COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0870

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

KATHRYN A. SABELLA,

PLAINTIFF-RESPONDENT,

V.

MIGUEL S. MELENDEZ AND ELODIA MELENDEZ,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Reversed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 NETTESHEIM, J. This is a real estate contract case. Miguel S. Melendez appeals from a judgment of specific performance directing him to convey his tavern business property to Kathryn A. Sabella pursuant to an offer to

purchase submitted by Sabella and accepted by Melendez.[1] In the trial court, Melendez argued that he was not required to convey his property because Sabella had not paid the earnest money as called for in the contract. Although the earnest money had not been paid, the trial court ruled pursuant to ***Kelly v. Sullivan***, 252 Wis. 52, 30 N.W.2d 209 (1947), that the parties' other mutual promises constituted sufficient consideration and rendered the contract enforceable.

¶2 We agree with the trial court that sufficient consideration supported the contract under ***Kelly***. However, Sabella's failure to pay the earnest money was a breach of the payment provisions of the contract which relieved Melendez of his obligation to convey the property. We therefore reverse the judgment.

Facts

¶3 The bench trial before the circuit court revealed the following facts. On March 27, 1998, Sabella tendered a written offer to purchase Melendez's real estate known as The Strand Tap, a tavern located in the city of Waukesha.[2] The purchase price was $130,000. Melendez had to accept the offer on or before March 30, 1998, and Sabella had to pay earnest money of $500 upon Melendez's acceptance. The balance of the purchase price was to be paid upon closing. The offer contained a financing contingency clause. The offer also included a "time is of the essence" provision with respect to the earnest money payment, Melendez's acceptance, Sabella's occupancy and the date of closing.

[1] Because Melendez's wife, Elodia, also signed the acceptance of the offer to purchase, she was named as an additional defendant and is bound by the judgment of specific performance. Because Miguel is the principal actor in this case on behalf of the Melendezes, we refer to them in the singular as "Melendez."

[2] The offer also covered certain personal property related to the tavern.

¶4 The parties did not use a broker. The offer provided that if a broker did not hold the earnest money, the parties should draft an escrow agreement governing disbursement of the money. However, no such escrow agreement was ever drafted.

¶5 On March 30, 1998, within the prescribed deadline, Melendez accepted Sabella's offer. The following day, Sabella executed her check for the earnest money in the amount of $500. However, the check was made out to her lawyer, Attorney Andrew Ladd, who had drafted the offer to purchase for Sabella. Ladd placed the check in Sabella's file and did not deposit the check in his trust account until January 18, 1999, some nine months later. Melendez was unaware of these facts and the earnest money was never paid to him.

¶6 In May 1998, her bank informed Sabella that her financing had been approved. Ladd conveyed this information to Melendez, who began backing away from the deal. Melendez at first told Ladd that he could not close by the July 1, 1998 deadline. Later, through his attorney, he advised Ladd that he would not close the deal, but he would pay Sabella's costs. At trial, Melendez testified that he did not believe he was obligated to convey the property because he had not received the earnest money.

¶7 Melendez's refusal to close resulted in Sabella's lawsuit for specific performance. The case was tried before the circuit court without a jury. At the close of the evidence, the trial court directed the parties to file briefs on the question of whether the contract was supported by sufficient consideration under ***Kelly***. In a written decision, the trial court rejected Melendez's defense that the offer was not enforceable because Sabella had failed to pay the earnest money. Instead, the court ruled under ***Kelly*** that the parties' other mutual promises

represented sufficient consideration and that the contract was enforceable. Melendez appeals. We will recite additional facts and address the trial court's ruling in greater detail as we discuss the issue.

Discussion

¶8 A request for specific performance is an equitable remedy and rests in the discretion of the trial court. *See* ***Anderson v. Onsager***, 155 Wis. 2d 504, 513, 455 N.W.2d 885 (1990). Such discretion must be exercised in accordance with established rules and standards, which include an examination of the relevant facts and an application of the appropriate law. *See* ***id***. at 513-14.

