

IN THE COURT OF APPEALS OF IOWA

No. 7-155 / 06-1546

Filed April 25, 2007

TROY M. BUDDE and THERESA A. BUDDE,
Plaintiffs-Appellees,

vs.

3 PUTT, L.L.C.,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson,
Judge.

Prospective seller appeals from a district court judgment entered in favor of prospective purchasers in an action arising from a failed real estate transaction. **AFFIRMED.**

Les V. Reddick and D. Flint Drake of Kane, Norby & Reddik, P.C.,
Dubuque, for appellant.

James A. O'Brien, Dubuque, for appellees.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

MILLER, J.

3 Putt, L.L.C. (3 Putt) appeals from a district court judgment entered in favor of Troy M. Budde and Theresa A. Budde, which granted the Buddes' claim arising from a failed real estate transaction for the return of an earnest money deposit and denied 3 Putt's counterclaim for breach of contract. We affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

On September 16, 2004, an auction was held to sell real estate and a business owned by 3 Putt known as Lombardi's Supper Club. William Luksetich and Joseph Healey formed 3 Putt for the purpose of owning and operating Lombardi's Supper Club. Luksetich and Healey retained Vance Luksetich, Ed Durnil, and Martin Rogers, who were affiliated with an organization called Tranzon, to conduct the auction and handle the sale of the real estate and business.

Before the auction began, Troy and Theresa Budde met with the Luksetiches, Healey, and Durnil to discuss purchasing the property. The Buddes told the owners and their representatives from Tranzon they could not take part in the auction because they "would not qualify as a cash buyer." The Buddes testified they were informed by 3 Putt that they could assume 3 Putt's first mortgage on the property with East Dubuque Savings Bank (EDSB) to assist in their ability to purchase the property. The parties thereafter negotiated an approximate purchase price. The transaction was not concluded at that point because 3 Putt wanted to attempt to sell the property for a higher price at the auction.

The Buddes did not participate in the auction. The auction generated a high bid of \$485,000. 3 Putt rejected the bid and resumed negotiations with the Buddes following the auction. The parties were located in separate rooms during the negotiations, which were conducted by Durnil on behalf of 3 Putt. He went “back and forth between [Healey] and Mr. Luksetich and Buddes . . . with numbers.” Once an acceptable purchase price of \$563,000 was agreed upon, the parties came together in the same room to finalize the transaction. The Buddes testified they were informed by Durnil before the agreement was finalized that the contract would be “null and void” if they were not able to assume 3 Putt’s first mortgage with EDSB.

Rogers, who was not present during the negotiations between the Buddes and 3 Putt, prepared an “Auction Purchase Contract” on behalf of 3 Putt pursuant to directions he received from Durnil. He modified a standard auction purchase agreement as follows:

Purchase: For the sum of Five Hundred Sixty Three Thousand Dollars (\$563,000.00 US) payable as follows \$25,000.00 US earnest money deposit to be made with personal funds payable to Monarch Title Company Escrow Account. The balance of the purchase price shall be paid in the following manner: Buyer shall tender to escrow agent the balance of the purchase price in the following manner: (i) Buyer to qualify for and assume first Mortgage of approximately \$410,000.00. . . .

The contract further provided:

In the event the Buyer fails to perform according to the terms of this contract, the earnest money deposit shall be forfeited as liquidated damages, not as a penalty, without delay or need for further agreement. . . .

. . . .

. . . As evidence of earnest money binding this contract, an earnest money deposit of \$25,0000.00 US is made with this

contract . . . Deposit to be held in accordance with the terms and conditions set forth in this agreement.

(Emphasis in original.)

The Buddes and 3 Putt reviewed and signed the contract on September 16, 2004. The Buddes gave Durnil the \$25,000 earnest money deposit later the same day. Theresa Budde testified that before she gave Durnil the check for \$25,000, she stated to him, "Now I get this back if this does not go through." She testified that he responded, "Yes, it would be null and void. You'll get your money back."

