COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3394

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

ALVIN M. NORTON,

PLAINTIFF-RESPONDENT,

V.

THOMAS W. HOILIEN AND LAUREL S. HOILIEN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Frankel[1], JJ.

[1] Circuit Judge Mark A. Frankel is sitting by special assignment pursuant to the Judicial Exchange Program.

PER CURIAM. Thomas W. Hoilien and Laurel S. Hoilien[2] appeal from a judgment awarding respondent Alvin M. Norton specific performance of a contract to convey approximately six acres of farmland. For the reasons stated below, we affirm the judgment of the circuit court.

On May 8, 1996, Norton formally offered to purchase from Thomas and Laurel approximately six acres of farmland "to be surveyed." On May 14, 1996, Thomas and Laurel accepted Norton's offer. The contract provided that the transaction was to close on July 15, 1996, and that "time is of the essence as to ... date of closing...." Sometime before the July 15 closing date, Norton began to farm the land.

The agreed-upon survey was not completed before July 15, and the closing did not take place. However, Norton continued to farm the land. In early October 1996, Thomas informed Norton that Thomas no longer wanted to sell the property. On October 19, the survey was completed, and on October 23 Thomas was informed that the deed had been prepared and was ready for his signature. Thomas refused to sign, and on January 27, 1997, Norton brought this action for specific performance. On or about July 11, 1997, Laurel transferred her interest in the property to Thomas. The circuit court granted specific performance. Thomas and Laurel appeal.

Specific performance is an equitable remedy, and a grant of specific performance is within the discretion of the circuit court. ***Depies-Heus Oil Co. v. Sielaff,*** 246 Wis. 36, 41, 16 N.W. 2d 386, 388 (1944). We review discretionary

[2] Thomas and Laurel are divorced, but, at the time of the events underlying this action, continued in the farming business together.

equitable decisions to determine whether the circuit court misused its discretion. ***Production Credit Ass'n v. Jacobson,*** 131 Wis. 2d 550, 555, 388 N.W. 2d 655, 657 (Ct. App. 1986). A discretionary decision will be reviewed to determine whether it is the "product of a rational mental process by which the facts of record and the law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981).

Thomas and Laurel argue that the circuit court erred because they never waived the "time is of the essence" clause, and failure to close by the date specified in the contract makes the contract void. Norton argues that Thomas and Laurel's suit is frivolous and that he should be awarded costs.

Waiver by Thomas

In our analysis, Thomas waived the issue of the closing date by his course of conduct. Specifically, it is undisputed that Thomas permitted Norton to farm the land before and after the July 15, 1996, closing date. At deposition and again at trial Thomas testified that he was in no rush to get the money, and that he had decided not to sell the land to Norton because he had changed his mind, not because the closing had not taken place by July 15. Further, it is undisputed that until early October, Norton remained under the impression that he was to purchase the land—Thomas testified that he did not communicate his change of heart to Norton until early October. Being without notice to the contrary, Norton continued to farm the land and with the plan to obtain a survey, which he finally received on October 19, 1996.

Under Wisconsin law, Thomas's actions constitute waiver of the "time is of the essence" clause. In ***Gonis v. New York Life Ins.***, 70 Wis. 2d 950,

955, 236 N.W. 2d 273, 276 (1975), the supreme court stated that whether time is actually of the essence to a contract is to be determined by examining not only the terms of the contract but also the acts of the parties. Similarly, in ***Clear View Estates v. Veitch***, 67 Wis. 2d 372, 378, 227 N.W. 2d 84, 88 (1975), the court held that timely performance may be waived by words or action. This accords with the general principle that the parties' course of conduct can alter the terms of a written contract. *See, e.g.,* ***Kornacki v. Norton Performance Plastics*****,** 956 F.2d 129, 132 (7th Cir. 1992) (construing Wisconsin law).

Thomas argues that he cannot have waived his rights, because waiver requires the voluntary relinquishment of a known right and he did not understand that his course of conduct could alter the contract. ***Consumer's Co-op v. Olsen***, 142 Wis. 2d 465, 492, 419 N.W. 2d 211, 221 (1988). We reject this argument. It has long been the law of this state that although a right cannot be waived without intention, intent may appear conclusively as a legal result regardless of whether actual or express intent to waive exists, or even actual or undisclosed intent not to waive. ***Somers v. Germania Nat'l Bank of Milwaukee***, 152 Wis. 210, 219-20,138 N.W. 713, 717 (1913) (internal citation omitted). *Accord*, ***Consumer's Coop***, 142 Wis. 2d at 492, 419 N.W. 2d at 221 (intent to waive may be inferred as a matter of law from the conduct of the parties).

Waiver by Laurel

Laurel argues that she never waived the "time is of the essence" clause. Underpinning this argument is Laurel's contention that she had an independent relationship with Norton, so that she was required to make an independent act in order to effect waiver. We reject Laurel's argument for two reasons. First, Laurel's actions did not differ in any significant manner from

Thomas's. Like Thomas, Laurel knew Norton was on the land, knew that the contract did not close on July 15, and took no action indicating that the passage of the closing date was fatal. Therefore, like Thomas, she waived the "time is of the essence" clause by her course of conduct. Second, Laurel acknowledges ceding her interest in the property to Thomas on or about July 11, 1997. Thus, her interest in the land has been extinguished and she has no interest left to argue. ***City of Madison v. Town of Fitchburg***, 112 Wis. 2d 224, 228, 332 N.W. 2d 782, 784 (1983) (to confer standing, party must have a stake in the outcome of the litigation).

Void Contract

Appellants last argue that failure to close by the set date voids the contract. We reject this argument also. As discussed above, Thomas's own actions modified the contract as to the "time is of the essence" clause. He is therefore estopped from coming to the court and arguing that the contract is void. *See, e.g.,* ***George J. Meyer Mfg. Co. v. Howard Brass and Copper Co.***, 246 Wis. 558, 580, 18 N.W. 2d 468, 479 (1945) (a course of dealing between the parties resulting in a certain interpretation by them is a species of estoppel). *Accord,* ***Clear View Estates***, 67 Wis.2d at 378, 227 N.W.2d at 88 (actions or nonactions of a party may estop that party from insisting on timely performance).

Frivolous Suit

Norton claims that Thomas and Laurel's suit is frivolous, and was instituted solely to harass and injure him. He moves for costs. Although we have affirmed the circuit court decision, appellants' decision to stand on the letter of the contract does not rise to the level of frivolous litigation, and we deny the motion. Section 814.025, STATS.

Because it correctly interpreted the law, the circuit court did not misuse its discretion in rejecting appellants' arguments. We therefore affirm. ***Production Credit Ass'n,*** 131 Wis. 2d at 555, 388 N.W. 2d at 657.

By the Court.—Judgment affirmed.

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