COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP861 **Cir. Ct. No. 2015CV3168**

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

MARVEL D. RUSS AND MONIQUE Y. RUSS,

PLAINTIFFS-APPELLANTS,

V.

RICHARD A. GOTZ,

DEFENDANT-RESPONDENT,

BARBARA J. TALBERT AND FIRM FOOTINGS, LLC,

DEFENDANTS.

Appeal from an order of the circuit court for Milwaukee County: STEPHANIE G. ROTHSTEIN, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 BRENNAN, P.J. This is an appeal of an order that 1) denied plaintiffs' motion for declaratory judgment regarding arbitration and 2) dismissed plaintiffs' action as a sanction for filing a motion four days after a filing deadline. We conclude that the trial court correctly interpreted the inspection agreement to require arbitration between the parties, including Richard A. Gotz, and affirm as to that part of the order. We also conclude that the trial court erroneously exercised its discretion in dismissing the action as a sanction because it did so without making a finding of egregiousness, and the record does not support such a finding. Accordingly, we reverse the dismissal and remand for further proceedings consistent with this opinion.

BACKGROUND

The parties and the contract.

¶2 Plaintiffs are Marvel D. Russ and Monique Y. Russ (the Russes). The Russes made a purchase offer on a house; the offer was contingent on a home inspection disclosing no defects. Prior to closing on the property, the Russes entered into a home inspection agreement with Firm Footings, LLC, which is owned solely by Gotz.

¶3 The parties to the agreement were identified in the agreement as follows:

> INSPECTION AGREEMENT …
>
> This AGREEMENT made this 3 day of Feb 2014, by and between Inspector and Client named below. Client agrees to employ Inspector and Inspector agrees to conduct a Real Estate INSPECTION and make a written report concerning the buildings and premises [on date and location indicated].

The "Client Acceptance" signature is the signature of Marvel Russ. The "Inspector" signature is that of Gotz. It is not disputed that Gotz is the sole owner of Firm Footings.

> The arbitration clause in the agreement states:
>
> Inspector and Client (and any other person claiming to have relied upon the inspection report) *specifically agree that any controversy or claim arising out of or relating to the inspection under this contract, or breach thereof, shall be resolved exclusively by arbitration* in accordance with the Wisconsin Association of Home Inspectors (WAHI) Dispute Resolution Program ….

(Emphasis added.)

¶4 The inspection was performed by Gotz, and his report disclosed no defects, and the Russes closed on the property on March 31, 2014. In May 2014, the Russes learned that one of the home's foundation walls was "severely displaced and in need of repair."

Proceedings at the trial court.

¶5 The Russes brought this action against Firm Footings for breach of contract and against Gotz for professional negligence.[1] In its answer, Gotz and Firm Footings asserted that the contract "requires the parties to submit to arbitration[.]" Firm Footings accordingly moved to stay the proceedings and sought an order for arbitration under the contract.

[1] The Russes also brought misrepresentation claims against the sellers of the property. The merits of those claims have not been addressed and are not relevant to this appeal except to the extent that we reverse the dismissal of all claims and remand for further proceedings.

¶6 On September 28, 2015, the trial court, the Honorable Mel Flanagan presiding, held a motion hearing. On October 16, 2015, the trial court issued a written order that stated in relevant part:

> Regarding … the motion by the Defendant, Firm Footings, LLC, to stay the proceedings and order arbitration as required under the inspection contract, the Court … specifically finds that … the remainder of the home inspection contract is valid and enforceable including the provision requiring arbitration.
>
> Based on the foregoing, the Court stays proceedings against Firm Footings, LLC and orders the Plaintiffs and Firm Footings, LLC, to arbitration as set forth in the home inspection contract.

¶7 On December 18, 2015, the parties appeared by telephone, off the record, before Judge Flanagan. There is no transcript of this proceeding. No written order was entered. The notes entered in the Consolidated Court Automation Programs (CCAP) for this hearing are as follows:

> Off the Record. Plaintiffs in court (via telephonics) by Attorney Rudolph Kuss; Defendants in court by (via telephonics) Joseph Scherwenka; Telephonic Status Conference held with parties. Plaintiff requested the Court to approve an order to dismiss the defendant, Firm Footings LLC, so his client would not have to arbitrate. Counsel for defendant objected and the Court did not approve the dismissal order. The Court advised plaintiff that he is bound by the order to arbitrate and has 30 days to comply or file a motion with the court to reconsider.

