

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 17, 2007**

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. 2006AP1175**

**Cir. Ct. No. 2004CV424**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**DENNIS J. EWER,**

**PLAINTIFF,**

**V.**

**PAUL S. GILBERTSON AND JULIE F. GILBERTSON,**

**DEFENDANTS-THIRD-PARTY  
PLAINTIFFS-APPELLANTS,**

**V.**

**FIDELITY NATIONAL BANK AND BANCINSURE, INC.,**

**THIRD-PARTY DEFENDANTS-RESPONDENTS,**

**PATRICIA A. TURANY, STATE FARM FIRE & CASUALTY COMPANY  
AND BILL BLACK,**

**THIRD-PARTY DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Chippewa County:  
RODERICK A. CAMERON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Paul and Julie Gilbertson appeal a summary judgment dismissing their third-party claims against Fidelity National Bank and its insurer, Bancinsure, Inc. The Gilbertsons argue the court erred because it should not have dismissed their third-party claims unless it also dismissed the plaintiff's claim against them. Because no motion for summary judgment filed by the Gilbertsons is before us, whether the court correctly refused to dismiss the plaintiff's claim is not relevant to this appeal. We affirm the judgment.

#### BACKGROUND

¶2 This case arises out of a May 27, 2004 offer to purchase a commercial building. The Gilbertsons were the prospective buyers, and the plaintiff in this case, Dennis Ewer, was the seller. Ewer accepted the offer on June 1.

¶3 The offer contained a financing contingency. The contingency would be satisfied if the Gilbertsons were offered a loan with a specific interest rate, term and amount. The contingency also stated:

If Buyer qualifies for the financing described in this Offer or other financing acceptable to Buyer, Buyer agrees to deliver to Seller a copy of the written loan commitment no later than the deadline for loan commitment.... **Buyer's delivery of a copy of any written loan commitment (even if subject to conditions) shall satisfy the Buyer's financing contingency unless accompanied by a notice of unacceptability. CAUTION: BUYER, BUYER'S LENDER AND AGENTS OF BUYER OR SELLER SHOULD NOT DELIVER A LOAN COMMITMENT TO SELLER WITHOUT BUYER'S PRIOR**

**APPROVAL OR UNLESS ACCOMPANIED BY A NOTICE OF UNACCEPTABILITY.** (Emphasis in original.)

¶4 The Gilbertsons attempted to secure financing through Fidelity. On July 16, 2004, Fidelity prepared a written loan commitment in which it agreed to extend a loan to the Gilbertsons. However, the terms of the loan commitment did not match the terms in the financing contingency.<sup>1</sup>

¶5 Soon after preparing the loan commitment, Fidelity faxed it to Ewer's real estate agent. The fax was not accompanied by a notice of unacceptability. The Gilbertsons deny authorizing this fax, while Fidelity claims it would not have sent the fax absent the Gilbertsons' permission.<sup>2</sup>

¶6 The Gilbertsons refused to go through with the sale, and Ewer sued them for breach of contract. Ewer alleged Fidelity's fax satisfied the financing contingency, and the Gilbertsons were therefore obligated to complete the sale. The Gilbertsons filed third-party negligence claims against Fidelity and its insurer, Bancinsure. The Gilbertsons alleged Fidelity negligently faxed the commitment letter to Ewer's realtor, and Fidelity's negligence resulted in their potential liability to Ewer.<sup>3</sup>

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<sup>1</sup> The offered loan had an adjustable rate rather than a fixed rate. It also was for \$200,000, not the full \$240,000 purchase price.

<sup>2</sup> In its answer, Fidelity denied sending the fax at all. In its brief to this court, Fidelity apparently concedes it did in fact send the fax. In any case, for the purposes of summary judgment we must accept the Gilbertsons' evidence indicating the fax was sent as true. *See Severude v. American Family Mut. Ins. Co.*, 2002 WI App 33, ¶2, 250 Wis. 2d 655, 639 N.W.2d 772.

<sup>3</sup> The lawsuit also involved other parties and claims. For clarity, we refer to only the parties and claims relevant to this appeal.

¶7 The court set a January 17, 2006 deadline for filing summary judgment motions. Just prior to the deadline, Ewer, Fidelity and Bancinsure filed motions for summary judgment, accompanied by briefs in support, against the Gilbertsons. The Gilbertsons did not file any motion for summary judgment prior to the January 17 deadline. They did, however, request summary judgment on Ewer's claim against them in the final paragraph of their brief in opposition to Ewer's motion.

