IN THE COURT OF APPEALS OF IOWA

No. 0-282 / 09-1213
Filed June 30, 2010

WALTERS DEVELOPMENTS CO., LTD. and IRONWOOD, L.C.,
Plaintiffs-Appellants,

vs.

FIDELITY BANK,
Defendant-Appellee.

FIDELITY BANK,
Third-Party Plaintiff/Cross-Appellant,

vs.

JOHN C. KLINE and RANDAL L. WALTERS,
Third-Party Defendants.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Walters Developments Co., Ltd. and Ironwood, L.C. appeal from the district court's ruling dismissing their petition to compel discharge of mortgages. Fidelity Bank cross-appeals. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Jerrold Wanek and Robert C. Gainer of Garten & Wanek, Des Moines, for appellants.

David C. Pulliam of Wasker, Dorr, Wimmer & Marcouiller, P.C., West Des Moines, for appellee.

Heard by Vogel, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

This case involves four parcels of real estate: (1) Lot 37 in Ironwood Plat 1; (2) Lot 40 in Ironwood Plat 3; (3) Lot 88 in Walnut Creek Hills of Clive Plat 2; and (4) Lot 107 in Walnut Creek Hills of Clive Plat 2. We will refer to the first two lots jointly as the Ironwood Lots, and we will refer to the third and fourth lots jointly as the Walnut Creek Hills Lots.

In 2004 and 2005, Walters Developments Co., Ltd. and Ironwood, L.C. (developers) obtained financing from Fidelity Bank for the development of multiple plats of land in the Des Moines area. Developers obtained two promissory notes secured by three separate mortgages and personal guaranties executed by Randal Walters and John Kline. The mortgages encumbered real estate that included the four lots involved in this case.

By late summer or early fall of 2007, developers had defaulted on the promissory notes. On or about October 30, 2007, Fidelity's attorney, Jeffrey Courter, and developers' attorney, Jerrold Wanek, discussed in a telephone conversation a "global agreement" to resolve the parties' disputes. On November 1, 2007, Courter emailed Wanek seeking confirmation that developers were interested in executing a global agreement whereby developers would "deed the real estate collateral back to the Bank in lieu of foreclosure and then have their personal guaranties released by the Bank." Wanek responded by email:

> My clients do confirm their agreement conceptually with your proposal to settle. . . . Except for the Earl May Waukee property, the "park" and Ironwood Plat 5, my clients will convey all real estate

> not previously sold in lieu of foreclosure in satisfaction of all debt of every nature except the EM Waukee debt and the Ironwood Plat 5 debt. This is a full release of all claims (except for the noted debts).

Courter asked Wanek to prepare the documentation, and counsel for both parties were in frequent communication during the next several days for purposes of drafting of the documentation.

On November 5, 2007, Wanek emailed Courter a draft of the deeds in lieu of foreclosure and the release. Kelly Barton, a vice president at Fidelity, reviewed proposed deeds from Wanek and emailed Courter on November 8, 2007, expressing concern that five lots, including the Ironwood Lots, had been omitted by Wanek. Fidelity learned that one of the five omitted lots, Lot 77 in Walnut Creek Hills Plat 2 (Lot 77), had sold previously and a closing of the sale occurred on October 10, 2007. On November 14, 2007, Courter forwarded Barton's list of omitted lots to Wanek, seeking advice on why the lots were omitted. Courter also informed Wanek that when Fidelity received the deeds under the global agreement, it expected to receive the proceeds from the sale of Lot 77. Wanek informed Courter that, in addition to Lot 77, two more of the five omitted lots had been sold and that he was still looking for information on the Ironwood Lots. Courter responded, "I think we have now confirmed the 4 lots Kelly Barton mentioned [not including lot 77] . . . have all been sold so those won't need to be in the deed." At Courter's request, Wanek modified certain deeds and revised the draft of the release to include a provision referencing Fidelity's receipt of proceeds from the sale of Lot 77.

