COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1137 **Cir. Ct. No. 2014CV173**

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

GLOBAL PROPPANT SUPPLY, LLC,

PLAINTIFF-APPELLANT,

V.

DAVID M. TUTTLE AND SALLY A. TUTTLE 1999 REVOCABLE TRUST, DALE W. STICKNEY, SUE A. STICKNEY, VICKI L. CHASE, PATRICIA SAMPSON, MICHAEL R. ROSIER, TERRY L. WESTERGARD, SUSAN A. EVANS, HENRY STROHMEYER, ALICE STROHMEYER, NOEL JONES AND DONNA JONES,

DEFENDANTS-RESPONDENTS,

SHADOWLAND HOLDINGS, LLC, EARL M. JOHNSON, PATRICIA A. JOHNSON, MICHAEL KELLY, NANCY KELLY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Juneau County: JOHN P. ROEMER, JR., Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. This case arises out of a failed plan to construct and operate a frac sand mine. An entity called Global Proppant Supply sought foreclosure on property that was to be used for the mine. The circuit court granted a judgment of foreclosure. The dispute here is between Global and the previous owners of the property.

¶2 It is undisputed that, when these landowners sold their property, the pertinent agreements included royalties and repurchase options for the selling landowners. The agreements were not with Global. The dispute here, broadly speaking, relates to whether the sellers' interests under the agreements or Global's mortgage interests take precedence.

¶3 At the sellers' request, the circuit court reformed the written agreements that governed the sellers' interests. The court then concluded, based on the reformed agreements, that Global's mortgage interests were subordinate to the sellers' interests and that the sellers' repurchase options had ripened. Global appeals.

¶4 Global argues that the circuit court erred by reforming the agreements. In the first section of our discussion, we explain why we agree with Global that the circuit court erred by reforming the agreements. In the remainder

of the opinion, we resolve various disputes among the parties by looking to the unreformed language of the agreements. We conclude that:

(1) The Royalty Agreements have no effect on Global's ability to foreclose;

(2) One of the repurchase options is subordinate to Global's mortgages;

(3) Global's mortgages are subordinate to other repurchase options; and

(4) As to the repurchase options that are not subordinate, one has ripened and two have not.

Based on these conclusions, we affirm the judgment in part, reverse the judgment in part, and remand for the circuit court to determine what further proceedings might be necessary consistent with this opinion.

Background

¶5 An entity called Shadowland Holdings was formed for the purpose of entering into the frac sand mining business. A separate and distinct entity called Shadowland Operating was formed for the purpose of constructing and operating the frac sand mine. As discussed below, the distinction between Shadowland *Holdings* and Shadowland *Operating* is relevant to the issues on appeal.

¶6 Shadowland Holdings purchased property for the planned mine from the sellers, including four sets of sellers that the parties refer to as Tuttle, Stickney, Strohmeyer, and Rosier. We refer to these sets of sellers individually as the Tuttle Group, the Stickney Group, the Strohmeyer Group, and the Rosier Group, and collectively as the sellers. These sellers were granted certain royalty rights and

repurchase options under agreements that Global calls the "Royalty Agreements" and the "Repurchase Agreements."

¶7 As we shall see, part of the dispute here relates to whether the Royalty Agreements were between the sellers and Shadowland *Operating* or between the sellers and Shadowland *Holdings*. There is no dispute that the Repurchase Agreements were between the sellers and Shadowland Holdings.

¶8 In June 2013, Shadowland *Holdings* borrowed a total of approximately $8 million from Global, secured by two mortgages on the underlying property that Shadowland *Holdings* had acquired from the sellers. After Shadowland Holdings defaulted, Global commenced this foreclosure action against Shadowland Holdings and named the sellers as additional defendants.

¶9 As most pertinent here, Global's foreclosure complaint alleged that Global's lien against the underlying property was superior to the sellers' interests, and that a foreclosure sale of the property would vest title in the purchaser free of any interests the sellers might assert. The sellers denied these allegations.

