COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP659 **Cir. Ct. No. 2005CV309**

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

ROBERT MARKING,

PLAINTIFF-APPELLANT,

V.

MILDRED L. SURWILLO,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed and cause remanded.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 KESSLER, J. Plaintiff Robert Marking appeals from an order granting defendant Mildred Surwillo's motion for summary judgment and dismissing Marking's complaint in its entirety. Marking also appeals from an

order granting Surwillo's counterclaim and a money judgment awarding Surwillo damages in the amount of $5885.[1] Because we conclude that the trial court properly found that, under WIS. STAT. § 706.02 (2003-04),[2] there was no valid and enforceable contract between the parties entitling Marking to specific performance, and further conclude that the trial court did not erroneously exercise its discretion when it determined that Marking had acted in bad faith and slandered the title of the subject property, in violation of WIS. STAT. § 706.13 when he filed a *lis pendens* on the property, we affirm. Finally, we grant Surwillo's motion to find Marking's appeal frivolous and remand to the trial court for a determination of damages.

BACKGROUND

¶2 On December 13, 2004, Marking emailed or faxed an unsigned Offer to Purchase (Offer) to Attorney Kevin Demet, Surwillo's attorney. Surwillo signed the Offer and faxed it back to Marking on December 15, 2004. The Offer contained the following provisions relevant to this dispute.

> **ACCEPTANCE** *Acceptance occurs when all Buyers and Sellers have signed an identical copy of the Offer*, including signatures on separate but identical copies of the Offer. ***CAUTION: Deadlines in the Offer are commonly calculated from acceptance. Consider whether short term deadlines running from acceptance provide adequate time for <u>both</u> binding acceptance and performance.***
>
> **BINDING ACCEPTANCE** This Offer is binding upon both Parties only if a copy of the accepted Offer is

[1] The money Judgment increased the amount of damages due to Surwillo on her counterclaim by $5 over the court's order, to account for the judgment docketing fee.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> delivered to Buyer on or before _____.
> ***CAUTION: This Offer may be withdrawn prior to delivery of the accepted Offer.***
>
> **PLACE OF CLOSING** *This transaction is to be closed* at the place designated by Buyer's mortgagee or _____ *no later than Dec. 28, 2004 unless another date or place is agreed to in writing*.
>
> ….
>
> **TIME IS OF THE ESSENCE** "Time is of the Essence" as to: (1) earnest money payment(s); (2) binding acceptance; (3) occupancy; (4) date of closing; (5) contingency deadlines STRIKE AS APPLICABLE and all other dates and deadlines in this Offer except:_____. If "Time is of the Essence" applies to a date or deadline, failure to perform by the exact date or deadline is a breach of contract….
>
> ….
>
> **ENTIRE CONTRACT** This Offer, including any amendments to it, contains the entire agreement of the Buyer and Seller regarding the transaction. All prior negotiations and discussions have been merged into this Offer. This agreement binds and inures to the benefit of the Parties to this Offer and their successors in interest.

(Bolded and italicized text in original; emphasis in unbolded italics added.) There was no financing contingency included in the Offer.

¶3 Marking informed Demet that he would not be able to close on December 28, 2004. Marking rescheduled the closing for December 29, 2004, but did not do so in writing. On Tuesday, December 28, 2004, at 2:06 p.m., Marking left a voicemail for Demet indicating that he could not close on December 29, 2004. The telephone message, as transcribed by Demet's office, stated:

> Hello Kevin, This is Rob Marking calling.
>
> Calling about the house I am buying from Mrs. Surwillo on Lakefield Drive. I just spoke with my lender and the guy was out for a couple of days and he just got in today and he won't be able to get documents out yet today

> for Wednesday's closing at 2:00. So, sorry for the inconvenience. But he could have them mailed out tomorrow so that they'd have them for a 2 o'clock closing on Thursday. So I tentatively scheduled that. Let me know if there are any issues or any problems with that. My number is … and this is Rob Marking calling. Thank you.

