COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1785 **Cir. Ct. No. 1998CV2823**

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

RA MORTGAGE & FINANCIAL COMPANY,

PLAINTIFF-APPELLANT,

V.

RONALD G. FEDLER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. This is the second appeal of this case. RA Mortgage & Financial Company[1] sued Ronald G. Fedler, alleging a breach of contract. In the first appeal, we concluded that we could not decide the case based on the current record and remanded the case to the circuit court to examine extrinsic evidence to resolve the contractual ambiguity and award damages if the court was able to resolve that ambiguity. After remand, the circuit court conducted a review of the paper record after denying Russell Anderson's motion for a supplemental evidentiary hearing. Based on the paper review and, after applying the construe-against-the-drafter rule, the court dismissed Anderson's case against Fedler.

¶2 The issues in this appeal are whether the circuit court erroneously exercised its discretion in denying Anderson's motion for a supplemental evidentiary hearing and whether the court erred in dismissing his contract claims. We conclude that the circuit court properly denied Anderson's motion for a supplemental evidentiary hearing. We also conclude, based on our de novo review of the paper record, that the extrinsic evidence does not resolve the contractual ambiguity. Therefore, applying the construe-against-the-drafter rule, we conclude that the non-disclosure agreement drafted by Anderson does not apply to lenders introduced to Fedler prior to the execution of the agreement. Accordingly, we affirm the circuit court's order and judgment dismissing this action against Fedler.

[1] Because Russell Anderson is the sole shareholder, officer and employee, we will hereinafter refer to Anderson as the plaintiff-appellant, rather than RA Mortgage.

BACKGROUND

¶3 Ronald Fedler is a real estate developer and Russell Anderson is a mortgage broker and the sole shareholder, officer and employee of RA Mortgage.[2] In 1994, Anderson and Fedler entered into a business relationship in which Anderson helped Fedler obtain loans to refinance his properties. Two years later, Anderson introduced Fedler to a loan officer at St. Paul Federal Bank, who indicated an interest in financing some of Fedler's projects. Fedler and Anderson engaged in further negotiations, during which they discussed the terms under which Anderson would continue helping Fedler secure other loans for his properties. Those negotiations led to the written contract, executed in August 1996, which is the subject of this dispute.

¶4 The terms of the contract provided that Anderson would procure financing "for projects to be built, acquired or refinanced" by Fedler in exchange for a one-half percent fee. The contract included a "non-disclosure and non-circumvention agreement" (hereinafter "the Agreement") prohibiting Fedler from contacting, dealing, or being otherwise involved in any other type of transaction with any banking or lending institution "introduced by" Anderson to Fedler without Anderson's permission. The contract specified that it was effective for two years from the Agreement date and applied to "any and all transactions entertained" by the parties.

[2] A more complete discussion of the background facts is provided in our first decision in ***RA Mortgage & Financial Company v. Fedler***, No. 2003AP265, unpublished slip op (Sept. 23, 2004).

¶5 Anderson commenced this action, claiming he was contractually entitled to fees under the Agreement resulting from introducing Fedler to St. Paul which subsequently provided Fedler loans for the Casa Blanca and Hunter's Ridge projects. The case went to trial. The trial court concluded that the contract was unambiguous and that the Agreement was applicable to the Casa Blanca and Hunter's Ridge projects financed by St. Paul. The court entered judgment in favor of Anderson for the value of those projects under a *quantum meruit* theory. Fedler appealed, arguing that the trial court erred in concluding that the contract was unambiguous and that Fedler breached the contract. Fedler contended that the contract applied only to those banks and lending institutions Anderson introduced Fedler to after the contract was executed.

¶6 On appeal, we concluded that the contract was ambiguous, requiring an examination of disputed extrinsic evidence to determine whether the contract applied to projects resulting from introductions made prior to the contract's execution. We reversed and remanded for the trial court to resolve the ambiguity about the contract's terms and to determine whether a breach had occurred. More specifically, we directed the trial court to do the following:

> On remand, the circuit court is directed to attempt to resolve the contractual ambiguity we describe above—i.e., whether the contract covers introductions made prior to the execution of the contract—by first examining extrinsic evidence on that point. If this effort fails to resolve the ambiguity, the circuit court may construe the contract against Anderson using the construe-against-the-drafter rule….

