COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2519 **Cir. Ct. No. 2003CV148**

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

RUTH E. MANTERNACH, GALEN T. MANTERNACH AND DEVELOPMENT ASSOCIATES,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

LAKE ARROWHEAD ASSOCIATES, INC. AND EAST BRIAR, INC.,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Adams County: CHARLES A. POLLEX, Judge. *Affirmed*.

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 HIGGINBOTHAM, P.J. Development Associates and Ruth and Galen Manternach (collectively, "Development Associates") appeal a judgment entered following a bench trial ordering reformation of the deed to a 1988 real

estate transaction between Development Associates and East Briar, Inc. on grounds of mutual mistake. Development Associates contends that the evidence was insufficient for the trial court to conclude that the legal description in the 1988 deed did not reflect the property boundaries agreed upon by the parties, and that the court's reliance on testimony of Development Associates' attorney for the transaction was contrary to principles of agency law. We disagree and affirm.

BACKGROUND

¶2 In May 1988, Development Associates purchased a lot ("Lot 1") of the Council Hills Addition (later named Council Bluff) in the Lake Arrowhead subdivision near Lake Arrowhead in the Town of Rome, Adams County, from developer East Briar. Collectively, Galen Manternach and his brothers, Wayne and Dale Manternach, were then the majority shareholders in Development Associates. Bill Werth was also a principal of Development Associates. Development Associates' attorney for the transaction was William Kahler. East Briar's attorney was Thomas Groeneweg.

¶3 At the time of the sale, a metes and bounds description of Lot 1 was included in the deed. This description stated that Lot 1 included within its borders "all land lying between the meander line and the water[']s edge of Lake Arrowhead." However, a draft of a new survey plat of Lot 1 created at least two months prior to the sale at East Briar's request excluded two sections of land that had been within the boundaries of the metes and bounds description. The first, named Outlot 1, consisted of all land running along Lake Arrowhead and extending from the water's edge inland 100 feet, and the other, Outlot 2, consisted of a narrow strip of land running along the southeastern and southern borders of the property. In June 1988, the deed to Lot 1 was recorded with the metes and

bounds description. The new plat survey of Lot 1 was also recorded earlier on the same day separate from the deed.

¶4 In 1989, Development Associates purchased from East Briar a second lot ("Lot 2") adjacent to Lot 1. At that time, Attorney Kahler informed Attorney Groeneweg by letter that, in the 1988 transaction, the parties had neglected to transfer ownership of Outlot 1, the waterfront parcel, from East Briar to the Lake Arrowhead Association ("Association").[1] Kahler copied the letter to Galen Manternach, with whom he was working on the purchase of Lot 2. Shortly thereafter, a deed drafted by Groeneweg was executed conveying Outlot 1 to the Association.[2]

¶5 In 1997, Galen and his wife Ruth Manternach purchased Lot 1 from Development Associates. The Manternachs decided to build a personal residence on the lot. After the Manternachs circulated a home plan which showed they intended to build near the shorefront, Groeneweg, then the Association's attorney, raised the issue of the ownership of the shorefront outlot. Additional facts are provided as necessary in the discussion section.

¶6 In 2003, the Manternachs and Development Associates filed this action seeking a declaration of interests under WIS. STAT. § 841.01 to Outlot 1 and Outlot 2. The plaintiffs moved for summary judgment, and East Briar moved to amend its answer and to file a counterclaim requesting reformation of the deed on

[1] The Lake Arrowhead Association manages the common areas within the subdivision, and is a creation of the documents that established the subdivision. The Association was established after the 1988 transaction and assumed the place of East Briar.

[2] It does not appear that any effort was made at this time to transfer title to Outlot 2.

grounds of mutual mistake. The court granted the plaintiffs' summary judgment motion, ruling that the legal description of the property unambiguously included the outlots within the boundaries of Lot 1. The court also granted East Briar's motion to amend its answer and to file a counterclaim. After a bench trial on the counterclaim, the court granted judgment in favor of East Briar and ordered reformation of the deed to exclude the outlots from the property boundaries of Lot 1. Development Associates appeals.[3]

DISCUSSION

¶7 This dispute centers on who owns Outlots 1 and 2 to Lot 1 of the Council Bluff Addition to the Lake Arrowhead subdivision. Development Associates asserts that it is the owner of the outlots by the terms of the legal description included in the 1988 deed to Lot 1. It challenges the trial court's finding that Development Associates and East Briar did not intend to convey Outlots 1 and 2 to Development Associates in the 1988 land purchase. It maintains that the court's finding of mutual mistake is not supported by the evidence and therefore reformation of the deed was in error.

