COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2202 **Cir. Ct. No. 2009CV2485**

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

STEPPING STONE HOMES, INC.,

PLAINTIFF-RESPONDENT,

V.

JOSHUA DEWALL AND TIFFANY DEWALL,

DEFENDANTS-APPELLANTS.

WISCONSIN PUBLIC SERVICE CORPORATION AND HOLY FAMILY MEMORIAL, INC.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Spouses Tiffany and Joshua DeWall defaulted on a land contract. They appeal from a judgment of strict foreclosure entered in favor of Stepping Stone Homes, Inc., and dismissing their counterclaims and affirmative defenses. The DeWalls contend that their claims of unconscionability, fraud and/or misrepresentation and a breach of the duty of good faith present questions of fact making summary judgment inappropriate. They also argue that the waiver of claims they signed as part of the amendment to the land contract is void. We disagree and affirm the judgment.

¶2 The DeWalls wanted to buy their first house. Having filed for bankruptcy two years earlier, they did not qualify for conventional financing. They responded to a newspaper ad for Intuitive Mortgage Services, n/k/a Home Path Financial, a company that professes to assist people with poor credit to buy homes. Jeffrey Kleiner, the general partner of Home Path and president of its affiliate, Stepping Stone Homes, Inc.,[1] told the DeWalls about Home Path's three-step plan to improve credit and achieve home ownership.

¶3 Generally, the plan works like this. An applicant selects a home from Stepping Stone's real estate portfolio or one Stepping Stone agrees to purchase. Home Path, which is a mortgage banker and broker, then tries to broker a loan for the applicant from a third-party lender for 100% of the home's purchase price. If that fails, Home Path itself tries to underwrite a loan in the full amount. If the applicant does not qualify for a 100% loan from Home Path, Stepping Stone will finance 80% of the purchase price under a two-year land contract and Home

[1] At the time, Stepping Stone Homes, Inc., was known as CLA Mortgage, Inc. We will use "Home Path" and "Stepping Stone," the entities' current names.

Path will finance 20% of the purchase price under a second-mortgage loan. Along the way, applicants work to rebuild their credit through various credit-repair strategies. The aim is to improve the applicant's credit scores during the initial financing term to refinance loans later into one lower payment and ultimately to obtain a conventional loan.

¶4 Kleiner developed a written three-step, two-year plan ("the Plan") for the DeWalls based on their current averaged credit score of 531. Step One was to move into a house "now" financed by two loans with estimated monthly payments of $837 at 10% interest.[2] Step Two was to achieve by one year after closing a credit score of 620 so as to refinance the two loans into one monthly payment of $695 at an interest rate of 8.50%. Step Three was to achieve a credit score of 720 in one more year and then obtain conventional financing for a monthly payment of $575 at a rate of 6.50%. The DeWalls' credit-improving responsibilities under the Plan were to keep current on all accounts, including utilities, keep all revolving accounts at less than 40% of their limits, incur no new collections, open a few new trade lines but have no more than five or six total, and create a savings plan. The DeWalls signed the Plan on March 31, 2007.

¶5 The DeWalls found a non-portfolio house. Stepping Stone agreed to buy the house for $85,000 and the DeWalls agreed to buy it from Stepping Stone for $108,000. In anticipation of the purchase, the DeWalls repainted the whole interior, tore out carpeting and refinished hardwood floors, largely at Stepping

[2] The DeWalls were advised that the projected payments did not include insurance or taxes and that the interest rates were an approximation based on current lender rates and could fluctuate with the market.

Stone's expense. The house was appraised at $108,000, the same amount the DeWalls had agreed to pay for it.

¶6 The DeWalls requested 100% financing. When the parties executed the purchase agreement, Kleiner gave the DeWalls two Truth-in-Lending Act (TILA) Disclosure Statements and two Good Faith Estimates ("Estimates"). Each of the TILA Statements provided at the top: "THIS IS NEITHER A CONTRACT NOR A COMMITMENT TO LEND." One Estimate quoted an $86,400 loan with a 30-year term, an interest rate of 8.385% and a monthly payment of $757.59. The second quoted a $21,600 loan with a 40-year term, at an interest rate of 11% and a monthly payment of $200.52. Both Estimates advised that "no lender has been obtained." For reasons the record does not make clear, the DeWalls signed only the purchase agreement.

¶7 Home Path was unable to obtain a 100% loan from a third-party lender or to directly underwrite 80% of the home price on the terms of the 30-year Estimate. At best, Home Path could underwrite a 20% loan on the terms of the 40-year Estimate and Stepping Stone would finance the remaining 80% through a land contract. On May 30, 2007, Kleiner sent the DeWalls an email stating:

> [W]here we are at is Mike [a Home Path employee] has tried everything and confirmed to me today that he has run out of lenders and has officially given up trying to get financing for a first mortgage. [S]o we are definitely at the point where we simply close a land contract and watch your file every quarter and when the scores are high enough to refinance to lower payments we do so then.
>
> [S]o all the original numbers are the same, there's a first mortgage (which would be the land contract) and the simultaneous second mortgage (which typically would be a down payment) and the monthly payments are as quoted originally for both of them for a total of $952/month….

