IN THE COURT OF APPEALS OF IOWA

No. 8-147 / 97-0562

DENNIS WIGGS and SUSAN WIGGS,

Plaintiffs-Appellees/Cross-Appellants,

vs.

STEWART H. PRICHARD and JUSTINE L. PRICHARD,

Defendants-Appellants/Cross-Appellees.

FILED
MAY 29 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Monona County, Robert C. Clem, Judge.

Defendants appeal the district court's ruling granting plaintiffs' request for specific performance of an oral agreement involving the sale of a hay grinding business. **AFFIRMED.**

Duane E. Hoffmeyer of Vakulskas and Hoffmeyer, P.C., Sioux City, for appellants.

Reed H. Reitz of Reimer, Lohman & Reitz, Denison, for appellees.

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

MAHAN, J.

Stewart ("Duke") and Justine Prichard appeal the trial court's grant of specific performance of an oral contract for the sale of the Prichards' hay grinding business, including three acres of land, to Dennis and Susan Wiggs. The Prichards contend the trial court erred when it granted specific performance because: (1) the facts clearly indicate there was an agreement to agree, but no conclusive mutually agreed upon instrument; (2) the evidence of performance showed the Wiggs were operating under a lease, not under an agreement for sale; (3) the terms of the alleged agreement were not clear; and (4) no agreement had been reached and the Prichards rescinded their offer prior to acceptance. We affirm.

The Prichards owned a hay grinding business. Prior to March 1, 1995, Duke leased the business to his sons. Duke testified his sons paid $15,000 per month. In return, he paid the real estate taxes, insurance, and made any major repairs. Duke needed someone to take over the business after March 1. In 1994, Duke hired an appraisal company to value the business. The appraisal company also conducted world-wide advertising of the hay grinding business, attempting to find potential buyers. Nothing came of this advertising.

Near the end of February 1995, Duke and Dennis began discussions concerning the business. Duke contends these discussions led to an agreement to agree. Duke contends Dennis agreed to take over the operation of the business on

March 1 with the intent Dennis would be able to acquire the business either by contract or lease with option to purchase. Duke maintains it was understood by the parties nothing was final until all terms had been put into writing. Duke argues Dennis was leasing the property for $125,000 per year payable in ten monthly installments during the pendency of the discussions.

Dennis contends he and Duke agreed upon a sale of the business at a price of $1,100,000, payable in installments of $12,500, excluding July and August, with an annual interest rate of six percent. He also argues Duke agreed to a covenant not to compete whereby Duke would not engage, directly or indirectly, or be in any manner connected with any kind of grinding business, other than wood, throughout Iowa. Dennis alleges the covenant not to compete was included in the agreement to ensure the Wiggs could make the payments because Duke did not want the business back.

The trial court found the parties had reached an oral agreement and the part performance exception to the statute of frauds had been satisfied. The trial court found the parties had agreed to the sale of the business for $1,100,000 payable in monthly installments of $12,500, except July and August, until the entire amount of principal and interest is paid. The trial court also determined the parties had agreed upon an annual interest rate of six percent. The assets and inventory included in the sale were found to be those listed in Exhibits A and B of the Wiggs' petition. The trial court denied the Wiggs' request to enforce the alleged covenant not to compete.

I. STANDARD OF REVIEW. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. SPECIFIC PERFORMANCE. The decision to grant specific performance is within our sound discretion; it is not to be granted as a matter of right. *Breitbach v. Christenson*, 541 N.W.2d 840, 843 (Iowa 1995). It is to be granted only in extraordinary, unusual cases in which irreparable harm will result in its absence, not as a matter of grace. *Id.* In determining whether to grant a request for specific performance, we must examine the particular facts of the situation and will generally grant the request when it would subserve the ends of justice and deny to do so where it would produce hardship or injustice on either party. *Id.* This court presumes real estate to possess a unique quality such that mere monetary damages may not always constitute adequate remedy for a breach of contract. *Id.* Although the grant of specific performance is equitable, this court will not remake or revise a contract the parties have freely agreed to; we will give the parties the benefit of the contract they have made as far as possible. *Id.* at 843-44. Ordinarily specific performance should not be decreed unless contractual terms are so express that the court can reasonably determine the duty of each party and the conditions under which performance is due. *Lange v. Lange*, 520 N.W.2d 113, 117 (Iowa 1994).