¶8 A court may apply the doctrine of mutual mistake to reform a written agreement when the "writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing." ***Vandenberg v. Continental Ins. Co.***, 2001 WI 85, ¶50, 244 Wis. 2d 802, 628 N.W.2d 876 (citation omitted). The party

[3] East Briar has also filed a cross-appeal of the court's prior order granting summary judgment to Development Associates on the interpretation of the language of the deed. We do not address the cross-appeal because our decision affirming the trial court's order to reform the deed is dispositive.

seeking reformation on grounds of mutual mistake must prove by clear and convincing evidence that the written agreement does not set forth the intention of the parties. ***Williams v. State Farm Fire & Cas. Co.***, 180 Wis. 2d 221, 233, 509 N.W.2d 294 (Ct. App. 1993). Whether a mutual mistake occurred is a question of fact. ***State Bank v. Elsen***, 128 Wis. 2d 508, 517, 383 N.W.2d 916 (Ct. App. 1986). When the trial court sits as the fact finder, it is the ultimate arbiter of the witnesses' credibility, and we must uphold its factual findings unless they are clearly erroneous. ***Kersten v. H.C. Prange Co.***, 186 Wis. 2d 49, 56, 520 N.W.2d 99 (Ct. App. 1994).

¶9 Relying on the testimony of Attorneys Kahler and Groeneweg and documentary evidence, the trial court made the following pertinent findings of fact: (1) Attorney Groeneweg was East Briar's attorney at the time of the 1988 land purchase, but he was not involved in negotiating the specific terms of the agreement; (2) East Briar/the Association did not intend to convey Outlots 1 and 2 to Development Associates; (3) Attorney Kahler was Development Associates' agent with respect to the land purchase, and Kahler did not intend for Outlots 1 and 2 on the newly recorded survey plat to be conveyed to Development Associates; (4) both Development Associates and East Briar agreed that Outlots 1 and 2 were not to be included in the land transaction and that the property description attached to the warranty deed conveying Outlots 1 and 2 was contrary to both parties' intent; and (5) the metes and bounds property description included with the offer to purchase was a "description of convenience."

¶10 Development Associates contends that the court's ultimate finding that neither party intended Outlots 1 and 2 to be included in the 1988 transaction lacks sufficient support in the record and is clearly erroneous. It argues the court improperly relied on the testimony of Development Associates' agent, Attorney

Kahler, which contradicted the testimony of a Development Associates principal, Galen Manternach, in determining that Development Associates did not intend to purchase the outlots. It suggests that the court's reliance on an agent's testimony over that of a principal was contrary to principles of agency law. Citing ***Harold Sampson Children's Trust v. Linda Sampson 1979 Trust***, 2004 WI 57, ¶36 n.24, 271 Wis. 2d 610, 679 N.W.2d 794, it maintains that the court should have looked only to Galen's testimony to determine whether Development Associates intended to purchase Outlots 1 and 2, and disregarded the testimony of its agent, Attorney Kahler.

¶11 Relatedly, Development Associates argues that there is no evidence that it authorized Kahler to negotiate a deal that did not include the land along the waterfront. Moreover, it argues that East Briar failed to prove that the mistake was mutual because it did not present evidence from a principal of East Briar establishing that East Briar did not intend to sell Outlots 1 and 2 in the 1988 transaction. For the reasons that follow, we conclude that the court's finding that the parties did not intend to include Outlots 1 and 2 in the transaction has sufficient support in the record and is not contrary to agency law principles.

¶12 "'Lawyers … are recognized as agents for their clients in litigation and other legal matters.'" ***Id.*** (*quoting* 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 comment b. (2000)). "'A lawyer's act is considered to be that of a client in proceedings before a tribunal or in dealings with third persons when … the client has expressly or impliedly authorized the act.'" ***Id.*** In dealings with a tribunal or third person, "'[a] lawyer's act is considered to be that of the client … if the tribunal or third person reasonably assumes that the lawyer is authorized to do the act on the basis of the client's (and not the lawyer's)

manifestations of such authorization." ***Id.*** (*quoting* 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 27).

