COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1913 **Cir. Ct. No. 2016CV60**

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

THOMAS R. NEWMAN,

PLAINTIFF-APPELLANT,

V.

WILLIAM C. KOTLOW AND JUDITH A. KOTLOW,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Juneau County: PAUL S. CURRAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Thomas Newman appeals the circuit court's order dismissing his complaint with prejudice. Newman argues on appeal that the circuit court erred when it construed the complaint as failing to state a claim upon which relief could be granted, and that the court applied incorrect legal standards.

Newman further argues that the circuit court erroneously exercised its discretion in dismissing the complaint with prejudice. For the reasons set forth below, we affirm the order of the circuit court.

BACKGROUND

¶2 The parties to this action own adjacent parcels of land in Juneau County, Wisconsin. In 2010, William Kotlow and Judith Kotlow purchased from Newman a parcel of land known as Lot 1 of Juneau County Certified Survey Map No. 3174, as recorded in Volume 13, page 114 of Certified Survey Maps as Document Number 625274 (hereinafter "Lot 1"). A quit claim deed was recorded evidencing the purchase.

¶3 Newman filed a complaint in the circuit court seeking a declaratory judgment stating that he has a right to use an access road located on Lot 1. The complaint alleges that, when Newman conveyed Lot 1 to the Kotlows in 2010, the Kotlows agreed that Newman would continue to have use of the access road. Attached as Exhibit D to the complaint is an e-mail sent to Newman by William Kotlow on August 11, 2009. In the e-mail, William Kotlow inquires about the price of the property and states, in relevant part: "You had mentioned requiring access to your property down the current road, I do not have a problem with that ...." Also attached to the complaint, as Exhibit E, is a letter from Newman to the Kotlows dated August 25, 2009, outlining terms of the sale of Lot 1. William Kotlow's signature appears at the bottom of the letter, with the word "accepted" handwritten next to the date.

¶4 The Kotlows filed an answer and motion to dismiss, arguing that the complaint failed to state a claim upon which relief could be granted. Newman submitted a reply and two supplementary affidavits. After a hearing, the circuit

court made an oral ruling granting the motion to dismiss. The court then entered a written order on July 28, 2016, dismissing the matter with prejudice. Newman moved for reconsideration, and his motion was denied. Newman then filed a notice of appeal seeking review of the circuit court's July 28, 2016 order.

STANDARD OF REVIEW

¶5 Whether a complaint states a cognizable claim upon which relief can be granted presents a question of law subject to de novo appellate review. ***DeBruin v. St. Patrick Congregation***, 2012 WI 94, ¶10, 343 Wis. 2d 83, 816 N.W.2d 878. We accept as true any facts set forth in the complaint and draw all reasonable inferences to be made therefrom in favor of the plaintiff. *See* ***id.***, ¶11. We will dismiss a claim only if it is clear that the plaintiff cannot recover under any circumstances. ***Evans v. Cameron***, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985). Our review of a circuit court's decision to dismiss with prejudice is limited to whether the circuit court erroneously exercised its discretion. ***Haselow v. Gauthier***, 212 Wis. 2d 580, 590-91, 569 N.W.2d 97 (Ct. App. 1997).

DISCUSSION

¶6 Newman asserts that the terms of the Kotlows' purchase of Lot 1 are contained in his letter dated August 25, 2009, and that the letter constitutes the purchase agreement between the parties. We will assume, without deciding the issue, that the August 25, 2009 letter, integrated with the quit claim deed, constitutes the overall contract between the parties for the conveyance of Lot 1. However, even if we make that assumption, the letter does not support a claim, under any legal theory, that Newman has an easement interest or right of use over the access road that is the subject of this dispute.

¶7 The August 25, 2009 letter contains references to two easements. The first reference is to an easement to "bore a geothermal heat sink" underneath the property, without rights for surface excavation. There is no legal description of this underground easement in the letter or in the quit claim deed, and neither the letter nor the deed mentions any particular right of access over or across the property conveyed from Newman to the Kotlows for the boring of a geothermal heat sink. Thus, no logical interpretation of the language reserving the underground easement supports Newman's claim that he has a right to travel over the access road at issue in this case.

¶8 The second easement reference in the letter reads as follows:

> I will retain use of present driveway easement, but my primary route for ingress/egress will be my driveway at the back of my lot. This driveway is also available to you at any time.

