

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 2009

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. 2008AP791

Cir. Ct. No. 2005CV759

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

TODD FRANCK,

PLAINTIFF-APPELLANT,

v.

CBL PARTNERS, LLC AND LON FEIA,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for St. Croix County:
SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Todd Franck appeals a judgment that dismissed his breach of contract and misrepresentation claims against CBL Partners, LLC, and its member, Lon Feia, and denied his motions after the verdict. He also appeals a judgment awarding attorney fees and costs to CBL. Franck contends the court

erroneously concluded a purchase contract for a condominium unit was ambiguous and the court should not have permitted the jury to determine the parties' intent. He also contends the court erroneously instructed the jury on his misrepresentation claim. We affirm the judgments.

BACKGROUND

¶2 In 2004, CBL began developing a business condominium in Hudson, Wisconsin. Franck negotiated with Feia to purchase a unit in the condominium. In May 2005, Feia and Franck met for several hours. No condominium documents yet existed, but Feia had architectural drawings created by Frisbie & Associates that showed proposed units to be sold. Each unit was labeled with a unit number and square footage. The square footage was determined with Frisbie's computer software and measured the space from the outside of the exterior walls to the center of the interior walls.

¶3 Feia and Franck filled in portions of a blank commercial offer to purchase form. Franck prepared an addendum with additional terms. They also incorporated Frisbie's drawings of the second floor, from which Franck narrowed his choice to two proposed units. The drawing indicated one of the units contained 1,328 square feet and the other 1,375 square feet. The agreement provided the unit would be 1,375 square feet, with the addendum specifying that if Franck chose the smaller unit, a wall would be moved to increase the space to a total not exceeding 1,375 square feet.

¶4 The term "unit" was not defined in the contract, and the contract contained a warning for Franck to verify dimensions:

PROPERTY DIMENSIONS AND SURVEYS: Buyer and Seller acknowledge that any Property, building or room

dimensions, or total acreage or building square footage figures, provided to Buyer or Seller may be approximate because of rounding or other reasons, unless verified by survey or other means. Buyer also acknowledges that there are various formulas used to calculate total square footage of buildings and that total square footage figures will vary dependent upon the formula used. **CAUTION: Buyer should verify total square footage formula, Property, building or room dimensions, and total acreage or square footage figures, if material to Buyer's decision to purchase.** (Emphasis in original.)

¶5 Franck subsequently selected a unit and discussed potential layouts with Frisbie. Frisbie generated two proposed layouts of Franck's unit, one containing 1,328 square feet and the other containing 1,386 square feet—Franck chose the latter. Matt Frisbie testified he informed Franck of the manner in which the square footage was calculated.

¶6 The condominium declaration and plat were subsequently drafted and were recorded on October 7, 2005. The declaration defined the condominium unit not to include the exterior walls, which were instead a common element. Therefore, the condominium plat reflected a smaller square footage number for the unit than Frisbie's drawings—1,232 square feet rather than 1,386.¹

¶7 Following unrelated disputes, the parties negotiated a second addendum to the contract dated November 10, 2005. The addendum reduced the purchase price and stated, “The Unit being purchased shall be Unit 206, which shall consist of 1,386 sq. ft. ... which will be completed in the manner described in the build-out plan created by Frisb[i]e Architects for the space....” Franck walked through the unit before signing the addendum, but he never measured it.

¹ The condominium plat was not prepared by Frisbie, but was instead created by an engineering firm.

¶8 The record contains conflicting evidence about when Franck received a copy of the condominium declaration and plat. Franck testified Feia refused to give him a copy of the condominium documents and Franck ultimately obtained a copy from a title company in late November. Feia testified the documents were sent to Franck's attorney by messenger during the writing of the November addendum. Regardless, when Franck realized the platted square footage of his unit was less than the number reflected in Frisbie's drawings, he refused to close the sale at the agreed price.

¶9 On December 7, 2005, Franck commenced this action, alleging breach of contract, misrepresentation, and seeking a declaratory judgment. CBL and Feia counterclaimed, alleging Franck breached the contract. The court denied both parties' motions for summary judgment, concluding genuine issues of material fact existed as to the terms of the contract.

¶10 A two-day jury trial was held. Franck objected to the wording of a special verdict question because it referred to the size of the condominium's "space" instead of referring to the size of the "unit." The special verdict read: "Did Lon Feia make the representation of fact as to the size of the condominium space ... to Todd Franck?" The court refused to change the language because the meaning of the word "unit" in the contract was a critical issue before the jury and the court did not want to confuse the jury by using that word in the verdict. During deliberations, the jury asked whether condominium space was the same as the definition of the unit. The court instructed the jury that "space" and "unit" were not defined in the jury instructions, but were facts to be determined by the jury.

¶11 The jury found that Feia made a representation of fact regarding the size of the space, but the representation was not untrue. It further found Franck breached the contract and that CBL and Feia did not. Franck moved to change the jury's verdict answers and for a new trial. The circuit court denied the motions.

