COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3578

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

BRIAN WISHNE AND MARY WISHNE,

PLAINTIFFS-APPELLANTS,

V.

J. ANTHONY ROSARIO AND
MARY KAY MCSHERRY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

CURLEY, J.[1] Brian and Mary Wishne (Wishnes) appeal the small claims judgment in favor of the respondents, J. Anthony Rosario and Mary Kay McSherry (Rosario/McSherry), permitting them to retain the Wishnes' $5,000 earnest money deposited in an aborted real estate transaction. The Wishnes argue

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

that the trial court erred in finding that the respondents were entitled to the $5,000. This court affirms.

I. BACKGROUND.

On March 24, 1998, Brian Wishne and his wife, Mary Beaumont-Wishne, signed an offer to purchase a property owned by J. Anthony Rosario and his wife, Mary Kay McSherry, located at 3805 North Bartlett Avenue in Shorewood, Wisconsin. The Wishnes used the standard Wisconsin Residential Offer to Purchase form when they offered to buy the respondents' property for $145,500. Pertinent to this appeal, their offer contained two contingencies and a handwritten provision concerning a real estate condition report. The Wishnes checked the box indicating that the offer was contingent on financing, but no details of the financing requirement were listed. Instead, the offer stated "[t]erms of financing contingency to be specified within 7 days of acceptance."

Additionally, the Wishnes checked the box indicating there was an inspection contingency. The form stated "[t]his contingency shall be deemed satisfied unless Buyer, within 30 days of acceptance, delivers to Seller a copy of the inspector's written inspection report and a written notice listing the defects identified in the inspection report to which Buyer objects." Printed language in the offer then gave the Seller the option of curing the defect upon certain terms and within the stated timeframe. The Wishnes also wrote under the heading "Additional Provisions" a handwritten provision that the "[s]eller must provide Real Estate Condition Report and Report of Code Compliance to Buyer within 10 days of acceptance of offer. Seller shall also make known to Buyer the existence of liens and encumbrances on the property, or of any easements, restrictions or covenants."

Rosario/McSherry counter-offered, incorporating most of the terms and conditions of the original offer to purchase. One of the provisions changed by the counter-offer concerned the inspection contingency. The counter-offer stated: "Inspection contingency will be modified such that the contingency will be removed within ten (10) days after acceptance hereof, or this agreement will become null and void if the Seller so chooses." The Wishnes accepted the counter-offer.

In an attempt to comply with the obligations imposed by the contract, Rosario/McSherry scheduled an inspection of their property with the Shorewood inspector, who sent them a document entitled "Statement of Non-Compliance," listing seven code violations. While the Wishnes never supplied the financing terms with respect to the inspection contingency, they engaged a home inspection firm to inspect the property. After the inspection revealed certain problems, the Wishnes delivered a notice of cancellation to the Rosario/McSherrys on April 15, 1998, seventeen days after the date of acceptance of the counter-offer. After an exchange of correspondence which indicated the Rosario/McSherrys refused to return the deposited earnest money, the Wishnes commenced a lawsuit. The trial court ruled in favor of the Rosario/McSherrys.

II. ANALYSIS.

The appellants raise three issues in this appeal. First, the appellants contend that the trial court erred in finding that the Wishnes' failure to specify the financing terms within seven days did not render the contract void. They claim, relying on ***Nodolf v. Nelson***, 103 Wis.2d 656, 309 N.W.2d 397 (Ct. App. 1981), that the absence of any specific financing requirements in the contract rendered it illusory. Second, the Wishnes argue that the trial court erred in its interpretation

of the inspection clause. The appellants contend that the language in the counter-offer only provided an additional option for the seller to cancel the contract; it did not, they insist, modify the printed language in the offer allowing the Wishnes thirty days to complete the property inspection. Finally, they argue that the trial court erred in allowing Rosario/McSherry to retain the earnest money as the sellers provided no real estate condition report and report of code compliance within ten days of acceptance of the offer, and thus, the sellers breached the contract.

