COURT OF APPEALS DECISION DATED AND FILED

March 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 98-1149

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

ROSSI & MILLS PARTNERSHIP, ANTHONY ROSSI & SONS AND STEPHEN C. MILLS,

PLAINTIFFS-RESPONDENTS,

V.

RONALD F. SCHULER AND CAROL M. SCHULER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

NETTESHEIM, J. Ronald F. and Carol M. Schuler appeal from a judgment ordering specific performance pursuant to their offer to purchase vacant land from Rossi & Mills Partnership, Anthony Rossi & Sons and Stephen C. Mills (Rossi & Mills). On appeal, the Schulers first challenge the trial court's holding

that the extension of the closing date did not violate the "time is of the essence" clause in the offer to purchase. Second, the Schulers dispute the court's finding that Rossi & Mills satisfied all of its obligations under the offer to purchase.

We conclude that the Schulers waived their "time is of the essence" claim by failing to raise the issue before the trial court. Alternatively, we reject the argument on its merits. We further conclude that Rossi & Mills satisfied all of its contingency obligations under the offer to purchase. Therefore, the trial court properly ordered specific performance. We affirm the judgment.

BACKGROUND

The facts underlying the issues on appeal are largely undisputed. The parcel of land at issue is located at the northeast corner of the intersection of State Highway 50 and 104th Avenue in the city of Kenosha. Rossi & Mills acquired the land in 1979 and in 1995 decided to develop the parcel for commercial and business purposes.

On December 29, 1995, Rossi & Mills entered into a "Vacant Land Offer to Purchase" with the Schulers. Among other contingencies, the offer stated that the Schulers were required to obtain a conditional use permit for the operation of a convenience store and related uses upon the premises and Rossi & Mills was required to obtain final plat approval from the city of Kenosha. The initial closing deadline was June 1, 1996.

On March 20, 1996, the parties executed an "Amendment to Contract of Sale" agreeing to extend the closing date to July 26, 1996, because neither the conditional use permit nor the plat approval had been obtained. Later, the parties agreed to two similar amendments: one extending the closing date to November 22, 1996, and the other extending the closing date to January 31, 1997.

In August 1996, Rossi & Mills obtained final plat approval from the city of Kenosha. The plat approval was conditioned upon Rossi & Mills completing certain improvements to 104th Avenue to facilitate access to the property. According to the terms of the "City of Kenosha Subdivider's Agreement" entered into by Rossi & Mills and the city of Kenosha, an occupancy permit would not be issued until Rossi & Mills completed the improvements. With plat approval in place, the Schulers then moved forward in obtaining a conditional use permit.

On January 9, 1997, the City Plan Commission approved the Schulers' conditional use permit subject to the fulfillment of twelve conditions. It is undisputed that the Schulers were responsible for all of these conditions except the third condition. This condition stated: "Detailed construction plans shall be submitted for review and approval for the 104th Avenue widening and median. No construction permits shall be issued until final construction plans have been approved. No occupancy permits shall be issued until all street improvements are completed." Rossi & Mills acknowledged that it was responsible under this condition to provide the construction plans and to obtain the necessary approval from the city. In a letter written January 30, 1997, city engineer Frederick A. Haerter acknowledged the receipt of Rossi & Mills' plans for the widening and median improvements for 104th Avenue.[1] Haerter wrote that the plans were conditionally approved. According to city planner Rick Schroeder, Haerter's letter demonstrated that Rossi & Mills had satisfied the third condition for the use permit.

[1] The letter is dated September 30, 1997. However, the trial court notes in its findings of fact that the parties agree that the letter was actually written on January 30, 1997. Haerter's testimony supports the trial court's finding.

The Schulers, however, did not submit any information to the city attempting to satisfy the other conditions of the conditional use permit which were their responsibility. Because these conditions remained unsatisfied, the closing did not occur as planned on January 31, 1997. In a letter dated February 13, 1997, the Schulers' attorney indicated that the Schulers were hesitant to close given that an occupancy permit would not be granted until Rossi & Mills completed the improvements to 104th Avenue. However, the letter also indicated that the Schulers intended to close as soon as their financing was in place—prior to April 1, 1997. By letter dated February 25, 1997, Rossi & Mills agreed to extend the closing to April 1, 1997.

As the April 1, 1997 closing date approached, Rossi & Mills' attorney contacted the Schulers' attorney to finalize the closing. When the Schulers failed to reply, Rossi & Mills sent a letter on April 11, 1997, demanding that the closing of the sale be scheduled within ten days. On April 22, the Schulers informed Rossi & Mills that they would not be closing because Rossi & Mills had not made the improvements to 104th Avenue. The Schulers contended that because the initial contract had not been extended beyond January 31, 1997, it had lapsed by its terms.

On May 9, 1997, Rossi & Mills filed a complaint seeking specific performance against the Schulers. Following a bench trial and the submission of letter briefs, the trial court issued a written decision and order granting Rossi & Mills' request for specific performance. The court held that Rossi & Mills had complied with the third condition of the conditional use permit because it had obtained plat approval from the city. The court ordered specific performance. The Schulers appeal.

DISCUSSION

The Schulers' "Time is of the Essence" Claim

We first turn to the Schulers' "time is of the essence" claim. They argue that Rossi & Mills unilaterally extended the closing date and changed the material terms of the contract in violation of the "time is of the essence" provision.[2]

When we reviewed the trial court's decision to learn what the court had written about this issue, we observed that the decision did not address this subject. This prompted us to search whether the issue had been raised before the trial court in the parties' posttrial letter briefs. However, these briefs were not included in the appellate record. As a result, we ordered, on our own motion, that the record be supplemented to include these materials. After reviewing those briefs, we are satisfied that the Schulers did not raise the "time is of the essence" issue before the trial court. Although the Schulers cited to the "time is of the essence" provisions of the contract, they never developed any argument even remotely akin to that which they now raise on appeal.

A party is obligated to raise an issue with sufficient prominence such that the trial court understands that it is being asked to rule on the matter. *See* ***State v. Salter***, 118 Wis.2d 67, 79, 346 N.W.2d 318, 324 (Ct. App. 1984). Here,

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[2] In response to the Schulers' concerns about the street improvements, Rossi & Mills proposed a closing agreement which would provide that it would complete the improvements to 104th Avenue in a timely manner and would not delay the Schulers' occupancy permit. Rossi & Mills also proposed that it give a bond for the improvements to guarantee its financial ability to complete the improvements. We reject the Schulers' argument that these proposals served to put Rossi & Mills in breach of the contract. These proposals did not disavow the parties' underlying contract. To the contrary, the proposals were premised on that contract. Moreover, the parties never reached an agreement on these new proposals. That left the existing contract in place. We reject the Schulers' claim that these proposals rendered the underlying contract unenforceable.

the letter brief submitted by the Schulers never raised or developed an argument that they were not obligated to complete the transaction because the "time is of the essence" provisions had been violated. Given that, it is understandable why the trial court's decision did not speak to this issue. Therefore, we deem the issue waived. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (appellate court will generally not review issue raised for the first time on appeal).

Alternatively, we choose to address this issue on the merits since Rossi & Mills has raised no waiver claim and since its respondents' brief substantively addresses the issue. *See* ***id.*** at 444, 287 N.W.2d at 146 (confirming that waiver rule is administrative and does not affect appellate court's power to address an issue).

In ***Gonis v. New York Life Insurance Co.***, 70 Wis.2d 950, 955, 236 N.W.2d 273, 276 (1975), the supreme court stated that whether time is actually of the essence to a contract is to be determined by examining not only the terms of the contract but also the acts of the parties. Similarly, in ***Clear View Estates, Inc. v. Veitch***, 67 Wis.2d 372, 378, 227 N.W.2d 84, 88 (1975), the court held that timely performance may be waived by words or action.

It is undisputed that the contract in this case contains a "time is of the essence" clause. The parties mutually agreed to an extension of the closing date a number of times. While none of these extensions expressly waived the "time is of the essence" provision as recited in the original agreement, it is obvious that the conduct of the parties effectively negated that provision. Moreover, in their February 13, 1977 letter to Rossi & Mills, the Schulers, while stating their concern that an occupancy permit could not be granted until the street

improvements were completed, nonetheless reaffirmed their wish to close as soon as their financing was in place. Given the Schulers' active role in repeatedly delaying the closing and in affirming their desire to close even after the third extended closing date had come and gone, we conclude that the "time is of the essence" clause was not violated.[3]

