COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2068

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

CLAYTON GANSER,

PLAINTIFF-APPELLANT,

V.

CLAUDIA SCHWARTZ, AND HAROLD SCHWARTZ, AS PERSONAL REPRESENTATIVE AND ATTORNEY-IN-FACT FOR CLAUDIA SCHWARTZ,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

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

DEININGER, J. Clayton Ganser appeals an order which confirmed a prior summary judgment declaring that he had no interest in a parcel of real estate for which his aunt had granted him an option to purchase. The trial court ruled that the option was a contract to convey which was invalid because it did not

bear Ganser's signature, and further that if it were deemed to be only an offer to sell, the offer was revoked prior to Ganser's acceptance. Ganser claims the trial court erred in both conclusions. We conclude that the granting of the option was a gratuitous gesture, unsupported by consideration, and thus the option was a revocable offer to sell which was withdrawn before it was accepted. We therefore affirm the circuit court order.

BACKGROUND

On August 11, 1992, Claudia Schwartz executed an "option"[1] which granted Ganser, her nephew, "the option to purchase on or before July 1, 1997, or within ninety (90) days of my death, whichever is sooner" an eighty-acre parcel of real estate in the Town of Roxbury, Dane County, for $60,000. The option recited consideration of $10, "this day in hand paid to me by Clayton Ganser, receipt whereof is hereby acknowledged." The option was in recordable form, bearing Schwartz's notarized signature, but not Ganser's, and it was subsequently recorded. Ganser was not present when the option was executed, nor had he sought it or negotiated the option price. He did not become aware of the option or receive a copy of it until some time after Schwartz had executed it. Some two weeks after learning of the option, he gave his aunt a $10 bill.

In late 1994, Claudia entered a nursing home and in January 1995, she was found to be incompetent. Her son, Harold Schwartz, acting under a durable power of attorney, informed Ganser by way of a registered letter, written

[1] The nature and validity of this instrument, and what rights, if any, it conferred on Ganser, are very much in dispute in this appeal. The instrument bears the title "OPTION," and it is referred to as such by the parties and the trial court. We will also refer to the instrument as "the option" in this opinion.

by his attorney and dated February 15, 1995, that he "will not convey the real estate that is the subject of the option under the terms of said option upon an attempt by you to exercise the option." The registered mail return receipt was signed on Ganser's behalf by his wife, Lorraine Ganser, on February 16. On March 3rd, the attorney for Claudia and Harold acknowledged receipt on their behalf of Ganser's "Notice to Exercise Option," whereby Ganser agreed to purchase the land in question for the $60,000 option price. Harold refused to convey the parcel to Ganser for $60,000. He received a written offer of $150,000 for the property from another prospective purchaser on March 11, 1992.

Ganser commenced suit seeking an order requiring Schwartz[2] to convey the parcel to him at the option price. Schwartz filed an answer alleging numerous affirmative defenses and two counterclaims. Schwartz subsequently moved for a summary judgment declaring that Ganser had no interest in the eighty-acre parcel. Ganser moved for an order declaring that "a valid and enforceable contract to convey exists between" him and Schwartz. The circuit court granted Schwartz's motion and entered a judgment declaring the option void and dismissing Ganser's complaint. The court later entered a final order in the case which confirmed the prior judgment dismissing Ganser's complaint and which dismissed Schwartz's counterclaims. Ganser appeals the final order and only the dismissal of his complaint against Schwartz is at issue in this appeal.

[2] Claudia and her son and attorney-in-fact, Harold, will subsequently be referred to collectively as "Schwartz," except where it is necessary to separately identify either of them.

ANALYSIS

We review the granting and denial of motions for summary judgment de novo, applying the same methodology and standards as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). If there are no disputed issues of material fact, summary judgment is proper where the moving party is entitled to judgment as a matter of law. ***Id***. When both parties move for summary judgment and neither argues that factual disputes bar the other's motion, the "'practical effect is that the facts are stipulated and only issues of law are before us.'" ***Lucas v. Godfrey***, 161 Wis.2d 51, 57, 467 N.W.2d 180, 183 (Ct. App. 1991) (quoted source omitted).

