COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1870 **Cir. Ct. No. 2013CV1790**

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

JAMES D. WOODBURN, JR. AND WM. SCOTT WOODBURN,

PLAINTIFFS-APPELLANTS,

V.

ROCK SOLID VENTURES, LLC, ROBERT G. SUTTER AND SUTTER PROPERTIES, LLC,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: RHONDA L. LANFORD, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

¶1 LUNDSTEN, J. This case involves a dispute over a right of first refusal that James Woodburn, Jr., and Scott Woodburn hold on property formerly owned by Robert Sutter. The dispute arose after the Sutter property went into

foreclosure and was acquired upon foreclosure sale by Sutter's nephew's company, Rock Solid Ventures. The Woodburns argue that their right of first refusal applied to the foreclosure sale and that the circuit court should have granted them equitable relief in the form of requiring Sutter and Rock Solid to allow the Woodburns to acquire the property "on the same terms and conditions" under which Rock Solid acquired the property. Sutter and Rock Solid respond that the Woodburns' right of first refusal did not apply to the foreclosure sale and that the Woodburns have not otherwise shown that they are entitled to the equitable relief they seek. We agree with Sutter and Rock Solid and, therefore, affirm.

Background

¶2 This case comes to us on summary judgment. In keeping with that procedural posture, our background facts include reasonable inferences from the record that favor the Woodburns.

¶3 In a series of transactions in 2002 and 2006, the Woodburns' father deeded the property, which was operated as a quarry, to Sutter. Sutter, in turn, granted a right of first refusal to the Woodburns. The right of first refusal was recorded and was set forth in a two-page document that included the following pertinent language:

> [Sutter] hereby agrees that if … [Sutter], or any successor interest to the said real estate, shall receive from any third party a bona fide offer to purchase … the … real estate at a price and on terms acceptable to the owner …, the owner shall give written notice of the price and terms and a copy of the accepted offer to purchase or agreement of sale to [the Woodburns] ….
>
> The [Woodburns] shall have ten (10) business days after receipt of a copy of the accepted offer to purchase, or agreement of sale, in which to execute a right of first refusal for the purchase of the said premises at the same

> price and same terms as contained in the said offer to purchase.

¶4 Sutter defaulted on a mortgage on the property, and, in 2011, the bank holding the mortgage commenced foreclosure proceedings.[1] The Woodburns were aware of the foreclosure proceedings because the Woodburn family owned a company called Vernon Valley Farms, which was a party to those proceedings.[2] The bank obtained a foreclosure judgment in the amount of $312,483.86.

¶5 Although the Woodburns were aware of the foreclosure proceedings, they did not attempt to intervene or otherwise take action until after the foreclosure sale. The Woodburns' explanation for this, which we take as true, is as follows: Based on the property's value, the amount owed on the mortgage, and other circumstances, the Woodburns reasonably believed that the bank would be the only bidder at the foreclosure sale. Then, because the bank would not want to keep the property, the Woodburns reasonably believed that they would be able to negotiate with the bank for a favorable purchase price, or, if the bank sought to re-sell the property to someone else, the bank, as a successor to Sutter, would be obligated to extend to the Woodburns their right of first refusal.

¶6 Prior to the foreclosure sale, Rock Solid obtained the bank's interest in the property for $234,083.47, and Sutter entered into an agreement with Rock Solid promising to "cooperate" in Rock Solid's efforts to enforce the foreclosure

[1] Prior to the foreclosure proceedings, Sutter transferred the property to a company he solely owned, Sutter Properties, LLC. The Woodburns concede that their right of first refusal did not apply to this transfer. We make no further distinction between Sutter and Sutter Properties, LLC. Similarly, we make no further distinction between the Woodburns.

[2] The parties explain that Vernon Valley Farms was made a party to the foreclosure proceedings because of a prior dispute between Vernon Valley Farms and Sutter that resulted in Vernon Valley Farms executing a judgment against the property.

judgment and acquire the property. Rock Solid filed paperwork in the foreclosure proceedings substituting Rock Solid for the bank as the foreclosure plaintiff. However, Rock Solid's counsel failed to serve this paperwork on the other parties in those proceedings, including Vernon Valley Farms.[3]

¶7 Notably, the Woodburns did not learn that Rock Solid stepped into the shoes of the bank until after the foreclosure sale. The Woodburns would have learned of the substitution before the sale had Rock Solid not failed to notify the other parties, which would have included Vernon Valley Farms, the entity owned by Woodburn family members.

