

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 13, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

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**No. 98-2597**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**LEON THIEDE, AND JOANN THIEDE,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**ESTATE OF MARGARET THIEDE, BY ITS PERSONAL  
REPRESENTATIVE, HELEN JOHNSON,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Columbia County: RICHARD E. REHM, Judge. *Reversed and cause remanded.*

Before Eich, Vergeront and Deininger, JJ.

DEININGER, J. Leon and JoAnn Thiede appeal a judgment dismissing their complaint against the Estate of Margaret Thiede. Leon and JoAnn seek specific performance of a contract for the sale of Margaret Thiede's farm, which the parties had signed before Margaret's death. The trial court

dismissed the complaint, concluding that because a specially drafted provision allowing Margaret to stay in the farmhouse for a period after closing had not been completed, an essential term of the contract was unenforceably vague. We conclude that whether the length of Margaret’s post-sale occupancy is an essential term of the contract is a factual matter that cannot be resolved on the basis of the complaint alone. Accordingly, we reverse the judgment dismissing Leon and JoAnn’s complaint.

## BACKGROUND

In reviewing the trial court's dismissal for failure to state a claim, we accept as true the facts alleged in the complaint, which are as follows. Leon and JoAnn owned a farm adjacent to a farm owned by Margaret. Leon and JoAnn had been working Margaret's farm pursuant to a lease when they began negotiating the purchase of the farm with Margaret and her daughter Marll. Leon and JoAnn's attorney drafted an offer to purchase Margaret's farm. The offer consisted of a standard form offer to purchase, supplemented by specially drafted attachment that described the property, established the purchase price of \$150,000, and provided additional terms of the transaction. Among the additional terms was the following:

Seller retains the right to stay in the home without further rent through \_\_\_\_\_. INITIAL: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 LT JT MT

Leon and JoAnn signed the form offer and the attachment, and faxed a copy to Marll. Leon presented the offer to Margaret who also signed both the printed form offer and the attachment. None of the parties, however, completed or initialed the post-sale occupancy provision.

Margaret died before the closing of the sale, and her estate refused to convey the property to Leon and JoAnn. Leon and JoAnn sued for specific performance of the contract for the sale of the farm. On the Estate's motion, the trial court dismissed the complaint for failure to state a claim, concluding that the contract was unenforceably vague because the specially drafted provision allowing Margaret to stay in the farmhouse for a period after closing was an essential term, and it was not completed.<sup>1</sup> Leon and JoAnn appeal.

### ANALYSIS

We review a motion to dismiss for failure to state a claim de novo, accepting as true the facts alleged and reasonable inferences drawn from those facts. *See Town of Eagle v. Christensen*, 191 Wis.2d 301, 311-12, 529 N.W.2d 245, 249 (Ct. App. 1995). The pleadings are to be liberally construed, and a claim will be dismissed only if “it is quite clear that under no conditions can the plaintiff recover.” *Id.* at 311, 529 N.W.2d at 249 (citations omitted). Our analysis is limited to the facts as stated in the complaint. *See Weber v. City of Cedarburg*, 129 Wis.2d 57, 64, 384 N.W.2d 333, 338 (1986).

Generally, specific performance is an equitable remedy that rests in the discretion of the trial court. *See Anderson v. Onsager*, 155 Wis.2d 504, 513, 455 N.W.2d 885, 889 (1990). Specific performance of a contract to sell land, however, should be ordered as a matter of course unless there are “factual or legal considerations which would make specific performance of the contract unfair,

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<sup>1</sup> The trial court also noted that Leon and JoAnn had argued that the contract met the formal requirements for a conveyance under § 706.02(1), STATS. The court did not specifically decide the issue, however, since it concluded that the contract failed for lack of an essential term. We address both the statutory and common-law defenses to enforcement of the contract below.

unreasonable or impossible.” *Id.* at 512-13, 455 N.W.2d at 889. Thus, in this case, Leon and JoAnn’s complaint should be dismissed only if it is clear from the complaint itself that there are factual or legal considerations that would make enforcement of the contract to purchase Margaret’s farm unfair, unreasonable or impossible.

