COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2185 **Cir. Ct. No. 2006CV2622**

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

STEWART TITLE GUARANTY COMPANY,

PLAINTIFF-APPELLANT,

V.

R.E. TITLE SERVICES LLC,

DEFENDANT,

LEXINGTON INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

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

¶1 KESSLER, J. Stewart Title Guaranty Company appeals from a summary judgment dismissing its breach of contract complaint against R.E. Title Services LLC.[1] We agree with the trial court's conclusions that the Title Insurance Underwriting Agreement ("Agreement") was ambiguous, that the facts are undisputed and that the parties intended that the Agreement be construed reasonably, consistent with standard practice in the title insurance industry. Based on the undisputed proof that R.E. Title followed this standard practice, R.E. Title was entitled to summary judgment and, therefore, we affirm.

BACKGROUND

¶2 The Agreement that Stewart and R.E. Title signed made R.E. Title responsible for conducting title searches, preparing title reports and writing title insurance on behalf of Stewart. Specifically, as material to this appeal, Section 3 of the Agreement provided:

> (a) [R.E. Title] … shall issue title policies according to recognized underwriting practices.…
>
> (b) All title policies must be based on a written report of title resulting from *a complete search and examination of those public records,* surveys, and inspections *relevant to the insurance afforded by such policies....* Each title policy … shall correctly reflect the status of title as of the date and time of said policy with appropriate exceptions as to liens, defects, encumbrances, and/or objections disclosed by the search and examination of title or known by [R.E. Title] to exist.

[1] The Respondent's name is spelled differently throughout the record. For instance, sometimes it is identified as R E Title Services LLC or RE Title Services LLC. Sometimes there is a comma before LLC. For purposes of this opinion, we will use the name stated in the appellate caption.

(Emphasis added.) The Agreement also described R.E. Title's responsibility to Stewart for losses. Section 5(b) states, as is material here:

> On each such loss due to the fraud or intentional act or omission of [R.E. Title] … or due to the negligence thereof; [R.E. Title] shall be liable to [Stewart] for the entire amount of such loss…. Such losses include but are not limited to:
>
> ….
>
> (2) Failure to discover or report any instrument of record affecting title.
>
> ….
>
> (5) Failure to prepare a title policy which shows defects and matters affecting title disclosed in the title search or which should have been disclosed in the title search.

¶3 In 2002, Kendra Terry contracted to purchase property in Milwaukee from Katie L. Butler. U.S. Bank, N.A., issued a loan to Terry secured by a purchase money mortgage on the property. Stewart provided the title insurance, written by R.E. Title, for Terry and U.S. Bank. The title policy did not list any outstanding mortgages. It so happened, however, that CTX Mortgage Company had issued a mortgage on the property to Butler in September 1999. The mortgage was recorded in the Milwaukee County Register of Deeds office on September 22, 1999. However, the CTX mortgage was recorded under an incorrect legal description. Specifically, the property on which CTX issued and recorded a mortgage to Butler was listed using the following description found at microfilm Image 1186 in the office of the Register of Deeds:

> LOT 20, IN BLOCK 8, IN *BRADLEY ESTATES*, A SUBDIVISION OF THE NORTHWEST 1/4 OF SECTION 14, IN THE TOWNSHIP 8 NORTH, RANGE 21 EAST, IN THE CITY AND COUNTY OF MILWAUKEE, WISCONSIN.

(Emphasis added.)[2]

¶4 In contrast to this description, Terry's 2002 warranty deed for the property she purchased from Butler described the property as:

> LOT 7 IN BLOCK 5 IN *RAINBOW RIDGE* NO. 2, BEING A SUBDIVISION OF A PART OF THE SOUTHEAST 1/4 OF SECTION 11, IN TOWNSHIP 7 NORTH, RANGE 21 EAST, IN THE CITY OF MILWAUKEE, MILWAUKEE COUNTY, WISCONSIN.

