COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal No. 2015AP490 **Cir. Ct. No. 2014CV197**

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

NANCY KEY,

PLAINTIFF-APPELLANT,

V.

WILLIAM RYAN HOMES, INC.,

DEFENDANT-RESPONDENT,

PINE INVESTMENTS LLC,

DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 HAGEDORN, J. This is a dispute over a real estate transaction gone bad. It all began well enough in 2005 when William Ryan Homes, Inc., agreed to purchase property from Nancy Key for later development. But as the due diligence progressed, William Ryan backed out of the deal in August 2008. In early 2014, Key brought suit seeking, among other remedies, specific performance on the agreement. The circuit court granted summary judgment to William Ryan, holding that the agreement provided Key with a limited and exclusive remedy: keeping the earnest money. Key argues that the contract gives her the right to determine whether a breach has occurred, and as a result, control over whether the limitation of remedies provision applies. Thus, she argues William Ryan did not materially breach the agreement—which would have triggered the limitation of remedies provision—and that specific performance is the proper remedy. We disagree and affirm the circuit court's grant of summary judgment. Additionally, William Ryan requests that we order Key to pay its reasonable attorneys' fees for this appeal. Because we conclude that William Ryan was not the "prevailing party in the lawsuit," we decline to order fees.

I. Background

¶2 Key owns real estate located in East Troy, Wisconsin. On February 3, 2005, Key executed an agreement with William Ryan to sell the East Troy property for $1.5 million.[1] The agreement provided that William Ryan would make an initial earnest money deposit of $25,000, which would be increased to $50,000 upon the approval of the preliminary plat. The agreement

[1] The agreement was amended two times and at one point assigned to Pine Investments, LLC, but none of the amendments or the assignment altered the provisions at issue here.

also gave William Ryan a time period to assess the suitability of the property and obtain various government approvals prior to closing.

¶3 Section 11 of the agreement contains several provisions relating to performance of the contract and remedies for its breach. It provides:

> This Contract may be terminated by either party by giving thirty (30) days written notice to the other party if such other party has materially breached any provisions of this Contract, provided, however, that if the party guilty of the breach cures such breach prior to the expiration of the thirty (30) day period, this Contract shall continue on in full force and effect. PURCHASER and SELLER agree to proceed in good faith and diligence in attempting to satisfy all contingencies. If the SELLER materially breaches this contract, PURCHASER may, at its option, elect to (a) seek specific performance; or (b) have the earnest money refunded. If PURCHASER materially breaches this contract, SELLER shall retain the entire Earnest Money Deposit, as liquidated damages as Seller's sole and exclusive remedy.… The prevailing party in any lawsuit between the parties shall be entitled to recover its reasonable attorneys' fees, costs and witness fees incurred in such lawsuit.

¶4 Pursuant to the agreement, William Ryan deposited $50,000 in earnest money in an escrow account. William Ryan purchased three ninety-day extension periods for $10,000 each and exercised its option to delay closing an additional eighteen months under the agreement.[2] The extensions would have expired on September 17, 2008. However, on August 14, 2008, William Ryan informed Key that it would "not be going forward with the deal."

¶5 On January 29, 2014—more than five years after William Ryan announced its intention to abandon the agreement—Key filed an action to enforce

[2] The circuit court noted that William Ryan actually paid for only nine months of the extensions under the contract.

the agreement.[3] Key requested specific performance, damages for breach of contract, and in the alternative that she be awarded the escrow money. Both Key and William Ryan stipulated that the $50,000 in earnest money should be disbursed to Key's attorney to be held in trust pending resolution of the litigation. Two months into the litigation, the parties agreed that the earnest money would be paid to Key.

¶6 Both Key and William Ryan later moved for summary judgment. The circuit court determined that the agreement limited Key's remedy to the earnest money deposit if William Ryan materially breached the agreement. The court found that William Ryan's statement that it would "not be going forward with the deal" was a material breach. Thus, the court concluded that Key's exclusive remedy was to retain the earnest money as liquidated damages. The circuit court also found that there was no prevailing party in the lawsuit because both William Ryan and Key had prevailed on significant issues during the litigation. Key succeeded in obtaining the earnest money, and William Ryan had prevailed on the issue of specific performance. Accordingly, because there was no prevailing party, the court declined to award either party their costs and fees. Key appeals the circuit court's denial of her request for specific performance. Neither William Ryan nor Key appeals the circuit court's ruling relating to attorneys' fees. William Ryan, however, does ask this court to award fees for prevailing in this appeal.