The Estate contends that the contract for the sale of Margaret’s farm is void and unenforceable because the parties did not fill in the blanks of the specially drafted post-sale occupancy provision. Although Margaret’s death renders this provision irrelevant, the dispute over the uncertainty of terms of the contract is not moot. The contract is enforceable against the Estate only if it would have been enforceable against Margaret while she lived. *See Wilcox v. Powell’s Estate*, 206 Wis. 513, 515, 240 N.W. 122, 123 (1932).

The Estate argues first that the contract is invalid under § 706.02, STATS., Wisconsin’s statute of frauds, which specifies formal requirements of contracts to convey real estate.<sup>2</sup> The Estate contends that the contract fails to

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<sup>2</sup> Section 706.02(1), STATS., provides:

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

(d) Is signed by or on behalf of each of the grantors; and

(e) Is signed by or on behalf of all parties, if a lease or contract to convey; and

(continued)

conform to § 706.02(1)(c), which provides that a contract to convey real estate is invalid unless it

[i]dentifies 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.

The Estate contends that Margaret’s post-sale occupancy is a material term that limits the interest conveyed, which must therefore be expressed in writing. Leon and JoAnn contend that the contract conforms to § 706.02(1)(c) because the contract identified Margaret’s continuing interest in the property conveyed and leaves unexpressed only the duration of that interest.

Section 706.02, STATS., requires that a “reasonable certitude in respect to the subject matter of the agreement must be expressed in the contract itself.” See *Trimble v. Wisconsin Builders, Inc.*, 72 Wis.2d 435, 442, 241 N.W.2d 409, 414 (1976). Under certain circumstances, however, the existence of a factual dispute may be material to the question of whether a contract conforms to the statute of frauds. For example, in *Wadsworth v. Moe*, 53 Wis.2d 620, 624, 193 N.W.2d 645, 647 (1972), the supreme court held that extrinsic evidence may

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(f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01(7) except conveyances between spouses, but on a purchase money mortgage pledging that property as security only the purchaser need sign the mortgage; and

(g) Is delivered. Except under s. 706.09, a conveyance delivered upon a parole limitation or condition shall be subject thereto only if the issue arises in an action or proceeding commenced within 5 years following the date of such conditional delivery; however, when death or survival of a grantor is made such a limiting or conditioning circumstance, the conveyance shall be subject thereto only if the issue arises in an action or proceeding commenced within such 5-year period and commenced prior to such death.

be used to identify the property to be conveyed, so long as the contract itself provides some “foundation, link, or key to the oral or extrinsic testimony which identifies the property.”<sup>3</sup> Here, the contract provides a foundation that the sale was subject to Margaret’s continued occupancy of the home following closing. The document gives no indication, however, of the intended duration of her occupancy, or of the importance to the parties of the period of Margaret’s post-sale occupancy.

We conclude that a factual dispute exists in this case as to whether the duration of Margaret’s post-sale occupancy was a material limitation on the interest conveyed under the contract. In *Hilkert v. Zimmer*, 90 Wis.2d 340, 343, 280 N.W.2d 116, 118 (1979), the supreme court held that a party’s allegation that a contract had been modified orally presented a factual dispute that precluded summary judgment on statute of frauds grounds. Similarly, Leon and JoAnn’s action for specific performance of the present contract cannot be dismissed on statute of frauds grounds unless a factual showing is made that the duration of Margaret’s occupancy of the house on the conveyed farmland was a material term of the sale contract.

We note in this regard that the property at issue here is not purely, or even primarily, residential. In a sale of a single-family home situated on a residential lot, one could well argue that the duration of a seller’s post-sale occupancy of the home would likely be a material term of a contract for its sale,

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<sup>3</sup> Although *Wadsworth v. Moe*, 53 Wis.2d 620, 193 N.W.2d 645 (1972), concerned § 240.98, STATS., the predecessor to § 706.02, STATS., the supreme court has suggested that there is no substantial difference between the two statutes because current § 706.02 “represents at least a partial codification of prior Wisconsin statutory and decisional law.” See *Trimble v. Wisconsin Builders, Inc.*, 72 Wis.2d 435, 440, 241 N.W.2d 409, 413 (1976).

given that the possession and use of the dwelling would seemingly constitute the principal value of the real estate to the buyer. But here, it is possible that Leon and JoAnn were interested in Margaret's property primarily as farmland to supplement the operation of their adjacent farm, and that the farmhouse was of little value to them. It is also possible that Margaret wanted or needed to occupy the farmhouse for only a brief period. Thus, it is possible, in view of the facts as alleged in the complaint, that the duration of Margaret's post-sale occupancy was but a minor detail in the parties' agreement. That is, there may be a set of facts which would permit Leon and JoAnn to survive a defense based on the statute of frauds.