The trial court concluded that the option executed by Schwartz was a "contract to convey" within the meaning of § 706.02(1)(e), STATS., and therefore it was required to be signed by both Ganser and Schwartz in order to comply with the statute of frauds. *See* §§ 706.01 and .02, STATS.[3] The court also determined that if the option was not a valid contract to convey, it represented only an offer by Schwartz to sell the parcel for $60,000, which offer was revoked by the February 15, 1995 letter from Schwartz's counsel before Ganser had accepted it. In either case, the trial court concluded that at the time Ganser attempted to exercise the option on March 3, 1995, it was void and Ganser had thus acquired no interest in the land described in the option. Ganser claims both conclusions were in error.

Both parties refer us to ***Bratt v. Peterson***, 31 Wis.2d 447, 143 N.W.2d 538 (1966), for guidance on the issues in this case. In ***Bratt***, a seller had

[3] The relevant portions of these statutes are quoted and discussed in the analysis which follows and in n.4, below.

granted a written 100-day option to purchase a parcel of land, which was extended in writing for an additional thirty days. Prior to the expiration of the extended option, the optionee notified the seller that he intended to exercise his right to purchase and he tendered the down payment specified in the option. The seller refused to convey to the optionee, having sold the parcel to another on a land contract executed during the thirty-day option extension period. ***Id.*** at 449-50, 143 N.W.2d at 539. The land contract purchaser commenced a quiet title action, claiming that the agreement to extend the option was void under the statute of frauds because it did not recite the new consideration for the extension. ***Id***. at 450, 452, 143 N.W.2d 14, 539-40. The optionee's answer alleged that the purchaser was aware of the option and knew that it had not expired when he entered into the land contract. The purchaser moved to dismiss the optionee's answer for failure to state a defense. ***Id***. at 450, 143 N.W.2d at 539. The trial court denied the motion and the supreme court affirmed. ***Id***. at 447, 143 N.W.2d at 538.

The court in ***Bratt*** ultimately concluded that the land contract purchaser was estopped from invoking the statute of frauds. ***Id***. at 454, 143 N.W.2d at 541. In its analysis of the statute of frauds issue, however, the supreme court stated:

> An option to purchase is a continuing promise or offer given by the landowner to sell real estate to another at a specified price within a specified period of time. *The offer ripens into a binding and irrevocable "option contract" if consideration is given, but can be withdrawn any time before acceptance if not based on consideration….*
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> ….
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> …Insofar as the statute of frauds is concerned [the extension agreement] is based on consideration and is an option agreement which involves an interest in land and must meet the requirements of the statute.

Id. at 451-53, 143 N.W.2d at 540-41 (footnotes omitted) (emphasis supplied). The court later summarized its holding in ***Bratt*** on the statute of frauds issue as follows: "An option to purchase real estate which does not conform to the statute of frauds is void and a nullity." ***Wadsworth v. Moe,*** 53 Wis.2d 620, 623, 193 N.W.2d 645, 647 (1972).

The present statute of frauds, unlike its predecessor which was applied in ***Bratt***, does not require consideration to be recited in the writing. The present requirements for a conveyance[4] to be valid under the statute are that it:

> (a) Identifies the parties; and
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> (b) Identifies the land; and
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> (c) Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered; and
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> (d) Is signed by or on behalf of each of the grantors; and
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> *(e) Is signed by or on behalf of all parties, if a lease or contract to convey; and*
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> (f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead …; and
>
> (g) Is delivered ….

Section 706.02(1), STATS., (emphasis supplied). The ***Bratt*** holding clearly subjects options to the requirements of the statute of frauds, as does § 706.01(6),

[4] "A 'conveyance' is a written instrument, evidencing a transaction governed by this chapter [706], which satisfies the requirements of s. 706.02." Section 706.01(4), STATS. Transactions governed by Chapter 706 include, except for certain enumerated exclusions, "every transaction by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity." Section 706.01(1), STATS.

