IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

EMMA JEAN ELDREDGE,	)	
	)	BRADLEY CHANCERY
Plaintiff/Appellant	)	
	)	No. 03A01-9501-CH-00352
v.	)	
	)	
BILLY W. MONAGHAN and wife, KATHY MONAGHAN,	)	
	)	AFFIRMED
Defendants/Appellees	)	

Barrett T. Painter, Cleveland, For the Appellant

James F. Logan, Jr., Cleveland, For the Appellee

O P I N I O N

INMAN, Senior Judge

I

This action for damages and for rescission of a deed executed and delivered on March 7, 1990 was dismissed for failure by the plaintiff to carry the burden of proof. She appeals, insisting that the evidence preponderates against the judgment of dismissal. Our standard of review is *de novo* on the record accompanied by the presumption that the judgment is correct unless the evidence otherwise preponderates. TENN. R. APP. P. 13(d). We affirm for the reasons following.

II

The Anatole Subdivision, a planned upscale community of pricey houses, was developed by the plaintiff at substantial cost, which was funded by a commercial lender who became increasingly impatient with the slow pace at which the lots were selling and threatened foreclosure of its deed of trust.

Reacting to the threat, the plaintiff, through her son and attorney-in-fact,

resolved to stimulate public interest in her subdivision. She devised a marketing scheme whereby established builders might purchase a lot at a discount provided they constructed a house thereon. There were no takers among the ranks of established contractors, apparently owing to their perceived notion that the market would not support a surfeit of expensive houses.

Whereupon the defendants--hereafter Monaghan--were approached. They were experienced in the building trade, but not in commercial contracting, owing essentially to their limited finances. According to the plaintiff, Monaghan accepted a proposal whereby he agreed to purchase four lots at different times and construct a residence on each of them. For the first lot Monaghan would pay the full asking price and immediately commence construction of a house; when this house was sold or occupied, Monaghan would select a second lot, construct a house thereon and, upon its sale, would select a third lot, than a fourth. If Monaghan paid the full asking price for the first, third and fourth lots, the second lot would be conveyed free of consideration. Stated differently, buy three lots, then get one free.

According to Monaghan, he rejected this proposal because he could not arrange the requisite financing, owing to the upscale nature of the proposed construction. Here is what he said:

> . . . I told him there was just no way that we could do it with the subdivision regulations as they were and the size houses and stuff like that. I could not, in anyway, finance three lots or anything like that.
>
> So, at that point in time, Johnny made me an offer. If I would start immediately, that [sic] he would let me purchase two lots for the price of one. And he would deed me the second lot as soon as I showed that I was getting started and that I would have a house under construction. So at that point that's what we agreed upon.

The first lot was conveyed to Monaghan on November 15, 1989, and he completed construction of a residence in September 1990. This house was occupied by Monaghan and sold the following year.

Before the first house was completed, the second lot was conveyed to Monaghan in May 1990. Friction developed between the parties over matters

extraneous and Monaghan never began construction of a residence on the second lot. He was, in fact, ordered out of "my subdivision," apparently in a display of anger by the plaintiff's agent.

In the course of time, the subdivision prospered and all of the lots were sold, including the third and fourth lots allegedly contracted to Monaghan.

The plaintiff sought rescission of the conveyance to Monaghan for the second lot, alleging a partial failure of consideration since Monaghan had not constructed a residence on it in violation of his agreement. Monaghan denied any breach, insisting that the oral agreement provided simply that he would receive two lots for the price of one with the concomitant allegation that he immediately construct a residence on the first lot, which he did.

III

The Chancellor found that the agreement involved the acquisition of two lots by the defendants, one at full asking price with the second lot free of consideration. He further found that the plaintiff had failed to carry the burden of proving her entitlement to rescission of the deed for the second lot or for damages and dismissed the complaint. The issue is whether the evidence preponderates against the findings of the Chancellor.

IV

At the outset, we notice an anomaly in the plaintiff's theory of the case. She argues that the defendants failed to fulfill the remainder of the contract which *inter alia* required them . . . "to purchase and build a house on the third and fourth lots," notwithstanding that she sold these lots to a third party or parties, thereby making her theory of the contract partially impossible of performance. We also notice that the plaintiff acknowledged that proof of damages would be essentially speculative. Consequently, the case turns on the issue of whether the evidence supports an action for rescission or, alternatively, for damages commensurate with the value of the lot.

Militating against the plaintiff's case are these undisputed facts: (1) The second lot was conveyed in March 1990. The complaint seeking rescission was not filed until September 18, 1993 with no intervening demand being made on the defendants to construct a residence on it. No reason is shown for the delay of three and one-half years in seeking the equitable remedy. (2) The plaintiff made no demand for payment of additional money or that the defendants purchase the third and fourth lots. (3) The plaintiff sold the third and fourth lots to third parties.

The equitable remedy of rescission "should be exercised sparingly and only when the situation demands such," *James Cable Partners v. Jamestown,* 818 S.W.2d 338, 343 (Tenn. Ct. App. 1991) and is available only "under the most demanding circumstances." *Robinson v. Brooks,* 577 S.W.2d 207, 208 (Tenn. App. 1978). Even a proved partial failure of consideration is not a ground for rescission unless the failure defeats the purpose of the contract. *James Cable Partners,* 818 S.W.2d at 345. Applying these principles, it is clear to us that the evidence neither justifies a rescission of the deed to the second lot, nor entitles the plaintiff to recover its value. But an overriding consideration is to be found in the fact that the Chancellor accepted the defendants' version of the oral contract, which was, simply stated, that if construction began immediately, "he would let me purchase two lots for the price of one." To a dispositive extent, the case turned on the credibility of the parties. The Chancellor accredited the defendants' version of the oral agreement, which the circumstances tend to support, and there the matter ends, since he is the best judge of this critical element. *Duncan v. Duncan*, 686 S.W.2d 568, 571 (Tenn. App. 1984).

The judgment is affirmed at the cost of the appellant.

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William H. Inman, Senior Judge

Concur:

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Herschel P. Franks, Judge

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Don T. McMurray, Judge