IN THE COURT OF APPEALS OF IOWA

No. 2-781 / 12-0382
Filed November 15, 2012

IN THE MATTER OF THE ESTATE OF LOYD D. FOSTER, Deceased.

GARY FOSTER,
Plaintiff-Appellant,

vs.

LEE FOSTER, DEAN FOSTER, and DONALD FOSTER,
Defendants-Appellees.

Appeal from the Iowa District Court for Mitchell County, John Bauercamper, Judge.

Gary Foster appeals from a district court order enforcing a family settlement agreement. **AFFIRMED.**

G. A. Cady III of Hobson, Cady & Cady, Hampton, for appellant.

C. Bradley Price of DeBries & Price, Mason City, for appellees.

Michael Vervaecke, Mason City, for Estate.

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

TABOR, J.

We are asked to decide the enforceability of a family settlement agreement. Gary Foster and his three brothers inherited 400 acres of Mitchell County farmland from their parents. All four brothers signed an agreement detailing how the land would be divided and stating that their spouses "relinquish all rights of dower, homestead and distributive share." Gary now argues his wife's refusal to convey her interest renders the agreement unenforceable. He also contends the agreement is not binding based on a survey line not contemplated at the time of the agreement.

Because we find the settlement agreement was not conditioned on either the spouses' signatures on subsequent conveyances or the location of the guy wire anchors for a cell tower on Gary's property, we affirm.

I. Background Facts and Proceedings

Loyd and Geraldine Foster owned farmland as tenants in common. When Geraldine died in 2007, Loyd received a life estate in Geraldine's property. When Lloyd died in 2008, his will called for the land—more than 400 acres—to be divided equally among the couple's four adult sons: Gary, Lee, Dean, and Donald. Another 6.87 acre parcel was bequeathed solely to Dean. Gary's share of the land was to be offset by the sum of $27,000.

The four brothers were unable to agree how to allocate the real estate. Gary retained DeDra Schoeder as his attorney. The other three brothers were unrepresented, but opposed Gary's suggestions on how to distribute the

property. The attorney for Loyd's estate, Michael Vervaecke, arranged for district court judge Bryan McKinley to mediate the dispute.

On April 19, 2010, the four brothers, Schroeder, Vervaecke, and Judge McKinley, all met at the Mitchell County courthouse for mediation. Vervaecke had prepared a document entitled "Family Settlement Agreement," which included preprinted provisions identifying the parties, the factual background, and basic terms. The form left blank spaces for three terms: the agricultural real estate and cash that Gary was to receive; the agricultural real estate Lee, Dean and Donald were to receive; and the closing date. At the end of the mediation, those disputed terms were filled out by hand.

The agreement allocated one parcel of real estate to Gary alone. Located on that parcel was a cell tower, which generated annual income for the property. The agreement provided: "Gary will be entitled to the June 1, 2010 cell tower payment and all subsequent payments." Although the parties anticipated the tower and its guy wires would be contained in that parcel, a survey later revealed one of the guy wires that anchored the cell tower extended approximately ten feet beyond the boundary of Gary's land. The agreement stated that in addition to that parcel, Gary would receive a cash payment of $75,000. The remainder of the real estate went to Lee, Dean, and Donald as tenants in common.

Paragraph nine of the agreement states:

> **BINDING EFFECT.** This Agreement applies to and is binding upon successors and assigns, which would include spouses and lineal descendants of the Parties. All benefits extended in favor of one Party by execution of this Agreement shall also extend in favor of the agents and assigns of such Party to whom the benefits are extended.

Paragraph twelve states:

> **<u>JOINDER BY SPOUSE.</u>** The spouses of Gary, Lee, Dean, and Don shall execute all subsequent conveyance documents required by law in order for marketable title to be conveyed to Gary, Lee, Dean, and Don. The spouses of Gary, Lee, Dean, and Don relinquish all rights of dower, homestead, and distributive share in and to the real estate.

All four brothers signed the agreement. The agreement did not require or contemplate signatures by their spouses. The spouses did not participate in the conference. Gary expressed concern to Schroeder and Judge McKinley that his wife might object to the settlement terms.