The Russes filed nothing within the thirty-day period.

¶8 On January 21, 2016, four days after the thirty-day deadline, plaintiffs filed a written motion seeking a declaratory judgment that, even if plaintiffs were bound by the order to arbitrate their breach of contract claim as to Firm Footings, they were not bound by the arbitration clause with regard to their professional negligence claim against Gotz. Defendants moved to strike the

Russes' motion and for sanctions on the grounds that it was not timely filed and no arbitration had occurred within the time period.

¶9 In response to Defendants' motion to strike, Plaintiffs' counsel filed an affidavit that averred that on the day of the December 18, 2015 proceeding, he had his staff place a phone order for the transcript of the September 28, 2015 motion hearing because there was a dispute between the parties about what the trial court's ruling had been. His staff placed a written order for the transcript on December 21, 2015. He received the transcript on January 20, 2016, and filed his motion the next day.

¶10 On February 29, 2016, a motion hearing was held before the Honorable Stephanie Rothstein, who succeeded Judge Flanagan after her retirement from the bench. The Russes' counsel argued that, even though the trial court had held that the Russes were required to arbitrate their claims against Firm Footings, "[w]hat wasn't decided at that last motion hearing was whether or not that means that [the Russes] need to arbitrate their professional negligence claims against Mr. Gotz personally." Gotz's counsel did not dispute this assessment: "I agree that the Court had not decided whether there was a need to arbitrate this regarding Mr. Gotz personally." When the trial court questioned the Russes' counsel about why there had been no arbitration in the thirty-day period, counsel responded:

> My clients decided that they no longer wanted to pursue their breach of contract claim against Firm Footings, LLC. They only wanted to pursue their professional negligence claim against Mr. Gotz…. So the only party of the home inspectors that my clients are interested in pursuing, it's my legal position that the arbitration clause doesn't cover claims against him. So that's why we haven't pursued arbitration.

¶11 The trial court denied plaintiffs' motion for declaratory judgment, concluding that the claims against Gotz were to be arbitrated. It stated in its subsequent written order filed March 11, 2016:

> The Court, having reviewed the motions and record and having heard the arguments of Counsel, finds that the home inspection contract clearly intends to run to the benefit [of] Richard A. Gotz, the inspector. Therefore, arbitration is required with regard to any claims asserted by the Plaintiffs against Richard A. Gotz.

The trial court also dismissed the action as to all defendants "[b]ased upon the Plaintiffs' failure to act within the time set by the Court's order of December 18, 2015." On April 22, 2016, the Russes appealed from the March 11, 2016 order denying declaratory judgment and granting dismissal.

DISCUSSION

Standard of review and principles of law.

¶12 The first issue requires this court to interpret the arbitration clause in the home inspection contract. "The interpretation of a contract is a question of law and although we consider the circuit court's interpretation, we owe no deference to the court." ***Edwards v. Petrone***, 160 Wis. 2d 255, 258, 465 N.W.2d 847 (Ct. App. 1990).

¶13 The second issue is whether the trial court properly dismissed the action as a sanction for plaintiffs' filing a brief four days after the filing deadline. "A circuit court's decision to dismiss an action is discretionary and will not be disturbed unless the aggrieved party establishes that the circuit court abused its discretion." ***Monson v. Madison Fam. Inst.***, 162 Wis. 2d 212, 223, 470 N.W.2d 853 (1991). A trial court erroneously exercises its discretion if it fails to apply the correct principles of law. "Because dismissal is such a harsh sanction ... [it] is

proper only when [a party] has acted egregiously or in bad faith." ***Morrison v. Rankin***, 2007 WI App 186, ¶20, 305 Wis. 2d 240, 738 N.W.2d 588. Our supreme court has stated that where a trial court sanctioned a party with dismissal without making a finding of egregiousness, the trial court had applied an "incorrect standard of law[.]" ***American Family Mut. Ins. Co. v. Golke***, 2009 WI 81, ¶44, 319 Wis. 2d 397, 768 N.W.2d 729. Where the circuit court made no finding of egregiousness, we review the record to determine whether the conduct was egregious and dismissal was therefore just. ***Rivera v. Perez***, 2010 WI App 91, ¶28, 327 Wis. 2d 467, 787 N.W.2d 882. *See also* ***Haselow v. Gauthier***, 212 Wis. 2d 580, 591, 569 N.W.2d 97 (Ct. App. 1997).