Whether preliminary negotiations actually ripened into an oral contract depends on the intention of the parties as gleaned from the facts of the case. *H & W Motor Express v. Christ*, 516 N.W.2d 912, 914 (Iowa App. 1994). When the terms of an agreement are definitely fixed so that nothing remains except to reduce them to writing, an oral contract will be upheld unless the parties intended not to be bound until the agreement was reduced to writing. *Id.*

> Factors to be considered in seeking to ascertain whether the parties intended to be bound prior to execution of a written document include whether the contract is of a class usually found to be in writing, whether it is of a type needing a formal writing for its full expression, whether it has few or many details, whether the amount is large or small, whether the contract is common or unusual, whether all details have been agreed upon or some remain unresolved, and whether the negotiations show a writing was discussed or contemplated.

Severson v. Elberon Elevator, Inc., 250 N.W.2d 417, 421 (Iowa 1977). Thus, if we determine the discussions were preliminary negotiations and did not ripen into an oral contract, our analysis is over and specific performance may not be granted. However, if we determine the negotiations resulted in an oral contract, we must determine whether the statute of frauds bars a determination of the contract terms.

We find the parties agreed to an oral contract. While the factors listed above favor the finding of preliminary negotiations as argued by the Prichards, the weight of the evidence shows a contract was reached.

The evidence shows the following occurred:

1. Duke hired a Texas company to appraise and advertise the business.

2. Duke obtained the names of three area people who were interested in buying the business, one of whom declined to discuss a possible purchase when he learned Dennis was negotiating to buy the business.

3. Duke and Dennis had known each other for approximately twenty years and were good friends.

4. Dennis had worked for Duke in the grinding business.

5. Dennis took over the operation of the business.

6. Duke mailed letters notifying customers of the sale of the business to Dennis; Dennis also mailed a letter to his new customers.

7. Dennis paid for major repairs.

8. Dennis bought a $1,000,000 life insurance policy.

9. Dennis paid $12,500 per month.

All of these factors point toward the formation of a contract. These factors show two men who were friends made an oral contract, thinking the memorialization on paper would be all that remained.

The sale of land falls under the statute of frauds. Iowa Code § 622.32 (1995). No evidence is competent unless it is in writing and signed by the party to be charged. Iowa Code § 622.32. The statute is not a substantive rule of law forbidding oral contracts. *Davis v. Roberts*, 563 N.W.2d 16, 20 (Iowa App. 1997). It is a rule of evidence limiting the manner of proving a contract within its provision. *Id.* Proof of oral contract is permitted:

> where the purchase money, or any portion thereof has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession of the premises under and by virtue of the contract, or when there is any other circumstance which, by the law heretofore in force, would have taken the case out of the statute of frauds.

Iowa Code § 622.33.

The words "purchase money" mean consideration received in whatever form it may exist. *Davis*, 563 N.W.2d at 20. This exception to the statute of frauds is commonly referred to as part performance. *Id.* Part performance will remove a real estate contract from the statute of frauds only when the acts constituting partial performance are referable exclusively and unequivocally to the contract. *Pollmann v. Belle Plaine Livestock Auction, Inc.* 567 N.W.2d 405, 409 (Iowa 1997); *Davis*, 563 N.W.2d at 20. If the acts claimed as part performance can be explained without reference to the alleged oral contract, they do not take the contract out of the statute of frauds. *Pollmann*, 567 N.W.2d at 409. Proof of the acts, conduct, or circumstances constituting consideration for the claimed oral contract must be clear, satisfactory, and convincing. *Davis*, 563 N.W.2d at 20.

We find the same factors listed above also show part performance and take the contract out of the statute of frauds. It appears after reaching the agreement on the sale of the business, Duke learned the full tax ramifications of the sale he and Dennis had arranged. Also, Duke and Dennis encountered personal problems. Now, Duke is trying to get out of a valid and binding contract. We think the trial court correctly

determined the terms of the contract and correctly awarded specific performance and denied the covenant not to compete.

For these reasons, we affirm the trial court

AFFIRMED.