IN THE COURT OF APPEALS OF IOWA

FILED
DEC 23 1986
CLERK SUPREME COURT

167

JOHN E. MAY and EDITH L. MAY, Husband and Wife,

Plaintiffs/Appellees/Cross-Appellants,

vs.

WILLIAM C. HINTZ,

Defendant,

MABEL IRENE OAKLEY, Individually, and MABEL IRENE OAKLEY, Executor of the Estate of Donald G. Oakley, Deceased,

Defendants/Appellants/Cross-Appellees.

MABEL IRENE OAKLEY, Individually, and MABEL IRENE OAKLEY, Executor of the Estate of Donald G. Oakley, Deceased.

Plaintiffs/Appellants/Cross-Appellees,

vs.

JOHN E. MAY and EDITH L. MAY, Husband and Wife,

Defendants/Appellees/Cross-Appellants.

Filed December 23, 1986

6-369
85-1563

Appeal from the Iowa District Court for Davis County (No. CE 203-685, CE 209-885) - Dan F. Morrison and James D. Jenkins, Judges.

Mabel Irene Oakley, individually and as executor of the estate of Donald G. Oakley, appeals and John E. May and Edith L. May cross appeal from judgments rendered in consolidated actions. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS.**

D. W. Harris, Bloomfield, and Emil Trott, Jr., of Barrett & Trott, Des Moines, for appellants.

R. Kurt Swain, Bloomfield, for cross-appellants.

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

SACKETT, J.

Mabel Irene Oakley, individually and as executor of the estate of Donald G. Oakley, appeals from an adverse decree (1) declaring they are not entitled to a deed to the residential portion of a tract of real estate and (2) refusing to enjoin forfeiture of an installment sale of real estate contract as to the residence portion of the tract. John E. May and Edith L. May cross appeal requesting this court (1) strike and vacate the issuance of a temporary injunction enjoining the forfeiture or (2) rule that the only effect of issuance of the injunction is to preclude sellers from enforcing their forfeiture pending trial on the merits.

The Oakleys[1] were buyers and the Mays were sellers under the real estate contract forming the basis of this litigation. William Hintz was a tenant on the farmland in question. The issue regarding his interest was resolved by the trial court. He is not a party to this appeal.

The contract is an installment real estate contract for the sale of 320 acres in Davis County. On the 320-acre tract is a house. The house had been used as a personal residence by the sellers and is now used as a personal residence by the buyers.

The contract provided the buyers would buy and the sellers would sell real estate described as the "East half (E 1/2) of section twenty-one (21). . ." and then provided as follows:

> 1. The TOTAL PURCHASE PRICE . . . which includes separately both Sellers' residence portion and farm portion, is the sum of Three Hundred Thirty-eight Thousand Dollars ($338,000.00). Of said total sum the amount of Fifty Thousand Dollars ($50,000.00) is allocated as total purchase price for the residence and the amount of Two Hundred Eighty-eight Thousand Dollars ($288,000.00) is allocated as total purchase price for the sale of the farm. Buyers shall make payments . . . as follows:
>
> (a) Upon the execution of this agreement, Buyers hereby pay to Sellers the sum of Ten Thousand Dollars

[1] Donald Oakley died after the contract was signed but before these actions were commenced.

($10,000.00), receipt of which is hereby acknowledged by Sellers, as a down payment upon the purchase price of the residence portion of the above described real estate.

(b) On or before October 1, 1979, Buyers shall pay to Sellers the sum of Forty Thousand Dollars ($40,000.00) as the balance of the purchase price of said residence.

(c) On January 15, 1980, Buyers shall pay to Sellers the sum of Fifty Thousand Eight Hundred Dollars ($50,800.00) as a down payment of the farm portion of the above described premises. (emphasis added).

The contract then provided for payment of the balance of the farm portion of the purchase price on an installment basis, the final payment to be due in the year 2000. The contract also provided:

DEED. Upon the execution of this contract, Sellers agree to contemporaneously execute and deliver to Buyers a warranty deed in conformity with the standards of the Iowa State Bar Association subject only to liens and encumbrances of record upon the execution of this contract, or hereafter created by Buyers, and further subject to such zoning regulation and easements of record for public utilities and established roads and highways.[2]

ESCROW OF DEED. Upon the approval of the abstract of title by Buyers, Sellers shall contemporaneously execute and deliver a warranty deed in favor of Buyers, or Buyers assigns, to Vern M. Ball, Attorney at Law of Bloomfield, Iowa. It is agreed that said Vern M. Ball is the Escrow Agent of the parties and that he shall hold said deed until the contract has been complied with at which time he shall deliver said deed to Buyers or their assigned.

