FILED
JUN 29 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERT R. HARDEE,	)	
Plaintiff-Appellee,	)	Filed June 29, 1988
vs.	)	103
JAN A BURKHARD and **SUSAN BURKHARD,**	)	
Defendants-Appellants.	)	
JAN A. BURKHARD and **SUSAN BURKHARD,**	)	
Plaintiffs-Appellants,	)	8-160 87-1098
vs.	)	
ROBERT R. HARDEE and **BEVERLY J. HARDEE,**	)	
Defendants-Appellees.	)	

Appeal from the Iowa District Court for Taylor County (No. 6903 & 6906), Darrell J. Goodhue, Judge.

The Burkhards appeal from a district court judgment dismissing their action to require a modification of the parties' real estate contract plus monetary damages and ruling in favor of Hardees' forcible entry action to remove the Burkhards from the property. **AFFIRMED.**

Richard L. Wilson of Wilson, Bonnett & Christensen, Lenox, for appellants Burkhards.

Jerome Y. Biggs of Travis & Biggs, Bedford, for appellees Hardees.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM

This is an appeal from the district court's ruling which dismissed Burkhards' claim against Hardees and which granted Hardees relief on their forcible entry action against Burkhards. We affirm the trial court.

We adopt as our own the following excerpt from the trial court's opinion:

> Robert Hardee and Beverly Hardee (Hardee) filed a forcible entry and detainer action which was tried in small claims court. The magistrate entered judgment for the plaintiff and defendant appealed. The defendant had made a motion to transfer the case to District Court and on appeal the motion was granted. Jan Burkhard and Susan Burkhard (Burkhard) filed a petition requesting damages and appropriate equitable relief. The parties stipulated that the two actions be heard together and that all matters be decided based on the recorded evidence that accompanied the magistrate appeal. All of the issues raised in Taylor County No. 6903, except for the question of damages, were raised in the forcible entry and detainer heard before the magistrate. It was stipulated by the parties that in the event the Court's decision is in favor of Burkhard that an ancillary hearing will be held at a subsequent date to determine the damage issue.

In 1975 Hardee, as seller, and Burkhard, as buyer, signed a real estate contract for the sale of a farm for over $381,000. The contract provided for principal payments of $8,000 on March 1 each year along with interest at the rate of 7% per annum on the unpaid balance. Burkhard failed to make these payments from 1983 to 1985. In 1985 the parties agreed to a debt adjustment with the Farmers Home Administration. By that agreement Hardee agreed to an interest-only payment during the years that income was not available to pay principal. On March 1, 1986, neither interest nor principal was paid. Burkhard also failed to pay the real estate taxes on the property for the years 1983-1984 and 1984-1985. In April 1986 Burkhard was served with a thirty-day notice of forfeiture. The controversy before us then followed.

The parties participated in the mandatory mediation provided by Iowa Code Chapter 654A (1987), and a mediation agreement was reached on November 18, 1986. From the date of the serving of the notice of forfeiture until

mediation was concluded, Burkhard had planted crops on the farm. Burkhard filed bankruptcy sometime in 1986 and eliminated creditors on his 1986 crop.

The mediation agreement provided that Burkhard would pay $19,000 on or before January 15, 1987. The agreement further stated that:

> If payment is made the Burkhards would like the option to renegotiate the land contract or rent the farm for 1987 .... If a new land contract cannot be renegotiated or an agreeable rent agreed upon by March 1, 1987, then the Burkhards *will vacate the farm* .... It is further understood by Burkhards and Robert Hardee the Hardees will immediately file the forfeiture of the land contract.

The mediator noted by separate instrument that "a total debt resolution was not agreed upon."

The forfeiture was perfected on November 19, 1986, and the Burkhards paid the $19,000. However, a new land contract was not negotiated and an agreeable rent was not agreed upon. Burkhards did not "vacate the farm" and on March 10, 1987, a notice to quit was served. The forcible entry action by Hardee then followed.

I.

Burkhards' first claim that they should not be required to vacate because the parties failed in their effort to renegotiate a new contract. We concur with the trial court when it found otherwise.

The trial court denied Burkhards' claim that the $19,000 was given in return for an agreement to negotiate. The trial court found and we concur:

> It is more likely that the $19,000 payment was intended to compensate Hardee for the unpaid 1986 interest of $19,135, or for the crop planted *on the real estate which was* subject to forfeiture in 1986, or for the unpaid real estate tax, or for the principal owed on the forfeited real estate contract for the crop year 1986.

