COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP64 **Cir. Ct. No. 2003SC1121**

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

WANGARD PARTNERS, INC.,

PLAINTIFF-APPELLANT,

V.

TANDEM TIRE AND AUTO SERVICE, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County: MICHAEL KIRCHMAN, Judge. *Reversed and cause remanded.*

¶1 DEININGER, J.[1] Wangard Partners, Inc. appeals an order that dismissed its eviction action against its tenant, Tandem Tire and Auto Service, Inc.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

The circuit court ordered the dismissal after concluding the parties had agreed to it in a stipulation meeting the requirements of WIS. STAT. § 807.05. Wangard claims the court erred in enforcing the purported stipulation because the only writing properly "subscribed" under § 807.05 did not specify the settlement terms and did not refer to any document that did so. We conclude that the record contains no settlement agreement meeting the requirements for enforceability under § 807.05. We therefore reverse the dismissal order and remand for further proceedings on Wangard's complaint.

BACKGROUND

¶2 Tandem Tire and Auto Service, Inc., leased commercial property from Wangard Partners, Inc., on which Tandem operated its tire and auto service business. Midway through the current lease term, Wangard objected to certain of Tandem's business practices. Wangard notified Tandem that it must remove a semi-trailer from the parking lot within thirty days, which Tandem did not do. Wangard thereafter declared Tandem to be in breach of the lease and commenced this eviction action, citing the semi-trailer, as well as Tandem's storage of loose tires and waste oil on the property, as breaches of the lease.

¶3 After Wangard commenced the eviction action, the parties began negotiations regarding Tandem's move-out date and its responsibility for rent and other damages. In a letter dated July 26, 2004, signed by counsel for both parties,

the two attorneys informed the court that the case "has been settled by agreement of the parties who expect to have the settlement documents filed with the court within the next two weeks." The letter also requested the court to remove the final status hearing and the scheduled trial from its calendar, which the court did.

¶4 At the time the joint letter was sent to the court, the parties were reviewing a draft stipulation prepared by Wangard's attorney. Wangard's counsel had faxed the proposed stipulation to Tandem's attorney some ten days before the July 26th joint letter was sent to the court. In a cover letter accompanying the proposal, Wangard's counsel informed Tandem's attorney that "I have only now faxed this proposed stipulation to my client. So, they may also have questions and concerns." These were the terms of the proposed stipulation:

> 1. Defendant shall vacate the premises which is the subject of this eviction action on or before October 1, 2004.
>
> 2. The lease between the parties shall govern their respective rights and responsibilities until Defendant vacates the demised premises.
>
> 3. Defendant's obligation to pay rent shall terminate when Defendant surrenders the premises to Plaintiff in the condition required under the lease between the parties.
>
> 4. The above-entitled action has been fully compromised and settled and may be dismissed on the merits, with prejudice, and without costs to any party.
>
> 5. Any party may, without notice, move the Court for an order dismissing this action against all defendants in accordance with the foregoing paragraph.

¶5 No other versions of the stipulation, or proposed amendments to it, passed between the parties or their counsel before the July 26th joint letter to the

court. Tandem vacated the leased premises during August of 2004. Wangard, however, informed its attorney that it expected Tandem to pay rent through October 1st regardless of Tandem's actual move-out date. Tandem then filed a motion to enforce the stipulation that Wangard's attorney had drafted, which specified that Tandem's rent obligation would end on the date it surrendered the premises. Wangard opposed Tandem's motion and moved for leave to file an amended complaint.

¶6 In support of its request that the court enforce the purported stipulation, Tandem argued that the parties' settlement agreement met the requirements of WIS. STAT. § 807.05. Tandem also argued that Wangard should be estopped from denying the validity of the parties' settlement agreement because Tandem had moved out in August in reliance on that agreement.