¶8 At the foreclosure sale, Rock Solid was the only bidder, and it acquired the property for $336,000. Subsequent to the sale, the Woodburns unsuccessfully attempted to intervene in the foreclosure proceedings.

¶9 The Woodburns then filed the instant action against Sutter and Rock Solid, seeking an order forcing Sutter to "offer" the property to the Woodburns and Rock Solid to "transfer title" to the property to the Woodburns "on the same terms and conditions under which Rock Solid … acquired the property." That is, as we understand it, the Woodburns sought an order requiring Sutter and Rock Solid to allow the Woodburns to acquire the property, apparently for $336,000. The circuit court denied this requested relief, and dismissed the Woodburns' action. The Woodburns appeal.

[3] Rock Solid's counsel averred that the failure to serve was inadvertent. As far as we can tell, the Woodburns do not dispute this. Regardless, the Woodburns fail to explain how it would affect our analysis if the service error had been intentional. We consider the reason for the failure to serve no further.

Discussion

¶10 As explained above, Sutter obtained the property at issue from the Woodburns' father, subject to the right of first refusal giving the Woodburns an opportunity to obtain the property according to the terms set forth in the right of first refusal document. The extent of this contractual right lies at the heart of our analysis.

¶11 It is hard to understand all of the Woodburns' various arguments. Generally, the Woodburns contend that Sutter's and Rock Solid's actions during the course of the foreclosure proceedings we describe above improperly interfered with the Woodburns' right of first refusal. The Woodburns argue that they are entitled to an equitable remedy they characterize as "specific performance." As explained, however, the "specific performance" they seek, according to their complaint allegations, is an order requiring Sutter and Rock Solid to effectively allow the Woodburns to acquire the property.

¶12 We reject all of the Woodburns' arguments. Our discussion begins with two related observations. The point of these observations is to explain that many of the Woodburns' arguments fall short because those arguments fail to come to grips with the need to show an invasion of a protected legal right, such as a contract right. We make these observations, and then address and reject what we conclude is the only potentially viable argument that the Woodburns make, namely, the argument that Sutter, with the assistance of Rock Solid, breached the Woodburns' right of first refusal.

¶13 First, although they make several arguments based in general concepts of equity, the Woodburns fail to adequately connect these arguments to any underlying cognizable legal claim that seeks to vindicate a legally protected

right. Equitable relief is granted "in response to an invasion of a legally protected right." *See* ***State v. Jason J.C.***, 216 Wis. 2d 12, 18, 573 N.W.2d 564 (Ct. App. 1997). Not every injustice is actionable. *See* ***Breier v. E.C.***, 130 Wis. 2d 376, 389, 387 N.W.2d 72 (1986).

¶14 The Woodburns rely on ***Ash Park, LLC v. Alexander & Bishop, Ltd.***, 2010 WI 44, 324 Wis. 2d 703, 783 N.W.2d 294, which discusses a circuit court's discretionary power to grant the equitable remedy of specific performance depending on the "facts and equities of the individual case." *See* ***id.***, ¶38; *see also* ***id.***, ¶¶32, 35-37, 39, 41-46, 72-74. But what the Woodburns' reliance on ***Ash Park*** fails to take into account is that the court's entire discussion of specific performance in ***Ash Park*** was in the context of deciding whether specific performance was the proper remedy *once a breach of contract was already established*. *See* ***id.***, ¶¶1-2. Here, as discussed further below, the Woodburns show no breach of contract, that is, no breach of their right of first refusal. And, the Woodburns do not adequately identify any other underlying invasion of a legally protected right. For example, to the extent that the Woodburns make arguments based on their lost opportunity to negotiate with the bank for a favorable price after the foreclosure sale, or their lost opportunity to bid on the property at the sale, the Woodburns fail to persuasively explain how these lost opportunities tie into any underlying legal claim or legally protected right that Sutter or Rock Solid violated.

¶15 Second, to the extent that the Woodburns' arguments are based on Rock Solid's failure to serve all parties with notice that Rock Solid stepped into the shoes of the bank in the foreclosure proceedings, the Woodburns appear to be relying on statutory or due process rights belonging to *Vernon Valley Farms*. As explained in the background section, the Woodburns learned of the foreclosure

proceedings because the Woodburn family owned a company called Vernon Valley Farms, which was a party to the foreclosure proceedings. The Woodburns complain that Rock Solid's subsequent failure to serve Vernon Valley Farms prevented the Woodburns from learning that the Woodburns' plan to obtain the property from the bank would not work. But Vernon Valley Farms is not a party here, and the Woodburns fail to support the proposition that the Woodburns are entitled to relief based on any right to notice held by Vernon Valley Farms.

¶16 We turn now to what we conclude is the Woodburns' only potentially viable argument: that Sutter breached the Woodburns' contractual right of first refusal. We note that, despite some statements in their briefing, the Woodburns may agree that the success of their action depends on such a breach. Toward the end of their reply brief, the Woodburns seemingly concede that their success depends on whether their contractual right of first refusal applied to the foreclosure sale. In the following passage from that brief, the Woodburns effectively say that a necessary prerequisite to relief is a violation of their right of first refusal:

> The [trial] court's refusal to grant specific performance is understandable given the fact that the trial court felt no triggering event had occurred under the [right of first refusal]. Because the trial court found no triggering event had occurred, the trial court found that the Woodburns had not lost any rights to acquire the property. *Obviously, no specific performance could thereafter be granted, nor would it be appropriate upon that preliminary finding.*

(Emphasis added.) As the Woodburns aptly state in their reply brief, "**It All Depends On The Language Of The R[ight] O[f] F[irst] R[efusal]**."

¶17 Thus, the remainder of our analysis focuses on the issue of whether the Woodburns' contractual right of first refusal applied to the foreclosure sale.

¶18 We interpret right of first refusal language as we do other contract language, applying de novo review. *See* ***MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust***, 2015 WI 49, ¶¶23, 37, 362 Wis. 2d 258, 864 N.W.2d 83; ***Tufail v. Midwest Hosp., LLC***, 2013 WI 62, ¶22, 348 Wis. 2d 631, 833 N.W.2d 586. "Contract interpretation generally seeks to give effect to the parties' intentions." ***Tufail***, 348 Wis. 2d 631, ¶25. "However, 'subjective intent is not the be-all and end-all.'" ***Id.*** (quoted source omitted). Rather, when contract terms are clear and unambiguous, we presume that the parties' intent is evidenced by the words the parties chose. ***Id.***, ¶26. Further, "[c]ontract language is construed according to its plain or ordinary meaning, … consistent with what a reasonable person would understand the words to mean under the circumstances." ***MS Real Estate Holdings***, 362 Wis. 2d 258, ¶37 (internal quotation marks and quoted source omitted). Courts interpret contracts "to give them common sense and realistic meaning." ***Id.***, ¶38 (internal quotation marks and quoted source omitted).

¶19 Sutter and Rock Solid assert on appeal that the Woodburns failed to raise most of their contract interpretation arguments before the circuit court and that we should deem those arguments forfeited. The Woodburns reply that their arguments were adequately raised. Rather than attempt to resolve this forfeiture dispute, we address and reject the Woodburns' contract arguments below because those arguments are, ultimately, easily rejected. The Woodburns may believe we have ignored some of their arguments or sub-arguments. To the extent that this is true, it is because we deem such arguments insufficiently developed or so patently meritless that they do not warrant our attention.

¶20 To repeat, the Woodburns' right of first refusal included the following pertinent language:[4]

> [Sutter] hereby agrees that if … [Sutter], or any successor interest to the said real estate, shall receive from any third party a bona fide offer to purchase … the … real estate at a price and on terms acceptable to the owner …, the owner shall give written notice of the price and terms and a copy of the accepted offer to purchase or agreement of sale to [the Woodburns] ….

This language plainly does not contemplate a foreclosure sale.

¶21 To begin, the language requires that *Sutter*, or a successor, receive a "bona fide offer to purchase ... acceptable to the owner." A "bona fide offer to purchase ... acceptable to the owner" does not describe anything that occurred during the foreclosure action here. The bid at the foreclosure sale was not presented to Sutter or a successor. Neither Sutter nor any successor had the ability to accept or reject the high bid at the foreclosure sale.

