COURT OF APPEALS DECISION DATED AND FILED

January 27, 2011

A. John Voelker
Acting 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. 2010AP1117

Cir. Ct. No. 2009CV451

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

RONALD K. SERWA,

PLAINTIFF-APPELLANT,

V.

CHRISTINE NEELY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANGEL C. NEELY, AND DENNIS G. WYMAN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 VERGERONT, P.J. This action concerns a dispute arising under a title contingency in a contract for the purchase of vacant land. The contingency stated that, if the seller was unable to provide the buyer with certain evidence

about the title within 120 days of the agreement, the buyer had the option of terminating the agreement. The seller was unable to provide this evidence within 120 days. In the buyer's action for specific performance, the circuit court granted summary judgment in favor of the seller, concluding that the conduct of the buyer in the two months between the expiration of the 120-day time period and the filing of this action showed the buyer chose not to close under the terms of the contract. The buyer appeals.

¶2 We conclude that the only reasonable inference from the evidence is that the buyer was unwilling to close under the terms of the contract and that this unwillingness constituted an exercise of the buyer's option to terminate the contract. We therefore affirm the grant of summary judgment dismissing the buyer's complaint for specific performance.

BACKGROUND

¶3 Ronald Serwa made a counteroffer to purchase the property in dispute for $260,000, and this was accepted in March 2009 by Dennis Wyman and by Christine Neely, personal representative of the Estate of Angel Neely. At the time, the property was the subject of a land contract, with Wyman the vendor and the Estate the vendee, and a foreclosure action was pending. The accepted counteroffer addressed the foreclosure action by providing that Serwa's obligations were contingent on the foreclosure action being dismissed prior to closing and that Wyman was entitled at closing to the balance of the amounts due on the land contract and the expenses of the foreclosure action.

¶4 When the parties entered into this contract, they were aware that another person, Randy Fenske, was claiming an interest in the property and that the property might be subject to seizure due to criminal proceedings against

Fenske. To address this situation, the accepted counteroffer included the following provision, which is at the heart of this dispute:

> 4. Notwithstanding any provision of the Offer, this transaction will close 10 days following Buyer being provided with evidence satisfactory to Buyer that no other parties except Dennis Wyman and the Estate of Angel Neely hold title to the property (subject to a land contract between these parties which will be terminated contemporaneously with Closing) and that title is otherwise merchantable. If sellers are unable to provide such evidence within 120 days following the effective date of this agreement, Buyer may terminate this agreement and all earnest money will be immediately returned to Buyer.
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> 5. Buyer's obligations are contingent upon Buyer receiving evidence satisfactory to Buyer that the Property is not subject to any seizure or attachment claims of the State of Wisconsin [or] United States of America (or any agency or instrumentality thereof).

¶5 The 120-day period ended on July 15, 2009, without the sellers supplying evidence of merchantable title. During the latter half of July and during August there were communications between counsel for the Estate and Serwa's attorney concerning how to proceed. The parties dispute what the correspondence between counsel shows about Serwa's willingness to proceed with the purchase. We discuss this correspondence in more detail later in this opinion.

¶6 On September 18, 2009, Serwa executed a Notice Relating to Offer to Purchase. The notice waived all contingencies and stated:

> Buyer has been provided with evidence satisfactory to Buyer that no other parties except Dennis Wyman and the Estate of Angel Neely hold title to the property (subject to a land contract between these parties) and that title is otherwise merchantable. Buyer hereby waives any right to terminate the Offer due to sellers being unable to provide such evidence within 120 days following the effective date of the agreement.

> Buyer stands ready willing an[d] able to close at Shawano Title Insurance Company 10 days from the date of this Notice.

¶7 Ten days later, Serwa appeared at Shawano Title Services, Inc., with a cashier's check for the purchase price due. Neither Neely nor Wyman appeared. The same day, Serwa filed this action against Wyman and Neely, as personal representative of the Estate, alleging that they had breached the agreement by refusing to close the sale. Serwa requested that they be ordered to specifically perform their obligation under the agreement to sell the property to him.

¶8 The Estate filed an answer denying that it breached the agreement and moved for summary judgment.[1] Wyman answered, asserting that he had been paid in full for his interest and asking to be dismissed. It is unclear whether he was dismissed, but he did not further participate in the circuit court and is not involved in this appeal.

