



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 I

November 24, 2020

To:

Hon. Mary E. Triggiano
Circuit Court Judge
901 North 9th. St.
Milwaukee, WI 53233-1425

Margaret Kathryn Heitkamp
Husch Blackwell LLP
555 E. Wills St. #1900
Milwaukee, WI 53202

John Barrett
Clerk of Circuit Court
901 N. 9th Street, Room G-8
Milwaukee, WI 53233

Timothy H. Posnanski
Husch Blackwell LLP
555 E. Wells Street, Suite 1900
Milwaukee, WI 53202

Nathaniel Cade Jr.
Cade Law LLC
P.O. Box 170887
Milwaukee, WI 53217

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

2019AP231

Robert F. Smith v. AM Finance, LLC (L.C. # 2018CV3510)

Before Brash, P.J., Dugan and Donald, 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).

Robert F. Smith appeals the order denying his motion to reopen and granting the motion of AM Finance, LLC and Austin Mansur (collectively "AM Finance") to reopen. Smith also challenges the circuit court's decision to grant AM Finance a writ of restitution. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for

summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ Therefore, we summarily affirm.

This appeal stems from the consolidation of Milwaukee County Circuit Court Case No. 2018CV3510 (the “large claims action”) with Milwaukee County Circuit Court Case No. 2018SC18269 (the “eviction action”). In the eviction action, AM Finance sought to evict Smith from property located at 212 East Mineral Street in Milwaukee (the “Mineral Street Property”). In the large claims action, Smith sought a declaration that he is the owner of that property. The circuit court dismissed both cases pursuant to a settlement agreement executed by the parties.² However, both parties later moved the circuit court to reopen their respective cases and enforce the terms of the settlement agreement in their favor.

The circuit court disposed of the cross-motions by denying Smith’s motion to reopen and by granting the motion brought by AM Finance. The circuit court additionally granted AM Finance a writ of restitution. This appeal follows.

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² The dismissal order provided:

1. Case No. 18[]CV[]3510 [i.e., the large claims action] is dismissed, with prejudice, and with each party to bear its own costs or attorneys’ fees; and

2. Case No. 18[]SC[]18269 [i.e., the eviction action] is dismissed, without prejudice, subject to being reopened in the event the conditions set forth in the Mutual Release and Settlement Agreement made effective on the 28th day of August, 2018, and executed by the parties are not met by Robert F. Smith.

The first issue we discuss is whether the circuit court properly denied Smith relief from the dismissal order under WIS. STAT. § 806.07. That statute provides the circumstances under which the circuit court may relieve a party from a judgment, order, or stipulation.³ This court will not reverse a circuit court order denying or granting relief under § 806.07 absent an erroneous exercise of discretion. *See Werner v. Hendree*, 2011 WI 10, ¶59, 331 Wis. 2d 511, 795 N.W.2d 423. “The circuit court erroneously exercises its discretion when it applies the wrong legal standard or if the facts of record fail to support the circuit court’s decision.” *Id.*

Smith filed what amounted to a five-sentence “Motion to Reopen and Enforce Stipulation” asking the circuit court to enforce the settlement agreement and to “either compel

³ WISCONSIN STAT. § 806.07 provides in relevant part:

(1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);

(c) Fraud, misrepresentation, or other misconduct of an adverse party;

(d) The judgment is void;

(e) The judgment has been satisfied, released or discharged;

(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;

(g) It is no longer equitable that the judgment should have prospective application; or

(h) Any other reasons justifying relief from the operation of the judgment.

compliance by the Defendant, or to sign a judicial deed, granting title to [him].” Smith’s filings did not contain any legal citations or legal argument.

In its written decision, the circuit court noted that Smith did not argue that AM Finance engaged in fraud, misrepresentation, or other misconduct. Additionally, the circuit court pointed out that Smith did not argue that it would be inequitable for the order to have prospective application. Instead, Smith asserted: (1) he was ready, willing, and able to make a timely payment to AM Finance under the terms of the agreement; (2) he “made the funds available” to AM Finance “by posting the funds with [AM Finance’s] title company”; and (3) AM Finance did not comply with the settlement agreement because it refused to sign the deed.

These fact-specific assertions do not amount to a cogent argument under WIS. STAT. § 806.07. The circuit court noted that Smith failed to invoke any particular subsection of the statute. It then went on to hold: “Instead of developing any legal argument, Smith has provided the [circuit c]ourt with only a factual background. The [circuit c]ourt is unwilling to construct an argument on Smith’s behalf.” In terms of the substantive relief Smith requested, the circuit court explained that Smith did not cite any supporting cases, statutes, or contractual language that provided him the right to relief he sought; namely, specific performance or a judicial deed. *See generally* WIS. STAT. § 802.01(2)(a) (requiring all motions to “state with particularity the grounds therefor”).