(Emphasis added.) It is undisputed that the description in the warranty deed is the accurate description.

¶5 According to the documents in the record, shortly after providing Butler a mortgage in 1999, CTX Mortgage assigned Butler's mortgage to Chase Manhattan Mortgage Corporation. Subsequently, Chase brought a foreclosure action against Butler and included U.S. Bank and Terry as defendants. Ultimately, Stewart paid U.S. Bank and then sued R.E. Title for, among other things, breach of contract, because the CTX mortgage was not found during the 2002 title search.

¶6 Thus, at issue in this case was whether R.E. Title and its insurer would have to pay Stewart. With all issues except the breach of contract claim

---

[2] Following the various pages on the microfilm of the CTX mortgage, and before the CTX Adjustable Rate Rider, is Microfilm Image 1193, an untitled and unidentified page on which a different property description appears:

> LOT 7 IN BLOCK 5 IN RAINBOW RIDGE NO. 2 BEING A SUBDIVISION OF A PART OF THE SOUTHEAST 1/4 OF SECTION 11, IN TOWNSHIP 7 NORTH, RANGE 21 EAST, IN THE CITY OF MILWAUKEE, MILWAUKEE COUNTY, WISCONSIN.

This phantom page is not explained and is not mentioned elsewhere in the CTX mortgage. However, the text is the same description that appears in Terry's warranty deed for the property.

resolved, the trial court ruled on the cross-motions for summary judgment filed by Stewart and R.E. Title. It is undisputed that R.E. Title searched only the tract index, based on the property described as "Rainbow Ridge" in Terry's contract. It is undisputed that the CTX mortgage was indexed based on the property description as "Bradley Estates." It is also undisputed that a search of the grantor/grantee index based on the name of the party in the transaction—a search R.E. Title did not conduct—might have led to discovery of the CTX mortgage. Stewart and R.E. Title each argued that, based on the undisputed facts, the plain language of the Agreement required judgment for them as a matter of law.

¶7 Although Stewart admitted that R.E. Title's title search of the tract index was reasonable, Stewart argued that the Agreement required more, namely a "complete search" of all "public records … relevant to the insurance." Stewart argued that because the grantor/grantee[3] index was obviously a relevant public record, R.E. Title had failed to conduct a "complete search" because it did not search the grantor/grantee index. Stewart asserted that R.E. Title breached the Agreement. However, Stewart produced no expert's affidavit concerning industry practices and no other evidence bearing on the intent of the parties as expressed in the Agreement.

¶8 R.E. Title argued that it had not breached the Agreement because only a search of those public records that are "relevant to the insurance" policy is required by the plain language of the Agreement. R.E. Title argued that when it

[3] BLACK'S LAW DICTIONARY 786 (8th ed. 2004), under the word "index," includes the following definition for "grantor/grantee index": "An index, usu. kept in the county recorder's office, *alphabetically listing by grantor* the volume and page number of the grantor's recorded property transactions." (Emphasis added.)

searched the Register of Deeds' tract index,[4] based on the legal description in Terry's contract to purchase, it was searching the "relevant" property records consistent with industry practice. R.E. Title concluded it had substantially performed the Agreement, and thus was not in breach.

¶9 R.E. Title filed a report and an affidavit from an expert who opined that R.E. Title had followed industry protocol in searching the tract index only. The expert, Bruce Persch, had maintained a Wisconsin Title Insurance license for twenty-two years and had "worked in all aspects of the title insurance industry in Wisconsin … including conducting record searches." His report stated:

> During my searching experience at the Milwaukee County Courthouse the register of deeds office hand posted to the tract books, and to the best of my knowledge we could not use the grantor/grantee index.
>
> When the computer tract index came into existence it was very similar to the hand posted tract books, in which we would search by legal description.

