IN THE COURT OF APPEALS OF IOWA

No. 7-010 / 95-1885

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JUN 26 1997

FRY DEVELOPMENT CORP.,

Plaintiff-Appellant\Cross-Appellee,

vs.

JEFFREY D. JOHNSON and PAMELA S. JOHNSON,

Defendants-Appellees\Cross-Appellants.

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

Plaintiff developer appeals and defendants cross-appeal from a district court judgment entered on plaintiff's action against the Johnsons for breach of a construction contract. **AFFIRMED.**

Richard A. Davidson and Clay Thompson of Lane & Waterman, Davenport, for appellant.

Michael J. McCarthy of McCarthy & Lammers, Davenport, for appellees.

Heard by Sackett, P.J., Cady, and Streit, JJ.

CADY, J. 000130

Fry Development Corp. (Fry) appeals from a district court judgment entered on its action against Jeffrey and Pamela Johnson for breach of a construction contract. The Johnsons cross appeal. On our review we affirm.

This case was spawned by the Johnsons' desire to build a dream home. At some point prior to 1993, Pamela discovered her dream home in Bettendorf. With the owner's permission, she took numerous photographs of the Bettendorf home, inside and out. She took these pictures because the Johnsons wanted the "exact" house built on property they had purchased in Davenport for $16,000. Fry built the Bettendorf home.

The Johnsons met with Scott Pearson, an employee of Fry. After some negotiation, Pearson represented to the Johnsons that Fry could build the exact house on the Davenport lot. The parties entered into a contract which required the Johnsons to pay Fry $149,400 for the construction of the new house. The Johnsons agreed to transfer title of the lot to Fry so it could obtain construction financing.

The Johnsons were intimately involved with the entire construction process. There were a number of changes ordered by the Johnsons, which increased the construction price to $160,196.98. When the house was completed, the Johnsons refused to close, expressing dissatisfaction with several aspects of the house.

The parties agreed to engage two independent arbitrators to judge the work done on the house. A report was prepared by the arbitrators and Fry performed the

recommended modifications in an attempt to convince the Johnsons to pay for the house. However, the Johnsons did not agree with the conclusions of the report and refused to pay for the house.

Fry placed the house for sale. The Johnsons did not cooperate with the sale of the house.

Fry subsequently filed a petition in equity alleging it was the owner of the property. In the petition, Fry claimed the Johnsons breached the contract by failing to pay for improvements and alleged they were preventing Fry's attempts to sell the property to a third party. Fry asked the court to appoint a receiver to sell the real estate and deposit the net proceeds from the sale with the clerk of court to be equitably divided after payment to Fry of the amount owed it due to the Johnsons' breach.

The Johnsons claimed Fry was a mere lienholder because they transferred the lot under the contract only to allow Fry to obtain financing. They asked the court to refuse to appoint a receiver and to direct Fry to complete its performance under the contract.

On January 18, 1995, the district court entered an order refusing to appoint a receiver, but permitting Fry to sell the property free of any right, title, or interest of the Johnsons, and directing the Johnsons not to interfere with any sale. The court further ordered the proceeds of the sale should be placed in escrow until the court

determined how the funds should be divided. Fry sold the real estate to a third party for $160,000 on July 7, 1995. The net proceeds of $5463 were deposited into escrow.

On October 18, 1995, the court entered its ruling on the merits. The court found Fry elected its remedy by selling the house. It found "a plain and simple reading of plaintiff's action does infer to others that plaintiff is limiting his damages to the net proceeds of the sale." However, the court went on to find the Johnsons did much more supervision of the building process than they should have, but there were problems with the building process. The court also found Fry improvidently represented to the Johnsons that it could construct the "exact house" they had used as a model. The court concluded Fry substantially performed under the contract, but the Johnsons were entitled to $2500 for the costs of the repair of minor defects.

In fashioning a remedy, the court determined both parties understood from the beginning of the contract that they were "overbuilding" for the neighborhood and there was some risk the house might bring a lower sale price. The court calculated Fry's actual and consequential damages at $23,794.19. Ultimately, however, the court held it would be "unfair" to award Fry additional damages while, at the same time, requiring the Johnsons to forfeit their interest in the lot, fixtures, and their earnest money. The court, therefore, held Fry would be limited to recovering the net proceeds of the sale due to its election to seek approval of the sale of the real estate.

The court awarded Fry the $5463 in damages and ordered the parties to split the costs of the action.