¶9 In support of the Estate's motion for summary judgment, it contended that the correspondence between its counsel and Serwa's counsel show that it had offered Serwa proposals to address the contingencies and explained that time was of the essence for the Estate, but Serwa did not indicate any willingness to proceed. Therefore, the Estate asserted, it had properly entered into a contract to sell the property to another buyer and Serwa was not entitled to specific performance.

[1] The Estate filed counterclaims alleging that Serwa had trespassed on the property and breached his duty of good faith, and seeking money damages. The circuit court dismissed the counterclaims and they are not at issue on this appeal. The allegations of trespass were also asserted as a defense to Serwa's claim for specific performance. However, the circuit court concluded that any trespass did not affect Serwa's right to specific performance, and the Estate does not challenge this ruling on appeal.

¶10 Serwa opposed summary judgment. His position was that he had the option to terminate the contract because the title contingency was not met within the 120 days, but he did not terminate it, and therefore the contract continued in effect. According to Serwa, his affidavit and the correspondence relied on by the Estate show that he did not terminate the contract but instead was making efforts to satisfy himself of clear title. Once he was satisfied, he asserted, he sent the September notice.

¶11 The circuit court granted summary judgment in favor of the Estate and dismissed the complaint. The court concluded that there were no factual disputes and Serwa's counsel's letters did not express a continuing desire to purchase the property, did not show an intent to follow through with the purchase, and were inconsistent with a desire to do that.

DISCUSSION

¶12 On appeal Serwa contends the circuit court erred in granting summary judgment to the Estate on two alternative grounds. First, he asserts, the court erred in construing the contract to require that he express a desire to continue under the contract with the purchase because the contract plainly provides that it remains in effect unless he terminates it. He contends he did not terminate it and he, not the Estate, is therefore entitled to summary judgment. In the alternative, Serwa argues that, even if the court's construction of the contract is correct, there are factual disputes as to whether he expressed a desire to continue with the contract and therefore he is entitled to a trial.

¶13 When we review a grant or denial of a motion for summary judgment, we employ the same methodology as the circuit court, and our review is de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d

816 (1987) A party is entitled to summary judgment if there are no genuine issues of material fact and that party is entitled to summary judgment as a matter of law. WIS. STAT. § 802.08(2) (2007-08).[2] The circuit court may award summary judgment to the nonmoving party if it determines there are no factual disputes and that party is entitled to summary judgment as a matter of law. § 802.08(6).

¶14 In determining if there are genuine issues of material fact, we draw all reasonable inferences in favor of the nonmoving party. ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980). Whether an inference is reasonable and whether there is more than one reasonable inference are questions of law, which we decide as part of our de novo review. *See* ***H&R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421.

I. Contract Construction

¶15 A resolution of the issues on appeal requires that we construe the 120-day provision in paragraph 4 of the accepted counteroffer. When we construe a contract, we assume the intent of the parties is expressed in the language of the contract and, if the contract language is plain, we apply that language. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345. Whether contract language is plain or ambiguous presents a question of law, which we review de novo. ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶8, 266 Wis. 2d 124, 667 N.W.2d 751.

¶16 The 120-day provision plainly states that, if the sellers are unable to provide the required evidence on title within the prescribed 120 days, the buyer

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

has the option of terminating the contract.[3] The unstated premise of many of Serwa's arguments appears to be that, if the 120 days expires without his receipt of satisfactory evidence of title, he has the right to undertake his own efforts to obtain satisfactory evidence and does not have to close until he obtains it. However, he does not present a developed argument in support of this construction. We conclude this is an unreasonable reading of the 120-day provision in the context of paragraph 4. There is no language giving the buyer this option. Moreover, this construction would allow the buyer to unilaterally determine how much time he or she has to obtain satisfactory evidence of title. The only reasonable reading of the 120-day provision in the context of paragraph 4 and the contract as a whole is that, if the buyer does not elect to terminate the contract, he or she is obligated to purchase the property notwithstanding the lack of satisfactory evidence of title.