Further, Persch stated in his affidavit:

> It is my professional opinion and conclusion that, as a result of the incorrect property description contained in the CTX mortgage (at Image 1186) and the complete lack of explanation or identification of the additional property description attached at the end of the CTX mortgage (at Image 1193), the CTX mortgage was filed with the incorrect property.
>
> It is also my professional opinion and conclusion that the title examiner who conducted the title search on behalf of R.E. Title was not negligent because no title examiner conducting a title examination relative to the

[4] BLACK'S LAW DICTIONARY 786 (8th ed. 2004), under the word "index," includes the following definition for "tract index": "An index, usu. kept in the county recorder's office, listing, *by location of each parcel* of land, the volume and page number of the recorded property transactions affecting the parcel." (Emphasis added.)

> correct property description would have discovered the CTX mortgage, which was filed under an entirely separate property description.

(Paragraph numbering omitted.)

¶10 The trial court concluded, contrary to both parties' arguments, that the Agreement was ambiguous as applied to the undisputed facts. With no specific evidence of the parties' intent (such as contemporaneous discussions or memoranda, or a history of dealings between the parties), the court interpreted the Agreement to require reasonable conduct based on evidence of standard business practices in the title insurance industry. Because Stewart did not file any affidavits to dispute Persch's evidence that searching only the tract index was reasonable and the standard practice, the trial court concluded R.E. Title was entitled to summary judgment dismissing Stewart's complaint. This appeal follows.

STANDARD OF REVIEW

¶11 In reviewing the grant or denial of a summary judgment, we apply the same methodology as the trial court and review *de novo* the grant or denial of summary judgment. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Contract interpretation is also a question of law we review *de novo*. ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (Ct. App. 1987).

DISCUSSION

I. Contract Interpretation.

¶12 "[T]he cornerstone of contract construction is to ascertain the true intentions of the parties as expressed by the contractual language." ***State ex rel.***

Journal/Sentinel, Inc. v. Pleva, 155 Wis. 2d 704, 711, 456 N.W.2d 359 (1990). Contractual language is ambiguous if it may fairly be susceptible to more than one construction. ***Town of Neenah Sanitary Dist. No. 2 v. City of Neenah***, 2002 WI App 155, ¶9, 256 Wis. 2d 296, 647 N.W.2d 913. A latent ambiguity may exist where "'[t]he words of a contract, in themselves, may be plain, yet when applied to the situation with which it deals, not plain, the literal sense leading to such unreasonableness as to suggest that the parties probably did not so intend.'" ***Stevens Constr. Corp. v. Carolina Corp.***, 63 Wis. 2d 342, 354, 217 N.W.2d 291 (1974) (citation omitted). Parol evidence "may be introduced to explain ambiguous terms of [a] written instrument." ***Id.*** To ignore part of the agreement would violate one of the principles of contract construction—that no part of the contract should be ignored. *See* ***Koenings v. Joseph Schlitz Brewing Co.***, 126 Wis. 2d 349, 366, 377 N.W.2d 593 (1985) ("[A]n agreement should be given a reasonable meaning so that no part of the contract is surplusage."). Ambiguities are construed against the drafter of an agreement. ***Hunzinger Constr. Co. v. Granite Res. Corp.***, 196 Wis. 2d 327, 339, 538 N.W.2d 804 (Ct. App. 1995).

¶13 Interpretation of the Agreement under the facts of this case presents a classic example of latent ambiguity in a contract. The words used in the Agreement are clear; however, when applying those words to the undisputed facts, the parties reach mutually exclusive conclusions: one party concludes the Agreement has been breached, while the other concludes it has not. We conclude that the Agreement is ambiguous.

¶14 Stewart argues that a "complete search" of all "public records" relevant to issuance of the policy of title insurance is required by the plain language of the policy. Stewart concludes R.E. Title breached the Agreement because: (1) the grantor/grantee index is, indisputably, a public record; (2) R.E.

