F. Connolly, Judge.

Defendant appeals from trial court judgment ordering her to specifically perform contract to convey land. Affirmed.

Gene Eaton and Jay W. Longinaker, of Eaton, Eaton & Longinaker, of Sidney, for appellant.

James A. Campbell, of Peters, Campbell & Pearson, P.C., of Council Bluffs, for appellee.

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

DONIELSON, J.

Defendant, Vera F. Forney, executrix of the estate of Guy B. Forney, appeals from trial court judgment ordering her to specifically perform a contract to convey approximately 72 acres of farmland to plaintiff, Ernest Ruckl. On appeal, defendant contends: She should have been joined as a defendant to the suit in her personal capacity since only her deceased husband signed the real estate purchase agreement; the contract to purchase land was unenforceable as it had been rescinded by the parties; and plaintiff should be barred by laches and estopped from enforcing the contract. We affirm.

Our review of this equitable proceeding is **de novo.** Davidson v. Lengen, 266 N.W.2d 436, 438 (Iowa 1978); Iowa R. App. P. 4. We give weight to the findings of fact of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. On January 27, 1968, Guy B. Forney and plaintiff entered into a real estate purchase agreement whereby Forney was to sell to plaintiff approximately 72 acres of farmland bordering the Missouri River in Fremont County at $150 an acre for a total contract price of $10,800. The contract was not signed by Vera F. Forney, Forney's wife. A title opinion obtained pursuant to the sale listed several objections to the status of Forney's title to the land. A quiet title action by Forney, originally commenced July 24, 1967, was dismissed under rule 215.1, Iowa Rules of Civil Procedure on January 8, 1970.

During this period an understanding arose between plaintiff's former lawyer and Forney's former lawyer, with the parties' agreement, to hold the land contract in abeyance pending the outcome of the quiet title action and the case of Nebraska v. Iowa, 406 U.S. 117, 92 S. Ct. 1379, 31 L. Ed. 2d 733 (1972). The attorneys considered that case, involving a boundary dispute, to have a potential effect on the real estate involved here. The case was ultimately decided by final decree of the United States Supreme Court on January 8, 1973. In May 1973, plaintiff contacted Forney to close the sale, but Forney wanted to delay the sale for three years for tax reasons. Despite subsequent discussions, the parties were never able to complete the sale.

This action for specific performance was commenced by plaintiff on June 6, 1974. Forney died in October 1975. Vera F. Forney, as executrix for her deceased husband's

estate, was ordered substituted as defendant in the case. Just prior to trial, defendant moved to have herself added as a defendant in her personal capacity, but this was overruled by the trial court. The trial court entered its judgment for plaintiff on April 29, 1978.

II. Defendant contends she should be joined as a defendant in her own personal capacity. Defendant argues that since she never signed the sales contract, her distributive share right still exists in the property. A distributive share of the surviving spouse consists of one-third of the value of all real property possessed by the deceased spouse at any time during coverture, unless such share has been relinguished. Sections 633.211, .212, .238, The Code 1979. This share exists, however, only as an intestate share or the share received when a spouse elects against the will.

In this case Vera elected to take under the will. Section 633.268, The Code 1979, states that absent clear intent to the contrary, a devise to the surviving spouse shall be presumed to be in lieu of the distributive share and homestead rights of the spouse.[1] There being no evidence introduced of a contrary intent of Guy, this statute severs any the distributive share right Vera had in the property. Caldwell v. City of Ottumwa, 198 Iowa 666, 669-71, 200 N.W. 336, 338 (1924); Thorp v. Lyons, 160 Iowa 415, 425, 142 N.W. 82, 86 (1913).

Defendant's reliance on O'Day v. O'Day, 228 Iowa 650, 292 N.W. 516 (1940), to preserve Vera's distributive share right is misplaced. The holding of O'Day was that exempt property passing by will to the widow did not lose its exempt quality. Id. at 651-53, 292 N.W. at 516-17. While overruling contrary statements in Caldwell involving the character of property, O'Day did not overrule the basic holding of Caldwell, 198 Iowa at 671, 142 N.W. at 338, that a surviving spouse waives any distributive share right when electing to take under the will. O'Day, 228 Iowa at 652, 292 N.W. at 517.

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[1] "Where the testator's spouse is named as a devisee in a will, it shall be presumed, unless the intent is clear and explicit to the contrary, and except as provided in section 633.272, that such devise is in lieu of the intestate share and homestead rights of the surviving spouse." Section 633.268, The Code 1979.

Since Vera's distributive share right has been extinguished, it becomes unnecessary to add her as a defendant in her own capacity to this action. Vera F. Forney no longer has any personal right to assert in this action and adding her as a defendant in her own capacity would be a meaningless act. Defendant, as executrix of Guy's estate, is the only real party in interest and Vera's presence is neither indispensable nor necessary to decide the issues presented.

