

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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. 2010AP469

Cir. Ct. No. 2009CV428

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**CAMBRIDGE FINANCIAL SERVICES, LLC, A VIRGINIA LIMITED
LIABILITY COMPANY,**

PLAINTIFF-RESPONDENT,

v.

MANUEL ROLON, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 REILLY, J. Manuel Rolon, Jr. appeals from a judgment of the circuit court awarding foreclosure to Cambridge Financial Services, LLC against one of Rolon's properties. Rolon argues that Cambridge is not entitled to the

judgment of foreclosure because Cambridge previously released its mortgage interest on the property. We hold that while the agreement to release the mortgage is ambiguous, the record clearly supports the circuit court's determination that the parties did not intend to release Cambridge's mortgage interest on the foreclosed property. The judgment of the circuit court is affirmed.

BACKGROUND

¶2 Cambridge is what is known as a “bridge lender”—it issues short-term high risk loans to borrowers who cannot get conventional financing. On July 21, 2005, Cambridge loaned Rolon \$375,000 in return for a note requiring repayment at fourteen percent interest. The note required Rolon to make monthly payments of \$4443.27 with a balloon payment of the principal amount due on July 21, 2008. The note was secured by a recorded mortgage listing two separate properties as collateral: 271 North Park Ave. and 101 E. Division St., both in Fond du Lac, Wisconsin.

¶3 One year into the loan, Rolon accepted an offer to sell the Division St. property for \$550,000, with Rolon financing \$400,000 of the purchase price. Here is where the dispute unfolds. Rolon agreed to assign to Cambridge the note and mortgage that Rolon received from the buyer of the Division St. property. Rolon claims that Cambridge agreed to release its mortgage interest in *both* the Park Ave. and Division St. properties, while Cambridge argues that it only agreed to release the Division St. property from the mortgage.

¶4 Rolon points to an “agreement to substitute collateral” dated September 14, 2006, that listed exclusively the Park Ave. property and stated that Rolon entered into a contract to sell “the Property,” and that Cambridge would fully satisfy “the mortgage on the Property.” This agreement was signed by one of

Cambridge's partners. Rolon argues that the agreement to substitute collateral released him from the entire mortgage rather than just the Division St. property that he was selling.

¶5 Cambridge responds that the September 14, 2006 agreement erroneously listed the Park Ave. property as "the Property" instead of the Division St. property. Cambridge recognized the error prior to the closing date and a revised agreement was prepared by Rolon's attorney that substituted the Division St. address for the Park Ave. address. The agreement was e-mailed to Cambridge on September 14 and signed by Cambridge the next day, although Rolon's signature does not appear on this agreement. The closing of the Division St. property occurred on September 15, 2006.

¶6 A Cambridge partner testified at trial that Rolon asked Cambridge to release the Division St. property so Rolon could sell it. Cambridge agreed to release just the Division St. property on the condition that Rolon would assign the note and mortgage Rolon obtained from the buyer of the Division St. property to Cambridge.

¶7 After the sale of the Division St. property, Rolon continued to make his monthly note payments to Cambridge for seventeen months. Rolon admitted at trial that he continued to make these payments because "I had to. I didn't have a release on [the Park Ave. property]. I didn't have my satisfaction on it." Rolon stopped making his payments in March 2008, four months before the final balloon payment was due.

¶8 In 2009, Cambridge commenced a foreclosure action against the Park Ave. property. Rolon defended, arguing that Cambridge was not entitled to a foreclosure judgment because Cambridge released its interest in the Park Ave.

property in the agreement to substitute collateral. Following a bench trial, the circuit court granted a judgment of foreclosure. Rolon appeals the judgment and we affirm.

The Circuit Court's Decision

¶9 The circuit court found that the September 14, 2006 agreement to substitute collateral listing the Park Ave. property was “an utter and blatant mistake.” While Cambridge acknowledged that it signed this document, a corrected version listing the Division St. property was drafted by Rolon’s lawyer prior to the closing date. This version was signed by Cambridge, although Rolon’s signature does not appear on the agreement.

