COURT OF APPEALS DECISION DATED AND FILED

August 18, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

Appeal No. 2024AP1372

Cir. Ct. No. 2023CV124

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

LANDON COLE,

PLAINTIFF-APPELLANT,

V.

COTY LINK,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Barron County: JAMES C. BABLER, Judge. *Reversed and cause remanded with directions*.

Before Stark, P.J., Hruz, and Gill, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Landon Cole appeals a judgment dismissing his claim for specific performance of an agreement, made between himself and Coty

Link, for the sale and purchase of real property. Cole argues that the circuit court erred by denying his summary judgment motion and granting summary judgment to Link as a result of that denial.[1] Specifically, Cole contends that the court erred by concluding that the agreement was ambiguous and unenforceable and that certain contract defenses excused Link from performing on the agreement.

¶2 We conclude that the circuit court erred as a matter of law by not ordering specific performance of the agreement. Accordingly, we reverse the court's denial of summary judgment to Cole and its judgment dismissing Cole's action resulting from its grant of summary judgment to Link. We remand the case for the court to order conveyance of the property to Cole and to determine the extent to which Cole is entitled to insurance proceeds under the agreement.

BACKGROUND

¶3 On February 27, 2023, Cole and Link executed an offer to purchase (the "purchase agreement"), wherein Cole agreed to purchase property located at 102 Knapp Street, Chetek, Wisconsin (the "Property"), from Link for a purchase price of $105,000. The Property is a .14-acre lot with a building on it. The Property was insured and had an insurance coverage limit for the building of $1,069,531.

¶4 In the purchase agreement, Cole acknowledged that he had received a disclosure report from Link regarding the Property's condition and that he agreed to accept "the [P]roperty in its current AS-IS condition." The disclosure

[1] The Honorable J. Michael Bitney denied Cole's summary judgment motion. The Honorable James C. Babler entered the judgment dismissing Cole's action.

report noted that there were structural defects on the Property, and it referred to a structural site observation report of the building on the Property. It also noted that a "spray foam roof" was added in 2022 and that items requiring repair pursuant to federal, state or local regulations included loose siding, "improper sewer … termination," and an unfinished floor and gas line.

¶5 The purchase agreement contains a maintenance provision requiring Link to "maintain the Property … until the earlier of closing or Buyer's occupancy, in materially the same condition it was in as of the date [the offer was made, February 24, 2023], except for ordinary wear and tear and changes agreed upon by Parties." Following the maintenance provision is a provision titled "property damage between acceptance and closing" (the "property damage provision"). (Formatting altered.) That provision addresses property damage that occurs prior to closing as well as the parties' rights and obligations depending on whether the damage is "in an amount not more than five percent of the purchase price" or whether, as relevant here, "the amount of damage exceeds five percent of the purchase price." If the amount of property damage exceeds five percent of the purchase price,

> Seller shall promptly notify Buyer in writing of the damage and this Offer may be terminated at option of Buyer. Should Buyer elect to carry out this Offer despite such damage, Buyer shall be entitled to the insurance proceeds, if any, relating to the damage to the Property, plus a credit towards the purchase price equal to the amount of Seller's deductible on such policy, if any.

¶6 The purchase agreement also includes provisions addressing default, which is defined as "[a] material failure to perform any obligation under this Offer." The agreement provides that if the seller defaults, the buyer may either "sue for specific performance" or "terminate the Offer and request the return of the earnest money, sue for actual damages, or both." In addition to those available remedies, the default provision allows the parties to "seek any other remedies available in law or equity." It further states that both parties "understand that the availability of any judicial remedy will depend upon the circumstances of the situation and the discretion of the courts."

¶7 The parties agreed to a closing date of March 24, 2023. On March 12, 2023, however, the roof of the building on the Property collapsed after a heavy snowfall. Link informed Cole of the collapse, after which Cole told Link that he wished to proceed with the purchase of the Property.[2] Link also filed a claim with his insurer for the damage. Cole and Link agreed to extend the closing date to allow them to further negotiate and for Link "to get insight on insurance." On March 16, 2023, Cole and Link amended the purchase agreement by changing the closing date to April 24, 2023. "All other terms of the offer to purchase" remained the same. (Formatting altered.)