The circuit court acted within its discretion when it denied Smith’s motion after concluding that it was procedurally defective. Smith failed to develop his WIS. STAT. § 806.07 argument in the circuit court and cannot remediate this shortcoming later, on appeal. Although the circuit court went on to consider Smith’s request to enforce the settlement agreement

notwithstanding the shortcomings of his motion, this court declines to do so. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (noting that “cases should be decided on the narrowest possible ground”). The circuit court properly denied Smith’s request to reopen the large claims action.

The circuit court went on to grant AM Finance the relief it sought. In so doing, the circuit court found that Smith did not timely exercise the option to purchase under the terms of the settlement agreement, and that pursuant to the terms, AM Finance had a right at that point to reopen the eviction action and to obtain a writ of restitution. Smith contends that the circuit court erred when it concluded that he breached the settlement agreement and did not exercise the option to purchase timely or correctly.

The construction of a settlement agreement is a question of law that we review *de novo*. See *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶13, 257 Wis. 2d 421, 651 N.W.2d 345. In construing a settlement agreement, we apply contract-construction principles. *Id.* “When the terms of a contract are plain and unambiguous, we will construe the contract as it stands.” *Id.*, ¶14.

Under the terms of the settlement agreement, the parties agreed that Smith would have the option to purchase the Mineral Street Property from AM Finance for \$250,000. The agreement provided: “Smith may exercise the option by delivering to AM[Finance] in certified funds the Purchase Price, and upon such delivery, AM[Finance] shall deliver to Smith a Quit Claim Deed for the Mineral [Street] Property.” If Smith did not exercise the option by October 12, 2018, he could elect to extend the option period twice by delivering extension fees that were separate from the agreed upon purchase price.

Pursuant to the express language of the settlement agreement, the purchase price and any extension fees were to be delivered to AM Finance. Smith, however, ultimately conveyed the purchase price of \$250,000 to First American Title Company to be held, as he writes, “in trust pending a resolution of the issue of ownership of the Mineral [Street] Property.”

We conclude that Smith failed to timely exercise the option to purchase when he delivered the purchase funds to First American Title Company and demanded that AM Finance provide assurances regarding the title to which Smith was not contractually entitled.⁴ The agreement specified what would happen if the option to purchase expired:

Effect of Expiration of Option. If Smith’s option expires, Smith agrees to vacate the Mineral [Street] Property on or before such expiration. If Smith does not exercise the option, and remains in possession of the Mineral [Street] Property after the expiration of the option, AM[Finance] may reopen the Eviction Lawsuit, obtain a Writ of Restitution, and take judgment for the amount of actual attorneys’ fees incurred to reopen the Eviction Lawsuit and actual costs incurred to execute on any Writ of Restitution issued to AM[Finance] related to Smith and the Mineral [Street] Property.

Therefore, under the terms of the agreement, AM Finance had a right to move the circuit court to reopen the eviction lawsuit and to obtain a writ of restitution, which the circuit court properly granted.

⁴ In this regard, the settlement agreement provided:

If Smith exercises the option described in Paragraph 1, Smith acknowledges, agrees, and understands that AM[Finance] makes no warranties, statements, or representations about the title or condition of the Mineral [Street] Property, except those described in this Agreement.... Smith expressly acknowledges and agrees that AM[Finance] is selling and Smith is acquiring the Mineral [Street] Property “**AS IS, WHERE IS, WITH ALL FAULTS,**”

(Bolding in original.)

For the first time on appeal, Smith contends that the circuit court erred when it failed to hold that the agreement was ambiguous. Smith asserts that the circuit court should have held a hearing to ascertain the parties' intent as to what AM Finance was to convey to Smith and to determine whether AM Finance purposefully acted to frustrate Smith's ability to exercise the option, amounting to a violation of the duty of good faith and fair dealing. Smith, however, never raised these issues below.⁵ As such, we deem them forfeited. *See Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) (refusing to address issues on appeal that were not raised before the circuit court).⁶

IT IS ORDERED that the order is summarily affirmed. *See* 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

⁵ We are not persuaded by Smith's contention that the issues were raised below and that on appeal, he is now presenting a new argument. "Although new arguments may be permitted on an issue that was properly raised in the trial court, 'we will not ... blindsides [circuit] courts with reversals based on theories which did not originate in their forum.'" *Gibson v. Overnite Transp. Co.*, 2003 WI App 210, ¶9, 267 Wis. 2d 429, 671 N.W.2d 388 (citations omitted). If we were to construe Smith's filings to allow for this new argument, it would be the epitome of a blindsides.

⁶ In light of this resolution, we do not address AM Finance's other arguments in favor of affirmance.

AM Finance additionally moved for an award of fees and costs under WIS. STAT. RULE 809.25(3), contending Smith's appeal is frivolous. This court is not persuaded that such costs and fees are warranted and denies the motion accordingly. *See Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶¶28, 30, 277 Wis. 2d 21, 690 N.W.2d 1.