COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP1374

Cir. Ct. No. 2005CV2358

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

FRANK E. BALDWIN,

PLAINTIFF-APPELLANT,

V.

F.C. LAND, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 VERGERONT, J. This appeal arises out of a contract between F.C. Land, LLC, and Frank Baldwin for the sale of vacant land owned by F.C. Land. Baldwin initiated this suit after a contingency concerning approval of a certified survey map was not fulfilled within the relevant time period and the transaction

did not close. The circuit court dismissed on summary judgment Baldwin's claim for breach of the duty of good faith implied in every contract and, after a trial to the court, concluded that F.C. Land was not obligated to convey the land upon Baldwin's unilateral waiver of the contingency. Baldwin challenges both these decisions. For the reasons explained below, we affirm.

BACKGROUND

¶2 Baldwin executed an offer to purchase certain vacant land in the City of Sun Prairie and F.C. Land accepted the offer on August 2, 2004. The property was identified as two lots—Lot 1 and Outlot 1—on a proposed certified survey map attached to the offer to purchase. We will refer to these two lots as "the Property." The closing date was September 15, 2004. One of the contingencies provided: "This offer to purchase is contingent upon Certified Survey Map approval by the City of proposed use prior to closing." Baldwin's plan was to construct an office building on the Property.

¶3 The closing date was extended three times by agreement of the parties—to October 15, 2004, to February 15, 2005, and to April 15, 2005. As of April 15, 2005, Sun Prairie had not approved a certified survey map (CSM) to create the lots that were to be conveyed to Baldwin under the contract. Baldwin informed F.C. Land that he wanted to either close the transaction on April 15 or extend the closing date for another thirty days. F.C. Land responded by returning the earnest money and did not close the transaction. The City approved the Montana Avenue CSM on May 17, 2005, and it was recorded on June 17, 2005. According to an affidavit submitted by Baldwin, the Montana Avenue CSM that was approved and recorded was not the same as the proposed CSM attached to the offer to purchase. While both contained the Property, the Montana Avenue CSM

contained property in addition to that contained in the proposed CSM in order to accomplish the extension of Montana Avenue to Ironwood Drive.

¶4 Baldwin filed this action seeking specific performance and monetary damages. The amended complaint alleged that F.C. Land breached the duty of good faith implied in every contract by not promptly applying for and obtaining approval of a CSM before the deadlines. The complaint also alleged that F.C. Land breached the contract by not obtaining approval of a CSM and by not closing the transaction.

¶5 F.C. Land moved for summary judgment on both claims. The circuit court concluded that F.C. Land was entitled to summary judgment on the claim that F.C. Land had breached its duty of good faith by failing to timely apply for and obtain approval of a CSM. It therefore dismissed that claim. As to the breach of contract claim, the court concluded that there was a disputed issue of material fact—specifically, whether the contingency was solely for the benefit of Baldwin, as he claimed, and thus could be unilaterally waived by him, or whether it benefited both parties. After a trial to the court on the contract claim, the court determined that the contingency was beneficial to both parties and therefore could not be unilaterally waived by Baldwin. Accordingly, the court concluded that F.C. Land had not breached the contract by failing to convey the Property without an approved CSM, and it dismissed the contract claim.

DISCUSSION

¶6 On appeal Baldwin contends that the court erred in dismissing both claims. First, he asserts there were competing reasonable inferences from the evidence that entitled him to a trial on his claim for breach of the duty of good faith. Second, Baldwin contends that the court erred in determining that, because

the contingency benefited F.C. Land as well as him, he could not unilaterally waive it.

I. Summary Judgment on Breach of Duty of Good Faith Claim

¶7 A party is entitled to summary judgment if there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2007-08).[1] We employ the same methodology as the circuit court and our review is de novo. ***Green Springs Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). In analyzing the factual submissions, we view them most favorably to the opposing party and draw all reasonable inferences in favor of that party. ***Burbank Grease Servs. v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781. Whether an inference is reasonable and whether more than one reasonable inference may be drawn from particular evidence are questions of law, which we review de novo. ***H&R Block E. Enters. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (Ct. App. 2007).

¶8 The duty of good faith, implied in every contract, includes a good faith effort to accomplish the goal of the contract. ***Estate of Chayka***, 47 Wis. 2d 102, 107, 176 N.W.2d 561 (1970). The absence of good faith may consist of "inaction … evasion of the spirit of the bargain, lack of diligence and slacking off," among other conduct. ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 797, 541 N.W.2d 203 (Ct. App. 1995) (citations omitted).

