IN THE COURT OF APPEALS OF IOWA

No. 8-714 / 97-2362

J. MICHAEL BERTROCHE, d/b/a
M & T BERTROCHE LAND COMPANY,
Plaintiff-Appellant,

vs.

SUE ANN GRAMPP,
Defendant-Appellee.

FILED
MAY 26 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

The plaintiff appeals from a district court order dismissing his petition seeking specific performance of a real estate contract and damages. **AFFIRMED.**

Paul J. Bieber of Gomez, May, Cartee & Schutte, Davenport, for appellant.

Ralph W. Heninger of Heninger and Heninger, P.C., Davenport, for appellee.

Considered by Vogel, P.J., Zimmer, J., and Hayden, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HAYDEN, S.J.

The plaintiff appeals the district court's order dismissing his petition seeking specific performance of a real estate contract and damages. He contends the district court erred in ruling the contract was unenforceable due to the lack of definite provisions for the defendant seller's parking easement. We affirm the district court's decision to dismiss the plaintiff's petition because the parking easement was an essential part of the agreement and there was no meeting of the minds between the parties on this essential element of the proposed agreement.

On March 25, 1996, Sue Ann Grampp and J. Michael Bertroche d/b/a M&T Bertroche Land Company entered into a real estate agreement. Grampp was to sell a parcel of real estate to Bertroche for consideration of $40,000. Bertroche gave $5,000 to Grampp at the signing of the purchase agreement. The purchase agreement contained an addendum which contemplated a future parking easement for Grampp. At closing, Grampp and Bertroche were to execute a parking easement agreement to allow Grampp to utilize at least twelve parking spaces on the piece of property being sold.

Negotiations began between the two parties as to the provisions of the parking easement. Both parties appeared to have different notions on the creation of the parking easement. Grampp insisted the easement be exclusive as to allow for the exclusive right to park in the spaces. There was also a disagreement as to the size of the easement and the parking spaces, as well as who would construct and maintain the easement. The two parties never came to a conclusion as to the terms of the parking

easement. After several attempts of coming to an agreement, Grampp rescinded the transaction and returned the $5,000 to Bertroche. Bertroche refused to accept the return of the money, seeking instead specific performance.

On June 21, 1996, Bertroche filed a petition seeking specific performance and money damages. Bertroche filed a summary judgment motion in January 1997, and Grampp filed a cross motion for summary judgment in February 1997. The parties essentially agreed the facts of the case were undisputed. However, they disagreed as to the appropriate conclusion to be reached as a result of the transactions between the parties. Both motions for summary judgment were denied. A trial occurred in October 1997, and the court dismissed Bertroche's petition in December 1997. Bertroche now appeals.

This case was tried in equity and our review is de novo. Iowa R. App. P. 4; *Lange v. Lange*, 520 N.W.2d 113, 115 (Iowa 1994).

The plaintiff's burden in a suit for specific performance is to prove by clear, satisfactory, and convincing evidence the terms of the contract declared upon in his or her pleadings. *Recker v. Gustafson*, 279 N.W.2d 744, 750 (Iowa 1979). Specific performance of a contract, however, is not a remedy which is available as a matter of right. *Youngblut v. Wilson*, 294 N.W.2d 813, 817 (Iowa 1980). Rather, its availability rests in the sound discretion of the court. *Gildea v. Kapenis*, 402 N.W.2d 457, 459 (Iowa App. 1987).

The district court found while the parties generally agreed upon the location and size of the parking easement, they could not agree on the easement's exclusivity

and duration thus, Bertroche failed to demonstrate a meeting of the minds as to an essential element of the contract. Bertroche contends the addendum granting the parking easement agreement was clear given the definition of the word "easement" and that there was a meeting of the minds as to what the agreement called for[1]. Grampp's position is that there was merely an agreement to make an agreement because the easement was an essential part of the entire transaction and that the essential terms and conditions of the easement were not agreed upon but were subject to further negotiation. Understandable or ascertainable terms are necessary ingredients for an enforceable contract. *Air Host Cedar Rapids v. Airport Comm'n*, 464 N.W.2d 450, 453 (Iowa 1990). Although vagueness, indefiniteness and uncertainty are matters of degree, their existence as to any of the essential terms of an agreement is adequate reason for a denial of specific performance. *Davis v. Davis*, 156 N.W.2d 870, 876 (Iowa 1968). There is little, if any, dispute to the general proposition of law that an agreement to agree to enter into a contract is of no effect unless all of the terms and conditions of the contract are agreed on and nothing is left to future negotiations. *Air Host Cedar Rapids, Inc.* 464 N.W.2d at 450; *Crowe-Thomas Consulting Group, Inc. v. Fresh Pak Candy Co., Inc.*, 494 N.W.2d 442, 445

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[1]Relevant part of the addendum:
1. Seller reserves on Lot 1 of Grampp First Addition a parking easement to the owner of Lots 26 & 27 of Fairmeadows Eighth Addition to utilize up to twelve parking spaces on such property. Such parking spaces shall be located closest to Lot 26 & 27 Fairmeadows Eighth Addition, but so as not to unreasonably interfere with Purchaser's business. At closing Seller and Purchaser shall execute a parking Easement Agreement providing for such parking rights.

