COURT OF APPEALS DECISION DATED AND FILED

May 29, 2002

Cornelia G. Clark
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. 01-1218 | **Cir. Ct. No. 00-CV-12**

STATE OF WISCONSIN | **IN COURT OF APPEALS DISTRICT III**

VALLEY LAND COMPANY,

PLAINTIFF-RESPONDENT,

V.

JOHN SALMON AND HARRIET SALMON,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for St. Croix County: C.A. RICHARDS, Reserve Judge. *Affirmed*.

Before Cane, C.J, Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. John and Harriet Salmon appeal a judgment granting Valley Land Company specific performance on a land contract. After trial to the court, the court found that the parties' conduct did not make time of the essence as to the October 1, 1999 closing date and that Valley's final proposed closing date was within a reasonable time. The Salmons challenge these ultimate

findings as well as the court's findings that their former attorney agreed to extend the October 1, 1999 deadline for closing and that the Salmon's failure to timely produce an abstract led to the failure to close October 1. We reject these arguments and affirm the judgment.

¶2 Under the terms of an addendum to a 1996 land contract, Valley exercised its option to buy two additional parcels on March 20, 1999. At that time, Gary Valley met with John Salmon at his home, provided him with written notification and a $2,000 check representing earnest money for the property. A few days later, he requested a real estate abstract from the Salmons' attorney. Salmon returned the earnest money check with a letter postmarked March 29, 1999. On March 30, the last day for exercising the option, Valley provided the Salmons with a second written notice of intent to exercise the option.

¶3 Over the next several months, the Salmons impeded the progress of the deal, causing Valley to fear that the Salmons did not intend to honor the contract. On July 1, 1999, Valley's attorney wrote a letter to the Salmons' attorney asking for written assurance that the Salmons would perform their obligations under the contract. Valley threatened to sue the Salmons if they did not receive sufficient assurance. The Salmons indicated their willingness to honor the contract, but raised additional demands. Valley's attorney then suggested September 30 or October 1, 1999, as a possible time frame for closing if the Salmons produced an abstract by August 15. The Salmons contend that the October 1 proposed closing date was made "of the essence" by the parties' conduct.

¶4 Whether the parties' conduct made the time of closing "of the essence" is a question of fact. *See* ***Employers Ins. v. Jackson***, 190 Wis. 2d 597,

616, 527 N.W.2d 681 (1995). Findings of fact will not be overturned unless they are clearly erroneous. WIS. STAT. § 805.17(2) (1999-2000). The trial court's assessment of the witnesses' credibility will not be overturned unless the court's findings are contrary to conceded facts, or are patently or inherently incredible, or in conflict with the laws of nature. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶5 The Salmons argue that Valley's threat to sue made time of the essence. The threatened lawsuit resulted from fear that the Salmons did not intend to honor the agreement. The proposed complaint did not reflect an urgency in the timing of the closing and does not suggest enforcement of an October 1, 1999, deadline.

¶6 The parties' conduct before and after the October 1 proposed closing date support the finding that time was not of the essence. The abstract was finally delivered to Valley's first attorney (who, by then, had been replaced by another attorney) on September 16, 1999, thirty-two days after it was due under the proposal. Because the August 15 deadline for the abstract was not met, neither party had agreed to make the October 1 closing date "of the essence" or conducted themselves as though it were. When Valley spoke with the Salmons' attorney on September 20 indicating that he needed additional time to update the abstract and get a title opinion, the attorney told Valley not to worry about the closing date. On September 30, Valley's new attorney determined that the abstract he had received covered the wrong parcel. In conversations between the attorneys, nothing was said about the October 1 proposed closing date. No specific arrangements had been made to conduct the closing. The Salmons' attorney, by letter dated October 1, 1999, indicated that a personal guarantee should probably be re-executed when the property closed. The Salmons' attorney asked in an October 26, 1999 letter

"shouldn't we be closing soon?" This evidence strongly supports the trial court's findings that the October 1, 1999, proposed closing date was not of the essence.

¶7 There is no basis for this court to overturn the trial court's finding that the Salmons' attorney told Valley not to worry about the October 1 deadline. As the arbiter of the witnesses' credibility, the trial court properly resolved the conflicts in the testimony. *See* ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977). The attorney's letters on and after October 1 indicated that the attorney believed the closing would still take place, a concession that time was not of the essence as to the October 1 proposed closing date.

¶8 The record also supports the trial court's finding that the Salmons' failure to timely submit an abstract led to the delay. The Salmons argue that they were not required to produce an abstract under the terms of the land contract and therefore the delay in presenting the abstract was irrelevant. The abstract was made relevant by the proposed agreement to close on October 1 if the abstract was provided by August 15. Therefore, the trial court properly viewed the Salmons' failure to deliver an abstract as the primary reason for the failure to close on October 1.

¶9 Finally, the record supports the trial court's finding that Valley Land was willing to close within a reasonable time. What constitutes a reasonable time is a question of fact. *See* ***Delap v. Inst. of Am., Inc.***, 31 Wis. 2d 507, 512, 143 N.W.2d 476 (1966). After months of dilatory tactics by the Salmons, Valley reviewed the abstract, got a title opinion, cleared some clouds on the title and suggested a new closing date around Thanksgiving 1999. Because most of the delay can be attributed to the Salmons and none of the parties expressed any desire to accelerate the process after September 16, the trial court appropriately found

that the suggested Thanksgiving closing time was reasonable under the circumstances.

By the Court.—Judgment affirmed.

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