**IN THE COURT OF APPEALS OF IOWA**

No. 8-402 / 06-1350
Filed July 16, 2008

**JOHN P. SALES and JOYCE E. SALES,**
Plaintiffs-Appellees,

**vs.**

**DETLEF SCHELLIN,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Johnson County, David M. Remley, Judge.

A seller appeals from a district court ruling ordering specific performance of a real estate contract and awarding the plaintiffs attorney fees. **AFFIRMED AND REMANDED.**

Detlef Schellin, Merritt Island, Florida, pro se.

Charles T. Traw of Leff Law Firm, L.L.P., Iowa City, for appellees.

Considered by Huitink, P.J., and Vogel and Zimmer, JJ.

**ZIMMER, J.**

Detlef Schellin appeals from a district court ruling ordering specific performance of a real estate contract for the sale of an apartment building to the plaintiffs, John and Joyce Sales. He claims the court erred in ordering the contract to commence on September 1, 2006, and in awarding the plaintiffs trial attorney fees. We affirm the judgment of the district court and remand for the limited purpose of determining attorney fees on appeal.

The plaintiffs owned an apartment building in Iowa City, Iowa, which was destroyed by a fire in March 1999. They were informed by their attorney they could defer payment of the capital gains tax on their insurance proceeds from the fire if they reinvested the proceeds in a like kind property by December 31, 2001.

The plaintiffs located an apartment building in Iowa City owned by Schellin that they were interested in purchasing. They approached Schellin in December 1999, and he agreed to sell them the property for $380,000. The plaintiffs' attorney then prepared an "Offer to Buy Real Estate and Acceptance" on their behalf, which contained the terms originally proposed by Schellin. The contract provided that the plaintiffs would pay Schellin $10,000 in earnest money to be held in their attorney's trust account,[1] an additional $66,000 in cash at the time of closing and delivery of possession, which was scheduled for February 1, 2000, and the balance in monthly installments amortized over twenty years with a ten-year balloon payment due on January 1, 2010. Schellin accepted the offer on January 5, 2000.

[1] The plaintiffs paid the $10,000 in earnest money on December 31, 1999.

The closing was canceled, however, after the plaintiffs' attorney discovered problems in the title to the real estate due to potential claims held by Schellin's former wife, Ellen. The parties attempted to resolve the title objections with Ellen, but she instead initiated a lawsuit against Schellin in March 2000, alleging he had entered into a written contract to sell the property to her.

The plaintiffs remained in contact with Schellin throughout 2000 and 2001. When it became apparent Ellen's lawsuit against Schellin would not be resolved in 2001, the plaintiffs became concerned the sale would not be completed in time for them to be able to defer the capital gains tax on their insurance proceeds. On December 4, 2001, their attorney sent Schellin a letter stating, "My clients are still prepared to perform under the terms of [the] contractual agreement and I hereby tender in their behalf the down payment . . . of $76,000" to be "placed in an escrow account, with interest accruing to [Schellin's] benefit if [he] ultimately [is] able to deliver good title." Schellin, however, demanded an additional $10,000 be added to the purchase price and that the down payment be paid directly to him rather than being placed in an escrow account. The plaintiffs agreed to his altered terms in a letter dated December 20, 2001, but they did not receive a response to their letter before the end of that year.

The plaintiffs were able to secure an extension of time from the Internal Revenue Service within which to procure the property, and they unsuccessfully continued to attempt to contact Schellin throughout 2002. In March 2003 the plaintiffs learned that he had failed to inform them that Ellen's lawsuit had been dismissed in May 2002. They sent Schellin a letter stating they remained "willing, able and committed to performing under the Offer to Buy Real Estate and

Acceptance accepted by Detlef Schellin on January 5, 2000." He responded to their letter with an offer to sell the property for an increased purchase price, down payment, interest rate, and a reduced amortization period.

The plaintiffs thereafter filed a petition seeking specific performance of the January 5, 2000 real estate contract. Schellin filed an answer and counterclaim, admitting the existence of that contract and requesting an order enforcing its terms. He also requested the plaintiffs be ordered "to pay all principal and interest due under the terms of the contract from February 1 2000 to the present."

Following a trial, the district court entered an order directing specific performance of the parties' real estate contract with possession to be delivered to the plaintiffs by September 1, 2006. The court denied Schellin's counterclaim seeking payment of the principal and interest due under the contract from February 1, 2000, and ordered him to pay the plaintiffs' attorney fees.