Fry appeals seeking the full contract balance due, plus consequential damages less the cost of remedying minor defects. The Johnsons cross-appeal arguing the court should affirm the trial court decision denying Fry any recovery in excess of the net proceeds and modifying the decision by granting them restitution for the loss of their real estate, earnest money, and fixtures.

I. Scope of Review

This case was tried in equity. Our review in equity cases is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Election of Remedies

Fry appeals the trial court order alleging the court erred in determining Fry's recovery was limited to the net proceeds of the sale of the house because it chose to sell the house to a third party. The trial court found Fry had elected its remedy.

Election of remedies is an equitable defense. *Bolinger v. Kiburz*, 270 N.W.2d 603, 605 (Iowa 1978). The doctrine is not favored and is applied narrowly. *Id.* The purpose of the doctrine is to prevent a double recovery for a single wrong. 25 Am. Jur. 2d *Election of Remedies* § 2, at 763 (1996).

Three elements must be established by the party relying on the defense of election of remedies: (1) the existence of two or more remedies; (2) inconsistency

between them; and (3) a choice of one of the remedies. *First Sec. Bank of Brookfield v. McClain*, 403 N.W.2d 788, 790 (Iowa 1987). The doctrine of election of remedies does not apply if the available remedies are consistent and concurrent or cumulative. 25 Am. Jur. 2d *Election of Remedies* § 19 (1996). There is no inconsistency between different remedies, all of which are based on the affirmance or disaffirmance of a contract. 28A C.J.S. *Election of Remedies* § 10 (1996); *see Moser v. Thorp Sales Corp.*, 256 N.W.2d 900, 906 (Iowa 1977).

In the present case, the Johnsons claim the trial court correctly determined Fry's recovery of damages was barred by the doctrine of election of remedies. They claim Fry elected to abandon its contract remedies and sell the real estate in full satisfaction of its claim. We agree.

We find Fry's petition requesting appointment of a receiver to sell the real estate with proceeds being deposited with the clerk of court after the payment of all liens and encumbrances amounted to an equitable action to rescind the contract between the parties. We find the trial court's decision which gave Fry title to the real estate in fee simple amounted to a rescission of the contract between the parties.

Rescission is an extraordinary remedy not available to a litigant as a matter of right but only when, in the discretion of the court, it is necessary to obtain equity. *Potter v. Oster*, 426 N.W.2d 148, 151 (Iowa 1988). Three requirements must be met before rescission will be granted. *Id.* First, a party who seeks relief by way of rescission must not himself be in substantial default. *Maytag v. Alward*, 253 Iowa

455, 466, 112 N.W.2d 654, 660 (1962). Second, the breach must be substantial and go to the heart of the contract. *Potter*, 426 N.W.2d at 151. Third, remedies at law must be inadequate. *Berry Seed Co. v. Hutchings*, 247 Iowa 417, 422, 74 N.W.2d 233, 236 (1956). Although the trial court made no specific findings with regard to these requirements in its initial order, based on the resulting sale of the real estate which prevented Fry from any performance under the contract, substantively the decision was one of rescission.[1]

The effect of a rescission is to extinguish the contract and annihilate it so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken. 17A Am. Jur. 2d *Contracts* § 600 (1996). Thus, rescission disaffirms the contract. An action for damages based on breach of contract is based on affirmance of the contract.

Consequently, Fry had a choice between two remedies. The remedies were inconsistent because one affirmed the contract and the other disaffirmed the contract. Finally, Fry made a choice between the two remedies by seeking rescission of the contract

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[1] We doubt under the circumstances of this case that element three, inadequacy of remedies at law, would be met as damages for breach of this construction contract would be ascertainable and reasonably certain. *See Maytag*, 253 Iowa at 466, 112 N.W.2d at 660. However, a finding that rescission was inappropriate at this point would be of little consequence since the real estate has already been sold. Further, neither party objects to the equitable stature of the case.

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III. Rescission

Restoring the status quo is the goal of the restitutionary remedy of rescission. *Potter*, 426 N.W.2d at 152. Unfortunately, it is impossible under the unique facts of this case to return the parties to the status quo. Therefore, observing our scope of review and the equitable nature of the case, we affirm the trial court's order as it effects substantial justice between the parties. We deny the Johnsons' claim for restitution. Costs of this appeal are taxed to Fry.

AFFIRMED.

Sackett, P.J., concurs; Streit, J., specially concurs.

STREIT, J. (specially concurring)

I concur in the result.