¶4 In a subsequent telephone call between Demet and Marking on December 28, 2004, Marking confirmed that he was "unable to obtain financing in time to close." On December 30, 2004, Demet faxed a letter to Marking reiterating the above information and then cancelling the deal, noting: "Your rights under the contract expired on December 28th when you failed to perform." At no time between December 13, 2004 and December 30, 2004, did Marking sign the Offer or deliver a signed Offer to Surwillo.

¶5 Marking commenced this lawsuit on January 11, 2005. On January 12, 2005, Marking caused a *lis pendens* to be recorded with the Milwaukee County Register of Deeds on the property that was the subject of the Offer. To date, the *lis pendens* has not been released. The complaint served on Surwillo was also unsigned, but an amended summons and signed amended complaint were filed on February 11, 2005. Surwillo filed an answer, affirmative defenses and counterclaim on February 9, 2005. On February 24, 2005, Surwillo filed a motion for summary judgment. On April 11 and 25, 2005, a hearing was held on Surwillo's motion. The trial court granted the motion, dismissing Marking's amended complaint in its entirety and ordering the release of the *lis pendens*.

¶6 Surwillo filed a motion for summary judgment on her counterclaim. Following a hearing, the trial court denied both parties' motions for summary judgment on Surwillo's counterclaim.

¶7 After a bench trial on Surwillo's counterclaim, the trial court made the following findings of fact and conclusions of law:

- Marking had "slandered title to Mrs. Surwillo's property"
- Marking "continued this action in bad faith"
- Marking "should not have maintained the lis pendens on this property"
- Surwillo "has incurred damages to clear title … in the amount of $4,880.00, and statutory damages in the amount of $1,000."

¶8 Marking appealed the judgment. Surwillo moved this court for a finding that Marking's appeal is frivolous.

DISCUSSION

Summary Judgment

¶9 Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). When considering a summary judgment motion, a trial court does not decide factual issues; rather, it determines whether a factual issue exists, resolving all doubts against the moving party. ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). On review, we apply the same standards as did the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

I. Enforceability of Offer

¶10 Determining whether the Offer became a valid and enforceable contract under WIS. STAT. § 706.02 is a question of law which we review *de novo*. ***Ott v. Peppertree Resort Villas, Inc.***, 2006 WI App 77, ¶11, 292 Wis. 2d 173, 716

N.W.2d 127. "When interpreting statutes, we begin with their language and, if the statutory language yields a plain meaning, we apply that meaning and look no further to ascertain the legislature's intent." ***Id.*** "We must give the words of a statute their common, ordinary, and accepted meanings, except that technical or specially defined words are given their technical or special definitions." ***Id.***

¶11 WISCONSIN STAT. ch. 706 "governs every transaction by which an interest in land is created or aliened in law or in equity." ***Gillespie v. Dunlap***, 125 Wis. 2d 461, 466, 373 N.W.2d 61 (Ct. App. 1985). Conveyances of real property in Wisconsin are controlled in part by WIS. STAT. § 706.02, Wisconsin's statute of frauds. Sec. 706.02.[3] "Normally the statute of frauds requires all contracts

[3] WISCONSIN STAT. § 706.02 states:

> **Formal requisites. (1)** Transactions under s. 706.001 (1) shall not be valid unless evidenced by a conveyance that satisfies all of the following:
>
> (a) Identifies the parties; and
>
> (b) Identifies the land; and
>
> (c) Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered; and
>
> (d) Is signed by or on behalf of each of the grantors; and
>
> (e) Is signed by or on behalf of all parties, if a lease or contract to convey; and
>
> (f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01 (7) except conveyances between spouses, but on a purchase money mortgage pledging that property as security only the purchaser need sign the mortgage; and

(continued)

conveying or aliening interests in land to be in writing … [and] signed by the grantor and the grantee." ***Gillespie***, 125 Wis. 2d at 466; *see* WIS. STAT. § 706.01.[4]