¶9 We begin with a discussion of ***Kelly***, the case that underpins the trial court's ruling. There, the parties simultaneously executed a written agreement for the conveyance of real estate. The agreement recited the seller's receipt of $5 earnest money. *See* ***Kelly***, 252 Wis. at 54. Later, the seller refused to convey the property. The buyer commenced an action for specific performance. The seller defended on the grounds that the earnest money had not been paid. *See* ***id***. at 56. The supreme court summarily rejected this argument stating:

> If it was otherwise valid, the November 24th agreement would be enforceable even if the phrase, "in consideration of $5," had not been included. It is clear from the rest of the writing that there is ample consideration for the seller's promise to convey a warranty deed, for the buyer in effect promises to pay the sum of $8,600 mentioned in the agreement. There is no failure of consideration.

Id.[3]

¶10 To the extent that the instant case raised a consideration issue, we agree with the trial court's ruling that sufficient consideration supported the agreement.[4] Sabella's offer promised to pay the purchase price. In exchange, Melendez's acceptance promised to convey good title. Under ***Kelly***, these mutual promises constituted sufficient consideration to support the parties' bilateral contract. *See also* ***Ferraro v. Koelsch***, 124 Wis. 2d 154, 164, 368 N.W.2d 666 (1985). Thus, the parties already had an enforceable agreement in place, and the earnest money provision was irrelevant to the question of consideration. In fact, the agreement did not obligate Sabella to pay any money until *after* Melendez had accepted the offer.[5]

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[3] The balance of the supreme court's opinion in ***Kelly*** is devoted to the seller's statute of frauds defense which claimed that the property had not been sufficiently described in the agreement. Although the supreme court agreed that the description did not satisfy the statute of frauds, *see* ***Kelly v. Sullivan***, 252 Wis. 52, 58, 30 N.W.2d 209 (1947), the court held that the agreement could nonetheless be enforced by specific performance because the buyers had partially performed under the agreement with the knowledge and consent of the seller. *See* ***id***. at 57-60.

[4] Although we ultimately rule for Melendez, we reject his attempts to distinguish ***Kelly***. Melendez argues that the ***Kelly*** court enforced the contract because the buyers had taken possession of the property and made improvements with the knowledge and approval of the seller. But as the preceding footnote observes, that holding was made on the statute of frauds issue, not the consideration issue. In addition, Melendez argues that the amount of the earnest money in ***Kelly*** was insignificant ($5) whereas here it was substantial ($500). We do not see that as a valid distinction.

[5] We appreciate that the offer obligated Sabella to pay the earnest money "on acceptance." Read literally, this would require Sabella to pay the earnest money simultaneously with Melendez's acceptance. Under this reading, if Sabella had delivered her earnest money check directly to Melendez rather than to Ladd on the day following the acceptance, her payment still would have been untimely. That is not a reasonable reading of this provision and that is why we say that Sabella was not required to pay the earnest money until after Melendez had accepted the offer. This obligation, however, remained subject to the "time is of the essence" provision.

¶11 This is the fact that sets this case off from ***Kelly***. There, the buyers had tendered the earnest money simultaneously with the parties' execution of the agreement. In that setting, the earnest money constituted part of the consideration and that is why the supreme court addressed the issue in consideration terms. But in this case, the earnest money did not serve a consideration purpose. Rather, the earnest money represented a partial payment by Sabella against the purchase price after the parties' agreement was already in place. Moreover, Sabella's obligation to pay the earnest money was governed by the "time is of the essence" provision in the agreement. This was the core of Melendez's defense. As early as his answer, Melendez did not speak in terms of a lack of consideration. Rather, he alleged as an affirmative defense that time was of the essence as to this payment, that the payment had not been made, and that as a result Sabella had no claim for specific performance.

