COURT OF APPEALS
DECISION
DATED AND FILED

March 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 97-1694-FT

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

ELAINE FRIEDMAN,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

CEDRICK PENNINGTON AND KATHY PENNINGTON,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed.*

SCHUDSON, J.[1] Elaine Friedman appeals from the trial court judgment, following a small claims court trial of an eviction action, awarding her

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

$943.05, plus costs. Cedric and Kathy Pennington cross-appeal from the same judgment. On both the appeal and cross-appeal, this court affirms.

In 1993, the Penningtons and Elaine Friedman's husband, Arthur Friedman, entered into a series of negotiations reflected by several documents regarding the rental and possible purchase of a single-family home. The details of the documents and their negotiations were somewhat complicated and the terms and conditions evolved and, according to some of the trial testimony, changed during the years the Penningtons rented the home. Cedric, Kathy, and Arthur all testified, however, that they intended that their agreement would include an option to purchase the property. Cedric also testified that Arthur said he (Arthur) "reneged on the [option] deal." The primary controversies involved in this appeal relate to whether, as a matter of law, an option ever existed and whether, if an option never was created, the Penningtons were entitled to recover certain moneys that were to have been credited toward their purchase of the home.

The trial court concluded that because the documents failed to identify either Arthur or Elaine Friedman (or anyone else, for that matter) as the owner of the home, they did not establish a valid option to purchase under § 706.02(1)(a), STATS., which requires that an option to purchase "[i]dentif[y] the parties." Accordingly, the trial court concluded that "the $3000 paid by the Penningtons for the option must be returned to them." Additionally, the trial court concluded that the "$100 per month being applied to the 'option price,'" which the Penningtons paid in each of nineteen monthly rental payments, must also be returned. On appeal, Friedman challenges both conclusions.

On review, this court will not overturn the trial court's findings of fact unless they are clearly erroneous. *See* § 805.17(2), STATS. However, the

application of a set of facts to the terms of an agreement and the determination of the parties' rights under that agreement present issues of law that this court reviews independently. *See* ***Bence v. Spinato***, 196 Wis.2d 398, 408, 538 N.W.2d 614, 617 (Ct. App. 1995); *see also* ***Gillespie v. Dunlap***, 125 Wis.2d 461, 465-66, 373 N.W.2d 61, 63-64 (Ct. App. 1985) (discussing exceptions to the Statute of Frauds and option to purchase agreements).

Friedman first argues that, despite the documentary noncompliance with the formal requirements of § 706.02, STATS., an option to purchase existed because the Penningtons and Arthur Friedman made an agreement that had all the "elements of an enforceable contract." Friedman correctly points out that the trial testimony confirmed that Arthur and the Penningtons intended to establish an option to purchase the home and believed they had made such an agreement. Friedman fails to explain, however, how such an option agreement could be legally viable when the owner of the property never was identified. *See* § 706.02, STATS. Not only did the documents fail to identify the property owner/party to the transaction, Arthur's trial testimony still left ownership in doubt. Thus, this court rejects Friedman's challenge to the trial court's conclusion that an option never existed.

Friedman next argues that if, as a matter of law, no option to purchase existed, then the trial court erred in allowing the Penningtons to recover $100 of each of nineteen monthly payments. Friedman maintains that although Arthur and the Penningtons agreed that $100/month would be credited toward their purchase of the home, the $100 amounts were intended as part of the monthly rental payments and, even if they weren't, they now cannot be considered "option" payments given the trial court's conclusion that no option existed.

Were the $100 monthly amounts rental or option payments? On this question, the testimony was mixed. At one point, however, Arthur conceded that the Penningtons "would obtain $100 per month of their rent as a *credit toward the option*." (Emphasis added.) Thus, the record does include evidence to support the trial court's finding that $100 of each of nineteen of the Pennington's monthly payments did not constitute part of their rent, but rather, were option payments they were entitled to recover. The fact that the trial court also concluded that a valid option to purchase never was established does not convert those option payments to rental payments.

By the same token, this court also rejects the Penningtons' cross-appeal argument. They maintain that because no valid option to purchase existed, their "option" payments must not be deemed option payments as a matter of law. Therefore, they contend, the payments must necessarily have been security deposit payments. Accordingly, they argue that this court should award them double their security deposit plus costs and attorney's fees, WIS. ADM. CODE § ATCP 134.06 and § 704.29, STATS., or, at the very least, remand to the trial court for fact-finding and a determination of whether the payments were security deposits.

This court, however, is satisfied that although the trial court never explicitly addressed the Penningtons' counter-claim, it implicitly rejected it. The evidence included both testimonial and documentary statements that the payments were not security deposits. No evidence suggested otherwise. By concluding what the payments were – option payments, the trial court, consistent with the evidence, also concluded what they were not – security deposits.

This case presented the trial court with a factual morass. On appeal, this court has studied the record carefully and appreciates that the evidence could

support any number of competing interpretations and theories. None of the trial court's findings, however, is clearly erroneous. And although the parties, on appeal and cross-appeal, attempt to construct arguments from the trial court's conclusion that no option to purchased ever was established, their arguments simply do not defeat the trial court's legal conclusions.

By the Court.—Judgment affirmed.

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