¶10 In the course of summary judgment briefing, the sellers argued that the agreements should be reformed based on mutual mistake, that is, the sellers argued that the agreements as written did not reflect the true intent of the parties to those agreements. Global objected to this reformation argument on several grounds, including that reformation was not pled by the sellers.

¶11 The circuit court reformed the agreements in several respects. Relying on the reformed agreements, the court concluded that Global's mortgage interests were subordinate to the sellers' interests, and that any sale of the underlying property would be subject to the sellers' interests. The court also

concluded that the sellers could exercise their repurchase options because all mining activity on the property had ceased.

Discussion

¶12 Our discussion is in two main sections. In the first, we explain why we agree with Global's argument that the circuit court erred by reforming the agreements. In the second, we apply the unreformed agreements to address Global's remaining arguments.

A. Reformation

1. Legal Standards for Reformation Based on Mutual Mistake

¶13 "Wisconsin courts have long recognized that a court in equity can reform written instruments that, by mutual mistake, do not express the true intentions of the parties." ***Chandelle Enters., LLC v. XLNT Dairy Farm, Inc.***, 2005 WI App 110, ¶18, 282 Wis. 2d 806, 699 N.W.2d 241. "A mutual mistake 'must be established by clear, convincing evidence that both parties intended to make a different instrument than the one signed and both [parties] agreed on facts different than those set forth in the instrument.'" ***Prezioso v. Aerts***, 2014 WI App 126, ¶39, 358 Wis. 2d 714, 858 N.W.2d 386 (quoted source omitted).

2. The Circuit Court's Reformation Ruling

¶14 The circuit court reformed both the Royalty Agreements and the Repurchase Agreements. As to the Royalty Agreements, the circuit court replaced references to Shadowland *Operating* with Shadowland *Holdings*. As to the Repurchase Agreements, which plainly listed Shadowland *Holdings* as the contracting entity, the circuit court modified the terms governing when the sellers'

repurchase options became effective. Additionally, the court reformed one specific agreement, the Rosier Group's Repurchase Agreement, by deleting a term expressly providing that the Rosier Group's repurchase option was subordinate to any mortgage lien.

3. Global's Arguments Against Reformation

¶15 Global argues that reformation was improper for several related reasons. More specifically, we understand Global to argue that:

(1) To obtain reformation as relief, the sellers were required to plead a cause of action for reformation, but did not do so;

(2) Even if the sellers had moved to amend their pleading to add a reformation claim when the sellers first argued for reformation, the circuit court would have misused its discretion to permit the amendment;

(3) Global was unfairly prejudiced by reformation because Global was a third party to the reformed agreements with no notice of the asserted mutual mistake; and

(4) The sellers failed to present undisputed evidence of mutual mistake entitling them to reformation on summary judgment.

¶16 We need only address the first two of these arguments. As we explain in the following section, we agree with Global that the sellers' failure to plead reformation is a sufficient basis to conclude that the circuit court erred in granting reformation. We also agree that, by the time the sellers first argued for reformation, the circuit court would have misused its discretion to permit an amendment of the complaint to add a reformation claim.

4. The Sellers' Failure to Plead

¶17 Global asserts that reformation based on mutual mistake is a cause of action and, as such, generally must be pled as a claim in order to afford recovery. The sellers do not make a cognizable argument disputing that reformation based on mutual mistake is a cause of action they needed to plead in order to recover on a reformation theory.[1] Rather, so far as we can tell, the sellers argue that, under Wisconsin's pleading standards, they adequately pled such a claim in their "Answer, Affirmative Defenses and Counterclaim," the sole pleading document that they filed.