¶17 While the contract gives Serwa the option of terminating the contract after the 120 days, it does not provide a time period within which he must exercise that option.[4] The Estate makes a brief argument suggesting that the contract is

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[3] The parties do not specifically address the relationship between the 120-day provision and the contingency in paragraph 5 of the accepted counteroffer—the receipt by the buyer of "evidence satisfactory to Buyer that the Property is not subject to any seizure or attachment claims of the State of Wisconsin [or] United States of America (or any agency or instrumentality thereof)." Based on the undisputed facts, the concern with government seizure of the property arose out of Fenske's potential interest in the property. Neither party suggests that, if the title contingency in paragraph 4 is satisfied, the contingency in paragraph 5 would not also be satisfied. We therefore do not separately address paragraph 5.

[4] The "time is of the essence" provision in the original offer, incorporated into the accepted counteroffer, does not supply an answer because this provision applies only where there is a date or deadline specified:

(continued)

unenforceable for this reason. *See* ***Vohs v. Donovan***, 2009 WI App 181, ¶8, 322 Wis. 2d 721, 777 N.W.2d 915 (a contract is not enforceable if an essential term is indefinite). However, the Estate's brief argument does not apply the case law on indefinite contract terms to the facts of this case. *See* ***id.*** (When there is evidence that two parties intended to enter into a contract, the court should attach a sufficiently definite meaning if possible.). The Estate also does not respond to Serwa's argument that, when a contract does not specify the time within which an act must be performed, a reasonable time is implied. *See* ***Flores v. Raz***, 2002 WI App 27, ¶11, 250 Wis. 2d 306, 640 N.W.2d 159. In short, the Estate does not explain why, assuming that a time period within which Serwa must exercise the option to terminate is an essential term of the contract, this term cannot be supplied by application of the case law implying a reasonable time.

¶18 In the absence of a developed argument by the Estate, we conclude the contract requires that Serwa must exercise the option of terminating the contract within a reasonable time after the expiration of the 120 days. This requirement of a reasonable time makes the term sufficiently definite and the contract enforceable.

¶19 We reach a similar conclusion with respect to the closing date if the title evidence is not provided by the seller within 120 days. In the absence of a

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> TIME IS OF THE ESSENCE. "Time is of the Essence" as to: (1) earnest money payment(s); (2) binding acceptance; (3) occupancy; (4) date of closing; (5) contingency deadlines … and all other dates and deadlines in this Offer …. If "Time is of the Essence" applies to a date or deadline, failure to perform by the exact date or deadline is a breach of contract. If "Time is of the Essence" does not apply to a date or deadline, then performance within a reasonable time of the date or deadline is allowed before a breach occurs.

developed argument to the contrary by the Estate, we imply the requirement that closing must take place within a reasonable time if the buyer has not elected to terminate within a reasonable time.[5]

¶20 In summary, the 120-day provision means that, if Serwa does not elect to terminate the contract within a reasonable time after the expiration of the 120-day time period, he is obligated to purchase the property within a reasonable time notwithstanding the lack of satisfactory evidence of title.

¶21 Serwa argues that the circuit court erred in construing the contract to require that a buyer must declare he or she wants to proceed under the contract at the close of the 120 days if the buyer does not wish to terminate the contract.[6] We agree with Serwa that the contract continues in effect unless the buyer exercises the option of terminating it within a reasonable time after the 120 days. However, it does not follow, as Serwa suggests, that the court may not consider, in deciding if the buyer has terminated the contract, the absence of any indication that the buyer wants to close under the contract. The contract language does not require any specific means of exercising the termination option. There is therefore no contractual bar to considering all the buyer's conduct that is relevant in the

[5] Statements in the Estate's brief suggest it may be of the view that closing was to take place on the 120th day or perhaps the day after if the title evidence had not yet been provided to the buyer. However, the Estate does not develop this position as an issue of contract construction, nor does it point to any factual materials that support this view. Accordingly, we do not address it further.

[6] We do not necessarily agree with Serwa's characterization of the circuit court's ruling: that it construed the contract to require that he declare his intent to continue under the contract. We understand the court to have ruled that Serwa's (or his counsel's) words and conduct showed that he had chosen to terminate the contract, and in that analysis the court took into account the absence of any statement by Serwa's counsel before September 18, 2009, that Serwa wanted to proceed to closing. As we explain above, that analysis would be proper under the contract. Because our review is de novo, we need not decide precisely how the circuit court construed the contract.

circumstances of the particular case to determine whether the buyer has exercised the option to terminate the contract. Depending on the circumstances of the particular case, the absence of any indication the buyer wants to close may be an appropriate fact to consider. Nothing in the contract language precludes this.

