

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 17, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1500

Cir. Ct. No. 2015CV236

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

SCOTT WEIGERT,

PLAINTIFF-APPELLANT,

V.

HEARTLAND FINANCIAL USA, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County:
TERENCE T. BOURKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Scott Weigert appeals an order granting the motion of Heartland Financial USA, Inc., (the Bank) to dismiss Weigert's complaint alleging that the Bank breached a real estate sales contract. We agree with the circuit court that there was no breach because there was no contract. We affirm.

¶2 Weigert expressed interest in buying four real estate properties from the Bank. On April 9, 2015, a Bank employee sent Weigert the following email:

The Bank asks that you present a formal offer to purchase for the four properties for \$165,000. The offer should clearly state that the properties are sold in the “as is” “where is” condition with no warranties by the Bank.... I’m assuming this is a cash offer, or at least the Bank will not be financing? We’d like to close by 4/30 if possible. We’d like to identify the sale prices for the individual properties in the offer as follows:

Walton Drive—\$41,250

8th Street, Manitowoc—\$41,250

32 Hughes Street—\$31,300

16th Street—\$51,200

Once presented, the Bank will review and accept the offer if ... the offer is drafted as stated above.

On April 10, Weigert replied by email that he would “have the offer to [the Bank] no later than Tuesday [April 14] morning.”

¶3 On April 14, before Weigert had presented the requested offer, the employee asked him if he would consider excluding one property from the deal. Weigert said he would only if the Bank donated that parcel to his church. The employee said she would consult her superiors and let him know.

¶4 On April 15, the employee advised Weigert that the Bank would not accept any offer from him on the properties. A Bank vice-president explained that Weigert had tendered no formal purchase agreement, his proposed alternative to excluding a property was not acceptable to the Bank, and the Bank since had accepted other formal offers.

¶5 Weigert filed suit, seeking specific performance of the contract he alleged the e-mail exchange created. The Bank moved to dismiss his claim. Finding that a formal offer was an “acceptable and reasonable demand for a commercial enterprise to make,” the circuit court granted the Bank’s motion. Weigert appeals.

¶6 A motion to dismiss a complaint for failure to state a claim upon which relief may be granted tests the legal sufficiency of the pleading. *Evans v. Cameron*, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985). We independently review the complaint to determine whether, liberally construing the facts alleged and the inferences reasonably drawn therefrom, it is quite clear that under no conditions can the plaintiff recover. *Bartley v. Thompson*, 198 Wis. 2d 323, 332, 542 N.W.2d 227 (Ct. App. 1995).

¶7 Weigert contends the April 9 and 10 e-mail exchange was an enforceable executory contract—“one in which the parties have bound themselves to future activity that is not yet completed.” *Gaugert v. Duve*, 217 Wis. 2d 164, 178, 579 N.W.2d 746 (Ct. App. 1998).

¶8 “Where the facts are undisputed, the existence of a contract is a question of law that we review independently.” *Kubichek v. Kotecki*, 2011 WI App 32, ¶34, 332 Wis. 2d 522, 796 N.W.2d 858. Both offer and acceptance are necessary for creation of contract. *Eisenberg v. Continental Cas. Co.*, 48 Wis. 2d 637, 652, 180 N.W.2d 726 (1970). To be enforceable, a contract’s basic terms and requirements must be definite and certain. *Herder Hallmark Consultants, Inc. v. Regnier Consulting Grp., Inc.*, 2004 WI App 134, ¶8, 275 Wis. 2d 349, 685 N.W.2d 564.

¶9 The Bank asked Weigert for a formal offer containing specific terms. If anything, Weigert's April 10 response was but an unenforceable agreement to agree at a future time. *See Dunlop v. Laitsch*, 16 Wis. 2d 36, 42, 113 N.W.2d 551 (1962). Then, before he presented a formal offer, the Bank amended, and thus revoked, its prior offer to ask that he remove one parcel from the deal they were negotiating. Weigert's counter proposal asking the Bank to donate a parcel served as a rejection of the Bank's amended offer. The e-mail exchange also does not satisfy the particularities of Wisconsin's Statute of Frauds, WIS. STAT. § 706.02 (2013-14).¹ An enforceable contract was not formed.

¶10 Weigert also claims the Bank did not act in good faith, thus excusing his failure to present a formal offer within the parties' agreed-upon deadline. He asserts that, in reliance on the Bank employee's statement that she would get back to him about donating a parcel, he reasonably believed that he could wait to submit an offer incorporating amended terms.

¶11 We agree that there is an implied duty of good faith and fair dealing in every contract. *LDC-728 Milwaukee, LLC v. Raettig*, 2006 WI App 258, ¶11, 297 Wis. 2d 794, 727 N.W.2d 82. The flaw in Weigert's argument, though, is that there was no contract here. The complaint was properly dismissed.

By the Court.—Order affirmed.

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

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

