COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2007AP950
2007AP955

Cir. Ct. No. 2005CV2441

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

CAPWIN 19, LLC,

PLAINTIFF-APPELLANT,

V.

MICHAEL G. ZINGG AND PARSONS INVESTMENTS LLC,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 DYKMAN, J. Capwin 19, LLC, appeals from an order granting summary judgment to Michael Zingg and Parsons Investments, LLC in Capwin's action against Zingg and Parsons for breach of contract. Capwin contends that the

trial court erroneously granted summary judgment to Zingg and Parsons based on their affirmative defense that Capwin anticipatorily breached the contract for the sale of land from Capwin to Parsons prior to the closing date. Capwin argues that summary judgment was inappropriate because there were disputed issues of material fact as to (1) the parties' intent as to contested provisions in the contract; (2) whether Capwin clearly expressed to Parsons that it would not close under the contract absent its proposed contract modifications; and (3) whether Parsons breached its duty to use diligent efforts to bring the transaction to a timely closing. Capwin argues alternatively that it is entitled to summary judgment on these issues based on the undisputed facts in the record. We conclude that the record reveals that there are alternative reasonable inferences to be drawn from undisputed facts, preventing summary judgment. We therefore reverse and remand for trial.

Background

¶2 The following facts are undisputed. In July 2004, Zingg (and/or assigns) offered to purchase six acres of land from Capwin. Capwin accepted the offer. The accepted offer set the closing date as November 30, 2004, at a title company in Dane County, "unless another date or place is agreed to in writing." An amendment to the contract states: "This agreement constitutes the entire agreement between the parties and no modification shall be binding unless in writing and signed by all parties." Over the next year, the contract was amended in writing multiple times, and a final closing date was ultimately set for May 13, 2005. Zingg assigned his buyer's interest to Parsons in April 2005.

¶3 During the week before the scheduled May 13 closing, counsel for Parsons (James Smith) and counsel for Capwin (A.J. Griffin III) engaged in discussions about a Closing Agreement and a Tripartite Agreement for the parties

to sign at closing. The discussions included negotiations over the terms to include in the agreements concerning storm water management and whether Parsons would indemnify Capwin from the Village of DeForest's claim for Capwin's obligations to the Village, if the Village did not agree to release Capwin from its obligations by joining the Tripartite Agreement.[1] Smith and Griffin failed to reach an agreement as to the terms to include in the two documents. Capwin appeared at the scheduled closing and Parsons did not.[2]

¶4 Capwin sued Parsons and Zingg for breach of contract. Both defendants denied liability and each moved for summary judgment, arguing that Capwin had anticipatorily breached the contract by demanding terms inconsistent with their contract as a condition of closing. Zingg also denied liability by virtue of his assignment to Parsons and an unfulfilled lease contingency in his original offer to purchase. Capwin opposed summary judgment as to both defendants, arguing that there were either disputed issues of material fact that precluded summary judgment or that the undisputed facts required the court to grant

[1] The three proposed parties to the Tripartite Agreement were Capwin, Parsons, and the Village of DeForest. The Village had not approved the agreement prior to the scheduled closing. Thus, discussions between Smith and Griffin focused on the terms to include in the Tripartite Agreement and the ramifications for the parties if the Village thereafter refused to sign.

Portions of the email communications between Smith and Griffin will be set forth in the discussion section.

[2] Because this summary judgment motion focuses on whether Capwin anticipatorily breached the contract by conduct prior to the closing, thus relieving Parsons of its obligation to attend the closing under the contract, only pre-closing conduct is relevant to this appeal. We thus do not address the parties' recitations of facts that occurred during and subsequent to the scheduled closing.

summary judgment for Capwin sua sponte under WIS. STAT. § 802.08(6) (2005-06).[3]

¶5 The trial court concluded that the defendants were entitled to summary judgment because the undisputed facts in the record established that Capwin had anticipatorily breached the contract prior to closing by unequivocally demonstrating that it was unwilling to close absent Parsons' consent to its proposed contract modifications. Capwin appeals.