The statement that Newman "will retain use of [the] present driveway easement" communicates that the "present driveway easement" is not on the property Newman is selling to the Kotlows. This is true because the phrase is a reference to an easement in existence at the time of the offer, and Newman cannot be the beneficiary of an easement across his own land. "An easement is an interest that encumbers the land of another." ***McCormick v. Schubring***, 2003 WI 149, ¶8, 267 Wis. 2d 141, 672 N.W.2d 63.

¶9 Also, the quoted paragraph above refers to a driveway as Newman's "primary route for ingress/egress," and describes the driveway as being on the back of Newman's lot, and not on the property he is selling to the Kotlows. Thus, this reference does not help Newman.

¶10 In sum, nothing in the paragraph quoted above, or in the rest of the letter, establishes an obligation on the part of the Kotlows to create or reserve a driveway or access road easement on Lot 1, the property that they are purchasing from Newman.

¶11 Still addressing the alleged easement, Newman argues on appeal that the complaint properly alleges facts sufficient to state a claim for promissory estoppel and breach of contract. However, as discussed above, the August 25, 2009 letter contains no such agreement. As to the e-mail message attached to the complaint as Exhibit D, sent from William Kotlow to Newman and dated August 11, 2009, the e-mail does state that Newman mentioned to Kotlow that he would be "requiring access" to his property "down the current road." However, to the extent Newman wishes to rely on this e-mail, or to present oral testimony about other communications between himself and Kotlow, such evidence is barred by the parol evidence rule.

¶12 Under the parol evidence rule, "'[w]hen the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake.'" ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶36, 330 Wis. 2d 340, 793 N.W.2d 476 (quoted source omitted). Here, the parties' agreement was reduced to writing in the form of a quit claim deed that was recorded. That deed does not contain any reference to an access road easement or any other easement. As discussed above, the August 25, 2009 letter, which we assume for purposes of this opinion was integrated with the quit claim deed to form the overall contract between the parties, also does not contain any reference to an access road easement on Lot 1. Any written or oral

communications between the parties that vary from or contradict the written contract are barred by the parol evidence rule and, thus, we will not consider them.

¶13 We turn next to Newman's argument that he alleged sufficient facts to state a claim for unjust enrichment. A claim of unjust enrichment consists of the following elements: (1) a benefit conferred upon the defendant by the plaintiff, (2) appreciation or knowledge by the defendant of the fact of such benefit, and (3) acceptance or retention by the defendant of the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value. ***Puttkammer v. Minth***, 83 Wis. 2d 686, 688-89, 266 N.W.2d 361 (1978). In his appellant's brief, Newman asserts that the Kotlows retained the benefit of ownership of the parcel without having to pay full consideration. The complaint, however, contains no such allegation, nor does it contain any other facts from which the circuit court could reasonably infer that the Kotlows were unjustly enriched. The complaint also makes no allegation of mistake, whether unilateral or mutual. Also absent are any allegations that would support a claim for fraud or duress. In short, Newman has failed to state a claim upon which relief may be granted under any theory in law or in equity, such that the circuit court properly granted the Kotlows' motion to dismiss.

¶14 We turn, then, to the issue of whether the circuit court erroneously exercised its discretion in dismissing the complaint with prejudice. A circuit court may, in the proper exercise of its discretion, dismiss a complaint with prejudice upon a finding of egregious conduct or bad faith. *See* ***Trispel v. Haefer***, 89 Wis. 2d 725, 732-34, 279 N.W.2d 242 (1979). It is also within the proper exercise of discretion for a circuit court to dismiss a complaint with prejudice where, as here, the plaintiffs failed to allege any facts that would serve as the basis of a claim sufficient to withstand a motion to dismiss. *See* ***Wisconsin Ass'n of Nursing***

Homes, Inc. v. Journal Co., 92 Wis. 2d 709, 721-22, 285 N.W.2d 891 (Ct. App. 1979) (affirming circuit court's decision to dismiss with prejudice where there was no likelihood of plaintiffs succeeding on the merits in their injunction action). Here, the circuit court reasoned that, since Newman could not succeed under any conditions, permitting him to refile would result in expense, delay, and a waste of judicial resources. Under the circumstances, and given that we agree with the circuit court that Newman cannot succeed on his claims under any legal or equitable theory, we are satisfied that the circuit court did not erroneously exercise its discretion in dismissing the complaint with prejudice.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3).