COURT OF APPEALS
DECISION
DATED AND RELEASED

June 5, 1997

NOTICE

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.

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No. 96-3380

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

DONALD W. VODAK AND BERNADINE J. VODAK,
HIS WIFE,

PLAINTIFFS-APPELLANTS,

V.

MARTIN KINYON, TRUDY KINYON, AND RANDALL R. SCHMIDT,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Richland County: GEORGE S. CURRY, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. Donald and Bernadine Vodak appeal from a summary judgment dismissing their complaint alleging intentional misrepresentation against Martin Kinyon, Trudy Kinyon and Randall Schmidt.

The trial court concluded that the defendants were entitled to judgment as a matter of law because the undisputed facts show that the Vodaks had not been induced to rely on misrepresentations that resulted in damage to them. We conclude the trial court properly granted summary judgment and affirm.

BACKGROUND

The basis for this action was an effort by the Vodaks to put together a bid to buy their farm at a sheriff's sale. There was a foreclosure judgment against the property in the amount of $172,865.29, as well as back taxes owing in the amount of $45,234. The sheriff's sale was scheduled for January 25, 1991. The amended complaint, in a distilled form, alleged that Schmidt and the Kinyons and others[1] had agreed to purchase various parcels of the farm, thereby providing the Vodaks with funds to make a bid at the sheriff's sale; that the Kinyons and Schmidt did not intend to keep their agreements and instead planned to buy the farm with others, leaving the Vodaks out; and that the Vodaks relied on the false representations and were damaged in that they did not seek others to form a group to buy the farm with them at the sale.

The specific written agreements and the chronology alleged in the amended complaint are as follows. Greg Greenheck made an offer to purchase forty acres of the Vodaks' farm on July 16, 1990, for $48,000 which required that Vodak furnish an abstract of title showing merchantable title. The amended

[1] The initial complaint also named Gregory Greenheck and Farm Credit Service as defendants. The trial court dismissed them, concluding the complaint did not state a claim for relief against them. The Vodaks do not appeal that decision. The trial court construed the complaint as stating a claim against the Kinyons and Schmidt for intentional misrepresentation and permitted the Vodaks to proceed only on that claim. The Vodaks do not challenge this decision on appeal.

complaint alleges that the Vodaks accepted the offer. On January 21, 1995, Schmidt offered to purchase sixty acres of the farm for $51,000, subject to certain contingencies and with the provision that "this offer is void if the property is sold, mortgaged, conveyed, transferred or encumbered prior to the closing date," and the Vodaks accepted that offer. On January 22, 1991, Richard and Shirley Rasmussen signed a contract agreeing to buy part of the farm for $53,600, with the provision that the agreement was void if the transaction did not close because of a defect in title that the Vodaks were unable or unwilling to cure. After lining up these agreements, the Vodaks learned that the mortgage holder refused to postpone the sale and was insisting on $125,000 before the sale. The Vodaks had only $21,000 of their own money to contribute. The Vodaks asked Schmidt, Greenheck and the Rasmussens to advance the purchase money for the farm even though their contracts did not require that. Initially Schmidt and the Rasmussens agreed to do so. Greenheck did not and also said he was no longer interested in buying the forty acres. The Vodaks then contacted the Kinyons, who signed an agreement on January 22, 1991, to purchase the forty acres that Greenheck had offered to purchase, but for the sum of $34,000, with the purchase and payment occurring "when clear title is produced and back taxes are paid by the seller. If title is not cleared, the purchase agreement is null and void."

On the evening before the sale, Schmidt told the Vodaks he was no longer willing to advance the purchase price before the sale. On the morning of the sale, Donald Vodak met with Schmidt and Richard Rasmussen to discuss how the bidding at the sale would proceed. Schmidt entered into a written agreement with the Vodaks that if the Vodaks did repurchase the farm, he would buy the sixty acres he had already agreed to buy plus "10 option acres" for $61,000. This writing provided that it "[was] not binding if Don (Vodak) does not purchase and

also I am not liable for any more than the intended 70 acres. Seller (Don) will provide survey and clear title to property." It was agreed at the meeting that Donald Vodak would bid as a representative of the Vodaks, the Rasmussens, Schmidt and the Kinyons, that the highest bid he would make would be $135,000 and that if Vodak were the successful bidder, Schmidt, the Kinyons and the Rasmussens would get the land described in their agreements upon paying the amount specified in their contracts, with the Vodaks contributing the $21,000 they had. At the sale, Martin Kinyon outbid Donald Vodak, offering $144,500 for the farm and, upon conclusion of the sale, refused to sell any portion back to the Vodaks, but sold portions to Schmidt and Greenheck.

