COURT OF APPEALS DECISION DATED AND FILED

October 2, 2003

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. 02-1657

Cir. Ct. No. 00-CV-34

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

RONALD J. HOWE AND JANICE HOWE,

PLAINTIFFS-APPELLANTS,

V.

NEENAH SPRINGS, INC.,

DEFENDANT-RESPONDENT,

COLON WALLACE CONSTRUCTION, INC., MILLER, BRUSSELL, EBBEN & GLAESKE, S.C., AND UNITED STATES OF AMERICA,

DEFENDANTS.

APPEAL from orders of the circuit court for Marquette County: DANIEL GEORGE, Judge. *Affirmed.*

Before Deininger P.J., Dykman and Vergeront, JJ.

¶1 DYKMAN, J. Ronald and Janice Howe appeal from orders granting summary judgment to Neenah Springs, Inc. (Neenah) and dismissing their causes of action for breach of a royalty agreement. Under the agreement, Neenah paid the Howes a royalty on each gallon of drinking water it bottled and sold from a well formerly owned by the Howes. The Howes contend that the trial court erred when it concluded that the royalty agreement allowed Neenah to terminate royalty payments after learning that the well did not conform to applicable governmental regulations. The Howes also contest the trial court's conclusion that laches barred their claim for additional royalties related to water provided at no charge or at a discounted price as part of Neenah's promotional practices. We conclude that the plain language of the agreement entitled Neenah to end royalty payments and drill its own well when notified that the existing well did not meet governmental standards and that the Howes are guilty of laches regarding their claim that Neenah underpaid royalties. We therefore affirm.

BACKGROUND

¶2 The Howes bottled and sold drinking water from an artesian well located on their property in Oxford, Wisconsin. They had previously used the well to supply water for their fish hatchery operation. In 1988 the Howes sold the bottling operation and real estate to Alvin Klawitter. Pursuant to the written agreement between the Howes and Klawitter, the Howes would receive royalty payments for twenty years based on the number of gallons of water sold. The initial royalty rate was $0.05 per gallon, to be reduced to $0.03 per gallon after the Howes's mortgage to the Bank of Wisconsin Dells was satisfied. Royalties would cease if "the supply of water from the wells stops or if the water directly from the wells does not meet F.D.A. standards for bottled water." The Howes retained a mortgage on the property to secure the royalty payments.

¶3 After Klawitter transferred his interest in the bottling plant to Neenah, the Howes and Neenah executed an amended royalty agreement on March 28, 1991. Under the terms of the amended agreement, Neenah paid the Howes $50,000, assumed their mortgage to the Bank of Wisconsin Dells, and reduced the royalty payments to $0.02 per gallon. Royalty payments would further decrease to $0.0125 per gallon in 1998 and would stop entirely by August 29, 2008. In a provision very similar to the first royalty agreement, the parties agreed that Neenah's obligation to pay royalties immediately terminated "in the event the supply of water from the well stops or if water directly from the well does not meet standards for bottled water of the FDA or any other applicable governmental authority."

¶4 In the fall of 1997, William Furbish of the Wisconsin Department of Natural Resources, Private Water Systems Section of the Bureau of Drinking Water and Groundwater, inspected Neenah's well and determined that it did not meet the state requirements for high-capacity wells, that is, wells discharging more than seventy gallons per minute. Furbish informed Neenah that the two wells on its property "do not meet potable high-capacity well construction standards and cannot be approved for use as high-capacity potable water supply wells." Further, Neenah's wells did not qualify to be grandfathered under the pertinent regulation, WIS. ADMIN. CODE § NR 812. Under WIS. STAT. § 281.98(1) and (2), continued use of a noncompliant well risked a forfeiture of $10.00 to $ 5,000.00 for each day of continued violations (each day constituting a separate offense). It is undisputed that neither Neenah nor the Howes ever obtained approval for a high-capacity well on the property.

¶5 Neenah's options were to discontinue using the nonconforming well, bring the well into compliance with the regulations for high-capacity wells, or risk

sanctions for every day the well operated. At Neenah's request, Ace Drilling, Inc., inspected the well. Ace Drilling recommended drilling a new well because bringing the existing well into compliance would be cost-prohibitive. Moreover, there was a considerable risk that attempting to upgrade the well would cause irreparable damage to the well.

