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UNPUBLISHED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.

GRIFFIN, P.J. (*concurring in part and dissenting in part*).

Following a nonjury trial, the trial court found plaintiff was entitled to a judgment for breach of contract and awarded damages. However, the trial judge exercised his discretion in deciding not to order specific performance. He also denied plaintiff's claim for attorney fees, finding they were not authorized by statute, court rule, or judicial exception. Plaintiff now appeals.

Plaintiff first argues that the trial judge abused his discretion in refusing to order the "extraordinary remedy" specific performance. See, generally, *Barbers Local 552 v Sealy*, 368 Mich 585, 588; 118 NW2d 837 (1962). I disagree and respectfully dissent. While under appropriate circumstances specific performance may be ordered to compel the sale of a residence, the equitable remedy is "a remedy of grace and not a matter of right." *Holy Cross Baptist Church v D V Construction Co*, 368 Mich 80, 83; 117 NW2d 159 (1962). See also *Bartos v Czerwinski*, 323 Mich 87, 93; 34 NW2d 566 (1948). Further, as stated by our Supreme Court in *Solomon v Shewitz*, 185 Mich 620, 631; 152 NW 196 (1915), depending on the circumstances of each case, the extraordinary remedy is "frequently refused":

> In *Walker v Kelly*, 91 Mich 212 (51 NW 934), specific performance, subject to the dower rights, was given, where the wife was not a party to the contract; the decree providing for compensation to complainant for present value of such contingent right of dower. However, it has frequently been held that the

> jurisdiction of a court of equity to decree the specific performance of contracts is not a matter of right in the parties to be demanded *ex debito justitiae,* but *applications invoking this power of the court are addressed to its sound and reasonable discretion, and are granted or rejected according to the circumstances of each case*. Specific performance is frequently refused, although the defense is not such as would warrant the rescission of the contract at the suit of the defendant. 36 Cyc, p 548, and note; *Rust v Conrad,* 47 Mich 449-454 (11 NW 265, 41 Am Rep 720), and cases cited; *Chicago, etc., R Co v Lane,* 150 Mich 162 (113 NW 22). (Emphasis added.)

See also *Derosia v Austin,* 115 Mich App 647, 652; 321 NW2d 760 (1982) ("The granting of specific performance lies within the discretion of the court and whether or not it should be granted depends upon the particular circumstances of each case.").

In the present case, the Honorable Nicholas J. Lambros acknowledged his discretion to order specific performance but decided to award damages instead. Judge Lambros reasoned:

> In regard to Miss Janes, I know she is requesting specific performance, but in this case the Court is not inclined to grant specific performance. The reason is as follows.
>
> First of all, the fact is that we are capable of awarding damages. There is no difficulty with regard to the damage amount that has been requested, and it is collectible. I think for this amount Cutler certainly is collectible and certainly there should be no problem with damages, and, therefore, the Court will award damages in the amount of [$]2,682, which is the differential from June 6th, is the increased amount of mortgage payment and she had to pay [$]300 to obtain a new appraisal.
>
> The Court will award [$]2,682. And, as I say, the Court is not going to award specific performance. Damages are suitable here. Moreover, this is at the discretion of the Court. The lady was candid. She said she 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. She should be able to pay the damages and the Court would not have to remove Miss Cutler from her premises.

Our abuse of discretion standard of review is highly deferential. As stated by the Supreme Court in *Spalding v Spalding,* 355 Mich 382, 384-385; 94 NW2d 810 (1959):

> The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.

See also *Alken-Ziegler, Inc v Waterbury Headers Corp,* 461 Mich 219, 227-228; 600 NW2d 638 (1999) ("[A]lthough the *Spalding* standard has been often discussed and frequently paraphrased,

it has remained essentially intact."), and *People v Bahoda,* 448 Mich 261, 289, n 57; 531 NW2d 659 (1995).

As noted by the trial court, defendant was candid regarding her good-faith reason for not closing on the sale. After listing her home for sale, defendant discovered that she would have to work an additional five years with her employer, the Department of Corrections, before her retirement benefits would vest. Accordingly, defendant sought to withdraw her sales agreement. Although plaintiff's monetary damages for the breach of contract are only $2,982, plaintiff seeks a decree in equity and the power of the sheriff to compel the sale and force defendant from her home.

The residence at issue is located at 1009 Parnell Avenue in Sault Ste. Marie, Michigan. At trial, plaintiff failed to present evidence of any special or unique attributes of the house that would distinguish defendant's home from any other house on Parnell Avenue or elsewhere in Sault Ste. Marie. The extent of plaintiff's testimony regarding her claimed need for specific performance was that she felt very "comfortable" with the house and could "picture" where all of her furniture would be placed. In this age of mass constructed houses and subdivisions, we should not assume, without evidentiary support, that every house listed for sale is unique and impossible to duplicate.

Under the circumstances of this case, which include an adequate remedy at law, I conclude that the circuit judge acted reasonably in declining to unleash the omnipotent authority of the judiciary to remove defendant against her will from her home. The trial judge did not abuse his discretion in awarding damages rather than equitable relief.[1]

In regard to plaintiff's claim for attorney fees, I concur with the majority and join in that portion of the opinion that affirms the denial of attorney fees.

I would affirm.

/s/ Richard Allen Griffin

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[1] "Equity looks at the whole situation and grants or withholds relief as good conscience dictates." *Thill v Danna,* 240 Mich 595, 597; 216 NW 406 (1927).

Further, although the procedural distinctions between law and equity no longer exist, "it is still true that most of the rules of equity are characterized by a greater flexibility than those of the common law, and that courts possess greater discretion in administering equitable remedies than even the same courts have in administering common-law remedies." McClintock, Equity (2d Ed), p 2. In this regard, "(e)quity is said to be flexible rather than rigid, its interest justice rather than law." Dobbs, Law of Remedies (2d ed), § 2.1(3), p 55.