COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0439 **Cir. Ct. No. 03CV000232**

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

LILIE-JEAN AWSUMB AND GORDON AWSUMB,

PLAINTIFFS-APPELLANTS,

V.

DAVID A. THOMPSON AND LAURA J. THOMPSON,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

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

¶1 CANE, C.J. Lilie-Jean and Gordon Awsumb appeal a judgment holding that a provision for a right of first refusal in a land sales contract was unenforceable because it failed to identify the land to which the right applied with sufficient certainty. The Awsumbs argue that: (1) their contract with David and Laura Thompson is valid and enforceable because it is definite as to all material

terms, such as contingencies and financing; (2) the contract is unambiguous; (3) the contract satisfies the statute of frauds, WIS. STAT. § 706.02;[1] and (4) if the contract does not satisfy the statute of frauds, extrinsic evidence can correct any ambiguities that may exist. They also argue that specific performance should be awarded. Because the Awsumbs' right of first refusal does not satisfy the statute of frauds, we affirm the judgment of the trial court.

Background

¶2 David and Laura Thompson are dairy farmers in St. Croix County, Wisconsin. They own several hundred acres of land in Kinnickinnic Township, including a fifty-three-acre field. Several years ago, Lilie-Jean and Gordon Awsumb moved to the area, bought a twenty-five-acre parcel of land immediately west of the Thompsons' fifty-three-acre field and built a house on the property. Gordon owns commercial real estate and develops townhomes.

¶3 In June of 2002, Gordon and David discovered that, due to a surveying error, the Awsumbs' driveway was actually on the Thompsons' property. Rather than moving their driveway, the Awsumbs told the Thompsons they were willing to buy the land on which the driveway was located, about an acre, for $4,000. Gordon's attorney drafted a contract for the purchase. That contract also included an offer to buy another parcel of land and a grant of right of first refusal "to buy any adgacent [sic] acreage which [the Thompsons] may later sell."

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

¶4 The Thompsons went to the Awsumbs' home to discuss the offer. Some documents—the parties do not agree which ones—were discussed. Gordon read the contract with David. The two men discussed the contract, but the substance of that discussion is in dispute. Lilie-Jean and Laura also discussed the offer separately. The substance of their conversation is also disputed. The parties agree that the Awsumbs offered the Thompsons two checks, each for $4,000, along with the contract, which they had already signed. Included with the contract was a topographical drawing of the two parcels of land the Awsumbs wanted to purchase. The Awsumbs and Thompsons disagree over whether the package also included an aerial photograph and a plat map. About a week after that meeting, the Thompsons signed the contract and returned it. They then cashed one of the $4,000 checks.

¶5 Sometime later, another of the Thompsons' neighbors expressed an interest in purchasing the second parcel referred to in the contract. David discussed the new offer with the Awsumbs who eventually agreed to pay $5,000 for the second parcel. Gordon and David shook on the deal and the closing on the two parcels, around 2.88 acres, occurred in late 2002.

¶6 The Thompsons subsequently began planning to sell Timothy and Stephanie Rippie five acres from the same field. This new parcel of land was located in the southeast corner of the field, and was not contiguous with the Awsumbs' property.[2] David did not notify the Awsumbs about the pending sale or provide them with the opportunity to match the Rippies' offer. When the Awsumbs heard about the negotiations from another neighbor, they brought suit

[2] The new parcel was about 800 feet away from the Awsumbs' land.

against the Thompsons and filed a lis pendens. The Thompsons counterclaimed for slander of title.

¶7 After a bench trial, the court found that, under the statute of frauds, the right of first refusal did not identify the land in question with sufficient certainty as to be enforceable. In addition to failing to identify the land sufficiently, the right of first refusal also failed, the court concluded, to identify financing terms, contingencies or any time limits. The court further determined that neither party presented any "extrinsic evidence regarding intent" which meant parol evidence could not correct any ambiguity in the term "adjacent." Finally, the court found that no equitable remedy was available under WIS. STAT. § 706.04.

¶8 The Awsumbs filed a motion for reconsideration. The court denied their motion adopting the reasons and rationale of its original decision. It clarified that decision by concluding that the Awsumbs' right of first refusal was unenforceable with respect to any acreage owned by the defendant as a result of "its ambiguity, lack of definiteness, lack of compliance with the statute of frauds, and lack of mutual assent." This appeal followed.