Standard of Review

¶6 Summary judgment is only appropriate where there are no genuine issues as to any material facts and the moving party is entitled to judgment as a matter of law. ***Driver v. Driver***, 119 Wis. 2d 65, 69, 349 N.W.2d 97 (Ct. App. 1984). We follow the same methodology as the trial court, which is well established:

> The court must initially examine the pleadings to determine whether a claim has been stated and whether a material issue of fact is presented. If the complaint states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits or

[3] During oral arguments, the circuit court asked the parties whether they agreed that there were no material facts in dispute, as each party had requested the court grant summary judgment in its favor. Counsel for Capwin explained that Capwin believed it was entitled to summary judgment based on the undisputed facts regarding the conduct of the parties after closing, which it believed established that Parsons breached its contractual obligation to attempt to resolve disputes between the parties. Counsel continued: "However, there are lots of issues of fact, core disputes of fact between the people up to that point in time." Regardless, even if parties agree on summary judgment that the material facts are undisputed, both the circuit court and the reviewing court must determine, as a matter of law, whether any material facts are in dispute. ***Precision Erecting, Inc. v. AFW Foundry, Inc.***, 229 Wis. 2d 189, 197, 598 N.W.2d 614 (Ct. App. 1999).

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

> other proof to determine whether the moving party has made a *prima facie* case for summary judgment under sec. 802.08(2). If the moving party has made a prima facie case for summary judgment, the court must examine the affidavits and other proof of the opposing party to determine whether there exist[] disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to a trial.

Id. (citation omitted).

¶7 On a summary judgment motion, a court does not decide issues of fact. ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991). Thus, "[t]he court does not decide issues of credibility, weigh the evidence, or choose between differing but reasonable inferences from the undisputed facts." ***Id.***

Discussion

¶8 "It is a well-settled principle of law that a repudiation of the terms of a contract, and demand for performance substantially different from that provided for in such contract, constitutes an anticipatory breach which entitles the other contracting party to rescind." ***Morn v. Schalk***, 14 Wis. 2d 307, 316, 111 N.W.2d 80 (1961). However, "[i]n order to constitute an anticipatory breach of a contract based upon a request for a modification of terms, such request must be coupled with an absolute refusal to perform unless such request is granted." ***Stolper Steel Prods. Corp. v. Behrens Mfg. Co.***, 10 Wis. 2d 478, 488-89, 103 N.W.2d 683 (1960). Thus, to justify a party's right to rescind a contract based on the other party's anticipatory breach, the breaching party's "refusal to perform must be distinct, unequivocal, and absolute." ***Id.*** at 490 (citation omitted). A request that is not accompanied by a threat of nonperformance if not granted does not amount to an anticipatory breach. *See* ***id.*** at 488-89.

¶9 Parsons[4] argues that Capwin anticipatorily breached the contract because it demanded that Parsons sign the Closing Agreement and Tripartite Agreement in order to close as scheduled, and that both documents contained terms modifying the parties' contract. Capwin responds that the record establishes that it only proposed the Closing and Tripartite Agreements and did not demand either as a condition of closing, and that extrinsic evidence establishes that both agreements memorialized the intent of the parties under the contract rather than introducing new obligations. Thus, to sustain the court's ruling on summary judgment in favor of Parsons and Zingg on grounds that Capwin anticipatorily breached the contract, the record must establish both that Capwin's proposed terms sought to modify the contract and that Capwin manifested its intent not to close absent Parsons' consent to those agreements.