A. Financing Contingency

The Wishnes' claim, that the contract was illusory due to their failure to submit the financing terms within seven days, rests on three cases. The first, ***Nodolf***, is a case where the purchaser brought an action against the vendor for specific performance. *See* ***Nodolf***, 103 Wis.2d at 657, 309 N.W.2d at 398. This court affirmed the trial court's finding that the language in the offer to purchase—"Above offer is subject to obtaining financing by July 25, 1979"—created a condition precedent to the buyer's performance and rendered the contract unenforceable. ***Id.*** at 658-59, 309 N.W.2d at 398-99. The second, ***Woodland Realty, Inc. v. Winzenried***, 82 Wis.2d 218, 262 N.W.2d 106 (1978), was cited in the ***Nodolf*** case. In ***Woodland***, the broker sued the property owners seeking a commission due under a listing contract and the property owners impleaded the prospective purchasers. *See* ***id.*** at 220, 262 N.W.2d at 107. The supreme court affirmed the trial court's decision that the "subject to financing" clause constituted a condition precedent because an offer ripens into a valid and enforceable contract only when the financing terms are actually met. *See* ***id.*** at 223-24, 262 N.W.2d at 108-09. The purchaser was never able to obtain the actual financing listed in the contract. Instead, the savings and loan was prepared to lend the money under the stated contract terms, but only with an interest escalation clause. The interest

escalation clause was found to be a material deviation from the contract terms. *See* ***id.*** at 224, 262 N.W.2d at 109.

The third case, ***Gerruth Realty Co. v. Pire***, 17 Wis.2d 89, 115 N.W.2d 557 (1962), concerned a suit brought to recover on a promissory note given by a potential purchaser as a down-payment for the purchase of two properties. After the purchaser was unable to get the anticipated financing, one of the two owners sued to recover on the promissory note. The supreme court found that the language—"This offer to purchase is further contingent upon the purchaser obtaining the proper amount of financing"—defeated the owner's claim because it operated as a condition precedent. ***Id.*** at 91-95, 115 N.W.2d at 558-60.

Here, the trial court ruled that the Wishnes' failure to supply the financing terms within seven days did not negate the Rosario/McSherry right to keep the earnest money. The trial court stated that the Wishnes should not get the benefit of their own "escape clause." Although not specifically articulated by the trial court, implicit in the trial court's ruling is the trial court's belief that the Wishnes should be estopped from raising this issue because the Rosario/McSherrys relied on the Wishnes' contract provision to their detriment. This court notes that "[e]quitable estoppel may apply to preclude an assertion of rights and liabilities under a note or contract." ***Gabriel v. Gabriel***, 57 Wis.2d 424, 428, 204 N.W.2d 494, 496 (1973).

However, there is another reason why the financing contingency should not defeat the Rosario/McSherrys' claim. The facts of this case clearly demonstrate that the Wishnes waived the financing contingency when they supplied no specific financing terms within the seven days. Their waiver was confirmed by their conduct when they advised the sellers that "financing is not a

problem. We're not worried about financing. We know we're going to get financing." *See generally* ***Broadbent v. Hegge***, 44 Wis.2d 719, 726, 172 N.W.2d 34, 38 (1969) ("Waiver can be established by acts as well as by words, but it must be a '… voluntary and intentional relinquishment of a known right.'"). Waiver, as defined, "means that a person is precluded from asserting a right, a claim or privilege because he or she has previously knowingly, voluntarily, and intentionally relinquished or given up that right, claim, or privilege." Wis J I CIVIL—3057.

Here, the Wishnes knew that they were required to supply the specific financing terms within seven days. They chose not to. Instead, they communicated to the sellers that they would get financing. After the time passed for the financing terms to be supplied, the Wishnes failed to advise the Rosario/McSherrys that they believed the contract was void. Instead, they continued to pursue the completion of the contract. They did so by hiring a home inspection firm and conducting themselves in a manner inconsistent with one who believes the contract was void. Thus, the Wishnes effectively waived the financing contingency. Therefore, the contract was not illusory and the holdings of the three cited cases are inapposite under these facts.