Discussion

¶9 Whether a contract is ambiguous is a question of law this court reviews de novo. ***Spencer v. Spencer***, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987). The application of a statute to a set of facts is similarly subject to independent review. *See* ***Nichols v. Nichols,*** 162 Wis. 2d 96, 103, 469 N.W.2d 619 (1991). Equitable decisions, such as those made under WIS. STAT. § 706.04, are by contrast discretionary and will be upheld unless the trial court has exercised

its discretion erroneously. *See* ***Mulder v. Mittelstadt***, 120 Wis. 2d 103, 115, 352 N.W.2d 223 (Ct. App. 1984).

¶10 The contract in this case consists of an agreement to buy several acres of the Thompsons' land and a right of first refusal on "any adgacent [sic] acreage that they may later sell." The contract thus identifies and purports to convey two kinds of interest in land, both governed by the statute of frauds. *See* WIS. STAT. § 706.02. The statute of frauds imposes a number of requirements on most contracts conveying any interest in land, including the requirement they identify the land in which the interest is being conveyed. ***Id.*** Wisconsin courts have long held that to satisfy the latter requirement a contract or memorandum must describe "with reasonable certainty" the property to which it relates. *See* ***Stuesser v. Ebel***, 19 Wis. 2d 591, 593, 120 N.W.2d 679 (1963); ***Thiel v. Jahns***, 252 Wis. 27, 31-32, 30 N.W.2d 189 (1947); ***Harney v. Burhans***, 91 Wis. 348, 351, 64 N.W. 1031 (1895). The central issue here is thus whether the phrase that creates the Awsumbs' right of first refusal, "any adgacent [sic] acreage," describes the land over which they can assert that right with sufficient certainty to be enforceable under the statute of frauds. If it does not, the contract is void and we need not address whether any other term of the contract is also deficient.

¶11 The trial court concluded that simply attaching a photocopy of a topographical map and referencing adjacent acreage did not identify the land over which the Awsumbs' right of first refusal extended sufficiently to make the contract enforceable. We agree.

¶12 The Awsumbs argue that "adjacent" has the clear meaning of "near" rather than "contiguous," citing BLACK'S LAW DICTIONARY 41 (6th ed. 1990)[3]: "[l]ying near or close to; sometimes, contiguous; neighboring ... implies that the two objects are not widely separated, though they may not actually touch, ***Harrison v. Guilford County*** … 12 S.E.2d 269 [N.C. 1940], while adjoining imports that they are so joined ... that no third object intervenes. ***Wolfe v. Hurley,*** … 46 F.2d 515, 521 [W.D. La. 1930]." The Thompsons counter that the term is commonly understood to mean "abutting or contiguous," based on the MERRIAM WEBSTER DICTIONARY[4] definition ("not distant, having a common endpoint"). A third source, 1 OXFORD ENGLISH DICTIONARY 155 (2d ed. 1989), similarly defines "adjacent" as meaning both "near" and "abutting."

¶13 Although not binding on this court, the appeal to dictionaries is enlightening because it demonstrates that adjacent can mean at least two different things in ordinary speech. It is thus a word that depends on context to remove ambiguity. Even if the Awsumbs are correct, however, and adjacent ordinarily means near rather than abutting, the problem of descriptive ambiguity remains. "Near" is a term of relationality whose meaning is established by context. Without sufficient information to establish relationality, "near" is just as ambiguous as "adjacent."

[3] The Awsumbs also cite other dictionary definitions, including the one on which the Thompsons rely.

[4] No edition is cited in the Thompsons' brief.

¶14 Whether the term adjacent acreage describes the land to which the right of first refusal attaches sufficiently will therefore depend on its context. That relevant passage states:

> In addition, thereto, by entering into this purchase offer for either or both parcels, sellers do hereby grant buyer the first right of refusal to buy any adgacent [sic] acreage which they may sell later for the greater amount of $4,000 per acre or what any other bona fide purchaser would offer in a bona fide arms length transaction.

The Awsumbs argue that because the Thompsons only own one parcel of land adjacent to their property, the fifty-three-acre field, adjacent acreage must mean any land within the entire fifty-three-acre field. We are not persuaded.