¶18 Whether the sellers' pleading document states a claim under our pleading standards is a question of law for de novo review. *See* ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693. In deciding whether a claim is stated, we "accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *See* ***id.***, ¶19. "However, a court cannot add facts in the process of construing a complaint." ***Id.***[2]

[1] Case law in Wisconsin is replete with references to reformation or mutual mistake as a "cause of action" or "claim." *See, e.g.*, ***Wilcox v. Estate of Hines***, 2014 WI 60, ¶11 n.10, 355 Wis. 2d 1, 849 N.W.2d 280 ("claim for reformation"); ***Vandenberg v. Continental Ins. Co.***, 2001 WI 85, ¶53, 244 Wis. 2d 802, 628 N.W.2d 876 ("'cause of action for reformation'" (quoted source omitted)); ***First Nat'l Bank of Appleton v. Nennig***, 92 Wis. 2d 518, 540, 285 N.W.2d 614 (1979) ("claim of mutual mistake"); ***Better Props., Inc. v. Kocher***, 239 Wis. 294, 296, 1 N.W.2d 157 (1941) ("cause of action based on contract or mutual mistake").

[2] We note that a heightened pleading standard applies to allegations of "mistake." *See* WIS. STAT. § 802.03(2). However, we need not and do not rely on this heightened pleading standard. As explained in the text, even under our generally applicable pleading standards the sellers' pleading document fails to state a claim for reformation based on mutual mistake.

All further references to the Wisconsin Statutes are to the 2015-16 version.

¶19 Applying these pleading standards, we agree with Global that the sellers did not state a claim for reformation based on mutual mistake. The sellers' pleading lacks allegations that are even suggestive of the substance of a claim for reformation based on mutual mistake. For example, nowhere in the sellers' pleading do they allege:

- any misunderstanding or error as to any written term in any of the agreements;
- that any term in any of the written agreements failed to reflect the contracting parties' true agreement or intentions;
- that any term in any of the written agreements should be rewritten or omitted; or
- that any unwritten term should be added to any of the written agreements.

We do not require magic words or formality. That is, the problem for the sellers here is not simply that they failed to use the terms "reformation" or "mutual mistake" in their pleading. Rather, as the above demonstrates, the problem for the sellers goes well beyond that.

¶20 Having concluded that the sellers did not include in their sole pleading document a claim for reformation based on mutual mistake, we now address the parties' apparent dispute over whether the circuit court could have reasonably exercised its discretion to allow the sellers to amend their pleading. We first question whether it makes sense to address this dispute because the sellers did not move to amend their pleading and the circuit court did not exercise its discretion on the topic. *See* WIS. STAT. § 802.09(1) (setting forth standards for leave to amend); ***Korkow v. General Cas. Co. of Wis.***, 117 Wis. 2d 187, 196-97, 344 N.W.2d 108 (1984) (same). Nonetheless, we choose to put the matter to rest.

¶21 Effectively, as we understand it, Global argues in the alternative that, even if the sellers had moved to amend their pleading to add a reformation claim, instead of simply arguing reformation in summary judgment briefing, the circuit court would have misused its discretion in permitting the amendment at that late date. The sellers' response to this argument is unclear, but the sellers seemingly take the position that it would have been proper for the circuit court to permit an amendment adding a reformation claim in the course of summary judgment briefing, even though discovery had closed. We briefly explain why the sellers' two main supporting arguments do not persuade us.

¶22 First, the sellers argue that Global had ample time and opportunity to conduct discovery regarding evidence that might bear on a reformation claim. This argument, however, does not explain why it was reasonable to expect Global to anticipate such a claim and conduct discovery on the topic. Why would Global have reasonably thought it needed to conduct discovery on the question of whether the written terms of the agreements failed to reflect the true intentions of the parties to those agreements? The sellers do not explain. For example, the sellers do not respond to Global's assertion that Global did not depose any of the sellers because the sellers' defenses, as framed by the sellers' own pleading, appeared to be based on the agreements as written.

¶23 Second, the sellers argue that Global had full advance knowledge of the agreements in 2013 when Global loaned funds to Shadowland Holdings in return for the mortgages on the underlying property. But, as Global points out, there is no reason to think that Global's knowledge of the agreements' existence meant that Global had notice that the sellers might claim that the written agreements contained mistaken terms that did not reflect the true intentions of all of the contracting parties. The sellers also cite evidence indicating that Global

knew there was a considerable legal risk that the Repurchase Agreements as written would be interpreted to make Global's mortgage interests subordinate to the sellers' repurchase options. However, Global's knowledge of *that* risk also does not show that Global knew the sellers might claim mistake, let alone show that it was reasonable to allow the sellers to amend their pleading at such a late date.

