

**IN THE COURT OF APPEALS OF IOWA**

No. 7-273 / 06-1180

Filed July 12, 2007

**EDWIN KOEHN,**  
Plaintiff-Appellee,

**vs.**

**DAVID CLARY and PAMELA C. CLARY,**  
Defendants-Appellants.

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**DAVID CLARY and PAMELA C. CLARY,**  
Counterclaim Plaintiffs-Appellants,

**vs.**

**EDWIN KOEHN,**  
Counterclaim Defendant-Appellee.

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Appeal from the Iowa District Court for Linn County, David L. Baker,  
Judge.

The Clarys appeal from the district court's order for specific performance  
of an oral contract in favor of Edwin Koehn. **AFFIRMED.**

Larry Thorson of Ackley, Kopecky & Kingery, L.L.P., Cedar Rapids, for  
appellants.

Melody Butz of Butz Law Office, Cedar Rapids, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ. Baker, J., takes no  
part.

**VOGEL, J.**

David and Pamela Clary appeal the district court's order finding an oral contract between them and Edwin Koehn for the sale of a certain portion of real estate from the Clarys to Koehn. We conclude, as did the district court, that the record supports the material terms of an agreement of the parties with partial performance by Koehn. We therefore affirm the order directing specific performance of the agreement.

Koehn and the Clarys are adjoining property owners. A prior case between these two parties to quiet title was litigated with regard to the boundary lines of each party's property, an access road, and a building of Koehn's that straddles the property line. On April 23, 2004, the district court quieted title in the Clarys but granted a permanent easement for Koehn's existing building that encroached on the Clary's property. The court also ordered the following:

All costs for surveying this easement shall be costs of the defendant herein, Edwin Koehn. The survey must be completed within ninety (90) days of the date of this order. The Clarys shall be compensated for this permanent easement in the amount of \$2000.00, which amount shall also be payable within sixty (60) days. Failing to obtain either the survey or pay the \$2000.00 shall nullify this grant of easement, and the [Clarys] may apply at said time for a court order to remove the structure from their property.

In mid-May 2004, Koehn and David Clary, in an apparent effort to avoid the court's order of a permanent easement, engaged in discussions for the sale of a triangular-shaped parcel upon which Koehn's existing building was situated, along with some surrounding land. The discussions entailed two different options for the sale: a triangular parcel with a short-side length of ninety feet for \$10,000 or a triangular parcel with a short-side length of ninety-five feet for \$25,000.

Koehn and David Clary eventually walked off and staked out the parcel agreed upon for sale, which at trial both parties admitted was intended to be the ninety-foot option for \$10,000. Koehn testified that he immediately contacted and hired the firm Hall & Hall to survey the parcel of land. The surveyed plat was recorded on June 22, 2004, and depicts a triangular-shaped parcel with a short-side length of ninety-five feet. Both parties testified at trial that this survey was erroneous per the terms of their agreed upon sale of \$10,000 for the ninety-foot short-side measurement. As for the payment, Koehn wrote two checks to his attorney's trust account to be held in escrow until the transaction was finalized. One check was dated May 19, 2004, for \$7500 and another dated June 12, 2004, for \$3500, which included \$1000 for related expenses. Once David Clary became aware of the recorded erroneous survey, the sale was in jeopardy. On September 23, 2004, in an attempt to bide time for the sale to be completed, Koehn's attorney executed a check from his trust account for \$2000 payable to the Clarys and their attorney, with "Satisfaction of Judgment EQCV045137" (the quiet title action) written on the memo line. This was done without Koehn's knowledge or consent.

