

STATE OF MICHIGAN
COURT OF APPEALS

LYNN URSULA JANES,

Plaintiff-Appellant,

and

SMITH & COMPANY,

Intervening Plaintiff,

v

FRANCES SUZANNE CUTLER,

Defendant-Appellee.

UNPUBLISHED

February 5, 2002

No. 230331

Chippewa Circuit Court

LC No. 99-004344-CZ

Before: Griffin, P.J., and Markey and Meter, JJ.

PER CURIAM.

Following a bench trial, plaintiff appeals by right from the trial court's judgment entered partially in her favor, awarding \$2,982 in damages but denying specific performance and attorney fees.¹ We affirm in part, reverse in part, and remand for further proceedings.

On June 26, 1999, plaintiff entered into a contract with defendant for the purchase of defendant's home. Sometime before the date set for closing, defendant decided not to complete the sale. Plaintiff filed suit, seeking specific performance and damages. The trial court determined that a valid contract existed between plaintiff and defendant and that plaintiff had complied with the terms of the contract. Thus, the trial court found that plaintiff was entitled to judgment and awarded damages, but denied specific performance finding that damages were adequate. The trial court also denied plaintiff attorney fees, finding that they were not warranted.

Plaintiff first argues that the trial court erred when it denied specific performance on the ground that damages were adequate. Plaintiff contends that the trial court failed to recognize that

¹ The judgment in favor of intervening plaintiff Smith & Company was satisfied; Smith & Company is not a party to this appeal.

realty is unique; thus, there is no adequate remedy at law. This Court reviews equity actions de novo. *Vergote v Kmart Corp (After Remand)*, 158 Mich App 96, 103; 404 NW2d 711 (1987).

The power to grant specific performance is within the sound discretion of the trial court. *Zurcher v Herveat*, 238 Mich App 267, 300; 605 NW2d 329 (1999), quoting *Foshee v Krum*, 332 Mich 636, 643; 52 NW2d 358 (1952). Specific performance of a contract for the purchase of real estate should not be arbitrarily refused. *Id.* Indeed, in the exercise of sound legal discretion, a trial court should order specific performance for the sale of real property unless to do so would be inequitable. *Id.* Although specific performance is not a matter of right, “the court is not justified in withholding a decree from the one clearly entitled thereto, merely because of the exigencies of the case.” *Tiley v Chapman*, 320 Mich 173, 175; 30 NW2d 824 (1948); see, also, *Zurcher, supra*. Specific performance is not precluded because the remedy at law is adequate. *Wilhelm v Denton*, 82 Mich App 453, 454; 266 NW2d 845 (1978).

Plaintiff testified that for several years, she tried to find a house to call home and once she found this particular home, she felt very comfortable with it. Plaintiff found defendant’s house uniquely suited to her needs and tastes. Defendant testified that she decided not to go through with the sale of her home primarily because she had changed her retirement plans. After she contracted to sell her home, she determined that she would not be able to retire as she had originally planned. Instead, she would have to remain at her job longer than anticipated, so she no longer wanted to move from her home.

In reaching its decision, the trial court specifically stated that it would not order specific performance because “we are capable of awarding damages” and because “[d]amages are suitable here.” The court further indicated that defendant “can’t move because of her retirement and the Court would not remove her from the house under the circumstances where the damages are only \$2,900.” Clearly, the trial court erred by using an incorrect standard in determining whether to grant plaintiff specific performance. Whether money damages are available is irrelevant to the determination to grant specific performance. The trial court may have sympathized with defendant’s predicament, and although we agree it is unfortunate that defendant miscalculated her retirement situation, plaintiff is not to blame. Because plaintiff is a ready, willing, and able buyer, who has complied with the terms of the contract, she is entitled to specific performance upon payment of the purchase price and so long as it would not be inequitable to so order. Thus, by virtue of the fact that the trial court erred in respect to the law regarding the determination to grant specific performance, it abused its discretion in denying it. Consequently, we reverse the trial court’s decision and remand on this issue for a determination of whether plaintiff is entitled to specific performance based on the proper considerations.

In summary, upon remand, the trial court must consider that (1) specific performance is not precluded simply because the remedy at law is adequate, and (2) it is defendant who has the burden of proving that specific performance would be inequitable under the applicable case law. See, e.g., *Tiley, supra*, *Zurcher, supra* and *Wilhelm, supra* at 454-455. The trial court, in its discretion, may either hold a hearing or simply make new findings on this issue.

In regard to the damages awarded by the trial court, this Court finds plaintiff is entitled to the full amount awarded. Even when granting specific performance, the trial court may award additional relief necessary to sort out the equities of the parties and should try to put the parties as nearly as possible in the position they would have been in had the conveyance of the property

occurred as agreed. *Giannetti v Cornillie (On Remand)*, 209 Mich App 96, 98; 530 NW2d 121 (1995). Here, the damages the trial court awarded are necessary to restore the parties as near as possible to the position they would have been in had defendant conveyed the property on time.

Plaintiff also argues that the trial court erred in refusing to grant attorney fees. Plaintiff raises two grounds to justify an award of attorney fees: first, defendant lacked a meritorious defense for specific performance; and second, the language of the contract itself shows that attorney fees were contemplated. The decision whether to award attorney fees is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997).

Generally, attorney fees are not recoverable as costs or damages unless expressly allowed by statute, court rule, or a recognized exception. *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999); *Phinney, supra*. Exceptions to the general rule are narrowly construed. *Brooks v Rose*, 191 Mich App 565, 575; 478 NW2d 731 (1991). One recognized exception to the rule against awarding attorney fees as damages includes recovery of fees as the result of another's fraudulent or unlawful conduct. *Id.* Further, provisions set forth in a contract for the payment of reasonable attorney fees as damages, including fees on appeal, are enforceable. *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 548-549; 362 NW2d 823 (1984).

The trial court found no basis for an award of attorney fees. We agree. There is no statute, court rule, or exception that expressly allows an award of attorney fees in this case. Although the contract between plaintiff and defendant does contain a default provision, the trial court correctly found that the written agreement did not expressly provide for attorney fees. This finding was not an abuse of discretion.

We affirm in part, reverse in part, and remand. No costs, neither party having prevailed in full. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Patrick M. Meter