> [A]s far as signing paper work for all this, tomorrow [I] will be in Milwaukee so can we get together on Friday [June 1]? [W]hat does your schedule look like for that day?

¶8 The parties executed the land contract on June 1, 2007. Under the contract, the DeWalls agreed to pay Stepping Stone $108,000 as follows:

> (a) $22,500.00 [the 40-year loan, plus $900 from the DeWalls] at the execution of this Contract; and
>
> (b) the balance of $85,500.00, together with interest from the date hereof on the balance outstanding from time to time at the rate of 9.99% per annum until paid in full as follows:
>
> Monthly payments of $749.69, due on or before the first day of each and every month, with the first payment coming due July 1, 2007. These payments will continue for 24 months at which time this note will Balloon and become immediately payable in full … provided the entire outstanding balance shall be paid in full on or before May 1, 2009 ("Maturity Date").

¶9 In their respective affidavits opposing summary judgment, the DeWalls each averred that they do not recall "anyone talking about the details of the agreements [or] … about the balloon payment, or the consequences of missing it [or] … about the differences between a land contract and a mortgage." Tiffany averred, however, that she recalls Kleiner advising them that the title had to stay in his name because she and her husband could not get "the 'full mortgage.'"

¶10 Home Path monitored the DeWalls' credit scores every quarter and provided them with written summaries of their progress. A typical one advised:

> Enclosed is a copy of your credit report from 09/10/2008…. According to your personalized plan there are to be no new collections. There are 9 new collections on your report. These need to be paid off. Also the child support lien will still need to be taken care of. There are some accounts that were included in your bankruptcy that are showing dollar amounts. I would suggest calling the

> credit agencies and faxing them a copy of your discharge paper …. By having a dollar amount it looks like that amount is added to your open credit amount and lowers your score. The judgments that were on your report last time are still reporting the same. I know from the workbook you filled out it said you were getting satisfactions from the court house. I would send cop[ies] of those to each of the 3 credit agencies to have the judgments show as being paid in full. I can give you the[ir] web site and phone numbers. The new collections, late payments and balance past due are all hurting your credit score.

¶11 By February 2009, the DeWalls' averaged score was lower than when they signed the Plan in March 2007. They were late on land contract payments and delinquent on their 2008 real estate taxes. Stepping Stone paid the 2009 real estate taxes and had force placed insurance on the property three times.

¶12 On February 26, 2009, Kleiner notified the DeWalls that Stepping Stone intended to foreclose the land contract because they were in default. He advised them that Stepping Stone intended to foreclose even if they cured their defaults because, with the May 1 maturity date looming, their declining credit scores would not permit refinancing. The DeWalls' efforts to obtain financing from other sources were in vain. The parties entered extension negotiations. The DeWalls rejected Stepping Stone's offer to extend the land contract for two years at 11.00% interest. They did accept its offer, however, to extend the land contract until November 1, 2009 on the same terms as the original one.

¶13 During the negotiations, the DeWalls had threatened to sue, telling Kleiner that they thought they had viable legal claims against Stepping Stone under the land contract. They did not specify the claims' legal or factual bases. The Land Contract Amendment Stepping Stone and the DeWalls ultimately executed contained a provision by which the DeWalls agreed to waive "any and all claims, demands, actions, damages, causes of action and affirmative defenses

which any of the releasing parties have asserted or claimed or might now or hereafter assert or claim against all or any of the released parties."

¶14 The DeWalls again defaulted. On December 17, 2009, Stepping Stone filed this action for strict foreclosure of the land contract. In their pro se answer, the DeWalls alleged, among other defenses, that the Home Ownership and Equity Protection Act ("HOEPA"), 15 U.S.C.A. § 1639, "may" apply to this case, that the land contract was unconscionable and that Stepping Stone violated its duty of good faith and/or committed fraud or misrepresentation. They also asserted counterclaims alleging that there "may be" violations of HOEPA, the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C.A. § 2601 *et seq.*, and Stepping Stone's duty of good faith.[3] The DeWalls provided no facts to support their defenses and counterclaims.

¶15 Stepping Stone moved for summary judgment. Now represented by counsel, the DeWalls opposed the motion with a brief and affidavits, arguing that the land contract was unconscionable. They also reasserted common law fraud and misrepresentation and alleged violations of WIS. STAT. § 224.77(1)(b) and (c) (2009-10),[4] prohibiting mortgage bankers and brokers from making false or deceptive statements or promises. They did not reassert any HOEPA violations. After a hearing on the motion, the court granted Stepping Stone a judgment of strict foreclosure and denied the DeWalls' counterclaims. The DeWalls appeal.

