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ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA09-238

RICKY R. GARRETT and SIGRID GARRETT, APPELLANTS V. THOMAS L. FITE, APPELLEE	**Opinion Delivered** 16 DECEMBER 2009 APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT, [NO. CV-2007-309 II] THE HONORABLE MICHAEL MEDLOCK, JUDGE AFFIRMED

D.P. MARSHALL JR., Judge

After a bench trial, the circuit court rejected Ricky and Sigrid Garrett's claim for specific performance of a land contract with Thomas Fite. The court concluded that a combination of circumstances—Fite's health, his relationship with his son-in-law (who was the real estate agent for him and the Garretts), and his frustration with his land dealings—resulted in Fite making a contract setting an unconscionable price of less than one-third of the land's appraised value. The Garretts appeal, arguing that the circuit court's decision was clearly erroneous and contrary to Arkansas law.

Specific performance is an equitable remedy that calls on the court's conscience. "[S]tripped of technicalities and red tape[,]" a court in equity does justice after

balancing the interests of all parties. *Poff v. Brown*, 374 Ark. 453, 455–56, 288 S.W.3d 620, 622–23 (2008) (citations omitted). The court can deny specific performance if a contract is unconscionable or supported by inadequate consideration. Howard W. Brill, *Specific Performance in Arkansas*, 1995 Ark. L. Notes17, 20. Here, the circuit court married these two grounds; it found an "unconscionable price" and voided the contract "for inadequacy of price and insufficient consideration."

Inadequate consideration, standing alone, must shock the court's conscience to justify setting aside a contract. *E.g.*, *Braswell v. Brandon*, 208 Ark. 174, 177–78, 185 S.W.2d 271, 273 (1945). Otherwise, inadequate consideration must be accompanied by proof of other material circumstances such as a weakness of understanding, fraud, imposition, mutual mistake, or one party's position of influence over the contracting party. *Luther v. Bonner*, 203 Ark. 848, 855–56, 159 S.W.2d 454, 457–58 (1942). Whether specific performance should be granted always raises a question of fact on the equities of a particular case. *Mitchell v. House*, 71 Ark. App. 19, 21–22, 26 S.W.3d 586, 587–88 (2000).

We see no clear error in the circuit court's answer here. This parcel was seventy-three acres. Its value was significantly greater than the contract price. Land appraiser Don Burris's testimony most impressed the court on this point. He set the parcel's fair market value at $368,000.00—more than three times the $104,000.00

contract price. Fite and his son, who built and sold houses, agreed with Burris's assessment. This was strong—if not conclusive—evidence of inadequate consideration.

The record also shows that Fite was vulnerable at the time of contracting. He had gout. And he was depressed about in-fighting among his children. Fite's physician observed this deteriorated mental state, opining that Fite "could not make good financial decisions." In Fite's own words, "I was just would have loved to fell in a place to just gone off and left everything. . . . I didn't—didn't care what happened really." Fite's son had decided to not list property with Fite's son-in-law, real estate salesman Ken Wintory. This was one source of the family conflict. But Wintory ended up representing both the Garretts and Fite in their real estate contract. Though Wintory had served the Garretts for months, Fite did not list the parcel with Wintory until the day the disputed contract was signed. According to Fite, Wintory made four separate visits to Fite's home that day. As Fite testified, he simply "gave in and signed it." Fite, however, did not sign the contract in his capacity as a trustee, despite having put all of his remaining property into trust just two months before. The Garretts and Fite never met.

This record is not one-sided. The Garretts offered some proof of the fairness of the contract price and of Fite's mental stability. Wintory used a formula to arrive at the $104,000.00 contract price. Fite admitted that he would have accepted nothing

less than $100,000.00 two years before the contracting. At that time, though, he was in a different financial condition and mistaken about the parcel's size. After signing one contract with the Garretts, Fite asked Burris to survey the land. When he discovered that the parcel was significantly larger, Fite had the presence of mind to include real estate covenants in the second, final contract. And while he did not initially object to the contract's price, Fite canceled his daughter's power of attorney almost immediately. She was married to Wintory.

The circuit court's judgment fairly summarized all the proof from the witnesses and the documents.

> The Court finds the testimony of Mr. Don Burris, a professional appraiser, concerning the value of the land compelling. An appraised value of more than three times the sale price contemplated by the real estate contract is reason for concern. A knowledgeable person dealing in real estate under normal circumstances would not sell property for less than one-third its value. There was no evidence that the Defendant, Tom Fite, needed the sale or that the sale was distressed. This Court finds that as a result of a combination of all the factors identified in the findings of fact including the Defendant's health, his relationship with his son-in-law and his frustration with his land dealings, the Defendant entered into a contract with an unconscionable price.

On this record, the court voided the contract. And where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. *Mitchell*, 71 Ark. App. at 21–22, 26 S.W.3d at 587–88.

Nor are we persuaded that the circuit court's conclusion was contrary to

Arkansas law. The court's factual findings about the inadequate price and Fite's vulnerability justified denying the Garretts specific performance. *Luther*, 203 Ark. at 855–57, 159 S.W.2d at 457–58; *see also T-1 Construction, Inc. v. Tannenbaum Development Co., LLC*, 2009 Ark. App. 169, at 7, 314 S.W.3d 740, 743. The supreme court voided a contract (as well as a deed) in *Luther* when an inadequate price was accompanied by evidence of mental distress and one party's influential position amidst that weakness. 203 Ark. at 855–57, 159 S.W.2d at 457–58. Here, the court made a similar finding; it balanced the equities and invalidated the contract. Arkansas law required nothing more. *Mitchell*, 71 Ark. App. at 21–22, 26 S.W.3d at 587–88 (2000).

Affirmed.

GRUBER and HENRY, JJ., agree.

Gean, Gean & Gean, Attorneys at Law, by: *Roy Gean, Jr.*, for appellants.

Stephen M. Sharum, for appellee.