STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1556

Tollefson Development, Inc.,
Appellant,

vs.

The Estate of James McCarthy,
Respondent.

Filed July 1, 2008
Affirmed
Willis, Judge

Dakota County District Court
File No. C2-01-8446

Chad D. Lemmons, Brent E. LaSalle, Patrick J. Kelly, Trevor S. Oliver, Kelly & Fawcett, P.A., 2350 UBS Plaza, 444 Cedar Street, St. Paul, MN 55101 (for appellant)

Clinton McLagan, P.O. Box 21347, Eagan, MN 55121 (for respondent)

Considered and decided by Willis, Presiding Judge; Johnson, Judge; and Muehlberg, Judge. [*]

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

Appellant challenges the district court's refusal to grant specific performance of a real-estate purchase agreement, arguing that the district court (1) applied the incorrect

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

standard of proof, (2) clearly erred by finding the purchase agreement to be fatally indefinite; and (3) improperly reviewed the agreement for overreaching and lack of mutuality of remedy. Because we conclude that the district court did not abuse its discretion, we affirm.

FACTS

This is the fourth appeal in a dispute involving the purported conveyance of a parcel of real estate to a developer. Brothers James McCarthy and Patrick McCarthy owned as tenants in common approximately 130 acres of land in Dakota County. In early 2000, representatives of appellant Tollefson Development, Inc. approached James McCarthy about purchasing all or part of the property, and James McCarthy and Tollefson began to discuss a sale. Patrick McCarthy told Tollefson's representatives that he was not willing to sell his interest in the property.

On August 17, 2000, James McCarthy signed a purchase agreement to sell his interest in approximately 60 acres of the property to Tollefson. The purchase agreement provides that "[t]he parties agree that this agreement shall cover (See Exhibit 'A' – Property Description) which acreage will be determined finally at or before closing." Exhibit "A" is a map, on which Gary Wollschlager, Tollefson's representative, sketched the borders of the property to be conveyed and wrote "APROX. 60 ACRES."

The purchase agreement also contains the following provisions describing the purchase price, earnest money, and the balance:

> **PURCHASE PRICE WILL BE**: TWO MILLION ONE HUNDRED SIXTY THOUSAND DOLLARS ($2,160,000.00) [this number is crossed out, and written in

> ink is the number $2,220,000] based on THIRTY-SIX ["THIRTY-SIX" is crossed out, and written in ink are the words thirty seven] THOUSAND DOLLARS ($36,000.00) [this number is crossed out, and written in ink is the number $37,000] per acre based on approximately sixty (60) acres. The price will be adjusted if acreage is more or less. Price is exclusive of existing road rights-of-way, utility easements and encroachments and wetlands.
>
> **EARNEST MONEY**: of FORTY THOUSAND DOLLARS ($40,000.00) upon execution of this agreement, which amount will be applied toward the purchase price in the event of closing by [Tollefson] . . . .
>
> **BALANCE**: of TWO MILLION ONE HUNDRED TWENTY THOUSAND ["TWENTY" is crossed out, and written in ink is "EIGHTY"] ($2,120,000.00) [this is crossed out and written in ink is $2,180,000.00] and No/100 Dollars shall be paid in cash on the date of closing. According to the following terms: Fifty percent of the proceeds to be disbursed to JAMES MCCARTHY and fifty percent to PATRICK MCCARTHY.

Because Patrick McCarthy refused to sell his interest in the property, the agreement also contained the following partition clause:

> [Tollefson] agrees to take action in the form of a partition for sale or partition in kind to resolve the interest of [Patrick McCarthy] in the subject property. [Tollefson] will retain the attorney to process the action. [James McCarthy] shall reimburse [Tollefson] for the expenses incurred in the litigation action, including attorney fees, at the time of the closing on the property. [James McCarthy] agrees to cooperate with [Tollefson] in processing said litigation. . . .
>
> [Tollefson], in its sole discretion, may terminate the partition action if [Tollefson] determines that the action may be protracted in nature and/or questionable in result. In that event, [James McCarthy] will reimburse or grant a Mortgage to [Tollefson] in the amount of the litigation expenses, which Mortgage shall be on [James McCarthy's] interest in the subject property and shall be paid at the time of sale of the

> property, or a transfer of [James McCarthy's] interest in the property.

