

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 1, 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. 02-3200
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-86

**IN COURT OF APPEALS
DISTRICT III**

JEFFREY P. CHENEY,

PLAINTIFF-APPELLANT,

v.

**WILFRED E. MORROW, DEPARTMENT OF WORKFORCE
DEVELOPMENT, AND JOHN BINGHAM, D/B/A ADVANCED
COMMUNICATIONS,**

DEFENDANTS,

THE UNITED STATES OF AMERICA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Forest County:
MARK A. MANGERSON, Judge. *Affirmed.*

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

¶1 HOOVER, P.J. Jeffrey Cheney appeals an order dismissing his amended complaint with prejudice. Cheney contends the trial court should have reformed a mortgage to give him an interest in certain real estate superior to a tax lien imposed by the United States. We reject Cheney’s contentions and affirm the order.

Background¹

¶2 Cheney’s Country Club, Inc. (CCC), is a Wisconsin stock corporation. In 1997, it owned a supper club and other property in Laona. Cheney was the sole shareholder.² He negotiated a sales agreement with Sherri Ison, selling 100% of the CCC stock so, according to Cheney, Ison would “acquire complete ownership of the real estate and personal property.”

¶3 Cheney personally financed the entire \$635,000 sale, obtaining at closing Ison’s promissory note, both individually and on CCC’s behalf. The note was to be secured by a mortgage on the real property as well as a UNIFORM COMMERCIAL CODE fixture financing statement. The mortgage was signed by Ison individually, but not expressly on behalf of CCC. The sales agreement provided that the stock would be held in escrow and, in the event of a default on the loan, Cheney could obtain an “ex parte” return of the stock.

¶4 Ison operated CCC for about four years, but failed to pay federal taxes. Consequently, the IRS obtained a tax lien against the corporation. Ison

¹ The United States generally accepts Cheney’s recitation of the facts. The two points on which the United States disagrees are immaterial.

² Cheney states that he was the “principal” shareholder, but because he transferred 100% of the stock, he apparently was the only shareholder.

then defaulted on the note to Cheney by failing to make a balloon payment. Cheney reacquired the CCC stock and began this mortgage foreclosure action, personally and on behalf of CCC.

¶5 Initially, Ison, the United States,³ and other junior lienholders were named as defendants.⁴ Cheney and CCC reached a settlement with Ison, wherein Cheney canceled the promissory note. Cheney was aware, however, that the tax lien on CCC's real estate would remain.

¶6 During a hearing on Ison's motion to enforce the settlement, the parties and the court realized that no mortgage had been given on behalf of CCC. Ison had mortgaged the property only in her individual capacity. Cheney requested that the court reform the mortgage to show that it was joined by CCC. The trial court refused because there was no formal motion for reformation and the United States had not been given an opportunity to address the reformation issue. The trial court granted Ison's motion to enforce the settlements, and she was eventually dismissed from the case.

¶7 Cheney then filed an amended complaint in which CCC was no longer a plaintiff. The United States filed a motion to dismiss, contending that because of Cheney and Ison's settlement, no debt remained for the mortgage to secure. Cheney asked for "application of judgment." At the hearing, the United States contended that CCC, now under Cheney's control, was responsible for

³ The United States is a party in state court pursuant to 28 U.S.C. § 2410 (1994). In actions affecting property on which the United States has a lien, this section allows the United States to be named as a party in any state court with the jurisdiction to foreclose on the property.

⁴ The junior lienholders, who are the nonrespondent defendants, were eventually dismissed, apparently because they voluntarily abandoned their claims against CCC.

satisfying the tax lien. Cheney countered, claiming he was or was supposed to be the recipient of a purchase money mortgage, creating an interest superior to the United States' lien. The complicating factor was that Ison individually, not CCC, had mortgaged the property. Thus, the sole issue was whether the mortgage could be reformed to reflect that CCC had granted it.

¶8 The trial court again refused to address reformation without a specific motion because it concluded that the United States' formal motion to dismiss had to be addressed first. The court granted the motion to dismiss, making specific findings and conclusions of law. Cheney appeals.

¶9 As in the trial court, the sole question presented is whether Cheney is entitled to reformation of the mortgage to include Ison's signature on behalf of CCC so that the mortgage would take precedence over the United States' tax lien. We conclude that he is not.

Standard of Review

¶10 “The lack of a grantor's signature [on a mortgage] is a formal defect which can be cured by a sec. 706.04, Stats., equitable relief proceeding.” *Security Pacific Nat'l Bank v. Ginkowski*, 140 Wis. 2d 332, 336, 410 N.W.2d 589 (Ct. App. 1987). The decision to grant equitable relief is committed to the trial court's discretion. *Zinda v. Krause*, 191 Wis. 2d 154, 175, 528 N.W.2d 55 (Ct. App. 1995). We uphold a trial court's exercise of discretion if the record shows a process of reasoning based on the facts of record and a conclusion based on a logical rationale founded upon proper legal standards. *State v. Shanks*, 152 Wis. 2d 284, 289, 448 N.W.2d 264 (Ct. App. 1989).

Discussion

¶11 The trial court made the following factual findings, all supported by the record:

5. Sherri L. Ison, signed the [promissory] note in her capacity as President of Cheney's Country Club, Inc. and in her individual capacity.