The Kinyons' answer denied that they breached their agreement with the Vodaks, denied any intent not to perform their agreement, and denied being part of any group for which a third person was to bid on their behalf. The Kinyons alleged that they had made inquiries about purchasing the farm before the Vodaks approached them, and nothing in their agreement with the Vodaks prevented them from bidding at the sale. Schmidt's answer also denied that he breached any agreement with the Vodaks and alleged that he was ready to perform what he had agreed to when the Vodaks fulfilled their part of the bargain, which they did not. He alleged that he never agreed to provide money before the foreclosure sale and never participated in a "plan."

The Kinyons and Schmidt moved for summary judgment, submitting their affidavits and the affidavits of Greenheck and Cliff Schneider. Taken together, these materials show the following. Greenheck never purchased the forty acres that was the subject of his offer to purchase because the Vodaks failed to clear title as required in the offer. On the evening before the sale, Donald Vodak called Greenheck and demanded that he perform the offer to purchase

immediately by tendering the cash purchase price of $48,000. Greenheck declined, saying that Vodak had not contacted him since the offer was made and he could not raise the money that quickly.

Martin Kinyon made plans to bid at the sheriff's sale a month before Donald Vodak contacted him. A few days before the sale, Vodak contacted Kinyon and asked him to purchase a certain forty acres of the farm. The Kinyons gave the Vodaks a postdated check dated January 26, 1991, in the amount of $250 as earnest money with the understanding that if the Vodaks were not able to clear title by stopping the sale, the agreement was null and void. They never promised the Vodaks that they would not bid at the sale and the Vodaks never asked them not to bid.

On the day before the sheriff's sale, Donald Vodak called Martin Kinyon and told him he was not able to stop the sheriff's sale the next day, and asked Kinyon to form a partnership with him to buy the farm. Kinyon declined, and declined Vodak's request to meet that evening to work out a plan to bid at the sale. The Kinyons believed they had no further obligation to the Vodaks under their agreement and went ahead with their earlier plans to bid for the farm at the sale. They acted only on their own behalf, and did not make firm or binding arrangements with either Schmidt or Greenheck before the sale to sell them portions of the farm, although in their earlier plans to bid on the farm they had considered selling off portions if they were successful and had discussed this possibility with neighbors. On the morning of the sale, Kinyon told Schmidt his finances were in order and he intended to bid on the farm.

Schmidt averred that each promise he made with the Vodaks he intended to keep.[2]

In response to the defendants' materials, the Vodaks submitted their affidavits, one of which averred that all the factual statements in the amended complaint and exhibits are true and correct and also incorporated the contents of his affidavit filed in the mortgage foreclosure action; portions of Donald Vodak's deposition; and the affidavits of Richard Rasmussen[3] and Terry Sprecher. Donald Vodak's affidavits and deposition show the following. The offers made by Rasmussen, Schmidt and Kinyon required payment of the purchase price after Vodak cleared title, which meant that he could not pay $125,000 to the mortgage holder prior to the sale, and the mortgage holder was insistent in going ahead with the sale unless it received this amount prior to the sale. Schmidt and the Kinyons refused to pay the purchase price in advance of getting good title, even though the mortgage holder agreed that if it received that amount before the sale, it would assign the mortgage foreclosure judgment to the offerors in proportion to the respective amount of their offers.

At the meeting with Rasmussen and Schmidt on the morning of the sheriff's sale, those present figured that Vodak could bid up to $135,000 with the amounts from the Rasmussens' contract ($53,600), Schmidt's ($61,000) and the Vodaks' $21,000. They figured that the $34,000 from the Kinyons' contract could be used to pay back real estate taxes on the property. The Vodaks would have been short about $7,000 on the back taxes, but they could have postponed the

[2] Schmidt admitted in his answer that he entered into the two written agreements with the Vodaks described in the amended complaint.

[3] Rasmussen's affidavit is a copy of an affidavit filed in the foreclosure action.

payment of back taxes on the thirty-six acres they were to keep. The mortgage holder indicated to the Vodaks that it would open the bidding at $125,000 and if that was the high bid, it would resell to the Vodaks and others for that price. In fact, the mortgage holder opened with a bid for $115,000. Another bidder, Schneider, dropped out at $130,000 when Vodak made a bid of $130,100. Kinyon then started bidding against Vodak, which surprised Vodak because he thought Kinyon was on his side.

