COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP802 **Cir. Ct. No. 2010IN5**

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

IN RE THE ESTATE OF JACKIE G. CARLEY:

CYNTHIA CARLEY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JACKIE G. CARLEY,

APPELLANT,

V.

JEFFREY MARCINIAK,

RESPONDENT.

APPEAL from a judgment of the circuit court for Langlade County: FRED W. KAWALSKI, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Cynthia Carley, as personal representative of the Estate of Jackie Carley (the Estate), appeals a judgment ordering it to return

payments made by Jeffrey Marciniak pursuant to a purchase agreement for real property repossessed after Carley's death. The Estate challenges the circuit court's factual finding regarding the date of execution of an addendum containing the option to purchase, contends Marciniak failed to exercise the option, and asserts Marciniak forfeited his payments by virtue of multiple alleged breaches. We agree the circuit court made an erroneous finding regarding the date of the addendum, but that error was harmless. We reject the Estate's remaining arguments and affirm.

BACKGROUND

¶2 This case arises from shoddy business paperwork relating to the lease and sale of the Brookside Tavern. On November 8, 2007, Carley and his wife, Cynthia, agreed to lease the tavern to Marciniak. Among other things, the lease prohibited use of the property as anything other than a tavern and living quarters and required written approval for any improvements to the property. Marciniak was to make monthly payments of $1,000.

¶3 An addendum was executed on the same day and made part of the lease. The addendum describes the option to purchase as follows:

> In addition to the monthly payments of [$1,000], the Lessee shall make a payment of [$10,000] on execution of the lease for an option to purchase the premises at any time during the lease for [$155,000]. On exercise of the option, the monthly lease payments shall be computed with interest at 6.7% as though this were a land contract from the beginning of the lease, and credit shall be given for the option payment as well, as of date paid. Lessee shall make additional option payments of [$20,000] each on December 5 of each year commencing December 5, 2008, which shall be applied, on purchase, in the same manner.

(Emphasis omitted.) If any payment was more than forty-five days late, the option to purchase would terminate and all payments would be forfeited. Marciniak also agreed to be responsible for fire and liability insurance and real estate taxes on the property.

¶4 Three days earlier, the parties had signed a three-page handwritten agreement. This handwritten note was apparently used by the drafting attorney as the basis for the agreement signed later. It essentially contains the same terms as the addendum, but omits any reference to a lease and describes the annual $20,000 payments as "balloon payments" rather than "option payments." Although this suggests the parties contemplated only a sale of the property, the handwritten agreement did not designate a purchase price.

¶5 Marciniak paid $10,000 in November 2007, and made all monthly payments through January 2010. All $20,000 annual payments were also made, though Marciniak made payments in varying amounts at varying times. Carley issued handwritten receipts for many of the payments, oftentimes with notations as to the date and amount of various payments yet due. At some point Marciniak began remodeling the living area of the tavern, but he did not solicit written approval from Carley before doing so.

¶6 Carley passed away on February 16, 2010. His wife hired counsel to handle his estate, and Marciniak was served with notice to vacate the premises in March. The notice alleged that Marciniak failed to timely make rent and option payments. Marciniak filed a claim against the Estate seeking recovery of all payments, including rent, made between November 2007 and February 2010. The Estate proceeded on the theory that all payments were forfeited because of Marciniak's alleged breach.

¶7 During the circuit court proceedings, it was revealed that on November 12, 2007, four days after the lease and addendum were signed, another handwritten agreement was executed by the parties. This note required an additional balloon payment of $30,000 due in early 2008. With respect to purchase price, however, the agreement was internally contradictory, purporting to set a purchase price of $155,000, but later stating that the parties would "talk over" a sale price between $75,000 and $155,000. The parties appear to agree that this second handwritten agreement is too vague to be of any use in resolving the present dispute.

¶8 The circuit court concluded Marciniak exercised his option by making the initial $10,000 payment. Afterwards, Marciniak made all required payments at or before they came due, at least until February 2010 when Cynthia Carley refused to accept any more money. The court found that this voided the agreement and that the Estate was not entitled to keep the payments because Marciniak had not materially breached the lease and addendum. The Estate was ordered to return all amounts paid toward purchase of the Brookside Tavern, but was permitted to keep any rental payments. The Estate now appeals.

