COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2007

David R. Schanker
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. 2005AP3150

Cir. Ct. Nos. 2005CV14
2005CV1623

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

DENNIS A. MARKOS,

PLAINTIFF-RESPONDENT,

V.

CENTRAL WISCONSIN INVESTMENT CORPORATION AND KENNETH W. SLATTERY,

DEFENDANTS-RESPONDENTS,

BROOKSTONE HOMES, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

EVERGREEN STATE BANK,

THIRD-PARTY DEFENDANT-RESPONDENT.

EVERGREEN STATE BANK,

PLAINTIFF-RESPONDENT,

v.

CENTRAL WISCONSIN INVESTMENT CORPORATION, DENNIS A. MARKOS AND KENNETH W. SLATTERY,

DEFENDANTS-RESPONDENTS,

BROOKSTONE HOMES, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MICAHEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Brookstone Homes, Inc., appeals the circuit court's judgment rejecting its claim of an interest in lots being developed for residential use by Central Wisconsin Investment Corporation (CWIC). Brookstone raises several issues, but we address only one because it is dispositive: whether Brookstone's contract with CWIC for an option to purchase the property was illusory. We conclude that it was and affirm.

¶2 We review a circuit court's decision granting summary judgment de novo. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶21, 241 Wis. 2d 804, 623 N.W.2d 751. Summary judgment is proper when there are no material issues of disputed fact, and one party is entitled to judgment as a matter of law. ***Id.***, ¶24.

¶3 Brookstone contends that its contract to buy property from CWIC was not illusory. "A contract is illusory when the contract is conditional on some

fact or event that is wholly under the promisor's control and his or her bringing it about is left wholly to his or her own will and discretion." ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶33, 291 Wis. 2d 393, 717 N.W.2d 58 (citations omitted).

¶4 Although the contract initially provided several specific remedies for default by Brookstone, those remedies were deleted from the contract, leaving only two provisions. First, CWIC could "terminate the Offer and have the option to … request the earnest money as liquidated damages" should Brookstone default. However, no earnest money was provided under the contract. Second, CWIC was permitted to "seek any other remedies available in law or equity." However, the right to sue for specific performance and for actual damages were among the remedies specifically deleted in the contract and Brookstone has made no meaningful attempt to explain what other remedies CWIC might have. In contrast, the contract contained several remedies in the event of CWIC default, including giving Brookstone the option to sue for specific performance and/or actual damages.

¶5 We agree with the circuit court that "this offer-to-purchase contract left Brookstone free to perform or not perform as it chose and with no consequence for the failure to perform," while at the same time "it left [CWIC] with an obligation to perform or to face the remedies that the offer to purchase prescribed in the event that it defaulted." Because the contract allowed Brookstone to perform or not perform based solely on its own will and discretion without any meaningful remedy for CWIC, the contract was illusory and thus unenforceable.

¶6 Brookstone contends that the contract cannot be considered illusory because Brookstone had already partially performed under the contract by purchasing some of the lots. We disagree. Regardless of whether Brookstone had already purchased some of the lots, CWIC had no means of enforcing further purchases under the contract and could not obtain any damages if Brookstone failed to act. Brookstone's partial performance did nothing to change Brookstone's ability to back out of the deal at its sole discretion without consequence. The money Brookstone spent to purchase some of the lots was not, as Brookstone argues, an investment in the contract constituting consideration, but rather was simply the purchase price for the land it received independent of any possible subsequent purchases.

¶7 The parties have raised other issues but we do not address them because the issues we have addressed are dispositive. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (if a decision on one point disposes of an appeal, we will not generally decide the other issues raised).[1]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

[1] In support of its case, Brookstone points to a case decided after briefing was complete, ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, 291 Wis. 2d 393, 717 N.W.2d 58. In ***Metropolitan Ventures***, the supreme court concluded that a contract was not illusory because neither party had complete control over determining whether the financing contingency had been met. ***Id.***, ¶33. ***Metropolitan Ventures*** is distinguishable because Brookstone had complete control over whether to purchase the lots, with no remedy available to CWIC in the event of default.