¶8 One central issue in the briefing was whether Fidelity's fax had satisfied the financing contingency. Ewer maintained it had; the Gilbertsons, Bancinsure, and Fidelity argued it had not. The circuit court concluded Fidelity's fax had not satisfied the financing contingency. It therefore granted summary judgment to Fidelity and Bancinsure. However, the court did not grant summary judgment to the Gilbertsons or Ewer, stating that "I think there is a big distinction between the relationship between Fidelity and the Gilbertsons on the one hand and the Gilbertsons and Mr. Ewer on the other so I don't think the results necessarily have to be the same."

¶9 The Gilbertsons appeal the judgment dismissing their third-party claims against Fidelity and Bancinsure. This appeal does not include any motions for summary judgment on Ewer's claim against the Gilbertsons.

#### **STANDARD OF REVIEW**

¶10 Summary judgment is appropriate where 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).<sup>4</sup> We review a grant of summary judgment independently, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

## DISCUSSION

¶11 The parties' arguments center around the circuit court's conclusion that Fidelity's fax did not satisfy the financing contingency. Before the circuit court, both Fidelity and the Gilbertsons argued the fax did not satisfy the contingency because the contingency could only be satisfied by "Buyer's delivery" of a loan commitment. The court agreed, interpreting "Buyer" as not including a Buyer's lender.

¶12 On appeal, the Gilbertsons argue:

Fidelity's fax either satisfied the financing contingency or it did not. If it did not, [Ewer's] claim against the Gilbertsons must fail, as must the Gilbertsons' claims against Fidelity and Bancinsure. If the fax did satisfy the contingency, [Ewer] must prevail in his claim against the Gilbertsons and the Gilbertsons must prevail in their claims against Fidelity and Bancinsure.

In other words, the Gilbertsons argue the court erred because it should not have dismissed their claims against Fidelity and Bancinsure unless it also dismissed Ewer's claim.

¶13 This argument does not explain why Fidelity and Bancinsure are not entitled to summary judgment. In fact, in this paragraph the Gilbertsons concede that if Fidelity's fax did not satisfy the financing contingency, their claims against

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<sup>4</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Fidelity and Bancinsure fail. In addition, the Gilbertsons do not attempt to refute Fidelity's argument that its fax did not satisfy the financing contingency. Their argument is that if the fax did not satisfy the financing contingency, they should be entitled to summary judgment, just as Fidelity and Bancinsure are.

¶14 However, no motion for summary judgment filed by the Gilbertsons is before us. The only question before us in this appeal is whether Fidelity and Bancinsure are entitled to summary judgment. As noted above, the Gilbertsons do not refute Fidelity's argument that its fax did not satisfy the financing contingency. They therefore concede the fax did not satisfy the financing contingency. See *State v. Alexander*, 2005 WI App 231, ¶15, 287 Wis. 2d 645, 706 N.W.2d 191 (arguments not refuted are deemed admitted). In addition, the Gilbertsons specifically state in their brief that if Fidelity's fax did not satisfy the contingency, their claims against Fidelity and Bancinsure fail. Together, these two concessions necessarily lead to the conclusion that Fidelity and Bancinsure are entitled to summary judgment.

¶15 We realize our holding would require the Gilbertsons to argue Ewer's position in order to succeed against Fidelity and Bancinsure in this appeal. However, the Gilbertsons could have avoided this result. Before the circuit court, the Gilbertsons failed to file a timely motion for summary judgment and brief in support. Even assuming the Gilbertsons' request for summary judgment in their brief in opposition to Ewer's motion was an adequate motion for summary judgment, at the circuit court the Gilbertsons never developed their argument that their claims should have been dismissed only if Ewer's claim was dismissed. Under those circumstances, it is not surprising that Ewer's claim against the Gilbertsons was treated differently from the Gilbertsons' claims against Fidelity and Bancinsure.

¶16 The Gilbertsons also did not request an interlocutory appeal of the circuit court's refusal to grant them summary judgment, as they could have done under WIS. STAT. RULE 809.50. Had they done so, we could potentially have determined which motions hinged on the meaning of the financing contingency and decided those motions consistent with each other. The Gilbertsons cannot complain that our holding is inconsistent with a circuit court action they have not asked us to review.

*By the Court.*—Judgment affirmed.

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

