IN THE COURT OF APPEALS OF IOWA

FILED
SEP 29 1981
CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF ANNA E. MEYERS, Deceased.

LYLE E. MEYERS and BEVERLY MEYERS, Husband and Wife, and CAROL HALVERSON,

Plaintiffs-Appellants,

vs.

HARVEY HANKINS and MARGUERITE HANKINS, Husband and Wife,

Defendants-Appellees.

Filed September 29, 1981

1-214
2-65798

Appeal from Hancock District Court - John F. Stone, Judge.

The plaintiffs appeal from the trial court's dismissal of their action to set aside two conveyances of Texas real estate. AFFIRMED.

Earl W. Hill, Kanawha, for plaintiffs-appellants.

Erwin L. Buck of Buck Law Offices, Britt, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

The plaintiffs appeal from the trial court's dismissal of their action to set aside two conveyances of Texas real estate. We affirm.

This case involves a controversy over 320 acres of land in Texas originally owned by William Bert Meyers, who gave the land in equal shares to his four children, Clifford, Donald, Anna Meyers, and Marguerite Hankins. William Meyers and Carol Halverson inherited their father Clifford's interest; and Lyle Meyers and Leonard Meyers inherited their father Donald's interest. When Anna Meyers died March 31, 1977, she left her share in the following way: 1/3 to Marguerite (1/12 of the total interest), and 1/6 each to Leonard, Lyle, William, and Carol (1/24 of the total interest each). The interest of each was subject to divestment based on an unrestricted power of sale contained in a codicil to Anna Meyer's will. Roland Hankins, son of Marguerite and Harvey Hankins, was appointed executor.

For many years prior to Anna's death, the surface of the Texas land had been leased for farming purposes, and the mineral rights had been leased to Kerr-McGee Oil Company. Since none of the family members knew the value of the Texas land, the executor, accompanied by his parents, went to Texas to investigate its value in August 1977. They determined that the land was worth approximately \$225-\$275 per acre, including the mineral rights, since all parties believed a gas well on the land was nonproductive.

After the parties returned from Texas, Marguerite offered to buy everyone's interest in the land for \$225 per acre. Roland sold the estate share to his mother on November 10, 1977. On the same date, William Meyers sold his own share. On August 7, 1979, Carol Halverson sold her interest to Marguerite. On August 25, 1979, Lyle Meyers sold his interest to Marguerite.

Unknown to anyone, the well started producing gas, and Kerr-Mcgee made its first purchase on November 18, 1977. However, the family members did not know of this and did not receive any payments until December 1979, and January 1980, because of title problems regarding the land.

The final report and accounting of the Anna Meyers estate was filed March 31, 1980. Objections to it were filed in April 1980, asking that the conveyance of the estate interest from Roland Hankins, executor, to his parents be set aside. A separate lawsuit was filed in July, asking that the conveyances by Lyle Meyers and Carol Halverson of their own interests to Marguerite and Harvey be set aside. The two cases were consolidated and tried together to the court. The Trial Court approved the final report and accounting and dismissed the equity action. The petitioners appealed.

Our review is de novo. Iowa R. App. P. 4. We will give weight to the findings of fact by the trial court, although we are not bound by them. Iowa R. App. P. 14(f)(7).

I. Agency. The plaintiffs allege that the trial court erred when it failed to find that the defendants were the agents of the plaintiffs with regard to the mineral rights of the Texas land. They also argue that defendants possessed information regarding the gas well, which they had a duty to disclose, and that they breached this duty by failing to disclose the information. We affirm the trial court.

An agency relationship is created by an express or implied agreement of the parties. 3 Am. Jr. 2d Agency § 17-18. The person who asserts the existence of the agency relationship has the burden of proving its existence. 3 Am. Jur. 2d Agency § 348. The defendants proved that Harvey Hankins was the agent for the family as to the surface rights of the land by showing that he managed the farm lease for the family. They failed to prove he was an agent for the family as to the mineral rights. There was no evidence to prove that Harvey, Marguerite, or Roland, were the agents of the other heirs. On the contrary, the evidence showed that each family member dealt with Kerr-McGee individually as to his share.

Plaintiffs also gave no proof that Harvey, Marguerite, or Roland knew of the true value of the land, or were concealing such knowledge from the others.

The trial court was correct in holding no agency relationship existed between the plaintiffs and the defendants.

II. Executor's Fiduciary Duty. The plaintiffs allege that Roland Hankins, executor of Anna Meyers' estate, breached his fiduciary duty to the other heirs by not making a complete investigation of the value of the Texas real estate. This contention has no merit. The trial court found that the codicil to Anna Meyers' will gave the executor full and complete authority to sell the decedent's property without procuring a court order. The court made the following findings of fact.

Roland called a meeting of the beneficiaries in June 1977 to discuss the disposition of the Texas property and other estate property. At this meeting, Marguerite indicated she wished to buy the land. Roland went to Texas to investigate the value of the Texas land, which he learned was worth approximately $225-$275 per acre. He called another meeting of the heirs when he returned, and told them what he had learned. Marguerite again offered to buy the land for $225 per acre. The heirs agreed that Marguerite could buy the estate interest, and William Meyers stated he wanted to sell his interest.

Roland acted with the consent of the heirs, and in good faith. The trial court was correct in finding that he had not breached his fiduciary duty as an executor.

III. Mistake. The plaintiffs argue that the trial court erred in failing to find that a unilateral, or in the alternative, a mutual mistake as to the value of the land, justified the rescission of the deeds.

The defendants assert that plaintiffs failed to argue the theory of mistake below, and have therefore lost their right to raise it on appeal. We agree with defendants.

In our rules of civil procedure, notice pleading is allowed, and a specific cause of action need not be pled, but the plaintiff must still give fair notice of his claim to allow the defendant to make an adequate response. Iowa R. Civ. P. 69. Christensen v. Shelby County, 287 N.W.2d 560 (Iowa 1980).

In the instant case, the issue of mistake was neither pleaded to nor considered by the trial court. The trial court is entitled to know what the legal claims are in the case before it. Any claim which is not raised should be deemed to be waived.

As plaintiffs point out, evidence of mistake was presented to the trial court. However, all the evidence relating to mistake was relevant and material to the issues which had already been properly pleaded and, as a result, the trial court had no reason to believe that any additional issues or claims were involved. In this case, evidence of mistake is insufficient to alert the trial court to the fact that a new legal issue was being presented for its consideration.

The situation in this case is distinguishable from that in Gosha v. Woller, 288 N.W.2d 329 (Iowa 1980). In Gosha the plaintiffs failed to give defendants notice of one of the theories they later claimed to rely upon and, in both cases, plaintiffs alleged that evidence was introduced which proved the theory even though they did not specifically allege it in their pleadings. The similarity ends there. In Gosha, the court on its own motion amended the pleadings to conform to the proof. Here the court did not amend the pleadings and, furthermore, plaintiffs failed to follow any of the procedural alternatives available to them: amend their pleadings to conform to the proof; ask for a new trial; or ask for an expansion of the court's findings of fact. Iowa R. Civil P. 88, 179(b). Plaintiffs are essentially asking us to go beyond Gosha by allowing them to prevail on a theory of law which the court did not allow by amending the pleadings itself, and of which the defendants had no notice. We hold that plaintiffs' failure to raise the theory of mistake precludes us from considering it on appeal.

AFFIRMED.