COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1084 **Cir. Ct. No. 2002CV411**

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

MARK R. ZWEBER,

PLAINTIFF-APPELLANT,

V.

MELAR LTD., INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Mark Zweber appeals an order granting Melar Ltd., Inc.'s, motion for summary judgment. Zweber contends: (1) the circuit court erred when it found that the real estate sales contract between Zweber and Melar was unenforceable because it violated the statute of frauds and essential terms were indefinite; (2) even if the contract was unenforceable, the sale was

enforceable under the promissory estoppel doctrine. Because we conclude the contract is unenforceable, we affirm that portion of the court's descision. However, we reverse and remand to the circuit court to determine Zweber's promissory estoppel claim.

BACKGROUND

¶2 After prior unsuccessful negotiations, Zweber and Melar entered into a written purchase agreement for the sale of Melar's real estate lots to Zweber. The purchase agreement, which included a $200,000 down payment, required the balance of the contract to be paid off on a per lot basis as Melar released individual lots to Zweber.

¶3 The purchase agreement contained several ambiguities, which are the subject of this appeal. First, the purchase agreement permitted Melar to continue marketing and selling the lots until the closing. With this in mind, it stated that, "Should there be fewer than 370 lots, the price of $1,200,000 shall be reduced by $3,250 per lot at closing." However, the purchase agreement failed to state whether the reduction should be taken from the down payment or the land contract balance. Another ambiguity involved the number of lots involved in the sale. Although Melar actually owned 381 lots, the purchase agreement never referenced more than 370 lots. Further, it failed to identify which of the 381 lots were actually being sold.

¶4 Closing on the sale never occurred, and Zweber filed suit against Melar, contending the purchase agreement was a valid and enforceable contract despite the ambiguities. Zweber sought damages and specific performance. Alternatively, Zweber argued that the sale should be enforced under the promissory estoppel doctrine. Melar moved for summary judgment, countering

that the purchase agreement was not an enforceable contract and was unenforceable by any other means. The circuit court agreed with Melar and granted the motion, finding the contract unenforceable and in violation of the statute of frauds. The court also granted summary judgment for Melar on Zweber's promissory estoppel claim.

STANDARD OF REVIEW

¶5 We review summary judgment without deference, using the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.[1] Our method of analysis of summary judgment is well documented, and it will not be repeated here. *See e.g.*, ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Application of a statute to an undisputed set of facts is a question of law we review without deference. ***World Wide Prosthetic Supply, Inc. v. Mikulsky***, 2002 WI 26, ¶8, 251 Wis. 2d 45, 640 N.W.2d 764. The construction of a written contract is also a question of law we review without deference. ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (Ct. App. 1987).

DISCUSSION

¶6 We first address whether the contract violated the statute of frauds. The statute of frauds exists to prevent subsequent disputes by requiring that parties produce reliable written evidence of the existence and terms of the contract to

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

prevent enforcement through fraud or perjury of contracts that do not exist. ***In re Paulson***, 252 Wis. 161, 164, 31 N.W.2d 182 (1948); RESTATEMENT (SECOND) OF CONTRACTS § 131, cmt. C (1981). To satisfy the statute of frauds in Wisconsin, a document evidencing a conveyance of property must describe the property with reasonable certainty. WIS. STAT. § 706.02(1)(b); ***Wiegand v. Gissal***, 28 Wis. 2d 488, 492, 137 N.W.2d 412 (1965). The description must be certain enough to readily identify the property. WIS. STAT. § 706.02(1).

¶7 The description of the property in the purchase agreement between Zweber and Melar is not sufficient to satisfy the statute of frauds. The document describes the property to be conveyed as "Loch Lomond Lots owned by Melar Ltd., Inc.," and there is no street address or legal description. One could reasonably infer that this description includes all 381 of the lots owned by Melar, but one could also reasonably infer it includes less than 381. The purchase agreement only references 370 lots, but from the given description, it is impossible to determine which 370 out of a possible 381 lots are actually being sold. Because the contract document does not provide a sufficient description to identify the property with reasonable certainty, the contract does not satisfy the statute of frauds.

¶8 Zweber argues that the title commitment, a separate document from the purchase agreement, should be used to assist in identifying the property and satisfying the statute of frauds. He relies on the description of 361 lots contained in the title commitment to support the contention that "the lots Melar intended to transfer to Zweber were the 361 lots he owned … at the time of closing." A court may look to extrinsic evidence to satisfy the statute of frauds if property is not sufficiently identified in the contract. WIS. STAT. § 706.02(2). However, the use of extrinsic evidence is limited to identifying the real estate. ***Stuesser v. Ebel***, 19

Wis. 2d 591, 594, 120 N.W.2d 679 (1963). Extrinsic evidence cannot be used to supplement the description or establish the parties' intent. ***Thiel v. Jahns***, 252 Wis. 27, 30-31, 30 N.W.2d 189 (1947).

