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365
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARTIN TRUDELL,	)	
Plaintiff-Appellee,	)	Filed March 22, 1979
vs.	)	
MARK A. LA VELLE and ADELE LA VELLE,	)	782 2-61860
Defendants-Appellants.	)	

Appeal from Woodbury District Court - James P. Kelley, Judge.

Defendants appeal from trial court order compelling specific performance of oral contract to convey title to real estate. Affirmed.

Robert W. Green, of Jacobs, Gaul, Nymann & Green, of Sioux City, for appellants.

Robert J. Hurst, of Hutchison & Hurst, of Sioux City, for appellee.

Submitted to Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendants Mark and Adele La Velle appeal from a decree in equity compelling specific performance of an alleged oral agreement for the sale of property to Adele's father, Martin Trudell. We affirm the trial court.

In February 1957, Mark and Adele La Velle, who had recently married, purchased a house located at 405 38th Street in Sioux City from Herman Davidson. They paid a $250 down payment, and agreed to pay $55 a month at 5 1/2 percent interest until the $8250 contract price was paid. Sometime in 1958, when the balance due on the contract was $7755.14, Mark and Adele entered into an oral agreement with Martin Trudell, under which Martin would take over the Davidson contract and make the balance of the payments due. Mark and Adele agreed to convey title to the property to Martin whenever he requested it, after the Davidson payments had been completed.

In June 1958, Martin took over the monthly payments and continued to make them until April 1971, when he made a final payment of $3,592.14 to complete the Davidson contract. Sometime before 1963, Mark and Adele and their growing family moved out of the house on 38th Street into a larger house. Martin furnished the down payment on the new house, to reimburse Mark and Adele for the equity they had in the 38th Street house. Martin then took possession and moved into the 38th Street house.

In addition to the monthly contract payments, from June 1958, Martin paid all taxes due on the property. In 1965, Davidson contacted the La Velles about overdue taxes, and was told by Adele that Martin "took care of" the taxes. Over the years, Martin installed a new furnace, hot water heater, and carpeting, re-roofed both the house and garage and painted the house more than once. Mark and Adele expressed no interest in the condition of the house or in the improvements made until after the petition in this action was filed.

When the Davidson contract was paid off in 1971, the deed and abstract to the property were forwarded to Martin by Davidson's attorney. The deed was made out to Mark and Adele, apparently at the request of Martin, who believed title would be conveyed to him at such time as he requested it. Martin put the deed and abstract in his safe deposit box, to which Adele had a key, but later removed them. Neither the deed nor abstract was ever in the possession of Mark or Adele.

In June 1977, Martin decided to sell the 38th Street house and contacted Denny Kuhn, a Sioux City relator. Martin and Kuhn visited the La Velles, to discuss arrangements for marketing the house and to obtain their signatures on the realty listing agreement. Kuhn was under the impression that Martin owned the house, and neither Mark nor Adele said anything to indicate otherwise. Both signed the listing agreement. However, later that evening Adele called Martin and told him, "[W]e are going to sell that place, and we are going to keep it all, and we aren't giving you a penny of it." This action followed.

I. Initially we must decide a procedural matter, arising on plaintiff's motion to dismiss this appeal, which was ordered submitted with this case.

On November 17, 1977, trial court issued its decree finding that an agreement existed and compelling specific performance. On November 28, 1977, the last day on which defendants could move for a new trial, the following docket entry appears:

> Defendants move the Court by their attorney John O'Brien for additional time to file their Motion for New Trial. Said Defs are granted until Dec. 8, 1977 to file said Motion for New Trial Herein.

On December 8, 1977, defendants filed their motion for new trial, which was resisted by plaintiff and overruled by trial court on March 2, 1978. Subsequently defendants filed this appeal, and plaintiff moved for its dismissal on the ground that the extension of time allowed for filing the motion for new trial violated rule 247, Rules of Civil Procedure, so that time had run on the 30 day limit to file an appeal.

As in Berghammer v. Smith, 185 N.W.2d 226, 229 (Iowa 1971), and Dunham v. Des Moines Railway Company, 240 Iowa 421, 429, 35 N.W.2d 578, 583 (1949), we find plaintiff could and did waive the requirements of rule 247 when he failed to make any objection below to the extension of time. The dispute here, as in Berghammer, 185 N.W.2d at 229, arises because of an apparent misunderstanding between counsel. The affidavit filed by defendants' trial counsel, which was not controverted or refuted in any way, indicates that notice of and agreement to the oral extension were informally obtained from plaintiff's counsel. See Berghammer, 185 N.W.2d at 230. We hold plaintiff's motion to dismiss the appeal should be overruled.

II. Defendants contend that the oral evidence introduced by plaintiff in attempting to prove a contract for the transfer of title in real property is not

competent under the statute of frauds, (§ 622.32(3), The Code 1977), and that the evidence shows only a gift on the part of plaintiff, and a landlord-tenant relationship. The trial court found that the plaintiff came within the exception to the statute of frauds provided in § 622.33, stating that the defendants' contention of a landlord-tenant relationship "taxes the credulity of the court."

We find this a succint comment on the evidence in the record. Martin paid 94 percent of the purchase price of the 38th Street house, and additionally made the down payment on another house for Mark and Adele. For at least 13 years, he lived in the house, making costly and significant improvements at his own expense. Mark and Adele never granted permission for or interfered with these improvements; they did not reimburse Martin. Martin lived in the house for almost five years without interference from Mark and Adele after it was completely paid for. Such conduct is not consistent, in our judgment, with the ordinary relationship of landlord-tenant, but is indicative of the existence of a contract, and constitutes part performance referable exclusively and unequivocally to the contract itself. Callon v. Callon, 185 N.W.2d 762, 765 (Iowa 1971). See Davis v. Davis, 261 Iowa 992, 156 N.W.2d 870 (1968); In re Estate of Lindsey, 254 Iowa 699, 118 N.W.2d 598 (1963); In re Estate of Karr, 235 Iowa 351, 16 N.W.2d 634 (1944).

In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court. Rule 14(f)(7), Rules of Appellate Procedure. On our **de novo** review of the record, we find no basis to disturb the result reached below. The decision of the trial court is affirmed.

AFFIRMED.