IN THE COURT OF APPEALS OF IOWA

No. 2-407 / 91-1809

FILED
NOV 30 1992
CLERK SUPREME COURT

STONER DEVELOPMENT CO.,

Plaintiff-Appellant,

vs.

BILL BARNES, INC.,

Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

Plaintiff appeals from the district court's judgment which dismissed its action for specific performance based on a real estate contract. **REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS DECISION.**

Mark McCormick of Belin Harris Lamson McCormick, A Professional Corporation, Des Moines, for appellant.

Ed Skinner of Skinner, Beattie & Wilson, P.C., Altoona, for appellee.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

SACKETT, J.

The question in this appeal is whether the trial court was correct in denying plaintiff-appellant's, Stoner Development Co., petition for specific performance of a real estate contract. Plaintiff contends the trial court should have ordered defendant-appellee, Bill Barnes, Inc., to perform on a contract defendant entered into to sell real estate located in Polk County to plaintiff. We reverse the trial court dismissal of plaintiff's action and remand to the trial court for proceedings consistent with this decision.

Plaintiff sought to purchase a tract of farmland containing some eighty acres from defendant. Steve Stoner is a principal in plaintiff corporation and was the person engaged in negotiations for the corporation. Plaintiff corporation engages in land development and is a development company. Bill Barnes is a principal in the defendant corporation and is the person who engaged in negotiations for that corporation. Defendant corporation engages in farming. Plaintiff prepared a purchase agreement. A house and one acre of ground were to be excepted from the tract. The purchase agreement showed an approximate total purchase price but provided the buyer would pay $2,500 an acre to be determined by a survey. The agreement also provided the offer was subject to F.M.H.A. approval, City of Bondurant approval, and Oskaloosa Home

Loan & Savings approval. Plaintiff had the agreement signed and met with defendant in the office of defendant's attorney, Paul Vos. Vos approved the agreement and defendant signed it in Vos's law office.

Defendant owned other property in the area, and defendant had a drainage problem with the other property.

The facts recited thus far are not in dispute. The parties disagree about what happened next. Defendant contends plaintiff knew of defendant's drainage problems and the words in the offer, "subject to approval of the City of Bondurant," meant defendant's drainage problems had to be solved before the transaction would close. Plaintiff contends these drainage problems did not surface until the sale was ready to close, and plaintiff and his lender met with defendant and his attorney for the closing. Plaintiff also contends the defendant said, "it did not have anything to do with plaintiff but he wanted plaintiff's help to solve his drainage problems before he closed."

Plaintiff and defendant discussed the drainage problem and the need to cure it. Defendant's attorney said he understood the provision for approval of the City of Bondurant was so that defendant could get help in getting a problem solved in Drainage District 30.

When the sale did not close, plaintiff brought this action for specific performance.

The case was tried to the court. After both parties rested, on November 20, 1990, the trial court made rambling oral findings. These findings are not clear to this court and apparently were not clear to the parties.

The trial court found the purchase agreement was a purchase agreement without specific terms and should be reformed. The trial court also found the parties should settle the matter. The trial court directed defendant's attorney to prepare a judgment entry.

The parties never agreed on a judgment entry. Consequently, on May 31, 1991, defendant made a motion for summary judgment contending plaintiff had asked for specific performance, the contract was not definite enough, and the court proceeded to reform the contract to provide for drainage of defendant's other property. Plaintiff also asked for summary judgment ordering the contract be performed.

Ultimately, the court entered written findings of fact that said the court had reconsidered all matters and found the parties did not precisely contract for a hundred-year flood drainage plan which is estimated to cost over $120,000, and further, since the court was not able to determine what the contractual agreement between the parties was, it was ambiguous and not enforceable. The court found it was not feasible to ignore the drainage discussion between the parties, and there was no way to

know the exact details because they never memorialized as such except in the wordage "subject to City of Bondurant approval" which the court found was intended to capsulize the conversation. Specific performance was denied and plaintiff's action was dismissed.

An action for specific performance is an equitable proceeding. See Janssen v. North Iowa Conference Pensions, Inc. of Methodist Church, 166 N.W.2d 901, 903 (Iowa 1969). We review de novo. Iowa R. App. P. 4.