I. The inspection agreement requires the Russes to arbitrate their negligence claim against Gotz.

¶14 This question requires us to interpret the contract. Construction of a contract is essentially a question of determining the intent of the parties. ***Armstrong v. Colletti***, 88 Wis. 2d 148, 153, 276 N.W.2d 364 (Ct. App. 1979). Where the terms of the contract are plain and unambiguous, we will construe it as it stands. ***Hortman v. Otis Erecting Co., Inc.***, 108 Wis. 2d 456, 461, 322 N.W.2d 482 (Ct. App. 1982). If, however, we determine that the terms of a contract "are reasonably or fairly susceptible to more than one construction," we will conclude that they are ambiguous. *See* ***Katze v. Randolph & Scott Mut. Fire Ins. Co.***, 116 Wis. 2d 206, 213, 341 N.W.2d 689 (1984). "Whether a contract is ambiguous is itself a question of law" that we review *de novo*. ***Wausau Underwriters Ins. Co. v. Dane Cnty.***, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987). We interpret a contract reasonably so as to avoid absurd results, give words their plain meaning, read it as a whole and give effect where possible to every provision. *See* ***Star Direct, Inc. v. Dal Pra***, 2009 WI 76, ¶62, 319 Wis. 2d 274, 767 N.W.2d

898. *See also* ***Gunderson, Inc. v. Aspirus Wausau Hosp., Inc.***, No. 2010AP1178, unpublished slip op. ¶14 (WI App. Feb. 2, 2011) (rejecting a party's "illogical reading" of a contract).

A. The arbitration clause applies to Gotz.

¶15 The signature on the preprinted line next to "Inspector" was "Richard A. Gotz," and the signature next to the preprinted word, "Client," was "Marvel Russ." The Russes do not admit that Gotz signed, but they do not challenge that fact either. The trial court found that Gotz was the party who signed the agreement as the "Inspector." The Russes do not argue that this is a clearly erroneous finding. Therefore we conclude that the "Inspector" signature was Gotz'.

¶16 Despite the presence of Gotz's signature identifying him as "Inspector," the Russes argue that it is dispositive that "Gotz's *printed* name is nowhere to be found in the Inspection Agreement." Thus they argue that the agreement they made was with Firm Footings, not Gotz, and they "never agreed in his contract with Firm Footings, LLC to submit any dispute with Mr. Gotz to arbitration." In an attempt to further support this argument, they point to the language in the contract that applies the arbitration requirement to "Inspector" and, more broadly, to "Client (and *any other person* claiming to have relied upon the inspection report)." (Emphasis added.) They argue that because there is no similar broadening language with regard to the "Inspector," the arbitration clause must be applied solely to claims against Firm Footings.

¶17 This argument is absurd on its face. No broadening language is required because the contract plainly speaks for itself. The plain language of the arbitration clause states the agreement is between the "Inspector," who is Gotz,

and the "Client"—the Russes. The clause expressly obligates the Russes to arbitrate any claims against the Inspector, Gotz. Adding to the absurdity of the argument is the fact that it is undisputed by the Russes that Firm Footings was a one-man operation—that man being Gotz—and that he performed the inspection.