¶7 The circuit court concluded that, because the proposed stipulation drafted by Wangard's attorney was the only document the parties or their attorneys had reviewed before the attorneys sent their July 26th letter to the court, the unsigned stipulation supplied the terms of the parties' settlement agreement, which agreement both attorneys acknowledged existed when they signed the July 26th letter. The court, concluding that the parties' attorneys had entered into an enforceable stipulation under WIS. STAT. § 807.05, granted Tandem's motion and dismissed Wangard's complaint. Wangard appeals the dismissal order.

ANALYSIS

¶8 Whether a stipulation is valid and enforceable is a question of law we decide de novo. *See* ***Cavanaugh v. Andrade***, 191 Wis. 2d 244, 264, 528 N.W.2d 492 (Ct. App. 1995). Resolution of the issue requires us to interpret and apply WIS. STAT. § 807.05 to the facts before us. *See* ***Laska v. Laska***, 2002 WI App 132, ¶7, 255 Wis. 2d 823, 646 N.W.2d 393. The statute provides:

> No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under ss. 807.13 or 967.08 and entered in the minutes or recorded by the reporter, *or made in writing and subscribed by the party to be bound thereby or the party's attorney.*

Wisconsin Stat. § 807.05 (emphasis added). There are thus two requirements for a stipulation not made in open court to be valid and enforceable. It must be both (1) in writing, and (2) subscribed by the party to be bound or that party's attorney. *See* ***id***.

¶9 We have before us a letter subscribed by the parties' attorneys that informed the court the parties had reached a settlement, and a separate writing that stated the terms of a proposed settlement, but which was not subscribed by the parties or their attorneys. The dispositive question is whether the requirements of WIS. STAT. § 807.05 are met when the terms of a purported settlement agreement are contained in an unsigned writing that is not incorporated or referred to in a properly subscribed document. We conclude they are not.

¶10 We decided in ***Laska*** that an agreement reached by the parties was not a binding stipulation under WIS. STAT. § 807.05 because it was not "subscribed" by the parties as the statute requires. ***Laska***, 255 Wis. 2d 823, ¶12. The parties in ***Laska*** reached an agreement through mediation, and the mediator set out their agreement in a memorandum that neither of the parties nor their attorneys signed. ***Id***., ¶3. The defendant's attorney sent a letter to the court stating: "The parties have agreed to settle this case. Therefore, the trial which was scheduled for the week of May 14, 2001 may be canceled. Someone will send you a Stipulation and Order of Dismissal when the settlement has been completed." ***Id***., ¶4. When the defendant refused to sign the settlement agreement, the plaintiffs moved to enforce it. ***Id***., ¶5.

¶11 The circuit court in ***Laska*** concluded that the stipulation was valid because it was "'subscribed' by [the parties'] conduct." ***Id.***, ¶6. We reversed, however, concluding that WIS. STAT. § 807.05 requires "a party's assent or approval [to] be formalized in some way *on the document itself*." ***Id.***, ¶12 (emphasis added). We explained that § 807.05 is an exception to the general rule that oral contracts are binding, and, thus, an oral stipulation is not enforceable unless it is formalized in the manner the statute requires. ***Id.***, ¶9. The fact that the defendant's attorney had signed a letter to the court indicating a settlement had been reached did not alter the dispositive fact that the mediator's memorandum detailing what the parties had agreed to was not "subscribed." ***Id.***, ¶12.

¶12 Tandem argues we must distinguish the letter sent to the court in ***Laska*** from the one sent by the attorneys in this case. The letter in ***Laska*** was signed by the attorney for only one of the parties, and it informed the court that "[t]he parties have agreed to settle this case." Here, the letter was signed by the attorneys for both parties and said that this case "has been settled by agreement of the parties." ***Id.***, ¶4.

¶13 Although there are some differences between the present facts and those in ***Laska***, the dispositive fact is the same in both cases: the material terms of the purported settlement agreement are not set forth (or incorporated by reference) in a document that is subscribed by the party against whom enforcement is sought (or that party's attorney). *See* ***id,*** ¶12. The July 26th letter signed by the parties' attorneys constitutes a properly subscribed writing, which, if it had contained the terms of the parties' settlement, would have been binding and enforceable under WIS. STAT. § 807.05. But, as in ***Laska***, the required signatures and the material terms of the purported settlement agreement were in separate documents, and there is thus no agreement or stipulation that may be enforced under § 807.05.