> (g) Is delivered. Except under s. 706.09, a conveyance delivered upon a parol limitation or condition shall be subject thereto only if the issue arises in an action or proceeding commenced within 5 years following the date of such conditional delivery; however, when death or survival of a grantor is made such a limiting or conditioning circumstance, the conveyance shall be subject thereto only if the issue arises in an action or proceeding commenced within such 5-year period and commenced prior to such death.
>
> **(2)** A conveyance may satisfy any of the foregoing requirements of this section:
>
> (a) By specific reference, in a writing signed as required, to extrinsic writings in existence when the conveyance is executed; or
>
> (b) By physical annexation of several writings to one another, with the mutual consent of the parties; or
>
> (c) By several writings which show expressly on their faces that they refer to the same transaction, and which the parties have mutually acknowledged by conduct or agreement as evidences of the transaction.

[4] WISCONSIN STAT. § 706.01 states, in pertinent part:

> **(4)** "Conveyance" means a written instrument, evidencing a transaction governed by this chapter, that satisfies the requirements of s. 706.02.
>
> ….
>
> **(6)** "Grantor" means the person from whom an interest in lands passes by conveyance, including, without limitation, lessors, vendors, mortgagors, optionors, releasors, assignors and trust settlors of interest in lands, and "grantee" means the person to whom the interest in land passes. Whenever consistent with the context, reference to the interest of a party includes the interest of the party's heirs, successors, personal representatives and assigns.

(continued)

¶12 The trial court properly concluded "that a real estate contract must be signed to be enforceable under the Statute of Frauds," and that the Offer was not signed by Marking "until after the December 28 closing date" and "after [Surwillo] had notified [Marking] that she was not going to sell him the property." The trial court concluded that the Offer did not meet the requirements under the statute of frauds and, therefore, was not a valid contract.

¶13 Marking first argues that the trial court erred in granting Surwillo's motion for summary judgment because "if it was [Surwillo's] position that it was not her intent to have a contract, then a material issue of fact exists." Marking then argues that if Surwillo intended to enter into the contract to sell the property, then the trial court erred in not granting Marking's motion for summary judgment requesting the trial court to order specific performance of the contract. We disagree. While intent to contract is a necessary element for the formation of a contract, *see* ***Pappas v. Jack O. A. Nelsen Agency, Inc.***, 81 Wis. 2d 363, 370-71, 260 N.W.2d 721 (1978), one's "intent" does not obviate the statutory requirements of WIS. STAT. § 706.02. An enforceable contract to convey an interest in real property must be signed by *both* the grantor and grantee before it becomes an enforceable contract. Sec. 706.02; ***Ott***, 292 Wis. 2d 173, ¶14.

¶14 Marking next argues, contrary to the specific language of the statute, that the Offer was valid because it needed to be signed only by the party against

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….

> **(10)** "Signed" includes any handwritten signature or symbol on a conveyance intended by the person affixing or adopting the signature or symbol to constitute an execution of the conveyance.

whom it was being enforced, *i.e.*, Surwillo. However, this is a contract for conveyance of an interest in real property and subject to specific contrary statutory requirements. It is undisputed that Marking never signed the Offer until after Surwillo withdrew her acceptance of the Offer on December 30, 2004. Accordingly, under WIS. STAT. § 706.02(1)(e), the Offer never resulted in an enforceable contract. *See* ***Gillespie***, 125 Wis. 2d at 466 (in Wisconsin, every transaction conveying an interest in real property is governed by WIS. STAT. ch. 706, whose requirements include that to be enforceable, "[t]he delivered document must also be signed by the grantor and the grantee"); ***Winger v. Winger***, 82 F.3d 140, 145 (7th Cir. 1996) ("Wisconsin … has adopted a statute of frauds which requires that certain real estate transactions comply with certain formal requirements to be enforceable."); ***Trimble v. Wisconsin Builders, Inc.***, 72 Wis. 2d 435, 440-41, 241 N.W.2d 409 (1976) (Statute of frauds is applicable to contracts to convey real property and must contain all elements essential to satisfy the statute.). Summary judgment for Surwillo dismissing any contract claims asserted by Marking was proper.