¶8 Both Cole and Link agree that the damage to the Property exceeded five percent of the purchase price. The building on the Property was determined to be a total loss, and, on April 4, 2023, Link applied for and received permission from the City of Chetek to raze the building. Cole believed he was entitled to the insurance proceeds under the purchase agreement, and he requested those proceeds from Link. Because the building was razed, Link informed Cole that he would not proceed to closing.

[2] Although it is undisputed that the building's roof collapsed, we note that the notice that Link provided to Cole said that the building itself "entirely collapsed."

¶9 Because Link did not proceed to closing, Cole filed this action seeking specific performance of the purchase agreement. Cole then moved for summary judgment, arguing that he was entitled to a judgment compelling Link to convey the Property to him and to "deliver the insurance proceeds" to Cole pursuant to the provisions in the purchase agreement. In response, Link argued that the purchase agreement was unenforceable because "the unforeseen and unexpected collapse of the building's roof" made it impossible to carry out the parties' intent when they entered into the purchase agreement. Link also argued that the frustration of purpose doctrine excused him from performance. If the circuit court determined that the purchase agreement was enforceable, Link argued that the court should limit Cole's recovery of insurance proceeds to the amount of the purchase price.

¶10 After a nonevidentiary hearing, the circuit court issued a written decision and order denying Cole's summary judgment motion because the purchase agreement, when read as a whole, was ambiguous and "material issues of fact" existed. The court interpreted the maintenance and property damage provisions together with the provision that Cole accepted the Property "as-is" to conclude that the purchase agreement was ambiguous and, therefore, unenforceable. The court explained that the agreement "contemplates only damage greater than 5%, not damage greater than 100%," and it shows that the parties contracted for "the old building on the lot" and for "the lot as-is[,] but the value of the lot has now increased dramatically" due to "a new structure paid for by the insurance so it is no longer materially the same piece of property."

¶11 The circuit court also concluded that Link was excused from performing on the purchase agreement because an "act of god" made it impossible for him to "deliver what he contracted to deliver" and the "object of the contract

[was] completely destroyed." The court further concluded that Link was excused from performing under the frustration of purpose doctrine, given that his purpose in contracting with Cole was to sell the Property in materially the same condition for the purchase price of $105,000, which he could no longer accomplish.

¶12 Given the circuit court's conclusion that the purchase agreement was unenforceable, Link requested that the court grant summary judgment in his favor, pursuant to WIS. STAT. § 802.08(6) (2023-24),[3] and to dismiss Cole's action. The court agreed, entered a judgment in Link's favor, and dismissed Cole's action. Cole appeals.

DISCUSSION

¶13 We review a circuit court's summary judgment decision de novo, applying the same methodology as the circuit court. *See* ***Tews v. NHI, LLC***, 2010 WI 137, ¶40, 330 Wis. 2d 389, 793 N.W.2d 860. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). Because the court's summary judgment decision involves the denial of the equitable remedy of specific performance, we apply a two-tiered standard of review. *See* ***Pietrowski v. Dufrane***, 2001 WI App 175, ¶5, 247 Wis. 2d 232, 634 N.W.2d 109.

¶14 We review legal issues de novo, ***id.***, but we review the circuit court's decision to deny specific performance for an erroneous exercise of discretion,

[3] All references to the Wisconsin Statutes are to the 2023-24 version.