¶18 We conclude therefore that the Russes are obligated to arbitrate with Gotz.[2]

B. The arbitration clause applies to the Russes' professional negligence claim.

¶19 The Russes further argue that even if the arbitration clause applies to Gotz, it cannot apply to their professional negligence claim against him. They make this argument despite the very clear language requiring arbitration for *any* claim *arising out* of or relating to *the inspection*. They argue that because the negligence claim arises from a breach of *statutory duties* imposed on inspectors, it therefore constitutes an exception to the arbitration clause. For this argument, they cite to ***Kirk v. Credit Acceptance Corp***., 2013 WI App 32, ¶6, 346 Wis. 2d 635, 829 N.W.2d 522, which they claim held that a consumer is not required to arbitrate claims that were based on violations of the Wisconsin Consumer Act. *See* ***id.***, ¶40. The Russes compare the statutory scheme governing consumer complaints in the WCA with the statutory standards for home inspection practice, and conclude that a professional negligence claim implicates the same kinds of consumer protection concerns that were at issue in ***Kirk***.

[2] We note that on appeal the Russes do not challenge the part of the decision of the trial court compelling them to arbitrate with Firm Footings as well.

¶20 The Russes' reliance on ***Kirk*** is misplaced. It is factually and legally distinguishable. In ***Kirk***, the parties had a permissive arbitration clause in the contract of a purchase of a car. *See* ***id.***, ¶39. Without seeking arbitration, the creditor, claiming payment default, unlawfully repossessed the car and then filed a delinquency action against the consumer. ***Id.***, ¶¶4-5. The parties stipulated to dismiss the lawsuit. ***Id.***, ¶5. The consumer then filed an action under the WCA alleging violations of the act and seeking damages under the WCA. ***Id.***, ¶6. Subsequently the creditor sought to invoke the permissive arbitration provision. ***Id.***, ¶8. The trial court granted summary judgment and awarded damages to Kirk and the creditor appealed. ***Id.***, ¶¶14-15.

¶21 On appeal, this court concluded that Kirk was not required to arbitrate his WCA claim, notwithstanding the arbitration clause in the contract because the ultimate issue to be arbitrated was compliance with the WCA, not performance of the contract:

> Presumably, Credit Acceptance is arguing that the issue to be arbitrated is whether it violated the WCA by its conduct. Thus, the issue for arbitration *is not whether the parties performed properly under the contract*, but rather, whether a separate and distinct consumer protection statute was violated by that conduct. It is not a matter of making contract payments or returning the car. The question for the arbitrator is whether Credit Acceptance did, or did not, violate the WCA. And even if the proof of a WCA violation entails proof of some of the contract actions, *the ultimate issue is distinctly different.*

Id., ¶40 (emphasis added). Alternatively, we held that even if arbitration was required, the creditor waived it by its conduct. ***Id.***, ¶41.

¶22 Here the claim is *not an independent cause of action under the WCA or any statute*. Additionally, the arbitration clause is mandatory and there is no question of waiver. The Russes misstate the reach of the holding in ***Kirk***, which

was limited to WCA actions: "the arbitration clause here did not require arbitration of Kirk's *WCA claims*." ***Id.***, ¶37 (emphasis added.) In contrast, the claim here is a professional negligence claim which is *precisely* about "whether the parties performed properly under the contract." *See* ***id.*** The only involvement of a statute is the Russes' reference to WIS. STAT. § 440.975,[3] which describes the standards of practice of home inspection and which does not create an independent cause of action or statutory damages, in contrast to the WCA. The Russes' claim is that Gotz was negligent in not telling them about the faulty basement wall. The ultimate issue is exactly the same as the issue that was the subject and purpose of the inspection contract. Accordingly, ***Kirk*** is not supporting precedent for the Russes' position.

¶23 We therefore conclude that the trial court correctly found that the arbitration clause requires arbitration of the professional negligence claim between the Russes and Gotz, and denied the Plaintiffs' motion for declaratory judgment. We affirm that part of the March 11, 2016 order.

II. The trial court erroneously exercised its discretion in dismissing the action as a sanction without the required finding of "egregious conduct," and the record does not support such a finding.

