COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP776 **Cir. Ct. No. 2015CV340**

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

WILLIAM FANKHAUSER AND ANNETTE FANKHAUSER,

PLAINTIFFS-RESPONDENTS,

JAMES M. KOLB, KIMBERLY DAGUE KOLB AND RANDY DAGUE,

INVOLUNTARY PLAINTIFFS,

V.

THOMAS FANKHAUSER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Barron County: JAMES C. BABLER, Judge. *Reversed and cause remanded for further proceedings*.

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

¶1 PER CURIAM. William and Annette Fankhauser commenced a lawsuit against Thomas Fankhauser in the Barron County Circuit Court claiming that Thomas obstructed William's access to his property by blocking an easement.[1] The parties' attorneys negotiated a potential resolution of the lawsuit that required the signatures of the parties on two documents in order to conclude the settlement. Ultimately, Thomas refused to sign the two documents.

¶2 William filed a motion in the circuit court, pursuant to WIS. STAT. § 807.05 (2015-16)[2], arguing that the parties had entered into a binding settlement agreement. The circuit court granted William's motion and held that, although the two documents were not signed by the parties, the parties had reached an "agreement in principle" that was enforceable. Thomas appeals, arguing that the communications between counsel did not constitute an enforceable settlement agreement. We conclude that the communications between counsel establish that the parties intended to be bound only after two documents were signed and, because those documents were not signed, there was no enforceable agreement. Accordingly, we reverse the circuit court's order.

[1] For simplicity, we will refer to William and Annette Fankhauser collectively as "William." We refer to Thomas and William by their first names because they share the same last name. The involuntary plaintiffs did not take a position on these disputed issues in the circuit court or on appeal, and we make no further reference to them.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

DISCUSSION

I. Authorities.

¶3 The parties dispute whether they entered into a binding agreement enforceable pursuant to WIS. STAT. § 807.05. Whether a settlement agreement is binding and enforceable is a question of law that we review de novo. ***Waite v. Easton-White Creek Lions, Inc.***, 2006 WI App 19, ¶5, 289 Wis. 2d 100, 709 N.W.2d 88.

¶4 WISCONSIN STAT. § 807.05 reads in pertinent part:

> No agreement … between the parties or their attorneys, in respect to the proceedings in an action … shall be binding unless … made in writing and subscribed by the party to be bound thereby or the party's attorney.

¶5 WISCONSIN STAT. § 807.05 does not modify contract law. Instead, when a party attempts to enforce a valid settlement agreement, it adds certain requirements described in the statute. ***Kocinski v. Home Ins. Co.***, 154 Wis. 2d 56, 68, 452 N.W.2d 360 (1990) (citing ***Logemann v. Logemann***, 245 Wis. 515, 517, 15 N.W.2d 800 (1944)).

¶6 We have held, in applying WIS. STAT. § 807.05, that if negotiations are to be followed by a "formal contract" signed by the parties, "no binding or completed contract will be found" unless the written contract is executed. ***American Nat'l. Prop. & Cas. Co. v. Nersesian***, 2004 WI App 215, ¶19, 277 Wis. 2d 430, 689 N.W.2d 922 (citing ***Milwaukee Med. Coll., Inc. v. Marquette Univ., Inc.***, 208 Wis. 168, 170-71, 242 N.W. 494 (1932) (During negotiations, if "it is understood that one party is to prepare and present for signature to the other a formal written agreement to evidence the contemplated contract, no contract is entered into unless the written agreement is actually prepared, presented, and signed."); ***Skycom Corp. v. Telstar Corp.***, 813 F.2d 810, 816 (7th Cir. 1987)

("Even if parties agree, point by point, on all the terms of a contract, if they understand that the execution of a formal document shall be a prerequisite to their being bound there is no contract until the document is executed.")). Consistent with the phrase used in ***American Nat'l. Prop. & Cas. Co.***, 277 Wis. 2d 430, we will refer to this as the "formal contract doctrine." So, pursuant to the formal contract doctrine, where parties negotiate for and contemplate signed documents as necessary steps to finalize their agreement, previous communications do not create a binding agreement, and the parties are bound only by the subsequent documents if those are signed. *See* ***Id.*** at ¶19.

¶7 From the undisputed facts we conclude that, at every stage of the negotiations, counsel for William and Thomas demanded written documents signed by the parties as precursors to a binding agreement.[3] Therefore, under the formal contract doctrine, the email communications between counsel concerning resolution of this lawsuit did not create a binding and enforceable settlement agreement.[4]

II. Facts.

¶8 Over a two-week period, counsel for William and Thomas exchanged emails and drafts of documents regarding a potential resolution of the lawsuit. Those emails establish that the attorneys for William and Thomas agreed throughout the negotiations that the parties would sign two documents as

[3] All settlement negotiations were between counsel for the parties and were contained in emails.