ALLOCATION. Of the aforesaid total purchase price, it is expressly understood and agree that the amount of Fifty Thousand Dollars ($50,000.00) due and payable on or before October 1, 1979, shall be considered solely and exclusively as the consideration paid for the residence and appurtenant yard located approximately at the center of the above described real estate, constituting two acres more or less of the above described property, to include the actual residence structure, yard, the circle driveway. It is hereby mutually agreed that the aforesaid sum of Fifty Thousand Dollars ($50,000.00) is a fair and accurate valuation of said residence portion. The amount of Two Hundred Eighty-eight Thousand Dollars ($288,000.00) of the aforesaid total purchase price, said amount being the nonresidence portion of the above described property, being considered as the farming

[2] Such a deed conveying the entire tract was executed and escrowed in accordance with the contract terms.

> operation acreage, . . . although the aforesaid acreages are divisible by nature, and divisible by purchase allocation amounts, a single deed shall be delivered as aforesaid in conveyance of both said tracts, and in satisfaction of the terms and conditions of this contract.
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> * * *
>
> INSURANCE. Buyers agree to keep the farm buildings and improvements upon said premises insured against loss by fire, tornado and extended coverage for a total sum of $16,800.00 or the balance owing under this contract, whichever is less. . . . Whereas Buyers have paid for the total purchase price of the residence, said Buyers need not maintain insurance coverage on said residence. (emphasis added).

The buyers took possession of the premises. They paid the $50,000 deemed to be the purchase price of the residence and made all payments of interest and principal on the farm portion[3] until 1985 when they failed to pay principal and interest due to the sellers[4] and failed to pay real estate taxes.

On May 1, 1985, buyers made demand for a separate deed to the house. On June 19, 1985, the sellers filed a petition for declaratory judgment requesting a determination whether buyers were entitled to a separate deed to the residential portion of the real estate. The buyers answered requesting, inter alia, a declaration they were entitled to a warranty deed to the two-acre tract referred to in the contract as the residence along with the adjacent yard and driveway.

On August 7, 1985, sellers served buyers with a notice of forfeiture of real estate contract claiming buyers had failed to comply with the terms of the contract and seeking to forfeit the entire 320-acre tract. On August 9, 1985, the buyers filed a petition in equity for an injunction. The buyers alleged sellers had served a forfeiture notice seeking to forfeit the entire real estate contract and sought to enjoin its application to the residential tract. The two actions were joined for trial. The trial court refused to enjoin forfeiture as to the residential tract and determined sellers were not required to give the buyer a deed to the residential tract. The buyers appealed contending (1) the

[3] An addendum was made to the contract to change the first payment of principal. It is not relevant to the issues herein.

[4] Certain payments due by buyers to FHA also were not made in 1985.

trial court should have enjoined forfeiture, and (2) the sellers must provide buyers with a deed.

This action is in equity and we therefore find the facts anew. Keokuk State Bank v. Eckley, 354 N.W.2d 785, 787 (Iowa App. 1984). Our review is de novo. See Skubal v. Meeker, 279 N.W.2d 23, 27 (Iowa 1979) (Court determined review was de novo where the court presented with issues of vacation of forfeiture and reformation of contract).

I.

We first examine the buyers' contention we should reverse the trial court's order holding sellers could forfeit buyers' interest in both the residential property and the farmland. Equity abhors forfeiture. Lett v. Grummer, 300 N.W.2d 147, 149 (Iowa 1981); Roshek Brothers Co., 249 Iowa 349, 358, 87 N.W.2d 8, 13 (1957). Contracts involving a forfeiture cannot be extended beyond the strict and literal meaning of the words used. Eckley, 354 N.W.2d at 789; Lane v. Crescent Beach Lodge and Resort, Inc., 199 N.W.2d 78, 81-82 (Iowa 1972). The sellers have the burden of proving the existence of facts which entitle them to forfeiture under the terms of the contract. Lane, 199 N.W.2d at 81. Forfeitures are not favored in law and courts will so construe contracts as to avoid them if possible. Id.

There is little argument the house and two acres were sold as a separate parcel for $50,000. We determine the contract clearly spells out that fact. This was not a contract where a certain percentage of the payments were allocated to one tract and a certain percentage allocated to another. The parcels were priced separately. However, there is no provision for a deed to be delivered when the $50,000 is paid for the residential tract. According to the contract and escrowed deed the buyers were to obtain but one deed to the entire 320-acre

tract. That deed was to be delivered after payment was made for both parcels.

The parties also agree the contract was allocated between the personal residence and the farmland acres to give the buyers the benefit of the personal residence exclusion and installment sale treatment of the farmland portion by keeping the down payment below 30 percent. Furthermore, because the entire initial payments were for the personal residence only, the sellers postponed paying income taxes until they commenced receiving payments on the farm portion of the contract. The buyers had arranged a like kind tax-free exchange of a personal residence and farm acres they owned in Illinois and needed to have the tracts separate in the contract to qualify for the like kind exchange.

We must determine whether the contract is divisible and whether the language of the contract results in the residence remaining as security for the farmland contract such that when the contract was forfeited the sellers could forfeit the buyers' interest in both parcels.

The sellers argue the residential parcel is security because the contract is not divisible while the buyers argue the contract is divisible. If the consideration for a contract is single and not apportionable, the contract is single or entire and not apportionable. Peek v. New York Life Insurance Co., 206 Iowa 1237, 1241, 219 N.W. 487, 488 (1928).

> As a general rule, it may be said that a contract is entire, when, by its terms, nature, and purpose, it contemplates and intends that each and all of its parts and the consideration shall be common, each to the other, and 'interdependent.' On the other hand, it is the general rule that a severable contract is one in its nature and purpose susceptible of division and apportionment. The question whether a given contract is entire or separable is very largely one of intention, which intention is to be determined from the language the parties have used, and the subject matter of the agreement. The divisibility of the subject matter or the consideration is not necessarily conclusive though of aid, in arriving at the intention.

Sturtevant Co. v. LeMars Gas Co., 188 Iowa 584, 591, 176 N.W. 338, 341 (1920) (quoting Timber Co. v. Windmill & Pump Co., 135 Iowa, 308, 310 (1907)). See also 91 C.J.S. Vendor and Purchaser §107:

> Whether the contract is to be regarded as entire or severable depends primarily on the intention of the parties, as indicated by the language of the instrument, construed in case of ambiguity with reference to the subject matter and the surrounding circumstances. Ordinarily, if the consideration is entire and not apportioned by the parties between the different undertakings or parcels of land to which the contract relates, the contract will be construed as entire. On the other hand, if the subject matter of the contract is divisible and the consideration is apportioned, it is indicative, although not conclusive, of a severable contract, and hence a contract will ordinarily be construed as severable where it embraces separate undertakings or parcels of land and the consideration is apportioned between them.
>
> If the contract is severable, the invalidity of one part will not invalidate the other, and it is possible, for a proper cause, to rescind one part leaving the other in full force and effect, and performance goes, on the other. On the other hand, if the contract is an entire one and not divisible, it must stand or fall in its entirety, and it is not possible to rescind or repudiate one part leaving the rest in full force and effect. Where real and personal property are sold as a unit for a single consideration, and title in general terms is reserved in the vendor, such reservation of title applies to the personal as well as to the real property.

In the instant case the consideration was apportioned by the parties between two separate parcels. We consider this in determining the divisibility of the contract.

The contract made no provision for the residential property to stand as security for the balance of the contract, nor did the contract provide for conveyance of the residential property in the event payment was not made for the farm acres. In essence, the sellers request we extend the contract to provide a lien for the unpaid balance of the farmland remains on the residential portion after full payment is made for the residential portion.

The instant case is analogous to Lane, 199 N.W.2d at 81. There the crucial question was whether the contract was breached by the buyer's failure to pay the insurance premiums when due. The contract did not expressly obligate buyers to pay the insurance premiums when due. Id. However, the sellers argued the contract made time of the essence and failure to pay the premiums on time was failure to keep the premises insured within the meaning of the contract. Id. The court said:

> In this case plaintiffs ask extension of contract terms by implication. They base their forfeiture claim upon reading into the contract a requirement that insurance premiums be paid when due with time of the essence.
>
> It is well settled that forfeitures by implication or by construction, not compelled by express requirements, are regarded with disfavor, and that contracts involving a forfeiture cannot be extended beyond the strict and literal meaning of the words used. Since forfeitures are not favored * * *, provisions for forfeitures are to receive, where the intent is doubtful, a strict construction against those for whose benefit they are introduced. Courts are reluctant to declare and enforce a forfeiture if by reasonable construction it can be avoided. Forfeitures are enforced only where there is the clearest evidence that that was what was meant by the stipulation of the parties.

Id. See 17 Am.Jur.2d Contracts §500, pages 975-976 (1984). See also Olson v. Harmack, 10 Wis.2 256, 102 N.W.2d 761, 763, (1960) (citing 17 C.J.S. Contracts §320, p. 742 (1955)) (Construction against forfeiture will be adopted whenever reasonably possible and a contract will be construed not to provide for a forfeiture unless there is a clear expression or manifestation of the intent of the parties in this respect).

Absent an express provision in the contract, we refuse to extend the contract to provide the residential tract stands as security for the unpaid balance on the farm acres. We further note the insurance clause providing the buyers need not maintain insurance on the residence property would further indicate the residence property did not remain a security.