¶15 Marking goes on to argue that: (1) the oral agreement to extend the closing date is admissible for determining whether he was in breach of the agreement as expressed in Demet's December 30, 2004 letter to him informing him that the sale was not going to proceed; (2) oral changes to written agreements are allowable, even when the written document specifically notes that all changes must be in writing; and (3) specific performance by Surwillo is the appropriate remedy for Marking because "[m]onetary damages, or other legal remedies, are not sufficient to compensate Marking for his loss." Because we have determined that under the plain language of WIS. STAT. § 706.02(1)(e), no enforceable contract ever existed, we do not need to address these issues. ***Gross v. Hoffman***,

227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

II. Counterclaim

¶16 Marking filed a *lis pendens* contemporaneously with his filing of this lawsuit. In response, Surwillo filed a counterclaim against Marking which included claims of: (1) slander of title; (2) abuse of process; and (3) violation of WIS. STAT. § 814.025. Marking never filed a response to the counterclaim. After trial, the trial court made the following additional findings of fact and conclusions of law.

- Marking had "slandered title to Mrs. Surwillo's property"
- Marking "continued this action in bad faith"
- Marking "should not have maintained the *lis pendens* on this property"
- Surwillo "has incurred damages to clear title … in the amount of $4,880.00, and statutory damages in the amount of $1,000.00."

¶17 WISCONSIN STAT. § 840.10 identifies who may file a *lis pendens*. It provides, in pertinent part:

> **(1)** (a) In an action where relief is demanded affecting described real property which relief might confirm or change interests in the real property, after the filing of the complaint the plaintiff shall present for filing or recording in the office of the register of deeds of each county where any part thereof is situated, a lis pendens containing the names of the parties, the object of the action and a description of the land in that county affected thereby.

However, to prevent abuses of *lis pendens*, the legislature, in WIS. STAT. § 706.13, provides a cause of action for slander of title. Section 706.13 provides, in pertinent part, that:

> **(1)** In addition to any criminal penalty or civil remedy provided by law, *any person who submits for filing, entering in the judgment and lien docket or recording, any* lien, claim of lien, *lis pendens*, writ of attachment, financing statement or any other instrument relating to a security interest in or the title to real or personal property, *and who knows or should have known that the contents of the instrument are false, a sham or frivolous, is liable in tort to any person interested in the property whose title is thereby impaired, for punitive damages of $1,000 plus any actual damages caused by the filing, entering or recording*.

(Emphasis added.)

¶18 Under common law, to prove a slander of title claim:

> [A]n individual must show a publication which: (1) results in an injurious falsehood or disparagement of property and includes matters derogatory to the plaintiff's title or business in general, calculated to prevent others from dealing with the plaintiff, or to interfere with his relations with others to his disadvantage; (2) has been communicated to a third person; (3) plays a material or substantial part in inducing others not to deal with the plaintiff, and (4) results in special damage.

Kensington Dev. Corp. v. Israel, 142 Wis. 2d 894, 902, 419 N.W.2d 241 (1988). "This common law has been codified by sec. 706.13, Stats. [and t]he elements are largely the same as at common law. A knowingly false, sham or frivolous claim of lien … relating to real … property filed, documented or recorded which impairs title is actionable in damages." ***Id.*** at 902-03. The legislature, in § 706.13, confirmed that filing a *lis pendens* is a conditional privilege, which means that "'persons making the statements have reasonable grounds for believing the truth of the statements made and that the statements made are reasonably calculated to accomplish the privileged purpose.'" ***Id.*** at 903 (citation omitted). The burden of proof on a claim arising under § 706.13 is the middle burden of proof—"clear, satisfactory and convincing evidence." ***Id.*** at 904-05.