Vodak also averred that the telephone conversation Kinyon said took place on January 24, 1991, never took place. In his deposition, Vodak testified that he told Kinyon when he first contacted Kinyon that he needed money to stop the sheriff's sale and Kinyon "agreed to cooperate with us by buying a parcel." He also testified that the day of the sale, after the sale, he went to the Kinyons' farm and Kinyon told him "we had this all planned for I don't remember how many weeks," and that Schmidt and Greenheck were each getting certain portions.

Rasmussen avers that on his attorney's advice he would not pay over the purchase price for the property prior to the sheriff's sale, and Schmidt and the Kinyons refused to as well. Rasmussen corroborates Vodak's account of the meeting on the morning of the sheriff's sale between Rasmussen, Schmidt and Vodak. He also avers that "Kinyon was not following the original plan" when he bid at the sheriff's sale.

Sprecher avers that he and his father were willing to buy part of the Vodaks' farm if it would help the Vodaks. He agrees with Vodak's deposition testimony that a couple days before the sale they spoke about it but Vodak said then he could not sell to the Sprechers because he already had signed contracts. After the sale, the Sprechers inquired if any land was available but the Vodaks did

not pursue negotiations at the time because they "had to get things straightened out first."

The trial court concluded that the evidence of Kinyon's statement to Vodak after the sale—to the effect that he, Schmidt and Greenheck planned to get the farm at the sale—presented a factual dispute concerning whether Kinyon and Schmidt made false representations to Vodak when they agreed to buy parcels of the farm if Vodak was the successful bidder. The court also determined that this evidence plus the actual bidding against Vodak presented a factual dispute concerning whether there was an intent to defraud Vodak and to induce him to act in reliance on the misrepresentation.

However, the court concluded that there was no evidence to show that the Vodaks relied on any misrepresentation which resulted in injury to them. First, the court reasoned that there was no evidence in Vodak's submissions, assuming all of them to be true, that the Rasmussens and Schmidt ever agreed to deal exclusively with the Vodaks in forming a plan to purchase the farm and there was no evidence of consideration for such an agreement. Secondly, the court reasoned that the Vodaks did not have sufficient funds to complete the transaction and clear title even if his plan with Schmidt and the Rasmussens to bid up to $135,000 had been successful. The Vodaks, by their own admission, needed the $131,000 (Vodak's bid at the time Schneider dropped out) plus $45,234 in back taxes, for a total of $176,234. Once the Kinyons declined to participate in a plan beyond the terms of the agreement they had signed, the Vodaks had only $135,600 ($53,600 from Rasmussen, $61,000 from Schmidt, and the Vodaks' $21,000); the court stated that even counting the Kinyons' purchase price, the Vodaks were still short by $6,634. The court concluded that it would be impermissible to permit a

jury to speculate over whether the Vodaks would have been able to clear title and then to speculate on what the proper measure of damages would be.

DISCUSSION

The Vodaks argue on appeal that there is evidence supporting all the elements of their intentional misrepresentation claim. With respect to the trial court's conclusion that they failed to prove damages, they point to Sprecher's affidavit as evidence that the Vodaks did not pursue that offer to purchase portions of the farm because "they thought they had a firm deal with Schmidt and the Kinyons." They also disagree with the trial court's determination that there was no evidence that the Vodaks had sufficient funds to clear title. They point to Donald Vodak's affidavit describing plan developed at the meeting on the morning of the sheriff's sale, pursuant to which the combined contract prices of the Rasmussens and Schmidt, plus the Vodaks' $21,000, would be used to bid up to $135,000; the Kinyons' contract price would be used to pay the back taxes; and the Vodaks would postpone payment of the back taxes on the buildings and land they retained. The Vodaks point out that there is nothing in the record indicating that the real estate taxes had to be paid at the foreclosure sale.

Schmidt and the Kinyons respond that summary judgment was proper on a number of grounds: there is no evidence (1) they made misrepresentations of fact; (2) no evidence they were precluded from bidding at the sheriff's sale; (3) no evidence that the Vodaks were precluded from redeeming the property after the sheriff's sale; and (4) no evidence that the Vodaks sustained any damages as a result of the purported misrepresentations.