B. Application of the Agreements as Written

¶24 Having concluded that the circuit court erred by reforming the Royalty Agreements and the Repurchase Agreements, we turn to address Global's remaining arguments based on the agreements as written. As a preliminary matter, we note that there is no dispute that Global had notice of the terms in the agreements and must abide by those terms. Global's arguments, instead, relate to how to interpret those terms.

¶25 "We interpret contract language de novo." ***Watertown Reg'l Med. Ctr., Inc. v. General Cas. Ins. Co.***, 2014 WI App 62, ¶33, 354 Wis. 2d 195, 848 N.W.2d 890. "Contract language is construed according to its plain or ordinary meaning, consistent with 'what a reasonable person would understand the words to mean under the circumstances.'" ***Ash Park, LLC v. Alexander & Bishop, Ltd.***, 2015 WI 65, ¶37, 363 Wis. 2d 699, 866 N.W.2d 679 (footnotes and quoted source omitted).

¶26 Global makes the following arguments as to the Royalty Agreements and the Repurchase Agreements:

(1) The Royalty Agreements have no effect on Global's ability to foreclose;

(2) The Rosier Group's repurchase option is subordinate to Global's mortgages based on an express subordination clause;

(3) The Tuttle, Stickney, and Strohmeyer Groups' repurchase options are subordinate to Global's mortgages for other reasons; and

(4) The Tuttle, Stickney, and Strohmeyer Groups' repurchase options have not ripened.

We address each argument in the corresponding sections below.

1. The Royalty Agreements

¶27 When the circuit court reformed the Royalty Agreements, the circuit court replaced references to Shadowland *Operating* with Shadowland *Holdings*. The Global argument that we now address as to these agreements assumes no such reformation. Global's argument proceeds as follows:

(1) The Royalty Agreements as written are between the sellers and Shadowland *Operating*;

(2) The entity that owned and mortgaged the underlying property was Shadowland *Holdings*;

(3) Because Shadowland *Operating* never owned the property, Shadowland Operating had no interest in the *property* to grant to the sellers; and

(4) Therefore, in Global's words, Global "is entitled to foreclose any interest the [sellers] may have by virtue of the Royalty Agreements."

¶28 The fourth part of Global's argument is unclear. If, as Global seems to say, the Royalty Agreements grant no interest in the underlying property, then we are uncertain why Global speaks in terms of "foreclos[ing]" with respect to the Royalty Agreements. Regardless, when we read Global's assertions as a whole and in tandem with Global's pleading allegations, it seems clear that what Global

means to argue is that, because the Royalty Agreements grant no interest in the underlying property, those Royalty Agreements have no effect on either Global's ability to foreclose on the property or on a foreclosure sale of the property free and clear of any seller royalty interest under the agreements.

¶29 As for the sellers, we see no developed argument in their brief addressing the Royalty Agreements as written. Accordingly, we conclude that the sellers effectively concede Global's argument on this topic. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) ("'Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.'" (quoted source omitted)).

2. The Rosier Group's Repurchase Option

¶30 We turn to Global's argument as to the Rosier Group's repurchase option. The Rosier Group's Repurchase Agreement contains a term that the other Repurchase Agreements do not, namely, a subordination clause that the circuit court deleted when the court reformed the agreements. This express term provides that the Rosier Group's repurchase option is subordinate to any mortgage lien. This clause provides, in full:

> **Subordination.** This Option shall be subject and subordinated at all times to the liens of any mortgages or deeds of trust in any amount or amounts whatsoever now existing or hereafter encumbering the Option Property, without the necessity of having further instruments executed to effect such subordination.