Schellin appeals. He first claims the district court "erred in providing that the sales contract would begin on September 1, 2006." He argues the court should have instead ordered "that the time frame be restored to its original value" and directed the plaintiffs to pay the principal and interest accruing since February 1, 2000, the original closing date. We do not agree.

The plaintiffs elected to allow Schellin to keep the rents and profits he collected from the apartment building since the conveyance should have been

made.[2] In *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 901 (Iowa 1981), our supreme court recognized that

> [a] purchaser who obtains a decree for specific performance may elect to pay interest on the purchase price for the time elapsed since the conveyance should have been made, and take the rents and profits received by the vendor, or allow the latter to retain these, and thereby relieve himself of liability for interest.

(Citations omitted.) It is thus "clear that the purchaser can either collect rents and profits and pay the interest or allow the vendor to keep the rents and profits but escape payment of interest." *Id.* This is so because a seller, "having wrongfully delayed the performance of the contract is not allowed to derive any advantage from his own fault." *Mitchell v. Mutch*, 189 Iowa 1150, 1153, 179 N.W. 440, 441 (1920). The court in *Mitchell* reasoned that

> [h]aving wrongfully withheld from the vendee the possession of the property, it would be clearly inequitable to permit him to collect interest upon the [contract] during the period of such wrongful delay if the vendee elects to claim a remission of interest as his measure of damage.

*Id.*

In denying Schellin's claim for interest, the district court found he wrongfully delayed performance of the parties' contract. Based upon our de novo review of the record, we agree. *See Passehl Estate v. Passehl*, 712 N.W.2d 408, 414 (Iowa 2006) (stating we review an equitable action for specific performance de novo).

It is clear from the evidence presented at the trial that the plaintiffs were ready and willing to perform under the contract since its execution but were

[2] Schellin collected $52,503 in rent in 2000, $45,955 in 2001, $52,300 in 2002, $50,328 in 2003, $51,035 in 2004, and $44,479 in 2005, although he claimed increasing expenses in maintaining and repairing the property each year.

unable to do so due to Schellin's inability to deliver good title to the real estate, his subsequent refusal to honor the terms of the contract as originally executed, and his rejection of the plaintiffs' attempts to complete the sale. We therefore find the district court did not err in denying Schellin's claim for interest on the purchase price. *See Mitchell*, 189 Iowa at 1153, 179 N.W. at 441. Nor did the court err in ordering that possession of the real estate should be delivered to the plaintiffs by September 1, 2006. *See Recker v. Gustafson*, 279 N.W.2d 744, 759 (Iowa 1979) (ordering specific performance of oral real estate contract with "practical equitable modifications [to the contract as] dictated by the passage of time since the contract was formed").

Schellin next claims the district court erred in awarding attorney fees to the plaintiffs. The parties' real estate contract provided for the payment of attorney fees. *See* Iowa Code § 625.22 (2003) (authorizing payment of attorney fees when a judgment is recovered on a written contract containing an agreement to pay for attorney fees). Where a real estate contract provides for attorney fees, the amount of fees awarded lies within the discretion of the district court. *Beckman v. Kitchen*, 599 N.W.2d 699, 702 (Iowa 1999). An award of attorney fees will not be disturbed on appeal in the absence of an abuse of discretion. *Id.*

The district court considered the time expended by the plaintiffs' attorneys in this protracted litigation, the nature and extent of their services, the amount involved, the difficulty of the issues, and the results obtained in ordering Schellin to pay the plaintiffs $28,313.80 in attorney fees. *See id.* (listing factors relevant to an award of attorney fees). No abuse of discretion has been shown.

The plaintiffs request permission to file an application for appellate attorney fees. We find no language in section 625.22 or in their real estate contract that precludes the award of appellate attorney fees. *See Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982). However, we prefer that the district court determine the reasonable amount of attorney fees plaintiffs should be awarded on appeal. *Id.* We therefore remand the case to the district court for the limited purpose of an evidentiary hearing on and the fixing of appellate attorney fees.

In summary, we affirm the judgment of the district court ordering specific performance of the parties' real estate contract and awarding the plaintiffs attorney fees, and remand for the limited purpose of determining attorney fees on appeal.

**AFFIRMED AND REMANDED.**