

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

October 15, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-2714**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**MARIAN STANISZ and  
ANNA WASILEWSKA,**

**Plaintiffs-Respondents,**

**v.**

**IRENE HASTINGS,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Irene Hastings appeals from a judgment granting specific performance on a contract for the sale of real property, and awarding \$20,343.96 in damages to Marian Stanisz and Anna Wasilewska. Hastings argues that the contract entered into between the parties contained an inadequate description of the property to be purchased and, therefore, did not

satisfy the statute of frauds. Hastings also argues that the \$20,343.96 awarded as damages was excessive and an abuse of discretion. We affirm in part and reverse in part.

Hastings owned 43.5 contiguous acres in the City of Franklin. In the fall of 1993, Hastings advertised the sale of two of those acres. On October 10, 1993, Stanisz and Wasilewska offered to purchase the two acres. Their initial offer to purchase, for \$83,000, described the property as "10642 South 92nd Street, in the City of Franklin, County of Milwaukee, Wisconsin more particularly described as single-family home, approximately 2 acres land, legal description to follow" and was subject to a financing contingency that Stanisz and Wasilewska obtain by November 1, 1993, a conventional, fixed rate 30-year mortgage at an interest rate not to exceed 7.25%. After receiving no response from Hastings, Stanisz and Wasilewska submitted two counter-offers, eventually increasing their offer to \$91,000. In response to Stanisz and Wasilewska's offer to purchase and counter-offers, Hastings submitted a "multiple counter-offer" dated October 27, 1993, granting Stanisz and Wasilewska until November 3, 1993, to accept the same. The "multiple counter-offer" was accepted by Stanisz and Wasilewska on November 3, 1993, and was confirmed by Hastings on November 5, 1993. Subsequent to the acceptance of the "multiple counter-offer," Hastings ordered a survey and appraisal report of the property. The certified survey map indicated that the parcel in question was approximately 2.2907 acres and had 200 feet of frontage on South 92nd Street. The appraisal report listed the property as being 99,781 square feet—2.2907 acres.

The "multiple counter-offer" incorporated by reference the terms in the offer to purchase that included the financing contingency. On December 17, 1993, Stanisz and Wasilewska obtained a \$81,900 loan with a fixed rate at 7.375 percent interest for thirty years.

Hastings attempted to cancel that transaction in March 1994. Stanisz and Wasilewska then brought the present action for specific performance of the contract. At the time of trial, the interest rates had gone up one percent, to 8.375 percent. During trial, testimony was offered by Hastings's son James, Stanisz and Wasilewska. James testified that the survey accurately depicted the land that Hastings intended to sell. He also described the property as being surrounded by corn fields on two sides, a street in front and an

adjacent non-owned property on the remaining side. Stanisz testified that the survey reflected what was shown to him by Hastings when Stanisz initially viewed the property. Wasilewska testified that Hastings told her that the property included the entire area around the house and outbuildings that was not a corn field.

The trial court granted specific performance, concluding that:

The court has no hesitancy in holding that the parties understood exactly what was to be conveyed, the conditions under which it was to be conveyed, and the seller, for whatever reason, determined that she would not proceed with the transaction and thereby breached the terms of the contract ....

The trial court also awarded \$20,343.96 as damages representing the one percent difference in interest rates between the time Stanisz and Wasilewska received their mortgage commitment and the time of trial.

Hastings argues that the contract between the parties did not satisfy the statute of frauds because it did not contain an adequate description of the property to be sold. A contract for the sale of real estate that does not conform to the statute of frauds is void and a nullity. *Bratt v. Peterson*, 31 Wis.2d 447, 452, 143 N.W.2d 538, 540 (1966). The statute of frauds, as codified at § 706.02(1)(b), STATS., provides:

**Formal requisites. (1)** Transactions under s. 706.01 (1) shall not be valid unless evidenced by a conveyance which:

....

(b) Identifies the land.

To comply with the statute of frauds, the contract must be reasonably definite as to the property conveyed. *Stuesser v. Ebel*, 19 Wis.2d 591, 593, 120 N.W.2d 679,

681 (1963). A general description of the land that is the subject of the contract is sufficient, and parol evidence may be admitted to provide a more particular description. See *id.*, 19 Wis.2d at 594, 120 N.W.2d at 681. This is an established exception to the general rule that testimony is inadmissible for the purpose of proving the terms of a contract for the sale of an interest in land, which the statute of frauds requires to be in writing. See *O'Connor Oil Corp. v. Warber*, 30 Wis.2d 638, 642, 141 N.W.2d 881, 883 (1966). "These criteria are used in determining the sufficiency" of the contract. *Zapuchlak v. Hucal*, 82 Wis.2d 184, 192, 262 N.W.2d 514, 518 (1978).

"The question of whether the description contained" in the contract, "together with properly admitted parol evidence, fulfills these criteria is a mixed question of law and fact." *Id.* "The question of the application of a description to its proper subject matter" is a question of fact; "[t]he question of the identity of the location is always one of fact," but the "construction of the terms used in a deed aside from extraneous evidence, is for the court." *Id.* The trial court's conclusion, therefore, that the transaction satisfied the statute of frauds "will not be reversed on review unless it is against the great weight and clear preponderance of the evidence." *Id.*

The trial court found that the initial offer to purchase identified the subject matter of the contract as property located at 10642 South 92nd Street in the City of Franklin, County of Milwaukee, Wisconsin, consisting of two acres more or less. The "multiple counter-offer," which ultimately created the binding contract between the parties, indicated that it was for the purchase of the same real estate referred to in the original offer to purchase. The "multiple counter-offer" had a provision requiring that a survey be completed to indicate a more definite legal description of the land. The survey was completed according to the deadlines set by Hastings and identified the property as 2.2907 acres with 200 feet of frontage on South 92nd Street. Further, testimony from both parties indicated that the boundaries of the property for sale were understood by Hastings, Stanisz and Wasilewska. Also, an appraisal report gave the exact measurement of the property in question. In light of this parol evidence, the trial court properly found that the evidence afforded a reasonable means of identifying the property in question. The description was, therefore, sufficient to satisfy the statute of frauds.

Hastings also argues that Stanisz and Wasilewska failed to meet a financing deadline and, therefore, there was no valid agreement between the parties. Although the original offer to purchase indicated that Stanisz and Wasilewska were required to obtain a financing commitment by November 1, 1993, the "multiple counter-offer" was not even made until November 3, 1993. This extended the financing deadline. Further, Stanisz and Wasilewska received a mortgage commitment on December 17, 1993, and Hastings did not attempt to rescind the sale until March 1994. Hastings's argument based on the financing contingency is without merit.

Finally, Hastings argues that the trial court misused its discretion in awarding \$20,343.96 in damages. According to the trial court, the \$20,343.96 represented the difference between the amount of the mortgage interest Stanisz and Wasilewska would have paid at the time of the trial compared to the amount of interest they would have paid had the transaction closed under the mortgage commitment they received. As noted, the mortgage rate at the time of trial was one percent higher than at the time Stanisz and Wasilewska received their mortgage commitment. In awarding Stanisz and Wasilewska \$20,343.96, the trial court reasoned that they should not have to bear the one percent differential in interest rates because they were willing and able to proceed with the transaction and Hastings was not.

The parties tell us that the property has not yet been conveyed to Stanisz and Wasilewska. The trial court's \$20,343.96 award representing the interest-rate differential was, therefore, premature. See *Capitol Indem. Corp. v. Reasbeck*, 166 Wis.2d 332, 338, 479 N.W.2d 247, 249 (1991) (an award of damages that has not been or may never be incurred is premature). We reverse that portion of the judgment awarding damages based on the interest-rate differential, and remand this matter to the trial court to retain jurisdiction over this case for a reasonable amount of time to permit the property to be conveyed. Following conveyance and on Stanisz and Wasilewska's motion and on notice, the trial court shall calculate the damages attributable to the interest-rate differential and enter an amended judgment thereon.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.