¶7 On remand, Judge Richard G. Niess replaced the judge who presided over the trial on the case, Judge Gerald C. Nichol. Consequently, a new judge ruled on Anderson's motion for a supplemental evidentiary hearing. Judge Niess denied Anderson's motion.

¶8 After denying Anderson's motion for a supplemental evidentiary hearing to provide additional extrinsic evidence, Judge Niess issued a final judgment denying Anderson's contract claim, based on his conclusion that Anderson had failed to provide sufficient extrinsic evidence to meet his burden of proof in resolving the contract's ambiguity. Judge Niess decided the case based on his review of the documentary evidence and the trial transcripts of testimony taken before Judge Nichol, as well as the parties' briefs and our first decision on appeal. Anderson appeals both the circuit court's denial of his motion for a supplemental evidentiary hearing and the court's final decision granting judgment in favor of Fedler.

DISCUSSION

¶9 The first issue we address is whether the circuit court properly denied Anderson's motion for a supplemental evidentiary hearing. To answer that question we must determine whether the court was obligated by our instructions on remand to hold a supplemental evidentiary hearing. Thus, we begin our analysis by first ascertaining our intent when we instructed the court to examine the extrinsic evidence to resolve the contract ambiguity. This is a question of law, which we decide de novo. *See* ***State v. Agnello,*** 2004 WI App 2, ¶24, 269 Wis. 2d 260, 674 N.W.2d 594. Based on a careful reading of our opinion in ***RA Mortgage & Financial Company v. Fedler****,* No. 2003AP265, unpublished slip op. (Sept. 23, 2004), we conclude that, by instructing the court to examine the extrinsic evidence to resolve the contractual ambiguity, we intended for the court to examine the extrinsic evidence already of record, and that, if the court determined it necessary, it could take additional evidence in the proper exercise of its discretion.

¶10 We begin our analysis by examining the reasons for reversing and remanding the first appeal before us. In ***RA Mortgage***, we observed that the trial court concluded that the contract at issue here was unambiguous on its face. ***Id.***, ¶10. Specifically, we observed that "[t]he court concluded that the contract unambiguously provided that Anderson was entitled to compensation relating to the refinancing of Fedler's Casa Blanca and Hunter's Ridge properties." ***Id.*** Consequently, the trial court did not make any factual findings regarding any extrinsic evidence of the parties' intent in entering into the contract. ***Id.***, ¶¶10, 25-26.

¶11 We disagreed with the trial court and concluded that the contract was ambiguous. ***Id.***, ¶11. However, we were unable to resolve that ambiguity on appeal because there were no findings of fact on the critical issue of the parties' intent. ***Id.***, ¶¶10, 23, 26. We observed that both parties relied on disputed extrinsic evidence in arguing why we should adopt their respective interpretations of the contract. ***Id.***, ¶24. We recognized that "[w]e may only consider undisputed evidence" to resolve the contractual ambiguity. ***Id.*** In other words, "'where [extrinsic] evidence permits more than one reasonable inference concerning the parties' intent, the trial court, not the appellate court, must make the factual determination and resolve the ambiguity.'" ***Id.***, quoting ***Spencer v. Spencer***, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987); *see also* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980) (the court of appeals may only consider undisputed evidence; it is not a fact-finding court). We also acknowledged that, had the court made factual findings on the extrinsic evidence, we could resolve the ambiguity on appeal by applying the construe-against-the-drafter rule of contract construction. ***RA Mortgage***, No. 2003AP265, ¶25. However, because the court did not make those findings, we concluded it

was necessary to remand to the court to do so. We accordingly instructed the circuit court on remand to "attempt to resolve the contractual ambiguity" on the question of "whether the contract covers introductions made prior to the execution of the contract [ ] by first examining extrinsic evidence on that point." ***Id.***, ¶26. We also instructed that if the trial court could not resolve the ambiguity, then it could "construe the contract against Anderson using the construe-against-the-drafter rule." ***Id.***