DISCUSSION

¶9 The Estate begins by challenging the circuit court's factual finding that after signing the lease the parties returned to the drafting attorney to modify the arrangement to a purchase agreement.[1] Specifically, the circuit court found

[1] As Marciniak notes, the Estate's argument on this issue cascades into argument on many other unrelated points. To the extent these points are relevant to the Estate's other arguments, we shall consider them at the appropriate time. To the extent the Estate does not raise these matters elsewhere, we deem them inadequately developed and decline to consider them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

that on November 12, Carley and Marciniak had the addendum drafted after deciding "to modify their relationship from a lease arrangement to a purchase arrangement." Marciniak concedes, and we agree, that this finding was clearly erroneous. *See* ***Phelps v. Physicians Ins. Co.***, 2009 WI 74, ¶34, 319 Wis. 2d 1, 768 N.W.2d 615 ("We uphold a circuit court's findings of fact unless they are clearly erroneous."). The addendum is dated November 8, 2007, the same day as the lease. It appears the documents were executed simultaneously, as the addendum is specifically adopted by the lease. It is clear the parties envisioned a potential purchase from the get-go.

¶10 However, the circuit court's error is of no consequence. There is no reasonable possibility that the error contributed to the outcome of the action. *See* ***Schwigel v. Kohlmann***, 2005 WI App 44, ¶11, 280 Wis. 2d 193, 694 N.W.2d 467. The court's error as to the date of the addendum did not alter the meaning of the parties' agreement. Nor does it appear that the circuit court was confused by the various agreements, as it remedied its minor drafting error later in its decision by further finding that "four days after the addendum [was] signed, a new agreement [was] written …."

¶11 The Estate next argues the circuit court misconstrued the addendum. Specifically, the Estate challenges the circuit court's conclusion that payment of the $10,000 was all that was necessary to trigger the option to purchase. Construction of a written contract is a question of law that we review de novo. ***Jones v. Jenkins***, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979). We interpret the language in accord with what a reasonable person would understand the words to mean under the circumstances. ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶22, 326 Wis. 2d 300, 786 N.W.2d 15." [T]he primary goal [of] contract interpretation is to determine and give effect to the parties' intention at the time

the contract was made." ***Farm Credit Servs. v. Wysocki***, 2001 WI 51, ¶12, 243 Wis. 2d 305, 627 N.W.2d 444.

¶12 Here, the circuit court concluded that the parties intended to enter into "an informal installment purchase agreement" initiated by the first $10,000 payment. After Marciniak made that payment, the court found that the parties "conducted themselves as though [Marciniak] was purchasing the property." Marciniak contends that the circuit court properly determined that Marciniak exercised his purchase option by making the initial $10,000 payment. The Estate, on the other hand, concludes that the $10,000 payment served as consideration for the option to purchase, with the additional $20,000 payments "each being necessary to keep the option alive."

¶13 The parties overstate the significance of the initial $10,000 payment. The agreement does not clearly state how Marciniak was to exercise the purchase option, but whatever the mechanism, by the time Marciniak paid the initial $20,000 payment, the parties were treating the transaction as though he was purchasing the tavern. "[E]ven if the parties' written agreement is expressed in terms so vague and indefinite as to be incapable of interpretation with a reasonable degree of certainty, the parties' subsequent conduct and practical interpretation can cure this defect by evincing the parties' intent in entering the contract." ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶25, 291 Wis. 2d 393, 717 N.W.2d 58, *opinion clarified on denial of reconsideration*, 2007 WI 23, 299 Wis. 2d 174, 727 N.W.2d 502 (quotation omitted). The circuit court found that Marciniak paid, and Carley accepted, large sums inconsistent with a mere unexercised option to purchase the tavern. *See* ***id.***, ¶26 (subsequent action must include some interpretive conduct by both parties, "consisting … of … the willing acceptance by one of them of such a performance rendered by the other").

¶14 The Estate does not challenge the circuit court's factual finding regarding the parties' conduct, instead focusing on the addendum language regarding the $20,000 payments. But that language, when read in context, is clear that the $20,000 payments were necessary only if the option had been exercised. The immediately preceding sentence described the consequences of exercising the option. A reasonable person would similarly interpret the subsequent duty to make "additional option payments" as arising only after the option had been exercised. A contrary interpretation—that the $20,000 payments merely kept the option alive—would be absurd, as no reasonable person would pay such substantial sums for a tavern without having first decided to purchase it. Thus, the triggering mechanism—whether it was payment of the initial $10,000 or something else—is unimportant; what is crucial is the circuit court's finding that Carley's continued acceptance of the $20,000 payments demonstrated that the option had in fact been exercised.

¶15 Contrary to the Estate's argument, this interpretation does not read the words "additional option payments" out of the addendum. *See* ***Wilke v. First Fed. Savs. & Loan Ass'n***, 108 Wis. 2d 650, 657, 323 N.W.2d 179 (Ct. App. 1982) ("Courts must construe contracts to give a reasonable meaning to each provision of the contract and avoid a construction that renders portions of a contract meaningless."). Marciniak's obligation to make the $20,000 payments was inextricably connected to his exercise of the option. Thus, it is not surprising that an attorney—albeit an inartful one—might resort to the phrase "option payments" to identify the transactions. The phrase does have meaning—it distinguishes the payments from lease payments.