¶22 Serwa also appears to take the position that a buyer does not exercise the termination option unless the buyer expressly declares that he or she is terminating the contract. However, this is not required by the contract and it would be an unreasonable construction. It would be unreasonable because it would allow the buyer to indefinitely avoid the closing on the basis of a lack of satisfactory evidence of title, thus indefinitely preventing the seller from being able to enter into a contract with a buyer who would accept the title uncertainty.

II. Analysis of Factual Submissions

¶23 Having established the proper construction of the 120-day provision, we turn to an examination of the parties' factual submissions. The inquiry is whether there are disputed facts or reasonable conflicting inferences from the undisputed facts on whether Serwa exercised his option to terminate the contract.[7] We conclude there are not and that the undisputed facts and the only reasonable inferences from those facts show that Serwa did terminate the contract by communicating an unwillingness to close without satisfactory evidence of title.

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[7] The Estate makes factual assertions in its appellate brief that either cite only to its brief in the circuit court or have no record citations and are not contained in Neely's affidavit and attached documents. We do not consider any factual assertion that is not supported either by the parties' affidavits and attachments or by the answer's admissions to allegations in the complaint. *See* WIS. STAT. § 802.08(2) and (3). This latter category includes the contract and the September 18, 2009, notice from Serwa, which are attached to the complaint and which the answer admits.

¶24 The correspondence between counsel attached to Neely's affidavit begins with a July 20, 2009, letter from the Estate's counsel. This letter proposes "extending the Offer to Purchase with payment of approximately $50,000 to extinguish Dennis Wyman in the foreclosure. Thereafter, we would go after Randy Fenske to terminate his interest." The Estate wanted an answer in two days.

¶25 This proposal was repeated in a July 23 letter, with the added information that the proposed "extension" would waive any other conditions, including evidence that the property is not subject to seizure. This letter set a deadline in four days and explained there was a need for a speedy response because of the foreclosure.

¶26 Serwa's counsel responded on July 27 by rejecting the "proposed amendment to the existing Offer" but stating that Serwa was willing to consider a "substitution for the existing Offer": the Estate would convey to Serwa its interest in the property for $50,000, Serwa would terminate the existing offer, and Serwa would deal directly with Wyman and Fenske regarding their interests. Counsel discusses in this letter the concerns that Serwa has with the title and the Estate's inability to provide satisfactory evidence of title. Counsel also states that "the Offer is still in effect and does not provide for you or your clients to set deadlines or to unilaterally terminate the Offer."

¶27 The Estate's response on July 28 objected to Serwa's position as an unreasonable "attempt to unilaterally keep the Offer to Purchase open" and repeated the need for a prompt response to its offer in order to protect the Estate's interest. This letter stated: "If you do not want to proceed under the terms that I had previously set, by giving me written notice on or before 5:00 p.m. today, I will assume the contract is terminated."

¶28 Serwa's attorney replied that same day, disagreeing that the Estate had the right to "unilaterally terminate" and stating that Serwa did "not consider the contract terminated." This letter again discusses the problems with the title.[8] The Estate's response two days later informs Serwa that it "will be moving on."

¶29 Three weeks later, on August 21, Serwa's counsel wrote stating that he "is still interested in completing a transaction to purchase the Property" and proposing terms for "amend[ing]" the "existing Offer": Serwa would pay $48,000 to Wyman in exchange for a deed for his interest in the property and termination of the foreclosure action, $50,000 in exchange for a deed for Fenske's interest in the property, and $162,000 to the Estate in exchange for a deed to its interest. The Estate responded that its counsel had already informed Serwa's counsel that the Estate had "moved beyond Ron Serwa."

¶30 There is no evidence of further communication between the parties until Serwa's September 18 notice waiving the title contingency.