¶12 It is apparent to us that because the circuit court had not originally examined the extrinsic evidence to determine the parties' intent regarding the Agreement to lenders introduced to Fedler prior to entering into the Agreement, we intended for the court to examine the evidence already of record on remand. This conclusion is consistent with our observation that the circuit court decided the case based on its determination that the Agreement was unambiguous and did not deem it necessary to consider any extrinsic evidence. Also, our instructions to the court do not mandate the court to take additional evidence to resolve the ambiguity. Thus, the scope of our instructions to the court on remand encompass examining the extrinsic evidence that was part of the record created at trial to resolve the contractual ambiguity, and, if the court could not resolve the ambiguity in that manner, applying the construe-against-the-drafter rule to resolve the case. Of course, there was nothing about our instructions preventing the court from exercising its discretion in taking and considering additional evidence to resolve the ambiguity.

¶13 Having determined our intent on remanding to the circuit court, we now consider whether the circuit court improperly exercised its discretion in denying Anderson's motion for a supplemental evidentiary hearing. We conclude that it did not.

¶14 Whether to reopen the record and grant a supplemental evidentiary hearing on remand is left to the circuit court's discretion. *See* ***Chevron Chem. Co. v. Deloitte & Touche, LLP***, 207 Wis. 2d 43, 44, 557 N.W.2d 775 (1997). A trial court's discretionary decision will not be reversed if "the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶15 On remand, Anderson moved for an evidentiary hearing seeking to supplement the record with additional extrinsic evidence to assist the court in resolving the contractual ambiguity. In denying Anderson's motion, the circuit court provided the following justification:

> At the outset, it should be noted that neither party sought a new trial on appeal, nor does the Court of Appeals' decision remand the case for further evidentiary hearings. While this court certainly has the discretion to reopen the evidence to supplement the record with facts pertinent to the issues in controversy, I decline to do so here for several reasons.
>
> First, as the Court of Appeals notes and the record from this case makes abundantly clear, the issue of contract interpretation has been central to this dispute from the outset. The parties liberally submitted extrinsic evidence both on summary judgment motion and at the trial, in support of the respective positions on contractual interpretation. Thus, this is not a situation where the parties were unaware, prior to the Court of Appeals' decision, that extrinsic evidence might very well be determinative of the dispute. While clarity of hindsight may very well engender desire on plaintiff's part for a 'second kick at the cat,' this is nothing new in the annals of litigation. Since the plaintiff had not only notice but actual knowledge that extrinsic evidence might be critical, availed itself of the opportunity to present such evidence at trial, and then argued the extrinsic evidence both to the trial court and the Court of Appeals, I see no justification to reopen the evidence to provide further extrinsic evidence, especially since such could have been submitted at the previous trial.

¶16 Anderson argues that he "never got a first 'kick at the cat' because Fedler objected to [the] admission of testimony concerning the intent of the parties and the trial court upheld the objection, reserving interpretation of the contract to itself." He points to the lack of testimony regarding the circumstances surrounding the November 1, 1996 letter Anderson sent to Fedler clarifying Fedler's obligations under the Agreement. Anderson also asserts that the parties' intent regarding the application of the Agreement to lenders introduced to Fedler prior to the execution of the Agreement "was not adequately explored at trial." This assertion is based on two occasions[3] when Fedler's counsel objected to questions asked of Anderson by his counsel regarding his intent in entering into the Agreement with Fedler, combined with an interruption when the court expressed a concern regarding a potential conflict of interest in presiding over the trial. We are not persuaded.