¶31 Global argues that this express subordination clause makes the Rosier Group's repurchase option subordinate to Global's mortgages and that, in Global's words, Global is entitled to "foreclose any interest granted to Rosier by

the Repurchase Agreement." Given the clear language in this subordination clause, it is hard to imagine what the sellers might argue in response. Regardless, the sellers do not respond, and we take this lack of a response as a concession on the topic. *See* ***id.***

3. Whether the Tuttle, Stickney, and Strohmeyer Groups' Repurchase Options Are Subordinate to Global's Mortgages

¶32 We turn to Global's argument that the remaining repurchase options, that is, the Tuttle, Stickney, and Strohmeyer Groups' options, are subordinate to Global's mortgages despite the absence of any subordination clause in those agreements. As to these agreements, the circuit court relied on an existing term in the agreements to conclude that Global's mortgages are subordinate to the sellers' options. Specifically, the court relied on contract language stating that the Repurchase Agreements "shall be binding upon the parties hereto, their personal representatives, successors and assigns." The court concluded that this language shows that the options run with the land, making Global's mortgages subordinate.

¶33 The sellers direct our attention to case law supporting a rule that option language like the language that the circuit court relied on here, while not dispositive, generally indicates that the contracting parties intended the option to run with the land. *See* ***Clark v. Guy Drews Post of Am. Legion No. 88***, 247 Wis. 48, 53, 18 N.W.2d 322 (1945) ("[U]se of the words 'heirs and assigns' is not necessary to the creation of an equitable servitude which will pass with the land. However, the use of those words is a strong indication of the purpose of the grantor although not controlling."); *see also* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) §§ 1.1(1) and 2.2 cmt. d (AM. LAW INST. 2000) ("Commonly used formulas for stating intent to create servitudes [meaning "a legal device that creates a right or an obligation that runs with land or an interest in land," § 1.1(1)]

include statements that the interests created 'run with the land' or that they 'bind' or 'inure' to the benefit of 'heirs and assigns' or 'successors' of the parties.").

¶34 We are uncertain whether Global challenges this general rule regarding the effect of language like the "successors and assigns" language here. What *is* clear is that Global takes the position that the circuit court misinterpreted the Tuttle, Stickney, and Strohmeyer Groups' Repurchase Agreements by relying on this "successors and assigns" language to the exclusion of other contract terms in the agreements.

¶35 More specifically, Global makes arguments based on (1) the contract terms determining when the sellers' options ripen, and (2) the contract terms addressing the sellers' remedies in the event that the sellers exercise their options and Shadowland Holdings fails to deliver marketable title. As we now explain, Global fails to persuade us that these terms make the sellers' options subordinate to Global's mortgages.

a. Contract Terms Determining When Sellers' Options Ripen

¶36 The Stickney and Strohmeyer Groups' Repurchase Agreements provide that the options "come into effect" or, in Global's words, "ripen" on the date that Shadowland Holdings provides notice to the pertinent seller that it is terminating all mining activity on the property. The Tuttle Group's Repurchase Agreement provides that the option comes into effect upon the earlier of such

notice or on a date three years from the cessation of mining activity on the property.[3]

¶37 Global argues that these terms show that Shadowland Holdings "must act" in order for the repurchase options to come into effect and, therefore, the options are "personal to [Shadowland] Holdings and do not run with the land." We find this argument lacking because Global does not explain why the pertinent actions could not logically be carried out by Shadowland Holdings' successors or assigns. For example, suppose Shadowland Holdings dissolved and assigned the underlying property to a newly created entity called Sunnyland Mining. In this example, it would be logical to conclude that Sunnyland, as "assignee," is bound by the Repurchase Agreements and that the sellers' options would come into effect if Sunnyland provided the sellers with notice that Sunnyland was terminating all mining activity on the property. To conclude otherwise is to simply ignore the "binding upon … successors and assigns" language. More broadly, Global's argument is illogical because it assumes that the sellers could *never* exercise their options as against *any* Shadowland Holdings successor or assign.