¶19 Marking argues that his *lis pendens* was "accompanied by a conditional privilege" that can be defeated only by "a party … show[ing] that the person who filed it knew that its contents were false, frivolous, or a sham, and that its filing was not calculated to accomplish its privileged purpose as a matter of law." Marking further argues that:

> [I]n order to determine whether a conditional privilege applies in a slander of title action involving a lis pendens, it is necessary to consider the underlying cause of action as requested in the pleadings … [and that t]his creates factual issues as to the intent of the party filing the lis pendens, since the burden was on Surwillo's [sic] to establish a prima facie case, it was her burden to establish improper motive or intent. Since there was no such evidence established, her counterclaim should have been dismissed.

¶20 Surwillo argues that Marking's *lis pendens* "is actionable in damages" because Marking "knows or should have known" that his filing "is false, a sham or frivolous," citing to WIS. STAT. § 706.13, because there never was an enforceable contract to convey real estate. Surwillo argues that the trial court specifically "found that this matter was pursued in bad faith by [Marking] and that he clouded title based on an unsigned agreement. Surwillo concludes that this demonstrates that the trial court's findings of bad faith "are supported by the evidence."

¶21 It is undisputed that when Surwillo withdrew her acceptance of the Offer on December 30, 2004, Marking had not signed the Offer. Accordingly, under WIS. STAT. § 706.02, the Offer never ripened into an enforceable contract. Consequently, at the time Marking filed his lawsuit in January 2005, he did not "have a reasonable ground for believing the truth of the pleading" and knew or should have known that there was no enforceable contract to convey real estate, making his *lis pendens* false, a sham or a frivolous claim impairing title.

Kensington, 142 Wis. 2d at 902-04. Accordingly, we affirm the trial court's judgment in favor of Surwillo on her counterclaim, because Marking slandered Surwillo's title to the subject property by filing the *lis pendens*.

¶22 Finally, Marking argues that attorney fees are not appropriate damages under WIS. STAT. § 706.13. Marking first makes this argument in his brief to this court. Because we need not decide issues not properly raised in the trial court, we decline to decide this issue. ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992).

Motion for a Finding of Frivolousness

¶23 Surwillo has moved this court for a finding that Marking's appeal is frivolous, and for an award of costs and fees associated with defending the appeal. Marking does not address Surwillo's motion for a finding of frivolousness directly in his pleadings. Marking, rather, simply argues that the Offer was a valid, enforceable contract in which he is entitled to specific performance.

¶24 We have determined that, under the plain language of WIS. STAT. § 706.02(e), there was no contract because the document failed to meet the requirements of the statute of frauds. We further affirmed the trial court's determination that Marking's filing of the *lis pendens* constituted slander of title because he knew or should have known there was no enforceable contract to convey an interest in real estate.

¶25 Whether an appeal is frivolous is solely a question of law. ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. In order to award costs and fees, the court must determine that the entire appeal is frivolous. ***Id.***

"Sanctions for a frivolous appeal will be imposed if the court concludes that the 'party or party's attorney knew, or should have known, that the appeal … [had no] reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.'" ***Id.***, ¶19 (citing WIS. STAT. RULE 809.25(3)(c)2; alteration in original). Like the trial court which concluded Marking's complaint was frivolous, we conclude that this appeal is frivolous.

¶26 As we have explained, the Offer clearly failed to satisfy the mandatory requirements of WIS. STAT. § 706.02(1)(e), because it was for the conveyance of an interest in real property and it was not signed by all parties to the agreement. Marking also "knew or should have known" that his position "could not be supported by a good faith argument for an extension, modification or reversal of existing law" and, in fact, Marking never made such an argument. ***Howell***, 282 Wis. 2d 130, ¶9. As required by WIS. STAT. RULE 809.25(3), we remand this matter to the trial court for a determination as to the appropriate fees and costs due Surwillo for having to defend this appeal.

By the Court.—Judgment and orders affirmed and cause remanded.

Not recommended for publication in the official reports.