COURT OF APPEALS
DECISION
DATED AND FILED

August 9, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3028

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

THOMAS J. BRENNAN AND JANE M. BRENNAN,

PLAINTIFFS-RESPONDENTS,

V.

GJERDINGEN FARMS, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. Gjerdingen Farms appeals from a summary judgment granting Thomas and Jane Brennan's claim for specific performance on a first option to buy land owned by Gjerdingen. Gjerdingen challenges both the determination that it had breached the first option contract and the availability of specific performance as a remedy. We affirm for the reasons discussed below.

¶2 We begin by noting that the parties filed cross-motions for summary judgment below, and that they agree that the uncontested facts present a question of law that may appropriately be decided de novo by this court. ***Lucas v. Godfrey***, 161 Wis. 2d 51, 57, 467 N.W.2d 180 (Ct. App. 1991). The relevant facts are as follows.

¶3 In 1993, Gjerdingen granted the Brennans a "first option to purchase" a parcel of land approximately 23.6 acres in size. The complaint and the amended answer both characterized the first option as a right of first refusal. In 1998, Gjerdingen listed the option parcel for sale as part of a larger tract of land, in excess of 2,700 acres. In 1999, Michael and Catherine Augelli offered to purchase the entire tract at the rate of $851 per acre, and Gjerdingen accepted their offer.

¶4 Gjerdingen's real estate broker notified the Brennans of the Augellis' offer. The Brennans promptly informed the broker that they wished to exercise their first option to purchase the 23.6 acres for the same price offered by the Augellis. The Augellis then made a second offer to purchase the smaller parcel at the rate of $1,400 per acre. Gjerdingen asked whether the Brennans were willing to match that price. They declined, and the Augellis cancelled their offer on the smaller parcel. Gjerdingen subsequently sold the larger tract of land to the Augellis minus the disputed parcel. The Brennans renewed their attempt to purchase the parcel at $851 per acre, but Gjerdingen refused to sell, leading to this lawsuit for specific performance.

¶5 Gjerdingen first contends that the only way it could breach its agreement with the Brennans would be to actually sell the parcel to a third party notwithstanding the Brennans' desire to exercise their first option. We disagree.

¶6 "A right of first refusal is essentially a conditional option dependent upon the decision or the desire of the [landowner] to sell." ***Last v. Puehler***, 19 Wis. 2d 291, 297, 120 N.W.2d 120 (1963). It is distinguishable from an ordinary option in that it provides the prospective purchaser the right to buy upon specified terms *only if* the seller decides to sell. ***Edlin v. Soderstrom***, 83 Wis. 2d 58, 68, 264 N.W.2d 275 (1978). This makes the seller's willingness to sell a factual issue which must be proved as a prerequisite to specific performance. ***Id.*** It does not make the actual selling of the land to a third party a prerequisite.

¶7 It is undisputed that Gjerdingen initially accepted the Augellis' offer to purchase the parcel at issue, along with other land, at the rate of $851 per acre, and that Gjerdingen's real estate agent notified the Brennans of the proposed sale. We agree with the trial court that this evidence is sufficient to establish Gjerdingen's willingness to sell the land at that price. Therefore, the Brennans' response indicating their desire to exercise their first option at the same price was sufficient to trigger an enforceable contract which Gjerdingen could not thereafter unilaterally revoke. We further conclude that, because the first option involved unique real estate adjacent to other land owned by the Brennans, specific performance was available as an equitable remedy. *See* ***Anderson v. Onsager***, 155 Wis. 2d 504, 511-12, 455 N.W.2d 885 (1990); ***Krause v. Holand***, 33 Wis. 2d 211, 214, 147 N.W.2d 333 (1967).

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).