¶17 The circuit court denied Anderson's motion for a supplemental evidentiary hearing primarily because he had ample opportunity to offer extrinsic evidence at trial and on summary judgment. We agree with the circuit court. Anderson's complaint regarding his inability to offer more extrinsic evidence centers on his counsel's inability to reestablish his footing following Fedler's counsel's evidentiary objections and the trial judge's brief aside on whether the judge should continue presiding over the trial because of a potential conflict of interest. We note that the court did not sustain Fedler's objections. Thus, the court presented no barrier to Anderson's counsel's ability to fully explore

[3] We do not address the second occasion, during which the court agreed with Fedler's counsel that the agreement speaks for itself as to the amount of fees; this line of questioning did not involve the intent question at issue regarding the contract's ambiguous provisions.

Anderson's understanding of the parties' intent regarding the application of the Agreement. Based on our reading of the trial transcript, what apparently happened is what often happens at trial when an objection is made: counsel did not pick up where he left off. In other words, Anderson's counsel was sidetracked from his line of questioning and took a different path. Anderson simply did not take the time to explore the topic of his intent in entering into the Agreement. We agree with the circuit court that Anderson had every opportunity to present extrinsic evidence on the parties' intent in entering into the Agreement and that his failure to do so does not suffice as a basis for holding a supplemental evidentiary hearing.

¶18 We next consider whether there was sufficient evidence supporting the circuit court's decision in favor of Fedler. The first issue we address is the standard of review. This case comes to us in an unusual posture. As we have explained, the circuit court judge deciding the case after remand was not the judge who presided over the trial. Thus, the judge's review on remand was based on the trial transcript, the documentary evidence, and the parties' briefs.

¶19 The general rule is that we will not reverse a trial court's factual findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). The policy underlying this rule is that the trial court is best situated to observe the demeanor of witnesses and to determine the credibility of those witnesses. *See* ***Racine Educ. Ass'n v. Racine Bd. of Educ.***, 145 Wis. 2d 518, 521, 427 N.W.2d 414 (Ct. App. 1988). Here, however, Judge Niess did not have the opportunity to observe the witnesses because he was not the judge presiding over the trial. Consequently, Judge Niess enjoyed no greater advantage than we in reviewing the evidence in this case. "When the evidence to be considered is documentary, as it is here, we need not give any special deference to the trial court's findings." ***Id.***; *see also* ***Weinberger v. Bowen***, 2000 WI App 264, ¶7, 240 Wis. 2d 55, 622

N.W.2d 471 (when we have a sufficient paper record, "we need not give any special deference to the trial court's findings or rulings because we are in as good a position as the trial court to address the issue"). Thus, our review is de novo. ***Racine Educ. Ass'n***, 145 Wis. 2d at 521.

¶20 This dispute centers on the following language from the Agreement:

> 1. This instrument shall confirm that each of the named signatories … hereby agree that they … will not make any contact with, deal or otherwise involve in any transaction with any banking or lending institution … introduced by **RA MORTGAGE** … without permission of **RA MORTGAGE**.…
>
> ….
>
> 3. This agreement is a perpetuation guarantee for 2 years from the date affixed below and is to be applied to any and all transactions entertained by the signatories, including subsequent follow up, repeat, extended, or renegotiated transactions, as well as to the initial transaction--regardless of the success of the project.…

As we have explained, we concluded in ***RA Mortgage*** that the contract is ambiguous regarding whether the parties intended to have the Agreement apply to lenders introduced to Fedler *prior* to the execution of the Agreement on August 6, 1996. Anderson argues that the extrinsic evidence resolves this ambiguity and demonstrates that the parties intended to include St. Paul under the Agreement, even though St. Paul was introduced to Fedler prior to entering into the Agreement. Fedler argues that Anderson has failed to demonstrate how the extrinsic evidence resolves the contractual ambiguity and, therefore, applying the construe-against-the-drafter rule, the Agreement should be read as not applying to lenders introduced to Fedler prior to entering into the Agreement, including St. Paul.

¶21 Based on our review of the record, including the trial transcript, the exhibits offered at trial, and the parties' briefs, we conclude that the extrinsic evidence does not resolve the contractual ambiguity. Therefore, applying the construe-against-the-drafter rule against Anderson, we conclude that the parties did not intend to apply the Agreement to lenders, specifically St. Paul, introduced prior to the effective date of the Agreement.

