COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2006AP103-FT Cir. Ct. No. 2004CV273

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

JOHN W. FRITSCH AND JUDITH A. FRITSCH,

PLAINTIFFS-RESPONDENTS,

V.

PREMIER INVESTORS, LLC,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

ROBERT DREHER AND VIRGINIA DREHER,

DEFENDANTS,

AUTO OWNERS INSURANCE COMPANY,

INTERVENOR,

V.

STRAWBERRY CREEK ESTATES CONDOMINIUM ASSOC., INC. AND STRAWBERRY CREEK ESTATES MASTER CONDOMINIUM ASSOC., INC.,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Door County: D. TODD EHLERS, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Premier Investors, LLC, appeals a grant of summary judgment in favor of John and Judith Fritsch. Premier contends the court erred when concluding that its contract to sell its condominium to the Fritsches had been modified. It also argues the court erred by awarding interest on the Fritsches' earnest money and double costs pursuant to WIS. STAT. §§ 807.01(3) and (4). We affirm the judgment.

FACTS

¶2 In August 2004, the Fritsches contracted to purchase a condominium unit from Premier. The purchase price was $475,000, and the Fritsches paid earnest money of $47,500. The Fritsches' offer to purchase included an inspection contingency, which stated:

> This offer is contingent upon a Wisconsin registered home inspector performing a home inspection of the Unit and the limited common elements assigned to the Unit, and an inspection, by a qualified independent inspector, of: no other ….

The contingency also provided that the Fritsches would provide a notice of any defects to Premier and gave Premier the option of curing the defects. Any remedial work to cure defects was to be completed no later than three days before the scheduled closing date.

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

¶3 After an inspection, the Fritsches submitted a "Notice Relating to Offer to Purchase" to Premier, listing six purported defects, one of which was mold or fungal growth in a crawl space. Premier responded with its own notice stating that it elected to cure the defects listed in the Fritsches' notice. Premier later sent the Fritsches a letter explaining that five of the six defects had been cured, but that the mold issue was the condominium association's responsibility, that the association had been notified of the problem, and that the association was proceeding to remedy it.

¶4 One day prior to the scheduled closing, the Fritsches sent a facsimile stating that Premier had defaulted on the contract by failing to remediate the mold by the time specified in the contract. The Fritsches declared Premier in breach of the contract and demanded the return of their earnest money. Premier responded that the mold was outside the unit and inspection contingency and was being remediated by the association. Premier stated that it stood ready to close the sale pursuant to the contract. The Fritsches did not appear for the closing.

¶5 The Fritsches filed this action seeking the return of their earnest money. Premier filed a counterclaim for breach of contract, seeking specific performance or damages. On competing motions for summary judgment, the circuit court concluded that the contract had been modified by the parties' notices regarding defects, and it granted summary judgment to the Fritsches. It also awarded interest on the earnest money and double costs to the Fritsches because of an earlier settlement offer, pursuant to WIS. STAT. § 807.01.

DISCUSSION

¶6 In reviewing a grant of summary judgment, we apply the standards set forth in WIS. STAT. § 802.08(2) in the same manner as the circuit court.

Badger State Bank v. Taylor, 2004 WI 128, ¶12, 276 Wis. 2d 312, 668 N.W.2d 439. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶7 There is no dispute that the crawlspace was not within the unit or limited common areas and was therefore beyond the scope of the inspection contingency. As such, Premier could only have breached the contract if the notices exchanged by the parties modified the original contract. Premier contends the Fritsches' notice of defects did not constitute an offer to modify the contract and there was no consideration for the purported modification. Premier further argues that the mold did not rise to the level of a defect under the contract. Finally, Premier asserts that if there was a modification to the contract, it was voidable because of mutual mistake or unilateral mistake and fraud.

¶8 The parties' arguments fail to acknowledge that the requirements to form a contract and modify a contract are not universally the same. In response to Premier's argument that the purported modification was not supported by consideration, the Fritsches rely upon ***Mitchell Bank v. Schanke***, 2004 WI 13, 268 Wis. 2d 571, 676 N.W.2d 849, which applied the rule that consideration is presumed where a contract is executed and under seal. ***Id.***, ¶¶24-31. The Fritsches ignore the fact that neither the original contract nor the purported modification was under seal in this case. They also fail to explain how the original contract was executed, as opposed to executory. Oblivious to these failures, Premier attempts to distinguish ***Schanke*** on the basis of the relief sought in that case.

¶9 In Wisconsin, a contract modification need only be supported by new consideration where the contract is complete or executed by one party. ***Murray v. Hamilton Beach Mfg. Co.***, 178 Wis. 624, 628, 190 N.W. 460 (1922). Where the contract is wholly executory, no new consideration is required; the original consideration being deemed sufficient. ***Id.*** A contract is executory where the parties have bound themselves to future activity that is yet to be completed. ***Schanke***, 268 Wis. 2d 571, ¶27. By contrast, a contract is executed where all promises have been fulfilled and nothing remains to be done. ***Id.*** Here, the original contract provided that, subject to contingencies, Premier would deed its condominium unit to the Fritsches and the Fritsches would pay the balance of the $475,000 purchase price. Insofar as neither party had fully performed its duties under the contract when the modification occurred, the contract remained wholly executory at that time, and no consideration was required to modify it.

¶10 With no consideration being required to modify this contract, Premier's argument that the Fritsches' notice of defects did not constitute an offer to modify the contract also fails. Premier's brief quotes the definition of "offer" from the RESTATEMENT (SECOND) OF CONTRACTS § 24 (1979) as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Without the necessity of consideration, however, an offer to modify an executory contract need not propose a bargain in the conventional sense. As a result, the fact that the Fritsches demanded the remediation of the mold and offered nothing in return does not affect the legitimacy of the modification.

¶11 Premier also argues that regardless of this modification, the mold did not rise to the level of a defect as that term is defined in the contract. Even assuming this were true, to the extent Premier agreed to remediate the mold and

modified the contract by doing so, it does not matter whether the mold would otherwise have been a defect under the terms of the original contract.

¶12 Premier also attacks the modification by asserting that the parties did not intend to modify the original contract. However, to the extent Premier unambiguously agreed in writing to remediate the mold, it is barred from contesting its intent to do so. *See* ***Schmitz v. Grudzinski***, 141 Wis. 2d 867, 872 n.4, 416 N.W.2d 639 (Ct. App. 1987). Instead, Premier must defend itself on the basis of fraud, duress, or mutual mistake. *See* ***Dairyland Equip. Leasing, Inc. v. Bohen***, 94 Wis. 2d 600, 606-07, 288 N.W.2d 852 (1980).

¶13 Premier asserts two of these defenses. Premier argues the parties were mutually mistaken about whether the crawlspace was within the inspection contingency, and alternatively, that it was mistaken and the Fritsches fraudulently inserted the crawlspace mold issue into their notice of defects with hopes of catching Premier off guard. We conclude that there is no genuine issue of material fact as to either of these contentions. Premier asserts that the person who sent its notice agreeing to cure the defects in the Fritsches' notice was unaware the crawlspace was beyond the scope of the inspection contingency. However, the portion of that person's deposition to which Premier cites fails to support this proposition. Without an averment supporting the allegation that it was mistaken, Premier's mutual mistake and unilateral mistake with fraud claims were properly rejected on summary judgment. *See* WIS. STAT. § 802.08(2).

¶14 Finally, Premier claims the court erred when awarding the Fritsches interest on the earnest money and double costs pursuant to WIS. STAT. § 807.01(3) and (4). Section 807.01(3) states:

> After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement for the sum, or property, or to the effect therein specified, with costs. If the defendant accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the defendant may file the offer, with proof of service of the notice of acceptance, with the clerk of court. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the taxable costs.

Section 807.01(4) states:

> If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under ss. 814.04 (4) and 815.05 (8).

Premier argues that the Fritsches' offer of settlement only offered to settle Premier's counterclaims and did not offer to settle the Fritsches' claim as plaintiffs.

¶15 While the Fritsches' offer made no mention of settling its own claim, under the circumstances, we conclude the court was correct in awarding interest and double costs. The Fritsches' claim sought the return of their earnest money. Premier's counterclaim sought specific performance or damages for breach of contract. The problem with Premier's argument is that, without its counterclaim, it would have no claim to the Fritsches' earnest money and could not stand in the way of having it returned. In effect, settling Premier's counterclaim would have resolved the whole dispute.

By the Court.—Judgment affirmed.

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