DISCUSSION

¶12 Franck claims he was entitled to judgment as a matter of law on his breach of contract claim and that the court should have changed the jury's answers to the special verdict questions regarding who breached the contract. He argues a "unit," under the condominium declaration, consisted of space measured from the inside of the exterior walls. He contends it is undisputed CBL was not giving him a 1,386-square-foot "unit." Franck also claims he is entitled to a new trial on his misrepresentation claim because the court used the word "space" rather than "unit" in the special verdict question about Feia's square footage representations.

¶13 We first address whether Franck was entitled to judgment as a matter of law on his breach of contract claim. The meaning of an unambiguous contract is a question of law we review independently. *See Farm Credit Servs. v. Wysocki*, 2001 WI 51, ¶¶8, 12, 243 Wis. 2d 305, 627 N.W.2d 444. We also review independently whether a contract is ambiguous. *Id.* A contract is ambiguous if it is susceptible to more than one reasonable interpretation. *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 177, 577 N.W.2d 67 (1996). "When 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.*

¶14 We first reject Franck's claim that CBL breached the contract as a matter of law because it did not deliver a 1,386 square foot "unit," as that term is

defined in the condominium declaration. The word “unit” is confusing in the context of this case because it has been defined differently at various times.

¶15 As indicated, the purchase contract did not explicitly define the term “unit.” However, at the time of the purchase contract, and before the condominium declaration, the unit effectively included the exterior walls and one-half of the interior walls because that is how square footage was measured in the architectural drawings. Then, in the condominium declaration, the unit was defined as not including the exterior walls, with the square footage being measured accordingly. While the usable floor space was the same under either definition, the two definitions resulted in different square footage figures: 1,386 square feet under the architectural drawings and 1,232 square feet under the condominium plat.

¶16 These definitions intersect in the November 2005 addendum, specifically that portion stating, “The Unit being purchased shall be Unit 206, which shall consist of 1,386 sq. ft. ... which will be completed in the manner described in the build-out plan created by Frisb[i]e Architects for the space....” While this language refers to the unit being 1,386 square feet, which is consistent with the referenced architectural drawings, that square footage includes exterior walls. Under the condominium declaration in existence by this time, exterior walls are not part of Unit 206, but are instead a common element. Thus, the 1,386 square feet in Frisbie’s drawings actually includes space beyond the boundaries of the “unit” under the declaration.

¶17 The inconsistencies in the language of the November 2005 addendum lead to two reasonable interpretations, as reflected in the parties’ arguments. Under CBL’s view, Franck was entitled to 1,386 square feet,

including the exterior walls in accordance with the architectural drawings, or 1,232 feet excluding the exterior walls in accordance with the condominium plat. Under Franck's view, the contract entitled him to 1,386 square feet, not including the exterior walls, because the unit does not include exterior walls under the condominium declaration and plat. With two different and reasonable interpretations, the contract was ambiguous, and the court correctly sent the issue to the jury.

¶18 We next address whether the court should have granted Franck's motion to change the jury's answers to the special verdict questions regarding who breached the contract. A motion to change an answer on a special verdict form challenges the sufficiency of the evidence to sustain the jury's answer. WIS. STAT. § 805.14(5)(c).² A trial court will grant such a motion if there is no credible evidence to sustain the verdict. WIS. STAT. § 805.14(1). We review challenges to the sufficiency of the evidence under the same standard. *State v. Michael J.W.*, 210 Wis. 2d 132, 143, 565 N.W.2d 179 (Ct. App. 1997).

¶19 We conclude there was sufficient evidence to support the verdict. As stated above, the contract was ambiguous, and one reasonable view of the contract was that Franck agreed to purchase the unit described in the condominium plat and architectural drawings. Further, there was credible evidence that Franck was informed the architectural drawings' square footage included the exterior walls. The contract also warned Franck that different methods of calculating

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

square footage could be used and that he should verify the square footage himself. Franck walked through the unit but never measured it.

¶20 Finally, we address Franck's challenge to the special verdict question: "Did Lon Feia make the representation of fact as to the size of the condominium space ... to Todd Franck?" The jury answered the question affirmatively, but answered no to the next question, which asked whether the representation was untrue. Franck challenges the court's decision to use the word "space" in the special verdict rather than the word "unit."

¶21 Circuit courts have wide discretion to frame special verdicts. *Estate of Hegarty v. Beauchaine*, 2006 WI App 248, ¶46, 297 Wis. 2d 70, 727 N.W.2d 857. We will not interfere with the special verdict used unless it failed to fairly represent the material facts to the jury. See *Behning v. Star Fireworks Mfg. Co.*, 57 Wis. 2d 183, 188-89, 203 N.W.2d 655 (1973). Franck argues the verdict failed to fairly represent the material facts because it was confusing. He contends he agreed to purchase "Unit 206" and therefore "unit," not "space," is the operative word.

¶22 We reject Franck's claim that the court's use of the word "space" instead of "unit" requires reversal. As discussed above, the word "unit" is confusing in light of the facts of this case, particularly regarding the determination of square footage. The court attempted to minimize this confusion by avoiding using the word "unit." We are not convinced that replacing "space" with "unit" in the special verdict would have made the jury's task less, rather than more, confusing.

By the Court.—Judgments affirmed.

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