Thus, because the determination of whether the contract complies with § 706.02, STATS., is subject to a factual dispute, we conclude that it would be premature to grant the Estate's motion to dismiss on the grounds that the contract did not comply with the statute of frauds.

The Estate also contends that the contract is invalid under the common-law rule that when an essential term of the parties' agreement is indefinite, then the entire contract is void. *See, e.g., Witt v. Realist, Inc.*, 18 Wis.2d 282, 118 N.W.2d 85 (1962). To be enforceable, the contract must spell out "the essential commitments and the obligations" of the parties. *See id.* at 297, 118 N.W.2d at 93. If an essential term is left open, subject to future negotiations, the contract is not enforceable until the parties agree on that term. *See Dunlop v. Laitsch*, 16 Wis.2d 36, 42, 113 N.W.2d 551, 554 (1962). This was the basis of the trial court's ruling in favor of the Estate.

We will not, however, invalidate a contract merely because some details are vague. "Courts are not inclined to strike down such a contract for

uncertainty if the deficiency can be supplied consistent with reasonableness in the interest of preserving the contract which parties thought they made.” *Gerruth Realty Co. v. Pire*, 17 Wis.2d 89, 91-92, 115 N.W.2d 557, 558-59 (1962). Moreover, not every term is essential to the agreement between the parties. See *Kovarik v. Vesely*, 3 Wis.2d 573, 582, 89 N.W.2d 279, 284 (1958). Thus, in evaluating the sufficiency of Leon and JoAnn’s complaint, we must determine first whether we can resolve the apparent indefiniteness of the term of Margaret’s occupancy and second whether the duration of the occupancy was essential to the contract.

Judging from the face of the contract, the post-sale occupancy provision is indeterminate: it has been left blank and thus expresses no intent as to the duration of Margaret’s occupancy. In limited circumstances, an omitted term may be supplied by the court, thereby preserving the otherwise intended contract. As a general rule, uncertainty as to time of performance does not render a contract void. See *Brevig v. Webster*, 88 Wis.2d 165, 175, 277 N.W.2d 321, 327 (Ct. App. 1979). And, where a contract for the sale of land is silent as to time of change of possession, the law will imply a reasonable time. See *Kelley v. Ellis*, 272 Wis. 333, 336, 75 N.W.2d 569, 570 (1956). As the trial court properly determined, however, the length of Margaret’s post-sale occupancy was not simply a matter of an unstated time of performance. The contract expressly provided that the closing of the sale should occur “no later than July 31, 1997.” Margaret’s occupancy is likewise not simply a matter of change of possession, because the specially drafted provision provides that Margaret would remain in possession of the home after Leon and JoAnn had assumed ownership and possession of the farmland. We conclude that the duration of Margaret’s occupancy is more analogous to an extension term of a lease, for which the court may not supply a term of a

reasonable period. See *Batavian Nat'l Bank v. S. & H., Inc.*, 3 Wis.2d 565, 569, 89 N.W.2d 309, 312 (1958).

The court may also sometimes resolve an uncertainty in contract terms by examining extrinsic evidence to determine whether the parties had agreed on the apparently uncertain term. See *Gerruth*, 17 Wis.2d at 92, 115 N.W.2d at 559 (holding that a “contract is certain which may be made certain from the surrounding circumstances”). But the court may not supply a completely missing term or rewrite the contract made by the parties. See *Batavian*, 3 Wis.2d at 569, 89 N.W.2d at 312. We will not consider extrinsic evidence unless the document itself supplies “some foundation, link or key to the extrinsic evidence.” See *Edlebeck v. Barnes*, 63 Wis.2d 240, 245, 216 N.W.2d 551, 554 (1974).

