

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 13, 2007

A. John Voelker
Acting 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. 2006AP493

Cir. Ct. No. 2004CV157

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DAVID H. PALMER AND BRENDA J. PALMER,

PLAINTIFFS-RESPONDENTS,

V.

PETER R. MASON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sawyer County:
NORMAN L. YACKEL, Judge. *Affirmed in part; reversed in part, and cause
remanded for further proceedings.*

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

¶1 CANE, C.J. Peter Mason appeals a judgment in favor of David and Brenda Palmer granting them strict foreclosure and a ninety-day redemption period for property sold to Mason through a land contract. Mason argues the court

erred by granting his attorney's motion to withdraw without notice and a hearing, preventing his presentation of certain evidence at trial, and setting a ninety-day redemption period. We reject Mason's first two arguments because he was not prejudiced by the court's failure to conduct a hearing on his attorney's motion to withdraw, and he failed to follow the rules of evidence and procedure. However, we conclude the court failed to reasonably exercise its discretion when setting the length of the redemption period. Therefore, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

¶2 On December 31, 2003, the Palmers and Mason entered into a land contract to sell property which had been operated as a resort. Under the contract the Palmers transferred to Mason title to the property, including vacant land, a lodge, cabins and improvements, equipment and personal property, in exchange for payments totaling \$1,250,000. Initially, Mason made a \$450,000 down payment. He then paid \$30,000 on February 17, 2004; \$70,000 on March 19, 2004; \$33,300 on August 5, 2004; and \$45,428.35 in December 2004. In total, Mason paid about \$628,000 to the Palmers.

¶3 Sometime in 2004, a dispute arose over a \$24,000 insurance claim paid to the Palmers and more than \$15,000 in advance customer deposits paid to the Palmers for lodging to be provided by Mason. The Palmers sued Mason for strict foreclosure under the land contract, alleging Mason breached the land contract by failing to make a payment of \$41,000 and by failing to insure the property. Mason contends he was not in default because the Palmers kept monies that were owed to him through insurance proceeds and prepayments for lodging at the property. Mason also asserts he did not default by failing to insure the

property because David Palmer, as his agent, was supposed to add Mason to the existing insurance on the property.

¶4 During this dispute, Mason was represented by two attorneys during different periods leading up to the trial. Both attorneys made motions to withdraw that the circuit court granted. Mason's first attorney, Thomas Duffy, withdrew after representing Mason for about eight months because he was related to the judge. Mason then retained attorney Michael Brose, whose withdrawal is the subject of this appeal.

¶5 Brose represented Mason from June 22, 2005, until October 6, 2005. Brose filed several documents on Mason's behalf, including an amended complaint stating Mason's counterclaims against the Palmers.¹ Based on the pre-trial schedule, the discovery deadline was November 1, 2005, but depositions were allowed until the trial date.²

¶6 On October 4, Brose filed a motion to withdraw as counsel for Mason. Along with his motion, Brose sent an affidavit in support of the motion, and a proposed order.³ In his affidavit, Brose asserted he wanted to withdraw due

¹ Mason counterclaimed for conversion, interference with prospective contract or economic interest, and intentional and negligent misrepresentation to disclose a defect.

² The briefs assert Brose and the Palmers' attorney sent letters to the court requesting and/or consenting to more time for discovery. However, "[a]n appellate court's review is confined to those parts of the record made available to it." *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). These letters are not contained in the record; therefore, we do not consider them.

³ The briefs also assert Brose also sent a letter to the court with his motion, which indicated the materials were also sent to Mason and the Palmers' attorney. However, "[a]n appellate court's review is confined to those parts of the record made available to it." *Id.* This letter is not contained in the record; therefore, we do not consider it.

to “lack of cooperation....” Brose also asserted he did not believe the case was at a “critical stage” because there was no trial date, deposition discovery had not been conducted, and both parties had requested an extension of the pre-trial discovery deadline. The court did not hold a hearing on the motion.

¶7 On October 6, the court granted Brose’s motion to withdraw. On appeal, Mason asserts he faxed a letter to the court on October 7 asking it to deny the motion. However, this letter is not in the record nor was it referenced in Mason’s motion for a new trial. Thus, we cannot consider it to determine whether Mason had notice before the court granted the order or whether Mason had an opportunity to object to the motion. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶8 On October 13, 2005, the court set the trial date for December 2, 2005. During the period between Brose’s withdrawal and a November 16 status conference, Mason made several discovery requests, which were granted.

¶9 During the November 16 status conference, the court questioned Mason about his decision to proceed pro se:

THE COURT: Well, and Mr. Mason, are you planning to represent yourself through this entire matter now?

MR. MASON: I guess I am. I was spending more time fighting my attorney to get him to do what I asked him to do than fighting the plaintiff in this situation, Your Honor.

THE COURT: You understand that if you aren’t trained in the law, not that you’re – that you might not know all the legal ins and outs of this matter?

MR. MASON: Yes, Your Honor. I’m aware of the situation. I’ve gone for some technical advice on Friday and there’s a good possibility I might have someone sitting in with me for technical assistance.

¶10 Mason appeared pro se for the December 2 non-jury trial. After a half-day trial, the court granted the Palmers for strict foreclosure, setting a ninety-day redemption period. The court rejected Mason's counterclaims because he failed to meet his burden of proof. The written judgment was entered on December 16, 2005.

