COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2082

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

HARMONY ANTIQUE CARS, INC.,

PLAINTIFF-APPELLANT,

V.

LSH, INC. AND TOWER LIGHT COMMUNICATIONS, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Rock County: MICHAEL BYRON, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 PER CURIAM. Harmony Antique Cars, Inc., appeals from a judgment arising from its claims against several defendants. The issues are whether: (1) the easement on Harmony's property has been terminated by certain

events that occurred; (2) the counterclaim against Harmony was frivolous; and, (3) the issue of Harmony's statutory costs is moot because it did not perfect the judgment. We resolve all the issues against the appellant and affirm.

I. EASEMENT

¶2 Respondent, Tower Light Communications, Inc., owns a radio tower. Respondent, LSH, Inc., owns the lot on which the tower was erected. Harmony owns an adjacent lot. Originally, the two lots were owned by one person. When the original owner sold one lot to Harmony's predecessor in interest, the remaining lot contained a radio tower. One of that tower's guy wires stretched from the tower, across part of the Harmony lot, and to a concrete anchor in the ground on the Harmony lot. As part of the land sale, the parties negotiated an easement for the wire and anchor. The warranty deed's easement provision states in its entirety: "Grantor reserves a right of way for a guy wire and associated hardware in its present location until such time as grantor, their heirs or assigns, remove the radio communications tower located on grantor's adjoining property."

¶3 In 1998, Tower Light built a second tower on the lot, to replace the original tower. The new tower included a new guy wire which covered a path similar, but not identical, to the old wire. The new wire ended in a new concrete anchor located approximately fourteen feet from the original one, but still on the Harmony property. Some time after the second tower was built, the first tower was removed, although the first concrete anchor remains on the Harmony property.

¶4 Harmony argues, based on the easement language, that the easement terminated upon removal of the original tower. The trial court concluded that the

easement was ambiguous, and at trial, evidence was presented as to the intent of the original parties to the easement. The trial court found that the parties did not have a meeting of the minds as to whether replacement of the original tower would terminate the easement. The court concluded that the most equitable interpretation was that the easement was not confined to the original tower, but should continue as long as a radio tower was maintained on the property. On appeal, Harmony argues that the easement was terminated by operation of two separate phrases in the easement. We will address each phrase separately.

¶5 Harmony first relies on the phrase "in its present location." The trial court agreed with Harmony that Tower Light violated this clause by putting the new wire and anchor in a different location. As a result, the court found that Tower Light had trespassed, and the court awarded damages for that trespass. Thus, Harmony has already prevailed on the question of whether Tower Light violated the easement provision allowing the wire and anchor "in its present location."

¶6 Harmony's argument on appeal, however, is that Tower Light's changing of the location has terminated the easement by operation of the easement's own terms. We disagree. Harmony apparently reads the easement as requiring that the easement remains in effect "until either the wire and anchor is moved from its present location or the tower is removed." However, that is a misreading of the text. We see no ambiguity on this point. In the actual wording of the easement, the phrase "present location" is not part of the phrase describing when the easement lasts "until." The phrase "present location" is only a description of the physical scope of the easement, and is not related to its duration.

¶7 Harmony next focuses on the phrase "until such time as grantor … remove[s] the radio communications tower." The trial court concluded, and we agree, that this phrase is ambiguous. It might reasonably be read as referring to removal of the specific original tower, or it might reasonably be a way of referring to a time at which no radio tower is maintained on the property.

¶8 Because this easement arose as a term of a contract to sell real estate, we apply principles of contract law. When a contract is ambiguous, the court may consider extrinsic evidence to ascertain the parties' intent. *See* ***Spencer v. Spencer***, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987). The court heard such evidence here, including testimony by the two men who were actually involved in the real estate sale. The court found that the men did not have a meeting of the minds as to the duration of the easement because they had not considered how that question might relate to replacement of the tower.

¶9 Harmony argues that the evidence showed that the two men agreed the easement was limited to the life of the original tower. However, we do not think the trial court's finding was clearly erroneous. *See* WIS. STAT. § 805.17(2) (1997-98).[1] Based on the testimony given, it was reasonable to conclude that the parties did not have any mutual intent regarding the easement's duration if the tower was replaced.

¶10 On appeal, neither party has provided a clear description of what legal principles should be applied when parties to a negotiated easement have failed to agree on a necessary term of the easement. Again, we think contract law should apply. Where parties to a contract fail to foresee a situation that later

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

arises, and thus have no expectations with respect to that situation, the court may determine the parties' rights and duties pursuant to RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981). *See* ***Stahl v. Sentry Ins.***, 180 Wis. 2d 299, 306, 509 N.W.2d 320 (Ct. App. 1993); ***Spencer***, 140 Wis. 2d at 451-53. RESTATEMENT § 204 states that "[w]hen the parties ... have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." In supplying the essential term, the court should not attempt to determine what the parties would have agreed to if the question had been brought to their attention; rather, we should supply a term "which comports with community standards of fairness and policy." RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d.

¶11 The trial court in this case concluded that the most rational result would be that the easement would continue for as long as the tower owners "ran or had a radio communication tower there." Accordingly, the court determined that the easement did not terminate when Tower Light constructed a second tower and removed the first one.

¶12 We agree that this is the most reasonable term to supply. As shown by the testimony, at the time of the contract Harmony's predecessor in interest had no reason to expect that the tower would be completely removed at any particular time. Even if not replaced, the original tower might have lasted for many more years. Therefore, the Harmony lot owner was apparently willing to accept the existence of the easement for the foreseeable future. It also seems reasonable for the tower owner to be able to replace the tower due to damage, or to respond to new business or technological circumstances. Therefore, we affirm the trial court's conclusion.

