FILED
AUG 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MELVIN G. FORSLING and **ELAINE J. FORSLING,**	)	
Plaintiffs-Appellants,	)	Filed August 30, 1983
vs.	)	
RICHARD KUDRNA, ROBERT C. TOMPKINS, and WANDA A. TOMPKINS,	)	3-179 2-68958
Defendants-Appellees.	)	

Appeal from Woodbury District Court - Lawrence W. McCormick, Judge.

Plaintiffs-buyers appeal from the trial court's judgment dismissing their petition in this action for specific performance of a real estate contract. AFFIRMED.

Robert W. Green of Jacobs, Gaul, Nymann & Green, Sioux City, for plaintiffs-appellants.

J. Patrick Ryan of Margolin, Ryan, Gildemeister & Willia, Sioux City, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ.

DONIELSON, J.

Plaintiffs-buyers appeal from the trial court's judgment dismissing their petition in this action for specific performance of a real estate contract. Defendants Tompkins were the sellers under the contract with plaintiffs; they eventually contracted to sell with defendant Kudrna instead. Plaintiffs claim that: (1) strict compliance with the closing date was waived by defendants Tompkins, so the contract was enforceable and specific performance should have been granted and that any abandonment of the contract would have to be done under Iowa Code ch. 656 (forfeiture of real estate contracts); (2) they are entitled to damages from Kudrna for his actions constituting the tort of interference with contractual relations, and (3) the trial court should have granted plaintiffs' motion to amend their petition filed after entry of judgment to include an allegation of Kudrna's interference with business expectancy. We affirm.

Plaintiffs and defendants Tompkins entered into a purchase agreement for property owned by the Tompkins. The agreement consists of an offer to purchase accepted by Tompkins. The purchase agreement was entered into on or about June 16, 1978. The agreement was subject to plaintiffs' obtaining "maximum FHA financing." Plaintiffs also entered into an agreement with the Tompkins that plaintiff would act as general contractor to repair the house sufficiently to meet FHA standards, for which Tompkins agreed to pay plaintiffs $5,000. The Tompkins also agreed to loan $3,000 to plaintiffs to be secured by a second mortgage. These additional agreements were not revealed to the lender at the time the mortgage application was made. The contract provided that possession was to be given on or before August 1, and that settlement would be on "July 28, 1978 . . . unless otherwise agreed by the parties."

While the FHA was processing the loan the August lst possession date was fast approaching. Robert Tompkins testified at trial that he talked to Melvin

Forsling in the latter part of July, and told Melvin "that if he [had a] loan commitment and had started work [on the repairs] that I would not disregard our agreement because a deadline had not been met." The loan commitment did not come through before the August lst closing date, and plaintiffs had not started the repair work by then.

Defendant Richard Kudrna, real estate investor with substantial income property holdings, had been discussing possible purchase of the property with the Tompkins since June. Kudrna was unwilling to consider purchasing the property until the realtor's listing agreement expired on August 10, 1978, but he signed a purchase agreement with the Tompkins on the next day. The agreement provided that it would be null and void if plaintiffs obtained financing by August 16, commenced the repair work by August 21, and completed the work by September 8. On August 14, Kudrna called the lender with whom plaintiffs were negotiating the mortgage and informed them that plaintiffs were obtaining the $3,000 loan from the Tompkins as an illegal second mortgage. On August 15, 1978, having been contacted by the lender, plaintiffs voided the $3,000 agreement. On August 18 the lender verbally informed plaintiffs that the loan would be made. The commitment was made in writing on August 21.

Kudrna refused to abandon his purchase contract, and the Tompkins refused to perform their contract with plaintiffs. Plaintiffs then filed this action on August 30, 1978, seeking specific performance of their real estate purchase agreement with defendants Tompkins and damages from Kudrna for his alleged willful attempt to destroy the contractual relationship between plaintiffs and the Tompkins. Defendants answered by claiming the contract with plaintiffs, which stated that time was of the essence, had expired due to the latter's failure to get FHA financing within the time limits imposed by the contract.

After a series of continuances to avoid automatic dismissal under Iowa R.

App. P. 215.1, the matter finally was tried in February of 1982. The court ruled that plaintiffs failed to prove their contract with the Tompkins was enforceable. Since time was of the essence and because of plaintiffs' failure to obtain financing by the August 1 possession date or pay by the July 28 settlement date, the Tompkins were held to be excused from performing under the contract. The court also dismissed plaintiffs' claim against Kudrna for tortious interference with a contractual relationship. Plaintiffs' posttrial motions for new trial and judgment notwithstanding the verdict were overruled as was their motion for leave to amend their petition to allege against Kudrna a claim of interference with a business expectancy. This appeal followed.

I.

Plaintiffs first claim that their contract with the Tompkins remained in effect after August 1, 1978, and that specific performance should have been granted. We disagree. The contract specifically provided that the offer to buy was "subject to the buyer [plaintiffs] securing maximum FHA financing." Settlement was to be made on July 28, 1978, "unless otherwise agreed by the parties." No such other agreement was made. Paragraph eight of the contract states that "[i]n the performance of each part of this agreement, time shall be of the essence." It is not disputed that plaintiffs did not obtain the required financing within the time mandated by the contract.

> When time is made of the essence of the contract, either by its terms or by the conduct of the parties, late performance does not fulfill the requirements of the contract and gives rise to a right in the innocent party to rescind the contract or relieves him from performance.

DeSombre v. Bickel, 18 Wis.2d 390, 396, 118 N.W.2d 868, 871 (1963). We assume the parties to this contract intended to give effect to the provision that time was of the essence. See Iowa R. App. P. 14(f)(14). By the time Kudrna contracted with the Tompkins, the latter could justifiably have rescinded their contract with

plaintiffs and in fact did so. We, therefore, adopt the trial court's conclusion that plaintiffs' failure to meet the contract deadlines was a breach of contract and that "defendants Tompkins were excused and cannot be held to the terms of the contract and the contract may not under those circumstances be specifically enforced."

Plaintiffs claim that the Tompkins, if they desired to be released from the contract, were required to invoke the provisions of Iowa Code ch. 656 (forfeiture of real estate contracts). We disagree. We believe ch. 656 assumes the existence of a valid, binding contract in which all conditions have been fulfilled. That situation is not present in this case. The contract was specifically made subject to plaintiffs' ability to get financing within the time limits contained in the contract. Since plaintiffs could not do so, the Tompkins' valid rescission negated the contract. Chapter 656 is irrelevant in this case.

Nor did defendants waive plaintiffs' inability to get financing in a timely manner. Although Tompkins told plaintiff he would not void the contract if he had started work and if financing could not be obtained by the August 1 closing date, we do not believe defendants thereby agreed to keep the contract in effect for an indefinite period of time. The record reflects defendants' continued and growing concern over plaintiffs' inability to obtain financing. Defendants rescinded the contract after only approximately two weeks had elapsed from the contract closing date. Such a relatively short delay does not constitute waiver.

II.

Plaintiffs next claim that the trial court should have found Kudrna liable for damages for tortious interference with their contractual relationship with the Tompkins. One of the elements necessary to establish this cause of action is "the existence of a valid contractual relationship." Stoller Fisheries, Inc. v. American Title Insurance Co., 258 N.W.2d 336, 340 (Iowa 1977). We have already determined

in Division I that the Tompkins had effected a valid rescission of their contract with plaintiffs at the time Kudrna and the Tompkins entered into their agreement. Since the plaintiffs-Tompkins contract no longer existed, there was no such relationship for Kudrna to interfere with. The trial court properly dismissed this claim.

III.

Finally, plaintiffs claim that they should have been allowed to amend their petition after entry of judgment to allege a new ground against Kudrna to conform to the proof; i.e. interference with business expectancy. "Leave to amend, including leave to amend to conform to proof, shall be freely given when justice so requires." Iowa R. App. P. 88. The trial court has considerable discretion in determining whether such amendments should be allowed. Ackerman v. Lauver, 242 N.W.2d 342, 345 (Iowa 1976). In this case the court did not abuse its discretion in overruling plaintiffs' motion, especially since it was not filed until after judgment had already been entered.

Having considered all of plaintiffs' claims and finding them without merit, we affirm the judgment of the trial court.

AFFIRMED.