¶22 As background testimony at the trial, Anderson testified that he had been a mortgage broker for thirty years and customarily charges customers a fee representing one-percent of the loan amount for his services. In order to protect his lending sources, he also customarily has customers sign a non-circumvention/non-disclosure agreement, prohibiting a customer from doing business directly with lenders introduced by Anderson for a finite period of time.

¶23 Turning to the events leading up to the drafting of the contract, we observe that the evidence sheds little light on the question of whether the parties intended for St. Paul to fall under the Agreement. Anderson had worked with Fedler on two other projects prior to introducing Fedler to St. Paul in 1996. For the first project, Fedler paid Anderson $5000 even though not required to by contract. For the second project, which involved the initial construction of Autumnwood, Anderson received his customary fee of one percent of the amount financed. Then, while at a social engagement in 1996, Anderson and Fedler decided to get together again to explore what lending sources Anderson might have for certain projects Fedler had in mind. The parties met again and discussed financing opportunities Anderson could procure for Fedler. Specifically, they discussed St. Paul. St. Paul indicated an interest in working with Fedler on the Autumnwood project; two other possible projects were also discussed. This evidence is not helpful in resolving the contractual ambiguity.

¶24 The evidence surrounding the formation of the financing fee agreement is also little help in resolving the contractual ambiguity. Anderson and Fedler met to discuss obtaining financing for Autumnwood. Anderson explained he ordinarily charges a one percent fee for his services, but that he would discount it to one-half percent for the Autumnwood project in consideration for volume business opportunities from Fedler. Fedler expressed an interest in these terms, as well as providing for the cancellation of the financing fee agreement without notice and extending the fee agreement every six months. The latter term was important to Fedler because of the uncertainty inherent in a new business relationship. Anderson then drafted the financing fee agreement with this discussion in mind. At most this evidence supports Anderson's assertion that the parties intended for the Agreement to cover more than just the Autumnwood transaction. But this evidence does not shed any light on whether both parties intended for the Agreement to apply to St. Paul.

¶25 Similarly, the evidence surrounding the formation of the Agreement is even less helpful. Anderson and Fedler did not discuss the Agreement until after Anderson drafted it and presented it to Fedler for signing on August 6, 1996. Anderson testified that he drafted the Agreement because the terms of the financing fee agreement provided that it could be cancelled by either party at any time and that it was renewable every six months. After Anderson drafted both documents, he met with Fedler and discussed the Autumnwood, Hunter Ridge and Casablanca projects, as well as the entire contract. They then signed the documents. There is no evidence regarding whether any specific lender was covered by the Agreement or whether the Agreement applied to any lender introduced to Fedler prior to its execution. The record also reveals that no evidence was offered regarding the specific term of the Agreement relating to

lender introductions. Anderson did concede at trial, however, that the contract contains no language governing its application to lenders introduced to Fedler prior to its execution. He also conceded that no agreement was in effect when he introduced Fedler to St. Paul. We further observe that Anderson testified that under the terms of the Agreement, he was entitled to all of Fedler's financing opportunities. But, again, this evidence does not tell us whether the parties intended for the Agreement to apply to lenders introduced prior to its execution.

¶26 Fedler has a different view of the facts relating to the formation of the agreements, which adds nothing to resolving the contractual ambiguity. He testified that the Agreement applied only to the Autumnwood transaction, a notion we disagreed with in ***RA Mortgage***. ***RA Mortgage***, 2003AP0265, ¶16. He also testified that, at the time the agreements were signed, he and Anderson did not talk about any specific lenders Fedler could not deal with once the agreements were terminated. These facts do not assist us in resolving the ambiguity at issue here.