¶6 Neenah obtained DNR approval and drilled a new well. As of March 1, 1999, Neenah ceased paying royalties to the Howes because it was no longer bottling water produced from the original well, although water from the new well came from the same aquifer.

¶7 In March of 2000, the Howes commenced this action against Neenah, alleging three causes of action for breach of contract. First, the Howes claimed that Neenah was not entitled to terminate its obligations under the royalty agreement because the quality of the water from the well satisfied government standards. Second, the Howes alleged that Neenah had not paid the full amount of royalties due regarding water that was given away or discounted for promotional reasons. Finally, the Howes alleged that Neenah's termination of royalty payments constituted a default on the mortgage that secured the royalty obligations. Neenah moved for summary judgment, arguing that there had been no breach because it was entitled to terminate royalty payments after learning that the well did not comply with the applicable regulations. Further, Neenah asserted that the agreement did not require payment of royalties for water given to customers for promotional purposes and, in any event, this claim was barred by the doctrine of laches. The trial court granted summary judgment to Neenah and dismissed the Howes's claims. The Howes appeal.

DISCUSSION

¶8 Summary judgment is appropriate when there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. ***Lodl v. Progressive Northern Ins. Co.***, 2002 WI 71, ¶15, 253 Wis. 2d 323, 646 N.W.2d 314; WIS. STAT. § 802.08(2) (2001-02).[1] When reviewing an order granting summary judgment, we employ the same methodology as the trial court and our review is de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

Termination of Royalty Payments

¶9 The Howes contend that the trial court erred when it concluded that the terms of the amended royalty agreement allowed Neenah to drill a new well and terminate its royalty payments upon learning that the existing well did not meet DNR standards for high-capacity potable wells. Instead of reading the amended agreement in isolation, as the trial court did, the Howes argue that the 1991 contract must be read in conjunction with the other documents they and Klawitter executed contemporaneously with the first royalty agreement. According to the Howes, it is only when all the agreements are read together that the parties' intent can be understood, which the Howes assert was to share the risk of the well running dry or the water becoming unsafe. The Howes argue that the trial court should have granted summary judgment in their favor because Neenah breached the royalty agreement when it decided to drill a new well without giving

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the Howes an opportunity to repair the existing well or to drill a new one at their expense.

¶10 When construing a contract our goal is to determine and effectuate the parties' intent. ***Woodward Commun. Inc. v. Shockley Commun. Corp.***, 2001 WI App 30, ¶9, 240 Wis. 2d 492, 622 N.W.2d 756. Language in a contract is ambiguous "only when it is 'reasonably and fairly susceptible to more than one construction.'" ***Dieter v. Chrysler Corp.***, 2000 WI 45, ¶15, 234 Wis. 2d 670, 610 N.W.2d 832 (quoting ***Jones v. Jenkins***, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979). Whether or not a contract is ambiguous is a question of law, which we review de novo. ***Id.*** If a contract is unambiguous, it will be enforced as written. ***Wilke v. Wilke***, 212 Wis. 2d 271, 274, 569 N.W.2d 296 (Ct. App. 1997).

¶11 We first address the Howes's contention that the amended royalty agreement must be read together with the 1988 Sale and Purchase Agreement and the accompanying Exploratory Agreement. In the Exploratory Agreement the Howes granted Klawitter and his assigns (Neenah) the right to conduct exploratory drilling on the Howes's land in the event the water supply from the existing wells diminished. In addition, the Howes promised to do nothing on their adjacent property that would compromise the flow of water to the existing well. While conceding that the 1991 amended royalty agreement did not reference, modify or terminate the Exploratory Agreement, the Howes assert that these contracts evince the parties' intent that the Howes retained the right to remedy any problems with the well that might occur.

¶12 We agree with the Howes that nothing in the 1991 royalty agreement modifies or terminates Neenah's right to conduct exploratory drilling, should the

need arise. But the 1991 royalty agreement also contains the following integration clause:

> This Agreement states the entire agreement of the parties with respect to the subject matter hereof. All agreements of the parties, or any of them, not specifically referenced or directly affected by this Agreement, shall be binding upon the parties and shall continue in full force and effect.

