COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3363

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

MOONEY & LESAGE & ASSOCIATES, LTD.,
A WISCONSIN CORPORATION,

PLAINTIFF-APPELLANT,

V.

GERMANTOWN MARKETPLACE, INC.,
A WISCONSIN CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mooney & Lesage & Associates, Ltd. (MLA) appeals from a judgment dismissing its action against Germantown Marketplace, Inc. (Germantown) for a commission under a real estate listing contract. MLA

argues that pursuant to an oral agreement and a contractual duty of good faith, Germantown should have completed the real estate transaction on an extended closing date. We conclude that summary judgment was appropriate because there was no written agreement extending the closing date. We affirm the judgment.

¶2 Under the listing contract between MLA and Germantown, MLA would earn a 3% commission upon the sale of Germantown's shopping center. The Lichter Trust made an offer to purchase the shopping center for $9 million. The offer was accepted and the closing was to occur on January 31, 1997. One condition of the offer to purchase was Lichter's sale of an apartment building on or before the date of the closing on the shopping center. The offer to purchase allowed Lichter to extend the closing date to February 28, 1997, if it had not yet closed on the sale of the apartment building.

¶3 The closing date was extended to February 28, 1997. On February 27, Lichter informed Germantown's attorney, David Keating, that the buyer of the apartment building was short of funds to close on February 28. The buyer of the apartment building was going to advance $50,000 earnest money to have the closing date extended. Lichter requested Germantown to extend the closing on the shopping center to March 14, 1997, so that sale of the apartment building could be completed. Litcher and Keating negotiated about extending the closing date and Litcher believed an agreement existed.[1] No efforts were made to close on February 28. Although Keating drafted an amendment to the contract which would have extended the closing date to March 14, 1997, Germantown

[1] Germantown requested a portion of the earnest money paid on the apartment building in the event that the sale was not completed by the extended deadline. The amount to be paid to Germantown was negotiated.

decided not to sign the amendment document. On March 3, 1997, Keating informed Lichter that Germantown did not want to extend the closing date.

¶4 The sale between Germantown and Lichter was not completed. MLA sought to recover its commission for producing a ready, willing and able buyer. It claims that Germantown was at fault for the failed transaction. Both parties moved for summary judgment. The circuit court held that there was no evidence that Germantown engaged in any wrongful conduct obligating it to pay the commission and that the dispute over whether the parties had orally agreed to extend the closing date was of no consequence because the oral amendment was unenforceable under the purchase contract and the statute of frauds.

¶5 We review decisions on summary judgment de novo, applying the same methodology as the trial court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995); § 802.08(2), STATS. That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***M & I First Nat'l Bank***, 195 Wis.2d at 496-97, 536 N.W.2d at 182.

¶6 MLA first argues that the agreement[2] between Lichter and Germantown to extend the closing date to March 14, 1997, is binding and enforceable under the statute of frauds, § 706.02(2)(c), STATS. The statute of frauds requires a written instrument to convey or maintain an interest in land but

[2] MLA's argument assumes that an oral agreement was made. We need not decide the legal result of the discussions between Keating and Lichter. Even if the parties dispute the level of agreement reached in those discussions, the disputed fact is not material to the outcome.

provides that the writing requirement may be satisfied 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." ***Id.*** MLA suggests that Keating's drafting of the extension amendment evidences the extension agreement and was "acknowledged by conduct."

¶7 The statute of frauds is not the controlling standard in this instance. Here, the parties' agreement provides that it may be amended "only by a written instrument executed on behalf of all of the parties hereto." The parties chose a more stringent writing requirement than that imposed by the statute of frauds. "The parties are master of their affairs," and they may elect not to be bound by unsigned writings. ***Skycom Corp. v. Telstar Corp.***, 813 F.2d 810, 814 (7th Cir. 1987). We must adhere to the method of amendment chosen by the parties or else "the written word would lose some of its power. The ability to fix the consequences with certainty is especially important in commercial transactions that are planned with care in advance." ***Id.*** at 815.

¶8 If the parties require the execution of a written document to amend their contract, the execution of the amendment document is a prerequisite to an enforceable extended closing date. *See* ***id.*** at 816. Here, the amendment document drafted by Keating was not executed and any agreement to extend the closing date was not enforceable, regardless of the provisions of the statute of frauds. There is no evidence that either party waived the requirement that amendments be made by "a written instrument executed on behalf of all of the parties hereto." ***S & M***

Rotogravure Service v. Baer, 77 Wis.2d 454, 252 N.W.2d 913 (1977), cited by MLA, is inapplicable.[3]

¶9 MLA claims that the oral agreement to extend the closing date is enforceable under the doctrine of equitable estoppel and that under the doctrine of promissory estoppel Germantown is precluded from denying the extension. "[A]n estoppel [does not] arise upon the mere refusal to make a writing as agreed. Where the entire transaction leading up to the making of the verbal contract is open and free from fraud or false representation, the subsequent failure to carry out that contract cannot of itself constitute an estoppel." ***Wamser v. Bamberger***, 101 Wis.2d 637, 643, 305 N.W.2d 158, 161 (Ct. App. 1981) (quoted source omitted). Estoppel does not arise here because the responsibility for the failed February 28, 1997 closing lies at the feet of Litcher and not Germantown and there was no fraud or misrepresentation involved.[4]

¶10 Further, the suggestion of estoppel requires some sort of detrimental reliance by the party asserting it. *See* ***id.*** at 644, 305 N.W.2d at 161. MLA asserts no change in the position it took upon reliance of the oral extension agreement. Even assuming that MLA could assert Lichter's supposed reliance on the oral agreement as its own, the failure to close with Germantown on February 28, 1997, was not the result of the oral agreement to extend the closing. One of the conditions of the purchase from Germantown was Litcher's sale of the apartment

[3] In ***S & M Rotogravure Service v. Baer***, 77 Wis.2d 454, 469, 252 N.W.2d 913, 920 (1977), the court acknowledged that some oral change agreements are enforceable, even if the contract provides that it can be modified only in writing, where the parties evidence by words or conduct an intent to waive or modify the written modification provision.

[4] Similarly, there is no evidence that Germantown breached any duty of cooperation or good faith dealing.

building. That could not be completed by February 28 because Litcher's purchaser was short of needed funds. The contractual contingency was not fulfilled or waived by the parties. No detrimental reliance exists.

¶11 The absence of an executed written instrument extending the closing date caused the purchase agreement to expire. We need not consider whether the clause providing that "time was of the essence" was waived by Germantown. The sale was not completed and MLA is not entitled to the commission.

By the Court.—Judgment affirmed.

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