¶12 Because Sabella relied on ***Kelly***, the issue of sufficient consideration came to cloud, and even dominate, the proceedings in the trial court. At the close of the evidence, in lieu of oral arguments from the attorneys, the trial court directed the parties to file written briefs addressing the issue of sufficient consideration under ***Kelly***. As a result, Melendez's core complaint that Sabella had not paid the earnest money within the "time is of the essence" requirements of the agreement faded into the background. And as a further result, we conclude that the trial court erred by extending ***Kelly*** to the different facts and the different issue posed by this case.

¶13 Having put this case in its proper context, we have considered whether we should remand this case for the trial court to consider whether Sabella was nonetheless entitled to specific performance. But we conclude as a matter of law that no reasonable reading of the evidence would support such relief. The

evidence is undisputed that Sabella not only failed to comply with the "time is of the essence" requirement regarding the part payment, but that she also failed to comply with the part payment provision in toto.[6] Having failed to do so, Sabella stood in breach of the payment provisions of the contract. As a result, she was not before the court with "clean hands," a relevant consideration on the question of specific performance. *See* ***Sipple v. Zimmerman***, 39 Wis. 2d 481, 498, 159 N.W.2d 706 (1968).

¶14 Even allowing that Melendez had second thoughts about the wisdom of the agreement, he committed no breach. He never advised Sabella or her representative that he was relieving her of the obligation to make the earnest money payment. The trial court expressly found that Melendez was unaware of the actions of Sabella and Ladd regarding the earnest money. And Sabella's own testimony established that she did not know what Ladd would do with the earnest money. Instead, she simply left it to Ladd's discretion. Absent waiver or estoppel, we are unaware of any law which says that a seller is obligated to continue to perform when the buyer already stands in breach of the agreement. While Sabella's argument at times has a ring of estoppel or waiver, she never expressly uses those terms. More importantly, she never develops a legal argument on these theories.

[6] The trial court stated that Melendez waived the "time is of the essence" provision of the agreement because he initially told Ladd that he could not close the transaction within the deadline set out in the agreement. Assuming this is so, we question whether that waiver operated to extend the other "time is of the essence" provision, particularly the payment of the earnest money. More importantly, even if the "time is of the essence" provision was waived, such waiver only governed the timing of the payment, not the obligation to make the payment. In the absence of a time limitation in an agreement, the law will imply a reasonable time. *See* ***Delap v. Institute of Am., Inc.***, 31 Wis. 2d 507, 512, 143 N.W.2d 476 (1966). Here, Sabella *never* paid the earnest money. Therefore, under no circumstances can it be said that payment was made within a reasonable time.

¶15 The trial court also observed that Melendez's offer to pay Sabella's costs reflected Melendez's belief that the parties had a valid agreement.[7] This too has an estoppel or waiver ring. But again, the law on these theories is not argued or developed on appeal. Regardless, we do not doubt that Melendez believed that he had a valid agreement with Sabella. After all, he had accepted her offer. And, as we have already held, the trial court correctly determined that the agreement was valid because it was supported by sufficient consideration. But Melendez's subjective belief, as a lay person, that he had a valid agreement with Sabella does not answer the issue in this case. Rather, the issue is whether Sabella was legally entitled to specific performance on these facts.

¶16 Although we are required to give deference to a trial court's discretionary ruling, the exercise of such discretion must be in accord with the law. *See* ***Anderson***, 155 Wis. 2d at 513. We conclude that the trial court committed legal error when it extended ***Kelly*** to the facts of this case. Beyond that, measuring Sabella's breach against Melendez's conduct, we hold as a matter of law that the evidence shows no basis for granting specific performance in favor of Sabella.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.

[7] Melendez contends that this was inadmissible evidence of an offer of settlement pursuant to WIS. STAT. § 904.08(1) (1997-98). However, Melendez did not object on these grounds when the evidence was offered and the issue is waived.