STATS. ("'Grantor' means the person from whom an interest in lands passes by conveyance and includes … optionors ….")

A conclusion that options are conveyances which must comply with the requirements of § 706.02(1), STATS., however, does not necessarily mean that every option is "a contract to convey" under § 706.02(1)(e), requiring the optionee's signature for it to be valid. Deeds, for example, are conveyances which meet the requirements of the statute by bearing only the signatures of grantors, as required by § 706.02 (1)(d). Whether an option, prior to being exercised, is subject to the "two signature" requirement of § 706.02 (1)(e), or whether the option grantor's signature alone satisfies the statute of frauds, is apparently a question of first impression.

The trial court relied on language from two published cases in concluding that an option is a "contract to convey" under § 706.02(1)(e), STATS., thus requiring the signatures of both grantor and optionee to be valid. Neither case, however, addresses the question before us now. In ***Kubnick v. Bohne***, 56 Wis.2d 527, 533-34, 202 N.W.2d 400, 404 (1972), the supreme court stated that "[a] person holding an option to purchase land has an interest in land, and the *option contract* is within the statutory requirement" (emphasis supplied). There, however, the option was contained within a written lease agreement which had been signed by both parties, ***id.*** at 530, 202 N.W.2d at 402, and it could thus properly be referred to as an "option contract." The issue in ***Kubnick*** was whether the parties could orally modify the written terms of purchase spelled out in the option clause of the lease agreement, ***id.*** at 534, 202 N.W.2d at 404, not whether the option was a "contract to convey" within the meaning of § 706.02(1)(e).

Similarly, in ***Gillespie v. Dunlap***, 125 Wis.2d 461, 466, 373 N.W.2d 61, 64 (Ct. App. 1985), this court, citing § 706.02(1), STATS., said that "[n]ormally the statute of frauds requires all contracts conveying or aliening interest in land to be in writing and to identify the parties, the land, and the interest conveyed. The delivered document must also be signed by the grantor and the grantee." There, as in ***Kubnick***, the option at issue was part of a written lease agreement, but the lease had not been signed by *either* party. ***Id***. at 462, 373 N.W.2d at 62. We affirmed the trial court's application of the equitable estoppel provisions of § 706.04(3), STATS., in ordering the landlord to convey the property to his tenant pursuant to the terms of the unsigned lease/option agreement. ***Id.*** at 467, 373 N.W.2d at 64. We did not address whether the option under consideration was a "contract to convey" within the meaning of § 706.02(1)(e), because there was no reason to do so on the facts of the case.

Schwartz would have us affirm the trial court's conclusion regarding the necessity of Ganser's signature on the option based on the language from ***Kubnick*** and ***Gillespie*** relied on by the trial court and quoted above. We decline to do so because neither case dealt even remotely with the issue at hand. Schwartz makes additional arguments based on language from ***Bratt***, the legislative history of Chapter 706 and comments by various secondary authorities. We agree that options must meet the requirements of § 706.02(1), STATS.; that many options may be deemed to be contracts; and that once exercised by the optionee, an option no doubt becomes a "contract to convey" for which the optionee's notice of exercise satisfies the requirement that a contract to convey bear the purchaser's signature. *See* § 706.02(2)(c), (statute may be satisfied by "several writings which show expressly on their faces that they refer to the same transaction"). We are not persuaded, however, that the term "contract to convey" in § 706.02(1)(e),

necessarily applies to all options prior to their exercise, such that any option signed by the grantor only may be declared null and void. We further conclude that it is not necessary, on the facts of this case, for us to resolve this particular issue.

It is undisputed that Claudia Schwartz's act in executing the option in Ganser's favor was a gratuitous gesture on her part; that it was not solicited or bargained for by Ganser; and that he had no notice or knowledge of it until some time after its execution and recording. While the option recites that Claudia received $10 in consideration for the option, it is also undisputed that Ganser had paid her nothing for the option prior to or at the time of its execution. Nothing in the record indicates that Claudia expected to receive $10, or anything else, in return for her granting of the option to Ganser. We conclude that the option never "ripen[ed] into a binding and irrevocable 'option contract'" because no consideration was given for it, and thus it could be "withdrawn any time before acceptance." ***Bratt***, 31 Wis.2d at 451, 143 N.W.2d at 540.

