OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

May 6, 2015

To:

Hon. Lee S. Dreyfus Jr.
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Bryce R. Cox
Werner Erich Scherr
Scherr & Scherr, LLP
230 W. Wells St., Ste. 610
Milwaukee, WI 53203-1845

Kathleen A. Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Daniel P. Fay
Erin Fay
Oakton Avenue Law Offices S.C.
200 Oakton Avenue
Pewaukee, WI 53072

You are hereby notified that the Court has entered the following opinion and order:

2014AP1749 Raymond Olson v. Gerald Donovan (L.C. # 2013CV1495)

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

Raymond Olson appeals from an order granting summary judgment to Gerald Donovan on Olson's claim seeking specific performance of a real estate transaction. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).[1] We agree with the circuit court that Olson did not perform under the contract and therefore specific performance of the contract was not warranted.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The following facts are undisputed in the record.[2] In November 2012, Olson offered to purchase Donovan's property. Donovan accepted the offer, and Olson paid $1000 in earnest money. The parties' contract established a closing date of May 10, 2013. The contract contained a financing contingency, but the contract did not establish a preclosing deadline for satisfying that contingency. We assume without deciding that the last date for procuring financing was the closing date.

On April 16, 2013, the parties executed an amendment to the offer to purchase which established a new closing date of May 31, 2013. Olson alleges that sometime in May, Donovan declined to close the transaction. Olson subsequently sued Donovan for specific performance.

On summary judgment, the circuit court concluded that the parties had a valid real estate purchase contract, the closing was extended to May 31, Olson did not have proof of financing until three weeks after the closing date, and Olson was not ready, willing and able to close on May 31. The court ordered Donovan to return Olson's earnest money. Olson appeals.

We review the circuit court's grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). "We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a

[2] The briefing in this appeal is wanting. The appellant's brief violates WIS. STAT. RULE 809.19(1)(i) which requires that parties be referred to by name, not party designation. The respondent's brief has repeated typographical errors with regard to the relevant dates in this case (p. 3, 4, 6, 8). In the future, when briefing in this court, counsel shall comply with the Rules of Appellate Procedure and more carefully review the brief before filing it.

matter of law." ***Streff v. Town of Delafield***, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

Our de novo review of the summary judgment record confirms that there were no disputed facts precluding summary judgment. On the undisputed facts, we conclude that equity would not be served by compelling Donovan to sell the property to Olson when Olson was not ready, willing and able to close on May 31. ***Ash Park, LLC v. Alexander & Bishop, Ltd.***, 2010 WI 44, ¶38, 324 Wis. 2d 703, 783 N.W.2d 294 ("The fairness of ordering specific performance depends on the facts and equities of the individual case.…").

In ***Anderson v. Onsager***, 155 Wis. 2d 504, 509, 512, 516, 455 N.W.2d 885 (1990), the purchaser was at all times "ready, willing and able to comply [contemporaneously] with his obligation to pay the purchase money" for the real estate under contract, and, under those conditions, the equitable remedy of specific performance was proper. In the case before us, the opposite occurred. Olson did not establish on summary judgment that he was ready, willing and able to close on May 31 because the proof he offered that he had financing was dated June 21, three weeks after the scheduled closing, and Olson had not yet satisfied the appraisal requirement for his postclosing financing commitment. Because Olson did not demonstrate that he had the ability to close on May 31, specific performance was not warranted.

Olson relies upon ***Rottman v. Endejan***, 6 Wis. 2d 221, 94 N.W.2d 596 (1959), to argue that Donovan breached the contract in May 2013 when he declined to close the transaction. In ***Rottman***, the sellers were unable to transfer possession of the premises to the buyers because a tenant remained on the property, contrary to the requirement in the parties' contract that the sellers convey the property free of tenants. ***Id.*** at 229. As a result, the buyers repudiated and

anticipatorily breached the contract by refusing to accept tender of the property and requesting return of the down payment. ***Id.*** Because the buyers anticipatorily breached the contract, the sellers no longer had to tender possession of the property as a condition precedent to seeking specific performance. ***Id.***

From ***Rottman***, Olson argues that Donovan's refusal to close relieved him of the need to procure a preclosing financing commitment. We disagree that ***Rottman*** has the effect Olson urges. When Donovan declined to sell the property in May, Olson still did not have a financing commitment. As noted, Olson's June 21 postclosing financing commitment stated that an appraisal was still required. Therefore, at the time Donovan declined to close, Olson was not ready, willing and able to close on the sale. Equity is not served by compelling Donovan to convey the property to Olson under these circumstances.

Olson complains that Donovan did not file an affidavit in opposition to Olson's summary judgment motion or in support of his own motion. Donovan argued that the purchase contract was illusory, lacking in consideration and unenforceable. Regardless of Donovan's arguments, Olson defeated himself on summary judgment by submitting proof that he was not ready, willing and able to close on May 31. A party seeking summary judgment must make a prima facie case that such relief is warranted. ***Jones v. Sears Roebuck & Co.***, 80 Wis. 2d 321, 326-27, 259 N.W.2d 70 (1977) (the failure of opponent of summary judgment to submit counter-affidavits does not entitle the movant to summary judgment if movant's submissions do not contain sufficient evidentiary facts to establish prima facie case).

On this record, the circuit court did not err in granting summary judgment to Donovan.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals