

FILED

JUN 29 1982

CLERK SUPREME COURT

191

IN THE COURT OF APPEALS OF IOWA

**R. SCOTT VLACK and LINDA K.
VLACK,**

Plaintiffs-Appellees,

vs.

JOHN P. CHONKA,

Defendant-Appellant.

Filed June 29, 1982

2-160
2-66999

Appeal from Scott District Court - J. Hobart Darbyshire and Max R.
Werling, Judges.

Defendant-buyer appeals trial court's partial summary judgment enforcing a
written, residential real estate sales contract between the parties, and the
subsequent judgment awarding plaintiffs-sellers \$9,587.58 damages for defendant's
breach of that contract. **AFFIRMED.**

Michael J. McCarthy of McCarthy & Hart, Davenport, for defendant-
appellant.

Robert D. Lambert of Betty, Neuman, McMahon, Hellstrom & Buttner,
Davenport, for plaintiffs-appellees.

Considered by Oxberger, C.J., and Donielson, and Johnson, JJ.

DONIRLSON, J.

Defendant-buyer appeals trial court's partial summary judgment enforcing a written, residential real estate sales contract between the parties, and the subsequent judgment awarding plaintiffs-sellers \$9,587.58 damages for defendant's breach of that contract. We affirm.

Our review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

In February, 1980, plaintiffs and defendant entered into a written contract for the sale of plaintiff's home to defendant. The buyer's offer was made subject to his obtaining conventional financing for \$60,000 at an annual rate not to exceed 14-3/4 percent for a term not less than thirty years. Defendant made a \$200 down payment to his realtor, the Mel Foster Realty Company, which was held in trust. Defendant secured the necessary financing to purchase the home, but refused to complete the transaction after he encountered problems selling his home in Connecticut.

Plaintiffs filed the instant action seeking damages for defendant's alleged breach of the contract, and subsequently filed a motion for summary judgment. Defendant resisted the motion, asserting in an attached affidavit that the sales contract had been orally modified by the parties to make sale of defendant's Connecticut home a condition precedent to his purchase of plaintiffs' home. Plaintiffs replied to the resistance, asserting that defendant's affidavit regarding the alleged oral modification was incompetent under section 622.32 (statute of frauds) and section 561.13 (the homestead statute). Plaintiffs also asserted that the alleged oral modification was void for want of consideration under Recker v. Gustafson, 279 N.W.2d 744 (Iowa 1979).

On August 5, 1980, trial court granted partial summary judgment for plaintiffs. Defendant timely filed a motion to reconsider. In support of the

motion, defendant filed an affidavit from a realtor who was allegedly present, acting as defendant's agent, when the oral modification was made, and the realtor's undated unsigned "addendum to purchase agreement" setting out the alleged oral modification. Plaintiffs filed a resistance, again arguing the statute of frauds.

On August 29, 1980, trial court denied defendant's motion for reconsideration on grounds that Recker was still present law and defendant could not overcome the "threshold issue" of the statute of frauds. Trial court subsequently entered judgment and awarded damages to plaintiffs. Defendant appealed and plaintiffs filed a motion to affirm asserting the statute of frauds issue was dispositive of the appeal. Plaintiff's motion was denied by an order filed September 31, 1981.

II.

On appeal, defendant asserts trial court erred by: (1) ruling that oral modification of a written contract for sale of land was void absent additional consideration under Recker v. Gustafson, 279 N.W.2d 744 (Iowa 1979); and (2) ruling that the oral modification of the written contract for sale of land was void under the homestead statute, section 561.13, The Code, because the sellers, husband and wife, did not join in execution of the modification. Plaintiffs assert that defendant has no competent proof of the alleged oral modification under the statute of frauds, section 622.32, The Code.

We find the trial court was correct in stating defendant failed to overcome the "threshold issue" of the statute of frauds and affirm the trial court. Section 622.32, The Code, provides that evidence of contracts for the sale of land is incompetent unless it is "in writing and signed by the party charged or by his authorized agent." In this case, the realtor's "addendum to the purchase agreement" setting out the alleged modification of the contract was not signed by anyone. The realtor's affidavit indicates he considered himself to be an agent for

the buyer, therefore, the "purchase money" exception to the statute of frauds set out in section 622.33, The Code, is not applicable because, although defendant paid \$200 to the realtor, the plaintiffs/vendors did not actually receive the money as required by the statute. Recker v. Gustafson, 279 N.W.2d at 750.

The preceding analysis is sufficient basis to affirm the trial court without reaching the merits of defendant's allegations of error. However, it should be further noted that defendant did not argue against application of the statute of frauds in either his resistance to plaintiff's motion to affirm or in his appellant's brief; therefore, he is also deemed to have waived the issue pursuant to Iowa R. App. P. 14(a)(3). For these reasons we affirm the trial court without further discussion.

AFFIRMED.