¶10 We first address Capwin's argument that the parties' contract was ambiguous, and that the court improperly construed the parties' intent under the contract on summary judgment. The disputed provision states as follows: "Buyer will be responsible for and pay for all storm water detention improvements on its site and any related storm water costs west of its site." The parties dispute whether this provision obligated Parsons to accommodate post-development storm water runoff from the lots east of Parsons' site. Capwin argues that the provision clearly obligates Parsons to do so, and if not, the provision is ambiguous and requires a factual determination of the parties' intent. Parsons argues that Capwin

[4] Although both Zingg and Parsons submitted summary judgment motions, their arguments as to whether Capwin anticipatorily breached the contract are parallel. Thus, in this portion of the opinion, we refer to Parsons to refer to the arguments advanced by Zingg and Parsons collectively. Later, we address the arguments raised by Zingg as to his individual liability separately.

has only advanced an argument that the contract is indefinite (and therefore unenforceable) rather than ambiguous, under ***Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (1996). Parsons contends that if enforceable, the contract is unambiguous, and does not impose on Parsons the obligation to accommodate storm water runoff from the lots to the east. Finally, Parsons contends that any ambiguity in the contract must be construed against Capwin because Capwin drafted the contract, citing ***Converting/Biophile Laboratories, Inc. v. Ludlow Composites Corp.***, 2006 WI App 187, ¶23, 296 Wis. 2d 273, 722 N.W.2d 633.

¶11 Parsons' first argument, that Capwin's ambiguity argument establishes indefiniteness rather than ambiguity, is unavailing. Parsons does not develop this argument further than to say that Capwin's argument that "the language paints with a broad brush" does not establish ambiguity, and that Capwin confuses ambiguity with indefiniteness.[5] Because neither party has developed an argument that the contract is unenforceable based on indefiniteness, we decline to address this issue further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Rather, we will address whether the contract is ambiguous and whether the court properly construed the contract on summary judgment.

¶12 "A contract provision is ambiguous if it is fairly susceptible of more than one construction." ***Management Computer Servs., Inc.*** 206 Wis. 2d at 177.

[5] "Vagueness or indefiniteness as to an essential term of the agreement prevents the creation of an enforceable contract, because a contract must be definite as to the parties' basic commitments and obligations." ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (1996). While "[t]he issue of definiteness may be decided by the jury or by the court as a matter of law," ***id.*** (citation omitted), "[w]hen a contract provision is ambiguous, and therefore must be construed by the use of extrinsic evidence, the question is one of contract interpretation for the jury," ***id.*** at 177.

"Whether a contract is ambiguous is … a question of law which an appellate court decides independently of the trial court's decision." ***Energy Complexes, Inc. v. Eau Claire County***, 152 Wis. 2d 453, 467, 449 N.W.2d 35 (1989) (citation omitted). Here, the disputed provision states that Parsons "will be responsible for and pay for all storm water detention improvements on its site and any related storm water costs west of its site." It does not explain what "all storm water detention improvements on its site" and "any related storm water costs west of its site" entail. Parsons' interpretation, that the language obligates it only for pre-construction storm water runoff, is reasonable. Capwin's interpretation, that the language obligating Parsons to manage storm water does not differentiate between pre- and post- construction storm water runoff, is also reasonable. Because the provision is susceptible to more than one reasonable interpretation, it is ambiguous. Thus, we turn to the effect of an ambiguous contract on summary judgment motions.

¶13 "In summary judgment cases involving contract claims, [the supreme court] has held that summary judgment should not be granted when the contract is ambiguous and the intent of the parties is in dispute." ***Id.*** at 466-67. Although "[o]nce a contract is found to be ambiguous, extrinsic evidence can be considered in order to determine the parties' intent[,]…. on summary judgment the court does not decide an issue of fact; a court merely decides whether there is a disputed issue of fact." ***Id.*** at 468. Thus, "we do not examine the extrinsic evidence contained in the [summary judgment submissions] to determine the true intent of the parties at the time the agreement was entered into; rather, we examine this extrinsic evidence to determine whether the intent of the parties is in dispute." ***Id.***

¶14 We turn, then, to the materials submitted with the parties' summary judgment pleadings. The focus of the parties' arguments and the trial court's order is a series of emails exchanged between Smith and Griffin in the week prior to closing. The relevant undisputed email messages between Smith and Griffin, as submitted on summary judgment, are as follows:

1. *May 5, 2005, Smith to Griffin:*

> Jay: I talked to Craig [Parsons] following our telephone conversation of this date. Neither Craig nor I understand the substance of the agreement on Craig's part to take care of storm water on lots 2 and 3. Where does that obligation arise? I don't see it in the contract or any of the amendments. Are we talking pre and post construction runoff? I obviously need to know where this obligation comes from and what it entails. Also, please get me the agreement that you spoke of involving the obligation to build on lot 1 and pay the taxes and future assessments relating to lot 1. Thank you for your continuing efforts to get this matter concluded. JS

2. *May 6, 2005, Griffin to Smith:*

> Jim, thanks for your email message of yesterday afternoon. I understand that Craig Parsons may have spoken with CapWin's engineer, Ron Klaas, who advised him that Lot 1 was to accommodate all stormwater run-off from Lots 2 and 3 only until such time as either Lot 2 or Lot 3 is developed. I will discuss this matter with my client this morning and get back to you.
>
> Pursuant to your request, I am transmitting a draft of the proposed "Tripartite Agreement" among our respective clients and the Village of DeForest. To my knowledge, the draft has not been reviewed by the Village; and we are not asking that your client execute the Tripartite Agreement at the closing. Rather, I will prepare and transmit to you this morning a Closing Agreement, dealing with pending matters, such as the issue of stormwater management, my client's obligation to complete the construction of Blanchar's Crossing and the Tripartite Agreement.

3. May 9, 2005, Griffin to Smith:

> Jim, a revised draft of the Tripartite Agreement follows as an attachment. I believe new paragraph 5 addresses the issue which we discussed last Friday. Please review it and let me know if it is acceptable.
>
> We are hoping to obtain the Village's input on the Tripartite Agreement before closing, but this may not be possible. However, I would like to have the agreement in a form which at least may be executed by our clients at the closing. I believe the demonstrated assent of two of the three parties to the Agreement may be of assistance in obtaining the ultimate approval of the Village.
>
> I am hoping to complete a draft of the Closing Agreement by tomorrow. At the present time I am awaiting input which my client has requested from Blake George. One of the issues I would like to address in the Closing Agreement is what our clients will do in the event the Village seeks to modify the Tripartite Agreement before it will agree to execute it. In such a case, I would like our clients to agree to work cooperatively with one another and with the Village in order to negotiate a form of agreement which is acceptable to all three parties. Moreover, should the Village ultimately decide not to release CapWin, as currently contemplated by paragraph 6, I would like to require in the Closing Agreement that your client indemnify CapWin from and against the default or failure of your client to perform and satisfy fully each of the obligations it is assuming under the Tripartite Agreement.
>
> Please let me know your thoughts concerning the revised draft which follows. Note that I have highlighted the revisions by underlining.

4. May 12, 2005, Smith to Griffin:

> Dear Jay:
>
> I am enclosing a revised Paragraph 1 of the "Closing Agreement" which I believe accurately and correctly describes the agreement between the parties relating to storm water management as set forth in the offer to purchase, as amended.

I am also suggesting that the last sentence in Paragraph 3 of the "Closing Agreement" be restated as follows:

> Buyer further covenants and agrees that in the event the Village shall refuse to enter into the Tripartite Agreement or otherwise fail to release Seller from liability for the performance for all of the obligations assumed by Buyer thereunder, Buyer shall nevertheless be required to perform and shall perform all of the duties and obligations which it has assumed as set forth in the Tripartite Agreement.

Please review this language with your client and get back to me.

5. May 12, 2005, Griffin to Smith:

Following as attachments are the revised Warranty Deed … and Closing Agreement …. Please note the following revisions in each document:

….

Closing Agreement—note that I have revised the final sentence of paragraph 3 to incorporate some of the language which you have proposed; however, my client and I still believe the indemnity of the [Seller] must be included, albeit in a slightly more limited fashion.

Due to prior commitments, I will need to leave the office by 4:00 p.m., today. I also will need to make arrangements to meet with Mr. Ziegler this evening in order to obtain his signature on all required documents. Please let me know if the accompanying documents are now acceptable to you and your client.

