IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

102

EUGENE H. GAVLOCK,

Plaintiff-Appellant,

vs.

WILLIAM J. WESTERMAN and PHYLLIS J. WESTERMAN,

Defendants-Appellees,

and LARRY WINNINGER AND CO., An Iowa Corporation,

Defendant-Appellee.

7-15
86-265

WILLIAM J. WESTERMAN and PHYLLIS J. WESTERMAN,

Third-Party Plaintiffs,

vs.

STEVE HARBAUGH and MARK WINNINGER,

Third-Party Defendants/ Appellees.

Appeal from the Iowa District Court for Black Hawk County (No. 64095) - Van D. Zimmer, Judge.

Plaintiff purchaser appeals from a trial court decision denying his petition for specific performance of a real estate contract. **AFFIRMED.**

Emil Trott, Jr., of Barrett & Trott, Des Moines, for plaintiff-appellant.

Jay P Roberts, of Swisher & Cohrt, Waterloo, for defendants-appellees/-third-party plaintiffs

Timothy J Luce, of Randall, Anfinson & Luce, Waterloo, for third-party defendants/appellees

Considered by Oxberger, C J , and Hayden, and Sackett, JJ.

SACKETT, J.

Plaintiff-purchaser Eugene H. Gavlock appeals from a judgment by the trial court dismissing his petition against defendants-sellers for specific performance of a real estate contract. Gavlock contends the trial court erred (1) in finding a $7,500 down payment was a condition precedent to the existence of a binding contract, and (2) in finding defendants-sellers had the right to rescind the contract when Gavlock failed to timely make the down payment. We affirm.

This case involves a real estate purchase agreement where Gavlock agreed to buy and Defendants Phyllis Westerman and William Westerman agreed to sell their Waterloo residence through the Westermans' real estate agent Steve Harbaugh of Larry Winninger and Company (Winninger Realty). In January of 1981, the Westermans listed their home with Winninger Realty.

On March 5, 1983, Gavlock made an offer on the Westerman home and two adjacent lots. On March 7, 1983, William Westerman advised Harbaugh he would not accept the offer and made a counterproposal. The counterproposal, made in the form of a purchase agreement, was accepted by Gavlock on March 7, 1983. On March 10, 1983, Gavlock withdrew his offer and made a new offer on only the personal residence. Harbaugh phoned William Westerman with the new offer and he orally accepted the offer on March 11, 1983, after a proposed arrangement was approved by Winninger Realty regarding payment of commission in installments. The purchase agreement was then mailed to the Westermans and eventually signed by both parties. The purchase agreement contained the following provisions:

> 9. OTHER TERMS AND CONDITIONS: This offer is also made subject to the following conditions:
>
> 9A. This is a lease-purchase agreement. $7500 by March 15, 1983.

The $7,500 down payment was to be held in escrow by Winninger Realty until closing on March 30, 1983. Gavlock gave Winninger Realty a check for $7,500 on March 15, 1983, but it failed to clear the bank due to insufficient funds. The check did not clear until March 29, 1983.

On March 16, 1983, realtor Mark Winninger received an unfavorable credit report on Gavlock. This report showed a bank judgment against Gavlock in excess of $60,000, another judgment for $52,000 and a debt to a Mr. Johnson of $49,500. The report also showed Gavlock had not filed income tax returns from 1979 to 1984. Winninger Realty did not inform the Westermans about Gavlock's unfavorable credit report or that Gavlock's check had not cleared the bank. Unaware of these facts, the Westermans signed the purchase agreement on March 16, 1983, and mailed it to Winninger Realty. In a letter of Harbaugh's accompanying the signed purchase agreement, William Westerman said he was accepting Gavlock as a creditor based on Harbaugh's recommendations. William Westerman also said he would also do his own credit check on Gavlock.

The signed purchase agreement arrived at Winninger on March 19, 1983. Harbaugh learned of Gavlock's adverse credit report on that date from Mark Winninger. Mark Winninger did not forward the purchase agreement to Gavlock because Gavlock had failed to pay the $7,500 down payment.

On March 25, 1983, William Westerman met with Harbaugh in Waterloo and requested the closing date be moved up to March 29, 1983. Harbaugh did not inform William Westerman at that time about the credit report or that Gavlock's check for the down payment had not cleared the bank. Harbaugh did not tell William Westerman until the following day, March 26, 1983, that the down payment check had not cleared the bank. William Westerman also

received his own credit report on Gavlock that day which indicated Winninger Realty had obtained a credit report on March 16, 1983.

William Westerman withdrew his offer to sell his residence on March 27, 1983. He did not participate in or authorize a closing. Subsequently William Westerman withdrew his listing with Winninger Realty. He listed his residence with another real estate agency and sold it approximately two weeks later for the same price as he had agreed to sell to Gavlock.

Thereafter Gavlock filed a petition seeking specific performance of the purchase agreement with the Westermans. The Westermans filed an answer, counterclaim and third-party action against Harbaugh and Mark Winninger for failure to disclose and material misrepresentation of Gavlock's financial situation. After a bench trial, the trial court entered a judgment finding Gavlock had (1) misrepresented his financial situation, (2) Gavlock did not have the financial ability to perform the contract, (3) the $7,500 down payment was a material term and condition precedent to a binding contract, and (4) the Westermans were entitled to rescind the contract based on Gavlock's failure to timely pay the down payment. The trial court dismissed Gavlock's petition and the Westermans' counterclaim. The trial court awarded the Westermans $4,000 in their third-party claim against Harbaugh and Winninger. This appeal by Gavlock followed.

