COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-1281

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

TERRY MCGUIRE,

PLAINTIFF-RESPONDENT,

V.

RICHARD R. BLANK, GENERAL PARTNER, D/B/A BELOIT PROPERTIES,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

SHOPKO STORES, INC., A MINNESOTA CORPORATION,

THIRD-PARTY DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

EICH, C.J. ShopKo Stores, Inc., appeals from a judgment enforcing an agreement by Beloit Properties to convey land to Terry McGuire and invalidating ShopKo's option to purchase the same parcel.

The facts are not in dispute. Beloit Properties owned a parcel of unimproved land that was subject to a cross-easement agreement which, in addition to restricting development of the property, granted ShopKo a "first-refusal" right to purchase the land should Beloit Properties receive a purchase offer from a third party. If Beloit Properties received a "bona fide offer" for the property, ShopKo was entitled to written notice of the offer and then had thirty days to indicate whether it was willing to purchase the property on the same terms.

McGuire submitted an offer to purchase the property in mid-September 1995, in a standard form that set a closing date of October 15, 1995. The form also stated: "Time is of the essence as to: additional earnest money payment, acceptance, legal possession, occupancy, date of closing and as to all dates inserted in this offer …." Beloit Properties accepted the offer.

After some discussions with McGuire about the property and the ShopKo cross-easement agreement, Richard Blank, Beloit Properties' general partner, wrote to ShopKo on October 31, attaching a copy of McGuire's offer to purchase. Blank described the offer as triggering ShopKo's right of first refusal and asked ShopKo to notify him as soon as possible of its intentions. On November 9, ShopKo responded, noting that McGuire's offer contained an October 15 closing date and asking Blank whether it was still a valid offer. Blank wrote back on November 21, discussing McGuire's offer and again asking ShopKo whether it was planning to exercise its first-refusal right.

At some point, Blank and ShopKo began discussing ShopKo's independent purchase of the property, although it is conceded that ShopKo never exercised its option under the cross-easement agreement. On December 20, 1995, ShopKo forwarded an offer to purchase the property and, after further negotiations, a final agreement was signed on January 24, 1996, setting a February 15 closing date.

Learning of all this, McGuire sued to enforce his contract with Beloit Properties. Apparently seeking a determination as to which of the contracts was valid, Beloit Properties joined ShopKo in the action as a third-party defendant. ShopKo counterclaimed, alleging that Beloit Properties had breached the option agreement by failing to convey the land. All three parties moved for summary judgment.

The trial court concluded that: (1) ShopKo lacked standing to challenge the validity of the McGuire/Beloit Properties contract because it was not a party to the agreement; (2) even if ShopKo had standing, its challenge would fail because the parties extended the McGuire/Beloit Properties closing date, making the agreement valid at the time it was transmitted to ShopKo; and (3) ShopKo's right of first refusal became a nullity when it was not exercised within thirty days after receiving notice of the McGuire offer to purchase.[1]

On appeal, we consider motions for summary judgment *de novo*, employing the same methodology as the trial court. ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.,*** 195 Wis.2d 485, 496, 536 N.W.2d 175, 182

[1] The court also ruled that: (1) even if ShopKo had exercised its first-refusal right timely, its offer was "too vague" to be enforced; and (2) because the conditions of ShopKo's offer varied from those in the McGuire offer, the right was not exercised according to its terms.

(Ct. App. 1995). Generally, we look to see whether there is a "genuine issue as to any material fact" and, if none exists, we determine whether the moving party is entitled to judgment as a matter of law. *See* § 802.08(2), STATS. Because the parties do not contest the facts surrounding their dispute, summary judgment is appropriate in this case.

Our independent review of the record and the parties' briefs satisfies us that: (1) ShopKo has standing to challenge the validity of the McGuire contract; and (2) the McGuire contract was valid when transmitted to ShopKo and, as a result, ShopKo's right of first refusal option expired when it was not exercised within the following thirty days. In so deciding, we reject ShopKo's argument that Beloit Properties, McGuire, or both, should be estopped from holding ShopKo to the thirty-day option deadline.[2] We therefore affirm the trial court's judgment.

I. The McGuire/Beloit Properties Contract

We first consider McGuire's argument—and the trial court's decision—that ShopKo lacks standing to challenge his agreement with Beloit Properties. In support of his argument, McGuire cites—without discussion or elaboration—***Abramowski v. Wm. Kilps Sons Realty, Inc.*** 80 Wis.2d 468, 259 N.W.2d 306 (1977), a case standing only for the general proposition that a party cannot seek to enforce a contract to which he or she is not a party. Unlike the challengers in ***Abramowski*** and similar cases, however, ShopKo is not suing to enforce another's contract—or even to obtain declaratory relief. ShopKo became a third-party defendant under § 806.04, STATS., as part of Beloit Properties'

[2] It thus becomes unnecessary to consider the parties' other arguments and the trial court's other rulings discussed in *supra* note 1.

attempt to obtain a judicial declaration with respect to the validity of the two contracts it had entered into for sale of the property. Section § 806.04(11) requires that "all persons … who have or claim any interest which would be affected by the declaration" be joined in an action for declaratory relief. The purpose of the statute "is to make it certain that the declaration will terminate the controversy." ***Lozoff v. Kaisershot,*** 11 Wis.2d 485, 491, 105 N.W.2d 783, 786 (1960).