¶16 The Estate also claims Marciniak committed numerous material breaches of the lease and addendum, which excused its subsequent performance.[2] *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996). Specifically, the Estate asserts that, contrary to the agreement, Marciniak failed to maintain fire and liability insurance, to pay real estate taxes, to operate the premises as a tavern and live on the property, to obtain Carley's consent for improvements to the property, and to make required monthly rent payments and "option payments."

¶17 The circuit court addressed only the Estate's assertions that Marciniak failed to maintain insurance and pay real estate taxes. The court appears to have assumed that such breaches had occurred, but deemed them "minor." Only material breaches excuse the nonbreaching party from its obligations under a contract. ***Id.*** A material breach is one that "destroy[s] the essential objects of the contract." ***Id.*** "The issue of whether a party's breach excuses future performance of the contract by the non-breaching party presents a question of fact." ***Id.*** at 184. Assuming—as the circuit court did—that such breaches occurred, they were not sufficient to destroy the contract's purpose—lease and sale of the Brookside Tavern.[3] Moreover, as the circuit court observed, Marciniak agreed to forfeit all payments only if he paid more than forty-five days late, not if he committed any breach. The circuit court's finding regarding the materiality of the breaches is not clearly erroneous.

[2] Presumably, the Estate means that it should not have to convey title to the property or refund amounts previously paid for the purchase.

[3] We note that Marciniak only agreed to "*be responsible for* all Real Estate Taxes and Fire and Extended Coverage Insurance premiums, as well as liability insurance on the premises." (Emphasis added.)

¶18 The circuit court did not address the remaining alleged breaches. These included Marciniak's failure to maintain the tavern's liquor license, failure to use the property as a tavern, failure to reside on the premises, failure to keep the property in a clean and tenantable condition, and failure to secure written permission to make improvements to the property. Assuming for the sake of argument that these events occurred and constituted breaches of the agreement, they were, at most, minor.[4] *See* ***id.*** at 183. In any event, all of these alleged breaches, along with the alleged breaches for failure to procure insurance and pay real estate taxes, have been waived of any materiality through Carley's continued acceptance of payments. *See* ***Gomber v. Hackett***, 6 Wis. 323, 323-24 (1857); *see also* ***Entzminger v. Ford Motor Co.***, 47 Wis. 2d 751, 754-55, 177 N.W.2d 899 (1970).

¶19 The Estate also asserts Marciniak failed to timely make rent and option payments. This assertion directly contravenes the circuit court's finding that Marciniak "was clearly not in default at least insofar a[s] the addendum to the lease is concerned." The court noted that shoddy recordkeeping had made it difficult to determine what amounts were paid and when; according to the court, "payments were made on random dates; in varying amounts; in cash; with receipts that are on small scraps of paper, which are difficult to read." Nonetheless, the court pieced together the payment history and concluded that Marciniak often paid

[4] Many of the alleged activities do not appear to be breaches of the agreement. For example, the lease did not require Marciniak to operate a tavern or reside on the premises. It merely stated that the property was to be used "only for a tavern and living quarters." Nor did the lease require Marciniak to maintain his liquor license; it simply called for the license's surrender if the lease was terminated. In any event, these provisions are not included in the addendum, and likely did not survive Marciniak's election to purchase the property, although that point has not been briefed by the parties.

in advance and was current as of December 5, 2009.[5] As far as we can tell, none of these findings are clearly erroneous, nor does the Estate challenge them as such.

¶20 To the extent the Estate asserts Marciniak was in default after December 5, 2009, we cannot agree. The Estate apparently relies on a handwritten receipt dated January 2010 indicating that an additional $3,500 was necessary to hold the property until February 15, 2010. Regardless of whether this payment was actually necessary—according to the addendum, the next balloon payment was not due until December 5, 2010—Marciniak attempted to tender it and rent to Carley's wife after Carley's death, but was rebuffed.[6] The court specifically found credible Marciniak's testimony that "he attempted to continue to make the payments to Mrs. Carley, but those payments were refused and eventually [Marciniak] was barred from the premises." The circuit court properly concluded that "whatever agreement that existed between the parties is void as a result of Mrs. Carley refusing to accept further payments and repossessing the premises."

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[5] As of December 5, 2009, Marciniak had actually paid $6,500 more than he was obligated to pay by that date.

[6] The Carleys and Marciniak apparently instituted an informal installment plan consisting of $5,000 payments made throughout the year. Marciniak had paid $1,500 on January 10, 2010.