6. May 12, 2005, Smith to Griffin:

Jay: After reviewing the proposed closing agreements and discussing it with Craig Parsons, it is our position that closing on this transaction cannot proceed. Simply put, there is no area left on lot 1 which can be used to create additional storm water management facilities. It was never intended that lot 1 was to be used as a reservoir to catch and handle the storm water from lots 2 and 3 after

> they are developed. It is impossible to meet this condition and Parsons never contracted to do so. Second, paragraph 4 of the closing agreement does not address the fact that the Buyer is already paying an additional $15k at closing to cover the cost of the temporary access road. So he is being asked to pay that money unconditionally toward the cost of construction of the road, and in addition, he is putting in $10k as part of the escrow agreement.
>
> [It] is clear that the $15k may simply be kept by the seller, and not used at all for road construction purposes. The closing agreement states that the seller is a party to the escrow agreement, and in fact is not a party. Finally, we have no resolution of the Tripartite agreement, nor an agreement on the part of the Village to sign it. Closing is therefore not possible at this point, as there are too many unresolved major issues. JS

¶15 Smith faxed a letter to Griffin following his email, stating that Parsons "was ready, willing and able to close on the purchase of Lot 1 on May 13, 2005, according to the terms and conditions of the offer to purchase, as amended ("Contract")," but that the disagreements between the parties over the terms in the proposed agreements "which have arisen in the last 48 hours render closing impossible." Griffin did not respond to the email or fax from Smith.[6]

¶16 The communications between counsel demonstrate that the parties' intent under the contract was in dispute.[7] Thus, the issue of what the parties intended under the contract cannot be resolved on summary judgment. Parsons

[6] There is some dispute between the parties as to when Griffin received Smith's last email, which was sent near the time Griffin had stated he would leave for the day. Regardless, the question is whether Capwin had already manifested a clear, unequivocal intention not to proceed absent Parsons' consent to the Closing and Tripartite Agreements, and whether those agreements modified the parties' contract.

[7] Capwin points to other material that it argues establishes that the parties intended Parsons to accommodate storm water runoff according to the terms of its proposed agreements. While those materials may support Capwin's argument to resolve the dispute in its favor, our conclusion that the parties' intent was in dispute precludes summary judgment in either party's favor.

argues, however, that whether or not the agreements imposed new obligations as to storm water management, they introduced for the first time the issue of Parsons indemnifying Capwin against the Village of DeForest. We turn, then, to the second part of Parsons' affirmative defense of anticipatory repudiation: whether Capwin demanded that Parsons consent to the terms of the proposed agreements under threat of Capwin's nonperformance.

¶17 Parsons contends that the communications between Smith and Griffin establish that Capwin manifested an unequivocal refusal to close according to the parties' signed contract, instead demanding that Capwin acquiesce to the terms proposed in the agreements.[8] Capwin points to the same communications and argues that they establish that Capwin merely proposed the agreements and never stated it would not tender performance without them. We conclude that both parties have advanced reasonable alternative inferences to be drawn from the communications between counsel during the week before the scheduled closing. We cannot determine from the material submitted on summary judgment whether Capwin manifested a clear intent not to perform absent Parsons' consent to its proposed agreements. That determination requires resolution of the competing

[8] Parsons also references the documents Capwin signed at the scheduled closing and an internal email among Capwin affiliates concerning the agreements. Because that material is not relevant to whether Capwin unequivocally manifested its intent to Parsons that it would not close absent its version of the agreements, we decline to consider them. Moreover, we do not agree with Parsons that the language in the proposed agreements establishes that Capwin demanded those terms. To the extent Parsons argues that the agreements state that Parsons must assume certain obligations, those demands amount to a repudiation only if Capwin also demanded that Parsons sign the agreements on threat of Capwin's nonperformance. Thus, we will not consider the language of the proposed agreements in determining whether Capwin repudiated by demanding Parsons sign those agreements. Moreover, while the language of the agreements is relevant to whether the agreements would have modified the terms of the written contract, we have explained we cannot interpret the ambiguous contract provision on summary judgment to resolve this factual dispute.

inferences to be drawn from the communications between counsel: specifically, whether Capwin's references to the agreements would reasonably be understood between the parties as a demand or were in accord with optional proposals between the parties; the implication of Griffin notifying Smith he would be out of the office after 4:00 p.m. and Smith not notifying Griffin that he believed the parties were at an impasse until about that time; and whether either party had manifested that it would have proceeded to closing without any further agreements. The dispute over these material issues renders summary judgment inappropriate.