On October 15, 2004, the Clarys filed a motion to enforce the judgment in the quiet title action. The motion admits that the Clarys and Koehn "had agreed to a sale of an additional ninety feet in a triangular-shaped piece of property to [Koehn] after the decree and judgment [in the quiet title action]," but that Koehn unilaterally altered the agreement with the erroneous survey of a ninety-five foot measurement. It appears from the record that this motion was not pursued further. Another survey was completed in December 2004 to establish the easement as ordered in the quiet title action. In January 2005, the Clarys cashed

the \$2000 check and continued through the spring of 2005 to request that Koehn remove some items of personal property from their land. Clary began constructing a fence that crossed over the triangular parcel of land, prompting Koehn to file a petition in June 2005 to enforce the oral contract and for a temporary and a permanent injunction. Koehn obtained a temporary, ex parte injunction, which was dissolved in August 2005 after a ruling by the district court that his claims were unlikely to succeed. Trial on the existence and enforcement of the oral contract was held in June 2006. The district court found that the parties did in fact have an oral agreement for the sale of the ninety-foot triangular parcel for \$10,000, provable due to the partial performance by Koehn placing purchase money in escrow and surveying the parcel. The Clarys appeal.

We review this equitable action for specific performance de novo. *In re Estate v. Passehl*, 712 N.W.2d 408, 414 (Iowa 2006). Contracts for sale of land ordinarily fall within the bounds of the statute of frauds. Iowa Code § 622.32 (2003); *Recker v. Gustafson*, 279 N.W.2d 744, 748-749 (Iowa 1979). This rule of evidence limits the manner of proving a contract within its provision. *In re Lindsey's Estate*, 254 Iowa 699, 710-11, 118 N.W.2d 598, 605 (1962). The impact of the statute of frauds, therefore, is not to void the contract but to render incompetent oral proof of its existence. *Davis v. Roberts*, 563 N.W.2d 16, 20 (Iowa Ct. App. 1997). The statute of frauds is subject to an exception where there has been payment of some or all of the purchase money. Iowa Code § 622.33; *Recker*, 279 N.W.2d at 749. The words "purchase money" mean consideration received in whatever form it may exist. *Williams v. Chapman*, 242 Iowa 294, 311, 46 N.W.2d 56, 65 (1951). This exception to the statute of frauds

is commonly referred to as part performance. Any conduct, acts, or circumstances offered to show part performance must refer exclusively and unequivocally to the contract. *Lindsey's Estate*, 254 Iowa at 711, 118 N.W.2d at 605. Proof of the acts, conduct, or circumstances constituting consideration for the claimed oral contract must be clear, satisfactory, and convincing. *Davis*, 563 N.W.2d at 20.

We conclude, as did the district court, that because Koehn took the affirmative steps to place the purchase money in escrow and have the parcel surveyed and platted (though erroneous), the evidence of the oral contract was admissible. The parties both testified that they had an agreement for the sale of the triangular parcel with a ninety-foot short-side length for \$10,000 prior to the recording of the erroneous survey, which measured the short-side length as ninety-five feet. Their later disagreement was whether a specific time frame for completing the sale was part of the original agreement. Clary testified it was to be completed within the sixty/ninety-day time frame set out in the quiet title ruling, as noted above. However, Clary testified that as of August 20, 2004, well beyond the time frame, he still intended to go through with the sale. It is clear that both parties decided to come to their own agreement for sale of a parcel of land rather than live with the ruling from the quiet title action for an easement. We agree with the district court that, through the parties' own admissions and the record presented at trial, there was an oral contract for the sale of this parcel with the material terms having been agreed upon by both parties. See *Seastrom v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 346 (Iowa 1999) (stating the terms of an oral contract must be sufficiently definite for a court to determine with

certainty the duty of each party and the conditions relative to performance). We affirm the district court's ruling ordering enforcement of the sale from the Clarys to Koehn for \$10,000, \$2000 of which has already been paid. The district court decree also ordered Koehn to "take all actions necessary to correct the erroneous plat." We affirm that directive, as well, so that the legal description of the real estate parcel to be sold is corrected in part to read "thence S18°52'20"W along said westerly right of way, 90.00 feet; thence [corrected degree and distance] to the point of beginning. Said parcel contains [corrected amount] acre, subject to easements and restrictions of record."

Other issues raised on appeal, are either without merit or not preserved for our review.

**AFFIRMED.**