¶10 The court also noted that Rolon continued making his monthly note payments to Cambridge for seventeen months after the Division St. property was sold. The only logical explanation for this, according to the circuit court, was that Rolon understood that Cambridge did not release the Park Ave. property.

¶11 Finally, when Rolon tried to sell the Park Ave. property in August 2008, he requested a payoff statement from Cambridge. The circuit court found that Rolon would not have made this request if he truly believed that there was no mortgage lien on the Park Ave. property.

¶12 The circuit court concluded that there was not a meeting of the minds as to releasing the mortgage interest in the Park Ave. property. The court granted Cambridge’s request for a judgment of foreclosure.

STANDARD OF REVIEW

¶13 Our interpretation of the agreement to substitute collateral between Rolon and Cambridge is a question of law that we review de novo. See *LDC-728 Milwaukee, LLC v. Raettig*, 2006 WI App 258, ¶8, 297 Wis. 2d 794, 727 N.W.2d 82. When the terms of a contract are plain and unambiguous, we will construe the contract as it stands. *Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. Contract language is ambiguous if it is susceptible to more than one reasonable interpretation. *Id.*, ¶10. When a contract is ambiguous, a court may look to extrinsic evidence to determine the parties' intent. *Id.* Extrinsic evidence includes the surrounding circumstances during the negotiations, the conduct of the parties before and after the agreement was executed, and documents related to the contract. *Id.*

¶14 We determine that the contract terms of the agreement to substitute collateral between Rolon and Cambridge are ambiguous. We therefore will examine extrinsic evidence to determine the parties' intent.

DISCUSSION

¶15 The answer to whether the Park Ave. property was released in the agreement to substitute collateral should require a simple examination of the record. Unfortunately, Rolon and Cambridge were both careless in preparing, documenting, and recording their transaction. Based upon the ambiguity in the contract terms, the circuit court had to resolve this case by making credibility determinations. The court ultimately concluded that the testimony of Rolon was not credible and that Cambridge never released the Park Ave. property from the mortgage. We agree and affirm the circuit court's decision.

¶16 The Wisconsin Supreme Court has stated that “a course of dealing between parties which results in a binding construction or interpretation of their contracts is a species of estoppel.” *George J. Meyer Mfg. Co. v. Howard Brass & Copper Co.*, 246 Wis. 558, 580, 18 N.W.2d 468 (1945). The circuit court found that the course of dealings between Rolon and Cambridge demonstrated that neither party intended to release the Park Ave. property from Cambridge’s mortgage in the agreement to substitute collateral. We affirm the circuit court’s conclusion. The record demonstrates that both parties recognized that the original agreement to substitute collateral mistakenly listed the Park Ave. property. While Cambridge acknowledged that it erroneously signed this document on September 14, 2006, it recognized the mistake and later that day Rolon’s lawyer drafted a corrected version listing the Division St. property and sent it to Cambridge. Cambridge signed the corrected version prior to the September 15 closing date. Rolon continued making his monthly note payments to Cambridge for seventeen months after he sold the Division St. property. Finally, Rolon requested a payoff statement from Cambridge when he tried to sell the Park Ave. property in 2008. Rolon’s conduct is evidence that he did not believe that the Park Ave. property was released from the mortgage on September 15, 2006.

¶17 Both versions of the agreement to substitute collateral include a provision that Cambridge “agrees to fully satisfy that Mortgage.” Because only one mortgage containing two properties as collateral existed, Rolon could plausibly argue that either version of the agreement satisfied his mortgage. This argument would have merit if Rolon’s conduct indicated that he thought the agreement released both properties. As we have discussed, the conduct of the parties after they executed the agreement is key to resolving the ambiguities. Rolon admitted at trial that “I didn’t have a release on [the Park Ave. property]. I

didn't have my satisfaction on it." The circuit court weighed the credibility of the parties' testimony with the record and found that the parties agreed to release only the Division St. property from the mortgage. We accept the circuit court's credibility determinations and therefore hold that Rolon's conduct overcomes any contract ambiguity.

CONCLUSION

¶18 As we hold that the parties never intended to release Cambridge's mortgage interest on the Park Ave. property, we affirm the foreclosure judgment.

By the Court.—Judgment affirmed.

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