COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP648 **Cir. Ct. No. 2006CV462**

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

AMBR ENTERPRISES, RICHARD GRAMS, ALAN MIKKELSON, BRUCE GJERMO AND MATTHEW KLEIN,

PLAINTIFFS-RESPONDENTS,

V.

U.S. OIL CO., INC.,

DEFENDANT-APPELLANT.

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

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 BRIDGE, J. U.S. Oil Company, Inc. appeals a judgment of the circuit court finding that U.S. Oil materially breached a contract for the sale of property owned by U.S. Oil and ordering U.S. Oil to convey title to the property to AMBR Enterprises upon tender of the purchase price. It contends that the circuit

court erred in concluding that there was a breach because AMBR's complaint did not allege that a breach occurred on the date identified by the circuit court, nor did AMBR present evidence at trial which indicated that AMBR considered the contract to be in breach on that date. It also argues that, pursuant to a provision in the contract addressing the acceptability of title at closing, it was excused from conveying title to the property to AMBR. Finally, it argues that even if it did breach its agreement to convey title, a subsequent addendum to the contract cured that breach under the doctrines of waiver or novation. We reject each argument and affirm.

BACKGROUND

¶2 U.S. Oil is a wholesale and retail distributor of petroleum products. U.S. Oil and Texaco Downstream Properties, Inc., were the owners of approximately thirty-eight acres of property located in McFarland, Wisconsin. The property was partially utilized as a bulk storage facility, also known as a tank farm, where approximately 10,000,000 gallons of gasoline and fuel were stored. The remaining portion of the property was vacant.

¶3 In the spring of 2003, AMBR contacted U.S. Oil officials about purchasing approximately thirteen acres of the vacant portion of the property. Apparently, U.S. Oil had concerns regarding AMBR's use of the property because of the potential for complaints regarding the existing semi-tanker truck traffic at the tank farm. AMBR advised U.S. Oil that the construction of mini-storage units was one of the proposed purposes for buying the property. U.S. Oil was satisfied that this usage would be compatible with the tank farm.

¶4 On approximately June 19, 2003, AMBR and U.S. Oil entered into a written contract for the purchase of the thirteen acres. Although the property was

still owned in part by Texaco at the time the contract was signed, Texaco was not a party to the contract. The contract provided in part that AMBR would pay U.S. Oil $242,900 for title in fee simple to the parcel with a closing date set for no later than July 15. The contract specified that time was of the essence as to acceptance, occupancy, and closing. The contract further provided that upon payment of the purchase price at closing, U.S. Oil would deliver "merchantable title" to AMBR consisting of a "warranty deed … free and clear of all liens and encumbrances …." No condition restricting the use of the property by AMBR was included in the contract.

¶5 Before U.S. Oil could convey title to the property to AMBR, it first needed to acquire Texaco's ownership interest in the property; however, it took longer to do so than originally anticipated. U.S. Oil and AMBR therefore entered into a number of written addenda to the contract which ultimately extended the closing date to April 16, 2004. On that date, U.S. Oil still did not have clear title and the parties did not close on the property. The parties did not enter into another addendum extending the closing date past April 16.

¶6 On May 31, 2005, after U.S. Oil had succeeded in obtaining full ownership of the land, U.S. Oil and AMBR executed a final addendum. This addendum provided for a new closing date "no later than July 31, 2005," and stated that tax proration would be based on 2005 tax bills. The addendum provided that all other terms of the offer to purchase and prior amendments remained the same. In addition, the May 31 addendum provided as follows:

> The parties hereby agree that, despite the time that has elapsed since the last activity on this transaction, it remains the parties' intention to comply with all terms and conditions of the Offer to Purchase dated June 17, 2003, as amended, and to close on the sale of this property as soon as practical.

¶7 It appears that at the time the parties entered into the May 31, 2005 addendum, they were unaware that on May 9, the Village of McFarland had passed a moratorium prohibiting the division of all lots pending the creation of a neighborhood development plan for the area. The moratorium was to be effective for six months, unless repealed by the McFarland Village Board at an earlier date.[1] When U.S. Oil's surveyor submitted an application for a certified survey map to the Village in June 2005, for purposes of subdividing the thirty-eight acre parcel as required by Village ordinance and the contract, he was advised by the Village that the application would not be considered until further notice due to the moratorium.