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶9 In support of its motion for summary judgment on Baldwin's claim that F.C. Land had breached its duty of good faith, F.C. Land submitted the affidavit of Jerry Connery, a member of F.C. Land. His affidavit and attached exhibits contain the following explanation for the length of time involved in the process of obtaining approval of the Montana Avenue CSM. The Property is located in an area that is being developed by means of at least two other projects. One of the other projects is West Prairie Village, also owned by F.C. Land. The Montana Avenue CSM could not be recorded until the recording of the West Prairie Village Plat, which established the location of what is now Ironwood Drive. Ironwood Drive, in conjunction with an extension of Montana Avenue, provides access from the Property to Highway 19. In addition, under the City of Sun Prairie's requirements, F.C. Land's acquisition of the land for Ironwood Drive necessitated that a CSM for land directly west of the Montana Avenue CSM, owned by someone other than F.C. Land, first be approved and recorded. (We will refer to this CSM as the Winter CSM.) Finally, in establishing the location of Ironwood Drive, F.C. Land discovered that a wetland area was affected, and the requisite approvals and permits to fill and relocate the affected wetlands were not granted until May 2005. Connery's affidavit details numerous steps, with dates, that F.C. Land took in the course of obtaining approval of the Montana Avenue CSM, including those involving storm water management plans for West Prairie Village and for the Property and the sewer system for West Prairie Village. The West Prairie Village Plat and the Winter CSM, like the Montana Avenue CSM, were approved on May 17, 2005.

¶10 Baldwin did not submit any factual materials contradicting the above averments in Connery's affidavit.[2] His position in the circuit court, as it is on appeal, is that there are reasonable inferences that can be drawn from undisputed facts and F.C. Land's submissions that show a breach of the duty of good faith. We agree with the circuit court that the inferences Baldwin relies on are not reasonable inferences.

¶11 First, Baldwin contends that a reasonable fact finder could infer a breach of the duty of good faith from the fact that F.C. Land never submitted the proposed CSM attached to the offer to purchase for approval. We agree with the circuit court that the contract for sale does not plainly require that the attached proposed CSM be approved; it is reasonable to read the contingency as referring to approval of a CSM that contains the Property. Therefore, it is not reasonable to infer lack of good faith from the fact that F.C. Land submitted for approval a somewhat different CSM containing the Property.

¶12 Second, Baldwin contends that a reasonable fact finder could infer a breach from the fact that F.C. Land did not submit the Montana Avenue CSM until March 14, 2005. However, there is no basis in the evidence for reasonably inferring that it could have been submitted sooner or, if it had been, that it would have been approved sooner. Without these inferences, there is no reasonable basis

[2] Baldwin submitted two affidavits. His counsel avers that he, counsel, drafted the offer to purchase, Baldwin explained to him that he wanted to construct an office building on the Property, and he, counsel, inserted the contingency "for [his] client's sole benefit and protection, which among other things included that he would be able to use the property as he intended." The affidavit of an employee of the City of Sun Prairie Department of Planning avers that the proposed CSM attached to the offer to purchase was never submitted, a letter of intent for the Montana Avenue CSM was submitted on March 14, 2005, the property in the former CSM is included in the latter and the latter also includes property to the west "to accomplish the extension of Montana Avenue to Ironwood Drive."

for inferring that the failure to submit the Montana Avenue CSM approval sooner was a breach of the duty of good faith.

¶13 We address Baldwin's third and fourth points together. Baldwin contends that it is reasonable to infer that F.C. Land's efforts to obtain approval of the West Prairie Village Plat were not necessary to obtain approval of a CSM containing the Property, and thus F.C. Land's efforts regarding the former do not show any effort to obtain approval of the latter. As a basis for this inference, Baldwin points to the absence of any contingency in the contract for sale relating to the West Prairie Village Plat and to evidence indicating that the Property is not in that plat and not directly adjacent to it. More particularly, Baldwin asserts there was no need to provide access to the Property by means of an extension of Montana Avenue to the west and a new street, Ironwood Drive, because Montana Avenue to the east was an already platted right-of-way with access to Thompson Road.

