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DISTRICT II

June 7, 2017

To:

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

2016AP1637

Jeffrey A. Gorn v. Marlene Boesel (L.C. #2015CV1365)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

This is a messy real estate dispute between Jeffrey A. Gorn and Marlene Boesel, a nonmarital couple. The circuit court endeavored to resolve it with a mix of contract and equity. Upon our review of the briefs and the record, we conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We reluctantly reverse and remand for the circuit court to reconsider or clarify its decision to award Boesel \$25,000.

Boesel moved into Gorn's home in 1998. In 2005, the couple purchased a vacant four-acre parcel of land adjacent to Gorn's property for \$325,000. The parties initially fairly equally

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

shared mortgage payments and property expenses. In 2010, Gorn drafted a document that both parties signed. It provided in full:

2/28/10

I Jeff Gorn agree to purchase from Marlene Boesel at her request, her portion of the property we currently own together [legal property description] for the sum of \$35,000 [amount of down payment Boesel claimed she made] and 10% of the total profit made on the property in the event the property in its entirety, is sold.

After Gorn paid Boesel the \$35,000, she made no further mortgage, tax, or insurance payments on the property. The relationship ended in 2011. Gorn paid Boesel an additional \$20,000 “as a means to end our fiscal and personal affairs together.” Boesel refused to sign a quitclaim deed.

Gorn filed an action sounding in breach of contract or, alternatively, partition or unjust enrichment. Boesel did not counterclaim. The circuit court concluded that the 2010 contract was a “wreck” but “is the agreement as it exists, and with all its warts.” The court applied the ten-percent provision to the parcel’s \$253,000 stipulated appraised value and ordered Gorn to pay Boesel \$25,000 over five years, when she must quitclaim her interest in the property.

After much deliberation, this court cannot determine the basis of the circuit court’s solution. The court indicated the parties were stuck with a “wreck” of a contract. We agree but must construe it as it stands. *See Gottsacker v. Monnier*, 2005 WI 69, ¶22, 281 Wis. 2d 361, 697 N.W.2d 436. We are perplexed as to how “10% of the total profit made on the property in the event the property in its entirety, is sold” translates to \$25,000 to Boesel *before* the property was sold. Even if sold that day for its stipulated value, the contract does not say “10% of the selling price” but “10% of the total profit.” The parcel’s stipulated value at the time of trial was \$72,000 less than its purchase price. Ten percent of the “profit” is a negative \$7200.

The court then indicated it would fashion an equitable resolution, which is a matter of discretion. *See Klawitter v. Klawitter*, 2001 WI App 16, ¶8, 240 Wis. 2d 685, 623 N.W.2d 169. We cannot tell what principles came into play. The court clearly rejected Gorn’s request for partition but perhaps the \$25,000 represents a “forced buyout” of Boesel’s interest. Perhaps the court applied unjust enrichment. Financially speaking, it is undisputed that Gorn bore the laboring oar over the years. Yet the court did not explain how it determined that Boesel conferred on him a \$25,000 benefit—beyond the \$55,000 he already paid her—that he knew of, appreciated, accepted, and retained under such circumstances that it would be inequitable for him to not repay her. *See Ludyjan v. Continental Cas. Co.*, 2008 WI App 41, ¶7, 308 Wis. 2d 398, 747 N.W.2d 745. For a discretionary decision to be upheld, a court must apply a proper standard of law. *Wynhoff v. Vogt*, 2000 WI App 57, ¶13, 233 Wis. 2d 673, 608 N.W.2d 400. If equity rather than contract was its underpinning, judicial economy would be served if we decided the issue, but we may not do so. Equitable relief is a matter of discretion. This court may not exercise discretion. *State v. Eckola*, 2001 WI App 295, ¶16, 249 Wis. 2d 276, 638 N.W.2d 903.

We are not saying that the circuit court’s ultimate decision is erroneous; we simply cannot tell upon what basis it was founded. We therefore reverse and remand for the circuit court to either reconsider its decision or more fully explain the basis for it. We do not address Boesel’s cross-appeal seeking a larger award.

IT IS ORDERED that the judgment of the circuit court is summarily reversed and remanded pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals