

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1151**

In re the Estate of: Terry Lee McCoy, Deceased.

**Filed June 13, 2022
Affirmed
Slieter, Judge**

Traverse County District Court
File No. 78-PR-20-198

Anton Cheskis, Huemoeller, Gontarek & Cheskis PLC, Prior Lake, Minnesota (for appellant Carrie McCoy)

Jason G. Lina, Fluegel, Anderson, McLaughlin, & Brutlag, Chartered, Morris, Minnesota (for respondent Ruth Drewicke)

Considered and decided by Slieter, Presiding Judge; Johnson, Judge; and Smith, John, Judge.*

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant-personal representative challenges the district court's order directing specific performance of a real estate sale based on a purchase agreement which had been executed by the decedent and respondent. Because decedent waived the time-is-of-the-essence clause and respondent timely sought specific performance, we affirm.

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

FACTS

Decedent Terry Lee McCoy owned real property near Wheaton (the property). On April 2, 2020, decedent executed a written purchase agreement to sell the property to respondent Ruth Anne Drewicke. The purchase agreement establishes a sale closing date of May 15, 2020 and provides for a 30-day extension of the closing date, to June 14, “[i]n the event Seller has not provided marketable title by the date of closing.” The purchase agreement also states that “[t]ime is of the essence.”

A preliminary title opinion revealed multiple defects rendering the title unmarketable, which decedent could not remedy by the May 15 closing date. Decedent remedied these defects by June 11, and a closing was scheduled for June 22.

On June 18, decedent was reported missing. His body was found on July 6, 2020, in a creek bed approximately 11 miles from the property. He was the victim of an apparent homicide.

Following decedent’s disappearance, Drewicke’s husband communicated with decedent’s daughter, appellant-personal representative Carrie McCoy, about maintenance of the property and options to close the sale. Over the next six months, McCoy expressed her intention “to honor [decedent’s] wishes by selling you guys his home” and represented that she was commencing a probate proceeding, which would facilitate closure of the sale. However, because McCoy had not started a probate proceeding, Drewicke petitioned the district court for appointment as special administrator on December 16. The district court granted Drewicke’s petition on December 21. McCoy subsequently petitioned for appointment as personal representative, and Drewicke withdrew her petition.

The district court appointed McCoy personal representative of decedent's estate on March 29, 2021. On May 28, Drewicke moved to compel performance of the purchase agreement by requiring McCoy to close the real estate sale to Drewicke, which the district court ordered. McCoy appeals.

DECISION

“Specific performance of a contract to convey real estate is a well-recognized remedy . . . governed by fixed principles.” *Boulevard Plaza Corp. v. Campbell*, 94 N.W.2d 273, 284 (Minn. 1959). “[I]f satisfactory proof is made that the contract is fair and was fairly made, specific performance should be decreed. But 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.” *Id.*

The parties agree that the motion for specific performance is “analogous to a motion for summary judgment” and that our review is, therefore, *de novo*. However, because we review an equitable order, our standard of review is not necessarily *de novo*. “Specific performance is an equitable remedy addressed to the sound discretion of the trial court.” *LaPanta v. Heidelberger*, 392 N.W.2d 254, 257 (Minn. App. 1986) (quoting *Flynn v. Sawyer*, 272 N.W.2d 904, 910 (Minn. 1978)). Equitable decisions of the district court warrant deference because it “is in the best position to analyze the facts and balance the relevant factors.” *Melrose Gates, LLC v. Chor Moua*, 875 N.W.2d 814, 819 (Minn. 2016). However, when the district court grants equitable relief as a matter of law without considering the equities of the particular situation, the less deferential *de novo* standard of review typically applied to summary judgment, may be appropriate. *Brown v. Lee*, 859

N.W.2d 836, 839-40 (Minn. App. 2015), *rev. denied* (Minn. May 19, 2015) (concluding that “a more deferential standard of review” was inapplicable because the district court, “without balancing the equities,” concluded that a claim failed “as a matter of law”); *see also* *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 861 (Minn. 2011) (“We review legal decisions on summary judgment under a de novo standard. That standard of review does not change simply because the claims at issue are for equitable relief.” (citation omitted)).

Though it appears the more deferential abuse-of-discretion standard of review applies because the district court considered the equities, we need not determine which standard applies here because McCoy’s argument fails under either standard. *See Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 278 n.2 (Minn. 2010) (“Here we need not decide the proper standard of review because we would reach the same result concerning equitable subrogation were we to review it under an abuse of discretion standard or solely under our normal review on appeal from summary judgment.”).