Ash Park, LLC v. Alexander & Bishop, Ltd., 2010 WI 44, ¶32, 324 Wis. 2d 703, 783 N.W.2d 294. We uphold the circuit court's exercise of discretion unless "it makes an error of law or neglects to base its decision upon the facts of the record." ***Id.*** Before a court orders specific performance, it "must be satisfied that the claim is fair, just, reasonable, and not the product of an unconscionable or oppressive bargain." ***Id.***, ¶39; *see also* ***Anderson v. Onsager***, 155 Wis. 2d 504, 512-13, 455 N.W.2d 885 (1990) (concluding that a court should order specific performance unless, in the exercise of its discretion, "there are revealed factual or legal considerations which would make specific performance of the contract unfair, unreasonable or impossible"). "The fairness of ordering specific performance depends on the facts and equities of the individual case before the circuit court and will vary from case to case." ***Ash Park***, 324 Wis. 2d 703, ¶38.

¶15 Determining whether the circuit court erroneously exercised its discretion by denying Cole specific performance involves the interpretation of the purchase agreement, a legal issue. When interpreting a contract, we generally seek to give effect to the parties' intentions. ***Tufail v. Midwest Hosp., LLC***, 2013 WI 62, ¶25, 348 Wis. 2d 631, 833 N.W.2d 586. If the contract's terms are clear and unambiguous, "we construe the contract according to its literal terms," presuming that "the parties' intent is evidenced by the words they chose." ***Id.***, ¶26 (citation omitted). If a contract's terms are ambiguous, meaning that they are fairly susceptible to more than one construction, then extrinsic evidence may be used to determine the parties' intent. ***Id.***, ¶27.

¶16 Cole argues that the circuit court erred by concluding that the purchase agreement was ambiguous based on the court's interpretation of the "as-is," maintenance, and property damage provisions. He contends that the purchase agreement is unambiguous and that its plain language entitles him to the remedy of specific performance. In response, Link argues that, when read in the context of the purchase agreement, those provisions render the agreement ambiguous.

¶17 Cole also contends that Link is not excused from performance based on the impossibility and frustration of purpose defenses because the parties anticipated and contracted for the occurrence of property damage before the original closing date of March 24, 2023. In response, Link argues that both defenses apply because the object that the parties contracted to receive and deliver, which he contends is only the building and not the entire lot, was destroyed.

¶18 We agree with Cole and conclude that the purchase agreement is not ambiguous because it is clear from the agreement's language that the parties agreed to the sale and purchase of the Property and that they contemplated that the Property could be damaged between acceptance of the agreement and closing. Link agreed to sell the Property located at 102 Knapp Street—the .14-acre lot with the building on it—and Cole agreed to pay $105,000 for that Property. Both parties knew that the building on the Property had structural defects, and their acknowledgment of those defects is shown by the purchase agreement's terms regarding Cole's receipt of the disclosure report and his acceptance of the Property "in its current as-is condition." (Formatting altered.) That acknowledgement is further evidenced by the maintenance provision, which required Link to maintain the Property in its current condition until closing, without any obligation to address those defects.

¶19 If, however, damage occurred to the Property prior to closing—such as the roof collapse that occurred here—the purchase agreement shows that Cole and Link contracted for that possibility through the property damage provision.

Given that the parties agree that the Property was damaged in an amount exceeding five percent of the purchase price, the agreement expressly granted Cole the option to either terminate the agreement or choose to move forward with the agreement despite the damage. The agreement also provided that if Cole chose the latter, he was entitled to "the insurance proceeds, if any, relating to the damage to the Property, plus a credit towards the purchase price equal to the amount of [Link's] deductible on such policy, if any."

¶20 Contrary to the circuit court's conclusion, there is nothing ambiguous about any of the above provisions. Cole and Link negotiated the sale and purchase of the as-is Property, the Property was damaged in an amount exceeding five percent of the purchase price before closing, and Cole chose to move forward with the purchase despite the damage to the Property. There is nothing in the property damage provision that limits the amount of damage that could occur such that the agreement is rendered unenforceable and, contrary to Link's contention, the maintenance and "as-is" provisions do not "incorporate[] a reasonable limit on the maximum damage amount." Nor, as Link argues, does the lack of a limit mean that "the parties did not contemplate any scenario where the Property deviated from the materially same condition before closing." As noted above, the parties did contemplate that scenario and addressed it with the property damage provision. The maintenance and "as-is" provisions place no limit on the property damage provision, and they simply show that Cole acknowledged he was purchasing the Property with known defects and that Link had to maintain the Property in that condition until closing.

