COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 5, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1176-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

DAVID LANG
and THOMAS LANG,

Plaintiffs-Respondents,

v.

DIANNE J. SEIBERT,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Dianne Seibert appeals a summary judgment for specific performance of an offer to purchase contract she entered into with David and Thomas Lang.[1] Seibert argues that (1) disputed issues of material

[1] This is an expedited appeal under RULE 809.17, STATS.

fact preclude summary judgment and (2) the trial court erroneously permitted the Langs to amend their complaint. We affirm the judgment.[2]

Dianne Seibert and Bernard Rasine, Jr., owned the Dans-Bar Resort in Couderay, Wisconsin and listed it for sale with Northern States Realty. On July 31, 1994, Thomas and David Lang submitted an offer to purchase the resort for $345,000, which was not accepted. On August 4, David Lang signed an amended offer to purchase, mislabeled "counter-offer," for $375,000, contingent on obtaining financing within forty-five days. Thomas Lang did not sign the amended offer. Seibert signed an acceptance of the offer, but Rasine did not.

On August 11, 1994, both Langs signed a third offer to purchase, also mislabeled "counter-offer," which was accepted by both Seibert and Rasine on August 16. This agreement also provided the offer was contingent upon the buyers' obtaining financing within forty-five days of acceptance of the offer. Within the forty-five-day period, on September 21, 1994, the Langs signed a written waiver of the financing contingency.

Also on September 19 or 21, 1994, Seibert advised her agent that she was no longer willing to proceed with the transaction. She believed that the forty-

[2] In her statement of issues, Seibert includes a third issue, whether the trial court erroneously dismissed her claim for unjust enrichment. Because this issue is neither argued nor briefed, we deem it abandoned. ***Reiman Assocs., Inc. v. R/A Adver., Inc.,*** 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981).

five-day financing contingency had expired on September 18, based upon the August 4 contract. As a result, she rescinded her acceptance and the transaction did not close.

The Langs commenced this action for specific performance of the August 4 contract. Ten months later they filed an amended complaint for specific performance of the August 16 contract and moved for summary judgment. The trial court determined that the statute of frauds rendered the August 4 contract unenforceable. Based on the August 16 contract, the trial court entered summary judgment for specific performance in favor of the Langs. Seibert appeals.

When reviewing summary judgment, we apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.,*** 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). Summary judgment is appropriate when material facts are undisputed and when inferences that may be reasonably drawn from the facts are not doubtful and lead only to one conclusion. ***Radlein v. Industrial Fire & Cas. Ins. Co.,*** 117 Wis.2d 605, 609, 345 N.W.2d 874, 877 (1984).

Seibert argues that material factual disputes bar the trial court from entering a judgment for specific performance. Seibert argues that when the August 4 and the August 16 contract are read together, an ambiguity is created with respect to the date by which the financing contingency is to be fulfilled and, therefore, a fact issue as to the parties' intent is raised. We disagree.

If a contract is plain and unambiguous, it must be enforced as it is written. ***Goossen v. Estate of Standaert,*** 189 Wis.2d 237, 247, 525 N.W.2d 314, 318 (1994). The cornerstone of contract interpretation is to ascertain the intentions of the parties as expressed by the contract language. ***State ex rel. Journal/Sentinel, Inc. v. Pleva,*** 155 Wis.2d 704, 711, 456 N.W.2d 359, 362 (1990). If the contract's language is plain and unambiguous, we construe it without consideration of parties' construction of it. ***Kreinz,*** 138 Wis.2d at 216, 406 N.W.2d at 169.

Absent ambiguity requiring resort to extrinsic evidence, the construction of a contract is a question of law. ***Lakeshore Commercial Fin.***

Corp. v. Drobac, 107 Wis.2d 445, 452, 319 N.W.2d 839, 843 (1982). Whether a contract is ambiguous is a question of law decided independently on appeal. *See* ***Lamb v. Manning,*** 145 Wis.2d 619, 627, 427 N.W.2d 437, 441 (Ct. App. 1988). A contract is ambiguous when it is susceptible to more than one reasonable interpretation. ***Wilke v. First Fed'l S&L Ass'n,*** 108 Wis.2d 650, 654, 323 N.W.2d 179, 181 (Ct. App. 1982). Summary judgment construing a contract is appropriate only when the contract is unambiguous or when the parties' intent can be established by undisputed facts that allow but one inference. ***Jones v. Sears Roebuck & Co.,*** 80 Wis.2d 321, 325, 259 N.W.2d 70, 71 (1977).

Seibert does not contend that the August 16 contract, standing alone, is ambiguous. Rather, she contends that it should be read with the August 4 contract, thereby creating an ambiguity as to the date that the financing contingency must be

satisfied. We disagree. The August 16 contract makes no reference to the August 4 offer and makes no suggestion that it should be read in conjunction with the previous August 4 offer. Because the August 16 contract is unambiguous, resort to extrinsic evidence as to the parties' intent is unnecessary. *See* ***Lakeshore***, 107 Wis.2d at 452, 319 N.W.2d at 843. The Langs were entitled to summary judgment of specific performance based upon the unambiguous language of the August 16 contract.

Seibert also argues that the August 4 contract was binding, and that the August 16 contract was merely meant to serve as a file copy and not create a separate contract. She argues that the lack of Rasine and Thomas Lang's signatures were of no consequence because she and David Lang testified that they had the power to bind all parties to the agreement. Seibert's argument suggests that the trial court erroneously concluded that the August 4 contract was unenforceable for failing to comply with the statute of fraud's requirement that the document must be "signed by or on behalf of all parties." *See* § 706.02(1)(e), STATS. We disagree. It is undisputed that at the time of the August 4 offer, Rasine was a titleholder to the property. It is also undisputed that Lang possessed no written power of attorney authorizing her to act on behalf of Rasine. The August 4 offer does not indicate that Seibert or Lang signed on behalf of another. *See* § 706.03(1m), STATS.[3] Because the August 4 document was not signed by or on behalf of all parties to the transaction, it is not a valid conveyance and fails to create any ambiguity with respect to the subsequent document.

Seibert also argues that a genuine issue of fact remains whether there was a mutual mistake between the parties regarding the validity of the August 4 contract. We disagree. The lack of a signature does not constitute a mutual mistake of fact or law but rather a formal defect under the statute of frauds. ***Security Pacific Nat'l Bank v. Ginkowski,*** 140 Wis.2d 332, 336, 410 N.W.2d 589, 591 (Ct. App. 1987). Because the buyers waived their financing

[3] Section 706.03(1m), STATS., provides:

> A conveyance signed by one purporting to act as agent for another shall be ineffective as against the purported principal unless such agent was expressly authorized, and unless the authorizing principal is identified as such in the conveyance or in the form of signature or acknowledgment. The burden of proving the authority of any such agent shall be upon the person asserting the same.

contingency before the date of its expiration in the August 16 contract, a binding agreement was created. *See* ***C.G. Schmidt, Inc. v. Tiedke,*** 181 Wis.2d 316, 321, 510 N.W.2d 756, 757 (Ct. App. 1993). The trial court properly granted the remedy of specific performance. ***Anderson v. Onsager,*** 155 Wis.2d 504, 512-13, 455 N.W.2d 885, 889 (Ct. App. 1990).

Next, Seibert argues that the trial court erroneously permitted the Langs to amend their complaint. The Langs' original complaint alleged breach of the August 4 contract, but the Langs filed an amended complaint alleging breach of the August 16 contract. The trial court granted the Langs' motion to amend their complaint finding that the amendment would not prejudice Seibert. It found that Seibert had been aware that the date of the contract was an issue since discovery proceedings six months before.

After six months have elapsed from the date of filing the action, a party may amend its pleading with written consent of the adverse party or by leave of the court. Section 802.09(1), STATS. Such leave shall be freely given at any stage when justice so requires. ***Id.***

A motion to amend pleadings is addressed to trial court discretion. *See* ***Brookfield v. Milwaukee Metro. Sewerage Dist.,*** 171 Wis.2d 400, 420-21, 491 N.W.2d 484, 491-93 (1992). We uphold the trial court's exercise of discretion if the record shows a process of reasoning dependent on facts of record and a conclusion based on a logical rationale founded upon proper legal standards. ***State v. Shanks,*** 152 Wis.2d 284, 289, 448 N.W.2d 264, 266 (Ct. App. 1989). Seibert argues that she was given no opportunity to respond to the amended pleadings. She does not, however, assert what response she would have made, nor how the lack of opportunity to make one prejudiced her. We conclude the record supports the trial court's exercise of discretion.

Finally, in her reply brief, Seibert makes three arguments. First, she contends that the Langs did not raise the statute of frauds in their pleadings or memorandum of law in support of summary judgment, so the issue was not properly before the trial court, and therefore not properly before the court of appeals. We disagree. The Langs argued in their legal memorandum that it was undisputed that the only offer signed by all four parties was the August 16 document. Although the issue was not expressly raised in the pleadings, the amended complaint, seeking relief on the basis of a signed August 16 offer, was

sufficient to put the issue before the court. We are satisfied that the Langs did not waive their statute of frauds argument.

Second, Seibert argues the defense of ratification; that she signed the August 4 document on behalf of Rasine and the August 16 offer was merely a subsequent ratification that relates back to the time of the original transaction and does not change the intent to the parties. We disagree. Seibert offers no proof that on August 4 she was acting on behalf of Rasine. "[T]here can be no ratification of a contract which one intends for another, even though he believes that he is authorized to make it on behalf of the other, unless the intent is manifested." ***In re Estate of Alexander,*** 75 Wis.2d 168, 179, 248 N.W.2d 475, 481 (1977) (citation omitted). Absent proof of impersonation or a manifestation of Seibert's intent to act upon the behalf of another, Seibert's argument fails.

Third, Seibert argues that the Langs failed to join Rasine, an indispensable party. Seibert does not dispute the Langs' assertion that in December 1994, Seibert bought out Rasine's interest. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.,*** 90 Wis.2d 97, 108-09, 279 N.W.2d 493, 499 (Ct. App. 1979) (Party may not complain if unrefuted proposition is taken as confessed). Seibert advances no facts to the contrary. As a result, we do not reverse on the basis of this argument.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.