(Iowa App. 1992). In other words an agreement to agree is not a contract. *Whalen v. Connelly*, 545 N.W.2d 284, 293 (Iowa 1996).

Our question for this appeal centers around the question of if there was a meeting of the minds of the two parties. It is of little dispute that the parties intended a parking easement to be a part of this transaction; the question surrounds the terms of the easement. The parties partially agreed on the size of the easement, yet not any specifics as to a land description, and the parties agreed to allow parking spaces, but not the size or exact number. There was no agreement as to the exclusiveness of the easement, nor the duration of the easement. The parties engaged in a series of negotiations as to which party was responsible for the construction and maintenance of the parking spaces. No agreement was produced from these negotiations. It appears clear from the testimony that even from the beginning, the parties differed as to what each wanted the parking easement to consist of. Bertroche was surprised and shocked when he found out Grampp wanted the exclusive right to the parking, and from the beginning Grampp had not envisioned it any other way. Grampp stated on numerous occasions how important the parking easement was to the completion of the transaction, and it is apparent the parties were on opposite ends of the spectrum on the terms of the parking easement. As to the parking easement, we do not believe there was a meeting of the minds on the terms and conditions of this easement.

Bertroche is requesting specific performance. Specific performance is available as a remedy for a breach of a contract for the sale of real estate. However, specific performance should not be granted unless the contractual terms are so express

that a court could reasonably determine the duty of each party and the conditions under which performance is due. *Lange*, 520 N.W.2d at 117. Bertroche argues the meaning of easement in the addendum was clear and gave a definite meaning to what the easement would consist of. Bertroche believes he was required to allow Grampp to use a portion of the property for parking and it was Grampp who was attempting to alter the contract to fit the secret agenda of having an exclusive right for parking. We do not believe Grampp to have such a sinister agenda as to lure Bertroche into the contract and then demand the exclusive right to park. Rather, we believe there was never a general understanding as to what both parties expected from the parking easement. Both parties testify there were ongoing negotiations as to the terms of the easement. If the terms and conditions of the easement would have been as clear and definite as Bertroche claims them to be, there would not have been the need for the lengthy negotiations after the agreement was signed. Bertroche had the burden of showing the existence of a contract with specific terms by clear and convincing evidence; he has failed this burden. The evidence brought forth by Bertroche does little more than show there was never a meeting of the minds by the two parties. The trial court was correct in not granting specific performance. The terms of the easement do not allow for a reasonable understanding of the duties of each party. We affirm the district court's decision to dismiss Bertroche's petition.

AFFIRMED.

No. 97-2362. [8-714] BERTROCHE v. GRAMPP

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge. **AFFIRMED.** Considered by Vogel, P.J., Zimmer, J., and Hayden, S.J. Opinion by Hayden, S.J. (6 pages $2.40)

Bertroche appeals the district court's order dismissing his petition seeking specific performance of a real estate contract. On March 25, 1996, Sue Ann Grampp and J. Michael Bertroche entered into a real estate agreement. Bertroche was to purchase a parcel of land from Grampp for consideration of $40,000. Bertroche gave Grampp $5,000 at the signing of the purchase agreement. Attached to the purchase agreement was an addendum granting Grampp a parking easement. The easement was to be executed at the closing. Negotiations between the two parties took place to determine the specifics of the parking easement. The two parties disagreed on the size of the easement, the number of spaces that were to be allowed, who would construct and maintain it, and the exclusivity of the parking. The two parties never came to an agreement and Grampp's eventually rescinded the transaction and returned the $5,000 to Bertroche. Bertroche did not accept the money and filed a petition seeking specific performance. The court dismissed his petition in December 1997 and Bertroche now appeals. **OPINION HOLDS:** The plaintiff's burden in a specific performance case is to prove by clear, satisfactory, and convincing evidence the terms of the contract and the granting of specific performance rests in the discretion of the court. Bertroche argues the terms of the easement were clear and there was a meeting of the minds as to what the easement was to consist of. Grampp contends the initial agreement was merely an agreement to agree and the terms of the easement were subject to future negotiations. In order to enforce a contract, the terms must be understandable or ascertainable. An agreement to agree is not considered a contract. The question of this appeal is whether or not there was a meeting of the minds between the two parties. In looking at the negotiations and the statements by the parties, we believe it was clear there was no meeting of the minds on the terms and conditions of the parking easement. There was never a general understanding as to what the parties expected from the parking easement. Bertroche had the burden of showing the existence of a contract with specific terms; he failed to meet this burden. The terms of the easement do not allow for a reasonable understanding of the duties of each party. We affirmed the district court's decision to dismiss Bertroche's petition.