Beloit Properties joined ShopKo because ShopKo was a principal party to one of two contracts for the sale of its land. In effect, Beloit Properties was asking the court to tell it which contract was valid. The contracts are inextricably intertwined, since ShopKo's ability to acquire the property rests on the validity of the McGuire contract—whether it was a valid, bona fide offer. In ***Hardware Mutual Casualty Co. v. Mayer,*** 11 Wis.2d 58, 69a-69b, 104 N.W.2d 148, 154 (1960), the supreme court permitted an interested party—an injured worker—to appear and argue with respect to the proper construction of his employer's insurance policy, even though he was not a party to the insurance contract in an action for declaratory relief. We are satisfied that, on the facts of this case, ShopKo has standing to challenge the validity of the McGuire agreement.

As indicated above, McGuire's offer contained a "time-is-of-the-essence" clause with respect to the closing date. It has long been recognized, however, that such a provision may be waived by the parties' subsequent conduct. ***M & I Marshall & Ilsley Bank v. Pump***, 88 Wis.2d 323, 330, 276 N.W.2d 295, 298 (1979). We believe that is the case here. There is no question that McGuire considered his offer to remain in effect after October 15, 1995. As to Beloit Properties, Blank wrote to a title company on October 26 acknowledging that the McGuire agreement was still in effect and stating that a closing was anticipated in

the near future. Blank's October 31 letter to ShopKo also acknowledged the agreement's continued vitality, as well as Beloit Properties' intent to "proceed with the sale of this property either to [McGuire] or to SHOPKO on the same terms and conditions." His November 21 letter to ShopKo was to the same effect. Indeed, Beloit Properties' third-party complaint in this case seeks to determine which of the two contracts—McGuire's or ShopKo's—it must honor. We consider Blank's subsequent conduct to have waived the "time-is-of-the-essence" provision of McGuire's offer, at least with respect to the stated closing date.[3] The offer was valid when Beloit Properties submitted it to ShopKo.

II. The ShopKo Agreement

As indicated, ShopKo's interest in the land was a right of first refusal. Upon receiving notice of the terms of a bona fide offer, ShopKo had the option to purchase the land itself on the same terms as contained in the offer—as long as ShopKo notified Beloit Properties in writing within thirty days that it was exercising that purchase right. If it did not do so, Beloit Properties was free to sell the property to the third party. ShopKo did not exercise its right of first refusal within thirty days of receiving notice from Beloit Properties of the McGuire offer.

[3] Citing ***Schaap v. Wolf,*** 173 Wis. 351, 354, 181 N.W. 214, 215 (1921), ShopKo argues that the statute of frauds requires that any purported waiver of the McGuire contract's time deadline must be in writing in order to be valid. ***Schaap***, however, dealt with an oral amendment to a timber-sale contract which changed its material terms. The court took pains to distinguish that situation from one where the oral agreement "[is] but an extension of time of performance," which the court appeared to recognize as not subject to the statute of frauds. ***Id***. at 353, 181 N.W. at 215. In a case decided only a year after ***Schaap***, the supreme court recognized that the parties' conduct and oral statements were sufficient to modify a time deadline in a contract for the sale of real estate. *See* ***Buntrock v. Hoffman***, 178 Wis. 5, 13-14, 189 N.W. 572, 575 (1922); *see also* 3A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 722, at 380 n.49 (1960 & Supp. 1997) (waiver of "time-is-of-the-essence" provision does not have to be in writing even though the contract is subject to the statute of frauds and is written).

ShopKo argues that it was not required to exercise the right within thirty days because: (1) McGuire's offer to purchase the property had "expired" and was thus not the type of bona fide offer that triggered the thirty-day time limit; and (2) Beloit Properties (or McGuire) should be estopped from relying on ShopKo's failure to meet the thirty-day deadline because ShopKo had questioned the validity of the McGuire offer and Beloit Properties never responded to its inquiry.

Because we have already held that the McGuire offer was valid and bona fide when Blank transmitted it to ShopKo, we need only consider ShopKo's estoppel argument. As indicated, the argument is based on a letter ShopKo wrote to Blank after receiving notice of McGuire's offer. According to ShopKo, when it received the offer on November 3 and noticed that the stated October 15 closing date had expired, it had legitimate grounds to question whether the offer was in fact bona fide, and it acted properly in notifying Blank of this fact and requesting clarification. Asserting that Blank never answered or responded to its inquiry, ShopKo argues that, as a result, it should not be held to the thirty-day deadline for exercising its first-refusal right.

When Blank submitted the McGuire offer to ShopKo on October 31, he described it as one which, under the terms of the Beloit Properties/ShopKo agreement, triggered ShopKo's "[right] of first refusal to purchase this property for the same terms and price as the [McGuire] offer." Blank "respectfully request[ed]" ShopKo to advise him "as quickly as possible" whether it wished to exercise its first-refusal right "in order that we can proceed with the sale of this property either to [McGuire] or to SHOPKO on the same terms and conditions." ShopKo responded with a letter to Blank a week or so later noting the October 15 date the McGuire offer "expired" and asking Blank to advise ShopKo "[i]f the

offer is still valid … so that we may offer a timely response." The record contains a subsequent letter from Blank to ShopKo dated November 21, 1995, in which Blank again discusses the terms of the McGuire offer—with particular respect to whether the offer required the preparation of "environmental data" for the property "as a condition of the purchase." The letter urges ShopKo to "proceed immediately" to investigate this data "in order that we can … close this transaction before the end of the year," and it also discusses a preliminary title report which Blank states was paid for by McGuire under the terms of his offer. The letter concludes with another reference to finalizing a closing date.

We are satisfied that only one reasonable inference can be drawn from this correspondence: when Blank attached the McGuire offer with a letter and wrote again to Shopko—both times indicating that the offer was valid—ShopKo was on notice that, in the eyes of Beloit Properties, the offer was indeed bona fide. We see no grounds upon which to relieve ShopKo from the effects of its failure to take steps to exercise its option within the thirty-day time period.

By the Court.–Judgment affirmed.

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