[3] In addition to William Ryan, the complaint also named Pine Investments, LLC and Chicago Title Insurance Company LLC. Chicago Title was dismissed from the action when it paid the $50,000 in escrow money to Key's attorney to be held in trust. Pine Investments never answered the complaint and, according to William Ryan, is no longer in existence.

II. Standard of Review

¶7 We review whether the circuit court erred in granting or denying summary judgement de novo. ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶34, 309 Wis. 2d 365, 749 N.W.2d 211. Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** Interpretation of a contract presents a question of law we also review de novo. ***Levy v. Levy***, 130 Wis. 2d 523, 528-29, 388 N.W.2d 170 (1986).

III. Discussion

¶8 This appeal centers on the interpretation of Section 11 of the agreement—specifically, whether the provision limits Key's remedy to the earnest money and precludes specific performance as an available remedy. We conclude that William Ryan materially breached the agreement, and Section 11 does limit Key's remedy to keeping the earnest money. We also decline William Ryan's request for attorneys' fees. Although Section 11 provides fees to "[t]he prevailing party in any lawsuit between the parties," William Ryan has not prevailed in the lawsuit.

A. Specific Performance

¶9 We interpret contracts to give effect to the parties' intent as expressed in the plain language of the contract. ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426. "[C]ontract language should be construed to give meaning to every word, 'avoiding constructions which render portions of a contract meaningless, inexplicable or mere surplusage.'" ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶45, 326 Wis. 2d 300, 786 N.W.2d 15 (citation omitted). If a contract provision specifies the remedies

available, then we will generally enforce that provision's plain language to effectuate the parties' intent. ***Ash Park, LLC v. Alexander & Bishop, Ltd.***, 2010 WI 44, ¶37, 324 Wis. 2d 703, 783 N.W.2d 294.

¶10 Section 11 provides that if William Ryan "materially breaches this contract, [Key] shall retain the entire Earnest Money Deposit, as liquidated damages as [Key]'s sole and exclusive remedy." The language "sole and exclusive remedy" could not be more clear. Per Section 11, if William Ryan materially breached the agreement, Key's only remedy was to retain the $50,000 earnest money—not to seek specific performance. This language is so clear that the parties appear to agree that this is the proper interpretation.[4]

¶11 Despite the apparent clarity of this limitation of remedies provision, Key contends that it does not apply. She argues that a material breach cannot occur under Section 11 unless notice of breach and an opportunity to cure is provided to the breaching party. Accordingly, Key claims to hold the key, so to speak, to whether there is a material breach, allowing her to forestall the existence of a material breach by refusing to give notice to William Ryan. Thus, though Key brought suit for breach of contract and here seeks specific performance (a remedy for breach), she nevertheless maintains that William Ryan has not materially breached the agreement.

¶12 William Ryan responds that the language of the contract does not make notice a condition precedent to the existence of a material breach but only

[4] William Ryan concludes that the limitation of Key's remedies "is triggered once William Ryan 'materially breaches' the [c]ontract." Similarly, Key states that if the contract was materially breached, then "Key's damages were limited to a set amount of liquidated damages."

provides the conditions by which the nonbreaching party may terminate the agreement. William Ryan openly admits it materially breached the contract; it refused to complete the purchase. As such, William Ryan insists Section 11 limits Key's remedy to retention of the earnest money. We agree with William Ryan.

¶13 The language of Section 11 is not susceptible to Key's proposed construction. The relevant text provides:

> This Contract may be terminated by either party by giving thirty (30) days written notice to the other party if such other party has materially breached any provisions of this Contract, provided, however, that if the party guilty of the breach cures such breach prior to the expiration of the thirty (30) day period, this Contract shall continue on in full force and effect.

