

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

HORNE V. KREJCI

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CARL N. HORNE AND JENNIFER S. SIECK, COPERSONAL REPRESENTATIVES
OF THE ESTATE OF FREDERICK R. HORNE III, APPELLANTS,

v.

FRANK R. KREJCI, APPELLEE.

Filed April 24, 2012. No. A-11-360.

Appeal from the District Court for Holt County: MARK D. KOZISEK, Judge. Affirmed.

Thomas M. Locher, Kevin J. Dostal, Ralph A. Froehlich, and Joseph J. Kehm, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellants.

James M. Bausch, Shawn D. Renner, and Tara A. Stingley, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Carl N. Horne and Jennifer S. Sieck, copersonal representatives of the estate of Frederick R. Horne III (referred to herein individually and collectively as “Rick”), appeal an order of the district court for Holt County, Nebraska, denying a complaint for specific performance of an option to purchase land. On appeal, Rick asserts that the district court erred in denying specific performance. On our de novo review of the record, we affirm the district court’s decision.

II. BACKGROUND

This case arises out of a sale of real property referred to as “North Ranch,” previously owned by Pete and Penny Horne, husband and wife; Rick and Susan Horne, husband and wife; Charles Horne; and Big Sandy Land Co., Inc. (collectively the Horne family). The evidence adduced in this case indicates that the Horne family’s sale of North Ranch was precipitated by

financial difficulties experienced by the Horne family that necessitated the raising of a significant amount of cash. Because North Ranch was the childhood home of Pete and Rick, their desire was to sell North Ranch at a discounted price to raise the necessary cash, but to secure an option to purchase North Ranch back.

On or about November 8, 2002, the Horne family entered into a purchase agreement with Frank R. Krejci, whereby Krejci would purchase North Ranch for \$4 million. As part of the same transaction for the purchase of North Ranch, on or about November 25, Krejci executed a lease agreement and option to purchase with Pete and Rick, wherein Pete was to lease North Ranch from Krejci for a period of 5 years for a rate of \$300,000 rent per year, and Pete and Rick were granted an option to purchase North Ranch back from Krejci for \$4.7 million “when the five year term of [the] lease end[ed].” The purchase agreement was to close on January 3, 2003.

After the parties executed the purchase agreement and the lease and option agreement, the Horne family determined that the \$4 million sale price was not sufficient to satisfy creditors and provide a clear title to Krejci. As a result, the January 3, 2003, closing did not occur and the initial purchase agreement and the initial lease and option did not take effect. On or about January 20, the Horne family and Krejci executed an amendment to the purchase agreement which raised the purchase price to \$4.8 million. On or about January 21, Krejci executed another lease agreement and option to purchase with Pete and Rick, wherein Pete was to lease North Ranch from Krejci for a period of 5 years for a rate of \$350,000 rent per year, and Pete and Rick were granted an option to purchase North Ranch back from Krejci for \$5.7 million “when the five year term of [the] lease end[ed].” The lease and option agreement included provisions specifying that failure to pay rent would be considered a default and that in the event of default, Krejci had the right to terminate the lease. The parties closed on the amended purchase agreement and the lease and option agreement, Krejci took possession of North Ranch, and Pete began renting North Ranch from Krejci.

Pete defaulted on the lease within the first year when he failed to make the required rent payments. On March 19, 2004, Krejci’s attorney sent a certified letter to both Pete and Rick notifying them that Pete had failed to cure defaults related to the lease, that numerous attempts to contact Pete had been unsuccessful, and that Pete had apparently abandoned North Ranch. The letter notified Pete and Rick that as a result of Pete’s failure to cure defaults, pursuant to terms of the lease and option agreement, Krejci was electing to terminate the lease. The letter also indicated that the termination of the lease “include[d] the option to purchase.” Pete ultimately sought relief through bankruptcy in 2004 and was judicially evicted from North Ranch pursuant to an order of the bankruptcy court in January 2005.

Krejci testified that he leased North Ranch to other parties after Pete vacated the property. There was no evidence adduced by either party concerning the rent received by Krejci from any other lessees of North Ranch.

Pete testified that he never attempted to exercise any option to repurchase North Ranch. There was also evidence adduced that neither Pete nor Rick contacted Krejci or his counsel with any objection to Krejci’s March 19, 2004, letter notifying them that the lease and option were being considered terminated as a result of Pete’s breach of the lease agreement.

On May 22, 2007, Rick sent a single-page document to Krejci titled “Exercise of Option to Purchase.” In the document, Rick conveyed that “pursuant to . . . the Lease Agreement and

Option to Purchase dated the 25th day of November 2002, [he was providing] notice to Frank R. Krejci of his intent to exercise the option to purchase the real estate . . . subject to the OPTION TO PURCHASE.” As noted above, the November 25, 2002, lease and option agreement containing the option to purchase for \$4.7 million never went into effect because the initial purchase agreement was never closed on; rather, the only effective lease and option agreement was dated January 21, 2003, and contained an option to purchase for \$5.7 million. There is no dispute in the record that Rick never made an attempt to cure his reference to the wrong lease and option agreement and never made a separate attempt to exercise the correct option.

In June 2007, Rick filed a complaint seeking specific performance. Rick died during the pendency of the proceedings, but the action was revived in the names of his copersonal representatives. In the complaint, Rick alleged that he provided notice in May 2007 of “his intent to exercise the Option to Purchase” and that Krejci had failed to acknowledge the notice to exercise the option. Rick also alleged that he was ready, willing, and able to fulfill and perform pursuant to the option. Rick attached to the complaint copies of the November 2002 purchase agreement and lease and option agreement that had never taken effect because of the parties’ failure to close on those documents. Rick did not reference or provide copies of the subsequent amendment to the purchase agreement or the subsequent lease and option agreement that actually were closed on and took effect.

In August 2007, Krejci filed an answer to the complaint. In his answer, Krejci affirmatively alleged that the purchase agreement and lease and option agreement referred to by Rick had never gone into effect, alleged that the purchase agreement had been amended to increase the purchase price, and alleged that the lease and option agreement that did go into effect was dated January 2003. Krejci denied that Rick had provided notice of his intent to exercise the option and affirmatively alleged that there was no option remaining in effect. Krejci alleged as affirmative defenses that performance of the lease was a condition precedent to the option agreement that was not satisfied and that the prior order of the bankruptcy court terminating the lease and option agreement was res judicata on the viability of any remaining option. Krejci filed an amended answer in July 2008, in which he added an assertion that there had been no separate consideration for the option to allow its survival separate from the lease agreement.

In December 2010, after 3 years of pretrial discovery and motion practice but prior to the commencement of trial, Rick filed a motion to amend the complaint to conform to the evidence. Rick sought to amend the complaint to reflect the proper lease and option agreement that had taken effect, rather than the lease and option agreement that had never taken effect. The court granted the motion and allowed Rick to file an amended complaint. Krejci filed an answer to the amended complaint, in which Krejci again alleged that performance of the lease was a condition precedent to the option that had not been satisfied, that the prior bankruptcy order terminating the lease and option agreement was res judicata on the viability of any remaining option, and that there had been no separate consideration for the option to allow its survival separate from the lease agreement.

Trial was held in December 2010. On April 1, 2011, the district court entered an order dismissing the complaint for specific performance. In its thorough 20-page order, the district court recounted the evidence adduced at trial and addressed the various assertions raised by the

parties. The court found that the purchase agreement and the lease and option agreement were part of a single transaction and were to be read together as part of a single transaction. The court found that the original purchase agreement and lease and option agreement, as well as the amended purchase agreement and the second lease and option agreement, reflected that the transaction was structured to guarantee Krejci an 11-percent rate of return on his purchase of the North Ranch, to be attained through Pete's rental payments under the lease and either Pete's or Rick's payment of the repurchase price set forth in the option.

The district court noted that the lease and option agreement did not expressly indicate that Rick's right to exercise the option was dependent upon Pete's payment of rents under the lease. The court held that the option did not terminate upon termination of the lease because the option was not expressly made conditioned upon performance of the lease, and the court rejected the argument that Pete's prior bankruptcy court order was *res judicata* concerning Rick.

The district court held that although Rick's option survived the termination of Pete's lease, Rick had failed to properly exercise the option. The court held that Rick's attempt to exercise the option, by specifically referring to the wrong lease and option agreement, was nothing more than a counteroffer to repurchase for \$4.7 million rather than the \$5.7 million set forth in the proper lease and option agreement. Thus, the court held that there existed no contract for which specific performance could be ordered, unless Rick's failure to exercise the option was excused.

Rick alleged that his failure to exercise the option was excused because Krejci's March 2004 letter to Pete and Rick constituted an anticipatory repudiation of the option contract. The court held that Krejci's letter to Pete and Rick did inform Rick that Krejci was terminating the option. The court held, however, that Rick did not accept the anticipatory repudiation, but, rather, elected to treat the repudiation as inoperative and attempted to exercise the option with his May 2007 notice to Krejci. The court held that having elected to treat the repudiation as inoperative, Rick remained subject to his obligations to enjoy the benefits of the option, including to provide proper notice of his intent to exercise the option. Because Rick had not strictly complied with the requirement to provide notice of his intent to exercise the option set forth in the January 2003 lease and purchase agreement, the court held that he was not entitled to specific performance.

Additionally, Rick had argued that Krejci should be estopped from asserting defective notice of intent to exercise the option as a defense because his position prior to the commencement of litigation had been that there existed no option, not that the attempted exercise of the option was insufficient. The court rejected this assertion.

The district court held that Rick was also not entitled to specific performance because, although not expressly made so in the lease and option agreement, the lease and option terms impliedly made Pete's performance under the lease a condition precedent to either Pete's or Rick's right to exercise the option. The court noted that holding that the payment of rents under the lease was not a condition precedent would potentially allow Rick to exercise the option and, because Pete failed to perform his obligations under the lease, Krejci would receive \$1,575,000 less than he had bargained for under the terms of the lease and option agreement. The court held that such a result would be inequitable and that such inequity was an additional reason to deny specific performance.

This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Rick asserts numerous errors challenging the district court's dismissal of his complaint for specific performance. Rick asserts that the district court erred in failing to grant relief under Rick's theory of anticipatory repudiation, asserts that the court erred in permitting Krejci to assert a new defense shortly before trial, erred in finding that payment of rent was a condition precedent to Rick's right to exercise the option, and erred in finding that exercise of the option would produce an inequitable result.

IV. ANALYSIS

1. STANDARD OF REVIEW

An action for specific performance sounds in equity, and on appeal, an appellate court decides factual questions de novo on the record. *Jones v. Stahr*, 16 Neb. App. 596, 746 N.W.2d 394 (2008). When considering an appeal in an action for specific performance, an appellate court will resolve questions of fact and law independently of the trial court's conclusions. *Id.* In reviewing an equity action, when credible evidence is in conflict on material issues of fact, the court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Id.*

2. ANTICIPATORY REPUDIATION/EXERCISE OF OPTION

We first conclude that even if Krejci's March 19, 2004, letter to Pete and Rick constituted an anticipatory repudiation of the option, Rick is not entitled to specific performance because Rick's conduct was consistent with a rejection of the anticipatory repudiation and was also insufficient to properly exercise the option. Because Rick both attempted to exercise the option and failed to do so sufficiently, he is not entitled to specific performance.

The anticipatory breach of a contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evidencing an intention to refuse performance in the future. *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006). Anticipatory breach requires an unequivocal repudiation of the contract. *Id.* The question of whether there has been repudiation is a question of fact. *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002).

In the present case, after Pete breached the terms of the lease by failing to pay rent, Krejci sent a letter to both Pete and Rick in March 2004. In that letter, Krejci indicated that he was electing to terminate the lease and indicated that the termination "include[d] the option to purchase."

The lease and option agreement included provisions referring only to the lease, its term, and the rent due under the lease. The lease and option agreement also included a provision referring only to the option to purchase, the time and method of exercising the option, and the purchase price. The option provision of the lease and option agreement contains no language expressly making Pete's performance of the lease a condition to existence of the option granted to Pete and Rick, although it did provide that the option was available and was to be exercised at the end of "the five year term of [the] lease." The lease and option agreement also includes a provision concerning Krejci's rights in the event of default or breach of the lease by Pete; that

provision expressly provides that Krejci may terminate “[the] lease” but does not provide that Krejci may terminate the option.

As the district court found, the plain language of the lease and option agreement does not make Pete’s performance an express condition that must be satisfied before Rick’s right under the option provision accrues. We find no error in the district court’s conclusion that the lease and option agreement did not provide for termination of the option upon breach of the lease. As a result, we also find no error in the district court’s conclusion that Krejci’s March 2004 letter to Rick constituted a repudiation of the option because Krejci conveyed to Rick that the option provision was being terminated prior to the time for performance and indicated Krejci’s intention to refuse performance of the option at a future time.

In *Lang v. Todd*, 148 Neb. 726, 28 N.W.2d 434 (1947), the Nebraska Supreme Court established that when one party to a contract repudiates the contract prior to the time for performance, the other party has the election to either treat the repudiation as an abandonment or breach of contract or to treat the repudiation as inoperative, and await the time for performance and hold the repudiating party responsible for the consequences of nonperformance, including specific performance in a proper case. The Supreme Court noted, however, that if the nonrepudiating party treats the repudiation as inoperative and “keeps the contract alive, it lives for the benefit of both parties, and he remains subject to all of his obligations under [the contract].” *Id.* at 732, 28 N.W.2d at 438. The Supreme Court held that a nonrepudiating party has the right to seek legal redress for repudiation before the date for performance and that bringing an action upon repudiation constitutes an unequivocal acceptance of the repudiation. *Lang v. Todd, supra*.

In the present case, although we find no error in the district court’s conclusion that Krejci’s March 2004 letter informing Rick that Krejci was terminating the option prior to the time for performance constituted an anticipatory repudiation of the contract, we also find no error in the district court’s conclusion that Rick elected not to accept the repudiation and seek relief, but, instead, elected to treat the repudiation as inoperative. The lease and option agreement provided that Rick’s exercise of the option was to be by providing notice to Krejci more than 180 days prior to the end of the 5-year term of the lease. The lease and option agreement was entered into in January 2003. On May 22, 2007, Rick notified Krejci by written notice that he intended to exercise his option. We find no error in the district court’s conclusion that this notice demonstrates that Rick did not elect to treat the repudiation as an abandonment or breach of contract and that Rick treated the repudiation as inoperative.

Because Rick treated the repudiation as inoperative and because he elected to keep the option alive, he remained subject to all of his obligations under the option provision of the lease and option agreement. See *Lang v. Todd, supra*. Rick’s election to keep the contract alive means that it lived for the benefit of both parties. See *id.* Thus, the question becomes whether Rick demonstrated that he fulfilled his obligations under the option provision such that Krejci’s refusal to perform constituted a breach warranting specific performance.

A party who seeks specific performance must show not only that he has a valid legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part. *Russell v. Western Nebraska Rest Home, Inc.*, 180 Neb. 728, 144 N.W.2d 728 (1966). Specific performance of a contract by a court of equity is not generally

demandable or awarded as a matter of absolute legal right, but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. *Langemeier v. Urwiler Oil & Fertilizer*, 265 Neb. 827, 660 N.W.2d 487 (2003); *Russell v. Western Nebraska Rest Home, Inc.*, *supra*. It will not be granted where enforcement would be unjust and may be denied when the party seeking it has failed to perform. *Id.*

Options to purchase real estate are strictly construed and not extended beyond the express provisions thereof. See *State Securities Co. v. Daringer*, 206 Neb. 427, 293 N.W.2d 102 (1980). The exercise of an option to buy or sell real estate must be absolute, unambiguous, without condition or reservation, and in accordance with the offer made. *State Securities Co. v. Daringer*, *supra*; *Master Laboratories, Inc. v. Chestnut*, 154 Neb. 749, 49 N.W.2d 693 (1951); *Jones v. Stahr*, 16 Neb. App. 596, 746 N.W.2d 394 (2008). There must be no substantial variation between the offer and the acceptance or exercise of the option, because if such acceptance or exercise of the option is coupled with any condition that varies or adds to the offer, it is not an acceptance, but a counterproposition. See *Jones v. Stahr*, *supra*.

In this case, the effective option was set forth in the lease and option agreement executed in January 2003 and provided that the purchase price was \$5.7 million. In his notice of intent to exercise the option, Rick specifically informed Krejci that he intended to exercise the option dated November 22, 2002. In the lease and option agreement executed by the parties in November 2002, but never closed upon, the purchase price for exercise of the option was \$4.7 million. The effect of Rick's notice was to indicate that he was offering to exercise the option to purchase the property back from Krejci for \$4.7 million, an amount that was \$1 million less than the purchase price contained in the offer set forth in the option provision of the properly executed and closed upon lease and option agreement. Rick essentially made a counterproposition, rather than effectively providing notice of his intent to exercise the option on the terms set forth in the proper lease and option agreement. As such, Rick's notice did not constitute a proper acceptance of the offer.

Rick filed his complaint for specific performance on June 29, 2007, which was also more than 180 days prior to the end of the 5-year term of Pete's lease under the January 2003 lease and option agreement. As such, if Rick's complaint could be construed as providing appropriate notice of his intent to exercise the option, the filing of the complaint could conceivably effectuate his requirements for properly accepting the offer and exercising the option. Nonetheless, a review of the complaint indicates that Rick again referred only to the November 2002 lease and option agreement; indeed, Rick specifically alleged that he attempted to exercise the option set forth in the November 2002 lease and option agreement and attached a copy of the November 2002 lease and option agreement to the complaint. Even after Krejci's answer in August 2007 included specific allegations that the lease and option agreement that was effectively closed upon was dated January 2003, and denied the paragraph of Rick's complaint in which Rick alleged that he had provided notice of his intent to exercise the option, Rick took no action to amend his complaint or otherwise express an intent to exercise the option contained in the January 2003 lease and option agreement until seeking to file an amended complaint in December 2010, more than 3 years after litigation commenced.

