COURT OF APPEALS
DECISION
DATED AND FILED

December 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP377 **Cir. Ct. No. 2014CV4875**

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

NDC, LLC,

PLAINTIFF-APPELLANT,

V.

WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. NDC appeals the circuit court's order denying NDC's claim alleging that there was a binding real estate purchase contract between NDC and the Wisconsin Department of Transportation and seeking specific performance on that contract. As we understand the situation, NDC seeks

to hold DOT to what all now agree was DOT's unreasonably low initial $90,500 offering price, so that NDC is in a better position to challenge that amount and receive a higher amount for the property and attorney's fees relating to that effort. After holding a bench trial, the circuit court rejected NDC's request for specific performance on several alternative grounds. We focus on two. First, the court made a factual finding that NDC rejected DOT's $90,500 offer to contract.[1] Second, the court concluded that, even assuming NDC accepted DOT's $90,500 offer, that acceptance was conditioned on a further acceptance by DOT, which did not happen. NDC fails to persuade us that the circuit court erred in either respect. Accordingly, we affirm based on each of these alternative grounds.

Background

¶2 As part of a road construction project, DOT sought to acquire a portion of NDC's property through eminent domain under WIS. STAT. § 32.05.[2] Pursuant to the statutory process, DOT sent a letter and a purchase agreement to NDC. Under the agreement, DOT would pay NDC $90,500 for the property DOT sought to acquire.[3] The letter indicated that, if the $90,500 price was acceptable to NDC, then NDC should sign and date an enclosed purchase agreement. The

[1] We sometimes speak in terms of DOT's "offer to contract" or DOT's "$90,500 offer." However, this language is shorthand for something more complicated. As explained in the text in Section B., we question whether this was a true offer. DOT offered NDC the opportunity to contract at the $90,500 price, which would require two further acts: NDC signing the agreement with the $90,500 price and, then, DOT signing that same agreement.

[2] All references to the Wisconsin Statutes are to the 2013-14 version, the current version. There have been no changes in the applicable statutes during any time relevant to our analysis.

[3] Consistent with the way the parties discuss the facts, when we refer to actions of "DOT" in this opinion, we include DOT's non-State-employee agents. NDC explains in its briefing that DOT used a company called Single Source, Inc., to provide negotiation and acquisition services.

purchase agreement stated that the agreement would not be binding unless signed by DOT within 60 days after NDC signed the agreement.

¶3 The circuit court found that, after receiving the purchase agreement with the $90,500 price, an NDC representative made oral statements to DOT communicating NDC's rejection. These included statements during a February 20, 2014 meeting involving DOT, NDC, and an NDC appraiser. The statements the circuit court expressly or implicitly accepted as true were that the NDC representative informed DOT that $90,500 was "ridiculously low," that NDC was not going to "accept an amount that wasn't fair," and, more specifically, that NDC was not going to accept the $90,500 offer. In addition to these oral statements by NDC, on March 31, 2014, NDC's appraiser sent a written appraisal to DOT valuing NDC's property at $854,700.

¶4 On April 17, 2014, NDC did an about-face. NDC wrote to DOT stating that NDC had decided to accept the $90,500 offer and included the purchase agreement NDC had received from DOT, now signed by NDC. DOT did not sign the purchase agreement. Instead, DOT advised NDC that it was willing to raise the offering price to $250,000.

¶5 NDC took the position that DOT had made a $90,500 offer and that NDC had accepted that offer by signing and returning the purchase agreement, resulting in an enforceable contract at the $90,500 price. As indicated above, NDC sought specific performance of the $90,500 amount, and the case proceeded to a bench trial. NDC explains on appeal that the reason it would seek specific performance on a contract for $90,500, even after DOT offered $250,000, relates to the compensation award NDC believes it could receive from a jury and the

method under which attorney's fees are calculated and awarded in eminent domain cases.

¶6 DOT maintained, for several reasons, that there was no valid contract. The circuit court agreed with DOT. The court found that NDC rejected DOT's $90,500 offer by NDC's oral statements and by sending NDC's appraisal to DOT. In addition, the court concluded that, even assuming NDC accepted the $90,500 offer price, there was no enforceable contract without DOT's signature on the $90,500 purchase agreement.

Discussion

¶7 NDC argues that DOT is bound by an agreement to purchase NDC's property for $90,500. NDC argues that it is entitled to specific performance in the sense that DOT must proceed as if it has offered, and NDC has accepted, DOT's $90,500 offering price for the property. If NDC were to receive a circuit court order for specific performance, NDC believes it could then challenge the $90,500 amount as too low and receive additional compensation and attorney's fees.

