COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP139 **Cir. Ct. No. 2010CV1285**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

COHAN LIPP, LLC,

PLAINTIFF-RESPONDENT,

V.

CRABTREE RIDGE, LLC AND CHARLES A. GHIDORZI,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Marathon County: MICHAEL K. MORAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Developer Charles Ghidorzi formed Crabtree Ridge, LLC, for the sole purpose of purchasing a parcel of land from Cohan Lipp, LLC. Crabtree breached the contract. The issue is the propriety of the remedy the

circuit court fashioned—specific performance at the contract price. Given the heightened deference we accord a circuit court sitting in equity, we affirm. We also affirm the award of prejudgment interest, attorneys' fees, and costs.

¶2 In 2007, Crabtree signed a Purchase Agreement by which it agreed to buy from Cohan Lipp an approximately twenty-three-acre parcel of vacant land for $3,105,000. Ghidorzi intended to build a large commercial development. The purchase would occur in three phases: Phase 1, a twelve-acre parcel, in December 2009 for $1.18 million; Phase 2, five-and-a-half acres, in December 2012 for $825,000; and Phase 3, the remaining five-and-a-half acres, in December 2014 for $1.1 million. Ghidorzi personally guaranteed Crabtree's obligation.

¶3 The Agreement entitled Crabtree to obtain a standard Phase 1 environmental site assessment (ESA). If the ESA revealed an "adverse environmental condition," not defined in the Agreement, Crabtree could terminate the Agreement or renegotiate its terms. The ESA commented that, although it was outside the scope of a Phase 1 ESA, the property "appear[ed] to contain wetlands" and it would be "prudent" to conduct a wetland delineation before disturbing the soil for development.[1] Worried that the parcel could not be developed as intended, Ghidorzi advised Cohan Lipp that Crabtree was terminating the Agreement.

¶4 The Agreement contained a default clause. It provided:

> In the event of default hereunder, the nondefaulting party shall have all rights and remedies available at law or in equity to remedy the default including, but not limited to, the right to compel specific performance and in addition, the right to recover all costs and expenses incurred in

[1] Ghidorzi had known since 2004 that wetlands existed on the property but never investigated their extent, nor did he request a wetlands contingency in the Agreement.

> remedying such default including, but not limited to, reasonable attorneys fees.

Cohan Lipp commenced this action for specific performance.

¶5 Whether wetlands constituted an adverse environmental condition and, if not, whether Crabtree breached the contract were tried to an advisory jury. The circuit court, Judge Vincent Howard, agreed with the jury that an adverse environmental condition meant the presence of hazardous substances or petroleum products, not wetlands, and that Crabtree defaulted. But concluding that specific performance of the total parcel at the full contract price was inequitable, the court ordered that the Phases 2 and 3 parcels be appraised for their current market value.

¶6 Both parties moved for relief from the decision. Judge Michael Moran now had the case, as Judge Howard had retired. Cohan Lipp asked the court to revisit the "shared risk" terms of the Phases 2 and 3 specific performance. Crabtree mainly sought a new trial, on grounds it was precluded from putting on a defense of impossibility. The court held that it was satisfied that liability was settled and that specific performance was the proper remedy, but ordered an evidentiary hearing to help it craft an appropriate specific performance order.

¶7 After a two-day hearing, the circuit court concluded that the equities rested with Cohan Lipp, as it had fulfilled its side of the Agreement; that, while perhaps the land could not be developed as envisioned, it was not undevelopable; and that Ghidorzi, a seasoned developer, chose to personally guarantee Crabtree's "speculative endeavor." The court also concluded that Ghidorzi failed to prove that specific performance was impossible. The court ruled that enforcing the terms of the Agreement was warranted, as were prejudgment interest, attorneys' fees, and costs. Crabtree and Ghidorzi appeal.

¶8 Our standard of review drives this decision. In contracts for the sale of land, specific performance is a proper remedy unless there are "factual or legal considerations [that] would make specific performance of the contract unfair, unreasonable or impossible." ***Anderson v. Onsager***, 155 Wis. 2d 504, 512-13, 455 N.W.2d 885 (1990). Specific performance is an equitable remedy. ***Ash Park, LLC v. Alexander & Bishop, Ltd.***, 2010 WI 44, ¶36, 324 Wis. 2d 703, 783 N.W.2d 294. When sitting in equity, the circuit court's discretion in determining the appropriate remedy is nearly unlimited. *See* ***Mulder v. Mittelstadt***, 120 Wis. 2d 103, 115, 352 N.W.2d 223 (Ct. App. 1984). The court has the power to enlarge the scope of the ordinary forms of relief, and even to fashion new ones to adapt to the circumstances at hand. ***Id.***

¶9 Crabtree and Ghidorzi argue that, as ordered, specific performance is unfair because the contract price far exceeds the current value of the property and does not take into consideration that Ghidorzi cannot comply because he essentially is "cash poor." We are not persuaded.

¶10 "The fairness of ordering specific performance depends on the facts and equities of the individual case." ***Ash Park***, 324 Wis. 2d 703, ¶38. Ghidorzi, no novice to such transactions, could have insisted upon a wetlands contingency or investigated in advance of the deal the extent of the wetlands he knew existed. The court noted that Crabtree and Ghidorzi presented no evidence of the cost of wetland mitigation or potential alternative uses. On the evidence that was presented, it concluded the property could be developed, if not as first anticipated.