¶31 Serwa's affidavit avers that he never gave nor intended to give notice that he was terminating the contract. He also avers that, after July 15, 2009, he still wanted to go through with the purchase if he could satisfy himself of satisfactory title; that he and his attorney therefore conducted their own investigation and he began directly negotiating with Fenske; that he was aware that his attorney was negotiating with the Estate to "rework the terms of the land

[8] The correspondence from Serwa's attorney indicates the view that the Estate had not fulfilled its obligation to provide evidence of clear title and Serwa was willing to be generous in allowing the Estate time to fulfill its obligation. However, the contract plainly does not obligate the Estate to provide satisfactory evidence of title in Wyman and the Estate. Rather, it gives Serwa the option of terminating the contract if the Estate is unable to provide this evidence within 120 days.

purchase," and that on September 18, 2009, he decided he no longer had a concern about a claim by Fenske, was satisfied with the Estate's and Wyman's title, and was willing to waive the contingency.[9]

¶32 The only reasonable inference from the correspondence and Serwa's affidavit is that Serwa was not willing to close on the purchase of the property without evidence satisfactory to him that only Wyman and the Estate had an interest in the property. There is no other inference that explains why the Estate was attempting, in the two weeks following July 15, to arrive at an agreement with Serwa to modify the contract on this point. In addition, Serwa's counsel's discussion of his concerns with the problems regarding title in his July 27 and July 28 letters permit only one reasonable inference: that Serwa was not willing to close without Fenske's interest being resolved. Finally, Serwa's own affidavit makes clear that after July 15, "[he] still wanted to go through with the purchase *if* [he] could satisfy [him]self that the title … was satisfactory." (Emphasis added.) His conduct as he describes it in his affidavit bears this out: he did not waive the title contingency and give notice that he wanted to proceed until he had satisfied himself that Fenske's claim was not a problem.

¶33 Serwa is correct that it was his option, not the Estate's, to terminate the contract after 120 days if the title contingency was not fulfilled. However, it is not a reasonable reading of the correspondence that the Estate's attorney was attempting to unilaterally terminate the contract. Rather, the only reasonable inference is that the Estate considered the contract terminated at the end of July 28 because Serwa was unwilling to proceed without satisfactory evidence of title and

[9] According to attachments to Serwa's attorney's affidavit, on September 18, 2009, an order was entered in another case terminating Fenske's interest in the property.

the parties were unable to agree on a modification to the contract on this point. It is true that Serwa had no obligation to agree to a modification of the contract. But, without a modification, the contract allowed him only two choices: either to exercise his option to terminate within a reasonable time or to close within a reasonable time notwithstanding the lack of satisfactory evidence of title.

¶34 Serwa points to two categories of evidence that, he contends, create a factual dispute over whether he terminated the contract. However, we conclude that none of this evidence creates a reasonable inference that he was willing to close without satisfactory evidence of title.

¶35 First, Serwa points to the absence of an express statement of termination, to his lawyer's assertions in the correspondence that he did not consider the contract to be terminated, and to his own averment that he did not intend to terminate the contract. The only reasonable inference from this evidence in the context of the entire record is that Serwa did not want the contract to terminate because he wanted to see if he could clear up the title concerns himself and, if he could, then he wanted to close. However, as we have already explained, the contract does not give him this right. Serwa's stated and actual desire to continue the contract as he erroneously construed it is not evidence that he was willing to close under the terms of the contract as correctly construed.

¶36 Second, Serwa points to the evidence of his efforts to satisfy himself of clear title between July 15 and September 18. However, as we have already stated, this evidence is consistent with a refusal to close without satisfactory evidence of title. It does not create a reasonable inference that he was willing to close without that evidence.

¶37 We conclude that Serwa's undisputed unwillingness to close without satisfactory evidence of title after 120 days constitutes a termination of the contract under paragraph 4 of the accepted offer to purchase. Serwa had only two options under the contract after the expiration of 120 days: to terminate or to close notwithstanding the lack of satisfactory evidence of title. His insistence on satisfactory evidence of title before he would close was a rejection of the option to close that was allowed him under the contract. If this does not constitute a termination of the contract, then Serwa, in effect, has the right to unilaterally modify the terms of the contract. This is not a reasonable reading of the contract.

CONCLUSION

¶38 We conclude the undisputed facts and the only reasonable inferences from those facts show that Serwa exercised his option to terminate the contract by communicating an unwillingness to close unless he had satisfactory evidence of title. Because he terminated the contract, the circuit court properly granted summary judgment in favor of the Estate.[10]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[10] Because of this conclusion, we do not discuss the Estate's argument that Serwa breached the express and implied contractual duty of good faith.