Specific performance is available when a contract involves property that is unique or possesses special value. Recker v. Gustafson, 279 N.W.2d 744, 759 (Iowa 1979). Real estate is assumed to possess the qualities necessary to specific performance. See id. The court should only decree performance if the contract is sufficiently clear and definite and leaves no reasonable doubt of the parties' intent. See Decker v. Juzwik, 255 Iowa 358, 369, 121 N.W.2d 652, 658 (1963). The trial court apparently refused to order the agreement performed because it found the purchase price was not definite and the language "subject to the City of Bondurant approval" was to represent some complicated agreement as to drainage.

Plaintiff first contends the purchase price was clearly defined. We agree. We find no ambiguity or uncertainty as to the purchase price. The total purchase price was listed as an approximate sum. The contract clearly provides there

is to be a survey and the house and one acre of ground known as 105 Lincoln St., SE are to be excluded. The contract incorporated a legal description and a plat. The only conclusion that can be drawn is the parties plainly intended the total purchase price be determined by multiplying $2,500 by the number of acres or fraction thereof as determined by a surveyor to be in the parcel. The contract price is clear and unambiguous.

Defendant did not contend the agreement was not definite. Defendant offered evidence of two conflicting stories of a secret side agreement altering the price stated in the contract. We do not find the conflicting testimony of defendant and his witness on this issue credible. The contract was reviewed and approved by defendant's attorney.

Plaintiff next contends the language of the contract should not prevent it from being performed. The issue is whether the language "City of Bondurant approval" was a provision requiring plaintiff to assist defendant in obtaining drainage for other lands and, if it were, whether it was ambiguous and could not be enforced.

Plaintiff testified he inserted this condition for his own protection because he did not wish to be bound to purchase the land if sewer or water or other services were not available or if zoning was a problem. Plaintiff testified the drainage problems first came up on the day

set for closing when defendant said he was not going to sign off because if he did he would have no leverage over the city to get his drainage problems corrected. Plaintiff's testimony was substantially corroborated by the loan closing officer who was present with plaintiff on the day plaintiff thought the deal was to be closed. The loan officer said defendant said this failure to close had nothing to do with plaintiff but defendant wished to use plaintiff, who apparently was a fair-haired boy with the city council, to help defendant close the transaction.

The loan officer also testified that price of the land was not an issue, and he had assumed from defendant's attorney's letter that the price was on a per-acre basis. The loan officer knew nothing of the drainage problem until the day of closing.

Although plaintiff drew up the agreement, defendant had plaintiff bring it to defendant's attorney's office to be signed. The attorney stated it was his understanding from the conversation that the language about approval of the city was so defendant could get help with the drainage district, although the attorney indicated defendant was not clear as to what the parties planned to do about the drainage district.

The question basically focuses on who should be believed on this issue. We give deference to the trial court when assessing the credibility of witnesses.

After a careful review of the contract, the papers that preceded closing and the testimony of the parties, we find the explanation given by plaintiff and the loan officer of the events of the closing to be very credible. In making this assessment, we note defendant was represented by legal counsel when the agreement was signed. Legal counsel's testimony that subject to city approval was to envision a complex drainage agreement benefiting land of defendant's that was not included in the purchase agreement is not credible.

The evidence that plaintiff is now ready and has been ready to perform the terms of the contract since June 6, 1989, is not disputed.

We, therefore, reverse the dismissal of plaintiff's action for specific performance. We modify the trial court order directing defendant to return plaintiff's $10,000 down payment.

We agree with plaintiff. Defendant is required to specifically perform the contract. Defendant shall deliver an abstract of title showing marketable title within thirty days of the date of the issuance of procedendo. Further, defendant shall execute a warranty deed conveying the property to plaintiff. A copy shall go to plaintiff for his approval.

Plaintiff's petition also asked for loss of use rent, legal costs and attorney fees, and interest. These

requests have not been made to this court, and they are deemed waived.

Costs on appeal are taxed to defendant.

REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS DECISION.