Additionally, the purchase agreement contained nine contingencies and provided that the purchase agreement was to be null and void if any of the contingencies was not resolved within 180 days after the date of the agreement.

After the parties signed the purchase agreement, Tollefson's counsel drafted a complaint for the partition action. The property described in the complaint was the entire 134.87 acres owned by James McCarthy and Patrick McCarthy. James McCarthy, unwilling to sue his brother, refused to sign the complaint. Tollefson sued James McCarthy to require his participation in the lawsuit in accordance with the partition clause. James McCarthy and Tollefson subsequently entered into a settlement agreement that amended several terms of the purchase agreement, including the purchase price, but did not specifically address the partition action, and Tollefson dismissed its suit against James McCarthy.

James McCarthy died, and Patrick McCarthy became the personal representative of respondent estate of James McCarthy. After the estate took no action to sell its interest in the property to Tollefson, Tollefson brought an action against Patrick McCarthy individually to partition the entire 134.87-acre property. The district court dismissed the action, concluding that Tollefson's contingent equitable interest in the property was not sufficient to maintain a partition action and that even if Tollefson could maintain such an action, it was impossible to grant Tollefson's requested relief because Tollefson could obtain only the undivided one-half interest of the estate in the approximately 60 acres

described in the purchase agreement. This court affirmed the dismissal, holding that Tollefson did not have a sufficient interest in the property to maintain the action. *Tollefson Dev., Inc. v. McCarthy*, 668 N.W.2d 701, 705 (Minn. App. 2003) (*Tollefson I*). *Tollefson I* did not reach the issue of impossibility of performance. *Id*.

Tollefson next filed a claim with the estate to enforce the settlement agreement that it had reached with James McCarthy. Patrick McCarthy, as the estate's personal representative, disallowed the claim. Tollefson petitioned the probate court, which concluded that it was impossible to enforce the purchase agreement, as modified by the settlement agreement between Tollefson and James McCarthy, because the settlement agreement required the sale of 60 acres, but described property of less than 60 acres. This court affirmed in an unpublished opinion. *See In re Estate of McCarthy*, No. A03-1183, 2004 WL 885741, at *4 (Minn. App. Apr. 27, 2004) (*Tollefson II*).

Tollefson then notified the estate that Tollefson unilaterally waived all contingencies in the original purchase agreement. In October 2004, the probate court granted Tollefson's motion to set aside the settlement agreement.

Tollefson then sued the estate to enforce the original purchase agreement by requiring the estate to initiate an action to partition the entire 134.87 acres so that the estate could then convey to Tollefson the portion of the property that Tollefson claimed had been sold to it by James McCarthy. The probate court granted summary judgment to the estate based on collateral estoppel and impossibility of performance. This court reversed and remanded, concluding that "the issues in this case are not identical with issues previously litigated, and . . . the evidence does not show that, as a matter of law, it

is impossible to enforce the purchase agreement through no fault of decedent." *Tollefson Dev., Inc. v. Estate of James McCarthy*, A05-1857, 2006 WL 1390559, at *1 (Minn. App. May 23, 2006) (*Tollefson III*).

On remand, the district court found after a bench trial that Tollefson had not demonstrated by clear-and-convincing evidence that the purchase agreement was enforceable. The district court found that the description of the property to be conveyed was inadequate and that the purchase price was indefinite. The district court also refused to grant specific performance on the ground that the purchase agreement was "not fair and reasonable," showed "overreaching" on the part of Tollefson, lacked mutuality of remedy, and supported an inference that "mistake, if not misrepresentation[,] was at work here." Tollefson appeals.

