COURT OF APPEALS
DECISION
DATED AND RELEASED

May 21, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1832

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

TIMOTHY C. GAHAGAN AND SANDRA J. GAHAGAN,

PLAINTIFFS-RESPONDENTS-CROSS APPELLANTS,

V.

SCOTT W. JAKUBOWSKI,

DEFENDANT,

KARL W. STAHLE, IRENE STAHLE AND RICHARD K. STAHLE,

DEFENDANTS-APPELLANTS-CROSS RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Reversed.*

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

BROWN, J. An owner of two lots near Okauchee Lake declared a scenic easement on the "lakefront parcel" to preserve the lake views for owners of the "back parcel." Although the easement was recorded, because the owner declared the easement just three days before he closed on the sale of the lakefront lot and he never told the new owners about the easement, the circuit court applied the doctrine of "equitable conversion" and removed the easement from the lakefront lot on behalf of the misinformed new owners.

We hold that the circuit court misapplied the doctrine of equitable conversion. Since the beneficiaries of the easement, the back lot owners, are innocent third parties who did not know that this easement was wrongfully declared, the owners of the lakefront parcel are bound to the presumption that this otherwise properly recorded easement is valid. The lakefront lot owners are not entitled to any equitable remedies. Instead, they are limited to pursuing a legal remedy against the seller for his failure to disclose the existence of this easement.

BACKGROUND

The facts are essentially undisputed. This case involves two real estate transactions involving the same seller, Scott W. Jakubowski, who owned two adjoining parcels near Okauchee Lake. One of the parcels, we refer to it as the "lakefront parcel," had frontage along the lake. The other parcel, we call it the "back parcel," was near the lake but was situated behind and to the side of the lakefront parcel.

In early 1990, Jakubowski entered into negotiations to sell these two lots. Timothy C. and Sandra J. Gahagan entered into a purchase agreement for the lakefront parcel on February 7, 1990. Around this time, Jakubowski was also

making arrangements with Karl W., Irene and Richard K. Stahle to sell them the back parcel.

During the negotiations for the back parcel, Jakubowski placed a scenic easement on the lakefront parcel for the benefit of the back parcel. The stated purpose of the easement was to give the back parcel owners "a natural, unobstructed view of Okauchee Lake ...." The easement imposed various duties on the owners of the lakefront parcel to maintain the easement. Jakubowski declared this easement on April 27, 1990; it was recorded that day.

The Stahles closed on the back parcel on May 10, 1990, and recorded that deed on May 29, 1990. The deed to the back parcel specifically describes that it includes the "scenic easement ... dated April 27, 1990."

Three days after Jakubowski declared the easement, the Gahagans and Jakubowski closed on the lakefront parcel. This deed was recorded on May 9, 1990. At the time of the closing, the Gahagans did not know that Jakubowski had declared the easement. Although the easement was recorded by the time the Gahagans closed, they explained in their trial briefs that their title report failed to include it.

The Stahles also knew very little about the Jakubowski-Gahagan transaction. The Stahles acknowledge that Jakubowski told Richard that he "had a buyer" for the lakefront parcel. Still, the Stahles deny that they knew any details concerning the sale of the lakefront parcel.

The Gahagans eventually learned about the scenic easement in October 1994 when they received a letter from the Stahles. In it, the Stahles asked the Gahagans to move some trees that had been planted within the easement. The

Stahles expressed concern that as the trees grew, they would be in violation of the easement.

Subsequently, the Gahagans filed suit against Jakubowski and the Stahles. Against Jakubowski, they sought compensatory and punitive damages under a variety of theories related to his misrepresentation about the scenic easement. Against the Stahles, the Gahagans sought to have the easement declared void and the title to their lakefront parcel quieted under the doctrine of equitable conversion. The Stahles filed counterclaims, generally seeking that the easement be declared valid.

After some discovery, the circuit court awarded summary judgment in favor of the Gahagans and against Jakubowski and the Stahles. It found Jakubowski liable as a matter of law for failing to disclose the existence of the scenic easement and set a trial on the matter of damages. With respect to the Gahagans' claims related to the continuing validity of the easement, the court found that Jakubowski never communicated to the Gahagans that the easement existed. Moreover, because Jakubowski declared the easement "just a couple of days before the closing," the court determined that it could apply its equitable powers to set aside the "usual presumption" that the easement was nonetheless valid because it was recorded before the closing on the lakefront parcel. The circuit court therefore entered a judgment which declared the easement "illegal, void and canceled of record."

