

FILED

JUN 28 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**JOHN R. HEARN,**

)

Plaintiff-Appellant,

)

Filed June 28, 1983

vs.

)

**JOSEPH P. COSTANZO and
MARY THERESA COSTANZO,**

)

3-1002-68944

)

Defendants-Appellees.

Appeal from Polk District Court - J. P. Denato, Judge.

Plaintiff-buyer appeals from an adverse judgment on his petition against defendants-sellers seeking specific performance of an alleged real estate contract. **AFFIRMED.**

John R. Hearn, pro se, and John P. Dollar, Des Moines, Iowa, for plaintiff-appellant.

Doyle D. Sanders of Peddicord, Simpson & Sutphin, Des Moines, Iowa, for defendants-appellees.

Heard en banc.

PER CURIAM

Plaintiff-buyer appeals from an adverse judgment on his petition against defendants-sellers seeking specific performance of an alleged real estate contract. We affirm.

Plaintiff and defendants entered into negotiations for the sale and purchase of a parcel of real estate owned by defendants. After a previous offer had been rejected, plaintiff, a practicing attorney, prepared a standard form "Offer to Buy Real Estate and Acceptance" which was signed by defendants. Under the terms of the offer, the contract price for the property was to be \$4,000, with a \$300 down payment to be made at closing, and monthly payments to start on the first of March, 1978. The offer was tendered in February, 1978, and time was expressly made "of the essence."

No abstract had as yet been prepared, and plaintiff agreed to handle this. The offer provided that plaintiff would cover the cost of the abstract unless the abstract did not show marketable title, in which case defendants were to reimburse him.

Problems subsequently developed when the abstract showed that the south fourteen feet of the lot in question had been deeded by defendants to the city for use as an alley and the record showed an unforfeited sales contract on the property. Defendants subsequently arranged to have the unforfeited real estate contract cleared up. However, the conveyance of the south fourteen feet of the lot continued to be a problem, apparently resulting in considerable misunderstanding between the parties regarding plaintiff's desire to purchase the lot without the south fourteen feet, possible adjustment in the contract purchase price, and the payment terms of the contract in general.

When the parties were unable to close the sale after protracted negotiations and defendants decided not to sell, plaintiff brought this suit. The trial court denied specific performance and dismissed plaintiff's petition on the ground that

plaintiff "failed to prove the minds of the parties were in agreement as to all material terms of the contract for the sale of realty."

Plaintiff urges four arguments on appeal: (1) the trial court erred in denying specific performance because defendants failed to plead or prove that specific performance would be inequitable or cause undue hardship; (2) the trial court erred by concluding that plaintiff failed to prove that the parties had a meeting of the minds as to all material elements of the contract; (3) defendants failed to establish their affirmative defense that plaintiff failed to pay the down payment and interest as allegedly agreed; and (4) the trial court erred in considering the theory of mutual mistake and in concluding that there was a mutual mistake of the parties.

I. Scope of Review. Our scope of review in this equity proceeding is *de novo*. Iowa R. App. P. 4.

II. Specific Performance. The doctrine of specific performance provides that where the breach of an agreement would be inadequately compensated by an award of damages, the party in breach may be compelled to perform specifically what he has agreed to do. No party has a right to specific performance; rather, its grant or denial rests within the discretion of the trial court. Youngblut v. Wilson, 294 N.W.2d 813, 817 (Iowa 1980).

On appeal, plaintiff suggests that unless defendants prove that it would be inequitable, or that it would cause undue hardship, the trial court is obligated to grant his request for specific performance. Nothing could be farther from the truth. In the absence of any resulting inequity, a grant of specific performance is merely permissible; it is never obligatory. Because the decision to grant or deny plaintiff's request for specific performance rested in the discretion of the trial court, we will overturn its decision only if it appears that there was an abuse of discretion. See Vermeulen v. Meyer, 29 N.W.2d 232, 234 (Iowa 1947). We find no such abuse of discretion under the facts of the present case.

The trial court had ample reasons to refuse to order specific performance here. Under the facts alleged in the present case, the court could have reasonably concluded that there was no "meeting of the minds," and hence, no enforceable contract. At the time the "Offer to Buy Real Estate and Acceptance" was executed, there was clearly a misunderstanding as to the location of the southern boundary of the subject property. Generally, mistakes concerning boundary lines go to the identity of the property, and a "mistake as to [the] identity of the land is a material and vital mistake." 3 Corbin on Contracts § 604, at 633 (1960). The contention that plaintiff considered the mistake to be material is buttressed by the fact that, upon discovering the true location of the southern boundary, plaintiff attempted to renegotiate the purchase price. As a rule, the trial court cannot order specific performance unless it has determined that the parties' minds met on all material terms of the alleged agreement. Foshier v. Fetzer, 154 Iowa 147, 165 (1912).

Even if there had been a "meeting of the minds" concerning all of the material terms of the contract, the trial court could have concluded that the parties to the contract rescinded it. The rescission of a contract may be accomplished by mutual assent of the parties. No formal agreement is required, and rescission may result from any course of conduct by the parties which is inconsistent with the continued existence of the contract. Kilpatrick v. Smith, 19 N.W.2d 699, 704 (Iowa 1945).

In the present case, the agreement provided for a March 1 possession date, a down payment of \$300 upon closing, and monthly payments to begin March 1. Time was expressly made "of the essence," yet as late as January of the following year there had been no real effort made to close, no payments had been tendered, and defendants retained possession. Moreover, plaintiff's active renegotiation of the purchase price in July and August of 1978 strikes us as being wholly inconsistent with the existence of a firm contract. Although different inferences

might have been drawn from these facts, when the parties' course of conduct is susceptible to different inferences, the issue of whether or not a valid rescission has been established is for the trial court to determine. See Severson v. Elberon Elevator, Inc., 250 N.W.2d 417, 422 (Iowa 1977).

We note parenthetically that the difficulties which prevented a timely closing of this real estate deal were entirely of plaintiff's own making. Moreover, even if it was possible to salvage a valid and binding contract here, it is clear that plaintiff would be in default of his obligations thereunder, despite his protestations to the contrary. The remedy of specific performance is not available to a party who is, himself, in default. Tschirgi v. Merchants National Bank, 113 N.W.2d 226, 228 (Iowa 1962).

III. Attorneys Fees. Defendants have requested that we award payment of their attorney fees. In support of this request, they point to paragraph 15(c) of the "Offer to Buy Real Estate and Acceptance," which provides for payment of attorneys fees by the party at fault. However, since it is our determination that the trial court was correct in ruling that there was no valid contract between the parties, we cannot enforce paragraph 15(c) against plaintiff. Defendants' request is therefore denied.

AFFIRMED.