COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2546 **Cir. Ct. No. 01-CV-20**

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

TAYLOR INVESTMENT CORPORATION OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PLL MARQUETTE, LLC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 ROGGENSACK, J. PLL Marquette, LLC (PLL) appeals the circuit court's award of attorney fees to Taylor Investment Corporation of Wisconsin

(Taylor) pursuant to WIS. STAT. § 814.025(3)(b) (1999-2000)[1] and the amount of fees awarded. PLL argues that its defenses to Taylor's action for nonpayment were not "without any reasonable basis in law" and therefore were not frivolous. We disagree and conclude that PLL's proffered defenses were frivolous. However, because we conclude that the circuit court's finding of fact regarding the amount of attorney fees owed Taylor subsequent to December 6, 2000, the date the circuit court determined PLL's defenses became frivolous, is unsupported in the record, we remand to the circuit court to adjust the amount of fees awarded

[1] PLL argues that the precise basis for the circuit's court award of attorney fees is unclear and therefore appeals the circuit court's award of fees under WIS. STAT. § 814.025 and alternatively, WIS. STAT. § 804.12(3). Based on our review of the record, we conclude that the circuit court awarded Taylor attorney fees under § 814.025(3)(b). Therefore, we limit our review of PLL's appeal to whether the circuit court erred in awarding attorney fees pursuant to § 814.025(3)(b). Additionally, all references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Section 814.025 provides in relevant part:

> (1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under section 814.04 and reasonable attorney fees.
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> …
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> (3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:
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> …
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Taylor to $2460, the undisputed amount of Taylor's attorney's fees from December 6, 2000 forward.

BACKGROUND

¶2 In November of 1999, Taylor accepted an offer by PLL to purchase "Lot 9 of The Preserve at Lawrence Lake Plat" (Lot 9). The offer contained the following provisions: (1) a $183,250 purchase price; (2) $5000 in earnest money due with the offer; and (3) an additional $5000 in earnest money due within ten days of acceptance. PLL submitted $5000 with its offer to purchase, which Taylor accepted on December 3, 1999. PLL submitted no additional earnest money. On December 21, 1999, the parties closed on the real estate transaction. As part of the closing, they signed a closing statement that was prepared in the belief the PLL's second $5000 payment was in the mail. Therefore, the closing statement reflected a total earnest money credit of $10,000. PLL paid $173,250 at closing, thereby tendering $5000 less than the agreed upon purchase price.

¶3 In February 2000, Taylor discovered that the closing statement had been prepared in error because the expected second $5000 payment from PLL had never arrived. Taylor wrote PLL on three separate occasions requesting payment of the unpaid earnest money. PLL disputed whether $5000 remained unpaid, and Taylor subsequently filed suit. PLL answered with denials on information and belief relative to the dispositive paragraphs of the complaint, and it raised the affirmative defense of accord and satisfaction.

¶4 During discovery, Taylor requested PLL to provide documentation confirming that the additional $5000 had been paid. It also submitted requests to admit that PLL had not paid the second $5000 in earnest money that the parties' contract required. PLL denied that it failed to submit the additional earnest

money, but it produced only one document to support its denial—the closing statement.

¶5 Taylor then filed a motion for summary judgment contending that there was no genuine issue of material fact in regard to the failure to pay the additional $5000 called for under the contract. Taylor also filed a motion for the award of costs and attorney fees pursuant to WIS. STAT. § 814.025. To support its summary judgment motion, among the documents Taylor submitted was a detailed affidavit from its regional sales manager stating that the closing statement was prepared in error and that Taylor had never received payment of the additional $5000 in earnest money. PLL submitted no affidavit alleging that the $5000 had been paid. Instead, PLL argued that it was entitled to rely on the closing statement as evidence of payment because it constituted a binding contract between the parties. The circuit court granted Taylor's motion for summary judgment on its contract claim and advised the parties that it would conduct an additional hearing on Taylor's motion for attorney fees.

¶6 Following the court's decision, Taylor filed a second motion requesting an award of costs and attorney fees under WIS. STAT. § 804.12(3). After a hearing, the circuit court ruled that because PLL denied that it failed to pay the additional earnest money based only on the closing statement, its defense was frivolous. The court awarded Taylor attorney fees subsequent to December 6, 2002, the day PLL filed its response to Taylor's request for admissions wherein PLL denied that the additional earnest money had not been paid. The court listed this amount as $4190 in the judgment. PLL did not appeal the summary judgment on Taylor's contract claim, but it does appeal the circuit court's award of attorney fees and the amount of fees awarded.

DISCUSSION

Standard of Review.