[3] The DeWalls apparently have abandoned any claim under RESPA.

[4] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

¶16 This court reviews a summary judgment determination de novo, applying the standard found in WIS. STAT. § 802.08, the same methodology that the circuit court uses. ***Sonday v. Dave Kohel Agency, Inc.***, 2006 WI 92, ¶20, 293 Wis. 2d 458, 718 N.W.2d 631. We affirm an award of summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Sec. 802.08(2); *see also* ***Sonday***, 293 Wis. 2d 458, ¶20.

¶17 The DeWalls first contend that foreclosure on a land contract is not appropriate where its terms are unconscionable. They assert that terms that violate HOEPA are unconscionable, and cast the $23,000 difference between what Stepping Stone paid for the house and the $108,000 they agreed to pay—also the house's appraised value—as an unconscionable "financing fee."

¶18 HOEPA amended TILA to address the problem of predatory lending to high-risk borrowers. It applies to a consumer credit transaction that is secured by the consumer's principal dwelling. 12 C.F.R. § 226.32(a)(1). It does not apply to "residential mortgage transaction[s]." 12 C.F.R. § 226.32(a)(2)(i). Further, Stepping Stone used a State Bar of Wisconsin Land Contract form, which states at the top: "TO BE USED FOR NONCOMMERCIAL ACT TRANSACTIONS."

¶19 Even if HOEPA applies, the DeWalls fail to establish that the $23,000 difference between the price it initially paid for the property and the price the DeWalls agreed to a few months later represents an unconscionable "financing fee." The DeWalls cite no mandatory authority that such is the case. Moreover, the parties do not dispute that Stepping Stone funded improvements to the

property after purchasing it, its appraised fair market value was $108,000 and the DeWalls agreed to pay that amount. We see no unconscionability in this regard.

¶20 The DeWalls next contend that the land contract was procedurally and substantively unconscionable. For a contract to be declared invalid as unconscionable, it must be both procedurally and substantively unconscionable. ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53, ¶29, 290 Wis. 2d 514, 714 N.W.2d 155. Procedural unconscionability relates to factors bearing on the meeting of the minds of the contracting parties. ***Leasefirst v. Hartford Rexall Drugs, Inc.***, 168 Wis. 2d 83, 89-90, 483 N.W.2d 585 (Ct. App. 1992). Substantive unconscionability pertains to the reasonableness of the contract terms themselves, ***id.*** at 90, and refers to whether they "lie outside the limits of what is reasonable or acceptable," ***Wisconsin Auto Title Loans***, 290 Wis. 2d 514, ¶36. Determining unconscionability presents a question of law that we determine de novo on a case-by-case basis. *See* ***id.***, ¶¶25, 33.

¶21 The DeWalls claim the formation of the land contract was procedurally unconscionable because they were at a "tremendous" negotiating disadvantage due to their prior Chapter 7 bankruptcy and credit difficulties and the parties' disparity in real estate financing and loan document experience. *See* ***id.***, ¶34 (listing relevant considerations when assessing procedural unconscionability). They assert that Kleiner represented to them when the offer to purchase was made that they would be purchasing the home with two traditional mortgages but then, just "two days before closing" presented them with a "highly irregular" arrangement of one traditional mortgage and one land contract, without explaining the difference between the two.

¶22 We are not persuaded. The TILA Statements clearly announced that they presented neither a contract nor a commitment to lend. The Estimates simply described the parameters within which a third-party lender would be sought. With their credit history, it should have been no surprise to the DeWalls that those financing avenues turned into dead ends. The DeWalls' suggestion that—despite their payment pattern—they still expected something akin to conventional financing rings hollow.

¶23 Granted, Kleiner's e-mail did say that they could "simply close a land contract." The DeWalls do not contend, however, that Kleiner refused to explain the particulars or that they even asked. They complain that the land contract was sprung on them just two days before closing, but they agreed to the proposed closing date. They were free to seek additional time to have their questions answered, to consider other options, to refuse Stepping Stone's land contract financing, or to apply—as they attempted, without success—for a home loan with any other financial institution. They chose to sign the land contract, however. They explain that, with Tiffany nine months pregnant, all the work they had done on the house and nowhere else to go, they were desperate. Courts use unconscionability to prevent oppression or unfair surprise, not to disturb the allocation of risks because of superior bargaining power. ***Wisconsin Auto Title Loans***, 290 Wis. 2d 514, ¶32. The DeWalls may have been in unfortunate straits but Stepping Stone did not act unconscionably.