We review summary judgments *de novo*, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304,

315, 401 N.W.2d 816, 820 (1987). Generally summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." ***Baxter v. DNR***, 165 Wis.2d 298, 312, 477 N.W.2d 648, 654 (Ct. App. 1991) (quoting ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-48 (1986)). A factual issue is "genuine" if the evidence is such that reasonable jurors could return a verdict for the nonmoving party. ***Id.***

The trial court and the parties have correctly identified the elements of a claim for intentional misrepresentation: (1) a false representation of fact; (2) made with intent to defraud and for the purpose of inducing another to rely on it; and (3) upon which the other actually did rely and was induced to act, resulting in injury or damage. ***Chitwood v. A.O. Smith Harvestore Products, Inc.***, 170 Wis.2d 622, 631, 489 N.W.2d 697, 702 (Ct. App. 1992). Like the trial court, we focus on the third element, although our analysis is somewhat different.

Vodak has presented no evidence that the Kinyons agreed to anything other than the written contract they signed. That does not obligate the Kinyons to do anything other than purchase forty acres from the Vodaks, assuming the Vodaks could present clear title to them. While the presence of Rasmussen and Schmidt at the meeting on the morning of the sheriff's sale is evidence that those two parties agreed to a cooperative bidding arrangement with the Vodaks, it is undisputed that the Kinyons were not present at that meeting and there is no evidence that they agreed to this. Donald Vodak's own affidavit acknowledges as much, because the Kinyons' purchase price was not counted toward the $135,000 that Rasmussen, Schmidt and Vodak agreed was available for the bidding.

Although Vodak averred that his plan was to use the Kinyons' purchase price to pay the back taxes, there is no evidence that the Kinyons' agreed to that. Vodak's general averment that the Kinyons "agreed to cooperate" is backed up only by reference to Vodak's specific testimony that the Kinyons agreed to purchase forty acres and signed a contract to do so. Rasmussen's general averment that he, Schmidt, and the Kinyons "agreed to buy enough of the farm to permit the Vodaks to pay the sum of $125,000 and the back real estate taxes and allow the Vodaks to retain the farm buildings and 20-30 acres around them" is not backed up by anything other than the written agreements and the details of the morning meeting, from which all agree the Kinyons were absent. Such a general averment, standing alone, does not create a genuine issue of material fact as to whether the Kinyons agreed to the plan that the Vodaks assert they formulated with the Rasmussens and Schmidt on the morning of the sheriff's sale.

Since the Kinyons were not obligated to pay the Vodaks anything until the Vodaks presented them with clear title to the forty acres and since it is undisputed that the Vodaks could not do that before the sale, the most the Vodaks could count on for purchasing the farm at the sale was $135,600. Assuming the agreement they made with Rasmussen and Schmidt the morning of the sale would have enabled the Vodaks to purchase the farm at the sheriff's sale for $131,000, there is no evidence that the Vodaks could have obtained the funds to clear the back taxes for the parcels that they were not keeping. Sprecher's affidavit does not provide this evidence, because it shows only that the Sprechers were willing to purchase some undefined amount of the land that the Vodaks had contracted to sell to the Rasmussens, Schmidt, and the Kinyons. The Vodaks state in their reply brief, in response to the argument that they failed to redeem the property after the sale, that they were not credit worthy and had exhausted all their resources. This

is not in evidentiary form, but we refer to it to make the point that there is no evidence, or even contention, that the Vodaks could have cleared the back taxes so as to clear title to the parcels they had contracted to sell, without the purchase price from the Kinyons, which the Kinyons were not obligated to pay unless they received clear title. There is no evidence that either Schmidt or the Rasmussens agreed that they would pay their contract prices to the Vodaks even if there was no means by which the Vodaks could pay off the back taxes on their parcels, that is, even if the Kinyons' $34,000 was not available for that purpose.

Therefore, even if we assume for purposes of argument that there was a representation implied in their contracts with the Vodaks that Schmidt and the Kinyons would not bid against the Vodaks and this was an intentionally false misrepresentation of fact, there is nevertheless no evidence that the Vodaks were damaged as a result of reliance on that misrepresentation. The plan the Vodaks state they made on the morning of the sale could work only if the Kinyons agreed to some modification of their written agreement with the Vodaks about the conditions under which they would make their $34,000 available to the Vodaks, and there is no evidence of that.

We conclude that the trial court properly granted summary judgment in Schmidt's and the Kinyons' favor. There are no genuine issues of material fact on the question of whether the Vodaks were injured by reliance on any intentional misrepresentations, and the respondents were therefore entitled to judgment as a matter of law.

By the Court.—Judgment affirmed.

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