On appeal Gavlock asserts the $7,500 down payment was not a condition precedent to a binding contract. As such, since there was a binding contract Gavlock contends the Westermans' remedy for his delay in paying the down payment was either to enforce the agreement or forfeit it pursuant to Iowa Code chapter 656. Alternatively, Gavlock contends if the Westermans had a right to rescind the agreement, they waived the right by accepting and not

promptly returning the $7,500 down payment. Gavlock claims he performed substantially all his obligations under the purchase agreement since they were not due until the closing date. Finally, Gavlock maintains he was under no obligation to volunteer information about his credit rating and he did not fraudulently misrepresent or conceal his financial status. The Westermans contend the trial court correctly denied specific performance on the ground Gavlock was financially unable to perform the contract.

An action for specific performance stands in equity and our review is de novo. Janssen v. North Iowa Conference Pensions, Inc., 166 N.W.2d 901, 903 (Iowa 1969). Specific performance is available when the contract involves property which is unique or possesses special value. Moser v. Thorp Sales Corp., 256 N.W.2d 900, 907 (Iowa 1977). However, specific performance of a contract is not a remedy available as a matter of right. Youngblut v. Wilson, 294 N.W.2d 813, 817 (Iowa 1980); Tri-States Investment Co. v. Henryson, 179 N.W.2d 362, 363 (Iowa 1970). Rather, its availability rests in the sound discretion of the trial court. Youngblut, 294 N.W.2d at 817. Specific performance will not be decreed unless the terms of the contract are so expressed that the trial court can determine with reasonable certainty what is the duty of each party and the conditions under which performance is due. Tri-States Investment Co., 179 N.W.2d at 363. The existence of vagueness as to any essential terms of the agreement is adequate reason for denying specific performance. Id.

Iowa courts have recognized that specific performance is not available to all plaintiffs. One of the essential requisites to the grant of specific performance is the ability of the plaintiff to show he has performed, offered to perform or is ready, able and willing to perform the acts required on his part. See Norwest Bank Marion v. L.T. Enterprises, Inc., 387 N.W.2d 359, 365 (Iowa

1986) (Iowa Supreme Court affirmed trial court's denial of cross-claim for specific performance where plaintiff could not produce a merchantable title and was not in compliance with the terms of the contract); 71 Am. Jur. 2d Specific Performance §65, at 93 (1964). Either performance or a tender of performance in some form within the time stipulated in the contract, where time is made of the essence, is essential to the right to bring suit for specific performance. Id. Moreover, specific performance is not available to one who is in default on the contract. Youngblut, 294 N.W.2d at 817. See Norwest Bank Marion, 387 N.W.2d at 365. In Youngblut the Iowa Supreme Court affirmed the trial court's decree of specific performance because it found the purchaser had completely fulfilled his contractual duties to immediately pay the seller an agreed down payment and to deposit the balance in escrow. Id. at 815, 817.

In the instant case, Gavlock did not pay the required $7,500 down payment either by the March 15, 1983, deadline or by the time the Westermans rescinded the contract on March 27, 1983. Gavlock argues his failure to pay the $7,500 should not defeat his claim for specific performance because the down payment was not a condition precedent and the terms in question were not material or fundamental parts of the contract. However, the Westermans contend and the trial court held the down payment was a condition precedent giving Westermans the right to rescind performance at any time prior to Gavlock's performance of the condition precedent. See Khabbaz v. Swartz, 319 N.W.2d 279 (Iowa 1982) (Nonperformance of condition precedent vitiates contract); National Farmers Organization, Inc. v. Lias, 271 N.W.2d 751 (Iowa 1979). See also Binkholder v Carpenter, 152 N.W.2d 593 (Iowa 1967) (Court of equity will more easily rescind unperformed contract than it will an executed one).

We determine it is clear from the language of the contract that the down payment was a condition precedent. The relevant portion of the purchase agreement specifically provides "[t]his offer is also made subject to the following conditions". The $7,500 down payment was one of those conditions.

We also determine the down payment provisions and deadline are material terms of the contract. The negotiations, rejected offers and counterproposals concerned mainly the purchase price, down payment and balloon payment. The Westermans rejected Gavlock's first two offers for that reason and Gavlock himself withdrew his second offer because of those particular contract terms. Gavlock cannot now be heard to deny the materiality of the payment terms of the March 10, 1983, purchase agreement.

In addition, there is no evidence to support Gavlock's argument the Westermans waived Gavlock's compliance with the condition precedent. Through their agents, the Westermans requested on more than one occasion that Gavlock put the payment into the escrow account. Likewise, we reject Gavlock's contention the March 15, 1983, down payment was not actually due until the closing on March 29, 1983. The terms of the purchase agreement specifically provide "[i]n the performance of each part of this agreement, time shall be of the essence." (Emphasis added.)

Therefore, based on the evidence as a whole, the trial court was correct in denying Gavlock's petition for specific performance of the contract to purchase the Westermans' residence. We affirm the trial court.

AFFIRMED.