Gary's wife did express dissatisfaction with the terms of the settlement agreement and refused to cooperate in carrying out the terms. On December 7, 2010, Lee, Dean, and Don (the brothers) filed an application to enforce the terms of the settlement agreement. Gary resisted. On March 4, 2011, Gary filed an action seeking partition of the entire real estate interest inherited by the four brothers from both parents. The parties agreed to try the application to enforce the settlement agreement, with resolution of the partition action to be reserved for a later date if necessary.

On January 4, 2012, the district court entered its order, granting the application to enforce the settlement agreement. Gary filed a motion to enlarge and amend the findings and modify the decree, which the district court denied in its entirety. Gary now appeals.

II. Scope and Standard of Review

On appeal, we consider and review a case in the same manner as the district court tried the case. *Molo Oil Co. v. City of Dubuque*, 692 N.W.2d 686, 690 (Iowa 2005). Our scope of review in equity cases is de novo. Iowa R. App. P. 6.907. In all other cases, our review is for correction of errors at law. *Id.*

Before trial in this matter, the district court stated:

> It's my understanding this matter is to be tried at law. However, my practice is, in a bench trial, to be rather liberal on objections I would overrule and let the objection go to the weight and credibility rather than admissibility and make sure that both sides have a complete record available for appellate review. There are some objections that I might be inclined to grant, but I would try to make the record as complete as possible to avoid the possibility of having to have a new trial because the appellate court didn't have all of the record it wanted.

In their resistance to Gary's motion to enlarge and amend, the three brothers contended the matter was heard in equity. The parties agree the proper scope of review is de novo. In equity cases, especially when considering the credibility of witnesses, we give weight to the district court's fact-findings, but are not bound by them. Iowa R. App. P. 6.904(3)(g).

III. Analysis

Gary advances three arguments on appeal as to why the agreement should not be binding. He first argues his wife's signature on the subsequent conveyance relinquishing her "dower" interest was a condition precedent to enforcing the settlement agreement. In the alternative, he characterizes her signature as a condition subsequent. He also argues the agreement is not

enforceable because a survey revealed that an anchor for one of the cell tower's guy wires was not on his parcel of land.

A. Spousal Signature on Conveyance Documents

Gary contends his wife's signature on the conveyance document concerning the transfer of the farmland was a condition to be met before the settlement agreement could be enforced. Gary raised this argument in his answer. Although the district court did not address the argument in its ruling, the brothers agree the issue was preserved for appellate review.

Conditions precedent are those facts and events that must occur before the parties to a contract have a right to performance, before a breach of contract can be recognized, and before the usual judicial remedies are available. *Mosebach v. Blythe*, 282 N.W.2d 755, 759 (Iowa 1979). Whether a condition precedent exists depends not on the particular words used, but on the intention of the parties, gathered from the language of the entire instrument. *Id.* Failure to perform a condition precedent generally vitiates the contract. *Emp. Benefits Plus, Inc. v. Des Moines Gen. Hosp.*, 535 N.W.2d 149, 155 (Iowa Ct. App. 1995).

Conditions subsequent are ones "which if performed or violated defeat[] the contract." *Galt v. Provan*, 108 N.W. 760, 761 (Iowa 1906). If the breach occurs after a party is entitled to property under the terms of the contract, the condition is a condition subsequent. *Id.*; *see also Midwest Oilseeds, Inc. v. Limagrain Genetics Corp.*, 387 F.3d 705, 720 (8th Cir. 2004) ("A condition subsequent discharges a duty that has already arisen under the contract."); *Helms v. Helten*, 290 N.W.2d 876, 880 (Iowa 1980) (finding a condition

subsequent existed where a will bequeathed property to the plaintiff "as long as he refrains from marrying or associating in any way" with a certain woman). Under the definitions in *Galt*, the condition alleged here (if a condition at all) would have required the spouses' signatures on the conveyances before the agreement was finalized. As such, it would be a condition precedent, not a condition subsequent.

In support of his argument that his wife's signature on the subsequent deed of conveyance was a condition precedent to the agreement, Gary relies on paragraph twelve of the agreement, which is headed "Joinder By Spouse." The paragraph states that the spouses of all four brothers "shall execute" the required conveyance documents "in order for marketable title to be conveyed to Gary, Lee, Dean, and Don." The next sentence states: "The spouses of Gary, Lee, Dean, and Don relinquish all rights of dower, homestead, and distributive share in and to the real estate."

Gary testified he believed the agreement was contingent upon the wives' approval. As he left the courthouse on the day of the mediation, he said, "I hope my wife will agree to this." He told the court he was under the impression his wife had to agree. Gary did recall Judge McKinley, the mediator, said, "Now, there is no backing out of this. This is a done deal."

The brothers contend the essence of the agreement was to allocate the land and certain sums of money. The provisions describing what the contracting parties would receive—which were written into the agreement by hand after the mediation—resulted from a meeting of the minds independent of obtaining the

spouses' signatures on the deeds. It is the brothers' position that paragraph twelve only sought to address the wives' inchoate dower interest in the property, which was inherited by their husbands.

The brothers point out that the inchoate right of dower[1] is not a vested interest. *See Bowman v. Bennett*, 250 N.W.2d 47, 51 (Iowa 1977). Accordingly, they assert the failure of Gary's wife to sign the conveyance did not void the contract, but created a lien, burden, or encumbrance upon the property in question. *See Peddicord v. Peddicord*, 47 N.W.2d 264, 268 (Iowa 1951) (explaining a wife holds a one-third interest in all real estate possessed by her husband during the marriage to which she has not relinquished her right, and that during her husband's life, this interest is inchoate and "is in the nature of a burden or encumbrance upon the real estate"); *see also Helms,* 290 N.W.2d at 883; *Dahl v. Zabriskie*, 88 N.W.2d 66, 66-68 (Iowa 1958).

The district court recognized the interest of Gary's wife and followed the *Peddicord* principle:

> It is the rule in this state that upon the refusal of the vendor's wife to release inchoate dower in land, the vendee may elect to enforce specific performance to the extent of the vendor's ability to perform, with allowance of an amount proportionate to the highest contingent interest of the wife, to be held by the vendee without interest and to be paid over by him only if and when the inchoate right is released by the wife or the marriage is terminated during the life of her husband by her death or by operation of law.

See Peddicord, 47 N.W.2d at 268. Applying this rule, the court ordered Vervaecke to prepare a trust instrument that would set aside one-third of the

[1] Dower, in its original common law sense, has been abolished in Iowa. *In re Estate of Dluhos Estate*, 70 N.W.2d 549, 553 (Iowa 1955). The continued use of the word in practice means "the right to the statutory distributive share which the surviving spouse receives." *Id*.

land, cash, and cell phone tower lease that Gary is to receive in return for his transfer of land to his brothers. This would be held in trust without income to Gary or his spouse until Gary's death, his spouse's death, or the dissolution of their marriage. We find the district court's method for enforcing the settlement agreement is consistent with long-standing precedent. *See Bradford v. Smith*, 98 N.W. 377, 379 (Iowa 1904) (rejecting argument that husband's failure to obtain court order allowing him to dispose of his wife's interest in property resulted in vitiation of sale contract).

Gary claims on appeal that *Peddicord* would only apply if "the contract antecedent negotiations do not indicate any conditions that were placed upon the conveyance." He goes on to argue: "In the instant case the evidence is strong that the spouse's agreement was a condition of the contract." We disagree. The record includes testimony from the estate's attorney, Gary's attorney, the three other brothers, and the judge mediating the settlement agreement—all refuting the idea that enforcement of the agreement was conditioned on the spouses signing the conveyance documents.

Vervaecke, the estate's attorney, testified that paragraph twelve was "incidental" to the primary purpose of the contract: "[I]t's only needed because there is real estate. I mean, if it was the division of two million dollars, obviously we don't need a spouse to sign off on that." He did admit that to obtain an effective deed to the property, the spouses would have to sign the conveyance.

