FILED
DEC 27 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

EDWARD A. KIRWAN,	)	
Plaintiff-Appellant,	)	Filed December 27, 1979
vs.	)	
BJARNE A. PEDERSON and **FIRST NATIONAL BANK IN SIOUX CITY, IOWA,** Executor of the Hugh Allan McCoy Estate,	)	325 2-62957
Defendants-Appellees.	)	

Appeal from Woodbury District Court - David J. Blair, Judge.

Plaintiff appeals judgment for defendant in action seeking to enforce alleged contractual arrangement for development of real estate. - Reversed and remanded.

Craig A. Raby, of Crary, Huff, Yates & Clem, Sioux City, for plaintiff-appellant.

Dewie J. Gaul, of Jacobs, Gaul, Nymann & Green, Sioux City, for defendants-appellees.

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

PER CURIAM

Plaintiff, Edwin A. Kirwan, appeals judgment for defendant, Bjarne A. Pederson, in action seeking to enforce an alleged contractual arrangement for development of real estate. Reversed and remanded.

Kirwan and Pederson had made arrangements for development of real estate in Sioux City. Those arrangements called for Pederson, a Nevada resident, to finance the purchase of the real estate and for Kirwan to carry out the "leg work" in Iowa for the purchase and development of the land. For his efforts, Kirwan was to receive twenty-five percent of the profit on the resale of the land. When his efforts to sell the land were rebuffed by Pederson, Kirwan brought this suit to enforce terms of an alleged oral contract, supposedly later memorialized in a writing introduced at trial as plaintiff's exhibit 1. Additionally, Kirwan sought to establish the parties had a joint venture and he asked for dissolution of the joint venture and appointment of a receiver authorized to sell the real estate and distribute the profit under the terms of the parties' contract. The trial court found the oral agreement unenforceable as a matter of law because Pederson's promise to pay "was contingent upon the fulfillment of a condition within the discretionary control of the defendant — a circumstance which makes defendant's obligation illusory and not actual." This finding was based on the trial court's construction of provisions regarding payment of the twenty-five percent of profit to Kirwan:

> Plaintiff urges the Court to conclude that a reasonable sale term arises by implication. The difference is that this defendant did not agree to sell at an unspecified time; rather, he has agreed to pay if he decided to sell. The defendant's commitment was merely vague and indefinite, but altogether illusory and unenforceable.

Kirwan appeals the trial court denial of recovery and asserts the court erred in holding the contract unenforceable and there was no joint venture.

I. In this equity action our review is de novo and although we give weight to the trial court's findings, we are not bound by them. White v. Board of Review of Polk County, 244 N.W.2d 705, 772 (Iowa 1976); Iowa R. App. P. 4.

II. All of Kirwan's grounds for recovery urged below and those asserted here are based on the alleged contract between Kirwan and Pederson. The trial court found the oral agreement illusory and unenforceable and also found the written agreement was not

intended to be a memorial of the oral agreement. The trial court finding that the contract was illusory is based on the construction given Pederson's alleged obligation to pay. We disagree with the construction given below and cannot conclude the agreement was illusory and unenforceable. Rather we find the parties agreed to a sufficiently specific, thus enforceable, contract. We rely solely on the oral agreement of the parties to reach this conclusion since we find the parties did not intend their written document to be legally binding.

When the terms of an agreement are definitely fixed so nothing remains except to reduce them to writing, an oral contract will be upheld unless the parties intended not to be bound until the agreement was reduced to writing. Severson v. Elberon Elevator, Inc., 250 N.W.2d 417, 420 (Iowa 1977). "The terms are sufficiently definite if the court can determine with reasonable certainty the duty of each party and the conditions relative to performance." Id. (citing Janssen v. North Iowa Conference Pensions, Inc., 166 N.W.2d 901, 907 (Iowa 1969)).

The term in issue here regards Pederson's obligation to pay twenty-five percent of the profits of sale to Kirwan. Kirwan asserts the twenty five percent was to be paid on sale of the land and that, by implication and by reference to the circumstances of the agreement, Pederson agreed to sell the land, although time of sale was indefinite. The trial court, instead, determined the agreement was to pay twenty-five percent of profit if Pederson chose to sell the land. Because this contingency of sale was in Pederson's discretion, the trial court said the contract was illusory and unenforceable.

We believe, however, Kirwan's construction is that intended by the parties and is reflected in the attendant circumstances of negotiation and performance. Pederson had sought out Kirwan's aid in the development project. He indicated it would take "a year or two" to complete. He said, at trial, "I wanted somebody to subdivide this thing and I have got to have somebody here to do this work. . . . And I says, 'I'll give you 25% of the profit for doing this work.'" This promise to pay profit indicates Pederson was going to sell the real estate. Although a time was not fixed for sale, the manifestation of the purpose of the agreement — to develop and sell the land - is clear. The words of Severson, 250 N.W.2d at 421, are applicable here:

> While we recognize a prudent businessman might have demanded additional terms and that the terms be spelled out with more precision, the persons involved in these negotiations were skilled, experienced businessmen and fully understood the implications of what they agreed upon. Neither party had any advantage over the other. We think the terms were sufficiently complete

> and specific when given those reasonable interpretations that ordinary businessmen are willing to give and considering the surrounding circumstances. See 5A Corbin on Contracts § 1174 at 279 (1964).

We find the term regarding sale of the land was not discretionary; rather the agreement was for twenty-five percent of profit to be paid on sale, at a later, unspecified date. We find the contract is sufficiently certain in its meaning to be binding. See Tri-States Investment Co. v. Henryson, 179 N.W.2d 362, 363 (Iowa 1970). Here, we are not faced with vagueness, indefiniteness, or uncertainty to the degree that enforcement is improper. This situation is unlike that of Tri-States Investment because there the manner and time of payment were left open for further negotiation. Here, those matters have been negotiated and were only awaiting the event that would trigger payment. That event, the sale of the land, was certain to occur at a future date, albeit unspecified. We reverse the trial court and hold the parties had an enforceable contract since the terms of the agreement were sufficiently specific and the parties intended to be bound by it even though it was not in writing. Severson, 250 N.W.2d at 420.

III. Because the trial court found no enforceable agreement between the parties, Kirwan's claim of joint venture status could not have prevailed below. Our finding that the agreement of the parties constitutes an enforceable contract obligates us to review Kirwan's joint venture arguments.

To have a joint venture, the parties must have a joint proprietary interest in the subject matter with a mutual right of control, the right to share in profits, and the duty to share in losses. Farm Bureau Service Co. of Hardin County v. Bavendar, 217 N.W.2d 560, 562 (Iowa 1974). A joint venture can exist only by the voluntary agreement of the parties. Id. Here, Kirwan did not have any duty to share in losses. He claims he would share them if the venture failed since he would not receive compensation for services rendered. That loss, however, would arise through Pederson's breach of contract rather than Kirwan's liability as a joint venturer. Additionally, we cannot conclude the parties' agreement voluntarily established a joint venture. Instead, it was a contract for services. Kirwan's claim of joint venture must fail. Accordingly, the statutes regarding dissolution of a joint venture or partnership and appointment of a receiver are inapplicable and Kirwan's assignments of error regarding them are found without merit.

IV. While Kirwan did not press a damages claim on appeal, we deem error sufficiently was preserved on damages by Kirwan's challenge to the lower court's finding the contract was unenforceable. Since we have determined Pederson breached the oral contract, this matter shall be remanded for determination of the amount of damages, if any, based on the record made at trial.

REVERSED AND REMANDED.