COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1480

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

RUSSELL I. BRATT,

PLAINTIFF-RESPONDENT,

V.

ROGER D. PEIRCE AND ELIZABETH L. PEIRCE,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Roger and Elizabeth Peirce appeal from a judgment declaring null and void an option to purchase land owned by Russell Bratt. We affirm the circuit court's determination on Bratt's summary

judgment motion that the option has expired, although on grounds different from those relied on by the circuit court.

¶2 In 1972, Bratt sold to the Peirces a parcel from a larger piece of real estate he owned in Ozaukee county. Several agreements were signed by the parties on June 27, 1972, giving the Peirces the option to buy land adjacent to the parcel they purchased and establishing rights and obligations regarding the roadway. A map attached as an exhibit to the option agreement showed the adjacent land divided into three parcels (parcels 4, 5 and 6), as if future development would allow such division. At the time of the agreement, the Peirces paid a $150 option fee. An additional $2,700 for each parcel was to be paid by the Pierces "upon the recording of a certified survey map or maps of said larger tract."[1] Notice of the election to purchase was required in writing "on or before the later of 18 months from recording said certified survey or two years from date hereof." A separate agreement[2] recited that the additional $2,700 payment for each of the three options was deferred and that the Pierces agreed "to pay interest from date hereof until the time for payment of said amounts as specified in … the Option Agreement." In October 1976, the Peirces recorded an affidavit and declaration of interest as it pertained to the option to purchase parcels 4, 5 and 6. In 1986, they sold their property to third parties. They never made any written notice of election to exercise the option to purchase.

¶3 In 1985, Bratt sold what had been referred to as parcel one in the option agreement to another party. At that time, Bratt first became aware of the

[1] To facilitate the sale to the Peirces, a certified survey map only of the parcel they were purchasing was recorded.

[2] The parties refer to this agreement as the Modification to the Roadway Agreement.

affidavit and declaration of interest the Peirces had recorded against the property. Bratt commenced a lawsuit against the Peirces to declare the option void, but the suit was dismissed for lack of timely personal service.

¶4 The 1985 sale of parcel one resulted in a citation against Bratt by the City of Mequon for an illegal division of land. The remaining parcels were each less than the city's two-acre minimum lot size requirement. To conform with the city's requirement, Bratt had a certified survey map prepared which combined parcels 4, 5 and 6 into one large parcel. The certified survey map was recorded on June 19, 1987, known as CSM #1875.

¶5 In 1998, Bratt found a purchaser for the large parcel identified in CSM #1875. Bratt commenced this action to remove the cloud on title caused by the Peirces' declaration of interest and to declare the option agreement void for not having been timely exercised. The Peirces defended on the ground that the condition precedent to the running of the eighteen-month option period had never been satisfied, and therefore, the option is still viable. Upon cross-motions for summary judgment, the circuit court concluded that certified survey maps filed in the mid-1980s described the boundaries of the disputed property, the Peirces had notice of the filing of those maps, and they did not exercise the option or pay the additional option fees due within eighteen months of the filing of those maps. The court concluded that the unambiguous language of the option agreement did not mandate that any of the recorded certified survey maps include the exact configuration described by the exhibit to the option agreement.

¶6 We do not review the circuit court's decision granting summary judgment; we independently apply the methodology set forth in WIS. STAT.

§ 802.08(2) (1999-2000)[3] to the record de novo. ***Wegner v. Heritage Mut. Ins. Co.***, 173 Wis. 2d 118, 123, 496 N.W.2d 140 (Ct. App. 1992). The methodology we apply in summary judgment analysis has been stated often and we need not repeat it. ***Id.*** Summary judgment should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** We may affirm on grounds different than those relied on by the circuit court. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

¶7 The Peirces wish to embroil the court in a grammatical evaluation of the option agreement to determine whether it is unambiguous. They claim that the potential ambiguity and the need to construe the agreement creates issues of fact which cannot be resolved by summary judgment. They argue that the recording of CSM #1875 was not a triggering event for the option to run because the map did not use the exact dimensions as sketched on the exhibit attached to the option agreement. We need not address these arguments. *See* ***Skrupky v. Elbert***, 189 Wis. 2d 31, 47, 526 N.W.2d 264 (Ct. App. 1994) (if a decision on one point disposes of the appeal, the appellate court need not decide other issues raised).

¶8 Bratt's complaint alleges that the Peirces never paid the interest due under the additional agreement signed the same day as the option agreement. While the Peirces denied this allegation in their answer, Roger Peirce admitted in his deposition that he had not paid interest because it was not yet due. When asked about the paragraph in the additional agreement making interest due from June 27, 1972, forward, Roger responded: "I agree that interest is due, forget

[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

about when, from the date of this agreement, June 27, until the deferred payment is due." The recitation in the additional agreement about the deferred payment of the additional $2,700 per parcel option fee demonstrates that interest was consideration for the option agreement. The payment of interest was not deferred. This is confirmed not only by Roger's testimony but also by a May 27, 1983 letter from Bratt's attorney on which the Peirces rely as supplying the parties' construction of the option agreement. The letter noted that "[a]t the present time there is a note for $8,100.00 which is getting interest at, I presume, approximately 5% per annum, as might be compounded."

¶9 We are presented with a situation where in the more than twenty-five years in which the option agreement has been in place prior to this litigation, the Peirces did not pay the required interest.[4] While the agreement does not indicate when interest shall be paid and Bratt did not demand payment, a reasonable time for performance is grafted upon the agreement. *See* ***Clear View Estates, Inc. v. Veitch***, 67 Wis. 2d 372, 378, 227 N.W.2d 84 (1975) (general rule of option agreements is that time is ordinarily of the essence whether or not the agreement specifically so provides). We recognize that what constitutes a reasonable time within the facts of a given case presents a question of fact. ***Shy v. Indus. Salvage Material Co.***, 264 Wis. 118, 124, 58 N.W.2d 452 (1953). Yet merely labeling the issue as one of fact does not preclude summary judgment. *See* ***Manor Enters., Inc. v. Vivid, Inc.***, 228 Wis. 2d 382, 389, 596 N.W.2d 828 (Ct. App. 1999) (whether only one reasonable inference can be drawn from the evidence is a question of law). Here, there is no dispute of facts as to what the parties did since

[4] The Peirces claim that Bratt did not raise the failure to pay interest in the circuit court and that it is waived. We disagree. The issue is stated in Bratt's brief in support of his motion for summary judgment.

execution of the option agreement. There is no basis to conclude that timely performance was waived or extended by Bratt, either expressly or impliedly by his conduct. *See* ***Clear View Estates***, 67 Wis. 2d at 378. Nor is Bratt estopped from insisting on timely performance because any reliance by the Peirces would not be reasonable in light of Bratt's previous lawsuit and his unresponsiveness to their demands to release the option. The only permissible inference is that the time for providing the requisite consideration for the option agreement was not to continue in excess of twenty-five years. The option agreement was extinguished as a matter of law for the Peirces' failure to make any interest payments on the deferred option fees.

¶10 Bratt argues that the appeal is frivolous. As a matter of law, we make the determination of whether an appeal is frivolous under WIS. STAT. RULE 809.25(3)(c). *See* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 252, 517 N.W.2d 658 (1994). We conclude that even though it is not necessary to address them, the Peirces' appellate arguments are not without arguable basis. We deny Bratt's request for an award of costs and attorney's fees for a frivolous appeal.

By the Court.—Judgment affirmed.

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