

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-0968

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

FRANK C. KELLER AND DIANE KELLER,

PLAINTIFFS-APPELLANTS,

v.

MICHAEL S. BENNING,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Barron County:
EDWARD R. BRUNNER, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Frank and Diane Keller appeal a summary judgment dismissing their action for specific performance against Michael Benning in which they sought to compel him to complete the sale of a resort as required by a real estate purchase contract. Under the contract, Benning sold the Kellers part of a resort and granted them the right to purchase the remaining

portion “in the event the seller chooses to sell.” Seventeen months later, Benning notified the Kellers that he would list the remaining property with a realtor and that the Kellers had thirty days under the contract to indicate their intention to exercise their right of first refusal. The trial court concluded that: (1) Benning’s statement that he would list the property with a realtor did not demonstrate his choice to sell it and therefore the right of first refusal was not operative; (2) the contract was not sufficiently specific to be enforced; and (3) the Kellers never fully exercised their right. Because we conclude that Benning’s notice triggered the Keller’s right of first refusal regardless of his subjective intent to sell, that the contract is enforceable and that the Kellers properly exercised their right, we reverse the judgment and remand with directions to grant the Kellers specific performance.

The April 1995 contract included this provision:

In the event that the Seller chooses to sell this property, the Seller shall notify the Buyers of that fact, and the Buyers shall have thirty days from the date of written notification in which to indicate their intention to exercise their right of first refusal. In the event that the Buyers exercised their right of first refusal, they shall close the real estate transaction within thirty days after the expiration of the 30-day notice previously described.

The contract set the purchase price at “the fair market value as determined for real estate tax purposes.”

On September 16, 1996, Benning sent a letter to the Kellers, notarized by Curtis Crane, a real estate broker, stating: “I, Michael Benning, will list the property I own ... for sale with Crane Realty ... as of 9/16/96. According to the contract with the first right of refusal, you have 30-days to respond.” The Kellers responded through their attorney on October 14, 1996, indicating they

were ready to proceed with closing within thirty days, and requested that Benning confirm a closing date. Benning then informed Crane that he would not sell the property to the Kellers for the amount stated on tax statement (\$40,239.89) and would not sell for less than \$79,900.

The construction of a written contract is a question of law that we review without deference to the trial court. *See Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis.2d 105, 115, 479 N.W.2d 557, 562 (Ct. App. 1991). The purpose of contractual construction is to ascertain the true intent of the parties as expressed by the contractual language. *See Hammel v. Ziegler Financing Corp.*, 113 Wis.2d 73, 76, 334 N.W.2d 913, 915 (Ct. App. 1983). Where the terms of a contract are plain and unambiguous, we will construe it as it stands. *See Hortman v. Otis Erecting Co.*, 108 Wis.2d 456, 461, 322 N.W.2d 482, 484-85 (Ct. App. 1982). It is not the role of the courts to rewrite contracts for the parties. *Id.*

The Keller's right of first refusal was triggered by Benning's notice. Benning's formal notice obligated the Kellers to respond within thirty days or forfeit their right of first refusal. The contract should not be construed to allow Benning to activate the Keller's obligations without simultaneously activating their rights. Benning's unexpressed intentions are immaterial. The initial agreement, Benning's notice and the Kellers' response, taken together, satisfy all of the requirements of the statute of frauds. *See* § 706.02(2), STATS. The Kellers fully exercised their right of first refusal. The letter from their attorney complied with the contract's provisions requiring them to "indicate their intention to exercise their right of first refusal" within thirty days of Benning's notice. Neither the contract nor the law requires them to submit another formal offer to purchase.

The trial court properly noted the difference between a right of first refusal and an option to purchase, and correctly determined that the Kellers did not hold an option to purchase. However, it inserted terms in the right of first refusal that are not found in the contract. The trial court held that the right of first refusal simply allowed the Kellers to buy the property under the terms of Benning's agreement with a third party. The court concluded that Benning had the right to have an offer submitted and evaluate it and the Kellers had no right to compel a sale on terms Benning did not accept. Benning's evaluation and acceptance of the terms occurred when he signed the original contract. That contract set a sale price equal to the fair market value as determined for real estate tax purposes. The contract does not require any offer from a third party to trigger the Keller's rights and obligations. Rather, the right of first refusal is activated by Benning's notice to the Kellers.

Benning argues that this court should recognize a distinction between choosing to "list the property ... for sale" and choosing to sell the property. That interpretation would require Benning to accept a third party's offer before the Keller's right of first refusal became operative. Because the terms of the contract do not require the Kellers to match a third party's offer, Benning's proposed distinction is not supported by the language of the contract. Benning's construction would require the Kellers to read Benning's mind to determine his subjective intent regardless of the notice he gave them. We conclude that the only reasonable construction of the contract's plain language is that the Keller's rights and obligations commenced upon receipt of the notice Benning provided.

The contract is sufficiently specific to be enforced. The purchase price and time for closing can be readily ascertained by a formula set out in the original agreement. Other details, such as the date and type of payment, date of

occupancy, warranties and condition of the property are not essential to the contract or were provided by the terms of the original agreement. No second agreement is necessary before the Kellers acquired an enforceable right under the contract. The contract does not allow Benning to renege on the agreement by unilaterally preventing completion of the sale by his failure to cooperate within the time allotted.

Because the Kellers have clearly established and complied with the terms of their contract to buy real estate, they are entitled to specific performance which is not to be denied by judicial arbitrariness. *See Edlin v. Soderstrom*, 83 Wis.2d 58, 71, 264 N.W.2d 275, 281 (1978). Unlike *Edlin*, this case presents no equitable considerations that warrant the trial court's refusal to grant specific performance.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