On December 10, 2007, Bruce Greenfield, President and CEO of Fidelity Bank, signed a release providing that developers' mortgages, including the

mortgages encumbering the four lots at issue, would be released. The same day, Wanek delivered to Courter certain deeds in lieu of foreclosure, not including the deeds to any of the four lots at issue. On December 31, 2007, Courter emailed Wanek stating, "[W]e now have all of the documents from you that you agreed to provide as part of the closing of the transaction **except** [a plat not relevant to appeal] which was specifically carved out in the Release." At no time did Fidelity mention the need to include the Walnut Creek Hills Lots in the deeds in lieu of foreclosure, nor did Fidelity state that it expected to receive the proceeds from the sale of the Ironwood Lots once developers closed on those lots. On January 9, 2008, developers closed on the Ironwood Lots and retained the proceeds without making any payment to Fidelity.

On January 15, 2008, Courter informed Wanek that Fidelity determined that developers had failed to turn over the deeds to the Ironwood Lots and stated that Fidelity would not release the mortgages until it received the two additional deeds. Courter later testified that he should have requested that developers turn over the proceeds from the sale of these lots, not the deeds, a mistake which he corrected in his next correspondence. Wanek responded by sending Fidelity a notice to file an action for discharge of mortgages. On March 19, 2008, Courter informed Wanek that Fidelity was aware that developers sold the Ironwood Lots before they conveyed the deeds in lieu of foreclosure and they should therefore have turned over the proceeds from the sales to Fidelity. Secondly, Courter informed Wanek that Fidelity determined that the Walnut Creek Hills Lots had erroneously not been included in the deeds in lieu of foreclosure and requested that developers execute deeds in lieu of foreclosure to transfer these two lots to

Fidelity. Developers did not convey the Walnut Creek Hills Lots to Fidelity, did not turn over the proceeds from the sale of the Ironwood Lots, and consistently maintained that they had fully performed their obligations pursuant to the agreement.

On April 11, 2008, developers filed a petition to compel discharge of mortgages pursuant to Iowa Code chapter 655 (2007). Fidelity counterclaimed, alleging conversion of sale proceeds from the Ironwood Lots and breach of contract. Fidelity also filed a third-party petition to enforce the personal guaranties given by Kline and Walters.

After a bench trial, the district court found that by failing to deliver to Fidelity deeds in lieu of foreclosure on the Walnut Creek Hills Lots, developers failed to fully perform all the duties required under the agreement and were therefore not entitled to relief under Iowa Code chapter 655. The district court dismissed Fidelity's claim for conversion, finding the release did not preserve any claim by Fidelity to the proceeds from the sale of the Ironwood Lots. The district court also found there was no breach of contract by developers, nor was there any event that would entitle Fidelity to enforcement of the personal guaranties.

Developers appeal, arguing: (1) developers are entitled to a discharge of mortgages; and (2) developers are entitled to attorney fees and costs. Fidelity cross-appeals, arguing the district court erred in: (1) dismissing Fidelity's claim for conversion; (2) dismissing Fidelity's counterclaims and third-party petition for breach of contract; and (3) failing to award attorney fees to Fidelity.

II. Standard of Review

We review this action in equity de novo. Iowa. R. App. P. 6.907. *Orr v. Mortvedt*, 735 N.W.2d 610, 613 (Iowa 2007). We give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.904(3)(*g*); *Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000).

III. Walnut Creek Hills and Ironwood Lots

Developers allege that the language of the release unambiguously memorialized the agreement of the parties and did not include a requirement that developers convey the Walnut Creek Hills Lots or transfer proceeds from the sale of the Ironwood Lots. Fidelity alleges that this case involves a mistake in the integration and that we must consider extrinsic evidence to determine what the parties understood to be their agreement.