¶14 The fact that the West Prairie Village Plat is not mentioned as part of the contingency and the fact that the Property is neither in this plat nor directly adjacent to it do not in themselves give rise to a reasonable inference that approval of the plat is unrelated to or unnecessary for approval of a CSM containing the Property. Connery's affidavit avers that the plat was necessary to establish a road, Ironwood Drive, that in conjunction with Montana Avenue would provide access from the Property to Highway 19. Baldwin's submissions do not dispute that approval of the plat was necessary for this purpose, nor do they dispute that Ironwood Drive in conjunction with the extension of Montana Avenue provides access from the Property to Highway 19. As a basis for his assertion that this new access was unnecessary for the Property, Baldwin refers to a page in a document prepared on behalf of F.C. Land in connection with the extension of Montana

Avenue, explaining the need for an extension. Baldwin does not cite any particular language, but we assume he means us to read this portion of the page:

> The purpose of the project is to extend a roadway to allow development of upland areas adjacent to it in a way deemed safe by the Wisconsin Department of Transportation. (WisDOT). Montana Avenue is an existing platted right-of-way and needs to be extended in order to avoid a long dead end street that does not meet the City of Sun Prairie standards. The extension of this street will allow for a connection to State Trunk Highway (STH) 19 and also County Trunk Highway (CTH) C. The road will serve new office and commercial development. This street is an existing platted roadway that currently dead-ends approximately 1300 feet west of Thompson Road.

The remainder of this paragraph describes why an impact on the wetland is unavoidable.

¶15 Without further elaboration or reference to other evidence in the record, we do not view the above-quoted language as a basis for reasonably inferring that an extension of Montana Avenue to the west was not necessary to provide adequate access for the Property to State Highway 19 and County Highway C. We decline to search through the record to see if we can gain more information on what access already existed from the Property to Highway 19 and how that compared to the extension of Montana Avenue westward to the new Ironwood Drive. In addition, Baldwin refers us to no evidence that provides the basis for a reasonable inference that the City would have approved a CSM containing the Property before the extension of Montana Avenue and the new road, Ironwood Drive, were established by the plat.

¶16 We also observe that the evidence submitted by F.C. Land shows that there were storm water management issues for both the Property and West Prairie Village. Baldwin refers us to no evidence that would provide a reasonable

basis for inferring that the City would have treated these issues separately and on separate timetables.

¶17 Baldwin's fifth point is that a reasonable fact finder could infer that F.C. Land's failure to inform Baldwin of a significant obstacle—the need for a land exchange and another CSM to obtain the land for the Ironwood Drive intersection—constituted a breach of the duty of good faith. However, Baldwin points to nothing in the record that shows, or provides a reasonable basis for inferring, that Baldwin did not know about this.

¶18 Finally, Baldwin contends that a reasonable fact finder could infer that F.C. Land knew or should have known there was no chance of closing the transaction. In support of this contention, Baldwin asserts that the evidence gives rise to a reasonable inference that F.C. Land was a sophisticated developer and knew of the City's approval process and the time necessary to obtain a CSM containing the Property. We agree it is reasonable to infer from the evidence that F.C. Land was a sophisticated developer and we will assume without deciding that it is reasonable to infer that F.C. Land was generally familiar with the City's plat and CSM approval process. We do not agree that this is a sufficient basis for a reasonable fact finder to infer that F.C. Land knew how long it would take to obtain approval of a CSM containing the Property. Baldwin points to no evidence showing that the timing of the approval process is predictable. So far as the record discloses, it is possible that a sophisticated developer with knowledge of the approval process could have reasonably believed that the time frames were adequate to obtain approval.

¶19 The specific evidence Baldwin points is a December 29, 2004 email from a city planner to F.C. Land's counsel in response to an email from that

counsel attempting to speed up the process for approval of the plat. The city planner, after a discussion with other city staff, set forth a schedule for submissions by F.C. Land and meetings by the relevant city bodies whereby final approval could be obtained on April 5, 2005, with the caveat that "this is the best case scenario and the elected and appointed officials have the final decision-making authority on whether the application moves forward or not." Baldwin contends that, accepting Connery's averment that the plat had to be approved before the Montana Avenue CSM, and given that the next regular city council meeting after April 5, 2005, was April 19, 2005, it is reasonable to infer that, when F.C. Land agreed with him on February 8, 2005,[3] to extend the closing date to April 15, 2005, F.C. Land knew approval of the CSM could not be obtained prior to April 15, 2005.