Soon after finalizing the contract, Troy Budde contacted Patrick Hutchins, a representative from EDSB, to inquire about the possibility of assuming 3 Putt's first mortgage on the property. Hutchins informed Budde the loan was not assumable without "written authorization of the bank and that I would need, you know, financial information before we could even consider it." Budde accordingly provided Hutchins with financial statements and tax returns. Hutchins notified the Buddes and 3 Putt a few days after the contract was finalized that the bank would not authorize the Buddes' assumption of the loan unless 3 Putt agreed to "stay on as a borrower." 3 Putt and the Buddes explored other options for completing the transaction but were unable to reach a satisfactory resolution. 3 Putt retained the \$25,000 earnest money deposit due to the failure of the real estate transaction.

The Buddes subsequently filed a petition at law requesting the return of their earnest money deposit. 3 Putt counterclaimed for breach of contract seeking damages in excess of the earnest money deposit. After a bench trial, the district court found the earnest money deposit should be returned to the

Buddes due to the nonoccurrence of a “financing contingency” in the contract. The district court further found the retention of the earnest money deposit “appears to function as a penalty.”

3 Putt appeals the district court ruling and raises the following issues:

- I. The district court erred in finding the earnest money should be returned to the Buddes where the express language of the contract between the parties provided otherwise.
- II. The district court incorrectly found that the retention of the earnest money by 3 Putt operated as a penalty and failed to award damages proven by substantial evidence.

II. SCOPE AND STANDARDS OF REVIEW.

We generally review the interpretation of a contract for correction of errors at law. Iowa R. App. P. 6.4; *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999). We are not bound by the interpretation made by the trial court. *Id.* However, if the interpretation was based upon extrinsic evidence, the findings of the trial court are binding on appeal if supported by substantial evidence. *Id.* Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995). When no relevant extrinsic evidence exists, the resolution of any ambiguity in a written contract is a matter of law for the court. *Hartig*, 602 N.W.2d at 797. The question whether an ambiguity exists is also one of law. *Id.*

III. MERITS.

Where, as here, the dispute centers on the meaning of certain contract terms, we engage in the process of contract interpretation. *Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001). The primary goal of contract interpretation is to determine the parties’ intentions at the time they executed the contract. *Id.* Interpretation involves a two-step process: 1) the court must determine what

meanings are reasonably possible from the words chosen, and 2) the court must choose among possible meanings. *Id.* (citing Restatement (Second) of Contracts § 202 (1981)).

The first step involves determining whether a term is ambiguous. “A term is ambiguous if, ‘after all pertinent rules of interpretation have been considered,’ ‘a genuine uncertainty exists concerning which of two reasonable interpretations is proper.’” *Id.* (quoting *Hartig Drug Co.*, 602 N.W.2d at 797). If the resolution of ambiguous language involves extrinsic evidence, a question of interpretation arises which is reserved for the trier of fact. *Id.* Rules of interpretation are used both to determine what meanings of disputed terms are reasonably possible as well as to choose among two reasonable meanings. *Id.* (citations omitted). “[T]he disputed language and the parties’ conduct must be interpreted ‘in the light of all the circumstances’ regardless of whether the language is ambiguous.” *Id.* (quoting *Fausel v. JRJ Enters., Inc.*, 603 N.W.2d 612, 618 (Iowa 1999)). Doubtful language in a written instrument will be construed against the party which selected it. *Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22, 27 (Iowa 1978).

The Buddes argue the district court was correct in finding the following language is ambiguous: “Buyer to qualify for and assume first Mortgage. . . .” The district court reasoned the clause could reasonably be interpreted both as a “financing contingency” and as an enforceable “contract term” due to the circumstances surrounding the formation of the contract. The district court resolved the ambiguity against 3 Putt as the drafter of the contract and found the

clause operated as a condition precedent, which when not met, relieved the Buddes of “further responsibility under the purchase contract.”

We have defined conditions precedent as

those facts and events, 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.