Mistakes involving contracts can be made in the formation, integration, or performance of a contract. *Pathology Consultants v. Gratton*, 343 N.W.2d 428, 437 (Iowa 1984). A mistake in the integration occurs when the parties "reach an agreement but fail to accurately express it in writing." *State Dep't. of Human Servs. ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 151 (Iowa 2001). "When the understanding of the parties was not correctly expressed in the written contract, equity exists to reform the contract to properly express the intent of the parties." *Id.* "[I]t normally makes no difference if the mistake is mutual or unilateral . . . because the operative mistake is the belief of the parties that the contract correctly expresses the agreement." *Id.* Reformation is the proper remedy to give effect to the intention of the parties and to prevent unjust

enrichment. *Id*. "Without reformation, the party benefited by this mistake would receive a benefit not provided for under the agreement which the written contract was meant to express." *Id.* Extrinsic evidence is admissible to allow "a litigant the chance to prove a writing does not, in fact, represent what the parties understood to be their agreement." *First Interstate Equip. Leasing of Iowa, Inc. v. L.M. Fielder*, 449 N.W.2d 100, 103 (Iowa Ct. App. 1989). Extrinsic evidence is admissible for the purpose of interpreting the terms of a written instrument. *Hamilton v. Wosepka*, 154 N.W.2d 164, 167 (Iowa 1967).

The record establishes that the parties understood their agreement to require developers to include deeds in lieu of foreclosure for the Walnut Creek Hills Lots, which were part of their real estate not previously sold. Wanek's email to Courter dated November 1, 2007, outlined the terms of the agreement, stating, "[M]y clients will convey all real estate not previously sold in lieu of foreclosure in satisfaction of all debt of every nature except [real estate not at issue on appeal.]" The parties clearly understood pursuant to this agreement that developers would convey to Fidelity deeds for *all* property not previously sold in exchange for Fidelity's release of all mortgages, notes, and guaranties associated with such real estate. Developers had not sold the Walnut Creek Hills Lots and therefore should have conveyed the deeds to Fidelity in lieu of foreclosure. There is no evidence in the record that the Walnut Creek Hills Lots were ever considered by either the developers or Fidelity as having been segregated out of the agreement involving all real estate not previously sold. We find the release should be reformed to give effect to the parties' intentions that developers convey the

Walnut Creek Hills Lots to Fidelity in lieu of foreclosure. We remand for orders consistent with this opinion.

As to the impact the release had on the Ironwood Lots, we disagree with the district court that Fidelity was required to preserve in the release its rights under the promissory notes to sales proceeds from these lots. As discussed above, the parties agreed that developers would convey deeds in lieu of foreclosure for all real estate *not previously sold*. Developers sold the Ironwood Lots before the first exchange or communication in the record about a global agreement although the transactions did not close until after the release was signed. The district court expressly found that Fidelity knew of the sale of the Ironwood Lots before it executed its release. The Ironwood Lots, therefore, were not part of the global agreement and were not subject to the terms of the release. In regards to the Ironwood lots, circumstances were "business as usual." This required developers to pay proceeds under the promissory note. The promissory note states, "BORROWER AGREES TO PAY NO LESS THAN 85% OF THE SALE PRICE OF EACH LOT SOLD" to Fidelity.

Fidelity has established a possessory interest in the sales proceeds. *See Blackford v. Prairie Meadows Racetrack & Casino, Inc.*, 778 N.W.2d 184, 188 (Iowa 2010) (stating a party must establish a possessory interest in property to establish a claim of conversion). We reinstate Fidelity's counterclaim for conversion and remand for the district court to determine the amount of proceeds to which Fidelity is entitled.

IV. Breach of Contract

Fidelity argues the district court erred in failing to find developers in breach of the promissory notes and the settlement agreement. Fidelity cites no authority in support of this argument; therefore we decline to address this issue. *See* Iowa R. App. P. 6.903(2)(*g*)(3); *Pierce v. Staley*, 587 N.W.2d 484, 487 (Iowa 1998).

V. Attorney Fees

Both parties argue they are entitled to attorney fees. At trial, both attorneys agreed with the district court that after a ruling was issued on the underlying legal issues, there would be "a supplemental proceeding or process" on the issue of attorney fees that would result in a supplemental ruling. However, because appeal was taken after the ruling was issued, there was no supplemental proceeding or ruling. Because we have no district court ruling to review, we do not decide the issue of attorney fees. *See Westegard v. Davis County Cmty. Sch. Dist*., 580 N.W.2d 726, 729 (Iowa 1998) (declining to decide an issue on which the district court had not made a ruling).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.