¶14 Our conclusion that there is no enforceable stipulation in this case finds additional support in ***Marks v. Gohlke***, 149 Wis. 2d 750, 439 N.W.2d 157 (Ct. App. 1989). A series of letters regarding a settlement passed between the circuit court and the attorneys for the parties in ***Marks***, but none specified the amount of money to be paid under the settlement. ***Id***. at 752. The circuit court

concluded that the letters, taken together, "constituted a valid settlement agreement," and the court took testimony to determine the amount of the settlement. ***Id***. at 752-53. We reversed, concluding that, because the letters bearing the attorneys' signatures did not include the settlement amount, they "fail[ed] to satisfy the writing requirement of [WIS. STAT. §] 807.05," and there was thus no enforceable agreement. ***Id***.

¶15 In all three cases, ***Laska***, ***Marks*** and the one before us now, one or both of the parties' attorneys signed a writing that indicated the parties had agreed to settle their litigation. In all three cases, however, one or more material terms of the settlement agreement were not contained in any writing subscribed by the party against whom enforcement was sought, or that party's attorney. The result in all three cases is the absence of any agreement that could be enforced under WIS. STAT. § 807.05.

¶16 The purpose of the formalities of WIS. STAT. § 807.05 is "to prevent disputes and uncertainties as to what was agreed upon." ***Adelmeyer v. Wisconsin Elec. Power Co.***, 135 Wis. 2d 367, 372, 400 N.W.2d 473 (Ct. App. 1986). As we pointed out in ***Marks***, "[a]ll parties need do to assure enforcement of their agreements is to put the agreements in writing, and sign the writing." ***Marks***, 149 Wis. 2d at 753. That did not happen in this case, and, as in ***Laska*** and ***Marks***, "disputes and uncertainties" remain as to whether these parties agreed to all

material terms of their purported settlement. The circuit court therefore erred in dismissing Wangard's complaint.[2]

¶17 We note in closing that Tandem made a second argument in the circuit court for why Wangard should be held to its purported agreement to forgo any rent accruing after the date of Tandem's removal from the premises. Tandem contended that Wangard should be estopped from demanding rent for the month of September because Tandem moved out before September 1st in reliance on the proposed stipulation drafted by Wangard's counsel. Tandem does not renew that argument on appeal, and we could not address it in any event. Resolution of Tandem's estoppel claim will require an evidentiary proceeding and findings as to what actions Tandem took, when and why it took them. Moreover, the estoppel claim is in actuality a defense against Wangard's claim for payment of September rent, as opposed to an alternative rationale for enforcing the purported settlement agreement.[3] Thus, Tandem may pursue its estoppel claim at trial or other

[2] Tandem also argues that "Wangard presented no evidence at the trial court … that Wangard had not agreed to the settlement terms agreed to by its attorney." Wangard, however, was under no obligation to present such evidence. It was Tandem's obligation, as the party seeking court enforcement of a purported settlement agreement, to establish that the parties had entered into an agreement meeting the requirements of WIS. STAT. § 807.05. There is no dispute that neither the parties nor their attorneys signed the proposed stipulation drafted by Wangard's counsel. As we have explained, that fact is dispositive on the legal question of whether an enforceable agreement existed.

[3] As we explained in ***Laska v. Laska***, 2002 WI App 132, 255 Wis. 2d 823, 646 N.W.2d 393, observation of the statutory formalities is required in order to produce an enforceable stipulation—the conduct of the parties cannot substitute for those formalities. *See* ***id***., ¶¶11-12.

proceedings addressing the merits of the parties' dispute that may ensue on remand.

CONCLUSION

¶18 For reasons discussed above, we reverse the appealed order and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded.

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