¶11 Likewise, the court thoroughly considered Ghidorzi's claim that his assets were largely unavailable to him. It concluded that Ghidorzi has "considerable control" over the various entities holding his "significant assets,"

and that he is able to move assets, use them as collateral in a bank loan, or seek authorization to obtain money from one of his trusts. Further, Ghidorzi did not show that his assets now are structured differently or are any less available to him compared to when he personally guaranteed the debt. "[F]or impossibility to void any duty to perform, the promisor must neither have known, nor had reason to know, of such impossibility when he [or she] made [the] promise." ***Zellmer v. Sharlein***, 1 Wis. 2d 46, 49, 82 N.W.2d 891 (1957). Crabtree and Ghidorzi did not meet their burden of proving their impossibility defense. *See* ***Ash Park***, 324 Wis. 2d 703, ¶4.

¶12 Ghidorzi was ordered to pay Cohan Lipp $308,191.32 in prejudgment interest. Crabtree and Ghidorzi contend this was error because they consistently disputed the amount Ghidorzi "should" pay if specific performance were ordered and because Cohan Lipp had beneficial use of the property while interest accrued, affording it a "double recovery." We disagree.

¶13 Although a party's entitlement to prejudgment interest typically is a question of law so that our review is de novo, ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶42, 265 Wis. 2d 703, 666 N.W.2d 38, in cases of equity, it is a matter of circuit court discretion, ***Estreen v. Bluhm***, 79 Wis. 2d 142, 156, 255 N.W.2d 473 (1977). The purpose of interest is to compensate one to whom payment is due for the lack of the use of his or her money. ***Id.*** Prejudgment interest may be recovered, however, only when the claim is liquidated or liquidable and subject to reasonably exact determination so that one can ascertain the amount he or she owes. *See* ***Teff***, 265 Wis. 2d 703, ¶43.

¶14 The closing date of each phase provided definite measurements by which interest could be determined. The Agreement set forth exactly how much

Crabtree owed and Ghidorzi guaranteed and when it was due. Ghidorzi "should" have paid what he agreed to pay. His failure to pay deprived Cohan Lipp of the use of its money.

¶15 Finally, Cohan Lipp did not realize a double recovery. It leased the property to a farmer for two seasons so as to pay part of the property taxes it became responsible for due to Ghidorzi's breach. The court reduced Ghidorzi's obligation to reimburse Cohan Lipp for those taxes by the amount of income Cohan Lipp received from the farmer.

¶16 The circuit court also ordered Ghidorzi to pay $248,215.75 in attorneys' fees and $55,481.43 in costs. Crabtree and Ghidorzi first complain that the Agreement does not clearly provide for attorneys' fees. We disagree. As set out above in ¶4, the default clause gave Cohan Lipp, as the nondefaulting party, "the right to recover all costs and expenses incurred in remedying [the] default including, but not limited to, reasonable attorneys fees." We reject Crabtree and Ghidorzi's tortured argument that the clause is ambiguous. Cohan Lipp plainly had the right to compel specific performance and to recover whatever costs, expenses, and reasonable attorneys' fees it incurred in doing so.

¶17 Crabtree and Ghidorzi also assert that the circuit court made the fee award "without scrutiny or analysis." The record shows otherwise. The circuit court properly used the now-familiar "lodestar methodology." *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶¶28-30, 275 Wis. 2d 1, 683 N.W.2d 58. It determined the reasonableness of the time expended and the hourly rate by reviewing the factors set forth in WIS. STAT. § 814.045(1) (2011-12). Noting that both sides vigorously fought the case and that Cohan Lipp satisfactorily documented its expenditures, the court concluded that the fees submitted were

reasonable, as they reflected no over-lawyering or over-billing and were in line with what other attorneys practicing in that area of the law charge.

¶18 In making the award, the court "'employ[ed] a logical rationale based on the appropriate legal principles and facts of record.'" ***Hughes v. Chrysler Motors Corp.***, 197 Wis. 2d 973, 987, 542 N.W.2d 148 (1996). We give deference to the court's decision because of its familiarity with local billing norms and its having witnessed first-hand the quality of the services rendered. ***Standard Theatres, Inc. v. DOT***, 118 Wis. 2d 730, 747, 349 N.W.2d 661 (1984). We see no erroneous exercise of discretion.

¶19 Throughout their brief, Crabtree and Ghidorzi argue that the court could have crafted a different remedy by, for example, incorporating price abatement or adopting the award Ghidorzi proposed. True, the court could have, but it also could do what it did. The circuit court's oral decision spanned fifteen pages of transcript. The court thoroughly examined the parties' arguments and submissions, the witnesses' testimony, the facts of the case, and the applicable law. What it ordered precisely matched the agreed-upon contract terms, both as to price and as to remedy in the event of default. "The purpose of specific performance is to order the breaching party to do that which it agreed to do in the contract." ***Ash Park***, 324 Wis. 2d 703, ¶36. The remedy the court fashioned was fair, just, and reasonable and well within its broad equitable authority. We must affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).