¶7 Our review of the circuit court's award of attorney fees under WIS. STAT. § 814.025(3)(b) presents a mixed question of fact and law. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 241, 517 N.W.2d 658, 666 (1994). A determination of what a reasonable person knew or should have known involves a question of fact. ***Id.*** We will not disturb findings of fact unless they are clearly erroneous. ***Riley v. Lawson***, 210 Wis. 2d 478, 491, 565 N.W.2d 266, 272 (Ct. App. 1997). Whether the facts as found support a determination of frivolousness is a question of law that we review *de novo*. ***Id.***

¶8 An award of attorney fees under WIS. STAT. § 814.025 is a discretionary decision. ***Lenhardt v. Lenhardt***, 2000 WI App 201, ¶13, 238 Wis. 2d 535, 618 N.W.2d 218. We will not overturn such a determination unless the circuit court erroneously exercised its discretion. ***Id.***

WIS. STAT. § 814.025.

¶9 PLL argues that the circuit court erred in awarding Taylor attorney fees under WIS. STAT. § 814.025(3)(b) because PLL relied solely on the closing statement as the basis for its defenses. PLL argues that its reliance is not without any reasonable basis in law and therefore, PLL's defenses were not frivolous. We are not persuaded by PLL's contentions.

¶10 A defense is frivolous under WIS. STAT. § 814.025(3)(b) if the party or attorney knew or should have known that a claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for the extension, modification or reversal of existing law. A

determination of frivolousness under subsection (b) is based on an objective standard of what a reasonable party or attorney knew or should have known under the same or similar circumstances. ***Sommer v. Carr***, 99 Wis. 2d 789, 799, 299 N.W.2d 856, 860 (1981). A defense is not frivolous because it later lost on the merits. ***Stern***, 185 Wis. 2d at 243-44, 517 N.W.2d at 667; ***Swartout v. Bilsie***, 100 Wis. 2d 342, 356, 302 N.W.2d 508, 517 (Ct. App. 1981). However, a defense is frivolous if there is no set of facts which could satisfy the elements of the defense, or if the party or attorney knew or should have known that the facts necessary to prove the required elements of the defense were not present and could not be produced.[2] ***Stern***, 185 Wis. 2d at 243-44, 517 N.W.2d at 667.

¶11 The inquiry here is whether there is a reasonable basis in law or equity for PLL to deny it had paid all of the purchase price for Lot 9 solely because the closing statement erroneously gave PLL credit for a second $5000 earnest money payment it never made. We conclude that there is not.

¶12 On appeal, PLL asserts three defenses to Taylor's action for nonpayment: (1) PLL was entitled to rely on the closing statement as evidence of payment because it constituted a contract between the parties that, absent a clear showing of misrepresentation or fraud, bound the parties; (2) the closing statement provided a basis for accord and satisfaction of the disputed $5000; and (3) the closing statement ratified a reduced purchase price.

[2] For example, in ***Stoll v. Adriansen***, 122 Wis. 2d 503, 515, 362 N.W.2d 182, 189 (Ct. App. 1984), we determined that "the total lack of evidence necessary to prove negligence would lead a reasonable party to conclude under the facts of this case that assertion of such a claim would be frivolous."

¶13 In regard to the contention that the closing statement was a contract between the buyer and seller that reduced the purchase price by $5000, there is no legal or factual basis to support that contention. The essential elements of contract formation are offer, acceptance and consideration. ***Briggs v. Miller***, 176 Wis. 321, 325, 186 N.W. 163, 164 (1922). The facts relevant to this defense are not disputed. On December 21, 1999, the parties executed a closing statement that summarized the financial portions of the contract to sell land, previously entered into by the parties. There is no evidence in the record to suggest that the closing statement was the result of a "new" offer or acceptance. Moreover, there is nothing in the record to suggest that this claimed "contract" was supported by consideration. Accordingly, we conclude that PLL knew or should have known that the facts necessary to meet the required elements of a contractual defense did not exist. Similarly, because a closing statement does not constitute a new agreement or promise between the parties, it cannot modify the existing contract. *See* ***Berg-Zimmer & Assoc., Inc. v. Central Mfg. Corp.***, 148 Wis. 2d 341, 347-48, 434 N.W.2d 834, 836-37 (Ct. App. 1988). Therefore, there was no reasonable basis in law or equity to support PLL's defense that it was entitled to rely on the closing statement as proof of a payment it never made.

¶14 PLL's second defense to Taylor's claim of nonpayment, accord and satisfaction, is equally lacking in legal support. PLL argues that Taylor discharged PLL from its obligation to pay the full purchase price when it accepted $173,250 at closing, rather than requiring the full $178,250 agreed to in the accepted offer to purchase.