In other words, the Howes and Neenah expressly agreed that the 1991 amended royalty agreement supplanted those provisions of the 1988 agreement pertaining to the royalties for water from the well. "While the effect of the modification may be the creation of a new contract, that contract consists of not only the new terms agreed upon, but also as many of the terms of the original contract *which were not abrogated by the modification*. ***Estreen v. Bluhm***, 79 Wis. 2d 142, 152, 255 N.W.2d 473 (1977) (emphasis added). Thus there is no reason to look beyond the amended royalty agreement to determine Neenah's rights and obligations regarding the payment of royalties for the existing well; any provisions in the original agreements regarding royalties were replaced by the terms of the 1991 agreement.[2] That the Howes previously granted Neenah the right to conduct exploratory drilling does not pertain to the issue of what circumstances permit Neenah to cease paying royalties under the 1991 agreement. The trial court did not err in limiting its inquiry to the terms of the 1991 agreement.

¶13 Having determined that the 1991 royalty agreement is the complete expression of the parties' intent with respect to royalties, we next consider whether

[2] It is notable that the original agreement refers to royalties ceasing if water from the *wells* stopped or failed government standards for bottled water; the amended agreement uses the singular, well, indicating that the payment of royalties depended upon water from the then-existing well, and not any wells that Neenah might subsequently drill.

that contract entitled Neenah to drill a new well and stop paying royalties to the Howes when the old well failed to meet DNR standards for high-capacity wells. At issue is the following language in the amended royalty agreement:

> In the event the supply of water from the well stops or if water directly from the well does not meet standards for bottled water of the FDA or any other applicable governmental authority, as in effect from time to time, all responsibility of Neenah Springs to make royalty payments hereunder shall immediately and completely terminate.

¶14 The Howes raise two objections to Neenah terminating royalties under this section. First, they stress that there was no problem with the water drawn from the well; it was still fit for human consumption and if the well had discharged water at a slower rate than seventy gallons per minute, it would have complied with the applicable DNR regulations. Because it was the construction of the well that failed to meet government standards, and the royalty agreement refers to termination in the event "water directly from the well" is not satisfactory, the Howes conclude that it is unreasonable to read the royalty agreement as granting Neenah the sole discretion to remedy the problem without allowing the Howes to correct the defects and thereby protect their stream of royalty payments. Second, the Howes argue that Neenah breached its duty of good faith when it decided to drill a new well without the Howes's involvement and then terminated royalty payments.

¶15 The royalty agreement does not expressly provide for termination of royalties as a result of a defect in the well. But this fact does not undermine the conclusion that when the DNR informed Neenah that the well did not comply with the requirements for a high-capacity potable well, any water drawn from that well and bottled for sale ceased to meet the applicable governmental standards. Even though the water was "safe," Neenah could no longer sell it as potable water

without violating DNR regulations and risking substantial fines. Given the plain language of the 1991 royalty agreement, we conclude that the failure of the well to meet DNR specifications constituted a valid basis for Neenah's termination of royalty payments.

¶16 Further, we agree with Neenah that there was no duty of good faith implied in the royalty agreement that required it to give the Howes an opportunity to bring the existing well into compliance or to drill a new well at their expense. Under Wisconsin law, an implied duty of good faith and fair dealing between the parties attaches to every contract. ***M&I Marshall & Ilsley Bank v. Schlueter***, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521, *rev. denied*, 2003 WI 16, 259 Wis. 2d 104, 657 N.W.2d 708. But "where the contracting party complains of acts of the other party that are specifically authorized in their agreement, we cannot see how there can be any breach of good faith and fair dealing." ***Id.*** Here, the amended royalty agreement expressly allows Neenah to "immediately and completely terminate" its obligation to pay royalties to the Howes if water from the well does not meet the applicable regulations. The agreement does not state that termination is only available after the Howes have had the opportunity to remedy the problem. The covenant of good faith and fair dealing cannot override a contract's express terms. ***Wisconsin Natural Gas Co. v. Gabe's Constr. Co., Inc.***, 220 Wis. 2d 14, 21, 582 N.W.2d 118 (Ct. App. 1998). Nor does the duty of good faith require Neenah to place the Howes's economic interests before its own. As the trial court observed, the Howes and Neenah were sophisticated business people who had the advice of counsel when they executed the amended royalty agreement. Under these circumstances, "it would be a contradiction in terms to characterize an act contemplated by the plain language of the parties' contract as a 'bad faith' breach of that contract." ***Super Valu Stores,***

Inc. v. D-Mart Food Stores, Inc., 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988).