Title intentionally did not search that index; and (3) had the grantor/grantee index been searched the CTX mortgage might ultimately have been discovered. Stewart argues that, after a search by property description (the tract index) disclosed no clouds on the title, the grantor/grantee index was relevant to issuance of the policy regardless of whether R.E. Title could have reasonably been expected to reach the same conclusion. The trial court noted that Stewart's application of the language of Section 3 to the facts here would mean:

> absolute liability [by R.E. Title] in the sense of having to scour every public record for some clue that might be out there. And you won't know what's relevant until you look at it. Something could be filed in the wrong place, it could be docketed improperly and you won't know that something's relevant until you go find it.

The trial court concluded this was not a reasonable reading of the contract. We agree.

¶15 The Agreement does not define what general categories of public records are "relevant to issuance of the policy" nor does it specifically require the search of any particular records. The undisputed conclusion offered by Persch was that "the CTX mortgage was filed with the incorrect property [description]." Thus, if Stewart's interpretation of the Agreement is correct, R.E. Title is liable even for its failure to find information that is incorrectly filed in public records. The penalty for failure to "complete" an exhaustive search for a document that is not where it is supposed to be—if it even exists—is absolute liability. Such an interpretation of the Agreement would effectively make R.E. Title both the underwriter of the policy and the agent hired to conduct title searches and issue policies on Stewart's behalf. This would eliminate not only Stewart's risk in the business of title insurance, but would also make the specifications of liability described in Section 5(b) of the Agreement meaningless.

¶16 Section 5(b) of the Agreement describes specific instances in which R.E. Title is liable to Stewart. Liability is predicated on R.E. Title's fraud, or intentional act or omission, or negligence in five specific circumstances:

> (1) Failure of title plant [sic] to disclose matters causing losses.
>
> (2) Failure to discover or report any instrument of record affecting title.
>
> (3) Violations of escrow instructions.
>
> (4) Failure to follow underwriting guidelines and/or instructions of [Stewart].
>
> (5) Failure to prepare a title policy which shows defects and matters affecting title disclosed in the title search or which should have been disclosed in the title search.

If, based on the plain language of Section 3, strict liability were the consequence to R.E. Title of failing to search *every* public record, and to find *anything* that might potentially impact the validity of the title to the described property, there would be no need for the specific descriptions of liability in Sections 5(b).

¶17 Where the contract is ambiguous, we may consider parol evidence to determine the intent of the parties. *See* ***Stevens Constr. Corp.***, 63 Wis. 2d at 354. "[P]arol evidence may include evidence of the circumstances surrounding the creation of the instrument and the practical construction of the instrument given to it by the parties." ***Wisconsin Real Estate Inv. Trust v. Weinstein***, 509 F. Supp. 1289, 1295 (E.D. Wis. 1981) (citing ***Wheelwright v. Pure Milk Ass'n***, 208 Wis. 40, 44, 240 N.W. 769 (1932)). "Evidence of industry custom, if not inconsistent with the language of the agreement, may also be relevant." ***Id.*** at 1295. We may not construe a contract to lead to an unreasonable result that is unlikely to be what the parties intended. *See* ***Stevens***, 63 Wis. 2d at 355; *see also* ***Jones v. Jenkins***, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979) (on appeal, court examining ambiguous

agreement "cannot redraft the agreement, but must adopt that construction which will result in a reasonable, fair and just contract as opposed to one that is unusual or extraordinary"). Nor may we interpret a contract to render portions mere surplusage. ***Koenings***, 126 Wis. 2d at 366. We decline to impose absolute liability on R.E. Title where the Agreement as a whole suggests no such intent of the parties. *See* ***Stevens***, 63 Wis. 2d at 355. Further, we conclude that the parties intended that the Agreement be construed reasonably, consistent with standard practice in the title insurance industry.