The plain language states that notice and opportunity to cure are prerequisites to *termination* of the agreement, not the existence of a material breach. This provision gives rights to both parties. It protects the party that allegedly breached by giving that party notice and the opportunity to cure. It also provides a notice-based framework for the nonbreaching party to identify the alleged breach, demand that it be cured, and if it is not, enable termination of the agreement. In fact, the notice provision assumes that a material breach has already occurred. In order to terminate, Key had to give William Ryan "written notice … if [it] has materially breached" the agreement. Thus, in order to trigger the notice requirement, William Ryan must already be in material breach. Nothing in the agreement allows Key to unilaterally prevent a material breach from occurring by simply withholding notice. Although it is true that a nonbreaching party may waive the materiality of a breach,[5] the ability to waive the materiality of a breach

[5] *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 183-84, n.25, 557 N.W.2d 67 (1996).

once committed does not equate to the ability to prevent that breach in the first place.[6]

¶14 We agree with the circuit court that William Ryan materially breached the agreement, triggering the limitation of remedies provision. William Ryan's statement that it would not close was a repudiation of the agreement and therefore a material breach. A material breach is a breach so severe "as to destroy the essential objects of the contract." ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996). The Restatement of Contracts makes clear that when a party repudiates a contract, that repudiation is a material breach. *See* RESTATEMENT (SECOND) OF CONTRACTS § 253(1) (1981). The Restatement declares that "[w]here an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach." ***Id.*** William Ryan's statement that it "would not be going forward with the deal" was a repudiation of its contractual duty to close on Key's property; it was a material breach. *See* ***Management Computer Servs.***, 206 Wis. 2d at 183-84 (explaining that a material breach is a breach that gives rise to a claim for damages for total breach).

[6] Key responds that this construction renders the contract illusory because under this interpretation "only Key had the obligation to perform." Not only is this simply not true—both parties had obligations under the agreement—but Key failed to raise this argument at the circuit court. Thus, we are not obligated to address it here. ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (issues not raised at the circuit court may be considered forfeited as a matter of judicial administration).

¶15 Key argues that the materiality of a breach is ordinarily a question for the jury. True enough. But it can be decided as a matter of law in clear cases. *See* ***Ash Park, LLC v. Alexander & Bishop, Ltd.***, 2009 WI App 71, ¶21, 317 Wis. 2d 772, 767 N.W.2d 614. William Ryan's repudiation is a clear case—maybe as clear as it gets. William Ryan clearly and unequivocally declared that it would not fulfill its contractual duties. Key offers no support or disputed facts in opposition, clinging only to the flawed notion that Section 11's notice requirement precludes a finding of material breach here.

¶16 Key raises two final objections. First, she argues that William Ryan breached the duty of good faith and fair dealing. But breaching a contract by informing the other party of your intent not to perform, as occurred here, is not a per se breach of the duty of good faith. Such a rule would turn contract law on its head. Contract law encourages efficient breaches by allowing and encouraging parties to negotiate determinate damages in an agreement. *See* ***Wolnak v. Cardiovascular & Thoracic Surgeons***, 2005 WI App 217, ¶¶27-28, 287 Wis. 2d 560, 706 N.W.2d 667. That is what happened here. William Ryan bargained for and received this exact deal in the contract language itself—including payment of negotiated liquidated damages. Key makes no substantive allegations of bad faith or acts on the part of William Ryan, and we see none here.

¶17 Finally, Key makes what appears to be a separate argument that specific performance is the preferred remedy and should be ordered as a matter of course in a contract for the sale of land. While Key's recitation of the general principle is accurate, its application here is not. Nothing in Wisconsin law suggests that an exclusive liquidated damages provision in a real estate contract must bend the knee to specific performance. Rather, Wisconsin law is replete with affirmations of the parties' freedom to contract, including the freedom to specify

determinate remedies. *See, e.g.*, ***Ash Park***, 324 Wis. 2d 703, ¶37 ("When a contract specifies remedies available for breach of contract, the intention of the parties generally governs."). While specific performance is an equitable remedy customarily available, the common law powers and traditions of the remedy should not run roughshod over the words of the contract itself. *See* ***id.***; ***Dekowski v. Stachura***, 176 Wis. 154, 185 N.W. 549, 551 (1921) (explaining that determining whether to grant specific performance involves the "vital question" of whether the parties intended a liquidated damages provision to preclude specific performance).[7] This is no different. The contract controls the remedy.

¶18 In short, there was a material breach of the agreement, and the remedy specified in the agreement controls. The circuit court correctly held that Key was limited to retaining the earnest money as damages for William Ryan's material breach.

B. Attorney Fees

¶19 Finally, William Ryan argues that if it were to be victorious on appeal (and it is), it is entitled to its fees and costs under the contract. Section 11 states that "[t]he prevailing party in any lawsuit between the parties shall be entitled to recover its reasonable attorneys' fees, costs and witness fees incurred in such lawsuit." Hence, in order for William Ryan to be entitled to its fees, it must be the "prevailing party in any lawsuit."