Marketable Title

The Schulers next contend that because Rossi & Mills had not performed the improvements to 104th Avenue and because the city's conditional use permit prohibited the issuance of any occupancy permit to the Schulers until the improvements were completed, Rossi & Mills could not convey marketable title to the premises.[4]

In support, the Schulers point to the representation in the offer to purchase which provides: "Seller represents to Buyer that as of the date of acceptance Seller has no notice or knowledge of conditions affecting the Property or transaction … other than [the contingencies attached to the offer to purchase]." Under the contract, "Conditions affecting the property or transaction" include: (1) "public improvements which may result in special assessments or otherwise materially affect the Property or the present use of the Property," (2) "agreements regulating the use of the Property," (3) "[a] lack of legal vehicular access to the

[3] This reasoning also disposes of the Schulers' further contention that Rossi & Mills' proposal to close the transaction on terms which would accommodate the Schulers' concerns about the occupancy permit violated the "time is of the essence" provisions. *See supra* note 2.

[4] Rossi & Mills contends that the Schulers waived this issue by failing to raise it before the trial court. However, the parties' letter briefs and the trial court's decision squarely address this issue. We therefore reject Rossi & Mills' waiver argument.

Property from public roads," and (4) "other conditions … which would significantly increase the cost of the development … or reduce the value of the Property." The Schulers contend that the condition in the plat approval that an occupancy permit would not be issued by the city until Rossi & Mills completed the improvements to 104th Avenue implicates the four conditions recited above. The Schulers contend that as a result Rossi & Mills was in no position to convey marketable title and, therefore, the court should not have ordered specific performance.

We reject the Schulers' argument both on the facts and on the law.

We first address the facts. The parties utilized a preprinted standard offer to purchase form. The "property condition representations" provision of this form includes the four conditions listed above. However, this provision is expressly qualified by the language "other than those identified in attached Exhibit 'B.'" The attached exhibit is not part of the preprinted form. Instead it was specially prepared to address the particular facts of this case. This exhibit expressly states as a contingency of the sale that Rossi & Mills is obligated to obtain final plat approval.

Thus, even were we to assume that the four property condition representations upon which the Schulers rely relate to the street improvements, it is clear from the parties' specially prepared qualification to these form provisions that Rossi & Mills' obligation was limited to procuring plat approval from the city. And, Rossi & Mills, in fact, procured such approval.

Next, we address the law. The Schulers rely on the supreme court's holding in ***Venisek v. Draski***, 35 Wis.2d 38, 150 N.W.2d 347 (1967). There an impending sale of real estate would have resulted in a violation of a zoning

minimum frontage requirement. *See* ***id***. at 48, 150 N.W.2d at 352. The court held that specific performance should not be granted in such a situation because "in addition to unmarketable title, a court would be in the position of compelling the performance of an illegal act." ***Id***.

The Schulers' reliance on ***Venisek*** is misplaced. The sale of the property in this case will not produce a violation of any zoning ordinance or other condition imposed by the city. That Rossi & Mills must yet comply with the plat approval condition to improve 104th Avenue and that the Schulers must yet comply with the other conditions precedent to obtain the conditional use permit does not render the sale illegal. Nor do those conditions constitute a blemish on the title that Rossi & Mills stands ready to convey.

In ***U.I.P. Corp. v. Lawyers Title Insurance Co.***, 82 Wis.2d 616, 626, 264 N.W.2d 525, 529 (1978), our supreme court reviewed the law of marketability of title. The court stated:

> [A]lthough a title is good, if there is reasonable doubt as to its validity it is not marketable. A material defect is such as will cause a reasonable doubt and just apprehension in the mind of a reasonably prudent and intelligent person, acting upon competent legal advice, and prompt him to refuse to accept it.… [I]t is stated that a marketable title is one that can be held in peace and quiet; not subject to litigation to determine its validity; not open to judicial doubt.

Id. (quoting ***Douglass v. Ransom***, 205 Wis. 439, 446, 237 N.W. 260, 263 (1931)) (alterations added).

In this case, the title that Rossi & Mills is prepared to convey is not in "reasonable doubt as to its validity." ***Id***. While it is possible that the parties may end up in future litigation if Rossi & Mills does not complete the street improvements, that does not mar the current validity of the title. Moreover, that

putative litigation would not determine the validity of the title. In summary, the Schulers' concerns as to their future ability to develop the property in light of Rossi & Mills' existing obligation to make the improvements to 104th Avenue does not present a question as to the marketability of title. Rather, the question of whether Rossi & Mills was required to complete the improvements to 104th Avenue prior to closing is one of contract. We now turn to that question.