[4] Because we decide this appeal on other grounds, we do not reach the question of whether all statutory requirements of WIS. STAT. § 807.05 were met; that is, whether an email is a "writing" and whether an attorney "subscribed" an email by having their name affixed automatically or otherwise to the foot of the email. Also, we do not decide whether the attorneys had authority to bind their clients through the email communications.

necessary parts of the settlement process. One necessary document was an affidavit regarding the disputed easement that would be signed by Thomas and recorded with the register of deeds. The other necessary document would be signed by all parties and came to be called the "Mutual Release and Settlement Agreement." The parties agreed that the Mutual Release and Settlement Agreement would contain the terms of the parties' agreement and would also state that the acts necessary to finalize the settlement would not occur until the Mutual Release and Settlement Agreement was signed by all parties.[5] We need not discuss each settlement communication between the parties' attorneys because two examples, from the beginning and the end of the negotiations, are illustrative.

¶9 The first relevant settlement offer was made by counsel for William to counsel for Thomas. Pertinent to our analysis, that first offer proposed that Thomas would remove a gate and posts that blocked the disputed easement "within five days of executing a signed agreement." The initial offer also required that Thomas confirm the "legality" of the existing easement by executing an affidavit "that complies with the Wisconsin recording statutes, so that acknowledgement of the easement can be recorded in the Barron County Register of Deeds …"

¶10 The final version of the Mutual Release and Settlement Agreement negotiated by counsel (but never signed by any party) sets forth a specific sequence of events required to occur before the lawsuit would be settled. First, all parties would sign a copy of the Mutual Release and Settlement Agreement and William would place $2,000.00 into his attorney's trust account. Second, if both those events occurred, Thomas would: (a) execute the affidavit to be recorded

[5] Throughout the communications, counsel continued to negotiate about the specific material terms of the settlement that would be inserted in the two documents.

with the register of deeds; and (b) remove a gate and posts that blocked the easement. When those conditions were met, the $2,000.00 held in trust would be sent to Thomas. The Mutual Release and Settlement Agreement also provided that it was fully "integrated" and was the "final expression" of their agreement because "all prior" understandings or agreements were superseded by this Mutual Release and Settlement Agreement.

III. Analysis.

¶11 William asserts that the "binding settlement agreement[s]" of the parties were the unsigned Mutual Release and Settlement Agreement and the unsigned affidavit of Thomas. William argues that we should ignore the fact that both documents were never signed because the signatures of the parties were not required to have them be bound by the terms of those two documents. As we now discuss, we reject William's arguments because the parties intended to be bound only by signed documents rather than the communications between their attorneys, and this dictates the result under the formal contract doctrine.

¶12 First, the email negotiations between counsel do not support William's argument that the parties intended to be bound by the communications in those emails. In fact, the opposite is true. The offers, without fail, required documents signed by the parties as precursors to a binding agreement.

¶13 Second, the Mutual Release and Settlement Agreement relied on by William contained provisions which required that the Mutual Release and Settlement Agreement be signed by the parties as a trigger for events necessary to

finalize the proposed settlement.[6] Further, that contract stated that, once signed, its terms superseded all prior negotiations and understandings between the parties. Those provisions indicate the intent that the parties would execute, by their signatures, the Mutual Release and Settlement Agreement following the negotiations and be bound by that written contract only if it was signed by them.

¶14 Third, at each stage of the negotiations, William demanded that Thomas execute an affidavit regarding the easement that William would record with the Barron County Register of Deeds. One of the formal requisites required for a valid conveyance (such as that demanded by William from Thomas) is that the instrument "[i]s signed by or on behalf of each of the grantors" and is in writing. WIS. STAT. §§ 706.02(1)(d) and 706.01(4). Pursuant to WIS. STAT. § 706.05, there are requisites for recording instruments with a register of deeds. One of those requirements is that the instrument shall "[b]ear such signatures as are required by law." Sec. 706.05(2)(a).[7] Because it was agreed that Thomas would execute an instrument to be recorded with the Barron County Register of Deeds, it necessarily followed that the parties also intended that the affidavit be in writing and be signed by Thomas because those are the necessary predicates for recording such an instrument with a register of deeds in Wisconsin.

¶15 For those reasons, we conclude that no binding and enforceable settlement agreement existed between William and Thomas. As a result, the circuit

[6] The parties do not dispute the meaning of "signed" or "signature" as those terms are used in the Mutual Release and Settlement Agreement. We conclude that the terms mean that each party was required to handwrite their name on a document. A useful definition is at WIS. STAT. § 990.01(38) which states: "If the signature of any person is required by law it shall always be the handwriting of such person …."

[7] "Signed" is a defined term in WIS. STAT. ch. 706. It includes a "handwritten signature or symbol" on the conveyance by the person adopting the signature or symbol. WIS. STAT. § 706.01(10).

court erred in determining that, pursuant to WIS. STAT. § 807.05, the parties had a binding and enforceable agreement.[8]

CONCLUSION

¶16 Accordingly, the circuit court order is reversed and this matter is remanded for further proceedings.[9]

By the Court.—Order reversed and cause remanded for further proceedings.

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

[8] William also contends that the parties reached a binding and enforceable agreement with their exchange of emails on November 18, 2016. However, even as of that date, the parties agreed that any completed settlement required that two documents be executed by the parties. So, pursuant to the formal contract doctrine, there was no binding agreement as of November 18, 2016.

[9] We also reverse the circuit court's award of $300.00 costs to William pursuant to WIS. STAT. § 814.07.