

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1845-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WILLIAM NIX AND RHONDA NIX,

PLAINTIFFS-RESPONDENTS,

v.

FLOYD POWELL, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County:
JAMES P. JANSEN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Floyd Powell, Jr., appeals a judgment requiring him to convey real estate to William and Rhonda Nix.¹ A fire destroyed the house

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 1999-2000 version unless otherwise noted.

that the Nixes were purchasing from Powell under a land contract and Powell received the proceeds from the insurance settlement. Exercising its equity powers under WIS. STAT. § 706.04, the trial court enforced the agreement by compelling Powell to complete the sale.² Powell argues that (1) the court should have granted him summary judgment because the land contract did not comply with the statute of frauds in several respects; (2) the Nixes are entitled to no relief because they materially breached the contract; and (3) the trial court erroneously exercised its discretion by compelling the sale because all of the elements of the transaction were not clearly and satisfactorily proven and the Nixes failed to establish any basis for equitable relief under WIS. STAT. § 706.04. We reject these arguments and affirm the judgment.

¶2 The land contract was signed by Powell but not by the Nixes. It identified the property only as 610 East 10th Avenue. It made the Nixes responsible for renters' insurance, taxes and utilities, but provided that Powell would pay taxes and insurance in January and add that amount to the balance due. The contract also created a payment schedule and provided that in the first and second year of the land contract, the Nixes could not be more than one month behind in payments. In the third year and after, they could be behind by two months.

¶3 Powell was not entitled to summary judgment merely because the contract violated the statute of frauds. To be entitled to summary judgment, he had to establish that there were no genuine issues of material fact and that he was

² The judgment also granted the Nixes a money judgment, reduced by an award to Powell on several counterclaims. Neither party contests those parts of the judgment in this appeal.

entitled to judgment as a matter of law. *See Green Springs Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Powell was not entitled to judgment as a matter of law merely because the contract violated the statute of frauds. WISCONSIN STAT. § 706.04 allows the court to grant equitable relief even though the contract does not comply with the formal requisites set out in WIS. STAT. § 706.02. Establishing violations of the statute of frauds is merely the first step in determining whether equitable relief should be granted. Therefore, the trial court properly refused to grant summary judgment based solely on the violations of the statute of frauds.

¶4 The trial court properly rejected Powell's argument that the Nixes cancelled the agreement by their failure to make all of the payments within the time set by the contract. During the sixteen months in which the Nixes occupied the property, they were late making two payments. Powell did not attempt to rescind the agreement or evict the Nixes. He continued to accept their checks and apply them toward the balance due until the fire, and made an issue of the late payments only after this lawsuit was commenced. His delay in attempting to enforce the payment schedule and his acquiescence in the Nixes' occasional late payments estop Powell from raising that issue at this time. *See Estate of Lohr*, 174 Wis. 2d 468, 475-76, 497 N.W.2d 730 (Ct. App. 1993).

¶5 Finally, the trial court reasonably exercised its discretion when it granted equitable relief under WIS. STAT. § 706.04. That statute allows the court to enforce the agreement if the transaction is clearly and satisfactorily proved and the transaction falls within one of three exceptions: (1) the deficiency of the conveyance may be supported by reformation in equity; (2) the party against whom enforcement is sought would be unjustly enriched if enforcement of the transaction were denied or; (3) that party is equitably estopped from asserting a

deficiency. *See Nelson v. Albrecht*, 93 Wis. 2d 553, 559-60, 287 N.W.2d 811 (1980). The elements of the transaction were clearly and satisfactorily proven. By their conduct, the parties adequately identified the premises, the starting date for the monthly payments and the insurance obligations. Powell would be unjustly enriched if he were allowed to retain the payments previously made, the insurance proceeds and the property itself. The land contract required Powell to sell the property. Upon payment of the full amount due, whether by the Nixes or by the insurance company, fairness dictates that he conveyed the property in its damaged state.

¶6 Powell cites *Hendricks v. M.C.I., Inc.*, 152 Wis. 2d 363, 365-66, 448 N.W.2d 289 (Ct. App. 1989), and *Disrud v. Arnold*, 167 Wis. 2d 177, 185-86, 482 N.W.2d 114 (Ct. App. 1992) to support his argument that he should be entitled to keep the insurance proceeds as well as the property. In *Hendricks*, the vendor retained the property and the insurance proceeds because he took it upon himself to insure the property even though it was the vendee's responsibility under the land contract. *Hendricks*, 152 Wis. 2d at 365. The contract in this case, however, states that Powell will pay for insurance and add the amount to the balance. Therefore, the Nixes were required to reimburse Powell for the cost of insurance. In effect, he bought insurance on their behalf and now wants to keep the insurance proceeds as well as the insured property. In *Disrud*, the vendee had defaulted and the vendor foreclosed. *Disrud*, 167 Wis. 2d at 180. The vendee had no interest in the realty at the time of the fire. Here, because Powell did not foreclose, the Nixes continued to have an interest in the property at the time of the fire. The equities in this case are not comparable to those recited in *Hendricks* and *Disrud*.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

