

IN THE COURT OF APPEALS OF IOWA

No. 9-033 / 08-1259
Filed March 11, 2009

SETH ZIMMERMANN,
Plaintiff-Appellant,

vs.

JULESTER HASTE,
Defendant-Appellee.

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs,
Judge.

Plaintiff appeals from the district court's ruling denying him specific
performance of a real estate purchase agreement. **AFFIRMED.**

Patrick M. Roby and Robert M. Hogg of Elderkin & Pirnie, P.L.C., Cedar
Rapids, for appellant.

Thomas D. Hobart and Andrew J. Hosmanek of Meardon, Sueppel &
Downer, P.L.C., Iowa City, for appellee.

Considered by Mahan, P.J., and Miller and Doyle, JJ.

DOYLE, J.

Seth Zimmermann appeals from the district court's ruling denying him specific performance of a real estate purchase agreement. Zimmerman contends the district court erred by finding that the financing contingency in the purchase agreement required him to provide the seller with written notification of a financing commitment on or before June 7, 2005, and the district court erred in denying him specific performance of the purchase agreement. Upon our de novo review, we affirm.

I. Background Facts and Proceedings.

In late 2004, Julester Haste decided to sell her 126-acre property located near Oxford. Haste met with Prudential Partners Real Estate realtors Amy Owen and Gerald Ambrose and agreed to list the property for approximately \$4000 per acre, for a total of \$505,000. In addition to helping her sell her property, Haste wanted Ambrose and Owen to help her locate another smaller rural property where she could live and pasture a few cattle and horses.

At about this time, Seth Zimmermann was looking for an acreage where he could spread out and do some small scale organic agriculture and build some eco-friendly housing. Zimmermann was represented by Jerry Howe, a real estate agent from Iowa Realty.

Zimmermann first became aware of Haste's property when Howe presented him with a flyer describing the property. After walking the property a couple of times, Zimmermann, on April 13, 2005, submitted an initial offer to buy the property for \$350,000. Over the next month, offers and counteroffers were made. On May 6, 2005, Zimmerman made a "full-price offer" agreeing to pay

\$505,000 for the property. The purchase agreement¹ provided to Haste contained the following language:

NEW MORTGAGE.

The agreement is contingent upon the BUYERS obtaining a written commitment for a first real estate mortgage for 80% of the purchase price with interest on the promissory note secured thereby of not more than 6% amortized over a term of not less than 30 years, with a balloon due date of not less than 30 years. BUYERS agree to pay not more than 0% for loan origination fees and points, and to pay in addition all other customary loan costs. BUYERS agree upon acceptance of this offer to immediately make application for such mortgage with a commercial mortgage lender and to exercise good faith efforts to obtain a mortgage commitment as above provided. *Upon receiving written loan commitment, (supported by the lender's required appraisal), BUYERS shall release this contingency in writing. If BUYERS have not obtained a written mortgage loan commitment containing the above terms, or terms acceptable to BUYERS on or before the 7th day of June, 2005, either SELLERS or BUYERS may declare this agreement void and all payments made hereunder shall be returned. BUYERS shall pay the balance of the purchase price at the time of the closing by combination of BUYERS' personal funds and net proceeds.*

(Emphasis added.)

On May 11, 2005, Haste made Zimmerman a counteroffer accepting the price offered, but proposed a possession date of September 1, 2005, and some other minor changes. On May 13, 2005, Zimmerman accepted Haste's counteroffer.

After signing the purchase agreement, Zimmermann began searching for financing. On June 3, 2005, the Hills Bank and Trust Company issued a loan commitment informing Zimmermann that his application for an adjustable rate

¹ The parties utilized a standard form entitled "Residential Lots/Vacant Land Purchase Agreement" that was approved by the Iowa City Area Association of Realtors. The form was based on state bar forms and developed by the association's attorney and forms committee.

mortgage was approved for a loan of \$182,400 to purchase the subject property.² The approval was subject to certain conditions, including a first mortgage not exceeding sixty percent of the purchase price of the land. However, at this time, Zimmermann did not sign the financing loan commitment because he still wanted to have the abstract reviewed to locate easements and rights of ways to determine the siting criteria for the location of the residences and orchard he planned. From June 3, 2005, to the deadline on June 7, 2005, despite having a loan commitment, Zimmermann did not sign a financing contingency release, nor did he request an extension or waiver.