This appeal only concerns the decision to apply the doctrine of equitable conversion and declare the scenic easement void. The Stahles' basic contention is that the circuit court should have held the Gahagans to the

presumption that the properly recorded easement[1] was controlling and, accordingly, the court should have upheld the easement even in light of Jakubowski's failure to disclose its existence. This issue, which involves the application of undisputed facts to established legal principles, presents a question of law which we review without deference to the circuit court. *See* ***Kania v. Airborne Freight Corp.***, 99 Wis.2d 746, 758, 300 N.W.2d 63, 68 (1981).

The Gahagans have also cross-appealed from the judgment. They challenge the court's decision to permit the Stahles to file a late answer to the amended complaint and to file a late response to the motion for summary judgment.

DISCUSSION

1. Appeal

The Stahles direct us to this state's rule of notice recording. Under § 706.08, STATS., a person who first records an interest in land has priority over persons who later assert a competing interest. *See* ***Kallas v. B & G Realty***, 169 Wis.2d 412, 418, 485 N.W.2d 278, 281 (Ct. App. 1992). The ***Kallas*** court also recognized a corollary to this rule that "'all persons dealing with land are charged with knowledge of the contents of any instrument recorded at length.'" *See* ***id.*** (quoting ***Rielly v. Arnsmeier,*** 220 Wis. 564, 570, 265 N.W 713, 716 (1936)). Applying this rule and the corollary, the Stahles contend that the resolution of this

[1] The circuit court noted in its oral decision that "if anyone had searched the title [of the lakefront parcel], they would not have found this lien—this easement on the property .... It was on the other parcel that went from Jakubowski to the Stahles." This statement suggests that the scenic easement had been improperly recorded. Neither party, however, makes such an allegation in this appeal. Moreover, the Gahagans stated in their complaint (and thus we accept it as true) that the Stahles recorded this easement with the register of deeds. Hence, we presume for our analysis that this easement was properly recorded.

case is simple; the scenic easement is valid because it was recorded *before* the Gahagans closed on the property, took title and recorded their deed.

The Gahagans contend that there are two alternative reasons why the above rule should not apply to them. We address them in turn.

One, the Gahagans note that the presumption within the notice recording is only triggered when the purchasing party is innocent. *See* ***Kordecki v. Rizzo***, 106 Wis.2d 713, 719, 317 N.W.2d 479, 482 (1982). This means that the purchasing party may not have any notice of a "prior conveyance." *See* ***id.*** at 719-20, 317 N.W.2d at 483. Pointing to the Stahles' admission of how they knew that Jakubowski "had a buyer," the Gahagans contend that the Stahles were not innocent; they knew that Jakubowski had previously signed a contract to sell the lakefront parcel and should have known that Jakubowski could not declare this easement.

We reject this theory because it is not supported by the record. All the Stahles knew is that Jakubowski had a buyer. A person with this information would not automatically presume that this meant that Jakubowski had actually signed a purchase agreement. Jakubowski could have only meant that a party was interested in the parcel. Based on what little information they had, the Stahles could rightly assume that Jakubowski would certainly account for the easement in his dealings with the purchasers of the lakefront parcel. We disagree with the Gahagans' suggestion that this little piece of information would have caused the Stahles (or a reasonable person in their position) to suspect that "there was someone out there who eventually might not be happy to have the scenic easement encumber their property" and try to seek out that third party to ensure that the scenic easement would not be a problem.

Second, the Gahagans claim that the doctrine of equitable conversion provides the remedy they seek even if the Stahles are innocent. The doctrine is designed to remedy conflicts that result when the legal and equitable interests in real property are severed between a vendor and vendee, for example, a dispute over the performance of a land contract. *See* W. Lawrence Church, *Equitable Conversion in Wisconsin*, 2 WIS. L. REV. 404, 405 (1970). The supreme court has explained that in the execution of a contract to purchase land, "'the vendee becomes equitable owner of the land.'" *See* ***Mueller v. Novelty Dye Works***, 273 Wis. 501, 504, 78 N.W.2d 881, 883 (1956) (quoted source omitted).

The Gahagans assert that the doctrine of equitable conversion applies here because after they entered into the purchase agreement with Jakubowski, they essentially owned the lakefront parcel (they had the equitable interest) and thus Jakubowski had no power to declare the easement. As the Gahagans explained in their complaint, Jakubowski was "merely retaining the fee title as security for payment of the balance of the purchase price."