As we have noted, the contract provides a foundation that the sale was subject to Margaret’s continued occupancy of the home following closing. However, nothing on the face of the contract document or in the complaint suggests that the uncertain term could necessarily be illuminated by extrinsic evidence of what the parties intended as to the duration of Margaret’s post-sale occupancy. That is, the contract does not provide a reference to something extrinsic to the contract that would supply the missing information, and the complaint does not allege that the parties had reached a mutual understanding as to the duration of Margaret’s occupancy but simply failed to insert the information in the blank provided for it. Moreover, Margaret’s death has complicated the marshaling of evidence as to what she may have intended with respect to the duration of her occupancy, and it has also made largely unnecessary a judicial resolution of the uncertainty in the contract term.

A reasonable conclusion to be drawn from the face of the contract and the facts alleged in the complaint is that the parties did not reach an agreement as to the length of Margaret's post-sale occupancy of the house. Accordingly, we conclude that the term of Margaret's occupancy is indeterminate, and that we cannot readily resolve that indeterminacy either by supplying a reasonable term or by considering extrinsic evidence as to the intent of the parties.

The decisive question, therefore, is whether the duration of Margaret's post-sale occupancy is an essential term of the contract. The basic determination that must be made is whether the inability to enforce the provision strictly according to its terms would make it unfair to enforce the rest of the contract. *See* 17A AM. JUR. 2D *Contracts* § 36 (1964). Whether a term is essential to the contract depends on the express terms of the contract and on the factual context of the agreement. *Cf. Kubnick v. Bohne*, 56 Wis.2d 527, 535-36, 202 N.W.2d 400, 404-05 (1972) (concluding that whether time of performance is an essential term is a factual matter depending on the terms of the agreement and its context). The express terms of the contract in this case do not indicate whether the term of Margaret's occupancy is essential to the contract. As the trial court observed, the fact that a provision was specially drafted to address her post-sale occupancy suggests that it was significant to the parties. But the existence of a provision does not, in itself, make it essential to the contract. *See id.* An equally permissible inference is that the parties' failure to fill in the blank indicates that the duration of Margaret's occupancy of the home was of little importance to either of them.

The facts alleged in the complaint relating to the importance of the length of Margaret's post-sale occupancy are sparse. But we must construe the complaint liberally, and we must draw every reasonable inference in Leon and

JoAnn's favor. As we have discussed with respect to the statute of frauds issue, the property involved in this transaction was not primarily residential and the overall importance to the parties of the duration of Margaret's post-sale occupancy of the home is not obvious from the face of the complaint. Accordingly, we must conclude that Leon and JoAnn may be able to establish that the duration of Margaret's occupancy was not an essential part of the agreement. Leon and JoAnn's complaint, therefore, cannot be dismissed for failure to state a claim on the grounds that the contract for the sale of the farm is indeterminate as to an essential term. Thus, they are entitled to further proceedings to determine whether the contract is in fact valid.

We conclude that whether the duration of Margaret's post-sale occupancy was a material term of the contract of sale cannot be decided from the complaint alone, and that whether the duration of Margaret's post-sale occupancy was an essential term must await consideration of the factual context of the sale agreement. We do not mean to suggest that the statutory and common-law defenses to enforcement of the sale contract raised by the Estate must necessarily rise or fall together. It is not necessary, however, for our disposition of this appeal to decide whether a contract term could be material within the meaning of § 706.02(1)(c), STATS., without it being essential to the contract, or, conversely, whether the contract could pass muster under the statute of frauds but still fail for vagueness of an essential term. Our conclusion with respect to both issues, however, is that each needs further illumination of facts for resolution.

## CONCLUSION

For the foregoing reasons, we conclude that the contract for the sale of Margaret Thiede's farm cannot be deemed invalid under § 706.02, STATS., at

the pleading stage. We also conclude that whether the contract is void because it is indefinite as to an essential term must await consideration of the factual context of the agreement. We emphasize that we do not conclude that the Estate cannot ultimately prevail on either or both of its defenses; we conclude only that it may not prevail on its motion to dismiss the complaint. Accordingly, we reverse the trial court's judgment dismissing Leon and JoAnn's complaint, and we remand for further proceedings.

*By the Court.*—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