¶38 As support for its argument, Global cites ***Beeren & Barry Investments, LLC v. AHC, Inc.***, 671 S.E.2d 147 (Va. 2009), a Virginia case in which the court concluded that a repurchase option was personal and did not run with the land. *See* ***id.*** at 148-49, 151. Global argues that ***Beeren & Barry*** is similar to the instant case. We are not persuaded.

[3] The Repurchase Agreements use the term "buyer" to refer to the former landowners (who we call the "sellers") and the term "seller" to refer to Shadowland Holdings, apparently in reference to the relationship the former landowners and Shadowland Holdings would have if the former landowners exercise their repurchase options. We note this terminology difference only to make clear to the parties that we have not misread the Repurchase Agreements.

¶39 The court in ***Beeren & Barry*** concluded that an option was personal when the option came into effect either upon the grantor's death or upon the grantor's election to sell the property within a 30-year period from the date the option was granted. *See* ***id.*** Global apparently analogizes these option-triggering events to the option-triggering events here relating to the termination of mining activity on the property. We do not agree that these triggering events are analogous. Tying an option to the grantor's death is plainly personal to the grantor in a way that the triggering events here are not. Further, the pertinent contract in ***Beeren & Barry*** did not, as here, broadly state that the entire agreement was "binding upon the … successors and assigns" of both parties to the contract. *See* ***id.*** at 148-49. There may be additional reasons to reject Global's reliance on ***Beeren & Barry***, but what we have said is enough.

b. Contract Terms Addressing Sellers' Remedies in the Event that Sellers Exercise Their Options and Shadowland Holdings Fails to Deliver Marketable Title

¶40 We turn now to the other contract terms on which Global relies to argue that the Tuttle, Stickney, and Strohmeyer Groups' repurchase options are subordinate to Global's mortgages, namely, the terms addressing the sellers' remedies in the event that the sellers exercise their options and Shadowland Holdings fails to deliver marketable title. We first summarize the remedy provisions that Global relies on. We then explain why we are not persuaded by Global's reliance on those provisions.

¶41 As pertinent here, the provisions state that, if the sellers provide notice that they wish to exercise their options, and Shadowland Holdings fails to provide marketable title free of any defects, including liens, the sellers may elect one of two remedies: first, the sellers may terminate the agreement and receive a

refund of their "Option Money"[4]; or, second, the sellers may seek specific performance, provided they commence an action for specific performance within six months.

¶42 We note that Global characterizes the available contractual remedies differently than we have in the paragraph above. Global describes the remedies as involving three options instead of two. We are uncertain why. The terms that Global cites are plain on their face, and our summary aptly describes them. What matters, however, is that our discussion here rejects Global's reliance on these remedy provisions, regardless whether summarized as providing two or three alternatives.

¶43 Global first argues that these remedy provisions show that the sellers agreed that the underlying property could be mortgaged, and that nothing in the agreements prohibited Shadowland Holdings from encumbering the property. This argument goes nowhere. Even assuming that the remedies language can somehow be read as an acknowledgment by the sellers that Shadowland Holdings could encumber the property with a mortgage, nothing in the language suggests that Shadowland Holdings could encumber the property such that the encumbrance would take priority over the sellers' interests. More to the point, we conclude that the remedy provisions simply do not address the sellers' rights in the event of foreclosure.

¶44 Notably, the remedy provisions are expressly directed *only* at what happens *if the sellers exercise their options*, not at what happens in the event of

[4] The Repurchase Agreements do not state what the "Option Money" is.

foreclosure. This silence cuts both ways. For example, suppose that Global had initiated a foreclosure action while Shadowland Holdings remained an ongoing mining concern. In this example, the sellers could not have exercised their options because no option-triggering event would have occurred. The remedy provisions would say nothing about the sellers' rights. So, too, the remedy provisions are silent regarding foreclosure following a triggering event.