D E C I S I O N

In a case tried by the district court without a jury, this court is limited to determining whether the district court's findings are clearly erroneous and whether the court erred in its conclusions of law. *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 457 (Minn. App. 2001), *review denied* (Minn. July 24, 2001).

I. The district court did not improperly review the purchase agreement for overreaching and lack of mutuality.

Tollefson contends that the district court erred by examining the purchase agreement for overreaching and lack of mutuality. Tollefson does not challenge the district court's findings on those issues but rather argues that, because the estate did not specifically raise overreaching or lack of mutuality in its answer or at trial, Tollefson was

unable to respond to those issues and the district court's decision should therefore be reversed.

Specific performance of a contract to convey real estate "is not a matter of absolute right, and if enforcement would be unconscionable or inequitable, performance will not be decreed." *Boulevard Plaza Corp. v. Campbell*, 254 Minn. 123, 136, 94 N.W.2d 273, 284 (1959). "[T]he [district] court may take into consideration . . . the fairness of the transaction." *Id.*; *see also Hilton v. Nelson*, 283 N.W.2d 877, 881 (Minn. 1979) (examining a real-estate purchase agreement for "elements of unfairness, or at least overreaching").

We conclude that the district court properly exercised its equitable discretion by examining the purchase agreement for overreaching and lack of mutuality. It was Tollefson's burden to establish that it would be fair and equitable for the district court to grant specific performance of the purchase agreement. *See* 81A C.J.S. *Specific Performance* § 130 (2004) (providing that "the burden is on the party seeking specific performance to show a right to the relief sought"). It is, therefore, difficult for Tollefson to argue that the district court's consideration of whether the purchase agreement was overreaching and lacking in mutuality violated "basic tenants [sic] of fairness."

Tollefson cites no case requiring a party to plead overreaching or lack of mutuality to allow the district court to consider those factors in deciding whether to order specific performance; they are factors that a district court may weigh in any case that seeks the specific performance of a contract to convey real estate. *Cf. Dakota County Hous. & Redevelopment Auth. v. Blackwell*, 602 N.W.2d 243, 244 (Minn. 1999) (stating that "the

district court must balance the equities of the case and determine whether the equitable remedy of specific performance is appropriate").

We note that, in any event, the estate pleaded the defenses of misrepresentation, fraud, and mistake in its answer, which put Tollefson on notice that the fairness of the proposed transaction would be disputed at trial. And the record contains significant evidence that the proposed transaction was unfair, including testimony that Tollefson's representatives misstated who would bear the costs of the partition action and the terms of the purchase agreement itself, which provide that James McCarthy will grant Tollefson a mortgage on his interest in the property to pay for litigation expenses if Tollefson, in its sole discretion, decides to terminate the purchase agreement.

II. The district court properly exercised its discretion in determining that Tollefson was not entitled to specific performance.

Whether to award specific performance is "a matter of discretion" for the district court. *Boulevard Plaza Corp.*, 254 Minn. at 136, 94 N.W.2d at 284. We review a district court's decision to grant or deny specific performance for an abuse of discretion. *See Flynn v. Sawyer*, 272 N.W.2d 904, 910 (Minn. 1978).

The district court here found that an award of specific performance would be inequitable, and Tollefson has not challenged this basis for the district court's decision, much less shown that it was erroneous. We conclude, therefore, that the district court did not abuse its discretion by denying Tollefson's request for specific performance of the purchase agreement on the ground that enforcement of the agreement would be inequitable.

Tollefson's remaining arguments challenge the district court's determination that the purchase agreement is not sufficiently definite to be enforceable. Because our review of the district court's determination that the purchase agreement is not "fair and reasonable" provides an independent basis for our decision, we do not reach the other issues that Tollefson raises on appeal.

Affirmed.