

IN THE COURT OF APPEALS OF IOWA

No. 9-556 / 08-2054
Filed September 17, 2009

**FREDERICK LOUIS ZEMKE and
CHERYL ZEMKE, husband and wife,**
Plaintiffs-Appellees,

vs.

ANNA ZEMKE,
Defendant-Appellant.

Appeal from the Iowa District Court for Buena Vista County, John P. Duffy,
Judge.

Appellant appeals from the district court's ordering specific performance of
a contract to purchase. **AFFIRMED.**

Andrew Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines,
for appellant.

David P. Jennett of David P. Jennett, P.C., Storm Lake, for appellees.

Considered by Vogel, P.J., and Vaitheswaran and Potterfield, JJ.

VOGEL, P.J.

Anna Zemke appeals from the district court's order directing her to specifically perform under a contract to purchase, by conveying certain real estate to her brother, Fred Zemke. She asserts that Fred did not timely exercise the option to purchase and therefore she was not required to complete the transaction.

I. Background Facts and Proceedings

In July 2002, Anna purchased approximately 150 acres of land from Fred and his wife, Cheryl, subject to Fred's exercise of an option to repurchase the land until July 1, 2007. As part of the option agreement, Fred was required to deliver a written notice, by certified mail, of his election to exercise the option. He was also required to pay 10% of the purchase price of \$180,000 upon exercise of the option. In August 2006, Fred chose to exercise the option to repurchase this land. Anna initially complied by signing and depositing a warranty deed with her attorney and negotiating terms for a closing statement. The closing was set for March 9, 2007, but it did not occur. The parties offered conflicting testimony as to the reason why the closing was abruptly terminated. Fred claims that his sister wanted "differences not included in the contract" and he was told that "she would not close and complete the sale." According to Anna's testimony, the conditions for the sale were not met, and "if the terms of the agreement and the option to repurchase would have been met, the closing would have taken place." Fred then brought this action, seeking specific performance of the purchase agreement. The parties and their respective attorneys met on June 27, 2007, in order to discuss the situation. During the

meeting, Anna stated that she would not honor Fred's election of the option to purchase because she was not given proper notice nor 10% down payment. Although he was ready and willing to tender the full purchase price, Fred agreed to meet Anna the next day, June 28, in Des Moines to tender the 10%. He then proceeded to drive to Des Moines on June 28 and waited for Anna at her house, from 5:00 p.m. to 8:30 p.m. As Anna was not home, Fred returned to his home in Storm Lake. The next day, Fred again attempted to hand deliver the election to exercise the option along with the 10% down payment, this time to Anna's workplace. Anna was not available, nor did her fellow coworkers know where she was. Fred then stopped at Anna's attorney's office to deliver the documents, but was told to leave the office. Anna testified that she and Fred spoke on the phone but claims she never agreed to meet with him on the 28th, or was even aware he came to Des Moines.

On June 29, 2007, Fred's attorney sent to Anna a notice of intent to exercise the option, as well as the 10% down payment via certified mail. Anna signed the return receipt on July 3, 2007. At trial, the district court concluded that Fred properly exercised the option before the July 1, 2007 deadline and was entitled to specific performance of the purchase agreement. Anna appeals.

II. Scope 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). In a *de novo* review, we make our own fact findings, but we give weight to the trial court's findings with respect to the credibility of witnesses. *In re Estate of Rutter*, 633 N.W.2d 740, 746 (Iowa 2001).

III. Exercise of Option

The July 2002 “Option Agreement and Purchase Contract” was divided into three sections: Article I “Grant of Option,” Article II “Purchase Contract,” and Article III “General Provisions.” Article I, subsection (3) entitled “Exercise of Option,” provided “[Fred] may exercise the option at any time during the option period by delivering a written notice, by certified mail, stating that [Fred] has elected to exercise the option.” Article I, subsection (2) “Option Period” provided, “[t]he option period shall be effective from the date of this agreement and shall terminate at five o’clock p.m. on July 1, 2007.” Article II, subsection (2) provided the purchase price of \$180,000 plus interest running from July 1, 2002, until closing: 10% “when the option is exercised”; and the balance due at closing.

The district court found “there is only one disputed issue in this case . . . whether Fred was required to tender 10% of the purchase price in order to exercise the option.” Anna argues the district court came to an incorrect conclusion by determining that Fred exercised the option before July 1, 2007, as she contends the exercise was incomplete without Fred’s tendering 10% of the total purchase price. “The only rule regarding the manner of exercise of an option is to discover from the language of the instrument the intent of the parties with reference thereto.” *In re Estate of Claussen*, 482 N.W.2d 381, 384 (Iowa 1992) (citing *Steele v. Northup*, 143 N.W.2d 302, 305 (1966)).

The general rule is that the time prescribed for exercise of an option is of the essence, and if the option is not exercised within the time limited, all rights of the optionee stand forfeited without notice. On the other hand, if the optionee is prevented from performing by obstructive and delaying tactics on the part of the optionor . . . then the delay is excused.

Steele, 143 N.W.2d at 305.

The district court found that, “[o]ther than the date of [the March 2007] closing, Anna indicated a definite intention to honor Fred’s election to exercise his option to purchase the land.” She demonstrated this knowledge by signing the warranty deed and preparing for the March 9, 2007 closing. It was conceded at trial that Anna had timely notice of Fred’s intention to exercise the option to purchase. Moreover, even after filing this lawsuit, Fred continued to attempt to hand deliver formal notice of his election of the option, as well as a bank draft with the 10% down payment. Additionally, Fred’s attorney made one final attempt to serve Anna with Fred’s exercise of the option to purchase, by mailing notice and the 10% down payment to Anna via certified mail on June 29, 2007.

The district court found that Fred made reasonable attempts to serve notice on Anna, both personally and via certified mail. It further found it was Anna who cancelled the scheduled March 9, 2007 closing, and that Fred was fully prepared at that time to complete the purchase by tendering to Anna the full purchase price. While Anna continues to assert that Fred never fully exercised his option to purchase, the court found that Fred “tendered the full purchase price for the property, and . . . payment or tender of 10% of the purchase price would be nothing but a mere technicality, without meaning.” We agree with the district court that it was Anna’s obstructive tactics both in failing to close the transaction in March 2007 and in avoiding service in late June 2007 that impeded Fred’s efforts to complete the purchase agreement. As such, we affirm the district court.

AFFIRMED.