¶15 Case law supports the argument that an otherwise insufficient description can be made certain by contextual terms such as "my property," when a party owns no other property, or "my 53-acre field." *See* ***Kuester v. Rowlands***, 250 Wis. 277, 279-80, 26 N.W.2d 639 (1947).[5] But those relational and context creating terms are exactly what is absent from the passage creating the Awsumbs' right of first refusal. Nothing in the passage indicates whether adjacent refers to the relationship between two complete properties, between two borders, between

[5] Other jurisdictions have similarly found simple relational descriptions, without further descriptive clarification, inadequate. *See, e.g.,* ***Watts v. Ridenhour***, 217 S.E.2d 211 (N.C. App. 1975) ("additional acreage lying to the rear of Plot No. 8 ... this acreage to lie primarily on the southeast side of a line running along the southeastern side of Plots Nos. 4, 5, 6 and 10" was found to be insufficient because there were an infinite number of ways in which five acres might be carved out of one end of the tract and nothing in the contract reduced those possibilities "to certainty"); *see also* ***Coast Business Brokers, Inc. v. Hickman***, 396 P.2d 756 (Or. 1964) (description of two tracts as "adjoining Honeyman Park [and] south of Florence" was insufficient without reference to location or ownership);

one or both of the parcels of land the Awsumbs purchased and the whole fifty-three-acre field or between one or both parcels and some portion of that field. Nor does the topographic map, which shows the two parcels purchased by the Awsumbs and a portion of the Thompsons' field, provide any evidence that would further identify the land described by adjacent acreage.

¶16 In cases where land description is on its face uncertain, insufficient, or ambiguous, extrinsic evidence can be admitted to satisfy the statute of frauds if that description itself furnishes some foundation, link or key to the oral or extrinsic testimony which identifies the property. ***Wadsworth v. Moe***, 53 Wis. 2d 620, 624-25, 193 N.W.2d 645 (1972). The use of extrinsic evidence is limited, however, to the identification of real estate; it cannot be used to supply a "portion of the description or to establish the intent of the parties." ***Id.***

¶17 The Awsumbs offered evidence that they explained to the Thompsons they wanted a right of first refusal over the entire fifty-three-acre field, that they looked at maps with the Thompsons and that the couples looked out the windows of the Awsumbs' home in a way that made it clear that the whole field was under discussion. The Thompsons testified to the contrary that the entire field was never discussed and they never thought the right applied to it. The evidence offered by both parties went to their intentions not to the identification of the real estate described in the contract, and is therefore inadmissible to satisfy the statute of frauds. *See* ***Ebel***, 19 Wis. 2d at 596-97. "It is not what the parties to the contract know but what they put in the contract as description, that is the test. All the terms of an oral agreement may be definite but the contract is void unless it or a memorandum meets the call of the statute." ***Id.*** at 596. Even if the Thompsons and Awsumbs came to a meeting of the minds orally, the contract is still unenforceable under the statute of frauds *unless* something in the written property

description provides a foundation, link or key to extrinsic evidence that further identifies the property in question. The sole descriptive term in the relevant passage is "adjacent acreage" and it provides no foundation linking adjacency to a marker, boundary or other form of property description. *See, e.g.,* ***Wiegand v. Gissal***, 28 Wis. 2d 488, 493-94, 137 N.W.2d 412 (1965) (existing boundary markers not admissible to identify property because the description did not refer to the markers). The trial court was thus correct that the right of first refusal is unenforceable under the statute of frauds.

¶18 Next, the Awsumbs argue that the trial court erroneously exercised its discretion when it held the contract was not enforceable under WIS. STAT. § 706.04. According to the statute, a "transaction which does not satisfy one or more of the requirements of s. 706.02 may be enforceable in whole or in part under doctrines of equity, provided all of the elements of the transaction are clearly and satisfactorily proved and, in addition" other criteria are met. ***Id.*** The trial court found that the elements of the transaction were ambiguous and that the parties' intentions were not established. Substantial evidence in the record supports those findings.

¶19 Finally, the Awsumbs ask this court to grant them specific performance with respect to the five-acre lot the Thompsons sold while this appeal was pending. Because we agree with the trial court that the provision for a right of first refusal is unenforceable, specific performance is no longer an issue.

By the Court.—Judgment affirmed.

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