On June 9, 2005, two days after the financing contingency deadline, Zimmerman executed a contingency release that released the financing contingency and the property investigations contingency contained in a separate paragraph of the purchase agreement. However, the contingency release added a new contingency: "Subject to review of abstract for any unknown easements or rights of ways that may affected (sic) Buyers plans for property."

By June 7, 2005, Haste's search for another farm had been unsuccessful, and she had become very distressed about not having a new place where she could move her horses and cattle. Therefore, when she did not receive the contingency release for the financing commitment, she decided to exercise her election to declare the purchase agreement null and void. On June 15, 2005, Haste's attorney wrote a letter to realtors Howe, Ambrose, and Owen declaring the purchase agreement null and void on the basis that the "purchase agreement

² Zimmermann testified that he intended to purchase the property with funds from the Hills Bank loan, \$184,000 cash from a silent partner, and the balance from inherited 401k funds. Haste knew nothing about the silent partner or the inheritance.

contained a contingency for financing to be released in writing on or before June 7, 2005.” Additionally, the letter stated Haste had not been provided with a well water test, a well report, and certain property investigations that were to be obtained within fifteen days from acceptance of the offer. Haste testified that she did not receive Zimmermann’s signed contingency release until June 16, 2005.

On August 26, 2005, Zimmermann filed a petition against Haste, seeking specific performance of the purchase agreement and monetary damages. In ruling upon Zimmerman’s subsequent motion for summary judgment, the district court found the financing contingency of the purchase agreement ambiguous because it was open to two meanings: whether the written release was merely needed to be provided to Haste within a reasonable time after Zimmerman obtained the written loan commitment or whether the written loan commitment and the written release needed to be provided to Haste by June 7, 2005. Because resolution of the ambiguity required extrinsic evidence, the court denied Zimmerman’s motion.

The matter was tried to the district court, and on July 3, 2008, the court entered its ruling. The court again found there was an ambiguity in the terms of the purchase agreement’s financing contingency paragraph and then examined the evidence presented to determine the reasonable meaning of the terms. The court concluded the interpretation requiring the written confirmation of the financing commitment on or before the date set out in the contract was the more reasonable interpretation,

[g]iven the purpose of the document concerning real property, the terms in the contract including provisions that time is of the essence, that notices in the contract be in writing, that the common

practice in the real estate trade in this area was to provide the written financing commitment within the time period set out in the document, and all the other facts in this case

Because Zimmermann failed to provide written notice by June 7, 2005, the court concluded he breached the contract and Haste had the right to declare the contract null and void. The court therefore denied Zimmermann's petition for specific performance and for monetary damages.

Zimmermann appeals.

II. Standard of Review.

As an action in equity for specific performance of a contract, our standard of review is de novo. *City of Ottumwa v. Poole*, 687 N.W.2d 266, 268-69 (Iowa 2004). Upon de novo review, this court gives weight to the district court's factual findings, especially when assessing the credibility of witnesses, but it is not bound by those findings. Iowa R. App. P. 6.14(6)(g).

III. Discussion.

Specific performance of a contract is not a remedy that is available as a matter of right; rather, its availability rests in the sound discretion of the court. *Youngblut v. Wilson*, 294 N.W.2d 813, 817 (Iowa 1980). It is to be granted only in extraordinary cases, in which irreparable harm will result. *Breitbach v. Christenson*, 541 N.W.2d 840, 843 (Iowa 1995). We have reviewed the evidence and the thorough and well-reasoned decision of the district court. We approve of the reasons and the conclusions in the ruling, and for all the reasons stated therein, we affirm. See Iowa Court Rule 21.29(1)(d).

AFFIRMED.