Nothing in the mediation agreement provides the $19,000 was a down payment or earnest money to be returned if negotiations failed. On the contrary, the agreement read as a whole seems to provide to the contrary.

The agreement simply stated that the Burkhards would pay $19,000 before January 15, 1987. If payment was made, the agreement noted that the Burkhards "would like" to renegotiate the real estate contract. If no payment or agreement could be reached, the Burkhards would be required to move off the property. In that event the Burkhards were given the right to remove their plants. In all events the Burkhards had the right to remain on the farm until at least March 1, 1987.

But even if the agreement could be read to mean that the parties were obligated to negotiate, the record is clear that an attempt to reach an agreement was made. However, they were far apart on the sale price to be used. To compound the problem, one party wanted a cash settlement and the other wanted a contract with deferred payments. Try as they may, a new contract could not be negotiated nor could a rental agreement be reached.

This then brings into play that part of the mediation agreement that provides, "If a new contract can not be renegotiated or an agreeable rent agreed upon by March 1, 1987, then the Burkhards will vacate the farm." This they have failed to do notwithstanding the fact that they were permitted to remain in possession of the farm until March 1, 1987 to harvest the crop and receive the proceeds without interference from the Hardees, who by then were entitled to interest payments of $19,135 and whose farm had delinquent real estate taxes for the years 1983-84 and 1984-85.

As we stated above, there is nothing in the agreement to provide for the return of the $19,000 in the event negotiations broke down and we, like the trial court, do not believe that we should read a provision into the agreement that the parties did not agree to.

As the trial court noted:

> [T]he mediation agreement does not agree to re-negotiate to any particular terms or even "agree to agree" or agree to make "good faith" efforts to re-negotiate. The agreement simply states that, "Burkhards would like the option to re-negotiate."

II.

Burkhards next contend they are entitled to a reformation of the contract in question. One who seeks reformation contending the instrument does not reflect the real agreement between the parties has the burden of establishing the contention by clear, satisfactory, and convincing proof. Wallace v. Spray, 78 N.W.2d 406 (Iowa 1956). The term "clear and convincing" has been held to connote establishment of facts by more than a preponderance of evidence but something less than establishing a factual situation beyond a reasonable doubt. In re Henderson, 199 N.W.2d 111 (Iowa 1972).

The right to reform an instrument lies within the discretion of the equity court and depends upon whether the remedy is essential to the ends of justice. Facts and circumstances must be sufficiently compelling to constitute an effectual appeal to the conscience of the court and prompt it to interfere by reformation to mitigate the rigorous application of law. Merle O. Milligan Co., Inc. v Lott, 220 Iowa 1043, 263 N.W.2d 262 (1955).

We concur with the trial court that the evidence is far from clear and convincing. The mediation agreement does not agree to renegotiate to any particular term or as the trial court put it to even "agree to agree." The mediation agreement did not alter Hardees' right to forfeit. Instead it explicitly recognized this right. Nor did this agreement alter in any manner the right of Hardee to his principal and interest payments.

A writing will be reformed only if the party seeking reformation clearly and convincingly establishes that it does not express the true agreement of the parties because of fraud or duress, mutual mistake of fact, mistake of law,

mistake of one party and fraud or inequitable conduct on the part of the other. Kufer v. Carson, 230 N.W.2d 500 (Iowa 1975). Burkhards failed to establish by clear and convincing evidence that the Hardees employed fraud or duress or that there was a mistake of law or a mutual mistake of fact, or that there was a mistake on their part. Accordingly, we affirm the trial court on this issue.

III.

Burkhards' final argument is that Hardees were unjustly enriched by the $19,000 paid to them in contemplation of the mediation agreement. Not only was the $19,000 payment called for in the mediation agreement compensatory as found by the trial court, but the payment of this amount was voluntary on the part of Burkhards. There was no language in the mediation agreement to enforce payment of this amount by Burkhards in the event they chose not to. It is recognized that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered on the ground that the claim was illegal or that there was no liability to pay in the first instance. 66 Am. Jur. 2d, Restitution and Implied Contracts, § 93. The payment by Burkhards was a voluntary payment made with full knowledge of all the facts, including the fact that he had not paid real estate taxes, interest, or principal, or any landlord lien for the crop year 1986.

AFFIRMED.

Hayden, P.J., and Habhab, J., concur; Sackett, J., dissents.

SACKETT, J (dissenting)

I respectfully dissent

I would order the $19,000 returned to the Burkhards