¶20 The flaw in this argument is that there is no reasonable basis for inferring that F.C. Land knew that, if the plat was approved on April 5, 2005, the Montana Avenue CSM could not be approved before April 19, 2005. It is undisputed that the West Prairie Village Plat and the Montana Avenue CSM, as well as the Winter CSM, were all approved on the same date by the city council, May 17, 2005. To the extent F.C. Land is relying on Connery's affidavit as the basis for an inference that the plat had to be approved at a city council meeting

[3] Connery's affidavit states that the date of last amendment to the contract for sale was January 6, 2005, and that amendment changed the closing date from January 15, 2005 to April 15, 2005. Baldwin asserts in his appellate brief that this is incorrect and refers us to a trial exhibit with an amendment, executed by both parties on February 8, 2005, changing the closing date from February 15, 2005 to April 15, 2005. This exhibit does not appear to be included in the summary judgment submissions. However, F.C. Land does not dispute that this exhibit, rather than Connery's affidavit, shows the correct date of the amendment. Therefore, we use February 8, 2005, although our analysis would be the same if the date of the amendment was January 6, 2005.

before the city council meeting at which the CSM was approved and that F.C. Land knew this, that is not a reasonable inference from his affidavit. Connery avers that the "Montana Avenue CSM could not be *recorded* until after the 'West Prairie Village' Plat was first *recorded* …" and "… the Montana Avenue CSM could not be *recorded* before the Winter CSM or the WPV Plat were *approved and recorded*." (Paragraphs 7 and 8) (emphasis added). This does not address the required order of approval between the plat and the Montana Avenue CSM, and the contingency refers only to "approval." However, even if we were to assume that Connery meant the plat had to be *approved* before the Montana Avenue CSM was *approved*, there is no basis for inferring that this could not happen at the same city council meeting and that F.C. Land knew or should have known that.[4]

¶21 In short, we agree with the circuit court that Baldwin's argument that he is entitled to a trial on the good faith claim is based on speculation rather than on reasonable inferences drawn from the record. F.C. Land submitted detailed evidence showing the steps it took to obtain approval of the Montana Avenue CSM, the Winter CSM, and the West Prairie Village Plat and evidence of the connection between them. In order to create a genuine issue of material fact for trial, it was incumbent on Baldwin to submit evidence showing that F.C. Land unnecessarily complicated or prolonged the process for obtaining approval of a

[4] Baldwin relies on ***LDC-728 Milwaukee, LLC v. Raettig***, 2006 WI App 258, ¶13, 297 Wis. 2d 794, 727 N.W.2d 82, in which the trial court found that a party had breached the duty of good faith implied in a lease option because, the trial court found, "there was no reasonable chance of [the party] actually completing that transaction and [the party] knew, or should have known, that was so." We upheld this determination, finding that it was supported by the evidence and was not based on an impermissible standard of "commercial reasonableness." ***Id.***, ¶¶13-15. We did not specifically address the "should have known" part of the trial court's determination. On this appeal we assume without deciding that evidence from which one could reasonably infer that F.C. Land should have known that it could not close on April 15 when it agreed to that amendment to the closing date would entitle Baldwin to a trial on the good faith claim.

CSM containing the Property or otherwise acted in a manner inconsistent with a good faith effort to meet the contingency by the agreed upon closing date. Baldwin did not do that, and the evidence F.C. Land submitted does not reasonably allow the inferences that Baldwin asks us to draw.

II. Trial on Breach of Contract Claim

¶22 Baldwin's challenge to the trial court's determination that F.C. Land did not breach the contract for sale is limited to his contention that he had the right to unilaterally waive the contingency, thus obligating F.C. Land to convey the Property. He does not contest the court's finding that the contingency benefited both parties.[5] The court found that, although the contingency was inserted by Baldwin's counsel for Baldwin's benefit, F.C. Land accepted that contingency as beneficial to it, and it was beneficial to F.C. Land because without fulfillment of the contingency the contract for sale would have been void.[6] As we understand Baldwin's position, he asserts that, even if a contingency or condition benefits both parties, the party who inserted it for its own benefit can unilaterally waive it.

¶23 In order to resolve this issue, we must decide the correct legal standard to apply to the facts found by the circuit court. This presents a question

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[5] Baldwin asserts in his main brief and restates in his reply brief that "the trial court's finding that [the contingency] benefited both Baldwin and F.C. Land is not dispositive of the issue whether Baldwin can waive [the contingency]."

[6] SUN PRAIRIE, WIS., CODE OF ORDINANCES, § 16.08.010(A) (2002) prohibits dividing land without complying with the requirements of the chapter, *see* CODE OF ORDINANCES, § 16.04.020 ("certified survey map"), and prohibits the recording of such a land division and improvements of such land; violators are subject to monetary penalties, injunctions, and other sanctions. CODE OF ORDINANCES, § 16.08.050(A)-(C).

of law, which we review de novo. ***McLellan v. Charly***, 2008 WI App 126, ¶28, 758 N.W.2d 94.