¶45 Global argues that when parties contract for their remedies, as the sellers and Shadowland Holdings did here, the court may not grant other remedies that thwart the parties' intent. *See* ***Ash Park, LLC v. Alexander & Bishop, Ltd.***, 2010 WI 44, ¶37, 324 Wis. 2d 703, 783 N.W.2d 294 ("When a contract specifies remedies available for breach of contract, the intention of the parties generally governs."). We do not disagree with this legal proposition. It just has no application here. Here, the contractual remedy provisions do not address the sellers' rights in the event of foreclosure, and we fail to see how the sellers' and Shadowland Holdings' contractual intent is thwarted by making Global's mortgages subordinate to the sellers' repurchase options.

¶46 Global asserts that allowing these sellers to "repurchase their parcels for $1, and strip the Mortgages from the Property without any further payment is unreasonable, unfair, and inequitable."

¶47 Before addressing this argument, we pause to note that the parties appear to assume that labeling interests "subordinate" or "not subordinate" carries with it a plain result. For example, Global assumes that, if the sellers' interests are subordinate to Global's foreclosure rights, Global can proceed with a foreclosure sale free and clear of any seller interests. Similarly, the sellers seemingly assume that, if their repurchase options are not subordinate to Global's foreclosure

interests, the options survive foreclosure intact, such that the sellers may exercise their repurchase options against the foreclosure sale purchaser under the same terms and conditions that applied to Shadowland Holdings.

¶48 Proceeding on the parties' assumptions described above, we now address Global's argument that what the Tuttle, Stickney, and Strohmeyer Groups seek is unreasonable and, therefore, an unreasonable interpretation of the Repurchase Agreements. Global points out that the agreements specify a mere $1.00 repurchase option price. To repeat, Global asserts that allowing these sellers to "repurchase their parcels for $1, and strip the Mortgages from the Property without any further payment is unreasonable, unfair, and inequitable." In other words, Global sees these sellers as receiving a windfall that could not reasonably have been contemplated by the contracting parties. But, as we now explain, Global fails to persuade us that the repurchase option price is unreasonable or inequitable.

¶49 Global's reasonableness argument is not persuasive, in part, because Global focuses on select facts to the exclusion of others. Most glaringly, Global's argument does not take into account the consideration the sellers may have provided in exchange for the favorable $1.00 repurchase price. We note that the sellers' briefing indicates that the sellers accepted a 50% reduction in the initial purchase prices in exchange, in part, for the $1.00 repurchase option.

¶50 Further, to the extent that Global argues that there is unfairness or inequity *to Global* as mortgage holder, Global's argument fails to come to grips with Global's acknowledgment that it had notice of the Repurchase Agreements when it loaned the $8 million to Shadowland Holdings. This means that Global had the ability to see both that the properties were encumbered by $1.00

repurchase options and that the Tuttle, Stickney, and Strohmeyer Groups' Repurchase Agreements lacked express subordination clauses like the one in the Rosier Group's Repurchase Agreement.

4. Whether The Tuttle, Stickney, and Strohmeyer Groups' Repurchase Options Have Ripened

¶51 We turn finally to Global's argument that the Tuttle, Stickney, and Strohmeyer Groups' repurchase options have not ripened, meaning that no triggering event has yet occurred that would allow these sellers to exercise their repurchase options. We agree as to the Stickney and Strohmeyer Groups' options, but disagree as to the Tuttle Group's option.

a. The Stickney and Strohmeyer Groups' Repurchase Options

¶52 The Stickney and Strohmeyer Groups' Repurchase Agreements provide, in pertinent part, as follows:

> This Option shall come into effect on the date which [Shadowland Holdings] provides [Stickney or Strohmeyer, respectively] with written notice that it is, in its sole discretion, terminating all mining activity on the Property ….