III. Defendant also contends the contract was of no effect or force because it had been rescinded by the parties. While recognizing that there is insufficient support for a finding of forfeiture or cancellation, defendant argues that the facts clearly show a rescission of the contract. Her view of the facts, however, does not comport with those established at trial.

Rescission is the unmaking of a contract. Butler Manufacturing Co. v. Elliott & Cox, 211 Iowa 1068, 1071, 233 N.W. 669, 670 (1930). A mutual rescission of contract for the sale of realty does not require a formal agreement, but may result from any act or course of conduct of the parties that clearly indicates their mutual understanding that the contract is terminated. Fulton v. Chase, 240 Iowa 771, 774-75, 37 N.W.2d 920, 922 (1949); Kilpatrick v. Smith, 236 Iowa 584, 595, 19 N.W.2d 699, 704 (1945) quoting Mortensen v. Frederickson Brothers, 190 Iowa 832, 846, 180 N.W. 977, 982 (1921). Written instruments affecting real estate may be set aside only upon evidence that is clear, satisfactory and convincing. Iowa R. App. P. 14(f)(12). The burden of establishing rescission is on the party raising the claim. Severson v. Elberon Elevator Co., 250 N.W.2d 417, 421 (Iowa 1977).

We cannot find any clear and convincing evidence in the record establishing rescission of this contract. The problems involving the various title objections hindered completion, but at no time is it clear that the parties wished the contract to be nullified because of them. An agreement was even reached to hold the sale in abeyance until the objections could be rectified, although this is disputed by defendant. Defendant points to Forney's expenditures for clearing the land and placing more of it under cultivation between 1972 and 1974 as showing his belief that the contract was dead. But about $1000 of the almost $1300 expended was spent after plaintiff had talked with Forney in May 1973 regarding closing the sale. Whatever Forney's intent was in clearing the land, he

was on notice that plaintiff intended to enforce the contract. The contract was at all times enforceable as there is no clear evidence of any mutual rescission.

IV. Lastly, defendant contends that the facts indicate plaintiff waived his rights under the contract and should now be barred by laches and estopped from asserting them. Specifically, defendant argues that plaintiff should be barred from asserting his claim or receiving equitable relief on it due to the great inequity, prejudice, and harm to defendant because of the sums expended for improvements, greatly increased value of the land, and loss of evidence caused by Forney's death.

Waiver is a voluntary and intentional relinquishment or abandonment of a known existing right. Bishop v. Keystone Area Education Agency No. 1, 275 N.W.2d 744, 753 (Iowa 1979). It must be proved by the party relying upon it. Continental Casaulty Co. v. G. R. Kinney Co., 258 Iowa 658, 661, 140 N.W.2d 129, 130 (1966). Defendant has failed to clearly establish that plaintiff waived his contractual rights. The delay involved in this case was either agreed to or caused by Forney. Plaintiff was ready and willing to see the contract fulfilled.

Concerning the law of laches and equitable estoppel, the Supreme Court of Iowa has stated:

> B. Equitable estoppel and laches are affirmative defenses. The party asserting these defense has the burden to establish all of their essential elements by clear, convincing and satisfactory evidence. Moser v. Thorp Sales Co., 256 N.W.2d 900, 908 (Iowa 1977). Prejudice is an element of both defenses. DeWall v. Prentice, 224 N.W.2d 428, 430 (Iowa 1974) (equitable estoppel); Davidson v. Van Lengen, 266 N.W.2d 436, 439 (Iowa 1978)(laches). And "[p]rejudice cannot be inferred merely from the passage of time." Cullinan v. Cullinan, 226 N.W.2d 33, 36 (Iowa 1975). Moreover, laches cannot ordinarily be claimed against one bringing an action within the statute of limitations, absent some special detriment to another. Moser, 256 N.W.2d at 908.

Defendant has failed to establish the element of prejudice as is required for both laches and equitable estoppel. DeWall v. Prentice, 224 N.W.2d 428, 430 (Iowa 1974). While the extended duration of this transaction is not commendable, prejudice may not be inferred from it. Plaintiff brought this action within the ten-year limitation period for this type of action. Section 614.1(5), The Code 1979. The offsetting of the sums expended for improvements to the land against the value of the title problems fairly and adequately prevented any undue harm to defendant. The appreciation in value of the land, now worth about $100,000, does not militate against the completion of this sale.

The necessary effect of an executory land contract is to give the purchaser the benefit of future appreciation. Moser v. Thorp Sales Corp., 256 N.W.2d 900, 912 (Iowa 1977); Burge v. Gough, 153 Iowa 183, 186, 133 N.W. 340, 341 (1911). Defendant has also failed to show how she was hindered by Forney's death in any specific and meaningful way in the gathering and presentation of evidence.

We affirm the trial court's judgment ordering defendant to specifically perform the contract to convey property to plaintiff.

AFFIRMED.