¶24 Baldwin relies on ***Godfrey Co. v. Crawford***, 23 Wis. 2d 44, 49, 126 N.W.2d 495 (1964), in support of his position. In ***Godfrey*** the contract provision at issue stated that, if a certain zoning revision was not consummated by a certain date, the contract would become null and void and all money paid by the buyer would be returned. ***Id.*** at 48. The court agreed that the provision benefited both parties—the buyer because nonfulfillment of the zoning revision cancelled his liability and returned to him the money he had paid, and the sellers because nonfulfillment terminated their liability and freed them to sell the property to someone else. ***Id.*** The court then noted "the general rule … that a party to a contract can waive a condition that is for his benefit." ***Id.*** at 49. However, before concluding that the buyer could unilaterally waive this provision, the court analyzed whether such a waiver would interfere with the protections afforded the sellers by this provision. ***Id.*** The court concluded a waiver would not interfere because the sellers had

> no protectable interest in whether or not the zoning revision has been consummated as such, but only in knowing on March 1, 1963, that either (1) the buyer is absolutely bound to immediately pay the balance of purchase price, or (2) the contract is at an end and they are immediately free to sell to someone else.

Id.[7]

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[7] Baldwin in his reply brief also cites ***Variance, Inc. v. Losinske***, 71 Wis. 2d 31, 38, 237 N.W.2d 22 (1976), as "commenting on ***Godfrey***," but we do not view ***Variance*** as adding to our discussion. In the context of deciding whether a party had waived a condition precedent, the ***Variance*** court referred briefly to ***Godfrey***, stating: "In ***Godfrey*** the court held that a plaintiff could waive a condition precedent regarding a zoning change in a contract … since such condition had been inserted for its own benefit." 71 Wis. 2d at 38.

¶25 A later case, ***Goebel v. First Federal Savings & Loan Ass'n***, 83 Wis. 2d 668, 677, 266 N.W.2d 352 (1978), made clear that one party may not waive a provision in a contract where "waiver would deprive the non-waiving party of a benefit under the provision in question." ***Goebel*** cited ***Godfrey*** in support of this proposition. ***Id.*** The ***Goebel*** court concluded that the provision in a mortgage note limiting the term of the loan was not solely for the benefit of the lender because in certain situations it would have the effect of relieving the borrower of the obligation to pay an additional sum for increased interest. ***Id.*** at 678. Therefore, the lender could not waive that provision and extend the term of the loan. ***Id.***

¶26 We read ***Godfrey*** and ***Goebel*** to permit a party to a contract to unilaterally waive a contingency that protects the interests of both parties only if waiver does not adversely affect the interests of the non-waiving party that are protected by that provision. We see nothing in these cases that suggests that it is relevant which party initially caused the provision to be inserted in the contract, if the provision protects the interests of both parties.

¶27 Baldwin also argues that the contingency is not really necessary to protect F.C. Land from having to convey the Property without approval of a CSM. He appears to concede that it would be a violation of the Sun Prairie ordinance to convey the Property without an approved CSM (or other specified means of land division) and that a contract is void if it requires an illegal act or if a penalty would be imposed upon performance. *See* ***Hiltpold v. T-Shirts Plus, Inc.***, 98 Wis. 2d 711, 716-17, 298 N.W.2d 217 (Ct. App. 1980). However, he contends that, because the good faith implied in every contract requires that F.C. Land would do what is necessary to lawfully convey the Property even without the contingency, F.C. Land would obtain approval of a CSM even without the contingency and the

conveyance would be lawful. We do not understand this argument. It is inconsistent with the circuit court's finding that the contingency benefited F.C. Land, but Baldwin does not develop an argument to dispute that finding. Moreover, following the logic of Baldwin's argument, as we understand it, the contingency is not necessary to protect his interests either, because even without it F.C. Land is obligated to obtain approval of a CSM before the closing date. Because this argument lacks coherence, we do not address it further.

¶28 We conclude the circuit court applied the correct law to its findings of fact in deciding that Baldwin was not entitled to unilaterally waive the contingency. The court's conclusion that F.C. Land was not obligated to convey the Property was therefore correct.

CONCLUSION

¶29 The circuit court correctly determined that F.C. Land was entitled to summary judgment in its favor on Baldwin's claim for breach of the duty of good faith. The court also correctly determined that Baldwin did not prove at trial that F.C. Land had breached the contract for sale. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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