COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2490 **Cir. Ct. No. 2009CV865**

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

KEVIN P. GERARD AND MARGARET M. GERARD,

PLAINTIFFS-RESPONDENTS,

V.

MICHAEL J. GERARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. This case stems from a family rift over the purchase and attempted sale of a vacant parcel of land on Lake Michigan. A jury found in favor of spouses Kevin and Margaret Gerard on their breach-of-contract

and slander-of-title claims against Kevin's brother, Michael Gerard. On appeal, Michael contends that an oral contract to convey the lot is unenforceable for indefiniteness, the damage award is excessive, and the trial court erred by denying his motion for judgment notwithstanding the verdict ("JNOV") on the slander-of-title claim. His contentions fail. We affirm.

¶2 Michael is a practicing physician and holds a law degree. He had accrued significant student debt. As the brothers were very close, over the years Kevin and Margaret often helped Michael out financially. He always repaid them. In 2007, he submitted an offer to purchase the five-acre Lake Michigan property ("Lot 3") on which he wanted to build a home. Unable to afford the $200,000 down payment and sizable additional investment for the house he intended to build on it, Michael turned to Kevin and Margaret for assistance in securing financing.

¶3 TCF Bank, where Kevin had business relationships, requested a written business plan for the purchase and development of Lot 3. The brothers' father, an attorney, drafted an agreement under which Kevin and Margaret would fund the down payment, obtain a mortgage for the balance of the purchase price, and take title to Lot 3. Michael would make all of the payments on the mortgage, real estate taxes, and a construction loan to build a house. Upon completion of construction, Kevin and Margaret would deed Lot 3 to Michael in exchange for Michael's payment of Kevin and Margaret's out-of-pocket costs and an agreed-upon interest rate.

¶4 When TCF declined to provide financing, Kevin said they discarded the document because it "no longer served a purpose, it wasn't applicable. Mike wasn't going to be getting the money to pay us back for a down payment, and he wasn't going to be able to buy the lot." Kevin maintains that he and Margaret

entered into a new oral agreement Michael proposed. Michael would assign the purchase contract to Kevin and Margaret, they would buy Lot 3 and hold it for one year, Michael would pay all expenses, and, at the end of the year, he would buy it from them by paying off the mortgage. Kevin and Margaret completed the purchase in November 2007 with a $94,000 down payment and financed the $456,000 balance with a twelve-month, interest-only note at 5.99%. Michael contributed $5250 and paid the holding costs between November 2007 and September 2008.

¶5 Then circumstances changed. A $70,000 bonus Michael anticipated had not materialized, he got engaged, his fiancée was pregnant, and she told Kevin she was not interested in Lot 3. Michael had not applied for a construction loan. Thinking Michael might not be willing or able to make the balloon payment due in two months, in September 2008 Kevin and Margaret put Lot 3 up for sale. Kevin told Michael they would reimburse him for all of the payments he had made.

¶6 Michael did not want to sell Lot 3, as he had grown "emotionally attached" to it. More than once, he tore down the "For Sale" signs and someone emptied the realtor's box of one hundred information flyers in one day. On September 24, he recorded a Memorandum of Interest in Real Estate ("the Memorandum") with the county register of deeds. He attached to it a copy of the disputed October 2007 document their father had drafted. The document described the Memorandum as a "written contract" by which Michael "acquired an equitable and beneficial interest" in Lot 3. The Memorandum also provided that Kevin and Margaret "acquired title for convenience only" and held title for his benefit. He did not tell Kevin and Margaret about the Memorandum.

¶7 Kevin and Margaret continued to try to sell Lot 3. They made monthly payments of over $3800, paid the taxes, and had to refinance their loan twice. In late 2009, a cash purchaser ("the buyer") contacted their realtor "with his checkbook open." The realtor notified Kevin that a title search revealed a cloud on the title due to the Memorandum. This was the first Kevin heard of it. The sale fell through and the buyer bought a nearby lakefront lot for $612,000.

¶8 Price reductions failed to attract another buyer. Michael refused to lift the Memorandum. He conceded on cross-examination that no matter how much Kevin lowered the price, nobody would make an offer with the clouded title.

