

IN THE COURT OF APPEALS OF IOWA

No. 9-185 / 98-0837

Filed July 23, 1999

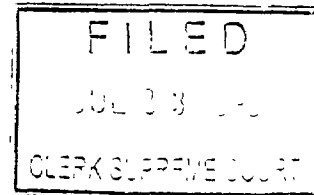
UNIVERSITY OF NORTHERN IOWA,

Plaintiff-Appellee/Counterclaim Defendant,

vs.

P.S. ERICKSON,

Defendant-Appellant/Counterclaimant.



P.S. ERICKSON,

Third Party Plaintiff-Appellant,

vs.

DONALD WOOD and OAKRIDGE REALTORS,

Third Party Defendants/Appellees.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister,
Judge.

The former owner of a parcel of land abutting the University of Northern Iowa appeals a supplemental order of the district court which directed him to transfer his undivided one-half interest in the property to UNI for half of the original contract sale price. **AFFIRMED.**

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Todd P. Forsythe, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, David R. Sheridan and Michael L. Smith,
Assistant Attorneys General, for appellee University.

Donald Wood, Cedar Falls, pro se.

Considered by Sackett, C.J., and Vogel and Zimmer, JJ. Mahan, J., takes no
part.

SACKETT, C.J.

Defendant-appellant P. S. Erickson appeals challenging orders directing the sale of a parcel of land to plaintiff-appellee University of Northern Iowa. Defendant contracted to sell a 2.8-acre tract located in Black Hawk County, Iowa, to plaintiff. After the contract was signed, defendant refused to perform. Plaintiff, apparently without checking to determine the title holder of the property, brought an action for specific performance asking defendant be ordered to convey the real estate and provide an abstract showing he had marketable title in exchange for plaintiff paying the contracted price of \$225,750. On September 20, 1996, the district court entered an order giving plaintiff the relief it had requested.¹ In the judgment, the court retained jurisdiction to enter supplemental orders as necessary.

Defendant delivered the abstracts of title to the property, and the attorney general's office, after examining the title, was of the opinion defendant owned an undivided one-half interest in the property in fee and a life estate only in the other one-half interest. Defendant, learning this, filed a petition to vacate the judgment for specific performance contending it was based on incorrect facts and he was unable to perform as ordered. The district court dismissed defendant's petition on March 26, 1997. The district court also found defendant should give plaintiff a deed for his interest in exchange for a pro rata share of the purchase price representing defendant's interest.

¹ Other claims raised and decided in the judgment are not relevant to the issues on appeal.

Plaintiff then filed a motion for a supplemental order asking the district court to compel defendant to convey a one-half interest in the property for one-half of the contracted purchase price. The court, after a hearing, issued a supplemental order determining a change-of-title changing title to an undivided one-half interest in the property from defendant to plaintiff should issue on payment to the court of one-half of the purchase price less offsets for pro rata taxes. The supplemental order issued on May 1, 1998. Defendant filed a notice of appeal on May 8, 1998, stating appeal was taken from the final order of May 1, 1998.

This case was heard in equity and it is agreed our review is de novo. *See Iowa R. App. P. 4*. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *Shine v. State*, 458 N.W.2d 864, 865 (Iowa App. 1990). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. *Id.*

Equity jurisdiction allows a court the necessary flexibility to determine the equities between the parties. *Farmers Sav. Bank v. Gerhart*, 372 N.W.2d 238, 245 (Iowa 1985); *Skubal v. Meeker*, 279 N.W.2d 23, 27 (Iowa 1979). A court of equity has the power to impose equitable terms upon a party as a condition to equitable relief. *Caldwell v. City of Ottumwa*, 198 Iowa 666, 673, 200 N.W. 336, 339 (1924).

Plaintiff contends defendant failed to preserve error in not appealing the district court order dismissing his petition to vacate the judgment. Plaintiff further

contends the supplemental order was within the retained jurisdiction to enter supplemental orders.

The only order from which appeal was taken, according to defendant's notice of appeal, is the May 1, 1998 supplemental order. We, therefore, address defendant's issues only as they relate to that order.

Defendant first contends the district court did not have jurisdiction to enter the supplemental order. We disagree. The district court specifically retained this jurisdiction. Once the jurisdiction of equity has attached in an action for specific performance, it will itself proceed to round out the whole circle of the controversy and decide every other contention connected with the subject matter of the suit essential to do complete justice. *See Bankers Surety Co. v. Linder*, 156 Iowa 486, 494, 137 N.W. 496, 499 (1912).

Defendant further contends there was no opinion from a qualified expert as to the state of the title to the real estate. He advances the district court made no finding as to the state of the title. Defendant, in his petition to vacate the judgment, stated he owned an undivided one-half interest in the property and a life estate in an undivided one-half interest. Any error on this issue was not preserved for appellate review.

Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and decided upon appeal. *PEB Practice Sales, Inc. v. Wright*, 473 N.W.2d 624, 625-26 (Iowa App. 1991). If no rule 179(b) motion is made, or an issue

not raised, we will assume as fact an unstated finding necessary to support the trial court's judgment. *Id.*; *Hubby v. State*, 331 N.W.2d 690, 695 (Iowa 1983).

Defendant also contends because the supplemental order followed the order in the declaratory judgment action by over one year, it was barred by laches.

Laches and equitable estoppel are affirmative defenses. *See Manson State Bank v. Diamond*, 227 N.W.2d 195, 200 (Iowa 1975); *Chadek v. Alberhasky*, 253 Iowa 32, 39-40, 111 N.W.2d 297, 301 (1961). The party asserting the defense has the burden to establish all essential elements thereof by clear, convincing, and satisfactory proof. *See DeWall v. Prentice*, 224 N.W.2d 428, 430-431 (Iowa 1974). The doctrine of laches will be applied only where it would be inequitable to permit recovery or is clearly demanded in the interest of justice. *Shives v. Niewoehner*, 191 N.W.2d 633, 637 (Iowa 1971). Ordinarily, laches cannot be claimed against one bringing an action within the statute of limitations, absent some special detriment to another. *See Chadek*, 253 Iowa at 40, 111 N.W.2d at 301; *Pap v. Pap*, 247 Iowa 371, 383, 73 N.W.2d 742, 749 (1955). Defendant has failed to meet his burden on this issue.

Defendant next advances plaintiff filed its action for specific performance without checking the title to the property, and in doing so plaintiff failed to protect itself and has no recourse in the absence of fraud against defendant upon the failure of the title.

A merchantable title is one which a reasonable, prudent person would accept in the ordinary course of business after being fully apprised of the facts and the

applicable law. *Woods v. Schmitt*, 439 N.W.2d 855, 864 (Iowa 1989); *Wilson Close, Ltd. v. Crane*, 499 N.W.2d 732, 734 (Iowa App. 1993). The record is not sufficient for us to determine the state of the title to the real estate.

There is nothing to suggest plaintiff knowingly misrepresented the state of the title to the court. The limited title information would show defendant owned the property and on April 8, 1981, deeded it to his wife and himself. The deed resulted in the parties holding the property as tenants in common. Defendant's wife died in 1992, and in 1993 defendant filed an affidavit stating his wife had died and he held the property with her as a joint tenant with full rights of survivorship, when he did not.²

While we agree with defendant it would have been prudent for plaintiff to check the title of public record and readily available, the fact plaintiff did not does not necessarily defeat its claim, nor is it a reason to reverse the supplemental order.

Defendant challenges the order the district court entered.

The invocation of equity jurisdiction permits the necessary reach and flexibility in working out the equities among these parties. *See Holi-Rest, Inc. v. Treloar*, 217 N.W.2d 517, 526-27 (Iowa 1974). Where a situation exists that is contrary to the principles 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, even if no similar relief

² At the time, the property was a homestead. Introduced as an exhibit is a copy of what was purported to be defendant's wife's will dated May 21, 1981, giving defendant a life estate in her property. There is no showing the will was admitted to probate. The record also does not reflect the extent of defendant's wife's holdings at the time of her death.

has been given before. *Moser v. Thorpe Sales Corp.*, 256 N.W.2d 900, 907 (Iowa 1977). The power of a court of equity is not limited to settling the rights of the parties upon what has been done in the past, but it reaches forth and declares their duties and rights for future quiet title suits, as in all equity suits. *Bankers Surety Co.*, 156 Iowa at 494, 137 N.W. at 499. Chancery jurisprudence has no immutable rules, but lights its own pathway, blazes its own trail, paves its own highway; it is, in short, an appeal to the conscience of the court. *Moser*, 256 N.W.2d at 907.

Although the person who intends to purchase land and obtain merchantable title cannot be forced to accept a partial interest if he entered into the contract to purchase in ignorance of the seller's incapacity to convey merchantable title, he is generally entitled to have the contract specifically performed, as far as the seller is able. See *Urbain v. Speak*, 258 Iowa 584, 589-90, 139 N.W.2d 311, 314 (1966); *Anderson v. Weirsmith*, 209 Iowa 714, 727, 229 N.W. 199, 205 (1930). In fact, a seller may be compelled to convey his defective title or deficient estate, with a resulting just abatement out of the purchase price for the deficiency of title, quantity, or quality of the estate to compensate for the seller's failure to perform the contract in full. See *Moser v. Thorp Sales Corp.*, 334 N.W.2d 715, 718 (Iowa 1983).

The supplemental order entered by the district court was within its equitable powers. We reject defendant's claim it was otherwise.

Defendant further contends the supplemental order failed to consider his life estate in an undivided one-half interest in the property. We agree with defendant the

district court failed to address his life estate and only directed his undivided one-half interest in the fee be transferred for the price. Defendant retains his life estate in the other undivided one-half interest. Neither party having requested a disposition of the life estate in the district court, error on this issue was not preserved. We do not consider it on appeal.

Defendant's other arguments have been considered and rejected. We affirm.

AFFIRMED.