

FILED

MAY 20 1977.

IN THE COURT OF APPEALS OF IOWA CLERK SUPREME COURT

DONALD L. SIGLER and
MARGARET L. SIGLER,

Appellees.

Filed May 20, 1977

v.

JACK A. O'BRIEN,

Appellant.

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2-57727

Appeal from Pottawattamie District Court - Paul H. Sulhoff,
Judge.

Appeal from a decree of specific performance in an action involving the sale of real estate. Reversed and remanded.

Peter J. Peters of Peters, Campbell & Pearson, of Council Bluffs, for appellant.

Jack E. Ruesch and Matt Walsh, of Council Bluffs, for appellees.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and
Carter, JJ.

ALLBEE, C.J.

Defendant appeals trial court's grant of specific performance to plaintiffs for the sale of certain real estate. Defendant contends that trial court erred in not sustaining his affirmative defense of rescission because of mutual mistake. The facts in this case are not significantly in dispute and we find they present a textbook example of mutual mistake. Accordingly, we reverse and remand.

Mutual mistake can occur in several manners: (1) the parties both assumed the existence of a material fact which in fact does not exist; (2) one party assumes the existence of a fact which does not exist and the other party knows of the mistake; (3) one party assumes the existence of a fact based upon the conduct or representation of the other party. See 54 Am.Jur.2d Mistake, Accident or Surprise § 7 (1971). All three varieties of 'mutual' mistake were clearly shown by the evidence here.

Defendant proved through plaintiffs' own witnesses that the contract description of the land - eight acres more or less - substantially varied from its actual size - 6.88 acres. This evidence alone is a prima facie showing that either plaintiffs have breached the contract or that mistake occurred. See Prenosil v. Pelton, 186 Iowa 1235, 1246, 173 N.W. 235 (1919); Gardner v. Kiburz, 184 Iowa 1268, 168 N.W. 814 (1918); Rathke v. Tyler, 136 Iowa 284, 111 N.W. 435 (1907).

But defendant did not rely on this prima facie evidence and presented uncontroverted evidence that each type of mistake occurred. First, Mr. Sigler testified he believed that the land contained approximately eight acres based on his experience as a farmer. This evidence combined with defendant's evidence that he also believed the tract was substantially larger, clearly shows that both parties assumed the existence of this fact when it did not exist. See Restatement, Contracts § 500 (1939). Second, plaintiffs' evidence showed that Sigler knew O'Brien thought the

tract was substantially larger than eight acres. O'Brien's first offer through a Mr. Luddington described the land as being 9.5 acres. Sigler testified that he partially rejected this offer because the stated acreage (which came from his own representations) was too much, yet he never informed O'Brien of his belief. The evidence is uncontroverted that Sigler had actual knowledge of O'Brien's mistaken belief. *Third*, O'Brien's mistake as to the size of the tract was due to Sigler's own representation. Defendant's evidence showed that his first offer which described the land as 9.5 acres was prepared by Luddington, Sigler's former real estate agent. Luddington's description of the land came from Sigler's earlier listing. The fact that Luddington was not Sigler's agent at the time of the offer is irrelevant since the earlier representation as to size had been made to the public at large. Defendant's evidence clearly showed that his mistaken belief as to the size of the tract was due to Sigler's misrepresentations to his former agent and the public.

There can be no doubt that O'Brien's and Sigler's mistake as to the size of the tract was a material one. O'Brien testified that his purpose for purchasing the tract was for commercial development rather than investment purposes. It is significant that every offer, whether prepared by defendant or plaintiffs, contained representations as to its acreage. The land was described as "Sigler's 8 acres - more or less" rather than by a technical legal description. Further, Sigler himself rejected O'Brien's first offer partially because of the incorrect statement of acreage. The conduct of the parties demonstrates the size of the tract was a material aspect of their bargain.

Plaintiffs argue that the sale of the land was in gross which necessarily precludes the finding of mutual mistake. Although there is evidence to the contrary, we agree the sale was

in gross. Yet, given the facts of this case, such a finding is irrelevant to whether defendant is entitled to relief. *See* Mahrt v. Mann, 203 Iowa 880, 210 N.W. 566 (1926); *Gardner v. Kuburz*, 184 Iowa 1268, 168 N.W. 814 (1919); *Rathke v. Tyler*, 136 Iowa 284, 111 N.W. 435 (1907). The sale of land in gross with a statement of acreage 'more or less' is not a waiver by the purchaser of substantial deficiencies in the amount of the land unless the facts so indicate. *See* Mahrt v. Mann, *supra*; *Gardner v. Kuburz*, *supra*; *Rathke v. Tyler*, *supra*.

This is particularly true where as here the vendee's mistake as to the size of the land in gross is due to the public representation by the vendor and the vendor has actual knowledge of the vendee's error. There are no facts surrounding this conveyance that would warrant the finding that O'Brien assumed the risk of at least a 15% deficiency. The fact O'Brien may have been negligent in not independently attempting to determine the size of tract before the conveyance can not be a bar to his relief. Restatement, Contracts, § 508 (1939).

Having found a legal wrong, we turn to O'Brien's remedy. O'Brien has requested rescission of this land contract and return of his deposit, a remedy somewhat unusual in land contracts. *See* Golly v. Grinnell College Foundation, 204 Iowa 319, 213 N.W. 252 (1927). Nevertheless, given the extent of variation in the size of the tract, the particular purpose defendant intended to make of it, the ease with which the parties can be placed in status quo, we do not believe the remedy of rescission would be an abuse of our equitable discretion in this instance. *See* Benkholder v. Carpenter, 260 Iowa 1297, 152 N.W.2d 593 (1967). Defendant is further entitled to return of his \$1500 earnest money deposit.

Trial court's judgment hereby is reversed and remanded with directions to enter a decree consistent with this opinion.