

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 1, 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. 2005AP2294

Cir. Ct. No. 2004CV2659

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

METRO APARTMENT RENTALS, LLC,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

T.R. THOMPSON BUILDERS, INC.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: ROBERT A. DeCHAMBEAU, Judge. *Reversed and cause remanded.*

Before Dykman, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Metro Apartment Rentals, LLC, appeals a judgment dismissing its complaint against T.R. Thompson Builders, Inc. Thompson cross-appeals. Metro, the buyer, sued Thompson, the seller, for

specific performance of a contract to sell an apartment building. Thompson counterclaimed to retain Metro's \$5,000 earnest money deposit. The court held on summary judgment that Metro materially breached the contract by failing to timely perform it, thus releasing Thompson from its contractual obligations. However, the circuit court denied Thompson's counterclaim for the earnest money, based on a determination that Thompson acted in bad faith. We conclude that material fact disputes remain on both Metro's claim and Thompson's counterclaim. We therefore reverse and remand for further proceedings on both.

¶2 The following facts are undisputed. In June 2004 Thompson accepted Metro's offer to buy an apartment building. The parties agreed to a \$485,000 price, with \$415,000 allotted to the real estate and \$70,000 to personal property on the premises. The parties set August 2, 2004, for closing, at the offices of Title Research Corporation (TRC), and agreed that time was of the essence.

¶3 Metro obtained financing from AnchorBank, which committed to a \$436,000 loan. In the weeks before closing, Thompson asked Metro to cancel the deal. Metro refused.

¶4 Duane Reed appeared at the closing as Metro's representative. AnchorBank had deposited the loan proceeds with TRC, and Reed came to the closing with sufficient funds to pay the remainder of the \$485,000 purchase price. However, the settlement statement TRC prepared as the closing agent listed the purchase price at \$555,000. Eugene Thompson, Thompson's representative in this matter, noticed the error several days before closing, but took no action to correct it. When Reed noticed the error at closing, a brief discussion ensued after which Reed left with matters unresolved. The next day Thompson announced that the

contract was cancelled because Metro failed to timely close on its purchase. Thompson's cancellation prompted this lawsuit.

¶5 Whether to grant specific performance of a real estate contract is a matter for the circuit court's discretion. *Anderson v. Onsager*, 155 Wis. 2d 504, 511-12, 455 N.W.2d 885 (1990). However, "unless in the course of a trial court's exercise of discretion there are revealed factual or legal considerations which would make specific performance of the contract unfair, unreasonable or impossible, specific performance of a contract to sell land should be ordered as a matter of course." *Id.* at 512-13. A party may waive a "time is of the essence" provision in a contract, and, in doing so, may not subsequently cancel the contract for delay without giving the other party a reasonable time and opportunity to perform. *Stolper Steel Prod. Corp. v. Behrens Mfg. Co.*, 10 Wis. 2d 478, 487, 103 N.W.2d 683 (1960).

¶6 On review of a summary judgment we apply the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). If material facts are disputed or competing reasonable inferences can be drawn from the facts, summary judgment is not appropriate. *See id.* and WIS. STAT. § 802.08(2).

¶7 We conclude that material facts are disputed and there are competing reasonable inferences concerning the parties' claims. According to Metro's submissions, Thompson wanted to cancel the transaction, going so far as to offer Metro several thousand dollars to withdraw. Eugene Thompson testified that he noticed the erroneous purchase price on the settlement statement in advance of closing, but said nothing to TRC or Reed. When Reed finally noticed it, Eugene Thompson denied that the \$555,000 figure was in error. After further discussion

he agreed to close at the price AnchorBank could verify, even though it appeared unlikely that the parties could clarify matters with AnchorBank and still close on August 2, as it was by then late afternoon. According to Reed, the TRC officer present informed the parties that it was too late to contact AnchorBank that day. In addition, Eugene Thompson never explained why AnchorBank's opinion mattered, because AnchorBank had already transmitted the loan proceeds to TRC. From these proofs, a reasonable factfinder could infer that Thompson unreasonably resisted timely closing on the contract, and therefore breached its duty of cooperation and good faith such that Metro was excused from performing its duty to close on August 2. *See Save Elkhart Lake, Inc. v. Village of Elkhart Lake*, 181 Wis. 2d 778, 787, 512 N.W.2d 202 (Ct. App. 1993) (every contract implies good faith and imposes a duty of cooperation on the parties).

¶8 Alternatively, even if the factfinder found that Thompson did not breach its duty of good faith and cooperation, one could reasonably infer that Thompson waived the contractual "time is of the essence" clause by indicating that closing would not occur until AnchorBank clarified its understanding of the purchase price. Among the submissions is the undisputed deposition testimony of TRC's officer that he understood from the parties' discussion that closing would be postponed until a later date while he contacted AnchorBank for this clarification. In addition, as noted, Reed testified that TRC's officer told the parties it was too late in the day to contact AnchorBank, but Eugene Thompson remained adamant about contacting the bank. One could reasonably infer from this evidence that Thompson agreed to a postponed closing, implicitly if not expressly.

¶9 Thompson's submissions include Eugene Thompson's testimony as follows. He knew the purchase price was \$485,000, never represented otherwise,

and was prepared to close at that price. His only concern was AnchorBank's knowledge of the correct purchase price, to insure that it did not mistakenly loan Reed too much money. However, as soon as Eugene Thompson raised this concern, Reed got angry, "things fell apart," and Reed left. This testimony creates a material fact dispute concerning the events at closing. If believed, it allows the inference that, by abruptly leaving rather than working with Eugene to address his concerns, Reed failed to cooperate and to act in good faith. Further proceedings are therefore necessary to resolve the factual disputes and decide between the competing inferences regarding what happened at closing.

¶10 In its brief, Thompson repeats its argument first made by motion, that Metro waived its right to appeal by accepting return of the earnest money. We decided this issue in Metro's favor by order dated November 23, 2005. Thompson provides no reason to reconsider that ruling.

¶11 We remand for further proceedings on the parties' respective claims. No costs shall be awarded.

By the Court.—Judgment reversed and cause remanded.

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

