COURT OF APPEALS
DECISION
DATED AND RELEASED

August 6, 1997

NOTICE

No. 97-0845-FT

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

CHARLES O. SCHRAUTH,

PLAINTIFF-RESPONDENT,

v.

THOMAS G. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

BROWN, J. Thomas G. Peterson appeals a judgment awarding Charles O. Schrauth $3200 plus costs for mortgage payments Peterson failed to make on a home owned by the two of them as tenants in common. Peterson mainly argues that Schrauth unambiguously relinquished his right of reimbursement by language in a contract to purchase Peterson's share of the property. Also, Peterson claims he is not liable for the missed payments because

Schrauth breached an unwritten contract awarding each a tenancy in common in return for shared mortgage payments or, alternatively, that Schrauth failed to mitigate his damages. We disagree and affirm the judgment of the trial court.

In May 1995, Peterson and Schrauth purchased a home together, owning the property as tenants in common. They verbally agreed that each would contribute one-half of the monthly mortgage payment and moved into the house in July. However, in September 1995, Peterson voluntarily moved out due to a change in his relationship with Schrauth. After failing to gain entrance to the house in late September, Peterson stopped making his share of the mortgage payments and did not contribute his one-half share of the mortgage payments during the four-month period from November 1995 to February 1996. In January 1996, Schrauth and a third party offered to purchase Peterson's ownership share of the property. Peterson rejected their offer and made a counteroffer which was accepted.

We begin by noting that the trial court found that Peterson and Schrauth entered into a valid oral contract making each liable for one-half of the mortgage payments. Peterson first argues that Schrauth breached this contract by denying Peterson access to the property, and, therefore, Peterson was under no obligation to make his one-half share of the mortgage payments.

The trial court did not speak directly on this issue.[1] However, because the trial court ultimately found Peterson liable for one-half of the mortgage payments, we deem the trial court to have implicitly found no breach of

[1] Our review of the record reveals that although evidence was entered as to whether Schrauth breached the oral contract, the trial court was never asked to make a ruling on this issue.

the oral contract. Whether Schrauth did breach the contract is a question of fact, and we will only overturn the trial court's findings of fact if they are clearly erroneous. *See* § 805.17(2), STATS.

The record contains ample evidence to support a finding that Schrauth did not breach the oral contract. For example, there is evidence that Peterson left voluntarily, the locks were not changed, and Peterson had continuous access to the house. Accordingly, we affirm the trial court's finding on this issue.

Peterson also argues that in their final sales contract Schrauth unambiguously released his right of reimbursement for one-half of the mortgage payments for the four-month period from November 1995 to February 1996. We deem this to be an argument that the final sales contract was an accord and satisfaction.

A contract of accord and satisfaction discharges the disputed claim and constitutes a defense against a creditor's claim that money paid did not satisfy a debt. *See* ***Van Sistine v. Tollard***, 95 Wis.2d 678, 681, 291 N.W.2d 636, 638 (Ct. App. 1980). For a contract of accord and satisfaction to arise the obligor must offer performance in satisfaction of a disputed claim, the creditor must understand that full satisfaction is intended, and the creditor must accept the offer. *See* ***id.*** at 681-82, 291 N.W.2d at 638.

According to Peterson, when Schrauth dropped his claim for reimbursement in return for Peterson's consent to sell, Schrauth unambiguously relinquished his right to reimbursement and intended the sales contract to fully

satisfy his claim.[2] We disagree. Nothing in the final sales contract evinces Schrauth's intent that the buy out be in full satisfaction of his claim for reimbursement. The contract merely reflects the fact that Schrauth dropped his request to be credited for past mortgage payments; it states nothing else. In the absence of any language to the contrary, we can only assume that by agreeing to drop his request, Schrauth decided not to use the sales contract as a vehicle to resolve his claim for reimbursement.

Finally, Peterson argues that Schrauth should have mitigated his damages. The trial court held that mitigation was irrelevant here because it only applies to landlord-tenant situations, not to sales contracts. We agree with Peterson that the trial court was incorrect in this regard. In any breach of contract situation, an injured party has a duty to mitigate damages, that is, to use reasonable means under the circumstances to avoid or minimize the damages. *See* ***Kuhlman, Inc. v. G. Heileman Brewing Co.***, 83 Wis.2d 749, 752, 266 N.W.2d 382, 384 (1978). An injured party cannot recover any item of damage which could have been avoided. *See* ***id.*** But the burden of proof is on the delinquent party to show that the injured party could have mitigated damages. See ***id.*** If the effort, risk, sacrifice or expense which the injured person must incur to avoid or minimize the loss or injury is such that a reasonable person under the circumstances might decline to incur it, the injured party's failure to act will not bar recovery of full damages. *See* ***id.***

[2] Schrauth's initial offer contained language crediting him for Peterson's one-half of the mortgage. Peterson's counteroffer, which Schrauth accepted, deleted this language without comment.

Here, Peterson's sole claim is that Schrauth should have demanded rent payments from a person he allowed to reside free of charge at the residence. We are aware of no law, and Peterson has failed to cite to any, that requires homeowners to charge rent to those they invite to stay at their house. Peterson has not proven that a reasonable person in Schrauth's situation would pursue rent from a person he invited to stay at his home. Peterson has failed to meet his burden regarding mitigation.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.