¶27 This observation applies with equal force to the evidence surrounding the termination of the financing fee agreement. During the closing of the Autumnwood transaction on October 31, 1996, Fedler informed Anderson that he would not pay Anderson a fee for the projects being financed by St. Paul. Fedler sent a letter to Anderson on November 1, 1996, terminating the financing fee agreement. Anderson also sent Fedler a letter on November 1 reminding him of his obligations under the Agreement. The letter is internally inconsistent on whether the Agreement applied to St. Paul as a lender introduced to Fedler prior to the execution of the Agreement. It states in pertinent part:

> You had indicated at the closing that you were interested in dealing direct on some future deals with St. Paul Federal without any further compensation for RA Mortgage or myself and what I thought about that. I told

> you that I usually don't do this and that we signed an agreement for a reduced fee basis so that I received a chance at doing all your business and that I would receive the fee that we signed the agreement for *on all future deals*. … The agreement has two distinct pages which are signed and dated by you and [me]. The first page is the actual agreement between the parties on fees, business, etc. to be conducted between Horizon (Ron Fedler) and RA Mortgage (Russ Anderson). The second page is a non-disclosure and non-circumvention agreement which has a term of two (2) years and protects me on *any future transactions* with the signatory, etc. from dealing with *any one that I introduce to them from the date of the agreement.* If they do any business with parties that I introduce them to they owe me a fee based on the agreement that was signed and thus this precludes you from dealing direct without paying me my fee. [Emphasis added.]

¶28 Anderson makes two points in his letter, which, by their terms, render ambiguous the parties' intent as to whether the Agreement applied to St. Paul. First, he states that he agreed to a discounted fee in exchange for Fedler's business on *all future deals*. If this is all that he said in the letter, this case would be easily resolved. However, he then proceeds to state that the Agreement protects him from Fedler conducting *any future transactions* with *any one he introduces Fedler to from the date of the Agreement.* It is unclear whether the clause "from the date of the agreement" modifies "any future transaction," or "he introduces Fedler to." The letter consequently reinforces the contract's ambiguity and suggests alternative interpretations: does the Agreement prevent Fedler from conducting any future transactions ("from the date of the Agreement") involving institutions Anderson has introduced him to without paying Anderson his fee; or does the Agreement only prevent Fedler from conducting business with a lender introduced to him after the execution of the Agreement ("from the date of the Agreement")? The letter could be reasonably interpreted either way and does not resolve the contractual ambiguity.

¶29 Anderson argues that the fact that Fedler paid him the one-half percent fee as called for by the Agreement for the Autumnwood transaction strongly supports his view that the Agreement applies to St. Paul. We agree that this is a reasonable interpretation of this fact. But St. Paul had already been introduced to Fedler at the time of the Agreement and financing for the Autumnwood project was well underway. Another reasonable inference from the fact that Fedler paid Anderson the one-half percent fee is that, similar to the first project for which Anderson obtained financing for Fedler and the first time Anderson worked with Fedler on procuring financing to construct Autumnwood, Fedler paid Anderson what he believed was a fair and reasonable fee for Anderson's efforts. In addition, when this fact is viewed in the context of the other extrinsic evidence, the significance Anderson places on it diminishes. We cannot conclude one way or the other from this one fact that the parties intended for the Agreement to apply to lenders introduced to Fedler prior to August 6, 1996.

¶30 Anderson also contends that Fedler's sending the letter terminating the financing fee agreement demonstrates that Fedler was aware that the Agreement applied to the Hunter Ridge and Casablanca transactions as well. We fail to see how this fact clarifies the ambiguity here. There is nothing about the text of the letter indicating Fedler understood that the Agreement applied to the two projects. In addition, one can reasonably infer from the termination letter that Fedler did not believe that the Agreement applied to these projects because he was introduced to St. Paul prior to entering into the Agreement. The fact that Fedler terminated the financing fee agreement by letter the day after closing on the Autumnwood transaction lends no support to either party's view of the Agreement.

¶31 In sum, our de novo review of the extrinsic evidence fails to resolve the ambiguity over whether the parties intended for the Agreement to apply to lenders introduced to Fedler prior to entering into the Agreement. Consequently, because Anderson drafted the Agreement, we apply the construe-against-the-drafter rule against him, and conclude that the Agreement did not apply to such lenders. We therefore affirm the circuit court's judgment and order dismissing RA Mortgage's complaint.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.