¶9 Kevin and Margaret commenced this lawsuit. They alleged that Michael's conduct slandered the title and breached the oral contract. At trial, Michael appeared pro se. A jury returned a verdict finding in favor of Kevin and Margaret. It awarded damages of $280,000, applicable to both the breach-of-contract and slander-of-title claims.[1]

¶10 On motions after verdict, Kevin and Margaret moved for judgment on the verdict, removal of the *lis pendens*, attorney's fees incurred in connection with their efforts to quiet title and obtain declaratory relief that the Memorandum inappropriately clouded the title, and punitive damages on the slander-of-title claim. *See* WIS. STAT. § 706.13(1) (2013-14).[2] As is relevant here, Michael moved to set aside the verdict, for a new trial, and for JNOV. The court granted Kevin and Margaret's motions and denied Michael's, assessed the statutory $1000

[1] After trial but before postverdict motions were decided, the trial court issued an order that removed the Memorandum and declared it of no further legal effect.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

punitive damages against Michael, and entered an interlocutory judgment on the verdict in the amount of $281,000.

¶11 Shortly thereafter, Michael filed for Chapter 11 bankruptcy, which stayed a hearing on Kevin and Margaret's attorney's fees motion.[3] When the stay was lifted, the trial court entered a judgment against Michael in the amount of $290,277.50, comprising the $281,000 in damages already awarded and $9,277.50 in attorney's fees on the slander-of-title claim. Michael appeals.

¶12 Although the jury found that an agreement existed, Michael contends the breach-of-contract claim fails because its indefiniteness as to price makes it unenforceable. "The issue of definiteness may be decided by the jury, *see* WIS JI—CIVIL 3022, or by the court as a matter of law." ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (1996).

¶13 His claim fails. First, by not raising this issue in the trial court, Michael has waived his right to appellate review. *See* ***Advance Concrete Form, Inc. v. Accuform, Inc.***, 158 Wis. 2d 334, 350, 462 N.W.2d 271 (Ct. App. 1990). Second, likely because he did not contest indefiniteness at trial, he did not request

[3] Kevin and Margaret initiated an adversary proceeding seeking a judicial determination that the interlocutory judgment obtained against Michael for slander of title was precluded from discharge in bankruptcy. ***Gerard v. Gerard***, 482 B.R. 265, 269 (Bankr. E.D. Wis. 2012). 11 U.S.C. § 523(a)(6) (2012) excepts from discharge any debt for "willful and malicious injury" by the debtor to another entity or to another entity's property. The bankruptcy court concluded that the interlocutory judgment was precluded from discharge. *See* ***Gerard***, 482 B.R. at 267, 273. The district court affirmed the bankruptcy court and dismissed the appeal. ***Gerard v. Gerard***, No. 13-C-0114, 2014 WL 461182, at *11 (E.D. Wis. Feb. 4, 2014). The Seventh Circuit Court of Appeals reversed and remanded to the bankruptcy court for a determination of whether Michael's conduct constituted a "willful and malicious injury," a question not put to the jury, or was based on negligence. ***Gerard v. Gerard***, 780 F.3d 806, 807 (7th Cir. 2015).

WIS JI—CIVIL 3022, "Definiteness and Certainty." "Failure to object at the [instruction] conference constitutes a waiver of any error in the proposed instructions or verdict." WIS. STAT. § 805.13(3).

¶14 Third, apart from waiver, the lack of a definite price is not fatal to a contract's enforceability. If parties do not state an exact price, a contract still is sufficiently definite if it specifies a "practicable method for determining ... price or compensation." ***Herder Hallmark Consultants, Inc. v. Regnier Consulting Grp., Inc.***, 2004 WI App 134, ¶9, 275 Wis. 2d 349, 685 N.W.2d 564 (quoting 1 *CORBIN ON CONTRACTS*, § 4.3 (Joseph M. Perillo ed., rev. ed. 1993)). "We will not upset a jury verdict if there is any credible evidence to support it." ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis. 2d 534, 543, 472 N.W.2d 790 (Ct. App. 1991). "This is even more true when the trial court gives its explicit approval to the verdict by considering and denying postverdict motions." ***Id.***

¶15 The evidence the jury accepted established a meeting of the minds: Michael would make Kevin and Margaret whole by buying Lot 3 back from them for the exact price due on the mortgage after one year. The exact amount needed to pay off the mortgage is a "practicable method" for determining the price. Ample evidence supports the jury findings that the parties had a contract, that Michael breached it, and that the parties contemplated a "practicable method" for determining the price. The trial court rejected Michael's postverdict arguments.