The construction of a written contract is a question of law that we review de novo. *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 Fin. 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 the contract as it stands. *See* ***Hortman v. Otis Erecting Co.***, 108 Wis.2d 456, 461, 322 N.W.2d 482, 484-85 (Ct. App. 1982).

As we have previously explained, the contingency recited in Exhibit B to the contract requires Rossi & Mills to obtain final plat approval. It is undisputed that Rossi & Mills has complied with this condition. It is also undisputed that the Schulers have failed to take the necessary steps to comply with their obligation to obtain a conditional use permit. Thus, it was the Schulers, not Rossi & Mills, who wrongfully refused to close the transaction pursuant to the parties' contract.

An executory contract is one in which the parties have bound themselves to future activity that is not yet completed. *See* ***Edwards v. Petrone,*** 160 Wis.2d 255, 258, 465 N.W.2d 847, 848 (Ct. App. 1990). Transactions are routinely closed under contracts that promise the performance of future acts. An

otherwise valid contract is not rendered unenforceable simply because it cannot be unequivocally predicted today that tomorrow's promised act will not be performed. If Rossi & Mills fails to complete the improvements to 104th Avenue and, as a result, the Schulers are unable to proceed with the construction of the proposed project under their conditional use permit, Rossi & Mills will presumably stand in breach of the contract and the Schulers may sue for their resultant damages. But that possible future scenario does not mean that the Schulers are relieved of their present obligation to close the transaction under the contract as it presently stands.

In hindsight, the Schulers perhaps would have written the contract differently to provide a contingency that Rossi & Mills complete the improvements to 104th Avenue before the parties were obligated to close the transaction. But that is not what the contract says. The contract provides that Rossi & Mills must obtain plat approval, and it has done that. The trial court said it very well:

> [T]here is nothing in the parties' contract for purchase, and various amendments thereto, which requires that Rossi and Mills complete the improvements to 104th Avenue before the sale to Schuler…. [B]ased upon the testimony of Schroeder and Haerter, that Rossi and Mills had completed their obligation under [the third condition] of the Conditional Use Permit, … the closing could have taken place on April 1, 1997. It did not take place because Mr. Schuler refused to close based upon an incorrect interpretation of the Conditions of Approval. Rossi and Mills are entitled to specific performance of the purchase contract.

Specific Performance

Our holdings as already expressed require that we reject the Schulers' final contention that the trial court erred by granting specific performance to Rossi & Mills.

Specific performance is an equitable remedy addressed to the sound discretion of the trial court. *See* ***Kimball v. Swanson***, 47 Wis.2d 472, 481, 177 N.W.2d 375, 380 (1970). We will not disturb the trial court's judgment unless it erroneously exercised its discretion. *See* ***Edlin v. Soderstrom***, 83 Wis.2d 58, 70, 264 N.W.2d 275, 281 (1978). The trial court properly exercises its discretion if it provides a reasonable basis for its decision. *See* ***LaRocque v. LaRocque***, 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987). When a party seeks the equitable remedy of specific performance of a contract for the sale of land, courts are required to order specific performance as a matter of course unless factual or legal considerations are revealed that make specific performance of the contract unreasonable, unfair or impossible. *See* ***Anderson v. Onsager***, 155 Wis.2d 504, 512-13, 455 N.W.2d 885, 889 (1990).

Because we have already determined that the title was without defect and because Rossi & Mills was in full compliance with all of the pre-closing terms and contingencies of the contract, the trial court properly directed specific performance of the parties' contract. *See* ***Edlin***, 83 Wis.2d at 70-71, 264 N.W.2d at 281.

CONCLUSION

We conclude that the Schulers waived their claim under the "time is of the essence" provision of the offer to purchase by failing to raise it before the trial court. In the alternative, we conclude that the "time is of the essence" provision was not violated because the Schulers agreed to the various

postponements of the closing date. We further conclude that because Rossi & Mills satisfied the terms of the contract and were ready to transfer marketable title, the trial court properly ordered the Schulers to specifically perform under the contract.

By the Court.—Judgment affirmed.

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