Although Rick's option to purchase North Ranch back from Krejci survived the termination of Pete's lease, and although Krejci's March 2004 letter to Rick could be construed

as an anticipatory repudiation of the option, Rick has not demonstrated that he was entitled to specific performance. Rick elected to reject the repudiation and treat the option contract as continuing in effect when he sent his May 2007 notice to Krejci attempting to exercise his option. Rick, however, failed to properly exercise the option by accepting it upon the terms contained in the effective January 2003 lease and option agreement. Instead, Rick conveyed a counter-proposal that effectively offered to exercise the option for \$1 million less than provided for in the January 2003 lease and option agreement. Rick has not demonstrated that he ever properly exercised the option by providing notice of his intent to exercise the option on the terms set forth in the January 2003 lease and option agreement. As a result, he has not demonstrated that he exercised the option in accordance with the offer made, and the district court did not commit reversible error in refusing to grant specific performance. We find no merit to Rick's assignments of error to the contrary.

3. "MEND THE HOLD" DOCTRINE

Rick also asserts on appeal that the district court erred in not applying the "mend the hold" doctrine to prevent Krejci from asserting that Rick had not properly exercised the option. Rick asserts that Krejci's basis for not honoring the option prior to trial was based on his opinion that the option did not survive Pete's breach of the lease and that when he asserted after litigation commenced that there had not been a proper exercise of the option, such a defense was a material change in Krejci's basis for defending against the complaint for specific performance. We find no merit to these assertions.

In support of his assertion, Rick directed the district court to the Nebraska Supreme Court's decision in *Kucera v. Kavan*, 165 Neb. 131, 84 N.W.2d 207 (1957). In that case, the plaintiff sought specific performance of an option contract where the plaintiff had, pursuant to the terms of the option, tendered a downpayment to the defendant. The defendant rejected the downpayment and alleged to the plaintiff that no valid option existed because of a lack of consideration. The plaintiff brought suit for specific performance, which the trial court granted. On appeal, the defendant asserted, in addition to challenges to the sufficiency of the consideration, that the plaintiff's acceptance of the option was not in accord with the terms of the option agreement. The Supreme Court rejected that argument, holding that a person who has given a reason for his conduct and decision concerning a matter involved in controversy cannot, after litigation has begun, change his position and place or explain his conduct upon a different consideration. *Id.*

The "mend the hold" doctrine referenced by Rick and applied by the Supreme Court in *Kucera v. Kavan*, *supra*, is not applicable to the facts and circumstances of the present case. Unlike the factual circumstances evidenced in *Kucera v. Kavan*, where the defendant attempted to excuse rejection of the plaintiff's exercise of an option at some point during litigation for a reason that was materially different than the reason the defendant communicated to the plaintiff when rejecting the exercise of the option, in this case, Krejci provided no response to Rick's May 2007 notice of intent to exercise the option. Krejci did not respond to that notice by indicating that there was no option. Although his prior letter to Rick in March 2004 indicated that position, Krejci did not give that reason for his conduct in refusing to honor Rick's attempt to exercise the

option in 2007 because Krejci did not give Rick any reason for refusing the attempt to exercise the option.

When Rick filed his complaint seeking specific performance, Krejci answered both by denying the paragraph of the complaint in which Rick asserted that he had effectively exercised the option and by additionally asserting that there was no option. Krejci's answer was the first instance in our record of Krejci giving Rick a reason for refusing his attempt to exercise the option. We find no error in the district court's conclusion that Krejci did not provide Rick one explanation for his conduct prior to litigation and then change his position after litigation commenced. We find no merit to Rick's assignment of error.

4. REMAINING ASSERTIONS

In light of our resolution of the above issues, we find upon our de novo review that the district court did not err in refusing to grant specific performance. As a result, we need not specifically address Rick's challenges to additional findings by the district court that served as additional grounds for the court to deny specific performance.

V. CONCLUSION

We find no merit to Rick's assertions on appeal. In this case, he never provided effective notice to Krejci of his intent to exercise the option contained in the January 2003 lease and option agreement, and we hold the district court did not err in refusing to grant specific performance. We affirm.

AFFIRMED.