

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STUART REALTY COMPANY,)

508

Plaintiff-Appellant,)

Filed November 26, 1985

vs.)

ABBAS HABHAB,)

5-454

Defendant-Appellee.)

84-1597

Appeal from the Iowa District Court for Hamilton County - Dale E. Ruigh,
Judge.

Plaintiff realty company appeals from judgment for defendant in an action
for breach of a real estate contract. **AFFIRMED.**

M. Wayne Oltrogge, Clear Lake, for plaintiff-appellant.

Patrick B. Chambers, Webster City, for defendant-appellee.

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

Defendant Abbas Habhab obtained an option to purchase five lots from plaintiff Stuart Realty Company. Habhab exercised his option for one of the lots and completed the purchase. Habhab allowed the option for the four other lots to lapse. However, after further negotiations, a subsequent purchase agreement for the four lots was entered into by the parties which provided for closing "upon receipt of FHA commitment but no later than March 1, 1981." The contract required that Stuart "continue the abstract to the date of the contract, showing good and merchantable title, free and clear of all taxes, assessments, liens and encumbrances . . . and a mortgage, the balance of which shall not exceed \$XXXXXX with interest at XXXX percent." The contract also required Stuart to deliver a warranty deed to Habhab at the time of closing, and stated that "[i]n the performance of each part of this agreement, time shall be of the essence."

Habhab was unable to obtain FHA financing and the closing did not take place. Habhab was not tendered deeds to the lots, a release of existing mortgages on the lots, nor abstracts showing merchantable title. In fact, Stuart Realty did not continue the abstracts for the March 1 closing date, nor were the mortgages on the lots paid off or arrangements made to do so. Neither did Stuart Realty prepare a deed for the lots in question.

Stuart Realty filed a petition in equity seeking specific performance of a real estate contract and damages resulting from an alleged breach. The count seeking specific performance was withdrawn prior to trial. The trial court found that Stuart Realty had failed to prove its own performance of the contract, dismissed the claim and entered judgment for Habhab.

On appeal, Stuart Realty asserts that the evidence was sufficient to establish its right to recovery of damages. Habhab counters that the evidence was sufficient to support the trial court's judgment.

When the buyer breaches a contract for the purchase of real estate, the seller has three alternative remedies: 1) he may rescind; 2) he may tender compliance with the contract and bring an action for specific performance; or 3) he may retain the land and bring an action for damages for loss of the bargain. Gordon v. Pfab, 246 N.W.2d 283, 287 (Iowa 1976). While Stuart Realty at first demanded specific performance as an equitable remedy, the case proceeded to trial solely on a legal theory for relief. By electing to seek monetary damages for noncompliance with the land contract, Stuart Realty transformed the action to one at law. "[W]here the primary right of the plaintiff arises from the nonperformance of a contract, where the remedy is monetary in nature, and where monetary damages are full and certain, remedies are usually provided by actions at law and equity has no jurisdiction." Mosebach v. Blythe, 282 N.W.2d 755, 758 (Iowa Ct. App. 1979). If an action at law is justified as a matter of law and is supported by substantial evidence, then the trial court's judgment will not be disturbed on appeal. Id.

One who seeks recovery on a contract has the burden to plead and prove the contract and his performance. Wilson v. Forty-O-Four Grand Corp., 246 N.W.2d 922, 925 (Iowa 1976). Furthermore, in the real estate context, the seller, in order to recover for breach of contract by the purchaser, must himself have been able and ready to perform his part of the contract. 92 C.J.S. Vendor & Purchaser § 529 (1955).

If time is of the essence of the contract, he must have been able to perform promptly at the time stipulated. Notwithstanding the circumstances may be such as to obviate the necessity of an actual tender or offer of performance, this fact does not dispense with the necessity

of an ability and readiness on the part of the vendor to perform. The fact that the purchaser was in default in the performance of an act precedent to the delivery of the deed and payment of the purchase money will not relieve the vendor from the necessity of showing his ability and readiness to perform in order to recover damages for breach of the contract to purchase.

Id. § 530 at 519-20; see also M. Friedman, Contracts and Conveyances of Real Property § 4.8(h) at 319 (3rd ed. 1975) ("A seller who is unable to convey title in the form agreed cannot place the vendee in default even though the vendee is unable or unwilling to perform his obligations under the contract.")

The purchase agreement in this situation required Stuart to convey a good title by warranty deed, and to furnish an abstract showing that it had merchantable title, free of all encumbrances. Upon this record, there has never been a time since the making of the contract when Stuart was able to perform according to its terms. The abstracts were not brought up-to-date for the March 1 closing, the lots remained subject to a mortgage and no deed was executed for the lots in question.

Furthermore, the purchase agreement expressly stated that time was of the essence. When time is made of a contract's essence, such provision is binding on the parties and both seller and purchaser are obligated to mutually and simultaneously perform on the day fixed for performance. Waters v. Pearson, 163 Iowa 391, 403, 144 N.W. 1026 (1914); 77 Am. Jur. 2d Vendor & Purchaser § 73 (1975).

We conclude that there was substantial evidence showing that Stuart Realty was not able or ready to promptly perform the purchase agreement on March 1, 1984. Therefore, because Stuart Realty failed to prove its own performance under the contract, it is not entitled to recover damages from Habhab for his alleged breach of that contract.

AFFIRMED.