

IN THE COURT OF APPEALS OF IOWA

No. 7-078 / 06-0619
Filed March 28, 2007

**ARTHUR O’HAVER and
MARY O’HAVER,**
Plaintiffs-Appellees,

vs.

**RONALD MOORE and
BETTY MOORE,**
Defendants-Appellants.

Appeal from the Iowa District Court for Linn County, Denver D. Dillard,
Judge.

The Moores appeal from the district court’s grant of the O’Havers’ partial
summary judgment motion and the subsequent finding that the O’Havers were
entitled to specific performance. **AFFIRMED.**

Michael Fay, Cedar Rapids, for appellant.

Kimberly Blankenship and Shannon Thompson of Bradley & Riley, P.C.,
Cedar Rapids, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

Ronald and Betty Moore appeal from the ruling of the district court granting Arthur and Mary O'Haver's motion for partial summary judgment seeking specific performance of a real estate installment contract. We affirm.

I. Background Facts and Proceedings.

On November 12, 1996, the Moores and the O'Havers entered into a contract ("O'Haver contract") for the sale of real estate. The Moores were acquiring 103 acres owned by Jacqueline Body ("Body property") on an installment contract ("Body contract"). In turn, the Moores agreed to sell the O'Havers thirty-two acres of the Body property for a purchase price of \$18,010. According to the terms of the O'Haver contract, the first \$18,000 was payable upon the execution of the contract and the remaining ten dollars was payable when the Moores fulfilled the underlying Body contract. The O'Haver contract also contained an option agreement.

The O'Havers paid the initial \$18,000 at the time the O'Haver contract was executed. On June 11, 2003, the Moores paid the Body contract in full and received a general warranty deed for the subject property. On July 9, 2004, the O'Havers paid ten dollars in satisfaction of the O'Haver contract. The Moores have not cashed the check for ten dollars, nor have they delivered a warranty deed for the property.

The O'Havers filed a petition seeking specific performance of the O'Haver contract and damages for breach of the contract on February 25, 2005. The petition also included a count for interference with an easement. On December 7, 2005, the O'Havers filed a motion for partial summary judgment seeking

judgment in their favor on both the specific performance and breach of contract claims. The O'Havers asserted that there was no genuine issue of material fact and that they were entitled to specific performance and breach of contract damages as a matter of law. In resistance to the motion, the Moores only stated that they had not given the O'Havers a deed because the property could not be "properly parcelled [sic] off" and that the county had advised the "[Moores] that they cannot record a deed to the property as requested by the [O'Havers]." This statement was not accompanied by an affidavit from the county recorder.

The trial court granted the motion for partial summary judgment as to the specific performance claim and denied the motion on the breach of contract claim. The trial court held that the allegation raised by the Moores in their resistance to the motion was "irrelevant to [the] Court's consideration." The trial court concluded the Moores had not raised a genuine issue of material fact and the O'Havers had established their entitlement to specific performance as a matter of law. The trial court denied the motion as to the breach of contract claim because it found the O'Havers had not set forth any specific statement of damages they had suffered as a result of the Moores' failure to perform.

On appeal, the Moores raise only one issue. They argue the trial court erred in granting the O'Havers' motion for partial summary judgment as to the specific performance claim.

II. Standard of Review.

The parties dispute the proper scope of review. The Moores argue specific performance is an equitable remedy and, therefore, our review is de novo. *Opat v. Ludeking*, 666 N.W.2d 597, 603 (Iowa 2003). The O'Havers argue

“[s]pecific performance is a matter of equity . . . resting within the court’s sound discretion,” and, consequently, we “review the court’s ruling for evidence of abuse of that standard.” *Lange v. Lange*, 520 N.W.2d 113, 117 (Iowa 1994). Neither case is directly on point. This case comes to us on a motion for partial summary judgment. When a case comes to us on a motion for summary judgment, even though the action was filed in equity, we review the motion for summary judgment for correction of errors. *Howard v. Schildberg Const. Co.*, 528 N.W.2d 550, 552 (Iowa 1995); *Farm & City Ins. Co. v. Anderson*, 509 N.W.2d 487, 489 (Iowa 1993).

III. Discussion.

When reviewing a motion for summary judgment, we view the facts in a light most favorable to the party opposing the summary judgment motion. *Gerst v. Marshall*, 549 N.W.2d 810, 812 (Iowa 1996). We must decide whether a genuine issue of material fact exists and whether the law was correctly applied. *Farm & City Ins. Co.*, 509 N.W.2d at 489.

In their resistance to the partial summary judgment motion, the Moores allege the county recorder informed them the property was not properly parceled off and, consequently, no deed could be recorded for the subject property. On appeal, they argue this allegation raised a genuine issue of material fact and the court erred in denying a trial on the issue. “In order to resist a motion for summary judgment, the resisting party must set forth specific evidentiary facts showing the existence of a genuine issue of material fact. The party may not rest on mere allegations” *Liska v. First Nat’l Bank in Sioux City*, 310 N.W.2d 531, 534 (Iowa Ct. App. 1981) (citations omitted). “A party opposing a motion for

summary judgment ‘must show that admissible evidence will be available at trial to establish a genuine issue of material fact.’” *Roberts v. Swift and Co.*, 198 F. Supp. 2d 1049, 1062 (8th Cir. 2002) (citation omitted). The Moores did not submit any evidence from the county recorder in support of their resistance to the motion. Without further evidence of the county recorder’s alleged statement, their allegation constitutes inadmissible hearsay. Iowa R. Evid. 5.801(c). We conclude the Moores failed to present a genuine issue of material fact.

The Moores do not attack the trial court’s determination that specific performance is an appropriate remedy in this case. “Failure in the brief to state, to argue or cite authority in support of an issue may be deemed waiver of that issue.” Iowa R. App. 6.14(1)(c). We consider the argument waived and need not address it further.

The trial court correctly determined that the Moores presented no genuine issue of material fact which warranted a trial and that specific performance was an appropriate remedy. For the foregoing reasons, we affirm the trial court’s decision to grant the O’Havers’ motion for partial summary judgment.

AFFIRMED.