FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-488 / 90-1696

DUANE ALLEN REEDER and RHONDA RAE REEDER,

Appellants,

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vs.

ROBERT STUSSE and **ARLENE PLUMER**, Co-Executors of the Estate of DORIS L. STUSSE,

Appellees.

Appeal from the Iowa District Court for Woodbury County, Edwin L. Mitchell, Judge.

Plaintiffs appeal the district court's denial of their claim in probate for specific performance of the decedent's alleged agreement to reduce the principal balance on a real estate contract and for damages. **AFFIRMED.**

Gregg E. Williams of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, and Emil Trott, Jr., Des Moines, for appellants.

Jeffrey A. Sar of Baron, Sar, Goodwin, Gill & Lohr, Sioux City, for appellees.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

In June 1978 Duane and Rhonda Reeder entered into an agreement to purchase farm real estate from Doris Stusse and her husband, Albert. The total purchase price was for around $272,000, or $1600 per acre.

From 1978 through March 1986, the Reeders made their required payments, leaving a principal balance of almost $170,000. However, in late 1986 or early 1987, the Reeders advised Doris, apparently now widowed, that they were experiencing financial difficulties and needed a reduction in payments. Discussions ensued between Doris and the Reeders.

On February 28, 1987, the Reeders, Doris, and her two children, Robert Stusse and Arlene Plumer, met concerning the payments. The Reeders contend that Doris agreed to reduce the principal by $51,000, or $300 an acre, effective March 1, 1986. The Reeders tendered a check to Doris reflecting the reduced payment. She deposited the check.

Doris then contacted her attorney, Glen Metcalf, concerning the payment reduction. The Reeders and Doris met with Metcalf on March 5, 1987. Metcalf advised Doris not to proceed with any contract modification pending consideration of the tax consequences. As a result, no written contract modification was signed by the parties. In August 1987 Doris, age seventy-six, died.

In December 1987 the Reeders filed a claim in probate in the estate of Doris Stusse. The Reeders sought damages

and specific performance of the alleged agreement to reduce the payments on the 1978 farm real estate contract. The executors filed an answer denying the probate claim and affirmatively alleging lack of consideration and misrepresentation or fraud concerning the agreement.

The district court denied the Reeders' claim. The court found Doris had made a conditional acceptance on February 28, 1987; her acceptance was conditioned upon her attorney's advice. The court found there was no evidence of any consideration given for the proposed modification. The court also found there was no evidence Doris waived any of her rights under the contract or evidence of equitable estoppel. The Reeders have filed this appeal.

Pursuant to Iowa Code section 633.33, this action for the establishment of a contested claim was tried in probate as a law action. Our review is on assigned error of law. Iowa R. App. P. 4. If supported by substantial evidence and justified as a matter of law, the judgment will not be disturbed on appeal. Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d 191, 194 (Iowa App. 1987). But the reviewing court is not bound by the trial court's determination of the law. Id.

We affirm the district court's finding the Reeders did not sufficiently show a modification of the contract. Whether a contact has been modified by the parties is a question of fact. Mosebach v. Blythe, 282 N.W.2d 755, 760 (Iowa App. 1979). The district court's finding is

supported by substantial evidence. The evidence shows Doris made a tentative agreement on February 28, 1987, subject to her attorney's approval. However, her attorney would not approve the proposed modification without considering the tax consequences. The parties did not proceed any further in reaching an agreement.

Furthermore, even if the parties had entered into a contract modification, it would not be binding because it was not supported by consideration. See Recker v. Gustafson, 279 N.W.2d 744, 759 (Iowa 1979) (new consideration is necessary to support a contract modification).

We recognize that under Restatement (Second) of Contracts section 89D, a modification may be binding without consideration if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made. See Quigley v. Wilson, 474 N.W.2d 277, 281 (Iowa App. 1991), aff'd, 474 N.W.2d 277 (Iowa 1991). However, we find the Restatement section is not applicable here because the proposed modification was not fair and equitable to all parties. The Reeders simply sought a reduction in their payments for the land.

After considering all of the arguments raised by the parties, we affirm the district court.

AFFIRMED.