[7] Other jurisdictions have enforced similar provisions that limit a party's right to specific performance. *See, e.g.*, ***O'Shield v. Lakeside Bank***, 781 N.E.2d 1114, 1119 (Ill. App. Ct. 2002) (enforcing provision making return of payments the "sole" remedy in case of breach).

¶20 Wisconsin has adopted the American Rule for attorney fees. ***Kremers-Urban Co. v. American Emp'rs Ins. Co.***, 119 Wis. 2d 722, 744-45, 351 N.W.2d 156 (1984). Under this rule, "attorney's fees are not recoverable unless such fees are expressly allowed by contract or statute." ***Borchardt v. Wilk***, 156 Wis. 2d 420, 426, 456 N.W.2d 653 (Ct. App. 1990). Thus, we will only enforce a fee-shifting provision if it clearly and unambiguously provides for the recovery of fees. ***Hunzinger Constr. Co. v. Granite Res. Corp.***, 196 Wis. 2d 327, 340, 538 N.W.2d 804 (Ct. App. 1995). If a fee-shifting provision does not define a term, then we give that term its ordinary meaning. ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 507, 577 N.W.2d 617 (1998). The question, then, is whether Section 11 clearly and unambiguously provides for fee shifting.

¶21 Neither William Ryan nor Key challenges the circuit court's ruling that neither party was the "prevailing party."[8] "[A] party has prevailed if he or she succeeds on any significant issue in litigation which achieves some of the benefit sought by bringing suit." ***Footville State Bank v. Harvell***, 146 Wis. 2d 524, 539-40, 432 N.W.2d 122 (Ct. App. 1988) (defining "prevailing party" in context of the Wisconsin Consumer Act); *see also* ***Sands v. Menard, Inc.***, 2013 WI App 47, ¶53, 347 Wis. 2d 446, 831 N.W.2d 805 (using same definition for a Title VII claim). Black's Law Dictionary similarly defines a "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." BLACK'S LAW DICTIONARY 1298 (10th ed. 2014). It is clear that William Ryan will "prevail" in this appeal. The real question is whether William Ryan has prevailed in the "lawsuit" between the parties.

[8] The circuit court observed that "each side won two quarters of the football game here and didn't do anything in the overtime."

¶22 The term "lawsuit" refers to the entirety of an action, not a particular stage of litigation. *See* BLACK'S LAW DICTIONARY 1663 (10th ed. 2014) (defining "suit," a synonym of "lawsuit," as "an ongoing dispute at any stage, from the initial filing to the ultimate resolution"). Filing an appeal is not a new "lawsuit" but a continuation of the same lawsuit. Said another way, an appeal is the legal equivalent of an instant replay challenge in football where one side seeks to change the call on the field; it is not a separate football game. This appeal is simply one part of Key's larger lawsuit. Although no Wisconsin decision has yet addressed the term's meaning, our definition is both common sense and in accord with decisions in other jurisdictions.[9] Although William Ryan may have had the call upheld on review, the outcome of the game, as determined by the circuit court, remains unchanged. William Ryan, by virtue of success before this court, has not become the prevailing party in the lawsuit. Therefore, we decline its request for attorneys' fees.

IV. Conclusion

¶23 Our job in this case is to enforce the real estate agreement the parties signed. William Ryan materially breached the agreement via repudiation. The clear limitation of remedies provision negotiated by the parties controls the outcome; it precludes Key from forcing William Ryan to purchase the property

[9] Two California cases treat the question of who was the prevailing party in a "lawsuit" as a question of the overall litigation not a particular stage. In ***Snyder***, the California Court of Appeal held that a defendant was not the prevailing party, despite successfully reducing the judgment on appeal because the defendant still suffered a net judgment. ***Snyder v. Marcus & Millichap***, 54 Cal. Rptr. 2d 268, 270 (Cal. Ct. App. 1996). Likewise, another decision by the same court held that a successful appeal that resulted in the reversal of summary judgment did not render the successful appellant the "prevailing party" in the lawsuit because the underlying "lawsuit" had yet to be resolved. ***Presley of S. Cal. v. Whelan***, 196 Cal. Rptr. 1, 2 (Cal. Ct. App. 1983).

from her. Furthermore, although William Ryan carries the day on appeal, the agreement does not entitle William Ryan to its attorneys' fees for this stage of the litigation.

By the Court.—Judgment affirmed.

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