We reverse that portion of the trial court's order refusing to restrain the sellers from forfeiting the residential portion of the contract. However, there is no basis to restrain the sellers from forfeiting the farmland portion of the contract. We affirm that portion of the trial court's order refusing to enjoin forfeiture of the farmland portion of the contract.

II.

We next address the buyers' contention we must order the sellers to execute and deliver a warranty deed to the residential portion. The contract provides for a deed on payment, but also provides conveyance should be made by one deed.

An executory contract for the sale of land, unless otherwise expressed, works an equitable conversion whereby the interest of the seller becomes personalty and the buyer, in the contemplation of equity, is actually seized of the estate. H. L. Munn Lumber Company v. City of Ames, 176 N.W.2d 813, 816 (Iowa 1970). We agree with the buyers that a deed should issue. In Smith v. Haynes, 9 Maine 106, 108 (1832), the court, faced with the seller's argument he was not required by contract to give a deed to property once consideration had been paid because he had only agreed to sell the land, construed the agreement as an agreement to make conveyance.

The sellers argue because the residential tract was never surveyed and a legal description provided it was not intended the tracts be severable. We reject this argument. Mere difficulty in determining the exact legal description of the tract to be conveyed should not alone constitute denial of the relief sought by the buyers. See Holden v. Construction Machinery Company, 202 N.W.2d 348, 365 (Iowa 1972) (Difficulty in ascertaining and measuring damages does not alone constitute a cause for denial of recovery). In the instant case, the

contract provides the residential portion is two acres more or less to include the residence structure, yard and circle driveway. No other farm or outbuildings are included in the description. While buyers were not required to keep the residence insured, they were required to keep the insurance on the outbuildings during the contract term. This is evidence the outbuildings were not included in the two-acre residential tract. We determine any other farm or outbuildings are not included in the two-acre residential tract.

However, we must address the issue of a legal description established for the two-acre tract. Equity jurisdiction allows a court the necessary flexibility to determine the equities between the parties. A court of equity has the power to impose equitable terms upon a party as a condition to equitable relief and to devise a remedy to meet the situation. See Farmers Savings Bank of Joice v. Gerhart, 372 N.W.2d 238, 245 (Iowa 1985); Skubal, 279 N.W.2d at 27; Holiday Rest Inn v. Treloar, 217 N.W.2d 517, 527 (Iowa 1974) (quoting McClintock on Equity §29 at 76 (2d Ed. 1948)); Caldwell v. City of Ottumwa, 198 Iowa 666, 673, 200 N.W.2d 336, 339 (1924). See also Moser v. Thorp Sales Corp., 256 N.W.2d 900, 907 (Iowa 1977). Where a situation exists which is contrary to the principals of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation, though no similar relief has been given before. Holden, 202 N.W.2d at 363-364.

The necessity for the second deed is caused by the buyers' breach. In order to adjust the equities we direct the transfer is conditioned upon buyers having a survey made and furnishing the sellers a legal description for no more than two acres including residence, yard and circle drive but not including other outbuildings. If the parties cannot agree on the boundaries of the survey the trial court shall appoint a master to make that determination with the cost

of the master to be paid one-half by each party. The sellers shall execute and deliver to the buyers a warranty deed to the described tract. Such warranty deed shall be subject only to liens and encumbrances of record upon the execution of the contract on September 28, 1979, or created by the buyers after September 28, 1979. Further, the warranty deed shall be subject to zoning regulations and easements of record for public utilities and established roads and highways, except that the sellers shall also warrant the property as being free of any lien created on the residential portion by the existence of a mortgage with Farmers Home Administration, the payment of which comprised a portion of the consideration for the sale of the farm portion. When a vendor exercises a right of forfeiture against a defaulting vendee the liability of the latter for the unpaid purchase money is extinguished. See Gray v. Bowers, 332 N.W.2d 323, 325 (Iowa 1983); Abodeely v. Cavras, 221 N.W.2d 494, 497-98 (Iowa 1974).

Because the tracts have not been separately described the real estate taxes have been assessed against the entire tract. Until such time as the taxing authorities tax the property separately the buyers shall be responsible for 18 percent of the real estate taxes assessed against the 320-acre tract and the sellers shall be responsible for the balance.

We do not require the sellers to furnish the buyers an abstract.

When the buyers filed their petition to enjoin forfeiture they obtained a temporary injunction enjoining forfeiture. The trial court denied a permanent injunction, which ruling we have affirmed in part and reversed in part. The sellers, however, contend the trial court should have vacated the temporary injunction. The sellers have failed in their brief to direct us to that portion of the trial court record where this issue was raised. See Iowa R. App. P. 14(a)(4) and (5), and 14(g). Nor do we find the issue to have been raised in the trial

court. We therefore do not consider it on appeal. See Shell v. Careage Corp., 353 N.W.2d 416, 420 (Iowa 1984).

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS.