IN THE COURT OF APPEALS OF IOWA

No. 0-713 / 90-431

FILED
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CLERK SUPREME COURT

IOWA GLASS DEPOT, INC.,

Appellant,

193

vs.

JAMES E. NEWMAN, PATTY M. NEWMAN, JERALD H. GREENWOOD and **M ENTERPRISES, INC.,**

Appellees.

Appeal from the Iowa District Court for Dubuque County, William G. Klotzbach, Judge.

Plaintiff/promisee of a right of first refusal to purchase real estate appeals a judgment denying declaratory and injunctive relief and finding an offer to purchase was bona fide. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH DIRECTIONS.**

Joseph E. Schmall of Bradley & Riley, P.C., Cedar Rapids, for appellant.

Arthur F. Gilloon of Norman, Gilloon & Wright, Dubuque, for appellees James Newman and Patty Newman.

James H. Reynolds, Dubuque, for appellees Jerald Greenwood and M Enterprises.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

Plaintiff Iowa Glass Depot, Inc., which is a promisee in a contract granting it a right of first refusal to purchase certain real estate, appeals a judgment denying declaratory and injunctive relief against defendants, offerees James E. and Patty M. Newman and offerors Jerald H. Greenwood and M Enterprises. The district court found that the offer to purchase part of the real estate was bona fide. We disagree, and therefore, we must reverse the judgment and remand the cause to the district court with directions to enter a permanent injunction.

Our scope of review in this declaratory judgment action is governed by the manner in which the case was tried before the district court. See In re Mt. Pleasant Bank & Trust Co., 426 N.W.2d 126, 129 (Iowa 1988) (citing Halsey v. Coca-Cola Bottling Co. of Mid-America, Inc., 410 N.W.2d 250, 252 (Iowa 1987)). The trial court ordered the case to be heard in equity; consequently, our review is de novo. Iowa R. App. P. 4. Although we give weight to the trial court's findings of fact, especially when considering the credibility of the witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7). It appears that Iowa Glass bears the risk of nonpersuasion because it will suffer the loss of any rights in the disputed property if it does not prevail. Iowa R. App. P. 14(f)(5). We turn now to the facts, which appear to be undisputed.

In 1981 Eunice and Jerald Greenwood sold some Dubuque real estate to Iowa Glass. As part of the transaction, Iowa Glass conveyed a portion of the real estate back to the Greenwoods. The property reconveyed to the Greenwoods is an odd, almost trapezium-shaped lot that contains a commercial building and a house. In exchange for the conveyance, Greenwoods gave Iowa Glass a right of first refusal to purchase that property. The agreement specified that Iowa Glass would have the first opportunity to purchase the property at the same price at which the Greenwoods received a bona fide offer.

In 1986 the Greenwoods assigned their interest in the 1981 agreement to James and Patty Newman. Eunice Greenwood, formerly known as Eunice Newman, is the mother of James Newman. Iowa Glass agreed to the assignment, and the Newmans executed a document granting or allowing Iowa Glass to retain the right of first refusal to purchase the property when Newmans receive any bona fide offer. This document states that the right of first refusal endures until the property is actually conveyed to a bona fide purchaser.

In April 1989 the Newmans listed the entire property with a real estate agent. Their asking price for the entire parcel was $100,000. An unrelated party, Mary S. Ransdell, offered to purchase part of the lot containing the commercial building and substantially less than half of lot for $60,000. (Apparently, this is the commercially

zoned portion of the lot.) The Newmans notified Iowa Glass of the offer and indicated a willingness to sell the remainder to Iowa Glass for $40,000 if they declined to exercise their right to match the offer of $60,000. Iowa Glass notified the Newmans that they did not wish to exercise their right, but the Ransdell offer fell through, and by contract, the right of first refusal did not lapse. No one now argues that Iowa Glass's rights have lapsed.

In January 1990 the Newmans informed Iowa Glass that they had received another offer for approximately the same property specified in the Ransdell offer, that is, the commercial building and substantially less than half of the lot. Jerald Greenwood, individually and as president of "M Enterprises," offered to purchase the commercial portion of the lot for $125,000. The trial court found that "M Enterprises," a registered trade name but not a corporation, is an alter ego for Eunice Greenwood, James Newman's mother.

The record shows that the Greenwoods were in financial difficulty when they sold certain property to Iowa Glass and the disputed property now subject to the right of first refusal. The record also shows that the Greenwoods now have the means to repurchase the commercial lot because of an inheritance.

We note that the $125,000 Greenwood offer is $65,000 (or 2.083 times) greater than the $60,000 Ransdell offer received six months earlier. The Greenwood offer is also

$85,000 (or 3.125 times) greater than the fair market value price of $40,000 established by Iowa Glass's expert appraiser. It is $25,000 more than the Newmans sought when they listed the entire property. Defendants offered no expert testimony on the value of the property.

Iowa Glass sought declaratory and injunctive relief. Iowa Glass argues that the Greenwood offer is not a bona fide offer. Iowa Glass contends that the offer is clearly excessive and is tainted by the familial relationship of the parties to the proposed purchase. Without elaboration, the district court held that Iowa Glass had failed to prove that the offer was not bona fide. The court further stated, "Although Defendants Newman did not have the burden they introduced evidence showing with reasonable certainty that Jerald Greenwood had the financial ability to comply with the terms of the contract, and the Court concludes that the offer by Jerald H. Greenwood, individually, and as an officer of M Enterprises, Inc., is a bona fide offer." Iowa Glass appeals. In a subsequent proceeding the district court denied defendants' request for an award of attorney fees. Newmans' appeal has been consolidated with that of Iowa Glass.[1]

In Imperial Refineries Corp. v. Morrissey, the supreme court held:

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1. By an order dated September 9, 1990, the supreme court dismissed defendant Greenwood's cross-appeal. Greenwood, individually, and as an officer of M Enterprises, Inc., now joins in the Newman cross-appeal.

> For an offer to be considered a bona fide offer, it must be shown with reasonable certainty that offeror possessed the financial ability to comply with the terms of the contract. Proof which indicates the offeror is operating on a shoestring speculation or attractive probabilities falls short of reasonable certainty. Shell Oil Company v. Kapler, 235 Minn. 292, [298,] 50 N.W.2d 707[, 712 (1951)].

254 Iowa 934, 944, 119 N.W.2d 872, 878 (1963). As the supreme court states several times, however, its conclusion is drawn from the facts and circumstances under which the offer is made. Id. at 943-45, 119 N.W.2d at 878.

"Bona fide" literally means "good faith." It is a technical term that implies an absence of fraud, deceit, or collusion. See, e.g., Ware v. Hylton, 3 U.S. (3 Dall.) 199, 241 (1796); O'Connor v. Gertgens, 85 Minn. 481, 494-95, 89 N.W. 866, 871 (1902). Thus, a "bona fide offer" must be an offer which is made not only with reasonable certainty of the offeror's financial ability, but also in good faith. The Iowa Supreme Court has adopted such an approach in a substantially comparable situation. Examining the term "bona fide offer" in the context of evidence in an eminent domain action, the supreme court stated that it would accept evidence of a bona fide offer if the offer is made in good faith and the offeror has sufficient ability to pay. Hardaway v. City of Des Moines, 166 N.W.2d 578, 581 (Iowa 1969) (quoting Chicago v. Lehmann, 262 Ill. 468, 104 N.E. 829 (1914)). Noting that

bad faith is difficult to prove, the Hardaway court indicated that the offer must be viewed "with reference to the fair cash market value of the property." Id. While we recognize that there may be differences in evidence and procedure between eminent domain proceedings and the type of case before us, we think some examination of good faith and the fair market value must enter the calculus of whether an offer is bona fide.

Based upon the facts and circumstances in this case, we conclude that the offer was not "bona fide." While we do not necessarily rely on the existence of familial relationships in reaching our conclusion, we agree with plaintiff that the parent-child relationship between the parties to the proposed contract of purchase should require us to examine the offer much more closely. See Rouse v. Rouse, 174 N.W.2d 660, 667 (Iowa 1970) (quoting First Nat'l Bank of Iowa City v. Harsock, 202 Iowa 603, 604, 210 N.W. 919, 920 (1926)). Having thus examined this offer, it is evident that it is substantially out of line with the record evidence on the fair market value. Putting aside the expert testimony that the property is worth $40,000, there is clear evidence from a disinterested offeror that the disputed parcel is worth a little more than $60,000, and there is evidence from Newmans themselves that combined with the remainder of the lot the entire property is worth only $100,000. While we do not attempt to adopt a specific formula for determining whether an offer is bona fide, we

think an offer that exceeds record evidence of fair market value by more than two times may be viewed as evidence of the parties' bad faith.

Upon our de novo review of the record, we hold that the trial court erred in finding that the offer from the Greenwoods was bona fide. We reverse the judgment of the district court. We remand the case to the district court with directions to enter a permanent injunction to enjoin defendants from proceeding with the sale proposed under the offer dated January 1, 1990, from Jerald H. Greenwood, individually and as president of M Enterprises, Inc., which was accepted by James E. Newman and Patricia M. Newman on the same date. Any further offer or offers to purchase said real estate shall be subject to plaintiff's right of first refusal.

Given our holding above, we affirm on the cross-appeal, denying attorneys fees.

Costs shall be taxed to appellees.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH DIRECTIONS.

Donielson, P.J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I would affirm the trial court.