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DISTRICT II

August 1, 2018

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

2017AP1651 Mark G. Kohlmann v. Joel S. Streblow (L.C. #2015CV317)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

This case arises from a real estate buy-back agreement gone wrong. Mark Kohlmann appeals a judgment to the extent it quieted title to properties he sold to Joel Streblow under the Agreement. Kohlmann had sought specific performance after Streblow refused to sell back the properties, claiming that Kohlmann did not properly exercise his option to purchase. The judgment also ordered Streblow to pay Kohlmann $1850 for equipment of Kohlmann's Streblow

removed from the properties, plus costs and attorneys' fees. Upon reviewing the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(2015-16).[1]

Streblow purchased seven parcels of land from Kohlmann in July 2005 for $300,000. Under the Agreement, Kohlmann reserved the right to buy back the properties on or before July 20, 2015 for $300,000 plus a four percent holding charge per year. He also was permitted to store certain equipment on the properties. At some point, Streblow sold one parcel and the house on another was ordered razed.

In June 2015, Kohlmann sent Streblow a letter advising that he "hereby exercises his right to buy back the properties." In contrast to the bare-bones Agreement, Kohlmann's letter included a ten-page WB-11 Residential Offer to Purchase (OTP) stating a purchase price of $168,530 and including a financing contingency and other provisions typical of OTPs. Viewing Kohlmann's overture as a counteroffer, Streblow ignored it. The option period expired.

Kohlmann sued Streblow for breach of contract, specific performance, replevin, and unjust enrichment. On Streblow's motion, the trial court dismissed the claim for specific performance at the end of Kohlmann's case because Kohlmann put forth no evidence that his attempt to exercise the option was timely and proper and instead constituted a counteroffer. At the close of all of the evidence, the court concluded that Kohlmann introduced no evidence to support an award of damages for Streblow's alleged breaches of the Agreement by selling one

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

parcel and razing the house on another.[2] Because of the "complete lack of proof" as to those damages, the court refused to let that issue go to the jury. It ruled, however, that Kohlmann could argue that he was entitled to damages relating to his alleged expenditures and labor for the properties.

The jury found that the parties had entered into an enforceable Agreement but that Streblow did not breach it with respect to Kohlmann's asserted expenditures or labor. Per the special verdict instructions, the jury articulated $23,782 in damages for those counts despite having found no breach. The only breach the jury did find was that Streblow removed from the properties some of Kohlmann's stored equipment, for which it awarded Kohlmann $1850.

On motions after verdict, the trial court rejected Kohlmann's arguments that it should change the jury's "no" answer to the question asking whether Streblow breached the parties' agreement with respect to Kohlmann's claimed expenditures and labor, and that he should be awarded the $23,782 in associated damages the jury found. The court explained that it is bound to sustain a verdict that is supported by any credible evidence, and that the jury answers damages questions regardless of how they answer liability questions to avoid a retrial on damages should the liability decision be reversed. Finally, the court granted Streblow's motion for a declaratory judgment quieting title to the properties because the time for exercising the buy-back option had expired. Kohlmann appeals.

[2] The Agreement provided that Streblow was not to sell, separate, or place liens on any of the properties during the period in which Kohlmann could exercise his option.

The court properly granted Streblow's motion for dismissal of the specific performance claim. WISCONSIN STAT. § 805.14(1) and (3) permit a trial court to dismiss an action at the close of a plaintiff's case when the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the plaintiff, there is insufficient evidence to support a verdict in the plaintiff's favor. The same standard applies to this court on review of the trial court's determination of the motion. ***Millonig v. Bakken***, 112 Wis. 2d 445, 450, 334 N.W.2d 80 (1983). Due to the trial court's better ability to assess the evidence, an appellate court should not overturn the trial court's decision to dismiss for insufficient evidence unless the record reveals that the court was "clearly wrong." ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388-89, 541 N.W.2d 753 (1995) (citation omitted).

The trial court was not "clearly wrong." Kohlmann put forth no credible evidence that he validly exercised his option to purchase or that his sole effort to do so was anything but a counteroffer. "An acceptance of an option must be unconditional and must be according to the terms set forth in the option." ***Harmann v. French***, 74 Wis. 2d 668, 671, 247 N.W.2d 707 (1976). If an option holder's offer to purchase "includes a demand for performance outside of the terms of the option that would impose an additional burden on the optionor, such notice is not deemed to be an acceptance of the offer but instead constitutes a counter-offer." ***Id.*** at 671-72 (citation omitted). Kohlmann's attempt to import new terms into the exercise of the option thus was a counteroffer not contemplated by the agreement and did not ripen into a contract of sale, such that he did not secure the right to specific performance. *See* ***id.*** at 672-73.

Kohlmann also contends the issue of whether Streblow breached the Agreement by selling one property and razing the house on another should have been submitted to the jury. As noted, the court held open the possibility that Kohlmann could establish damages for breach with

respect to the two properties. He failed to put forth sufficient evidence to support a finding of such damages, however. While he produced some evidence of those parcels' fair market value, he established no evidence of his cost for either property. The court then questioned Kohlmann's counsel at length about where in the record there was any proof at all of Kohlmann's consequential damages, any numbers from which the jury could make a determination. Counsel could point to none and eventually conceded that Kohlmann would not argue for a damages award in regard to the lost opportunity to purchase those properties.

A jury cannot determine damages "by speculation or guesswork…. Damages must be proved with reasonable certainty." ***Pleasure Time, Inc. v. Kuss***, 78 Wis. 2d 373, 387, 254 N.W.2d 463 (1977) (citation omitted). Further, it is error to instruct on an issue that the evidence does not support. ***Lutz v. Shelby Mut. Ins. Co.***, 70 Wis. 2d 743, 750, 235 N.W.2d 426 (1975). The trial court must decide, as a matter of law, if sufficient credible facts were presented to warrant giving a particular instruction. ***Walter v. Cessna Aircraft Co.***, 121 Wis. 2d 221, 231, 358 N.W.2d 816 (Ct. App. 1984). Because the question is one of law, we owe no deference to the trial court's determination. ***Id.*** We agree, though, that the trial court's decision was correct.

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals