IN THE COURT OF APPEALS OF IOWA

No. 9-277 / 08-1245
Filed June 17, 2009

HIGH DEVELOPMENT CORP., an Iowa Corporation, and WOODRIDGE HOLDINGS, LLC, an Iowa Limited Liability Company,
Plaintiffs-Appellees,

vs.

STAR OF THE WEST COMPANY, an Iowa Corporation,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, James H. Carter, Senior Judge.

Star of the West Company appeals from the district court ruling on High Development Corporation's petition in equity, requiring specific performance of a purchase agreement for the sale of real estate. **REVERSED.**

Larry J. Thorson of Ackley, Kopecky & Kingery, L.L.P., Cedar Rapids, for appellant.

Matthew S. Carstens of Bradley & Riley, P.C., Cedar Rapids, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

EISENHAUER, J.

Star of the West Company appeals from the district court ruling on High Development Corporation's petition in equity, requiring specific performance of a purchase agreement for the sale of real estate. It contends the court erred in requiring specific performance because High Development Corporation was not prepared to close on the specified date and the purchase agreement stated time was of the essence. It further contends the award of attorney fees to High Development Corporation was unreasonable. We reverse.

I. Background Facts and Proceedings. The facts of this case can be succinctly stated as follows: On July 5, 2006, Star of the West Company (Star of the West) entered into a purchase agreement with High Development Corporation (High Development) regarding property located at 1101 Old Marion Road in Cedar Rapids. Star of the West agreed to sell the property to High Development for a purchase price of $170,000 and $5000 in earnest money was tendered when the purchase agreement was executed. Closing was set for August 30, 2006.

The purchase agreement specifically states, "In the performance of each part of this Contract, time shall be of the essence." In addition, the buyers were informed in a letter from the realtor on August 27, 2006, that the sellers would not extend the closing. The purchase agreement further states,

> If the Buyer(s) fails to fulfill this Contract, Seller(s) may forfeit the same as provided in Chapter 656 of the Code of Iowa, and all payments made so far shall be forfeited, or the Seller(s) may proceed by an action at law or in equity.

On August 30, 2006, High Development informed Star of the West it would not have the funds to close on the transaction until the following day. Star of the West refused to extend the closing. Although High Development had the necessary funds and was ready to proceed with closing on August 31, 2006, Star of the West, through the realtor, indicated the sale would not be consummated. Closing never occurred.

Star of the West did not refund the $5000 High Development supplied in earnest money. Nor did it take action to serve High Development with a notice of forfeiture pursuant to Iowa Code chapter 656 (2005). Within two weeks, Star of the West entered into a purchase agreement to sell the property to a third party.

On September 15, 2006, High Development filed a petition in equity, seeking specific performance of the purchase agreement, damages, and attorney fees. Star of the West answered, stating time was of the essence in the purchase agreement, and because High Development was unable to perform on the specified date, specific performance could not be sought. Star of the West also requested an award of its attorney fees.

Following a bench trial in May 2008, the district court entered its findings of fact and conclusions of law. The court found Star of the West was obligated to proceed under chapter 656 if it wished to extinguish High Development's rights under the contract for failure to timely tender the purchase price. It further found High Development's tender of the purchase amount on August 31, 2006, cut off any right of forfeiture. The court then concluded High Development was entitled

to specific performance of the purchase agreement and awarded High Development $31,000 in attorney fees. Star of the West appeals.

II. Scope and Standard of Review. Our review of the district court's grant of equitable relief is de novo. *SDG Macerich Prop., L.P. v. Stanek Inc.*, 648 N.W.2d 581, 584 (Iowa 2002). We must examine the facts as well as the law and decide the issues anew. *Id.* In doing so, we give weight to the district court's findings of fact, but we are not bound by these findings. *Id.*

III. Analysis. The district court found High Development was entitled to specific performance because Star of the West's obligation to perform was not legally discharged. The court concluded Star of the West was bound to proceed to forfeit the contract in conformity with chapter 656. Because it had not, the court concluded High Development's tender of the purchase price on August 31, 2006, cut off any right of forfeiture. Iowa Code section 656.1 provides,

> A contract which provides for the sale of real estate located in this state, and for the forfeiture of the vendee's rights in such contract in case the vendee fails, in specified ways, to comply with said contract, shall, nevertheless, not be forfeited or canceled except as provided in this chapter.

Additionally,

> This chapter shall be operative in all cases where the intention of the parties, as gathered from the contract and surrounding circumstances, is to sell or to agree to sell an interest in real estate, any contract or agreement of the parties to the contrary notwithstanding.

Iowa Code § 656.6. Star of the West did not initiate forfeiture proceedings. However, this was not its only remedy.

A seller has several remedies when a purchaser defaults on a real estate contract. *Pierce v. Farm Bureau Mut. Ins. Co.*, 548 N.W.2d 551, 556 (Iowa 1996). The seller has a right to elect whether (1) to keep good their tender of performance, demand the balance of the purchase price, and sue for specific performance; (2) to terminate the contract because of the vendee's breach, keep their land and sue for damages for the breach; (3) to rescind the contract in toto; or (4) to enforce a forfeiture under the statute. *Id.*; *Abodeely v. Cavras*, 221 N.W.2d 494, 497-98 (Iowa 1974). Here, Star of the West terminated the contract and kept the land. It did not sue for breach of contract, but instead went about mitigating its damages.

Iowa Code chapter 656, generally applies to the situation when a vendee has acquired some equitable interest in property by virtue of having made payments under an installment contract. In order to "forfeit" this equitable interest and reclaim the property, the vendor must go through the forfeiture process. *See Hampton Farmers Co-op. Co. v. Fehd*, 133 N.W.2d 872, 874-75 (Iowa 1965) ("From the vendors' standpoint forfeiture presents a swift and inexpensive remedy in the event of a default. A vendee can live with such remedy to obtain the advantages of an installment contract . . . when other financing could not be obtained."). However, when there is no installment contract but instead a one-time closing that did not occur, we believe each party has the ability to invoke normal contract rights and remedies. *See Passehl Estate v. Passehl*, 712 N.W.2d 408, 414-15 & n.8 (Iowa 2006) (stating that the forfeiture statutes were inapplicable and basic contract principles applied to a

dispute over whether a party was entitled to specific performance of a contract to convey land).

Furthermore, the decision to grant specific performance is within our sound discretion; it is not to be granted as a matter of right. *Breitbach v. Christenson*, 541 N.W.2d 840, 843 (Iowa 1995). It is to be granted only in extraordinary, unusual cases in which irreparable harm will result in its absence, not as a matter of grace. *Id.* In determining whether to grant a request for specific performance, we must examine the particular facts of the situation and will generally grant the request when it would subserve the ends of justice and deny to do so where it would produce a hardship or injustice on either party. *Id.* Specific performance is a remedy available particularly in cases of real estate transactions because the court presumes real estate to possess a unique quality such that mere monetary damages may not always constitute adequate remedy for a breach of contract. *Id.*

The object of specific performance is to best effectuate the purposes for which a contract was made, and it should be granted upon such terms and conditions as justice requires. *Berryhill v. Hatt*, 428 N.W.2d 647, 657 (Iowa 1988). Although the grant of specific performance is equitable, this court will not remake or revise a contract the parties have freely agreed to; we will give the parties the benefit of the contract they have made as far as possible. *Brietbach*, 541 N.W.2d at 843-44. Here, the purchase agreement states “time is of the essence.” Star of the West argues High Development’s failure to close on the specified date makes it inequitable to require specific performance.

A cardinal rule of contract construction is that "time is of the essence." *SDG Macerich Prop.*, 648 N.W.2d at 586. Where the parties set out a specific time for performance in the contract, they have made time of the essence. *Id.* at 587; *Ujdur v. Thompson*, 878 N.W.2d 180, 183 ("[W]here the parties make time of the essence in setting a deadline for payment, strict compliance with such deadline is required."). Our supreme court has held it grossly inequitable to require specific performance of a real estate contract where time is of the essence and "on the day fixed [the defendant] was ready and willing to perform, and was prevented from doing so by plaintiff's default." *Thurston v. Arnold*, 43 Iowa 43, 47 (1876); *see also Peterson v. Rankin*, 161 Iowa 431, 436, 143 N.W. 418, 420 (1913) ("Plaintiff must have performed his part of the contract, or tendered performance in a legal manner, before he would be entitled to insist upon a performance by the other party to it."). This is true even if the tender of money is made even one day late. *Frey v. Camp*, 131 Iowa 109, 111-12, 107 N.W. 1106, 1106 (1906).

We conclude High Development materially breached the contract when it failed to complete the purchase on August 30, 2006, and therefore is not entitled to specific performance. Accordingly, we reverse the district court's order, including its award of attorney fees.

REVERSED.