II. MOTION TO FIND COUNTERCLAIM FRIVOLOUS

¶13 This issue requires additional facts relating to the ownership of the tower, which has been severed from the real estate upon which it sits. When the original owner of the two lots sold one of the lots to Harmony's predecessor in interest, he retained ownership of the tower and the property on which the tower sits. We will refer to the real estate under the tower as "the tower property." After another intervening sale, in 1996 LP Productions, Inc. bought both the tower property and the tower. LP then sold just the tower to LSH, Inc., and retained ownership of the tower property. In 1996, LSH sold the tower to Tower Light. As a result, when the present dispute began, the tower was owned by Tower Light, but the tower property was owned by LP. Then, during the litigation, LP conveyed its interest in the tower property to LSH.

¶14 The remaining procedural history becomes complicated, and to present it fully here "would be to swell the opinion to an unusual compass." ***Kimball v. City of Kenosha***, 4 Wis. 336, [*321], 344 [*333], (1855). Briefly stated, near the start of this litigation Harmony filed a lis pendens regarding the tower property then owned by LP. LP responded with a counterclaim alleging slander of title by Harmony. The counterclaim was based on the theory that the lis pendens was improper because Harmony's suit would not affect the tower property owned by LP, but only the tower itself, owned by Tower Light.

¶15 For reasons that are not material here, LP was dismissed from the suit before trial. However, LSH sought to have LP's counterclaim assigned to LSH. The trial court declined to rule on that request until trial. In so ruling, the court stated, during a motion hearing on April 12, 1999, that "[y]ou can go ahead

at trial with the proof, and I'll just decide it, whether they're the successor in interest."

¶16 At trial, the court dismissed the slander of title counterclaim. However, the court denied Harmony's motion to find the counterclaim frivolous. Harmony appeals this decision and argues several reasons why the counterclaim was frivolous. We reject them all, for reasons which follow.

¶17 Harmony argues that it was frivolous for LSH to pursue the counterclaim because LSH did not amend its pleadings to allege slander of title. We agree that it does not appear LSH amended its pleading to make a counterclaim on its own behalf. But the question remains whether LSH could pursue LP's counterclaim as LP's successor in interest. The trial court allowed this issue to be tried. However, the court did not rule on the question at trial, perhaps because once the trial court concluded that Harmony's filing of the lis pendens was appropriate, that conclusion would defeat a slander of title claim by either defendant. On appeal, however, the appellant does not address whether LSH could properly pursue LP's counterclaim. Accordingly, we do not consider the issue further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶18 Harmony argues that LSH cannot pursue a slander of title claim because LSH took title to the tower property after the lis pendens was recorded, and therefore failed to mitigate its damages. We reject this argument because, if LSH is pursuing LP's counterclaim rather than its own, LSH's conduct in taking title to the tower property is irrelevant. Harmony also asserts that LSH could not have been injured by the lis pendens, but again, this argument has no bearing on LSH's litigation of the counterclaim by LP.

¶19 Harmony argues that the counterclaim was frivolous because Harmony was required to file the lis pendens against the tower property by WIS. STAT. § 840.10(1). Harmony argues that its lawsuit necessarily affected the tower property because the easement is "appurtenant" to that property, meaning that it is incapable of existence separate from the tower property. This is an issue that is reasonably debatable. The easement on the Harmony property does not appear to be appurtenant to the tower property. The easement appears to benefit only the owner of the *tower*, not the tower property. We think that a nonfrivolous counterclaim could be maintained based on the argument that Harmony should not have filed a lis pendens against the underlying tower property.

¶20 Harmony argues that the counterclaim was frivolous under case law which provides a privilege for the filing of a lis pendens when the pleader has a reasonable ground for believing the truth of the pleading. Harmony argues that the counterclaim would not have prevailed on this element because Harmony was required to file the lis pendens under WIS. STAT. § 840.10(1). However, as we concluded, we think Harmony's application of § 840.10(1) to these facts is arguable, and therefore a counterclaim on this theory would not be frivolous.

III. STATUTORY COSTS

¶21 The trial court reduced Harmony's statutory award of costs to one-half because Harmony had failed to recover a more favorable judgment at trial than the defendants' settlement offer. *See* WIS. STAT. § 807.01(1). Harmony now argues that the trial court should have awarded all of its statutory costs. The respondents reply that this issue is moot because Harmony did not perfect its judgment within the time required by WIS. STAT. § 806.06(4), and has therefore forfeited its right to recover *any* costs. Tower Light does not provide any factual

evidence that the judgment was not perfected, but Harmony does not dispute the issue factually, so we will accept it as true. We agree that the issue is moot. Because Harmony has forfeited its right to recover costs, our determination of whether Harmony should recover greater costs will have no practical effect on this controversy. *See* ***Racine Educ. Ass'n. v. Board of Educ.***, 129 Wis. 2d 319, 324, 385 N.W.2d 510 (Ct. App. 1986).

¶22 We note that in responding to the cost issue, the respondents argue that Harmony should not have been awarded any costs at all, and that respondents should instead be awarded their costs. Because these issues would require modification of the judgment appealed from, and not merely affirmance, the respondents were required to file a cross-appeal to raise these issues. *See* WIS. STAT. RULE 809.10(2)(b). There is no cross-appeal in this case, and therefore we lack jurisdiction to address these issues.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.