

IN THE COURT OF APPEALS OF IOWA

FILED

OCT 22 1986

CLERK SUPREME COURT

**KELLY P. DeWULF and KATHRYN
DeWULF,**

Plaintiffs-Appellees,

vs.

LeROY CLAUSSEN,

Defendant-Appellant.

Filed October 22, 1986

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6-151
85-960

Appeal from the Iowa District Court for Scott County (69473) - J. Hobart
Darbyshire, Judge.

Defendant buyer appeals a judgment for plaintiff sellers in an action for
specific performance of a contract for the sale of real estate. **AFFIRMED.**

Randy J. Hohenadel of Wells, McNally & Bowman, Davenport, Iowa, for
defendant-appellant.

Gary J. Rolfes and John S. Peavey of Condon & Peavey, DeWitt, Iowa,
for plaintiffs-appellees.

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

SCHLEGEL, J.

Defendant buyer appeals a judgment for plaintiff sellers in an action for specific performance of a contract for the sale of real estate. We affirm.

Plaintiffs Kelly and Kathryn DeWulf made an offer to purchase eighty acres of farm land from an estate, which was accepted by the two coexecutors. Prior to closing, defendant (one of the coexecutors) executed a contract for the sale to him of approximately four of the eighty acres on which a house was located. The document was signed, at that time, by Kelly but not Kathryn. It contained a provision stating "subject to attorney approval." Defendant took possession of the property. Closing of the sale to plaintiffs of the eighty acres took place shortly thereafter.

Defendant did not submit the contract to his attorney for approximately four months. The attorney withheld approval due to the possibility that heirs of the estate might consider the purchase to be self-dealing by defendant as coexecutor. Shortly before the scheduled closing date, defendant advised plaintiffs that he would not go through with the sale. Plaintiffs then commenced an equitable action seeking specific performance.

The court entered judgment for plaintiffs ordering specific performance and awarding attorney fees of \$2,048.58. The court found that defendant's sale of a property he owned was not a condition precedent and that if approval of his attorney was a condition precedent it was waived by defendant's delay in submitting the contract to him for approval.

On appeal, defendant asserts: (1) that plaintiffs could have been adequately compensated by a money judgment and that specific performance was therefore an inappropriate remedy; (2) that the contract contained two unsatisfied conditions precedent and that it therefore should not have been enforced; (3) that the contract was not enforceable when it was not signed by one of the plaintiffs

until after defendant expressed intent not to go through with the sale and when plaintiffs did not hold legal title to the property at the time the contract was executed; and (4) that attorney fees should not have been awarded in the absence of an affidavit complying with the requirements of Iowa Code section 625.24.

Since this controversy was tried below in equity, our review is de novo. Although not bound by them, we give weight to the findings of fact of the trial court. Iowa R. App. P. 14(f)(7).

I. Specific Performance. Specific performance of a contract is not a remedy which is available as a matter of right, rather, its availability rests in the sound discretion of the court. Youngblut v. Wilson, 294 N.W.2d 813, 817 (Iowa 1980). Defendant argues that the remedy of specific performance of a land purchase contract is available to a purchaser but not to a seller. Real estate has unique properties or a special value which permits courts to order specific performance of a contract involving its sale. Severson v. Elberon Elevator, Inc., 250 N.W.2d 417, 423 (Iowa 1977). A vendor has an equal right with the purchaser to maintain a suit in equity for specific performance; and where a purchaser fails to perform his contract, the vendor may keep his tender of performance good, and may demand the balance of the purchase price, and ask for specific performance. Waters v. Pearson, 163 Iowa 391, 399, 144 N.W. 1026, 1029 (1914); Utterback v. Stewart, 224 Iowa 1135, 1140, 277 N.W. 735, 738 (1938).

The trial court did not err in granting specific performance as a remedy. The record does not reveal any hardship or injustice which would accrue to the defendant in this case from the granting of specific performance of the contract.

II. Conditions Precedent. Defendant argues that he intended language in the contract to mean that the sale of the north 80 acres or the sale of a

Bettendorf house was a condition precedent to performance of his obligation to buy the homestead. We agree with the trial court that this assertion is an attempt to alter the express terms of the contract; and, in any event, the north 80 was subsequently sold, removing that provision as a condition precedent.

Defendant also argues that the following handwritten language of the contract was a condition precedent that made the entire agreement conditional upon defendant's attorney's approval:

Subject to attorney appoval [sic] rent of \$250 a month
till colsing [sic].

Every contract implies good faith and fair dealing between the parties to it. 17 Am. Jur. 2d Contracts § 256 (1964); 17A C.J.S. Contracts § 318 (1963); Nora Springs Co-op Co. v. Brandau, 247 N.W.2d 744, 750 (Iowa 1976) (obligation of good faith in U.C.C. context).

The record shows that defendant delayed for over four months between execution of the contract and submitting the contract to the attorney. During this period defendant took affirmative acts to complete the sale, such as the completion of the survey under his guidance and supervision. Although having several opportunities prior to August 21, 1984 (closing date was to be September 1, 1984) to get his attorney's approval, defendant did not do so. Contrary to the attorney's expressed opinion that the sale would give the appearance of self-dealing, plaintiff introduced testimony that the heirs of the estate had no interest in the amount defendant was going to pay plaintiff for the homestead. At the time of the closing on the sale of the south 80, defendant did not deliver the repurchase contract to his attorney although the attorney was present at the closing. Plaintiff testified that defendant had come to plaintiff's farm to say that defendant could not afford to complete the transaction.

The trial court was correct in its conclusion that these circumstances indicate that defendant waived the condition of attorney approval because he did not exercise good faith in submitting the agreement to his attorney for approval. See Rodgers v. Baughman, 342 N.W.2d 801, 806 (Iowa 1983).

III. Enforceability of the Contract. Defendant argues that since the offer to purchase form was not signed by plaintiff's wife, the contract cannot be enforced. Unlike Snider v. Fisk, 218 N.W.2d 652 (Iowa 1974), cited by defendant, there is absolutely no evidence in the record that plaintiff's wife did not assent to the sale. It is clear from the record that there was mutual assent of the spouses to join in the agreement.

There is no merit in defendant's contention that plaintiffs did not hold title to the property at the time the document was signed. Plaintiffs held equitable title to the land, if not legal title. See Hewitt v. Rankin, 41 Iowa 35, 44 (1875). The offer to buy the south 80 had been accepted by the executors on October 31, 1983. The closing for the south 80 took place on March 1, 1984. In that period of time, plaintiffs and defendant had worked out the offer/acceptance on the farmstead. Plaintiffs held equitable title after October 31, 1983.

IV. Attorney's Fees. Plaintiffs allege the trial court erred in awarding defendant \$2,048.58 in attorney's fees since the affidavit required by Iowa Code section 625.24 (1985). Plaintiff did file a brief and affidavit setting forth the charges for services rendered. Attorneys for plaintiffs have agreed to file an affidavit that fully complies with section 625.24. On submission of such affidavit, we agree with the trial court that such fees should be paid to plaintiffs by defendant.

AFFIRMED.