B. Inspection Contingency

As noted, the Rosario/McSherrys' counter-offer contained the following language: "Inspection contingency will be modified such that the contingency will be removed within ten (10) days after acceptance hereof, or this agreement will become null and void if the Seller so chooses." The Wishnes argue that this language only provided the sellers with an additional option, it did not invalidate the thirty-day period contained in the printed offer to purchase form

allowing them to inspect the property. Further, they argue that the Wishnes breached the contract because, after receiving their inspection report, the Wishnes never made an election as to whether they wished to cure the defects or void the contract.

The Rosario/McSherrys argued, and the trial court so found, that the counter-offer's language was intended to shorten the time available for an inspection. This court agrees. Not only does the document state that it is modifying the inspection contingency, thus substituting ten days for the thirty days listed in the written form, but Rosario testified that the parties spoke about the contingency and the Wishnes knew why the provision was changed. Rosario testified that he and his wife were seeking to sell their home quickly because they were closing on another home at the end of May 1998, and, had the thirty days language stayed in the contract, it would have left them little time to sell their house if anything should prevent the contract from being consummated.

Contrary to the Wishnes' assertions, they had only ten days in which to submit a report to the Rosario/McSherrys and request them to make an election under the contract. Consequently, when the inspection report was submitted to Rosario/McSherry seventeen days after the counter-offer was accepted, the inspection contingency had already been waived and the Rosario/McSherrys were under no obligation to do anything with regard to the tendered report.

C. Real Estate Condition Report

Finally, the Wishnes claim they are entitled to the return of their earnest money because the sellers breached the contract by not fulfilling the provision written into the original offer to purchase which reads: "Seller must provide real estate condition report and report of code compliance to buyer within

ten days of acceptance of offer. Seller shall also make known to buyer the existence of liens and encumbrances on the property, or any easements, restrictions or covenants."

The trial court found that the sellers substantially complied, even though the Village inspector's report was received outside the time frame listed in the counter-offer. The trial court reasoned that when the Rosario/McSherrys supplied to the Wishnes an oral report of the Shorewood Village inspector's findings that everything was in compliance except for seven minor repairs, they substantially performed. Further, a copy of the statement of non-compliance dated within the ten days was given to the Wishnes later. The trial court further ruled that the sellers made a good faith effort to obtain the report and to repair the items not in compliance and, as evidence of this fact, Rosario/McSherry ultimately obtained a certificate of complete compliance on May 18, 1998. With respect to the requirement that they provide the Wishnes with information concerning a clear title, the trial court stated that while the sellers may not have actually provided the buyers with a list of existing liens, encumbrances, etc., it was not unreasonable for them to stop performing under the contract when they received the "notice of cancellation." This court agrees with the trial court's analysis.

Finally, we note that a party may be excused from performance because of circumstances beyond his or her control. *See generally* ***Hess Bros., Inc. v. Great Northern Pail Co.***, 175 Wis. 465, 468, 185 N.W. 542, 543 (1921). As noted in the respondents' brief, substantial testimony was presented at trial by the sellers that they were hampered in complying with the report of code compliance provision. First, there was a delay by the Village of Shorewood in scheduling an appointment for an inspection, and later, the schedules of the local utilities prevented the problems from being corrected earlier. The sellers had ten

days to perform, they clearly attempted to perform as is evidenced by the fact that they obtained a report within the ten days. The fact that there were minor repairs to be done was not clearly foreseeable by the sellers; thus, their failure to complete the repairs within the ten days is excusable. Finally, this court agrees that the Rosario/McSherrys were not required to comply with the requirement alerting the Wishnes of the property's liens, encumbrances, etc. After the Wishnes breached the contract, Rosario/ McSherrys' obligations ceased.

For the stated reasons, this court affirms.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.