¶16 Michael next contends that the damages awarded are excessive because they far exceed any sum that the evidence reasonably supports. When reviewing an award of damages, we view the evidence in the light most favorable to the plaintiff. ***Fahrenberg v. Tengel***, 96 Wis. 2d 211, 231, 291 N.W.2d 516 (1980). The award will not be upset on appeal merely because it was large or

because this court would have awarded a lesser amount. ***Ballard v. Lumbermens Mut. Cas. Co.***, 33 Wis. 2d 601, 605, 148 N.W.2d 65 (1967). We will reverse it only when the award is so excessive as to indicate that it resulted from passion, prejudice, or corruption, or that the jury disregarded the evidence or applicable rules of law. ***Id.***

¶17 Michael attempts to allocate the damages between the breach-of-contract and slander-of-title claims. Kevin and Margaret contend that both causes of action include all damages proximately caused by the wrong.

¶18 The jury properly found that Michael knew or should have known that all or part of the contents of the Memorandum "were false, a sham, or frivolous." Under WIS. STAT. § 706.13(1):

> any person who submits for filing, entering in the judgment and lien docket or recording, any lien, claim of lien, lis pendens, … or any other instrument relating to a security interest in or the title to real … property, and who knows or should have known that the contents or any part of the contents of the instrument are false, a sham or frivolous, is liable in tort to any person interested in the property whose title is thereby impaired, for punitive damages of 1,000 *plus any actual damages caused by the filing, entering or recording*. [Emphasis added.]

Actual damages "are those occurring as a natural consequence of the wrongful conduct, but not so necessarily foreseeable as to be implied in law." ***Tym v. Ludwig***, 196 Wis. 2d 375, 382, 384, 538 N.W.2d 600 (Ct. App. 1995).

¶19 Contract damages also compensate the wronged party for damages arising naturally from the breach. ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 320, 306 N.W.2d 292 (Ct. App. 1981). Recovery is limited to those reasonably supposed to have been contemplated and foreseeable at the time the parties made the contract as the probable result of a breach. ***Id.*** at 320-21.

¶20 The special verdict had three damages questions. The jury determined that Kevin and Margaret's out-of-pocket expenses "including without limitation, down payment, holding costs, and costs of refinancing" amounted to $215,224.86—a sum exactly matching that shown in Exhibit 14, a detailed listing of Kevin and Margaret's uncompensated, out-of-pocket expenditures for Lot 3; that there was no change in Lot 3's value between September of 2008, when Kevin and Margaret put it on the market, and the time of trial; and that the total amount of damages Kevin and Margaret suffered was $280,000.

¶21 Besides Exhibit 14, the jury heard that Kevin and Margaret suffered tax penalties and lost interest income from having to withdraw funds from retirement and educational savings to make the mortgage payments. The buyer testified that he was willing and able to make an offer on and write an earnest-money check for Lot 3, walked away from the deal because of the slander of title, and shortly thereafter bought a similar lakefront lot within a few miles of Lot 3 for $612,000. The realtor testified that the clouded title cost Kevin and Margaret not only the sale to the buyer but three years' access to any potential buyers of vacant lakefront lots. The out-of-pocket loss of $215,000 plus the additional $65,000 in damages, to equal $280,000 total damages, is amply supported by the evidence.

¶22 Michael next complains that the trial court erred by denying his JNOV motion on the slander-of-title claim. We disagree.

¶23 A motion for JNOV may be granted when "the verdict is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment." ***Logterman v. Dawson***, 190 Wis. 2d 90, 101, 526 N.W.2d 768 (Ct. App. 1994) (citation omitted). The motion actually is a postverdict motion for a directed verdict; while it does not challenge the

sufficiency of the evidence to support the *verdict*, it asserts that the facts found by the jury are insufficient as a matter of law to support a *judgment*. ***Id.*** at 101-02. Our review is de novo. ***Id.*** at 101.

¶24 Michael posits that "the gist and principal thrust of the [Memorandum] is an assertion by Michael that he possessed an equitable interest in Lot 3." His logic goes something like this: he already possessed an equitable interest in Lot 3, the Memorandum was his assertion of his equitable interest, Kevin and Margaret held title to Lot 3 subject to his equitable interest, and as their title already was impaired by his equitable interest, as a matter of law, the later recording of the Memorandum could not have impaired their title.

¶25 We agree with Kevin and Margaret's observation that "[t]he 'principal thrust' of the Memorandum was that Kevin and Margaret did not actually hold title in their own names, but held it only for the benefit of Michael. This was false." The evidence showed that a warranty deed conveyed title to Lot 3 from the seller to Kevin and Margaret, as husband and wife, and that the property tax bills were in Kevin and Margaret's names. Michael's equitable interest, if anything, was in whatever payments he made in regard to the property. Exhibit 14 showed and the damage award took into account that Kevin and Margaret reimbursed him. The facts support the verdict and the judgment.

By the Court.—Judgment affirmed.

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