¶8 In the meantime, U.S. Oil learned that AMBR no longer intended to restrict its use of the property to the building of mini-storage units. On July 7, 2005, U.S. Oil sent AMBR a letter stating that the transaction could still be closed at the same price. It stated that a condition of doing so, however, was AMBR's commitment to placing mini-storage units on the site, as originally discussed. U.S. Oil then sent a second letter to AMBR advising it that the transaction would not be closed on July 31 on the basis of impossibility due to the moratorium, which prohibited the splitting of lots in the Village.

¶9 After the moratorium was lifted, AMBR filed suit for specific performance. Following a trial to the circuit court, the court found that U.S. Oil materially breached the contract when it failed to deliver merchantable title to AMBR on April 16, 2004. The court entered a judgment for specific performance in favor of AMBR, which required U.S. Oil to convey the property to AMBR upon tender of the purchase price. The execution of the judgment was stayed by

[1] The moratorium was repealed on September 8, 2005.

the circuit court pending the outcome of U.S. Oil's appeal. We reference additional facts as needed in the discussion below.

DISCUSSION

BREACH ON APRIL 16, 2004

¶10 U.S. Oil first contends that the circuit court erred in concluding that a breach of contract occurred on April 16, 2004. It argues that AMBR did not allege in its complaint that there was a breach on that date, and that AMBR did not present evidence at trial which indicates that AMBR considered the contract to be in breach on that date. The circuit court rejected U.S. Oil's argument. The court ruled that the evidence presented at trial "demonstrated [U.S. Oil's] indisputable material breach on April 16, 2004" and that the evidence "has been available to and known by all parties for years prior to the trial." The court also ruled that U.S. Oil failed to show that it suffered any prejudice from AMBR's assertion of an April 16 breach.

¶11 When an issue is not raised by the pleadings but is tried by either the express or implied consent of the parties, the issue will "be treated in all respects as if [the issue] has been raised in the pleadings." WIS. STAT. § 802.09(2) (2007-08).[2] Section 802.09(2) authorizes the circuit court to amend the pleadings to conform to the proof at trial, *see* ***Hess v. Fernandez***, 2005 WI 19, ¶15, 278 Wis. 2d 283, 692 N.W.2d 655, but the failure to do so is not, in all circumstances, detrimental to the trial of those issues. *See* § 802.09(2). A court may treat the complaint as amended, even though no such amendment was requested, where the

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

opposing party has been fairly apprised of the issues involved and the variance between the pleadings and the proof has not misled the opposing party to his or her prejudice. ***Goldman v. Bloom***, 90 Wis. 2d 466, 480, 280 N.W.2d 170 (1979). The circuit court is allowed broad discretion under the statute. ***Id.*** In reviewing the court's actions, we apply an erroneous exercise of discretion standard of review. ***Schultz v. Trascher***, 2002 WI App 4, ¶14, 249 Wis. 2d 722, 640 N.W.2d 130.

¶12 At trial, there was both testimony and argument with respect to U.S. Oil's breach of contract on April 16, 2004. U.S. Oil was thus fairly apprised that the breach of contract on that date was a question involved in this case. Moreover, U.S. Oil has offered no proof establishing that the failure to formally amend the pleadings to allege April 16 as a date of breach was prejudicial to it in any respect. We therefore conclude that the circuit court properly exercised its discretion in ruling that a breach of contract occurred on April 16, 2004.[3]

FAILURE TO CONVEY CLEAR TITLE ON APRIL 16, 2004

¶13 U.S. Oil next argues that it was excused from conveying title to the property to AMBR because Texaco was still a partial owner of the property on April 16, 2004. U.S. Oil contends that, as a result, it was unable to convey clear title to AMBR on that date, which it claims voided the contract. To support this contention, U.S. Oil relies on a provision in the offer to purchase addressing the acceptability of title at closing. This provision provides that if title is unacceptable