¶9 We reject Zweber's contention that we would only be looking to identify the property by turning to the title commitment. Using the title commitment as Zweber requests would move beyond identification of the property. In actuality, Zweber asks us to turn to the title commitment to establish the parties' intent as to how many lots are to be transferred and a description of which lots are to be transferred. Thus, this extrinsic evidence cannot be used to satisfy the statute of frauds. Additionally, Zweber very briefly argues that the title commitment should be analyzed as a component of the contract and not as extrinsic evidence. Because it is undisputed that the title commitment was not in existence at the time of the agreement, we reject this argument.

¶10 Further, the purchase agreement is not an enforceable contract because it lacks essential terms. An enforceable contract requires an offer, acceptance and consideration resulting from a meeting of the minds. ***American Nat'l Prop. & Cas. Co. v. Nersesian***, 2004 WI App 215, ¶16, 277 Wis. 2d 430, 689 N.W.2d 922. To form a contract, there must be a meeting of the minds upon all essential terms. ***Todorovich v. Kinnickinnic Mut. Loan & Bldg. Ass'n***, 238 Wis. 39, 42, 298 N.W. 226 (1941). However, a literal, subjective meeting of the minds is not required, and we instead look to the terms of the agreement to discern the parties' intent. ***Kernz v. J. L. French Corp.***, 2003 WI App 140, ¶20, 266 Wis. 2d 124, 667 N.W.2d 751 (citations omitted). Thus,

> [i]t must be borne in mind that the office of judicial construction is not to make contracts or to reform them, but to determine what the parties contracted to do; not necessarily what they intended to agree to, but what, in a

> legal sense, they did agree to, as evidenced by the language they saw fit to use.

Marion v. Orson's Camera Ctrs., Inc., 29 Wis. 2d 339, 345, 138 N.W.2d 733 (1997) (quoting ***Wisconsin Marine & Fire Ins. Co. Bank v. Wilkin,*** 95 Wis. 111, 115, 69 N.W. 354 (1897)).

¶11 Contract terms must be definite, so the basic obligations of the parties may be ascertained. ***Goebel v. National Exchangors***, ***Inc.,*** 88 Wis. 2d 596, 615, 277 N.W.2d 755 (1979). If an essential term is indefinite, then the contract is unenforceable. ***Management Computer Servs.***, ***Inc., v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (1996). In contracts for the sale of real estate, payment terms are essential. ***Thiel v. Jahns***, 252 Wis. 27, 30, 30 N.W.2d 189 (1947).

¶12 Applying this standard, the contract between Zweber and Melar is unenforceable. The parties contemplated that there might be fewer than 370 lots available at the closing and that the price would be reduced by $3,250 per lot; however, the purchase agreement failed to identify whether the price reduction was to be deducted from the down payment or the land contract balance. Zweber contends the contract was clear that the reduction was to be taken from the down payment, but we disagree. Zweber points to language in the contract that states, "Should there be fewer than 370 lots, the price of $1,200,000 shall be reduced by $3,250 per lot at closing." Zweber argues that this obviously meant that the deduction was to be taken from the down payment because "no other sums remained for reduction at closing." Certainly this is a reasonable interpretation of the language, but it is also reasonable to determine that this language means the

deduction should be taken from the land contract balance. Therefore, the essential term of price is indefinite, and the contract is unenforceable.[2] Because the purchase agreement is not an enforceable contract, we do not address Zweber's contention that Melar was in breach of contract.

¶13 Finally, Zweber argues that under the doctrine of promissory estoppel, the circuit court should have enforced the definite promise Melar made to Zweber. Melar's motion for summary judgment never mentioned the claim under promissory estoppel, and Zweber accordingly never discussed this claim in his reply. The trial court, however, concluded that because the contract was invalid, Zweber could not recover under promissory estoppel and dismissed his claim. If a plaintiff has a contract claim, then the plaintiff is generally restricted to recovery under the contract. ***Kramer v. Alpine Valley Resort, Inc.***, 108 Wis. 2d 417, 425, 321 N.W.2d 293 (1982). However, a party may be able to recover under promissory estoppel when no contract exists. ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, ¶53, 262 Wis. 2d 127, 663 N.W.2d 715. At present, because the contract is invalid, there is no contract claim barring recovery under promissory estoppel.

¶14 It is unclear whether the underlying facts are undisputed as to the elements for promissory estoppel. Whether promissory estoppel has been proven involves a question of fact for the circuit court. *See* ***U.S. Oil Co. v. Midwest Auto***

[2] Zweber also argues that the contract should be reformed due to a mutual mistake regarding the reduction of the price. For the reformation of an agreement due to a mutual mistake, the original contract must be enforceable or there can be no reformation no matter how clearly the mistake is established. ***Petesch v. Hambach***, 48 Wis. 443, 446-47, 4 N.W. 565 (1880). Because the purchase agreement is not an enforceable contract, we reject Zweber's argument that the contract should be reformed due to a mutual mistake.

Care Servs., 150 Wis. 2d 80, 89, 440 N.W.2d 825 (Ct. App. 1989). Thus, we reverse and remand this issue to the trial court for further proceedings to determine Zweber's promissory estoppel claim.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings. Costs are denied to both parties on appeal.

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