¶24 The second issue we address is the trial court's dismissal of all of the Russes' claims as a sanction for an untimely filing. Such sanctions are within the discretion of the trial court and will not be reversed absent an erroneous exercise of discretion. ***Monson***, 162 Wis. 2d at 223. There are two times when a dismissal as a sanction is an erroneous exercise of discretion: one, when it is made without

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

a finding of egregiousness, and two, when it is made in spite of the fact that the client was blameless as to the conduct that triggered the sanction. ***Golke***, 319 Wis. 2d 397, ¶44; ***Industrial Roofing Servs., Inc.***, ***v. Marquardt***, 2007 WI 19, ¶2, 299 Wis. 2d 81, 726 N.W.2d 898. When a finding of egregiousness has not been made, an appellate court may review the record to determine whether it supports such a finding and, if it does not, may hold as a matter of law that the record does not support such a finding. *See* ***Rivera***, 327 Wis. 2d 467, ¶28; *see also* ***Haselow***, 212 Wis. 2d at 591.

¶25 Here, the trial court based the dismissal sanction on what it described as an untimely filing of a motion four days after a deadline set by the predecessor trial court had lapsed. The first problem with the dismissal sanction is that the predecessor trial court's December 18 order that established the thirty-day deadline was not recorded or written but appears only in CCAP notes. Admittedly, the Russes don't dispute the deadline (just its applicability to claims against Gotz), but considering the harshness of the dismissal sanction, we note the deadline's absence from the record and caution trial courts about making a proper record.

¶26 The next problem with the court's imposition of the dismissal sanction is that it was based on the successor trial court's incorrect assumption that the previous judge's order applied to Gotz. Again, had the predecessor court's order been made on the record, the successor trial court might not have made this incorrect assumption. However, the assumption was incorrect. The December 18 order setting the thirty-day deadline did not apply to Gotz. It never mentioned Gotz, only Firm Footings. Counsel for both parties agreed on February 29 that the previous trial court had not ruled on whether the professional negligence claim against Gotz was subject to arbitration, only that the claim against Firm Footings

was. Accordingly there is no basis to punish the Russes for delaying arbitration of the claim against Gotz.

¶27 The third problem with the dismissal sanction is that counsel for the Russes provided an affidavit for the February 29 hearing explaining the delay (which related to a request for a transcript of an earlier proceeding). Counsel's affidavit explained that he made a timely request for the transcript and then filed his motion the day after he received the requested transcript. The trial court did not address counsel's reason for delay.

¶28 But the biggest problem with the trial court's dismissal order is its absence of a finding of egregiousness, or any other articulated reasoning, from which we could discern the court's proper exercise of discretion on this required finding. The trial court made the following statements on this issue in the hearing:

> The Court is aware and finds that Judge Flanagan gave 30 days for arbitration to occur. Again, this is not -- this was not a surprise. This was not something that could not have been done way prior in fact to December 18th of … 2015.… This action has been extant for some time. The agreement was signed in February of 2014, and the plaintiff has, for whatever reasons, not participated in arbitration as required under the contract.
>
> So Judge Flanagan gave them frankly 30 days for arbitration in a situation where the parties had already had a significant period of time to conduct arbitration and they hadn't done so. 30 days from December 18th does result in the time line as set forth by [Firm Footings' counsel] in her brief in opposition to the plaintiff's motion for declaratory judgment.
>
> The plaintiffs' motion was filed on the 21st of January. It did not include a Motion to Reconsider. It did not include a request to extend the time limit that had been firmly set by Judge Flanagan.

The trial court then stated that the plaintiffs' motion was untimely and dismissed all of the Russes' claims. The court made no mention of the required finding of egregiousness, and falls far short of the required exercise of discretion for a dismissal sanction.

¶29 We have independently reviewed this record and conclude that the Russes' conduct was not egregious. The trial court erred in its order of March 11, 2016, because it based the sanction on a faulty assumption—that Judge Flanagan, who had set the thirty-day deadline in her December 18, 2015 order, had previously ordered the Russes to arbitrate the claim against Gotz personally and that the Russes were delaying without any good reason. Thus we conclude that the sanction of dismissal was an improper exercise of discretion.

¶30 Based on the foregoing, we therefore reverse that part of the order dismissing plaintiffs' claims as a sanction. We reinstate the claims and remand for further proceedings consistent with this opinion.

By the Court.—Order affirmed in part and reversed in part, and cause remanded with directions.

Not recommended for publication in the official reports.