[3] Because we conclude that a breach of contract occurred on April 16, 2004, we do not address U.S. Oil's argument that it was excused from performing the contract on July 31, 2005, on the basis of impossibility due to the Village of McFarland's moratorium on land subdivisions. On April 16, the moratorium was not in effect.

for closing, the buyer may object. If the buyer does so, the offer "shall be null and void."[4]

¶14 The circuit court rejected U.S. Oil's argument, ruling that the clause protected AMBR, rather than U.S. Oil. The court stated that U.S. Oil knew when it executed the initial contract in 2003 that it did not have merchantable title to the parcel. By agreeing to deliver merchantable title nonetheless, it knowingly assumed the risk of nonperformance. U.S. Oil disputes the court's conclusion, arguing that the quoted language protected U.S. Oil as well as AMBR because the language prevented AMBR from suing U.S. Oil, and released U.S. Oil from further obligations with respect to the agreement.

¶15 The construction of a contract for the sale of real estate presents a question of law, which we review de novo. ***Galatowitsch v. Wanat***, 2000 WI App 236, ¶11, 239 Wis. 2d 558, 620 N.W.2d 618. We construe contracts to achieve the intent of the parties, giving terms their plain and ordinary meaning. ***Goldstein v. Lindner***, 2002 WI App 122, ¶12, 254 Wis. 2d 673, 648 N.W.2d 892. If the words of a contract convey a clear and unambiguous meaning, our analysis ends. ***Id.***

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[4] The provision provides in full as follows:

> TITLE ACCEPTABLE FOR CLOSING: If title is not acceptable for closing, Buyer shall notify Seller in writing of objections to title by the time set for closing. In such event, Seller shall have a reasonable time, but not exceeding 15 days, to remove the objections, and the time for closing shall be extended as necessary for this purpose. In the event that Seller is unable to remove said objections, Buyer shall have 5 days from receipt of notice thereof, to deliver written notice waiving the objections, and the time for closing shall be extended accordingly. If Buyer does not waive the objections, this Offer shall be null and void. Providing title evidence acceptable for closing does not extinguish Seller's obligations to give merchantable title to Buyer.

¶16 The language of the provision relied upon by U.S. Oil is clear and unambiguous. It provides the *buyer* the right to object to title and the right to waive those objections. Under the terms of the provision, the agreement becomes null and void only if the *buyer* does not waive objections previously made to the acceptability of title. This provision does not afford the seller, in this case U.S. Oil, the right to assert deficiencies in title as a defense to the enforceability of the agreement. Accordingly, we conclude that the circuit court properly ruled that U.S. Oil may not rely on this provision as a defense to its breach of the contract.

WAIVER AND NOVATION

¶17 U.S. Oil argues that, even if it did breach its agreement to convey the thirteen acre parcel to AMBR by failing to close on April 16, 2004, the subsequent addendum signed by AMBR on May 31, 2005, cured that breach under the doctrines of waiver or novation.

Waiver

¶18 In support of its claim of waiver, U.S. Oil relies on the fact that AMBR was aware of U.S. Oil's failure to convey merchantable title on April 16, 2004, but did nothing until May 31, 2005, when it agreed to a new closing date. The circuit court ruled that the execution of the May 31 addendum, in and of itself, did not constitute a waiver or forgiveness of U.S. Oil's prior breach. It determined that additional evidence beyond the terms of the May 31 addendum would be required to demonstrate an intent to waive on AMBR's part, but the record was devoid of any evidence of an agreement by AMBR to release U.S. Oil from the consequences of its prior breach.