Royalties on water distributed for promotional purposes

¶17 The Howes also challenge the trial court's conclusion that Neenah did not breach its contractual obligations regarding royalties for water distributed before March 1, 1999, and that, in any case, the doctrine of laches barred the Howes's claim. At issue is the following language in the 1991 amended royalty agreement setting forth the terms for calculating Neenah's payments:

> Neenah Springs shall pay Howes a royalty of $0.02 per gallon on all sales of water which is bottled and sold as artesian drinking water and which is derived from the well of seller situated at the Bottling Plant, Oxford, Wisconsin. Such royalty shall apply to sales made on and after April 1, 1991. With respect to sales made from and after January 1, 1998, the royalty shall be reduced to $0.0125 per gallon. … This Agreement shall expressly exclude: (i) sale of distilled water, and (ii) water which is given to wholesalers and retailers at no charge due to promotional considerations or otherwise, not to include 6, 5, and 3 gallon containers or bottles sold to distributors for home or office delivery.

¶18 When accounting for gallons of water that were given away in promotions, Neenah discounted the entire invoice to reflect the amount of payment actually received, rather than specifically identifying the number of free gallons. Neenah did not maintain records specifying what, if any, discounts were given for a particular sale. The Howes argue that under Neenah's recordkeeping, promotional water was not "given to wholesalers and retailers at no charge," but in fact was sold at a discount. Therefore, the Howes contend that Neenah owes royalties for the total number of gallons on those invoices because the royalty exemption for water given at no charge does not apply to water sold at a reduced

price. We agree with Neenah and the trial court that laches precludes the Howes from proceeding with this breach of contract claim.

¶19 "Laches is an equitable defense to an action based on the plaintiff's unreasonable delay in bringing suit under circumstances in which such delay is prejudicial to the defendant." ***Sawyer v. Midelfort***, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1998). The three elements of laches are: (1) unreasonable delay, (2) knowledge of and acquiescence in the course of events, and (3) prejudice to the party asserting laches. ***Id.*** On summary judgment, we review the trial court's application or denial of equitable relief for erroneous exercise of discretion. ***Singer v. Jones***, 173 Wis. 2d 191, 194-95, 496 N.W.2d 156 (Ct. App. 1992).[3]

¶20 The trial court concluded that under the 1991 royalty agreement, the Howes received quarterly accountings regarding Neenah's sales and had the right to inspect Neenah's books each January.[4] It also concluded that the Howes were

[3] ***Singer v. Jones***, 173 Wis. 2d 191, 194-95, 496 N.W.2d 156 (Ct. App. 1992), involved the application of the equitable doctrine of constructive trust. In another context, we used a de novo standard of review to determine whether Indian tribes were indispensable parties under WIS. STAT. § 803.03(3). *See* ***Dairyland Greyhound Park, Inc. v. McCallum***, 2002 WI App 259, ¶¶20-25, 258 Wis. 2d 210, 655 N.W.2d 474, *rev. denied* 2003 WI 1, 258 Wis. 2d 110, 655 N.W.2d 129. But ***Milas v. Labor Ass'n of Wisconsin, Inc.***, 214 Wis. 2d 1, 8, 571 N.W.2d 656 (1997) concluded that the applicability of equitable estoppel is reviewed de novo, though without analysis or authority. ***Singer*** thus conflicts with ***Milas*** as to a review of equitable estoppel, but remains the only authority broadly applicable to a review of equitable remedies, including laches.

[4] Paragraph two of the 1991 amended agreement provides in pertinent part:

(continued)

aware in 1995 and 1996, from reviews conducted by their accountants, that there existed a possible difference of opinion with Neenah regarding proper compensation for water sales. However, it was not until 1999 that the Howes objected to Neenah's practice and they did not commence their action for breach of contract until 2000. Accordingly, the trial court concluded that all three elements of laches were established because the Howes unreasonably delayed in bringing their claim, essentially acquiescing to Neenah's accounting methods, and this delay prejudiced Neenah because the relevant billing records of the disputed transactions had not been maintained.