¶21 Because Cole and Link contemplated and contracted for damage occurring to the Property prior to closing, the circuit court also erred by concluding that the impossibility and frustration of purpose defenses excused Link from performance. Those defenses are inapplicable as a matter of law. An impossibility defense excuses a party's performance due to an "act of god" (a/k/a force majeure, as the parties argued) or some other intervening circumstance that makes it impossible for the party to perform, but the defense does not apply if performance becomes impossible due to "contingencies which should have been foreseen and provided against in the contract." *See* ***Jennings v. Lyons***, 39 Wis. 553, 557-58 (1876); WIS JI—CIVIL 3062; WIS JI—CIVIL 3066.

¶22 Similarly, a frustration of purpose defense excuses a party's performance if that party's principal purpose in making the contract is frustrated without the party's fault "by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made." ***Convenience Store Leasing & Mgmt. v. Annapurna Mktg.***, 2019 WI App 40, ¶15, 388 Wis. 2d 353, 933 N.W.2d 110 (citation omitted). The defense does not apply "if the parties have contracted with reference [to the frustrating event] or have contemplated the risks arising from it." ***Id.***, ¶19 (alteration in original; citation omitted). That is precisely what happened here. Because Cole and Link contracted for property damage occurring prior to closing, such as the roof collapse that occurred here and the resulting remedy, the impossibility and frustration of purpose defenses do not apply to the circumstances and do not excuse Link from performance.

¶23 Here, under the purchase agreement's clear and unambiguous language, Cole had the option to proceed with the sale and purchase of the Property, despite the damage, and to receive the insurance proceeds relating to the damage and a credit for the purchase price. Because Link refused to proceed to closing, he defaulted on the purchase agreement.

¶24 Link's default entitled Cole to the remedies set forth in the purchase agreement, and Cole chose to seek specific performance. Granting Cole specific performance is not unfair, unjust or unreasonable, given that the purchase agreement provides for the circumstances that occurred in this case. The parties knew the condition of the Property prior to entering into the agreement and they agreed on provisions acknowledging those conditions and the possibility of damage to the Property prior to closing. Given the purchase agreement's clear language, we conclude that Cole is entitled to specific performance—i.e., conveyance of the Property to him and receipt of the insurance proceeds.

¶25 Although the circuit court erred as a matter of law by concluding that Cole was not entitled to specific performance under the purchase agreement, we recognize its concern regarding the fairness of Cole's receipt of the insurance proceeds and the increased value of the Property as a result. Both Cole and Link agree that we should remand the case to the circuit court for a determination regarding Cole's recoverable insurance proceeds. Given that specific performance is an equitable remedy, and a court has wide latitude to fashion an equitable remedy to fit the circumstances of a case and the relations of all the parties once it determines that equitable relief is appropriate, we agree that we should remand this case for the circuit court to make a determination regarding the insurance proceeds. *See* ***Ash Park***, 324 Wis. 2d 703, ¶¶73-74.

¶26 Accordingly, we remand this case to the circuit court with directions to enforce the terms of the purchase agreement as to the conveyance of the Property and to determine the extent to which Cole is entitled to the insurance proceeds under the property damage provision. The court must do so based on the evidence presented by the parties and made part of the record. In making this determination, the court shall consider the following factors: (1) the value of the entire Property before and after the building's roof collapse; (2) the value of the building itself before and after the roof collapse; (3) the cost of removing the razed building; (4) the amount of insurance proceeds that actually were—and will be—paid, and what those proceeds were used for; (5) any independent damage to the entire Property; and (6) any other relevant factors the court and parties believe are appropriate.

By the Court.—Judgment reversed and cause remanded with directions.

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