We will accept, for the moment, the Gahagans' description of the legal relationship they shared with Jakubowski prior to the closing. And we will assume, without deciding, that this relationship placed legal limitations on Jakubowski's power to act. However, we reject their claim that the doctrine of equitable conversion provides a remedy to their resulting conflict with the Stahles even if the Stahles were innocent third parties to this relationship.

The doctrine of equitable conversion is generally limited to resolving disputes which only involve the vendor and vendee, such as when one becomes incapacitated. *See* ***Anderson v. Nelson***, 38 Wis.2d 509, 517-18, 157 N.W.2d 655, 660 (1968). The doctrine is inapplicable in cases where a conflict has arisen

between the vendee (or the vendor) and a third party who proceeds without knowledge of the relationship between the vendor and the vendee. *See* ***Mueller***, 273 Wis. at 507, 78 N.W.2d at 884. We thus see that the doctrine is inapplicable for the same reason that the notice recording rule is applicable—the Stahles simply had no knowledge that Jakubowski did not have the authority to declare the easement.

In sum, we conclude that the circuit court erred when it applied the doctrine of equitable conversion to void the scenic easement. The Gahagans were bound to this properly recorded easement; it is valid. We therefore reverse that portion of the circuit court's judgment which declared it void.

Of course, while we conclude that the circuit court misused its equitable powers when it voided this properly recorded easement, we emphasize that our decision does not leave the Gahagans without a remedy. As noted above, the circuit court in a separate judgment found that Jakubowski was personally liable for failing to tell the Gahagans at closing that he had declared this easement. So while the Gahagans are without an equitable remedy and must accept this easement on their property, they are entitled to a legal remedy of damages against Jakubowski.

2. Cross-Appeal

We turn briefly to the Gahagans' cross-appeal. It concerns two of the circuit court's rulings, one which permitted the Stahles to file a late answer to the amended complaint and one which permitted the Stahles to file an allegedly late affidavit in response to the motion for summary judgment.

The Gahagans filed an amended complaint on November 7, 1995, adding two additional causes of action. Their motion for summary judgment

followed on January 29, 1996. The parties subsequently entered into a stipulation that required them to mail or fax all documentation related to the summary judgment motion "no later than the close of business on March 6, 1996."

The Stahles' answer to the amended complaint and response to the summary judgment motion did not reach the court until March 8, 1996, as indicated by the clerk of court's date-stamp. However, an affidavit from counsel's secretary, included with the documents, stated that the documents were all mailed on March 6, 1996.

The Gahagans filed a motion to strike the answer to the amended complaint and the response to the summary judgment motion on grounds that they were untimely. The circuit court denied both motions and the Gahagans renew these claims in their cross-appeal. We affirm the circuit court's rulings.

On the issue of the amended complaint, the circuit court stated that there was "excusable neglect" and emphasized that the late reply "would not be prejudicial." In doing so, the court seemed to accept the claims of the Stahles' counsel that the "amended complaint contains substantially all of the same factual allegations as the original complaint does."

We have reviewed the pertinent documents and have confirmed that the circuit court correctly found that the amended complaint contained the same general allegations as the earlier complaint. In fact, the first paragraph of the amended complaint states: "Plaintiffs reiterate and reallege paragraphs 1, 2, 3, 6, 7, 8, 9, 10, 11, and 12 of the original Complaint on file herein." Given the similarity between the complaint and the amended complaint, the circuit court acted well within its discretion when it accepted the late answer; we cannot

imagine how the Gahagans were possibly affected by the Stahles' late answer. *See* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 468, 326 N.W.2d 727, 731 (1982).

Indeed, the amended complaint was so similar in substance to the earlier complaint, we are troubled by the Gahagans' attempt to rely on a hypertechnical procedural flaw to secure victory through a default judgment.

We likewise affirm the circuit court's decision to accept the late response to the motion for summary judgment. The Gahagans base their claim that these documents were late on the fact that the envelope they received containing the response is postmarked March 7, 1996, one day beyond the March 6 deadline. Although the circuit court did not make an express finding about when these documents were mailed, we infer from its ruling that it accepted the affidavit filed by the Stahles' counsel which showed that these documents were mailed on March 6, 1996. Although this affidavit does not state *at what time* they were mailed, perhaps they were mailed after the post office closed, this affidavit supports the court's implicit finding that the documents were mailed by March 6, 1996. We affirm its decision to deny the motion to strike.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.