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. 98-2063

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

DORO INCORPORATED,

PLAINTIFF-APPELLANT,

V.

GEORGE O. DECKER, A/K/A GEORGE DECKER, INDIVIDUALLY AND AS TRUSTEE OF THE DECKER REVOCABLE TRUST,

DEFENDANT-RESPONDENT,

VAVIA DECKER AND DECKER REVOCABLE TRUST, GEORGE O. DECKER-TRUSTEE,

DEFENDANTS.

APPEAL from an order of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed.*

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

PER CURIAM. Doro Incorporated appeals an order dismissing Doro's complaint that sought specific performance of a real estate purchase contract. Doro argues that the pleadings join material factual issues with respect to the identification of the real estate. Because the complaint failed to allege a contract that identifies the land to be conveyed with reasonable certainty, the trial court correctly concluded that the statute of frauds barred recovery. Therefore, we affirm the order dismissing the complaint.

When reviewing the dismissal of an insufficient complaint, we must accept as true all facts pled and all reasonable inference to be drawn from those facts. ***Hillcrest Golf & Country Club v. City of Altoona***, 135 Wis.2d 431, 434, 400 N.W.2d 493, 495 (Ct. App. 1986). We construe the complaint liberally in favor of stating a claim, with a view toward substantial justice to the parties. Section 802.02(6), STATS.; ***Hillcrest***, 135 Wis.2d at 434, 400 N.W.2d at 495. "The complaint should be dismissed as legally insufficient only if it is quite clear that under no circumstances can plaintiffs recover." ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 317, 401 N.W.2d 816, 821 (1987). With these principles in mind, we turn to our review of Doro's complaint.

Doro's complaint alleged that George Decker, Vavia Decker and the Decker Revocable Trust accepted Doro's written offer to purchase certain Barron County real estate. A copy of the contract was attached to the complaint and provided:

> Buyer offers to purchase a minimum of five acres, with final total acreage to be determined upon completion of site plan as referenced below. Said acreage to be located in parcels 8A, 31A or 14-1 along Cty. Tk. Hwy. "O" of attached map, all in the South 32/T35N/R11W, Barron County, Wisconsin.

We conclude that the complaint is insufficient because it fails to allege a valid contract for the purchase of the land. "[T]he general and long standing rule in Wisconsin is that in order to satisfy the statute of frauds, the property referred to … must be described to a reasonable certainty." ***Zapuchlak v. Hucal***, 82 Wis.2d 184, 191-92, 262 N.W.2d 514, 518 (1978).[1] Failure to comply with the statute of frauds renders a contract for the sale of land void. ***Id***. at 191, 262 N.W.2d at 518. The construction of an unambiguous contract is a question of law we review independently. ***Jones v. Jenkins***, 88 Wis.2d 712, 722, 277 N.W.2d 815, 819 (1979).

Here, the contract attached to the complaint does not identify the land to be purchased with reasonable certainty. It merely describes a larger parcel of land from which an unspecified quantity of land, not less than five acres, would be selected at a later date. This description identifies neither the amount nor

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[1] The statute of frauds, § 706.02, STATS., provides:

> Formal requisites (1) Transactions under s. 706.01 (1) shall not be valid unless evidenced by a conveyance which:
> (a) Identifies the parties; and
> (b) Identifies the land; and
> (c) Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered; and
> ….
> (2) A conveyance may satisfy any of the foregoing requirements of this section:
> (a) By specific reference, in a writing signed as required, to extrinsic writings in existence when the conveyance is executed; or
> (b) By physical annexation of several writings to one another, with the mutual consent of the parties; or
> (c) By several writings which show expressly on their faces that they refer to the same transaction, and which the parties have mutually acknowledged by conduct or agreement as evidences of the transaction.

location of land. The trial court correctly ruled that the description is inadequate under the statute of frauds.

Additionally, there is no question of ambiguity that would permit the use of parol evidence to identify the parcel to be sold.[2] *See* ***Capital Invests., Inc. v. Whitehall Packing Co***., 91 Wis.2d 178, 190, 280 N.W.2d 254, 259 (1979) (Extrinsic evidence is irrelevant if the contract is unambiguous). Despite Doro's position that the contract is unambiguous, it nonetheless argues that parol evidence is admissible to supplement the legal description. Doro argues that whether the document adequately describes the land depends largely on facts, citing ***State v. Conway***, 34 Wis.2d 76, 84, 148 N.W.2d 721, 725 (1967). Doro reads ***Conway*** too broadly. ***Conway*** asked whether "questions of insufficiency of the description to satisfy the statute of frauds and lack of legal authority to contract [were] appealable where they were not relied upon as affirmative defenses in the answer of the defendants, and where evidence concerning these questions was not introduced at trial?" ***Id***. at 80, 148 N.W.2d at 723. In answering that question, our supreme court observed that the "question of indefiniteness of description … depends largely on the facts of the case" and that "parol evidence is used to supplement the description." ***Id***. at 84-85, 148 N.W.2d at 725. The court further noted, however, that: "*On the face of the contract, the description is perfectly*

[2] Because Doro concedes the agreement is unambiguous, we need not address its alternative argument that extrinsic evidence may be admitted to resolve the ambiguity. *See* ***Spencer v. Spencer***, 140 Wis.2d 447, 450, 410 N.W.2d 629, 630 (Ct. App. 1987) (A document is ambiguous when its words and phrases are reasonably susceptible to more than one interpretation. However, where an ambiguity exists in the contract which requires resort to extrinsic evidence, the question is one of fact.).

adequate to satisfy the statute of frauds." ***Id***. at 85, 148 N.W.2d at 726 (emphasis added).

In contrast, on the face of the contract before us, the description is inadequate. The problem is that the precise land to be purchased had not yet been agreed upon. As a result, parol evidence cannot be used to supplement the description. Doro's argument misperceives the nature of the parol evidence rule. While it may be used in cases when the written expression of an agreement is incomplete, it is not applicable when the parties have not completed their negotiations.

The parol evidence rule can be stated as follows:

> When the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress or mutual mistake.

S***pring Valley Meats v. Dairlyand***, 94 Wis.2d 600, 606-07, 288 N.W.2d 852, 855 (1980). "The real question when a party invokes the parol evidence rule is whether the parties intended the written agreement to be final and complete or 'integrated,' or whether they intended any prior agreements to be part of their total agreement." ***Id***. at 607, 288 N.W.2d at 855. Because no fraud, duress, mutual mistake or lack of integration is alleged, parol evidence is inapplicable.

Doro also argues that the contract's referral to the site plan permits the court to admit extrinsic evidence. We disagree. The contract itself demonstrates that parties had not yet reached a final agreement with respect to the amount or location of land to be sold. Consequently, the extrinsic evidence as to a

site plan would not supply the necessary information. "If the document or the contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; and the so-called 'contract to make a contract' is not a contract at all." 1 CORBIN ON CONTRACTS § 2.8(a) at 134 (rev. ed. 1993); *see also* ***Dunlop v. Laitsch***, 16 Wis.2d 36, 42, 113 N.W.2d 551, 554 (1962). The trial court correctly determined that the complaint's allegations were insufficient.

By the Court.—Order affirmed.

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