Gary's attorney, Schroeder, testified she also considered the spouses' signature on the conveyances to be "incidental" to the agreement, and she

understood the settlement agreement to be a “final agreement” that was binding and enforceable. She testified the agreement was not contingent upon anything else. With regard to paragraph twelve, Schroeder testified she did not believe anyone involved in the negotiation looked at it as a condition precedent to the agreement: “We looked at it as simply a step that needed to be done for him to be able to obtain the land he picked, you know, the deeds had to be signed.”

Dean Foster testified he believed the agreement was complete when all four brothers signed it. Gary never stated that his signature was subject to getting his wife’s agreement. Dean recalled Judge McKinley jokingly said to him, “Now, don’t come back in two weeks and say that your wife won’t sign this.”

Lee Foster likewise testified he believed the agreement to be complete without the wives’ approval. He believed the wives’ signatures on the conveyance documents was just a formality. Donald Foster also testified to his belief the agreement was a “done deal” and binding after it was signed by the brothers.

Judge McKinley testified by deposition that he believed the agreement was final and binding. In the deposition, the judge recalled that Gary indicated he was hopeful his wife would agree with the settlement. The judge remembered that he and Schroeder discussed with Gary the relevant points as to why he entered into the agreement so he could relate them to his wife. Judge McKinley did not believe the agreement was contingent upon the signature of the spouses. In his mind, it was a full and complete agreement.

Even Gary's own testimony supported the finality of the family settlement agreement. He acknowledged that when he signed the settlement agreement "all the terms [had] been agreed upon." He also testified that everyone was under the impression that "it was a done deal."

Because the evidence supports the conclusion the parties did not intend the spouses' signatures on the conveyances as a condition precedent of the settlement agreement, we affirm.

B. Location of the Cell Tower Guy Wires.

Gary also contends the location of the cell tower guy wires on his property was a condition that had to be met before the agreement could be enforced. The district court rejected that contention: "The minor title defect regarding the cell phone tower anchor does not rise to the level of grounds for rescission of the agreement by Gary. It is a minor matter typically resolved prior to real estate closings."

The agreement described Gary's parcel as "subject to survey." Gary argues the phrase "subject to survey" indicates a condition, but no language in the agreement requires the cell tower be located entirely on Gary's parcel.

At trial, attorney Schroeder testified as follows:

> Q. . . . Part of the land that Gary was to receive needed to be surveyed? A. Yes, it was all subject to survey.
>
> Q. All subject to survey. Were you aware that there was, in fact, a survey done that divided the land as indicated on the drawing, but that doing that resulted in a line that had the tower on the land that was to go to Gary, but one of the guy wire anchors on the other side of the survey line? A. It was all subject to survey because the entire tower needed to be on Gary's side. That was our understanding, correct.

> Q. So it was subject to the parties agreeing exactly where that line was to go? A. To include the whole tower on Gary's portion, yes.

The district court summarized the issue as follows: "[Q]uestions were raised about the future enforceability and profitability of the cell phone tower lease based upon this title defect. It was suggested by counsel for Gary's brothers that the defect could be cured by a permanent easement or some other adjustment to the legal description." Because the defect could be cured, the court considered it a "minor matter" that did not vitiate the contract.

The fact the guy wire anchor extends into the brothers' property does not impede performance of the settlement agreement. Although paragraph two of the agreement says "subject to survey," the phrase applies to the location of the boundary, not the entire contract (i.e. the boundary arbitrarily drawn by Gary during the mediation was subject to the survey and could be adjusted in light of the results). The agreement is silent as to the location of the cell tower. Rescission of a contract is only proper if a party can show nonperformance of an actual condition precedent. *See Khabbaz v. Swartz*, 319 N.W.2d 279, 284 (Iowa 1982). In this case, there was no showing the contracting parties conditioned the settlement agreement on the location of the guy wire anchor.