¶8 As an initial matter, we note that, although eminent domain procedures are, to a large extent, controlled by statutes, NDC does not, for the most part, base its argument on statutory provisions. With one exception, discussed in paragraph 22 below, NDC does not argue that, under a proper construction of applicable statutes, it is entitled to the relief it seeks. Rather, NDC frames its arguments in terms of general contract law. Accordingly, we briefly state basic contract law principles and then, with the exception noted, address each of NDC's non-statutory arguments.

¶9 "A valid contract requires an offer, acceptance and consideration." ***Piaskoski & Assocs. v. Ricciardi***, 2004 WI App 152, ¶7, 275 Wis. 2d 650, 686 N.W.2d 675. "Offer and acceptance exist when the parties mutually express assent ...." ***Id.*** Whether the parties assented is a factual question. ***Id.*** We uphold a circuit court's factual findings unless those findings are clearly erroneous. *See* ***id.*** (citing WIS. STAT. § 805.17(2)). If the material facts are undisputed, however, the existence of a contract is a question of law for de novo review. ***Id.***

A. Circuit Court's Factual Finding That NDC Rejected The $90,500 Offer

¶10 We begin with the circuit court's factual finding that NDC rejected DOT's $90,500 offer by NDC's oral statements and by sending NDC's much higher appraisal to DOT. NDC appears to challenge this finding as clearly erroneous, but, in doing so, NDC seems to misconstrue what the circuit court did. NDC frames the issue as the circuit court's making an erroneous finding that NDC made a "counter-offer." NDC's underlying assumption is that there are just two options: either NDC *accepted* DOT's $90,500 offer or NDC *counter-offered* with a higher amount. However, the circuit court plainly found that NDC rejected DOT's $90,500 offer. The circuit court did not find, or rely on a finding, that NDC made a counteroffer. To the extent the circuit court discussed the possibility of a counteroffer, it merely noted as an aside that "[a]t best [notifying DOT about the $854,700 appraisal] could be considered a counter offer."

¶11 When we look at the rest of NDC's briefing on this topic, we see two ways in which NDC appears to challenge the circuit court's finding that NDC rejected DOT's $90,500 offer. Neither argument is persuasive.

¶12 First, as we understand it, NDC argues that the circuit court erred by relying on NDC's oral statements because the statements were too general to

indicate a rejection. We disagree, and observe that NDC cites no authority for the proposition that more specific statements would be necessary. NDC relies on the RESTATEMENT (SECOND) OF CONTRACTS § 38(2) (Am. Law Inst. 1981), but, if anything, this Restatement section cuts against NDC. The Restatement section states that "[a] manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement." RESTATEMENT (SECOND) OF CONTRACTS § 38(2), at 104 (Am. Law Inst. 1981). Here, the circuit court could, and in effect did, reasonably find that NDC's oral statements manifested NDC's intention to reject the $90,500 offer with no indication that NDC intended, inconsistently, to further consider the offer.[4]

¶13 Second, NDC complains that the circuit court's finding that there was a rejection depended on an erroneous underlying factual finding that *NDC itself sent* NDC's appraisal to DOT. NDC argues that this underlying finding was against the great weight and clear preponderance of the evidence, which instead shows that NDC's appraiser, not NDC, inadvertently sent the appraisal to DOT against NDC's directions. This argument fails because, regardless whether sending the appraisal to DOT is attributed to NDC, NDC's earlier oral statements are enough to support the circuit court's finding that NDC had already rejected

[4] As far as we can tell, NDC does not argue that, if the circuit court properly found that NDC rejected the $90,500 offer, NDC was entitled to *withdraw* its rejection and that it did so with its later April 17, 2014 letter purporting to accept the $90,500 offer. Regardless, such an argument appears to lack merit. *See* ***Cass v. Haskins***, 154 Wis. 472, 474, 143 N.W. 162 (1913) ("The general rule is that, where an offer is made and refused, the transaction is closed, and the party refusing cannot by changing his mind create a contract or obligation against the protest of the party making the offer."); RESTATEMENT (SECOND) OF CONTRACTS § 38(1), at 104 (Am. Law Inst. 1981) ("An offeree's power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention.").

DOT's $90,500 offer. There may be additional reasons why NDC's appraisal-related argument fails, but the reason we identify is sufficient to reject it.

B. Circuit Court's Conclusion That There Was No Valid Contract Without DOT's Signature On The Purchase Agreement

¶14 There is an alternative reason to reject NDC's challenge. Our discussion of this alternative reason assumes, for argument's sake, that NDC did not reject DOT's $90,500 offer, but instead, on April 17, 2014, attempted to accept the offer by signing and returning the purchase agreement for that price. However, as we shall see, even under this assumption, the circuit court properly rejected NDC's request for specific performance.

