FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HAROLD J. CONWAY and GEORGE A. CONWAY,

Plaintiffs-Appellees,

vs

DALE H HASSMAN,

Defendant-Appellant,

and PEOPLES NATIONAL BANK,

Defendant-Appellee.

Filed October 29, 1985

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5-354
84-74

Appeal from the Iowa District Court for Monroe County - Phillip R. Collett, Judge

Defendant buyer appeals from the judgment in an action for specific performance of a real estate contract. **AFFIRMED.**

Robert J. Dieter of Redfern, McKinley, Mason & Dieter, Cedar Falls, Iowa, for defendant-appellant.

Marvin V. Colton, Albia, Iowa, for plaintiffs-appellees.

W K. Cash, Albia, Iowa, and Emil Trott, Jr. of Barrett & Trott, Des Moines, Iowa, for defendant-appellee.

Heard by Donielson, P.J., Schlegel, and Hayden, JJ.

Defendant buyer appeals from the judgment in an action for specific performance of a real estate contract. The buyer asserts: (1) that the evidence was sufficient to establish fraud in the inducement rendering the contract void ab initio; (2) that the evidence was sufficient to establish a right to rescission; and (3) that plaintiffs failed to timely comply with an order of trial court and thereby gave the buyer a right to a favorable judgment entry. Plaintiffs and defendant bank assert, inter alia, that a posttrial motion was ineffective to extend the time for filing notice of appeal and that the appeal should therefore be dismissed. We affirm.

Harold and Margie Conway were owners of 365 acres of farm land encumbered with two mortgages with FmHA and a mortgage with Peoples National Bank of Aliba. The FmHA mortgages contained provisions allowing acceleration of payments after an unapproved sale.

In 1981, the Conways signed a listing agreement with one Harry Keniston, a real estate broker, to sell 255 acres of their farm land. Keniston ultimately showed the property to Dale Hassman, a defendant in this action. As a sales tool, Keniston showed Hassman a computer document entitled "Farm Profile," which represented that 138 acres were tillable. Keniston also stated that the tillable acreage could be increased to 155 acres by removing fences and excavating waterways. Terms were negotiated and Hassman made an offer which was accepted after the bank approved him as a buyer.

FmHA never approved the sale and sent a notice of acceleration to plaintiffs, who unsuccessfully pursued an administrative appeal. Ultimately, FmHA commenced foreclosure proceedings, but dismissed them after reaching an agreement with plaintiffs and the bank for refinancing.

On March 1, 1982, Hassman sent a letter to the Conways expressing concern over, inter alia, a discrepancy in the number of tillable acres and the state of title. Hassman did not make the contract payment due in March, 1982, and on June 29, 1982, he sent plaintiffs a notice of rescission of the contract.

On April 20, 1982, the Conways commenced an action seeking acceleration of the principal balance or, alternatively, specific performance. Hassman counterclaimed for misrepresentation and fraudulent inducement and for rescission.

Following the trial, the court denied plaintiffs' claims for acceleration and specific performance because they were in default and title was not marketable. They were ordered to refinance the property so as to remove the FmHA mortgage. The court denied Hassman's fraud-based claims, entered judgment against him for unpaid annual installments, and ordered him to perform the contract.

Findings of fact and conclusions of law, filed on July 29, 1983, required plaintiffs to comply within thirty days "from the date of filing this opinion." The judgment entry filed on September 21, 1983, required plaintiffs to comply within thirty days from judgment. On September 23, Hassman filed a "motion to expand findings of fact and conclusions of law" based on the inconsistency between the two orders.

On December 8, 1983, the court overruled the motion, stating that the judgment entry accurately reflected what was intended while the language of the earlier order, due to mistake, did not. Notice of appeal was filed on January 6, 1984. By orders of Justices Carter and Wolle and issue of timeliness of the notice of appeal is submitted with the appeal. Justices Wolle and McGiverin overruled motions to dismiss based on delay in complying with various requirements of the rules of appellate procedure.

I. Notice of appeal was filed by the Hassmans in January, 1984, several months after the entry of judgment and well beyond the 30-day time period within which an appeal must be taken. Because of this, we are faced with the question of whether we have the jurisdiction to consider claims now raised. As we view it, the determinative factor is the effect of Hassman's September 23, 1983 posttrial motion.

The motion in question was originally filed as a motion to enlarge or amend pursuant to Rule 179(b). Normally, this type of motion serves to toll the 30-day period for an appeal. Iowa R. App. P. 5. However, as the Conways point out, Hassman's motion was untimely since it was not filed within 10 days of the findings of facts and conclusions of law. See Quality v. Chrysler Credit Corp., 261 N.W.2d 466, 471 (Iowa 1978). A motion which is untimely, and hence defective, will not affect the running of the period within which an appeal must be taken. Id.

In recognizing that Hassman's rule 179(b) motion was not timely, the trial court elected to treat it as a Rule 252 motion to modify the judgment. However, even characterizing the motion as one under Rule 252 would not serve to give this court jurisdiction over the substantive claims raised on appeal. In contrast to Rule 179(b), a motion pursuant to Rule 252 does not affect the time period for an appeal from a final judgment. See Iowa R. App P. 5. While defendant could properly appeal from the trial court's decision with respect to the motion, our jurisdiction would be limited to consideration of only those matters before the court at the time the motion was considered.