¶18 Our conclusion is buttressed by prior court decisions and various statutes describing the recording system for matters affecting real estate. Reliance on the tract index has been discussed and considered previously in Wisconsin. In ***Kordecki v. Rizzo***, 106 Wis. 2d 713, 317 N.W.2d 479 (1982), our supreme court addressed the problem of two purchasers of real estate from a common vendor, and a claim of title based on an unrecorded document.[5] ***Id.*** at 714-16. In the context of discussing the plaintiff's admitted obligation to make a reasonable search of the public records to discover other conveyances of the land in question, the court noted that WIS. STAT. § 706.09(4) (1979-80)[6] referenced the tract index

[5] There were actually multiple competing transactions, but the crux of the problem in ***Kordecki v. Rizzo***, 106 Wis. 2d 713, 317 N.W.2d 479 (1982), that is relevant for our purposes involves the court's discussion of what sort of search of public records is necessary for a reasonable inquiry. *See* ***id.*** at 717 n.2.

[6] WISCONSIN STAT. § 706.09(4) (1979-80) is identical to the current version of § 706.09(4), except that the 1979-80 version used the word "indices" instead of "indexes." Section 706.09(4) (2007-08) provides:

(continued)

as a public record from which a reasonable search would disclose chain of title instruments. *See* ***Kordecki***, 106 Wis. 2d at 717 n.2. That disclosure of chain of title occurs because § 706.09(1)(b)[7] requires that documents transferring interests

---

> CHAIN OF TITLE: DEFINITION. The term "chain of title" as used in this section includes instruments, actions and proceedings discoverable by reasonable search of the public records and indexes affecting real estate in the offices of the register of deeds and in probate and of clerks of courts of the counties in which the real estate is located; a *tract index* shall be deemed an index where the same is publicly maintained.

(Emphasis added.)

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[7] WISCONSIN STAT. § 706.09(1) provides in relevant part:

> WHEN CONVEYANCE IS FREE OF PRIOR ADVERSE CLAIM. A purchaser for a valuable consideration, without notice as defined in sub. (2), and the purchaser's successors in interest, shall take and hold the estate or interest purported to be conveyed to such purchaser free of any claim adverse to or inconsistent with such estate or interest, if such adverse claim is dependent for its validity or priority upon:
>
> ….
>
> (b) *Conveyance outside chain of title not identified by definite reference.* Any conveyance, transaction or event not appearing of record in the chain of title to the real estate affected, unless such conveyance, transaction or event is identified by definite reference in an instrument of record in such chain. *No reference shall be definite which fails to specify*, by direct reference to a particular place in the public land record, or, by positive statement, the nature and scope of the prior outstanding interest created or affected by such conveyance, transaction or event, the identity of the original or subsequent owner or holder of such interest, *the real estate affected*, and the approximate date of such conveyance, transaction or event.

(Emphasis added.)

in real estate contain a correct description of the property transferred if they are to bar a subsequent purchaser's claim to the property.

¶19 In ***Associates Financial Services Co. of Wisconsin, Inc. v. Brown***, 2002 WI App 300, 258 Wis. 2d 915, 656 N.W.2d 56, we affirmed an award of summary judgment to a subsequent mortgage company that was a good faith purchaser for value against an adverse claim based upon a previously recorded quitclaim deed. ***Id.***, ¶¶1, 6. Although recorded, the quitclaim deed contained an incorrect legal description of the property, making it impossible to be found in the tract index. ***Id.***, ¶6. The incorrect description referred to "Certified Survey Map No. 1151," although the correct legal description was "Certified Survey Map No. 1511." ***Id.***, ¶2 (emphasis removed). The adverse claimants argued that Associates Financial's search of only the tract index was unreasonable because Associates Financial could have discovered the previously recorded interest, albeit recorded under the incorrect legal description, by using a computer system in the Register of Deed's office. ***Id.***, ¶8. Although admitting that their adverse interest had not been properly recorded "'as provided by law'" because it did not contain a valid description of the land conveyed, ***id.***, ¶10 (citation omitted), it appears that the adverse claimant believed an index by name of the parties (such as a grantor/grantee index) would have disclosed its interest, *see* ***id.***, ¶8. Relying on ***In re Carley Capital Group***, 117 B.R. 951, 959 (Bankr. W.D. Wis. 1990), we held that the "scope of inquiry is 'limited to the contents of all instruments in the chain of title and of the contents of instruments referred to in an instrument in the chain of title.'" ***Associates Fin.***, 258 Wis. 2d 915, ¶11. It was conceded in ***Associates Financial***, as it was here, that the tract index system would not have shown the document upon which the title dispute was based. *See* ***id.***, ¶12. We rejected the claim that search of a computer system maintained by the Register of Deeds was