¶15 As noted in the Background section of this opinion, the circuit court concluded that, even assuming NDC had not rejected DOT's $90,500 offer, there could be no enforceable contract without DOT's signature. The circuit court based this conclusion on the language in the purchase agreement requiring DOT's signature. Specifically, the purchase agreement states:

> This agreement is binding upon acceptance by WisDOT as evidenced by the signature of an authorized representative of WisDOT. If this agreement is not accepted by WisDOT within 60 days after Seller's signature, this agreement shall be null and void.

In effect, DOT's offer contains a contingency that NDC could agree to by signing and returning the purchase agreement. Under the contingency, DOT expressly reserves the right to treat the agreement as null and void if DOT does not sign the agreement within 60 days of the date NDC signs the agreement.

¶16 NDC argues that DOT could not present an offer that became a binding agreement only if it was both accepted by NDC and then accepted by

DOT. According to NDC, the letter and purchase agreement sent to NDC must be treated as a complete offer that became binding when NDC signed and returned the purchase agreement. NDC takes the position that DOT could not make its offer contingent on further action by DOT. In NDC's view, the propriety of the contingency is a legal issue subject to de novo review. In NDC's favor, we will assume without deciding that the question is a legal issue and will review it de novo. Still, NDC falls far short of persuading us that the circuit court wrongly concluded that there was no enforceable contract without DOT's signature.

¶17 NDC argues that the circuit court's conclusion is "not supported by basic contract law" and turns "fundamental contract law on its head," but NDC fails to cite any contract law that supports this argument. If anything, NDC's references to basic contract law make us wonder whether DOT's $90,500 offer was, in proper contract parlance, a valid "offer" or, instead, was merely a step in negotiations that were never completed. Regardless, it should be obvious that, if DOT's $90,500 proposal was not in some relevant sense an "offer," it was nonetheless part of negotiations that were never completed, and the parties did not enter into a binding contract.

¶18 The authority that NDC cites appears to cut against NDC by suggesting that parties may impose whatever contract conditions they like and, in such situations, the question, if any, is what the parties intended. *See* ***Skycom Corp. v. Telstar Corp.***, 813 F.2d 810, 814-15 (7th Cir. 1987) (interpreting Wisconsin law). Here, we see no clearer indication of intent than the unambiguous language in the purchase agreement stating that DOT's signature was required before the agreement would become binding.

¶19 We do not mean to suggest that it never matters whether something is or is not an "offer." Here, for example, if NDC had signed the purchase agreement but DOT failed to sign it within 60 days, and DOT later attempted to enforce the agreement over NDC's objection, DOT would lose. In that situation, NDC could correctly argue that DOT's initial proposal was not an "offer" that was accepted when NDC signed it and, therefore, there was no offer and acceptance within the meaning of contract law.

¶20 In a distinct but closely related argument, NDC asks us to infer DOT's intent. NDC argues that, when the purchase agreement is considered along with DOT's supporting appraisal and cover letter making reference to an "offer," the documents viewed as a whole show that DOT intended to make a valid offer that would be binding upon NDC's signature. We disagree. Even when we consider all of the offer-related materials, we agree with the circuit court that the unambiguous language in the purchase agreement makes clear DOT's intent that there be no binding agreement without further action by DOT.

¶21 NDC points to evidence that, in at least one other acquisition for the same highway project, DOT closed a transaction without signing the purchase agreement or adhering to other formalities. But NDC provides no legally cognizable reason why extrinsic evidence, such as DOT's practice in other transactions, should control over the unambiguous contract language before us. *Cf.* ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476 ("'If the contract is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence.'" (quoted source omitted)). Moreover, the example NDC cites may be nothing more than DOT providing compensation when it was not

legally bound to do so. That situation would say nothing about what DOT is *required* to do in this case.

¶22 Finally, NDC makes one statutory argument.[5] NDC argues that there is nothing in the applicable eminent domain statute allowing DOT to make the type of conditional offer DOT made here. However, NDC fails to present a persuasive argument as to why the statutes must expressly authorize the type of conditional offer at issue here. NDC points to nothing in the statutes that plainly prohibits such a practice. The most pertinent statutory language brought to our attention seemingly gives DOT and property owners the ability to agree to conditions that are not specified in the statutes. WISCONSIN STAT. § 32.05(2a) authorizes a condemnor to "contract to pay the items of compensation ... in one or more installments on such conditions as the condemnor and property owners may agree." We see nothing in this language prohibiting the condition at issue here.

Conclusion

¶23 For the reasons stated above, we affirm the circuit court's order denying NDC's claim for specific performance. Because we resolve this appeal on other grounds, we need not address DOT's argument that NDC's claim for specific performance is barred by sovereign immunity.

[5] If NDC means to make other statutory arguments, we consider them insufficiently developed. We note that the pertinent parts of NDC's briefing consist of one paragraph in NDC's main brief along with more or less the same paragraph repeated in its reply brief. In any event, NDC's statutory arguments could affect only our second, alternative ground for affirming the circuit court.

By the Court.—Order affirmed.

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