¶19 Waiver is the voluntary and intentional relinquishment of a known right. ***Christensen v. Equity Coop. Livestock Sale Ass'n***, 134 Wis. 2d 300, 303, 396 N.W.2d 762 (Ct. App. 1986). "Intentional," in this context, does not require proof of the waiving party's actual intent to waive, but rather proof that the waiving party *acted* intentionally and with knowledge of material facts. ***Nugent v. Slaght***, 2001 WI App 282, ¶¶12-13, 249 Wis. 2d 220, 638 N.W.2d 594. When the facts are conclusive as to the intent to waive, the question of whether the terms of a contract have been waived presents a question of law. However, where the facts are not conclusive, intent to waive presents a question of fact, s*ee* ***Hanz Trucking, Inc. v. Harris Bros. Co***., 29 Wis. 2d 254, 265, 138 N.W.2d 238 (1965), and ***Christensen***, 134 Wis. 2d at 303, which we review under the clearly erroneous standard. *See* ***Broadie v. State***, 68 Wis. 2d 420, 423, 228 N.W.2d 687 (1975). As the party asserting waiver, U.S. Oil bears the burden of proof. ***Christensen***, 134 Wis. 2d at 303.

¶20 Citing ***Ricchio v. Oberst***, 76 Wis. 2d 545, 557-58, 251 N.W.2d 781 (1977), and ***Peyer v. Jacobs***, 275 Wis. 364, 368, 82 N.W.2d 202 (1957), U.S. Oil asserts that the Wisconsin Supreme Court has recognized that an agreement to extend a closing date for a real estate transaction may constitute a waiver of past deadlines. While we recognize that under certain circumstances, a contract provision calling for a particular closing date may be waived, sufficient evidence of such a waiver must be presented. There is nothing in the May 31, 2005 addendum, nor in AMBR's conduct, that leads to the conclusion that the addendum was a forgiveness of U.S. Oil's breach of contract or an abandonment of AMBR's claim for breach. At most, the May 31 addendum reflects AMBR's continued desire to complete the transaction. Further, the record is devoid of any evidence of conduct on the part of AMBR inconsistent with its intent to enforce

the contract by obtaining title to the property. The evidence is conclusive that AMBR did not intend to waive the April 16, 2004 breach. We therefore conclude, as a matter of law, that the circuit court's ruling was proper.

Novation

¶21 U.S. Oil also argues that the May 31, 2005 addendum constituted a novation of the parties' prior agreements which ultimately called for an April 16, 2004, closing date. In general terms, novation is the substitution of an existing obligation with a new agreement or obligation. ***Navine v. Peltier***, 48 Wis. 2d 588, 592-93, 180 N.W.2d 613 (1970). The circuit court ruled that the May 31 addendum was not a novation.

¶22 Whether novation has occurred depends on two factors: (1) whether the facts show consent by the parties, and (2) whether there was sufficient consideration to support the new obligation. *See* ***id.*** at 594. The alleged existence of a novation presents a mixed question of fact and law. ***Siva Truck Leasing, Inc. v. Kurman Distribs.***, 166 Wis. 2d 58, 68, 479 N.W.2d 542 (Ct. App. 1991). We uphold the court's factual determinations unless clearly erroneous, but determine as a matter of law whether the facts fulfill a legal standard. ***Id.***

¶23 As to whether the facts show consent, U.S. Oil contends that novation can be implied from the conduct of the parties. In particular, it argues that, at the time of the final addendum, the parties reached a new agreement with a new closing date. From this, U.S. Oil argues that it is reasonable to conclude that this new agreement was a substitution for the parties' prior agreement, apparently on the basis that AMBR had forgiven earlier breaches of contract.

¶24 As we discussed above, the circuit court declined to infer from the May 31, 2005 addendum that AMBR forgave U.S. Oil's April 16, 2004 breach. Moreover, the court ruled that there is no indication that AMBR intended the May 31 addendum to constitute a "new agreement" which would substitute for the parties' prior agreement. The May 31 addendum states that the parties agree to *amend* the June 17, 2003 offer to purchase, and that all other terms of the offer and subsequent amendments remain the same.

¶25 The drawing of an inference on undisputed facts when more than one inference is possible is a finding of fact which is binding upon this court. "It is not within the province of … any appellate court to choose not to accept an inference drawn by a fact finder when the inference drawn is a reasonable one." ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989). We accept as reasonable the circuit court's inference that the final addendum did not by its terms constitute a novation. We therefore conclude that a novation did not occur.

CONCLUSION

¶26 For the reasons discussed above, we affirm the judgment of the circuit court for specific performance.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.