COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-1352

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

JAMES G. THOMA,

PLAINTIFF-APPELLANT,

V.

FIRSTAR BANK MILWAUKEE, N.A.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. James G. Thoma appeals from a judgment dismissing his claims against Firstar Bank Milwaukee, N.A. Because we conclude that Thoma rescinded by his conduct the real estate purchase contract between the parties, the trial court properly granted Firstar summary judgment on all of Thoma's claims arising out of the failed real estate transaction.

The following facts are undisputed by the parties. In August 1992, Thoma offered to purchase the former Universal Foundry site in Oshkosh from Firstar, which owned it as a result of a mortgage foreclosure. The parties thereafter entered into a contract for sale of the real estate (the August 1992 contract) and Thoma paid a total of $10,000 in earnest money. The contract contained a contingency which permitted Thoma to have the property evaluated for environmental hazards and if he was not satisfied with the results of the environmental inspection, the purchase contract would be void. Thoma's environmental consultant opined that the property was not contaminated.

Although Thoma believed that a dust collection system on the property was included in the purchase price, the day before the October 15, 1992 closing, Thoma discovered that the system had been removed pursuant to a sale contract with another party. In an October 14 letter to Firstar, Thoma's counsel advised that Thoma insisted upon reinstallation of the dust collection system and expressed Thoma's willingness to extend the closing date in order to accomplish that. In response, Firstar advised that the dust collection equipment was not included in the real estate sale contract because it had been sold the previous year. However, Firstar still wanted to close the transaction with Thoma.

The removal of the dust collection system created environmental contamination at the building and Thoma had his environmental consultant inspect the property again. The closing was delayed while the parties disputed whether the dust collection system was included in the contract and Thoma evaluated the contamination resulting from removal of the dust system.

By letter dated November 11, Thoma advised Firstar that he intended to close the transaction once the environmental consultant opined that the

environmental contamination had been removed. Thereafter, Thoma learned about alleged illegal dumping of chemicals on the property. The real estate sale never closed, and in February 1993, Firstar directed its real estate broker to return Thoma's earnest money to him. Without reserving any rights, Thoma deposited the returned earnest money. Thereafter, Thoma did not have any contact with Firstar regarding the status of the property although he did periodically inquire of the Department of Natural Resources regarding the progress of the contamination removal.

Thoma submitted a new offer to purchase in September 1994, almost two years after the failed closing. Firstar rejected the new offer. Thoma sued Firstar for damages in October 1994, alleging breach of the August 1992 contract (and seeking enforcement of the same), misrepresentation, and a violation of § 100.18, STATS. The trial court granted Firstar summary judgment and dismissed Thoma's claims. Thoma appeals.

We review decisions on summary judgment by 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); *see* § 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.

We address the rescission issue first. Whether a contract was rescinded is a question of fact to be determined from the parties' intent as expressed in their words, act or conduct. *See* ***Ricchio v. Oberst,*** 76 Wis.2d 545, 555, 251

N.W.2d 781, 786 (1977). We look to the parties' summary judgment submissions to see whether they establish the existence of a material factual dispute relating to rescission of the contract. Based upon our independent review of the record, we conclude that there is no factual dispute that Thoma rescinded the August 1992 contract by his conduct.

In support of its motion for summary judgment, Firstar submitted the affidavit of a Firstar vice president stating that the earnest money was returned to Thoma, Thoma did not contact Firstar for over two years thereafter to assert any rights relating to the August 1992 contract, and Thoma submitted a new offer to purchase in September 1994 rather than seeking to enforce the August 1992 contract. Firstar also submitted a portion of Thoma's deposition in which he affirmed receiving the earnest money even though he disagreed with Firstar's view of the status of the August 1992 contract. Firstar also submitted a portion of Thoma's environmental consultant's deposition in which he stated that he did not have any contact with Thoma after he presented test results relative to the contamination which occurred when the dust collection equipment was removed.

In response to Firstar's summary judgment motion, Thoma submitted deposition excerpts outlining disputes regarding performance of the August 1992 contract. However, Thoma did not submit any materials countering the conduct alleged by Firstar or addressing his intentions when he accepted return of the earnest money. We note that a portion of Thoma's deposition excerpt states that he asked his attorney whether he would create problems if he deposited the earnest money check. Counsel advised that he would not have any problems if Thoma did so. However, the summary judgment record does not contain any submissions setting forth what problems Thoma was concerned about, e.g., rescission of the contract,

waiver of rights under the contract, etc., to create a factual issue regarding his intent with regard to the August 1992 contract.

At the summary judgment hearing, Thoma argued that he did not intend to rescind the August 1992 contract. However, the record does not contain any submission addressing Thoma's intent. In order to counter Firstar's claim that there were no material facts in dispute, Thoma was required to submit affidavits or other proofs to show that a dispute existed relating to his retention of the earnest money and his other conduct. *See* ***Sherry v. Salvo,*** 205 Wis.2d 14, 30, 555 N.W.2d 402, 408 (Ct. App. 1996).