¶21 The Howes concede that there is a substantial delay between their awareness of how Neenah calculated promotional giveaways and their objection to this practice. But they dispute the trial court's conclusion that the delay prejudiced Neenah's ability to defend against their claim. Neenah, the Howes argue, had notice since 1995 that its accounting practices were in question, although the Howes concede that they made no formal objection "for a period of time." The Howes contend that Neenah cannot assert prejudice because it chose to use the discounting method to record water provided at no charge in promotions and has retained the funds that it should have paid as royalties to the Howes. Therefore,

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> Neenah Springs shall project gallonage each month, and shall pay royalties on projected gallonage within ten (10) days from the end of such month, the first such payment to be due May 10, 1991. Neenah Springs shall provide an accounting of water sales as of the end of each calendar quarter, such accounting to be provided within ten (10) days following the end of each such quarter. Actual royalty payments under this Agreement shall be adjusted quarterly on the basis of said accounting. Howes shall have the right once each year, in January, to provide for inspection of the books and records of Neenah Springs by an independent accountant to verify reported gallonage, provided such inspection shall occur at the premises of Neenah Springs.

the Howes conclude that any prejudice is the result of Neenah's decision not to maintain its billing records. We disagree.

¶22 The Howes's attempt to create a factual dispute regarding Neenah's knowledge that its billing practices were not acceptable is unavailing. While the record demonstrates that the Howes's accountants informed them in 1995 that Neenah read and applied the royalty provision regarding promotional water in a manner that reduced the Howes's royalties, there is nothing to show that the Howes presented their objections to Neenah at that time.[5] Therefore, the trial court reasonably concluded that by failing to contest Neenah's payments, the Howes acceded to Neenah's manner of calculating the royalties owed.

¶23 Nor are we persuaded by the Howes's argument that Neenah's own actions caused its prejudice. Thomas Rogers, Neenah's president, stated in his affidavit that, had Neenah been aware of the Howes's disagreement with its accounting, it would have changed its billing practices. Moreover, Neenah could reasonably decide not to maintain records of the discounts given on each invoice when it had no notice from the Howes that the amount of royalties would be disputed, especially when the Howes exercised their right to annually inspect Neenah's records. The lack of those records now compromises Neenah's ability to defend against the Howes's claim for additional royalties. The trial court did not erroneously exercise its discretion when it concluded that the Howes's delay in contesting Neenah's accounting of promotional water exempt from royalties was

[5] For example, the February 1996 letter to Jan Howe from their accounting firm, Morton, Nehls & Tierney, closes with the sentence "You may wish to consult an attorney to determine if you're [sic] not notifying Neenah of any disputed items could be construed as your acceptance to their calculations."

unreasonable, and the lack of notice resulted in prejudice to Neenah. Accordingly, the trial court properly concluded that the doctrine of laches applied to bar the Howes's second cause of action for breach of contract and that, as a matter of law, summary judgment on this claim was appropriate.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

¶24 VERGERONT, J. (*concurring*). I agree with the analysis and conclusion of the majority opinion in all respects except that I am not persuaded that ***Singer v. Jones***, 173 Wis. 2d 191, 194-95, 496 N.W.2d 156 (Ct. App. 1992), establishes the proper standard of review of a summary judgment when one of the issues is whether an equitable procedural doctrine such as laches or equitable estoppel should apply. ***Singer*** involved the question on summary judgment; whether the trial court should apply the equitable remedy of a constructive trust. Since we decided that case, the supreme court decided ***Milas v. Labor Ass'n of Wisconsin, Inc.***, 214 Wis. 2d 1, 8, 571 N.W.2d 656 (1997), in which it reviewed a summary judgment entered after the trial court decided not to apply equitable estoppel. After noting that whether summary judgment should be granted is a question of law, the court said: "When the facts and reasonable inferences therefrom are not disputed, it is a question of law whether equitable estoppel has been established. This court determines questions of law independent of the circuit court, benefiting from its analysis." ***Id.*** (citation omitted). I see no reasonable basis for distinguishing between equitable estoppel and laches, both equitable procedural doctrines, for purposes of the standard of review of a summary judgment. However, whether we apply a de novo or a deferential standard of review to this trial court's decision that laches applies, I would affirm the trial court's decision.