¶18 Finally, Zingg argues that we should sustain the court's summary judgment ruling as to him on alternative grounds; that is, that he was released from liability through his assignment to Parsons and the fact that the lease contingency in his original offer to purchase was never satisfied.[9] Capwin replies that the facts do not establish more than a mere assignment, which is insufficient to relieve Zingg of liability, and that Zingg is barred from raising his lease contingency argument based on waiver and estoppel. We conclude that there are factual disputes as to these issues precluding a ruling on summary judgment.

¶19 Zingg argues that even though an assignment itself is not sufficient to preclude his liability, the record establishes "facts other than the other contracting party's mere consent to the assignment" that relieve him of liability, citing ***Mandel v. Fischer***, 205 A.D.2d 375, 376 (N.Y. App. Div. 1994).

[9] The trial court did not address Zingg's arguments as to his personal liability, because it granted summary judgment to both defendants based on its finding that the record established that Capwin anticipatorily breached the contract. However, because we review summary judgment motions de novo, we are not precluded from considering it. *See* ***B&D Contractors, Inc. v. Arwin Window Systems, Inc.***, 2006 WI App 123, ¶4 n.3, 294 Wis. 2d 378, 718 N.W.2d 256.

Specifically, Zingg points to Capwin's negotiating exclusively with Parsons after the assignment as establishing that Capwin knew that Zingg was merely a "straw man" in the transaction between Zingg and Parsons. Capwin disputes this categorization of the record, and argues that the exchanges merely show that Capwin consented to the assignment, which is insufficient under ***Mandel*** to cut off Zingg's liability. Because resolving this dispute requires factual and credibility determinations as to the meaning of Capwin's exclusive negotiations with Parsons, we are unable to do so on summary judgment.

¶20 Zingg's other argument as to his liability is that his original offer to purchase contained a lease contingency that was never satisfied, thus relieving him of liability under the contract. Capwin responds that Zingg executed amendments to the contract and assigned his interest to Parsons after the date he claims the contract became void due to failure to fulfill the lease contingency. Capwin argues that Zingg is thus precluded from raising this argument through waiver and estoppel, citing ***Milas v. Labor Association of Wisconsin, Inc.***, 214 Wis. 2d 1, 9, 11-12, 571 N.W.2d 656 (1997).

¶21 We are unable to determine whether either waiver or equitable estoppel apply at this point in the proceedings. As to waiver, which has been defined as a "voluntary and intentional relinquishment of a known right," we are unable to determine if the "essential element" of Zingg's "intent to relinquish" his right to raise the issue of the lease contingency exists based on his further involvement with the contract. *See* ***id.*** at 9. As to equitable estoppel, that doctrine requires an action or non-action by the opposing party that induced reasonable reliance by the claiming party to the claiming party's detriment. ***Id.*** at 11-12. While the issue of whether the requirements for equitable estoppel have been established is a question of law when the facts and reasonable inferences

therefrom are undisputed, ***id.*** at 8, whether to apply the doctrine of equitable estoppel once the elements have been shown is within the circuit court's discretion, ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, ¶21, 291 Wis. 2d 259, 715 N.W.2d 620. Because, as we have explained, the reasonable inferences surrounding the lease contingency are in dispute, we cannot determine whether the elements of equitable estoppel have been met. Moreover, even if the elements have been met, we may not exercise the circuit court's discretion in its place. *See* ***Barrera v. State***, 99 Wis. 2d 269, 282, 298 N.W.2d 820 (1980). Thus, we are unable to resolve this issue on summary judgment. Because there are reasonable alternative inferences to be drawn from the undisputed facts submitted on summary judgment, we reverse and remand for trial.

By the Court.—Order reversed and cause remanded with directions.

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