McCoy argues that the district court erred in ordering specific performance because “genuine issues of material fact exist regarding . . . whether the parties treated time [as] of the essence, and whether the limitation of remedies in the Purchase Agreement precludes Respondent’s remedy of specific performance.” The record belies McCoy’s argument.

“Waiver is ‘an intentional relinquishment of a known right’ that must ‘clearly be made to appear from the facts disclosed.’” *BOB Acres, LLC v. Schumacher Farms, LLC*, 797 N.W.2d 723, 727 (Minn. App. 2011) (quoting *Citizens Nat’l Bank of Madelia v. Mankato Implement, Inc.*, 441 N.W.2d 483, 487 (Minn. 1989)), *rev. granted* (Minn. June

14, 2011) *and appeal dismissed* (Minn. Aug. 12, 2011). “Ignoring a provision in a contract will constitute waiver if the party whom the provision favors continues to exercise his contract rights knowing that the condition is not met.” *Id.* at 727-28 (quotation omitted).

Similarly,

where the course of conduct of a party entitled to the performance of certain terms or conditions of a contract has led the other party to believe that such performance will not be required until it has become too late to perform, the person who has so conducted himself is barred from asserting the right he had.

Id. at 728 (quoting *Wolff v. McCrossan*, 210 N.W.2d 41, 44 (Minn. 1973)).

In *BOB Acres*, this court considered an appeal from a summary judgment denying specific performance of a real estate purchase agreement with a time-is-of-the-essence clause and a closing date which passed without completion of the sale. *Id.* at 727-28. We concluded that the district court erred in denying appellant specific performance because “[r]espondent’s actions throughout the process suggest[ed] that it waived . . . timely performance of the closing” and respondent showed “nothing to rebut the evidence that it anticipated closing” after the closing date passed. *Id.* at 728. The same is true here.

In support of her motion to compel sale of the property pursuant to the terms of the purchase agreement, Drewicke submitted affidavits from the title company’s closing officer, the real estate agent who drafted the purchase agreement and worked with decedent and Drewicke to facilitate the sale, and the manager of the apartment decedent was moving to. These affidavits state, respectively:

- “the closing[] was supposed to take place Monday, June 22”;

- decedent “continually worked . . . to ensure the closing could take place and never expressed any desire to cancel the closing” and “the closing would have taken place by June 22 had [decedent] not disappeared”; and
- decedent “expressed . . . his excitement about selling his home in Wheaton to the Drewickes” within days of his disappearance.

Additionally, after decedent’s funeral, McCoy informed Drewicke that she intended “to honor [decedent’s] wishes by selling you guys his home.”

McCoy opposed Drewicke’s motion for specific performance and submitted her affidavit stating that decedent was “frustrat[ed] with being ‘nickeled and dimed’ by Drewicke and her husband, and waived on whether he was going to follow through with the sale of the Property or not.” It is based on this “nickeled and dimed” statement that McCoy claims the district court erred by granting specific performance without an evidentiary hearing. We are unpersuaded.

The uncontradicted facts show that decedent agreed to a June 22 closing date, beyond the 30-day contract-extension and, but for his disappearance, would have closed on that day. Decedent, thus, waived the time-is-of-the-essence clause and relinquished any right to strict compliance with the closing date. *BOB Acres*, 797 N.W.2d at 727-28. The district court properly concluded that decedent waived the time-is-of-the-essence clause, and McCoy failed to show a genuine dispute of material facts.

McCoy’s argument that the contractual-limitation period bars Drewicke’s specific performance claim similarly fails. “[I]t has long been settled that a cause of action for breach of contract accrues on the breach of the terms of the contract.” *Levin v. C.O.M.B. Co.*, 441 N.W.2d 801, 803 (Minn. 1989). “A breach of contract is a failure, without legal

excuse, to perform any promise that forms the whole or part of the contract.” *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014). The purchase agreement requires that a cause of action for “specific performance . . . be commenced within six (6) months after *such right of action arises*.” (Emphasis added).

As we have already explained, the record supports the district court’s conclusion that decedent waived the time-is-of-the-essence clause. And McCoy consistently indicated that she would proceed to a closing and, at no time, explicitly indicated otherwise. On December 22, McCoy first implied that she would not close the sale when she informed Drewicke that Drewicke “would [have] had the house if [she] would [have] just waited for me to be done gr[ie]ving.” McCoy cannot now claim that the contractual-limitation period expired even though she led Drewicke to believe that she would complete the sale. *BOB Acres*, 979 N.W.2d at 729.

Affirmed.