COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2053 **Cir. Ct. No. 2002CV1088**

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

WALTER H. OSSWALD AND LAVERNE P. OSSWALD,

PLAINTIFFS-RESPONDENTS,

V.

JACK OSSWALD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: DOROTHY L. BAIN, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jack Osswald, pro se, appeals a judgment ordering him to specifically perform a contract to sell land to his brother and sister-in-law, Walter and Laverne Osswald. Jack complains the trial court erred when it supplied a term to the contract requiring him to convey the real estate through a

warranty deed rather than a quitclaim deed. We reject Jack's argument and affirm the judgment.

Background

¶2 The property in question is in the City of Wausau and has been in the Osswald family since the mid-1930s. Jack's grandparents owned it, then transferred it his mother, who conveyed it to Jack and his brother Henry. Jack bought Henry's interest in 1978 and has owned it since. Walter and Laverne have occupied the property since sometime in the 1970s.

¶3 In January 2002, the city notified Jack of a special assessment against the property for construction of a sewer and water main. The estimated assessment totaled over $55,000. Shortly after receiving the city's notice, Jack wrote to Walter, discussing property taxes and the assessment:

> The point of my letter is to advise you that there is no way that I can make such payments. Thus I will have to sell the property.
>
> Since your family has in the past expressed a desire to own it, I am offering it to you and them first. It is on the same net acre terms as I received from Henry…; namely a net of $100,000 for the whole of the forty. The sale will be as is subject to the taxes for 2000 forward and the assessment.
>
> Please let me know if there is an interest. Otherwise I shall have to look elsewhere for a buyer.

¶4 Walter and Laverne sent a letter to Jack, although he evidently never received it. The letter, offered into evidence but not relied upon by Walter and Laverne, essentially expressed their desire and willingness to accept Jack's offer. Although Jack did not receive the letter, he learned that Walter and Laverne were willing to accept the offer because in March 2002, he sent a get-well note to Walter asking, in part, how Walter was progressing on the deal. On April 26, Jack

wrote to Henry that Walter "left a phone message in January that it sounded okay to him and he would get to it after his surgery."

¶5 On April 2, a title company sent some documents to Jack, including a warranty deed listing two of Walter and Laverne's sons as grantees. Jack did not respond to Walter, but wrote to Henry that he had only offered the land to Walter and Laverne, not other family members. If the sale was not to Walter and Laverne, Jack wanted to receive the market price for the property.

¶6 When Walter learned of this, he had the title company send a new packet of documents. This time, the warranty deed listed Walter and Laverne as the grantees. Walter asked Jack to sign the documents or indicate corrections and return them to the title company.

¶7 Jack again did not respond to the documents and apparently avoided Walter at a family function in July 2002. In August 2002, Walter sent a letter to Jack recounting the transaction history and asking him to execute and return the documents sent by the title company. When Jack did nothing, Walter and Laverne commenced their action in December 2002.

¶8 Prior to trial, Walter and Laverne had sought summary judgment, which the trial court denied because it believed there was a genuine issue of material fact regarding whether there was an enforceable contract. After taking evidence, however, the court ultimately concluded there was a contract and Walter and Laverne were entitled to prevail. The court noted the contract was silent as to the type of conveyance and supplied that term, requiring Jack to convey the title by warranty deed. Jack appeals.

Discussion

¶9 Whether the parties intended to create a contract is a question of fact. ***Novelly Oil Co. v. Mathy Constr. Co.***, 147 Wis. 2d 613, 617, 433 N.W.2d 628 (Ct. App. 1988). We sustain factual findings unless clearly erroneous. WIS. STAT. § 805.17(2).[1] Interpretation of a contract is a question of law. ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (Ct. App. 1987).

¶10 For there to be a contract, there must be an offer, acceptance, and consideration.[2] "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." ***Spencer v. Spencer***, 140 Wis. 2d 447, 451-52, 410 N.W.2d 629 (Ct. App. 1987) (quoting RESTATEMENT (SECOND) OF CONTRACTS, § 204 (1981)).

¶11 Jack argues that the court erred because it supplied a missing term to the offer, not the contract. We, however, perceive Jack's quarrel is not really with where the court placed the new term but rather with the obligations imposed by a warranty deed. Because parties' rights and obligations differ between warranty

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The element of consideration is undisputed in this case.

and quitclaim deeds,[3] Jack suggests there is no way to fairly supply the term without changing the underlying bargain. We are unpersuaded.

¶12 The court found Jack's January letter constituted a valid offer, even absent a provision for the type of deed. Moreover, the court held that the offer did not mandate use of a quitclaim deed. The court additionally found that Walter and Laverne had made valid acceptance of Jack's offer.

¶13 Jack attempts to escape a warranty deed's greater obligations by arguing that the court's supplied term changes the nature of what he bargained for. This argument is unavailing. Any time a court supplies a term to a contract, it risks altering the parties' obligations and the underlying bargain. Indeed, the Restatement by its very language applies when parties fail to include a term "essential to a determination of their rights." Ultimately, the court determined there was a valid offer and acceptance that created a contract missing a term regarding the type of deed to be used. The court properly supplied the missing term.

¶14 Although not set out as a separate argument, Jack further argues that assuming the court can supply the additional term, it erred when it required a warranty deed over a quitclaim deed. Again, we are unpersuaded.

[3] A quitclaim deed is a deed that "conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid." BLACK'S LAW DICTIONARY 446 (8th ed. 2004). By contrast, a warranty deed is a deed "containing one or more covenants of title; esp., a deed that expressly guarantees the grantor's good, clear title and that contains covenants concerning the quality of title, including … defense of title against all claims." ***Id.***

¶15 First, "where no provision indicating the character of the title is made in a contract for the sale of real estate, the law implies that the vendor is to convey marketable title free from incumbrances." ***Padgett v. Szczesny***, 138 Wis. 2d 150, 155, 405 N.W.2d 714 (Ct. App. 1987) (citation omitted); ***Petre v. Slowinski***, 251 Wis. 478, 483, 29 N.W.2d 505 (1947) (citation omitted). A quitclaim deed does not promise valid title free from incumbrances the way a warranty deed does. Thus, requiring a quitclaim deed when the contract is silent would be inappropriate.

¶16 But Jack additionally relies on the portion of his letter stating the "sale will be as is subject to the taxes for 2000 forward and the assessment." He argues that because of the "as is" language, the implication is a quitclaim deed will be used. The court held that the language did not involve the type of deed, because "as is" refers to property condition only.

¶17 The court relied on ***Omernik v. Bushman***, 151 Wis. 2d 299, 303, 444 N.W.2d 409 (Ct. App. 1989), where we wrote that an "'as is' clause in a real estate contract puts the burden upon a buyer to determine the condition of the property purchased." A few years later, we stated again that "[n]ormally, the effect of an 'as is' clause is to alert the buyer that he or she must determine the condition of the property being purchased." ***Grube v. Daun***, 173 Wis. 2d 30, 59, 496 N.W.2d 106 (Ct. App. 1992). In other words, "as is" refers to the physical condition of property, not the intangible legal status of a deed.

¶18 Jack argues that ***Omernik*** is distinguishable because the clause in that contract—and, we add, in ***Grube***—refers to "as is condition" whereas the word "condition" does not appear in his letter. At best, however, this would lead us to conclude the offer is ambiguous. When a contract is ambiguous, we may

look to extrinsic evidence to determine the parties' intent, and we will construe ambiguities against the drafter. ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426.

¶19 The court noted that Walter, who had several years' real estate experience, testified that in all his years, "as is" always referred to the physical condition of the property. The court also held that a portion of the offer calling for "the same net acre terms as [Jack] received from Henry" did not require a quitclaim deed because it found Walter and Laverne were unaware of the terms of Henry's sale to Jack. Finally, the court noted that when the first warranty deed was presented, Jack did not object to the form. He only objected to Walter's sons being named grantees and Walter promptly remedied the deed. Thus, the court inferred as a factual matter that Jack acquiesced to a warranty deed.[4] Jack does not show how this finding is clearly erroneous.[5]

¶20 The court properly required Jack to convey the property by warranty deed. The court found a valid contract, but one that was missing a required term. Thus, the court supplied the missing term. It properly required a warranty deed under that term. The law presumes that when there is no mention of the type of deed to be used, the title must be transferred encumbrance-free, thus implying a warranty deed should be used. Nothing about the existing contract terms requires

[4] To the extent Jack argues that the "subject to taxes" line requires a quitclaim deed because taxes are liens by operation, the court rejected that argument. The court stated the matter "was addressed in the papers accompanying the warranty deeds that they had sent to [Jack] … demonstrating that the inclusion of that condition did not necessitate the use of a quitclaim deed." On appeal, Jack's argument is a cursory paragraph, with no legal or record cites to support his claim. We consider it no further.

[5] We do not set aside the trial court's factual findings unless clearly erroneous. WIS. STAT. § 805.17(2).

use of a quitclaim deed. "As is" either refers to the property's physical condition only or it is ambiguous. If we assume it is ambiguous, the extrinsic evidence suggests a warranty deed should be used and, in any event, we construe that section against the drafter, Jack.

By the Court.—Judgment affirmed.

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