



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

July 9, 2014

To:

Hon. Robert J. Wirtz
Circuit Court Judge
Fond du Lac County Courthouse
160 South Macy Street
Fond du Lac, WI 54935

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
160 South Macy Street
Fond du Lac, WI 54935

Alyssa Ann Johnson
Blommer Peterman, S.C.
165 Bishops Way
Brookfield, WI 53005

Anthony L. O'Malley
Zacherl, O'Malley & Endejan, S.C.
P.O. Box 1424
Fond du Lac, WI 54936-1424

Timothy H. Posnanski
Whyte Hirschboeck Dudek, S.C.
555 E. Wells Street, Ste. 1900
Milwaukee, WI 53202-3837

Carol Schneider
1505 Mason Street
New Holstein, WI 53061

You are hereby notified that the Court has entered the following opinion and order:

2013AP2170

Bank of America v. Carol Schneider and Jeffrey C. Schneider
(L.C. #2012CV934)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Jeffrey Schneider appeals from a foreclosure judgment. He argues he should have been able to rescind the mortgage or reform the land description based on fraud in the inducement. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm the

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

judgment because a prior stipulation prevents Schneider from challenging the land description in the mortgage.

In 2007, Jeffrey and Carol Schneider signed a promissory note to Universal Financial Group, Inc. and an accompanying mortgage. In 2010, an action was commenced to compel the Schneiders to execute a duplicate original of the mortgage because the original was not recorded, could not be found, and a mortgage could not be recorded unless it contained original signatures. In their first answer in that suit, the Schneiders asserted as an affirmative defense that the mortgage was subject to rescission or reformation due to misrepresentation in the inducement. They explained that they had executed the mortgage without a legal description of the property it burdened but that the lender's representative indicated the mortgage would only cover the Schneiders' homestead and a five-acre area around it. Acknowledging that the existing copy of the mortgage failed to include a legal description of the property, an amended complaint was filed seeking equitable reformation to include in the mortgage the legal description of the entirety of the Schneiders' eighty-acre farm. In their amended answer, the Schneiders did not repeat the affirmative defense of misrepresentation but asserted lack of standing, estoppel by laches, failure to mitigate damages, failure to include all necessary parties, unclean hands, unconscionability, and the violations of federal statutes regulating mortgages and real estate transactions. Ultimately the action was dismissed without prejudice on the parties' stipulation which recited that the title company had recorded a Lost Instrument Affidavit,² "the validity of which is not challenged by the parties and which resolves the reformation and specific performance claims

² The Lost Instrument Affidavit attached a copy of the original mortgage, including exhibit A to the mortgage—the legal description of the entirety of the Schneiders' eighty-acre farm.

that were the subject of this dispute.” The stipulation also provides, “The parties wish to preserve all other claims and defenses they may have arising under the promissory note, mortgage, and other contractual documents between and among the parties, their predecessors in interest, affiliates, agents, principals, owners, successors, and assigns.”

The mortgage was assigned to Bank of America (BOA) and in December 2012, BOA commenced the foreclosure action based on default in payment since September 2008. In his answer Jeffrey³ denied that the legal description set out in the complaint accurately described the mortgaged premises. He also asserted that the mortgage was subject to rescission or reformation based on misrepresentation in fact, misrepresentation in the inducement, and unconscionability. In opposition to BOA’s motion for summary judgment, Jeffrey argued that the Schneiders had never intended to mortgage their entire farm. The circuit court determined that the prior stipulation was unambiguous, that by its terms, the parties agreed that the mortgage included a legal description of the entire farm, and that the defenses preserved by the stipulation were those asserted as affirmative defenses in the amended answer in the prior case. Summary judgment was granted on the determination that Jeffrey’s claims concerning misrepresentation as to the legal description of mortgaged property were waived.

We review a grant of summary judgment independently, using the same methodology as the circuit court. *Hardy v. Hoeffler*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Here the import and meaning of the stipulation in the previous action is at issue. Jeffrey argues the stipulation is ambiguous. The construction of a stipulation is a question of law which we

³ Jeffrey and Carol divorced in February 2013 and she did not participate as a party to the action.

review de novo. *Duhamel v. Duhamel*, 154 Wis. 2d 258, 262, 453 N.W.2d 149 (Ct. App. 1989). A stipulation is construed like a contract and the goal is to give effect to the intention of the parties. *Stone v. Acuity*, 2008 WI 30, ¶67, 308 Wis. 2d 558, 747 N.W.2d 149. Whether ambiguity exists in a contract is also a question of law which we decide de novo. *Spencer v. Spencer*, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987). “A document is ambiguous when its words and phrases are reasonably susceptible to more than one construction.” *Id.*

We conclude that the stipulation is unambiguous.⁴ It recites that no party challenges the validity of the Lost Instrument Affidavit that was recorded and included the entire farm in the legal description. By his willingness to let the Lost Instrument Affidavit go unchallenged and form a basis to resolve the prior lawsuit which asked for reformation of the mortgage, Jeffrey waived his right to challenge the legal description in the Lost Instrument Affidavit. He cannot now challenge the legal description having once agreed to the validity of the recorded mortgage.

The stipulation also recites that only claims “unrelated to the specific performance and reformation claims asserted by the Plaintiff in this action and arising under the promissory note, mortgage, or other contractual documents between and among the parties ... are preserved.” In this action Jeffrey asserts claims related to reformation of the property’s legal description. He cannot do so because only unrelated claims were preserved by the stipulation. Although dismissal without prejudice does not bar another action for the same cause, *Jason B. v. State*,

⁴ We need not consider Jeffrey’s discussion of extrinsic evidence of the parties’ intent. Absent ambiguity, the determination of “the parties’ intent ends with the four corners of the contract, without consideration of extrinsic evidence.” *Huml v. Vlazny*, 2006 WI 87, ¶52, 293 Wis. 2d 169, 716 N.W.2d 807.

176 Wis. 2d 400, 406, 500 N.W.2d 384 (Ct. App. 1993),⁵ it is the language of the stipulation that controls here and we need not consider the effect of the dismissal without prejudice.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

⁵ In his reply brief Jeffrey argues that his claims are not waived because the prior lawsuit was dismissed without prejudice and he cites to and quotes from *Theis v. Short*, No. 2004AP2428, unpublished slip op. (WI App July 28, 2005). It is a violation of WIS STAT. RULE 809.23(3) to cite and quote from an unpublished opinion of the court of appeals. Violations of the noncitation rule will not be tolerated and a \$50 sanction against counsel is imposed. See *Tamminen v. Aetna Cas. & Sur. Co.*, 109 Wis. 2d 536, 563, 327 N.W.2d 55 (1982). Counsel shall submit payment of the \$50 penalty to the clerk of this court within ten days of the date of this opinion and order.