Khabbaz v. Swartz, 319 N.W.2d 279, 283 (Iowa 1982) (quoting *Mosebach v. Blythe*, 282 N.W.2d 755, 759 (Iowa Ct. App. 1979) (other citations omitted)). “A determination that a condition precedent exists does not depend on the particular form of the words used, but rather depends on the intention of the parties gathered from the language of the entire instrument.” *Id.* (quoting *Davis & Co. v. Cobban*, 39 Iowa 392, 393 (1874)). Where a condition precedent cannot be met to satisfy the terms of the contract, the contract will be void. *Id.*; *Gildea v. Kapenis*, 402 N.W.2d 457, 460 (Iowa Ct. App. 1987).

In *Khabbaz*, 319 N.W.2d at 283, the supreme court found that a “subject to financing” clause is a condition precedent. The clause in *Khabbaz* provided: “This Offer to Buy is subject to Buyer obtaining a conventional real estate mortgage loan . . . If said financing is not obtained . . . this Offer to Buy shall be cancelled and all sums paid hereunder shall be refunded to Buyers.” *Id.* at 281. In *Gildea*, 402 N.W.2d at 458, 462, we likewise determined a purchase offer that contained a clause stating the contract was “subject to buyer obtaining suitable financing interest rate . . .” was a condition precedent. We reasoned that “the actions of the parties and the circumstances surrounding the present agreement indicate that the sale of the . . . property was conditioned upon [the buyer] obtaining financing terms. . . .” *Id.* at 462. See also *ARDI Exchange v. Valley*

Natl Bank, 493 N.W.2d 862, 864-65 (Iowa 1992) (determining a provision requiring qualification as an approved reinsurer and “assumption of the contract” functioned as a condition precedent in view of the circumstances surrounding the formation of the contract). *But see Gerard v. Peterson*, 448 N.W.2d 699, 701 (Iowa Ct. App. 1989) (rejecting argument that a real estate contract was subject to an oral condition precedent where the contract did not contain any language conditioning the buyers’ performance on their ability to obtain financing).

We find substantial evidence exists in the record to support the district court’s ruling that the clause at issue in this matter is ambiguous. In determining ambiguity, the document must be read in light of the surrounding circumstances and will be given such a practical meaning as the parties themselves have placed upon it. *Gildea*, 402 N.W.2d at 459 (citations omitted). Rogers, the drafter of the contract, testified that in his experience, the clause “would be a financing contingency. . . .” Like the parties in *Khabbaz* and *Gildea*, the Buddes and 3 Putt were aware that the Buddes’ performance of the contract depended upon their ability to secure the agreed upon financing. William Luksetich testified that the “idea of Buddes assuming 3 Putt’s loan” developed because “[o]bviously they didn’t have the cash and we just wanted to have it done. . . .” He understood the bank needed to authorize the Buddes’ assumption of the loan because “they’re not just going to let anybody in the world assume a loan.” The Buddes testified they were assured both before and after signing the contract by 3 Putt’s agent that the contract would be “null and void” and their earnest money would be returned if they were unable to assume the mortgage.

Although the clause at issue in this matter does not contain the same “subject to financing” language as the clauses in *Khabbaz* and *Gildea*, the actions of the parties and the circumstances surrounding the formation of the contract indicate the sale of the property was conditioned upon the Buddes being able to qualify for and assume 3 Putt’s first mortgage. We therefore conclude substantial evidence supports the district court’s ruling that the clause operated as a condition precedent, which voided the contract when the condition was not met.¹ *Khabbaz*, 319 N.W.2d at 284; *Gildea*, 402 N.W.2d at 460.

IV. CONCLUSION.

We find substantial evidence exists in the record to support the district court’s ruling that the clause at issue in this matter is ambiguous in light of the circumstances surrounding the formation of the contract and the actions of the parties. We therefore conclude the district court was correct in ruling that the clause operated as a condition precedent that voided the contract when the condition was not met. We accordingly affirm the judgment of the district court.

AFFIRMED.

¹ We do not need to address 3 Putt’s claim that the district court erred in finding the retention of the earnest money by 3 Putt operated as a penalty and in failing to award damages for breach of contract because of our conclusion that substantial evidence supports the district court’s ruling that the contract was void due to the nonoccurrence of a condition precedent.