Although it is apparent that Hassman's appeal may not be timely, we believe it would be in the interests of justice to avoid unnecessary future litigation and render a final disposition concerning the matters now before this court.

See State v. Barbee, 370 N.W.2d 603, 606 (Iowa Ct. App. 1985). Accordingly, we reach the merits of Hassman's claims.

II. Hassman first claims that the record supports a finding of fraud in the inducement and, as such, the contract should be considered void. We disagree.

A fraudulent misrepresentation requires 1) a material misrepresentation, 2) made knowingly, 3) with the intent to induce a person to act, 4) justifiable reliance and 5) actual damage. Beeck v. Kapalis, 302 N.W.2d 90, 94 (Iowa 1981).

Contrary to Hassman's assertion, we cannot say that any material misrepresentation was made concerning tillable acres of land. Hassman complains that he could only plant 91 acres of corn even though the farm profile indicated that 138 were tillable. However, as plaintiffs point out, this position ignores a distinction made in the profile between tillable acres and acres suitable for corn. The profile accurately reflects that of the 138 acres generally suitable for crop production, only 90 acres would be suitable for corn. Hassman has presented no information which would indicate the 138 acres could not be used for production of other crops. His evidence of ASCS normal crop acreage of approximately 72 acres is not indicative of the number of acres which could be tilled. Based on the evidence in the record, we can only conclude that defendant was not misled.

Similarly, we also conclude that Hassman was not misled regarding the existence of the FmHA mortgages by either the seller or the bank. Hassman testified that he had no knowledge of any mortgage other than the bank's. However, the broker testified in his deposition that he had informed Hassman of the FmHA mortgages on at least two occasions. It is apparent that the trial court considered the broker's testimony to be more credible; we are not inclined to interfere with this credibility determination on appeal.

With respect to the bank, Hassman argues that an affirmative duty existed to disclose all encumbrances. We cannot agree.

> Ordinarily, mere silence on the part of one party, in an arm's length transaction, as to material facts discoverable by the other does not serve to create actionable fraud. This is not the case, however, where there exists a relationship of trust or confidence, and the trusted party has superior knowledge of the facts. In the latter situation the superior party has a duty to disclose all material facts of which he is aware, or at least those favorable to his own position and adverse to the other.

First National Bank in Lenox v. Brown, 181 N.W.2d 178, 182 (Iowa 1970) (citations omitted).

In the case before this court, the record does not reflect a relationship of trust or confidence which would allow the bank to induce Hassman to purchase the property. In fact, Hassman signed the offer without any inquiry of the bank. Furthermore, we note that the FmHA mortgages were properly recorded and were a matter of public record. A buyer as sophisticated as Hassman should have been aware that such information was available. It cannot be said that the bank had superior knowledge of information which could not otherwise be discovered.

The trial court properly concluded that there were no material misrepresentations. We affirm its decision in this respect.

III. Hassman also argues that he is entitled to rescission of the contract since his title to the land was placed in jeopardy by the actions of the Conways and the bank. Specifically, he points to the fact that the Conways failed to provide an abstract showing marketable title by March 1, 1981, as required by the contract.

Our review of the record, however, convinces us that Hassman's actions preclude equitable recovery. Prior to the notice of rescission Hassman failed to make the payment due on March 1, 1982. Because of this default, rescission

was not available. Binkholder v. Carpenter, 260 Iowa 1297, 1308, 152 N.W.2d 593, 600 (1967).

We also conclude that Hassman's failure to act with any urgency in determining the status of title bars equitable relief. Estoppel by acquiescence applies where there has been an unreasonable delay in asserting a remedy. Thurn v. Thurn, 310 N.W.2d 539, 541 (Iowa Ct. App. 1981). The determinative question is whether the actions of the individual holding the right would indicate that it had been waived. Id.

In the case at bar, the primary basis for rescission is the seller's failure to deliver an abstract showing marketable title by March 1, 1981. Yet Hassman did not attempt to rescind until June 29, 1982. During this time period, Hassman continued to treat the contract as valid. It would be inequitable to allow rescission at this point since Hassman's actions would indicate a waiver.

IV. Hassman's final claim is that he is entitled to a favorable judgment entry since the Conways failed to timely comply with the July 29, 1983, order of the trial court. We disagree.

The trial court's findings of fact and conclusions of law, filed July 29, 1983, ordered Conway to make title marketable within 30 days. However, the subsequent judgment, filed September 19, 1983, required compliance within 30 days from the "filing of this judgment." We conclude that the final order of the court should be permitted to stand. The trial court indicated that the statement contained in the July order was erroneous and that its intention was to allow 30 days from the judgment. Certainly, the ends of justice would be best served by giving effect to the corrected version. "The maxim is that no litigant has a vested right in an erroneous ruling." Davenport Bank & Trust v. City of Davenport, 318 N.W.2d 451, 455 (Iowa 1982).

Finding no error, we affirm the trial court in all respects.

AFFIRMED.