Ganser asserts, without analysis or citation to authority, that when he "gave Claudia a $10.00 bill a couple of weeks after he first became aware of the existence of the option.… The legal effect … was to make the option irrevocable." In his reply brief, he cites ***St. Norbert College Foundation, Inc. v. McCormick***, 81 Wis.2d 423, 260 N.W.2d 776 (1978), for the proposition that "lack of adequate consideration is not a defense that is recognized in Wisconsin." The supreme court in ***St. Norbert*** acknowledged that "'inadequacy of consideration alone is not a fatal defect'" in a contract because it is the parties themselves who must judge the adequacy of the consideration. ***Id***. at 430, 260 N.W.2d at 780 (quoted source omitted). The court, however, distinguished the adequacy of consideration from "the *existence* of legal consideration," noting that the latter was amenable to legal

inquiry. ***Id***., (emphasis supplied). We conclude here not that $10 was inadequate consideration for the Schwartz-Ganser option, but that there was no legal consideration given for the option that transformed it from what it was—a gratuitous, unsolicited offer to sell—into what Ganser would like it to have been, an irrevocable option contract, supported by consideration.

"To constitute consideration, a performance or a return promise must be bargained for." RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1979). The performance or return promise is bargained for if "it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." ***Id***. at § 71(2). The comments and illustrations following § 71 of the Restatement make it clear that the belated and voluntary payment of $10 by Ganser did not cure the lack of consideration to support the grant of the option:

> [I]t is not enough that the promise induces the conduct of the promisee or that the conduct of the promisee induces the making of the promise; both elements must be present, or there is no bargain. Moreover, a mere pretense of bargain does not suffice, as where there is false recital of consideration or where the purported consideration is merely nominal….
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> ….
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> **Illustrations:**
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> ….
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> 4. A desires to make a binding promise to give $1,000 to his son B. Being advised that a gratuitous promise is not binding, A writes out and signs a false recital that B has sold him a car for $1,000 and a promise to pay that amount. There is no consideration for A's promise.

RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b at 173-74 (1979).

Finally, we agree with Schwartz that the recital of consideration in the option raises only a rebuttable presumption that Ganser gave consideration for

the option. ***Estate of Mingesz v. Kieffer***, 70 Wis.2d 734, 739, 235 N.W.2d 296, 299 (1975). The grantor of an option containing such a recital may contradict it "by evidence that no such consideration was given or expected." RESTATEMENT (SECOND) OF CONTRACTS § 87 cmt. c at 230 (1979). Here, Schwartz has rebutted the presumption, through affidavits in support of summary judgment, showing that there is no dispute that Claudia's execution of the option was an unsolicited, gratuitous gesture. Ganser's belated transfer of a nominal consideration, the $10 bill, did not convert the gratuitous, non-bargained-for option into an irrevocable option contract. *See* ***id.,*** § 87 cmt. b at 229 ("[G]ross disproportion between the payment and the value of the option commonly indicates that the payment was not in fact bargained for but was a mere formality or pretense…. [A] payment of one dollar by each party to the other is so obviously not a bargaining transaction that it does not provide even the form of an exchange.").

CONCLUSION

Regardless of whether Schwartz's option in favor of Ganser is voidable for lack of Ganser's signature under § 706.02(1)(e), STATS., it constituted at most a revocable offer to sell which was withdrawn by Schwartz prior to acceptance or exercise by Ganser.[5]

By the Court.—Order Affirmed.

Not recommended for publication in the official reports.

[5] Ganser has not challenged on this appeal the trial court's conclusion that Schwartz's letter of February 15, 1995, effected a withdrawal of the offer to sell prior to his March 3, 1995, acceptance. His only argument is that the option was irrevocable because he gave his aunt a $10 bill, an argument which we have rejected.