6. Sherri L. Ison also signed a mortgage, in her individual capacity.

7. The mortgage ... was drafted by Jeffrey P. Cheney's attorney.

8. Sherri L. Ison did not possess title to the real estate in her individual capacity. The real estate was owned by Cheney's Country Club, Inc.

9. Sherri L. Ison did not sign a mortgage in her capacity as President of Cheney's Country Club, Inc. nor was any mortgage given by Cheney's Country Club, Inc. to Jeffrey P. Cheney to secure the note.

....

12. ... [A] settlement agreement was reached between Cheney's Country Club, Inc., Jeffrey P. Cheney, and Sherri L. Ison.

13. Jeffrey P. Cheney signed the settlement agreement in his personal capacity and on behalf of the corporation as President.

....

19. Sherri L. Ison was dismissed as a party to this lawsuit, and all debt was released.

¶12 From these factual findings, as well as the findings contained in the court's judgment but not listed here, the court concluded that the original sale between Cheney and Ison did not involve the sale of real estate. Rather, it was a sale of corporate stock. Moreover, Ison had personally signed a mortgage on

property she did not personally own, so the mortgage she provided was unenforceable. The court also concluded that it would not be equitable to create a new mortgage and nothing remained to litigate because no debt remained.

A. Extinguishing the Debt Cancels the Mortgage

¶13 The trial court concluded that Cheney's mortgage was invalid because Ison did not individually own the property she mortgaged. Cheney contends that she could mortgage it because she had corporate control, although the trial court correctly noted that in any event there was no mortgage from CCC. We decline to address this issue because the trial court's conclusion that the underlying debt was extinguished controls regardless who conveyed the mortgage.

¶14 In the promissory note Ison, as the borrower, promised to pay Cheney for the loan and interest by securing the debt with a mortgage on the real estate. Ison was to be personally and individually obligated to pay the debt, but CCC would unconditionally guarantee Ison's performance. Although the promissory note says nothing about CCC providing a mortgage, we will assume that a mortgage was a condition included in the note's terms.

¶15 As part of his settlement with Ison, however, Cheney agreed to "deliver the original Promissory Note marked 'cancelled' to Ison" This extinguished Ison's debt, but by canceling the note Cheney also effectively canceled CCC's duty to guarantee her performance. With Ison's debt extinguished, there was nothing for CCC to secure with a mortgage, and even if

there were a valid mortgage from the corporation it would have been satisfied.⁵ In short, there is no mortgage remaining to reform.

B. Agreement’s Nature Prevents Reformation Under WIS. STAT. § 708.09

¶16 Although the cancellation of the debt underlying the mortgage is dispositive, we would reach the same result based on WIS. STAT. § 708.09. Cheney asks us to allow reformation so that his mortgage will conform to WIS. STAT. § 708.09,⁶ which states, “A purchase money mortgage is one given as part of the transaction of purchase *to the vendor of real estate* for all or part of the purchase money or to a 3rd person who advances all or a part of the purchase money.” (Emphasis added.) The trial court concluded there was no sale of real estate, and we agree.

¶17 Cheney suggests we examine all the documents as a whole to ascertain his intent to secure a purchase money mortgage. However, the documents clearly reference only the sale of stock. The purchase and sale agreement notes, “The Buyer has offered and the Seller has accepted an offer to purchase the outstanding stock” of CCC. Further down, in the agreements section of the note, “the Buyer hereby agrees to purchase and the Seller hereby agrees to sell the Stock” and “At Closing ... the Buyer shall deliver to the Seller a promissory note ... as payment for the Stock of the Company.”

⁵ Cheney argues that without reformation, he is punished twice—first by the failed business deal and second by having to pay the tax lien. We acknowledge that Cheney is the victim of a business deal gone bad, but for the reasons explained above, reformation is not an available remedy.

⁶ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶18 The promissory note makes no reference to what is being sold, but in the recitals of the escrow agreement, we note that “Buyer and Seller have agreed to the sale of the stock of the Corporation” Also, “Buyer and Seller close the transaction for the sale of stock,” “Seller is financing Buyer’s purchase of the stock in its entirety,” and “Seller wishes to have a perfected security interest in the stock of the Corporation” At no point is there any reference to sale of real estate.

¶19 Cheney argues that the sale of stock amounts to a sale of the real estate because the real estate is a corporate asset. Moreover, he explains, this is why there is no new deed recorded at the time of sale—the real estate was in CCC’s name before the sale to Ison and remained so after the sale.

¶20 That is precisely why Cheney’s sale of stock to Ison is not a real estate sale. CCC did not sell the realty. The fact that ownership and control of the corporation changed does not mean ownership of the real property did. Corporations have identities separate and distinct from their shareholders. *See* WIS. STAT. § 180.0302 (Unless its articles of incorporation provide otherwise, a corporation has the same powers as a natural person to do all things necessary to carry out business affairs.). Indeed, this is a main reason for incorporating a business in the first place—to create the corporate entity. CCC, however, sold no real estate. Because there was no sale of real estate, it would be improper, if not impossible, to create a purchase money mortgage through reformation.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

