

IN THE COURT OF APPEALS OF IOWA

FILED

APR 25 1989

CLERK SUPREME COURT

DES MOINES METROPOLITAN)
AREA SOLID WASTE AGENCY,)

Plaintiff-Appellee,)

vs.)

JERRY RAY KANE,)

Defendant-Appellant.)

9-82
88-1209

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Appeal from the Iowa District Court for Polk County
(CE27 15597), Ray Hanrahan, Judge.

Defendant appeals a district court decree granting
plaintiff specific performance of a contract to sell
land. **AFFIRMED.**

Nathan B. Updegraff and Steven J. Holwerda of Selby,
Updegraff, Smith & Holwerda, Newton, for
defendant-appellant.

Donald J. Polden, Des Moines, for plaintiff-appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

In this specific performance action, defendant Jerry Ray Kane (Kane) appeals the district court's decree ordering him to complete the sale of real estate to the Des Moines Metropolitan Area Solid Waste Agency (Metro). The district court ruled that Kane did not carry his burden of proving that there was a lack of consideration for the agreement between himself and Metro, and that Metro was entitled to a decree requiring specific performance of the agreement. We affirm.

Following negotiations concerning Metro's desire to purchase a part of Kane's land for landfill purposes, two offers to buy and acceptances were signed by appropriate agents of Metro and by Kane. The reason for two offers and acceptances was that at the time of the negotiations, it was not known whether Kane would be able to obtain a conveyance of the property from his contract seller, since there was an outstanding balance on that contract. If Kane could receive a conveyance of the property, Metro would pay the entire purchase price in cash, while if Kane's contract seller would not take prepayment and convey the property to Kane at present, Metro would pay the purchase price over such a period of years as would be necessary to satisfy that contract seller. Both parties understood this problem and the reason for the two instruments. Subsequently, a prepayment and conveyance of the land became possible,

and the agreement calling for payment of the entire purchase price at the time of closing became the agreement of the parties.

Kane claims that since the agreements called for no down payment or earnest money payment, there was a lack of consideration and he is not bound by the agreement. He claims that since there was no consideration, he had the authority to cancel the sale before the closing of the transaction. His sole claim, put simply, is that due to the lack of a down payment or earnest money payment, the agreement was without consideration and is not binding upon him.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We review the facts as well as the law to determine rights anew from the credible evidence on issues properly presented and preserved. Insurance Agents, Inc.v. Abel, 338 N.W.2d 531, 533 (Iowa App. 1983). We give weight to the findings of the trial court, but we are not bound by them. Iowa R. App. P. 14(f)(7).

Kane claims that the failure to provide for a down payment or an earnest money deposit constitutes a failure of consideration. Iowa Code section 537A.2 (1987) provides: "All contracts in writing, signed by the party to be bound or by the party's authorized agent or attorney, shall import a consideration." "The want or failure, in whole or part, of the consideration of a written contract

may be shown as a defense. . . ." Iowa Code § 537A.3 (1987). In addition to providing the plaintiff with a presumption of consideration, the defendant who relies upon the defense of lack of consideration where there is a written contract has the burden of proving there is none. Abel, 338 N.W.2d at 534.

The trial court found that the defendant, Kane, had failed to carry his burden of proving that the agreement was without consideration. We agree. The mutual promises of the parties to the agreement constituted the consideration. As in Kristerin Development Co. v. Granson Investment, 394 N.W.2d 325, 331 (Iowa 1986), the offer and acceptance contained mutual promises as consideration to support an agreement. Metro promised to pay \$49,368.50 in exchange for Kane's promise to transfer the real estate involved. "The court generally will not inquire further into the 'adequacy' of consideration given." Id at 331-32.

The mere absence of a down payment or earnest money deposit will not provide evidence to show a lack of consideration. The promise of each of the parties in this case constituted a consideration. That consideration did not fail by reason of the exclusion of such a payment.

We find that the district court was correct in its findings and order, and we affirm the decree entered thereon.

AFFIRMED.