DISCUSSION

¶11 On appeal, Mason presents three issues. The first issue is whether the circuit court erred by allowing Brose to withdraw without notice and a hearing. The second issue is whether the court reasonably exercised its discretion in scheduling the trial and in denying Mason's attempts to present certain evidence. The third issue is whether the court reasonably exercised its discretion when setting a redemption period of ninety days. In reviewing discretionary rulings, this court will uphold a decision if the circuit court examined relevant facts, applied a proper legal standard, and reached a reasonable conclusion. See *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

I. Attorney Withdrawal

¶12 Mason argues he was entitled to notice and a hearing before the court granted Brose's motion to withdraw. We need not decide this issue because even if we were to conclude Mason was entitled to more notice, or a hearing on Brose's withdrawal, he has not established he was materially, adversely affected by Brose's withdrawal.

¶13 First, the record contains no objection by Mason to Brose's withdrawal. In fact, after the motion was granted, the record contains several references to Mason's desire to go forward without an attorney formally

representing him. The court even made a finding of fact in response to his motion for a new trial that Mason had insisted on representing himself and Mason does not dispute this finding. Second, the time between Brose's withdrawal and the trial was sufficient for Mason to have obtained the services of another attorney or requested more time to prepare for trial. To this point, during the scheduling conference on November 16, Mason indicated he had been in contact with another attorney and might have an attorney sitting in for "technical assistance." The record demonstrates Mason made a conscious decision to proceed to trial without counsel, and he cannot now be heard to complain about his choice because he does not like the result.

II. Scheduling and Evidentiary Rulings

¶14 Mason next argues that the court unreasonably exercised its discretion relating to scheduling orders and evidentiary rulings. As a pro se litigant, Mason must comply with the rules of procedure and evidence. *See Waushara County v. Graf*, 166 Wis.2d 442, 452, 480 N.W.2d 16 (1992). Essentially, Mason argues the court erred by scheduling the trial and refusing to admit certain evidence.

¶15 Mason argues the court unreasonably refused to extend the discovery deadline beyond November 4 because both attorneys previously requested a discovery deadline. However, as noted above, these letters are not in the record and we cannot consider them. Mason's argument that there should have been a discovery extension and a later trial date appears to focus on his inability to conduct depositions. However, the discovery deadline explicitly excluded depositions. Nowhere in the record is there any evidence that the court prevented him from taking depositions or that he even attempted to depose a witness.

Additionally, Mason did not object to the trial date. Therefore, because Mason was permitted to conduct depositions after the discovery deadline and he did not object to the trial date, the court reasonably exercised its discretion.

¶16 Mason also argues the court prevented him from presenting relevant evidence. However, the court did not prevent Mason from producing evidence because it was irrelevant, but rather because he failed to establish its admissibility. Additionally, Mason failed to request the right documents from other parties prior to trial to establish his claims. Mason admits he had further problems admitting documents because he either did not overcome the hearsay objection or he merely forgot to present documents. These errors were Mason's and not the court's.

III. Redemption Period

¶17 Mason argues the ninety-day redemption period was an unreasonable exercise of discretion because the circuit court did not receive any evidence on this point nor did it ask for Mason's opinion. WISCONSIN STAT. § 846.30 governs redemption periods and requires the redemption period be at least seven days. However, the redemption period must be reasonable "in light of the circumstances." *Steiner v. Wisconsin Am. Mut. Ins. Co.*, 2005 WI 72, ¶45, 281 Wis. 2d 395, 697 N.W.2d 452.

¶18 In determining whether a period is reasonable, "the factor bearing upon the reasonable period of the equity of redemption is dependent largely on the amount paid by the vendee under the terms of the land contract." *Henry Uihlein Realty Co. v. Downtown Dev. Corp.*, 9 Wis. 2d 620, 628, 101 N.W.2d 775 (1960). Mason correctly characterizes the case law as indicating that the more money that has been paid, the longer the redemption period should be, in light of the greater ownership interest in the property to be redeemed by the vendee. For example, in

Uihlein, the supreme court held a redemption period of ten months was a reasonable exercise of discretion where the vendees had paid about \$448,000 on a \$1,000,000 land contract, but defaulted on paying property taxes. Additionally, the supreme court in *Binzel v. Oconomowoc Brewing Co.*, 226 Wis. 498, 277 N.W. 98 (1938), held a redemption period of four months was reasonable where the vendee was insolvent and did not have a substantial interest in the land.

¶19 Here, the record shows that the court requested input only from the Palmers' attorney about the amount of time that would be reasonable to redeem the property. The Palmers' attorney suggested a sixty-day redemption period to the court. The court, again without inviting Mason's input, increased the period to ninety days, but did not state how it arrived at ninety days as a reasonable time to redeem in light of the roughly \$628,000 already paid by Mason for the property. Although we may search the record in order to sustain a court's exercise of discretion, the record is silent as to how the court arrived at the ninety-day redemption period. See *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Therefore, we conclude the court failed to reasonably exercise its discretion when setting the ninety-day redemption period; this portion of the judgment is reversed and the matter is remanded for a determination of what a reasonable redemption period would be under the circumstances.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded for further proceedings. Costs are denied to the parties.

Not recommended for publication in the official reports.