While Gary's attorney testified it was their understanding the cell tower was to be located entirely on Gary's parcel, the tower itself is located on the parcel. The record does reveal the contracting parties believed it was necessary for all guy wire anchors to be on the parcel as well. Furthermore, any defect could be cured by moving the boundary line ten feet—which would provide Gary

a larger parcel of land—or by granting of an easement. The brothers testified they would cooperate in adjusting the survey or granting appropriate easements.

Because the agreement was not conditioned on the guy wires of the cell tower being located within Gary's parcel of land, we affirm the district court's order enforcing the agreement.

AFFIRMED.

Danilson, J., concurs; Potterfield, P.J., dissents.

POTTERFIELD, P.J. (dissenting)

I respectfully dissent and would reverse the district court's ruling enforcing the settlement agreement among the brothers. The issue, as I see it, is whether paragraph 12 of the settlement agreement is a term of the contract constituting a condition to its enforcement, or simply, as the majority writes, a statement of the obvious. The paragraph reads:

> The spouses of Gary, Lee, Dean and Don *shall execute* all subsequent conveyance documents required by law in order for marketable title to be conveyed to Gary, Lee, Dean, and Don. The spouses of Gary, Lee, Dean and Don relinquish all rights of dower, homestead, and distributive share in and to the real estate.

(Emphasis added.)

In construing this paragraph as a statement of the obvious, the majority relies on *Peddicord*, 47 N.W.2d at 265 and *Helms*, 290 N.W.2d at 878. These cases involve the correct *remedy* in situations where the contract does not require the wife to relinquish her dower rights and the wife refuses to do so.[2] The *Peddicord* court explicitly distinguishes that case from one, like Gary Foster's "where the unwillingness of the wife to relinquish her inchoate right of dower is relied upon as a defense to specific performance." 47 N.W.2d at 269.

Neither case answers the question clearly presented by Gary Foster: was paragraph twelve of the family settlement agreement either a condition precedent or condition subsequent, such that its failure defeats the contract? I believe it is.

When parties to a contract condition its effect on the approval of a third entity, not a party to the contract, such as approval by a bank, a court, or a

[2] In *Peddicord*, the court was not certain there even was or would be a refusal, and outlined the remedy in the hypothetical case. 47 N.W.2d at 268-69.

spouse, the refusal of the third party to so approve defeats the contract. *See Khabbaz*, 319 N.W.2d at 283 (finding two conditions precedent: that financing from third party be obtained by a date and also made under certain terms); *Bruggemeyer v. Bruggemeyer*, 258 N.W.2d 364, 366 (Iowa 1977) (finding nonperformance of a condition precedent—that the sale was subject to approval by the district court—vitiated the contract between the parties); *Snider v. Fisk*, 218 N.W.2d 652 (Iowa 1974) (finding specific performance of contract not available where contract was executed on the condition wife would agree to sale and wife did not agree.). Similarly, when a contract conditions its effect on an event to occur in the future, the failure of that event to occur defeats the contract. *Mosebach*, 282 N.W.2d at 759 (agreement stated the condition that the parties "will actively endeavor to consummate a sale" of the business).

A condition precedent is an event "occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available" *Id.* Whether a condition precedent exists in a contract is determined from "the intention of the parties gathered from the language of the entire instrument." *Id.*

Paragraph 12 unambiguously requires the wives, not parties to the contract, to relinquish their dower rights to the land. To the extent its meaning is ambiguous, we can look to extrinsic evidence to determine the parties' intent. *Fisk*, 218 N.W.2d at 654 ("The parol evidence rule does not prevent a party from showing that a signed document was not to be effective until a condition was

met"). A contract provision is ambiguous if it is reasonably susceptible to more than one interpretation. *Gildea v. Kapenis*, 402 N.W.2d 457, 459 (Iowa Ct. App. 1987). The extrinsic evidence admitted by the district court, without objection, were the statements of Judge McKinley and Gary Foster. Both of these statements confirm the parties' understanding that the wives' signatures were necessary to give the contract effect.

Because I find paragraph twelve of the family settlement agreement constituted a condition precedent, I would reverse the district court and find specific performance of the contract unavailable to the Foster brothers in this case.