IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF CARL NYMEYER, DECEASED;	)	
STANLEY A. NYMEYER and CHARLES F. NYMEYER,	)	8-431 87-1778
Appellants.	)	

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Appeal from the Iowa District Court for Hardin County (Pro. No. 15325), Carl D. Baker, Judge.

Stanley and Charles Nymeyer, heirs, and Richard Dunn, executor, appeal from a district court judgment rejecting the executor's petition for declaratory judgment and granting Marlyn and Helen Nymeyer's counterclaim for reformation of a real estate contract. **AFFIRMED.**

Michael A. Smith of Lundy, Butler & Lundy, P.C., Eldora, for appellants Stanley and Charles Nymeyer.

Richard N. Dunn of Dunn Law Firm, Eldora, for Richard N. Dunn.

Charles F. Fairall of Fairall, Fairall, Kaplan, Hoglan & Condon, Marshalltown, for appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

OXBERGER, C.J.

The heirs and the executor of the estate appeal the district court judgment which rejected the executor's petition for declaratory judgment and granted Marlyn and Helen Nymeyer's counterclaim for reformation of a real estate contract. We affirm.

Our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

Charles, Stanley and Marlyn Nymeyer are the three heirs of Carl Nymeyer who died in 1983. In 1976, a real estate contract for a farm was entered into between Carl, as seller, and Marlyn and Helen, as buyers. The contract did not contain a specific provision for foreclosure. The contract did provide that the seller had the right to forfeit the contract "in addition to any and all other legal and equitable remedies which he may have." Marlyn continued to make payments through 1985. The contract required the buyer to make a balloon payment for March 1986, unless the seller elected to extend the payment for five years. The executor took no action and Marlyn failed to make the March payment. At the time of trial, the amount owed was $232,594.96.

Richard Dunn was appointed as executor after a dispute arose between the heirs concerning the real estate contract. The executor instituted an action seeking the

right to retain any distribution of estate assets to Marlyn to cover the indebtedness on the contract. Marlyn counterclaimed by seeking reformation of the real estate contract to limit the available remedy for breach of the contract to forfeiture. After hearing testimony as to the intent of the parties to the real estate contract in 1976, the district court reformed the contract. The executor's claim for the right of retention was rejected.

The rules governing reformation of an instrument are well established:

> One who seeks reformation contending the instrument does not reflect the real agreement between the parties has the burden of establishing his contention by clear, satisfactory and convincing proof. (Citations omitted.) 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. (Citations omitted.) Reformation of course does not mean changing terms of an instrument but refers to a change in the instrument to reflect the real agreement of the parties. (Citations omitted.) We have said the right to reform an instrument is not absolute but lies within the discretion of the equity court and depends upon whether the remedy is essential to the ends of justice.

Kufer v. Carson, 230 N.W.2d 500, 503-04 (Iowa 1975).

In this case the record reveals that there was an agreement between the parties that the remedy of foreclosure would be eliminated from the real estate contract between Carl Nymeyer and Marlyn and Helen Nymeyer. The attorney, Larry High, testified to

conversations which he had with the parties which demonstrated this intent. Testimony from the case discloses that the language "in addition to any and all other legal equitable remedies which he may have" was left in the contract inadvertently. The attorney who drew the contract, although he knew of the parties' intentions in this regard, forgot and utilized stock paragraphs which contained this language.

Appellant argues that since the parties had a chance to review the contract when they signed it that they are bound by it. While it is the general rule that a party who has the opportunity to read a written agreement before he signs it and fails to do so is estopped in a proceeding to reform or cancel same. Akkerman v. Gersema, 260 Iowa 432, 441, 149 N.W.2d 856, 861 (Iowa 1967). However, this rule has exceptions. The law requires only reasonable diligence. Id. If the clause was inserted in the deed by mistake on the part of appellant or the scrivener who drew it, then it was contrary to the real intentions of the parties' agreement. Betz v. Swanson, 200 Iowa 824, 826, 205 N.W.507, 509 (1925).

We affirm the trial court's reformation of the contract to reflect the intent of the parties. In light of the reformation, we deny appellant's request to exercise a right of retainer. Under the contract as it has been reformed, the contract would have been forfeited and no debt would have been owed to Marlyn and Helen Nymeyer.

AFFIRMED.