¶24 The DeWalls also contend their dealings with Kleiner and his businesses were substantively unconscionable. As examples, they claim that Kleiner agreed to finance only homes that needed work so that he could boost the price to make it more difficult for them to pay for the home; that their recent bankruptcy and poor credit score made it unrealistic that, within two years, they

would be able to either satisfy the balloon payment or improve their credit to a point that would allow them to refinance the home on better terms; and that Home Path's quarterly credit score checks themselves drove their scores down.

¶25 Once again, the record depicts it differently. The DeWalls point to no offending contract term or provision. *See* ***Leasefirst***, 168 Wis. 2d at 90. They were advised when they signed up for the Plan in March 2007 that the goal was to repair their damaged credit to ready them for conventional financing in two years, and that they played a significant and explicitly stated role in doing so. Nonetheless, they were late with most payments, took out a loan at over 100% interest, were delinquent on their taxes and accrued new collections. Those actions ran contrary to the Plan and, as the DeWalls were advised, caused their credit scores to fall. What would have occurred had they adhered to the Plan is pure speculation. On these facts, we cannot say that the Plan's or the land contract's provisions were outside reasonable or acceptable limits.

¶26 Next, the DeWalls contend that Stepping Stone committed fraud or misrepresentation when it represented to them that they would be able to repair their credit and refinance the land contract after two years. To establish fraud or misrepresentation, a party must show that a representation of fact was made; the representation was false; the person made the representation knowing it was untrue, recklessly made it without caring if it was true or false, or failed to exercise ordinary care in making the representation and in ascertaining the facts; and the other party believed the representation to be true and relied on the representation to its detriment. ***Ollerman v. O'Rourke Co.***, 94 Wis. 2d 17, 25, 288 N.W.2d 95 (1980). Whether the falsity of a statement could have been discovered through ordinary care is assessed in light of the intelligence and

experience of the misled person. ***Williams v. Rank & Son Buick, Inc.***, 44 Wis. 2d 239, 246, 170 N.W.2d 807 (1969).

¶27 The DeWalls assert that Kleiner, for Stepping Stone, falsely represented the Plan as a quick credit-repair program when in truth it was a "design for failure" that ensured they would have no other financing when the balloon payment came due. They claim he misrepresented that the recommended strategies, such as opening new lines of credit and quarterly credit checks, would improve their credit scores when such actions actually drove their scores down. They relied on his pie-in-the-sky representations to their detriment, they assert, because the misrepresentations could not be discovered by the exercise of ordinary care since there was nothing in the documents they signed that indicated that, for them, a two-year credit-improvement plan bordered on the impossible.

¶28 True, Kleiner told the DeWalls that home ownership via a conventional loan was possible within two years. The documents they signed plainly state that nothing was guaranteed, however. Indeed, the Plan spelled out the DeWalls' concomitant obligations, making it clear that achieving the two-year goal was tied to their actions. Yet they repeatedly incurred new collections and delinquencies. Failing to keep the accounts current was more detrimental to their credit scores than was simply opening the new accounts in the first place.

¶29 Next, the DeWalls claim that Stepping Stone breached the duty of good faith implied in every contract.[5] *See* ***Crown Life Ins. Co. v. LaBonte***, 111

[5] Ordinarily it is a question of fact whether a party to a contract has breached its obligation of good faith. *See* ***Amoco Oil Co. v. Capitol Indem. Corp.***, 95 Wis. 2d 530, 542, 291 N.W.2d 883 (Ct. App. 1980). The material facts relevant to this issue are not disputed, however.

Wis. 2d 26, 44, 330 N.W.2d 201 (1983). They assert that Stepping Stone interfered with their performance of the contract—for instance, by repeatedly checking their credit scores or advising that they open new trade lines, causing others to check their scores—thus preventing them from improving their credit scores and refinancing the land contract. The record indicates otherwise.

¶30 Home Path regularly contacted the DeWalls with written recommendations to remedy problems shown on their credit reports. In addition, Stepping Stone twice offered the DeWalls additional time to repair their credit so as to refinance the land contract with a conventional loan with more favorable terms. We fail to see how Stepping Stone acted to thwart the DeWalls' performance of the contract.

¶31 Lastly, the DeWalls contend that the Amendment to the land contract is unenforceable because it contains an exculpatory provision that is unclear and violates public policy. An exculpatory contract seeks to release a party from liability resulting from his or her negligence or other wrongful act. ***Merten v. Nathan***, 108 Wis. 2d 205, 210, 321 N.W.2d 173 (1982).

¶32 We already have concluded that the DeWalls have failed to establish that Stepping Stone engaged in any fraud or misrepresentation. Because no tort liability is involved in this case, we need not address the DeWalls' claim that the waiver was an exculpatory provision that violated public policy.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.