¶53 Global argues that there is no evidence that Shadowland Holdings provided the required notice and, therefore, the Stickney and Strohmeyer Groups' repurchase options have not ripened. As for the sellers, we see no responsive argument. We take the lack of a response as a concession, and conclude that these options have not ripened.

b. The Tuttle Group's Repurchase Option

¶54 The Tuttle Group's Repurchase Agreement provides for an additional triggering event that is not included in the Stickney and Strohmeyer Groups' Repurchase Agreements. Specifically, the Tuttle Group's agreement provides:

> This Option shall come into effect on the earlier of the following:
>
> A. The date which [Shadowland Holdings] provides [Tuttle] with written notice that it is, in its sole discretion, terminating all mining activity on the Property; or
>
> *B. A date three years from the cessation of mining activity on any of the properties ….*

(Emphasis added.) This additional triggering event is our focus.

¶55 The parties dispute whether this additional triggering event occurred. Global argues that mining activity could not have "ceased" on the underlying property because such activity never began. The sellers, in contrast, take the position that Shadowland Holdings *did* engage in such activity and that all such activity ceased by the end of 2013.

¶56 Looking to the parties' more specific assertions, we see that the parties do not dispute the facts. Rather, their dispute is a legal one over how to interpret the contractual term "mining activity" and whether Shadowland Holdings' activities on the property through the end of 2013 constituted "mining activity." These activities, according to the parties' briefing, included excavation, building a berm and a retention pond, and having mining equipment delivered to the property.

¶57 Global argues that these activities are plainly not "mining activity." Alternatively, Global argues that the term "mining activity" is ambiguous in this context, meaning that the term might be interpreted and applied in two or more different but reasonable ways, requiring us to consider extrinsic evidence of what the parties to the contract meant by "mining activity."

¶58 The sellers, in contrast, argue that these activities plainly are "mining activity." We agree with the sellers.

¶59 The term "mining activity" is broader than the term "mining" and connotes both mining itself and at least some related activities. If "mining" was what the parties to the contract had in mind, they could have said simply "mining." Instead they referred to "mining *activity*" on the property (emphasis added). The most reasonable reading of this contractual term is that it includes activities in furtherance of mining on the property (or perhaps in winding down mining on the property, had mining ever started), not simply mining itself.

¶60 Global cites dictionary definitions for "mining" and "activity" and, combining those definitions, interprets the phrase "mining activity" to mean "the collective acts of one person or of two or more people [i.e., "activity"] *to* extract ore or minerals from the ground [i.e., "mining"]" (emphasis added). But even under this interpretation, we agree with the sellers that the activities here were mining activities. The activities here were plainly done "to" extract frac sand from the ground or, stated another way, to accomplish "mining."

¶61 Under Global's limited view of "mining activities," the only covered activity would seemingly be the literal removal of frac sand from the ground, and would exclude all preparatory steps no matter how necessary to the successful removal of frac sand. For that matter, Global's view seemingly excludes the

transportation of frac sand from one location on the property to another if that transportation does not involve the actual removal of the sand from its initial location. This is not a reasonable interpretation of the term "mining activity," which, in our view, plainly covers preparatory steps necessary for the removal of frac sand.

¶62 Accordingly, we conclude that the Tuttle Group's repurchase option ripened when Shadowland Holdings ceased the excavation and other activities on the underlying property that we have described.

¶63 Before moving on to our summary and conclusion, we note that, under the pertinent agreement, the Tuttle Group had 90 days to exercise the repurchase option once the option ripened. The parties do not indicate whether the Tuttle Group sought to exercise its repurchase option within the 90 days, and Global does not argue that the Tuttle Group forfeited the right to exercise the option by not timely exercising it. Thus, we do not weigh in on those topics.

¶64 To summarize as to both the Royalty Agreements and the Repurchase Agreements as written, we conclude that:

(1) The Royalty Agreements have no effect on Global's ability to foreclose;

(2) The Rosier Group's repurchase option is subordinate to Global's mortgages;

(3) Global's mortgages are subordinate to the Tuttle, Stickney, and Strohmeyer Groups' repurchase options; and

(4) The Stickney and Strohmeyer Groups' repurchase options have not ripened, but the Tuttle Group's repurchase option has.

Conclusion

¶65 For the reasons stated above, we affirm the judgment in part, reverse the judgment in part, and remand for the circuit court to determine what further proceedings might be necessary consistent with this opinion.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

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