required for the purchaser to perform a reasonable search because WIS. STAT. § 706.09(2)(b)[8] imposes no such requirement on a purchaser for value. ***Associates Fin.***, 258 Wis. 2d 915, ¶14. We concluded that one does not need to search *all* public records "to see if there is *some way*, in the absence of a proper recording, that an interest could *possibly* be discovered. Indeed, such a requirement would be contrary to the very purpose of the recording statutes—to ensure a clear and certain system of property conveyance." ***Id.*** (emphasis in original).

¶20 Here, the only evidence in the record relevant to standard business practice in the title insurance industry is from R.E. Title's expert, Persch. The trial court described that evidence as "a statement that it's reasonable not to search the grantor/grantee index." The trial court noted that Persch's opinion was based on his "expertise searching a tract index without searching [the grantor/grantee] index." Stewart did not factually dispute Persch's statements, but argued the statements were irrelevant because of the unambiguous language in the Agreement. Having concluded that the Agreement is ambiguous as applied to the

[8] WISCONSIN STAT. § 706.09(2)(b) provides:

> **(2)** NOTICE OF PRIOR CLAIM. A purchaser has notice of a prior outstanding claim or interest, within the meaning of this section wherever, at the time such purchaser's interest arises in law or equity:
>
> ….
>
> (b) *Notice of record within 30 years.* There appears of record in the chain of title of the real estate affected, within 30 years and prior to the time at which the interest of such purchaser arises in law or equity, an instrument affording affirmative and express notice of such prior outstanding interest conforming to the requirements of definiteness of sub. (1)(b)….

undisputed facts, we can only conclude, based on the record before us, that the parties intended their Agreement to be applied reasonably, consistent with standard business practice in the title insurance industry.

II. Summary Judgment.

¶21 Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). "'[T]he opposing party may avoid summary judgment only by set[ting] forth specific facts showing that there is a genuine issue for trial.'" ***Kaufman v. State Street Ltd. P'ship***, 187 Wis. 2d 54, 58, 522 N.W.2d 249 (Ct. App. 1994) (citation and one set of quotation marks omitted; second set of brackets in ***Kaufman***). In ***Butler v. Advanced Drainage Systems, Inc.***, 2006 WI 102, 294 Wis. 2d 397, 717 N.W.2d 760, we summarized the summary judgment process:

> Every decision on a motion for summary judgment begins with a review of the complaint to determine whether, on its face, it states a claim for relief. If it does, we examine the answer to see if issues of fact or law have been joined. After we have concluded that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. When they do so, we review the opposing party's affidavits to determine whether there are any material facts in dispute, or inferences from undisputed material facts, that would entitle the opposing party to a trial. We will affirm a grant of summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

Id., ¶18 (citations and internal quotation marks omitted).

¶22 Applying those standards here, we conclude that the complaint stated a cause of action for breach of contract, issue had been joined and Stewart

had the burden of proof as to the breach of contract claim. R.E. Title, in support of its motion for summary judgment, offered facts which made a prima facie showing that it had complied with the contract as we have interpreted it. That evidence was the affidavit and report from Persch describing reasonable business practices. Moreover, Stewart admitted that R.E. Title's search of the tract index was reasonable. Stewart offered no affidavits to contradict Persch or which provided other evidence of the intent of the parties in the Agreement. Thus there are no disputed material facts in the record.

¶23 Like the trial court, we conclude that R.E. Title is entitled to summary judgment dismissing Stewart's claim based on breach of contract. Thus, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.