FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ELZO BILLS,

Plaintiff-Appellant,

vs.

DAVID A. HARGER and LUCILLE J. HARGER,

Defendants-Appellees.

Filed October 28, 1982

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2-319
2-67928

Appeal from Linn District Court - Ansel J. Chapman, Judge.

Plaintiff appeals the trial court's decision denying his request for specific performance or, in the alternative, money damages arising from defendants' refusal to reconvey 38 acres of land pursuant to an alleged oral agreement. AFFIRMED.

David P. McManus of Olinger & McManus, Cedar Rapids, for plaintiff-appellant.

John K. VonLackum of Elderkin, Pirnie, VonLackum & Elderkin, Cedar Rapids, for defendants-appellees.

Heard en banc.

Plaintiff appeals the trial court's decision denying his request for specific performance or, in the alternative, money damages arising from defendants' refusal to reconvey 38 acres of land pursuant to an alleged oral agreement. On appeal, plaintiff contends that (1) the evidence does not support the trial court's conclusion, and (2) the court should consider all of the evidence on review since none would be subject to exclusion under the parol evidence rule or the statute of frauds. We affirm.

This cause for specific performance or, in the alternative , for damages, was brought in equity and accordingly, our review is de novo. Iowa R. App. P. 4; Severson v. Elberon Elevator, Inc., 250 N.W.2d 417, 420 (Iowa 1977). While we are not bound by the trial court's findings, we do give them weight, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7); Recker v. Gustafson, 279 N.W.2d 744, 748 (Iowa 1979).

I.

In January of 1973 plaintiff, Elzo Bills, and defendants, David and Lucille Harger, entered into a real estate installment contract under which plaintiff sold defendants a three-acre tract of land for use as a mobile home site. Subsequently, title problems became evident when it was discovered that the tract described in the contract contained only one and one-half acres instead of three. The parties agreed that the installment agreement should be rescinded and the contract was torn up.

The parties renegotiated and in June, 1973, they executed an offer and acceptance agreement for 39 acres at a price of $16,000 with a $6,000 down payment and $10,000 to be paid upon delivery of a warranty deed. In August, 1973, the parties entered into an installment real estate contract implimenting the offer and acceptance agreement, with the exception of an apparent increase in the

amount of the down payment. The $7,500 contract balance was to be paid at the rate of $92.27 per month. Nevertheless, the contract was cashed out on December 31, 1971, from loan proceeds defendants obtained to finance the final purchase. Defendants received a warranty deed from plaintiff at this time.

The plaintiff alleges that at the time the parties entered into the contract they contemporaneously entered into an oral side agreement providing that the defendants would ultimately purchase only one acre, would use the other 38 acres as collateral to obtain financing, and would then reconvey the 38 acres to the plaintiff at the end of ten years. When the defendants denied the existence of any such oral agreement and told the plaintiff they would not reconvey the 38 acres to him in 1983, the plaintiff filed the present action requesting specific performance or, in the alternative, damages of $90,000.

During trial the defendants contended that much of the plaintiff's evidence concerning the alleged oral agreement was inadmissible under the parol evidence rule or the statute of frauds. The trial court heard the plaintiff's evidence subject to these objections. In its written ruling the trial court declined to consider these objections because it denied the plaintiff relief on the ground that, considering all of the evidence, plaintiff failed to prove the existence of an oral agreement for the return of the 38 acres. It is from this ruling that plaintiff appeals.

II.

Plaintiff contends that the evidence does not support the court's conclusion that he failed to prove an oral agreement. We disagree.

It is clear that "[w]here specific performance of an oral agreement affecting real estate is sought, plaintiffs have the burden to prove the contract by a preponderance of clear, satisfactory and convincing evidence." Gustafson, 279 N.W.2d at 750 (citations omitted). To determine whether an oral contract has been formed the court in Severson articulated the following standard:

> When the terms of an agreement are definitely fixed so that 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. The terms are sufficiently definite if the court can determine with reasonable certainty the duty of each party and the conditions relative to performance.

Severson, 250 N.W.2d at 420 (citations omitted).

In the instant case the court found that no oral contract had been formed. In making its determination it is clear that the court considered the nature of the transaction and the testimony adduced at trial:

> Plaintiff's contention is contrary to the reasonableness of the entire transaction and the common behavior of reasonable individuals in real estate transactions; contrary to [defendant's] testimony concerning the $7500 loan he received from the bank in Center Point and which was confirmed by Burtwin Day, executive vice-president of that bank; contrary to the testimony of two reputable and extremely competent attorneys who were involved, one way or another, in the activities of the parties' and contrary to any definitive description of the particular 38 acres involved.

We are especially sensitive that this testimony presents matters of credibility which the trial court was in a better position to judge. Moreover, plaintiff never informed the attorney who handled the installment contract of the oral agreement. When the land was mortgaged, he never informed the attorneys for the mortgagee bank of the oral agreement. In addition, he reported on his income tax return that he had sold the 39 acres for $16,000.

Having reviewed the entire record, we agree with the trial court that plaintiff has failed to carry his burden to prove the existence of the oral agreement. In light of our ruling we need not consider whether it was error to receive evidence of the alleged oral agreement; our result would be the same if this evidence were disregarded.

AFFIRMED.