¶22 Moreover, the Woodburns suggest no good reason why the phrase "bona fide offer to purchase" would, in ordinary usage, include a foreclosure sale bid. They focus on a dictionary definition of "bona fide" as meaning "[m]ade in good faith; without fraud or deceit." BLACK'S LAW DICTIONARY, at 210 (10th ed. 2014). They assert that a bid at a foreclosure sale is "bona fide" because any bidder must have cash or the equivalent to bid. This assertion goes nowhere because, even assuming that a foreclosure sale bid would be "bona fide," the assertion does nothing to explain why a bid would ordinarily be considered an "offer to purchase," much less an offer made to Sutter or a successor.

[4] The Woodburns do not suggest that there is other pertinent contract language here, such as language in other deed or lease documents associated with the property.

¶23 The Woodburns argue that Sutter's and Rock Solid's cooperation during the foreclosure proceedings effectively shows Sutter's "acceptance" of Rock Solid's "offer." However, the Woodburns completely fail to anchor this characterization of events to the undisputed facts. Rock Solid did not make an offer to Sutter. So far as we can tell, from the Woodburns' point of view, Sutter at best agreed not to get in the way of Rock Solid's effort to obtain the property in the foreclosure proceedings. Under this theory, offered by the Woodburns, we would not be giving the contract language its ordinary and common-sense meaning, but would instead be giving the language extraordinarily broad and uncommon meaning.

¶24 The Woodburns point out that their right of first refusal, unlike the language in some such contracts, does not contain language referring to the seller's "intent to sell" or "desire to sell." The Woodburns appear to argue that a lack of "intent to sell" or "desire to sell" indicates that a right of first refusal is intended to apply at a foreclosure sale. We agree that excluding a seller's "intent to sell" or "desire to sell" seems like a reasonable step in the right direction if parties intend to draft right-of-first-refusal language that would be triggered by a foreclosure sale. However, the absence of such intent or desire language falls far short of showing that the intent of the drafters was that the right of first refusal applies to such a sale. As we have explained, the language that *is* present in the Woodburns' contractual right of first refusal is incompatible with treating any part of a foreclosure proceeding as a triggering event. Along this same line of thought, although the Woodburns draw our attention to a number of cases, they point to no case in which a court has concluded that a right of first refusal like theirs applied to a foreclosure sale.

¶25 There are more reasons why the right-of-first-refusal language here is a mismatch with a foreclosure sale, but what we have said is enough to reject the Woodburns' contract interpretation arguments. We do not hold that a right of first refusal could *never* be drafted to apply to a foreclosure sale. We simply hold that the Woodburns' right of first refusal was not so drafted.

¶26 Before ending, we briefly address the only case that the Woodburns rely on that even arguably merits discussion, ***National City Bank v. Welch***, 936 N.E.2d 539 (Ohio Ct. App. 2010). The Ohio court in ***Welch*** warned of a hypothetical scenario in which a property owner wishing to sell property might circumvent a right of first refusal as follows: "[T]he interested buyer could simply take a mortgage from the present owner and then foreclose (or take a deed in lieu of foreclosure), which would circumvent the original grantor's intent." ***Id.*** at 544. While this ***Welch*** scenario would appear to be a breach of the covenant of good faith and fair dealing inherent in every contract, it does not parallel the facts alleged by the Woodburns here. The Woodburns point to no evidence suggesting that Sutter mortgaged the property or defaulted on his mortgage in an effort to circumvent the Woodburns' right of first refusal.

¶27 We acknowledge the Woodburns' apparent view that Sutter and Rock Solid's actions *after* commencement of the foreclosure action allowed Sutter to circumvent the Woodburns' right of first refusal. But this view goes nowhere because the Woodburns did not negotiate a right of first refusal that applies to a foreclosure sale. If Sutter and Rock Solid's actions circumvented anything, it was the Woodburns' opportunity to negotiate with the bank for a favorable price on the property after the foreclosure sale, or the Woodburns' opportunity to bid on the property at the foreclosure sale. However, as should be clear by now, the inapplicability of the right-of-first-refusal language to the foreclosure process

means that these lost opportunities are not protected by the contract language that the Woodburns rely on.

¶28 One final point. As far as we can tell, there is no dispute that the Woodburns' right of first refusal is an obligation imposed on Sutter's successor in interest, which, as far as the parties' briefing shows, continues at this time to be Rock Solid. Thus, in the future, Rock Solid may be obliged to honor the Woodburns' right of first refusal.

Conclusion

¶29 For the reasons stated above, we affirm the circuit court's judgment denying the Woodburns relief.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.