

DELOY WINNINGHAM,)
)
 Plaintiff/Appellant,)
)
 VS.)
)
 MAYFIELD BROWN and)
 E. R. MCLERRAN,)
)
 Defendants/Appellees.)

Appeal No.
01-A-01-9509-CH-00421

Clay Chancery
No. 3137

FILED

June 14, 1996

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF CLAY COUNTY
AT CELINA, TENNESSEE

THE HONORABLE JOHN MADDUX, JUDGE

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
LEWIS, J.

OPINION

This is an action for specific performance and/or damages arising from an alleged fraudulent inducement to contract. The lower court dismissed the plaintiff's claim. We affirm.

I.

The plaintiff entered into an agreement to purchase a lot in Celina running along Highway 53 for approximately 300 feet. The sellers actually did not own the subject property but had an option to purchase it from the Bank of Celina. After the parties signed the agreement, the sellers notified the buyer that they could not sell him the entire 300 feet of frontage because they needed a forty foot strip along the edge of the property for access to other property to the rear. The buyer alleged that the sellers orally advised him that they would give him an easement over the forty foot strip and that they would deed the strip to the city of Celina for a street. The buyer orally agreed to these terms.

On the date set for closing, the sellers obtained a deed from the Bank of Celina and conveyed a lot fronting 260 feet on Highway 53 to the buyer. Approximately two months later the sellers conveyed to the buyer an easement over the remaining forty foot strip. The forty foot strip was not conveyed to the city of Celina and the city did not build a street on it.

The buyer sued the sellers, alleging only that the sellers failed to convey the forty foot strip of land to the city. The complaint sought a finding that the contract had been orally amended but also sought an order of specific performance of the

original agreement. In the alternative the buyer asked for the damages resulting from the breach.

At the trial the buyer introduced the issue of the sellers' representations that they owned the land when they only had an option to purchase it. Thus, the issue decided by the chancellor was whether the sellers were guilty of fraudulent representations that entitled the buyer to specific performance of the original agreement or damages for the breach of the amended agreement. The chancellor found that the sellers did not make any fraudulent representations to the buyer; and that the buyer did not justifiably rely on any representations made by the sellers.

I.

The first issue raised on appeal concerns the fact that the sellers did not own the property in question when they agreed to sell it to the buyer. We are at a loss, however, to see how the buyer can gain anything by making this argument. The basis for an action of fraud and deceit is a misrepresentation of the defendant and some damage flowing from a justifiable reliance on the misrepresentation. *Holt v. American Progressive Life Ins. Co.*, 731 S.W.2d 923 (Tenn. App. 1987).

In this case there is no proof whatsoever of any damage caused by the buyer's reliance on the sellers' representation that they owned the property in question when they only had an option on it. The buyer got the exact property he had been promised. (He did not get the road built on the easement, but we will deal with that aspect of the case in the next section of this opinion.) Therefore, we are of the opinion that this issue is completely without merit.

II.

In the light most favorable to him, the plaintiff's claim could be stated in these terms: In order to induce him to accept less than the original contract called for, the sellers promised the buyer that they would convey the forty foot strip to the city and that the city would construct a street on it; the promise was made without any present intention of actually conveying the land or with reckless disregard of what the city would actually do; and the failure to carry out the promise resulted in damage to the buyer.

The chancellor made two specific findings with respect to this claim. He found that "there was no misrepresentation made regarding the forty (40) foot easement to the plaintiff," and that "the plaintiff . . . did not have a reasonable basis on which to rely on any misrepresentation that is alleged in this case." The chancellor further found that the buyer was not a credible witness and that he was so anxious to start his business on the property that he voluntarily gave up the forty foot strip of land.

The credibility of the witnesses is a matter for the trial court's determination, and is binding on the reviewing courts unless other real evidence compels a contrary conclusion. *State ex rel. Balsinger v. Town of Madisonville*, 222 Tenn. 272, 435 S.W.2d 803 (1968). Other findings of fact in a non-jury case are presumed to be correct and may be disregarded by this court only if the evidence preponderates against them. Rule 13 (d), Tenn. R. App. Proc. We have reviewed the record and conclude that the evidence does not preponderate against the chancellor's findings. Thus, the key elements of the buyer's claim have not been established by the proof.

In reviewing the record we also find a complete failure of proof as to the buyer's damages. In breach of contract cases we say that the parties are entitled to the benefit of the bargain. See 22 Am. Jur. 2d, *Damages* § 45. Stated differently, the plaintiff is entitled to be put in the same position he would have been in had the contract been performed. *Action Ads, Inc. v. William B. Tanner Co.*, 592 S.W.2d 572 (Tenn. App. 1979).

The buyer alleged that the sellers promised to convey the easement to the city and that the city had agreed to put a road on it. Thus, the measure of the buyer's damages would have been the value of the property with the road constructed less the value of the property without the road. The record does not contain any proof of the value of the property under either condition.

III.

The buyer's claim that he is entitled to specific performance of the original agreement may be disposed of summarily. Specific performance is a discretionary remedy and is available where the remedy at law is inadequate. *New River Lumber Co. v. Tennessee Ry. Co.*, 136 Tenn. 661, 191 S.W. 334 (1916). We think the buyer had an adequate remedy at law. In addition, to order specific performance of an agreement the buyer admits was no longer the agreement of the parties, would violate all the principles of equity.

The judgment of the court below is affirmed and the cause is remanded to the Chancery Court of Clay County. Tax the costs on appeal to the appellant.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

SAMUEL L. LEWIS, JUDGE