As the summary judgment record stands, Firstar's rendition of Thoma's deposit of the returned earnest money and his conduct subsequent thereto is undisputed. Consequently, the trial court did not err in concluding that Thoma rescinded the August 1992 contract by accepting return of the earnest money in February 1993, submitting a new offer to purchase in September 1994 and not pursuing any remedies until his October 1994 suit. The court concluded that it was undisputed that Thoma "walk[ed] away from the deal."

This case is similar to ***Hausmann v. Wittemann,*** 26 Wis.2d 482, 132 N.W.2d 537 (1965). The parties entered into a contract in 1954. After a dispute arose between the parties regarding the presence of a tenant on the property, Wittemann returned the earnest money to Hausmann. *See* ***id***. at 484, 132 N.W.2d at 537. Seven years later, the tenant vacated the property and Hausmann wrote to Wittemann suggesting that the transaction could be completed. *See* ***id.*** at 483-84, 132 N.W.2d at 537-38. Wittemann declined and Hausmann sought specific performance to compel Wittemann to comply with the terms of a real estate contract;

Wittemann contended that the contract was rescinded by mutual mistake. *See* ***id.*** at 483, 132 N.W.2d at 537.

The supreme court noted that the "decisive act" was the return of the earnest money and its receipt and retention. This evidenced an intention to terminate the sale contract rather than postpone the transaction pending resolution of the problem with the tenant. *See* ***id.*** at 486, 132 N.W.2d at 538-39. In accepting the check, Hausmann "manifested an acquiescence in the termination of the contractual relationship." ***Id.*** Return and retention of the earnest money, the failure to take any legal action to enforce the contract, and inactivity by Hausmann when he learned that another party had made an offer on the property were inconsistent with a continued contractual relationship and were "conclusive evidence of an intent to consider the transaction at an end." *See* ***id.*** at 486-87, 132 N.W.2d at 539.

Similarly, Thoma accepted return of the earnest money, took no steps to enforce his claimed rights relating to the August 1992 contract and presented a new offer to purchase in September 1994 rather than relying upon the August 1992 contract. Thoma's conduct is inconsistent with any claim that the August 1992 contract was extant subsequent to receipt and retention of the earnest money.

Thoma's motion for reconsideration in the trial court, which included supplemental materials aimed at creating a factual dispute, is unavailing.

> Motions for reconsideration serve a limited function; to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment.... Nor should a motion for

> reconsideration serve as the occasion to tender new legal theories for the first time.

Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir. 1987) (quoting ***Keene Corp. v. International Fidelity Ins. Co.,*** 561 F. Supp. 656, 665-66 (N.D. Ill. 1982), *aff'd,* 736 F.2d 388 (7th Cir. 1984)).

The trial court considered the supplemental materials in its reconsideration decision and concluded that they did not create a material issue of fact. However, we conclude that the materials were outside the scope of the summary judgment proceeding and exceeded the limited purpose of reconsideration motions. Therefore, we do not address Thoma's argument that the materials created a factual issue which should have caused the trial court to reconsider its summary judgment decision.

Having concluded that Thoma rescinded the August 1992 contract, we need not address the trial court's other rulings regarding accord and satisfaction and waiver. We also need not address Thoma's claims of misrepresentation and violation of § 100.18, STATS., because one cannot rescind and enforce or seek the benefits of the same contract. *See* ***Seidling v. Unichem, Inc.,*** 52 Wis.2d 552, 556-57, 191 N.W.2d 205, 208 (1971). An aggrieved purchaser may elect either to rescind the contract or affirm the contract and seek damages. *See* ***First Nat'l Bank & Trust Co. v. Notte,*** 97 Wis.2d 207, 225, 293 N.W.2d 530, 539 (1980). The effect of rescission is to restore the parties to the positions they occupied in the absence of a contract. *See* ***Seidling,*** 52 Wis.2d at 557-58, 191 N.W.2d at 208-09.

Thoma argues that a provision of the August 1992 contract permitted return of the earnest money without sacrifice of any rights he had under the

contract. The contract states that "[d]isbursement of earnest money does not determine the legal rights of the parties in relation to this agreement." Thoma cites ***Yee v. Giuffre,*** 176 Wis.2d 189, 499 N.W.2d 926 (Ct. App. 1993), in support of his argument.

Yee is distinguishable. In ***Yee,*** the parties' real estate transaction faltered and return of the earnest money was demanded thirty days after the missed closing date. Within a week thereafter, Yee sued Giuffre for breach of contract. *See* ***id.*** at 191, 499 N.W.2d at 927. Clearly, Yee pursued his remedies against Giuffre notwithstanding his demand for return of the earnest money. In contrast, Thoma accepted return of the earnest money and his conduct from that point forward clearly indicated that he walked away from the August 1992 contract.

By the Court.—Judgment affirmed.

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