¶15 The doctrine of accord and satisfaction allows parties to discharge an existing disputed claim arising in contract by substituting for the contract an agreement to compromise and performance of the substituted agreement. ***Tower***

Ins. Co. v. Carpenter, 205 Wis. 2d 365, 371-72, 556 N.W.2d 384, 386-87 (Ct. App. 1996). It constitutes a defense to an action to enforce a claim, but is applicable only where there existed a disputed claim and the parties agreed, by express or implied contract, to discharge the disputed claim by substitute payment. ***Flambeau Prods. Corp. v. Honeywell Info. Sys., Inc.***, 116 Wis. 2d 95, 113, 341 N.W.2d 655, 664 (1984); ***Chicago & N.W. Transp. Co. v. Thoreson Food Prods., Inc.***, 71 Wis. 2d 143, 146, 238 N.W.2d 69, 71 (1976).

¶16 Here, there was no dispute about the price at which Taylor had agreed to sell and PLL had agreed to buy Lot 9, and PLL does not argue that there was. Therefore, when the closing statement was presented there was no disputed claim to which accord and satisfaction could be applied.

¶17 As a final effort, PLL argues that Taylor "ratified" the terms of the closing statement crediting to PLL payment of the promised $10,000 in earnest money by "going forward with the transaction, and accepting PLL's funds." According to PLL, Taylor cannot claim after realizing its mistake that the additional payment did not occur or that the closing statement reflects an incorrect accounting. This is a defense that was not raised before the circuit court. Therefore, we will not address it for the first time on appeal. ***Arsand v. City of Franklin***, 83 Wis. 2d 40, 55, 264 N.W.2d 579, 586 (1978). Accordingly, we conclude that there was no reasonable basis in law or equity for PLL's defense to payment and that PLL violated WIS. STAT. § 814.025(3)(b), as the circuit court determined.

Award of Attorney Fees.

¶18 PLL also argues that the circuit court erred in determining the amount of attorney fees awarded Taylor. The court awarded Taylor attorney fees

to commence December 6, 2000, the day PLL filed its response to Taylor's request for admissions and denied that the additional earnest money had not been paid. PLL argues that the judgment awarding fees totaling $4190 exceeds the amount of attorney fees incurred by Taylor subsequent to December 6, 2000. We agree.

¶19 Taylor does not contest the date in the judgment regarding when PLL's defense became frivolous. Therefore, we accept December 6 as the conclusive date. Taylor submitted an affidavit averring that it incurred attorney fees totaling $4234 for the entire action. The detailed itemization of those fees shows $2460 in fees were incurred subsequent to December 6, 2000. Therefore, the circuit court's finding of fact regarding the amount of fees incurred subsequent to December 6 is not supported by the record and is clearly erroneous. An exercise of discretion is erroneous if it has no factual basis in the record. *See* ***Lenhardt***, 2000 WI App 201, ¶13.

¶20 In an effort to retain the amount of fees awarded, Taylor argues that PLL waived this error by not bringing it to the circuit court's attention, citing ***Schinner v. Schinner***, 143 Wis. 2d 81, 420 N.W.2d 381 (Ct. App. 1988). Waiver is a rule of judicial administration which we may choose not to apply. ***Id.*** at 94, 420 N.W.2d at 386. We choose not to apply it here because the record is as clear for both parties as it is for us that the circuit court inadvertently inserted the total expended on attorney fees, rather than the amount expended subsequent to December 6. In our view, the parties should have resolved this matter between themselves. Accordingly, we reverse the amount of attorney fees awarded and remand to the circuit court to adjust the judgment to reflect an award of $2460, the fees incurred subsequent to December 6, 2000.

CONCLUSION

¶21 Because we conclude that PLL's defenses to Taylor's action for nonpayment were without any legal or factual basis, we affirm the circuit court's ruling that its defenses were frivolous. However, because we conclude that the circuit court's finding of fact regarding the amount of attorney fees owed Taylor subsequent to December 6, 2000, the date the circuit court determined PLL's defenses became frivolous, is unsupported in the record, we remand to the circuit court to adjust the amount of fees awarded Taylor to $2460, the undisputed amount of Taylor's fees from December 6, 2000 forward.[3]

By the Court.—Order affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.

[3] In its brief to the court, Taylor makes an oblique request for further relief, including attorney fees. We presume the request is made pursuant to WIS. STAT. § 809.25(3). However, to award attorney fees for a frivolous appeal, this court must conclude that the entire appeal is frivolous. ***Nicholas v. Bennett***, 190 Wis. 2d 360, 365 n.2, 526 N.W.2d 831, 834 n.2 (Ct. App. 1994), *aff'd* 199 Wis. 2d 268, 544 N.W.2d 428 (1996). Because we remand to the circuit court to adjust the amount of attorney fees awarded Taylor, we cannot conclude that the entire appeal is frivolous.