¶13 Development Associates appears to read the above-cited language in ***Harold Sampson Children's Trust***, stating that a third party or tribunal must look to the client's manifestations, and not those of the lawyer, in determining whether a lawyer's act is considered to be that of his or her client, to mean that a court may not consider evidence presented by the lawyer and must rely only on evidence presented by the client. We do not read footnote 24 to make any such statement. Nowhere does the footnote suggest that only evidence presented by the client may be considered in determining whether an attorney is authorized to do a particular act on behalf of the client. Thus, we see no reason why the trial court could not credit Kahler's testimony that he was given the authority to negotiate the terms of the 1988 transaction and disregard Galen's testimony on this topic.

¶14 Development Associates appears to contend that, even if the court could rely on Kahler's testimony regarding the scope of his authority, his testimony was insufficient to support the court's conclusion that Kahler was authorized to negotiate the terms of the 1988 transaction on Development Associates' behalf. Development Associates notes that Galen testified that he did not authorize Kahler to negotiate the transaction on behalf of Development Associates, and that he believed that neither his brother Wayne nor Werth authorized Kahler to negotiate on the company's behalf.

¶15 We conclude that the evidence was sufficient to support the court's finding that Attorney Kahler was authorized to negotiate the 1988 purchase on Development Associates behalf. Kahler testified at trial that Development Associates retained him to represent it in connection with this transaction. On

cross-examination, Galen Manternach admitted that Kahler was hired to represent Development Associates in this transaction. Moreover, two letters that were copied to the Manternachs show that Attorney Kahler engaged in substantive discussions about the boundaries of Lot 1 with East Briar's attorney. Kahler wrote in a November 1987 letter to East Briar's attorney, and copied to Wayne, that "we anticipate" the existence of greenways, including one running from the water's edge and out 75 to 100 feet. In an April 1989 letter to Groeneweg copied to Galen, Kahler raised the issue of ownership of the outlots, which he determined were owned by East Briar, but should have been transferred to the Association as a part of the 1988 transaction. Significantly, no documentary evidence or testimony was offered to show that the Manternachs attempted to rein in Kahler after receiving these letters, a fact that could reasonably be viewed as a manifestation of Development Associates' intent to authorize Kahler to negotiate these terms on its behalf.[4]

¶16 Having concluded that the court could credit Kahler's testimony regarding whether he was granted the authority to negotiate on behalf of Development Associates, we likewise see no reason the court could not choose to credit Kahler's testimony over that of a principal of Development Associates regarding the ultimate issue of whether Development Associates intended to purchase the outlots. In essence, Development Associates suggests that, when the testimony of an agent conflicts with that of a principal, the court must resolve the dispute in favor of the principal. Development Associates fails to cite any

[4] Moreover, we note that the evidence supporting the view that Kahler lacked negotiating authority is not without problems. Galen admitted at trial that his brother Wayne was the "frontman of the deal," and that he (Galen) did not have regular contact with Kahler at that time, suggesting that Galen was not in the best position to assess the scope of Kahler's authority.

authority for this proposition and we are aware of none. The court heard two conflicting stories—one from Kahler stating that Development Associates did not intend to purchase the outlots, and the other from Galen Manternach stating that it intended to do so—evaluated the credibility of the witnesses, and chose to believe Kahler's testimony. We may not overturn this determination. *See* ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977) (while acting as the finder of fact, the trial court is the ultimate arbiter of the credibility of witnesses).

¶17 We further conclude that the court's finding that Development Associates did not intend to purchase the outlots was sufficient for the court to conclude that East Briar proved its case by clear and convincing evidence. In addition to Kahler's testimony discussed above, documentary evidence was presented to show that Wayne Manternach and Bill Werth were aware that the metes and bounds description did not accurately represent the property being conveyed. In a June 1, 1988 letter to Wayne and Werth, Kahler provided instructions on handling the closing documents. Kahler instructed the Development Associates principals that the legal description would need to be included on the warranty deed when the new survey plat was to be recorded. Kahler informed the principals that Werth had the original copy of the new plat, and that it was to be recorded along with the other documents at closing. The new survey plat delineated the outlots as being separate from Lot 1. A court could reasonably infer from this evidence that both Wayne and Werth were aware that Lot 1 did not include the outlots, and that Kahler was authorized to negotiate these terms of the transaction. We conclude this evidence, combined with Kahler's testimony regarding Development Associates' intent, was sufficient grounds for the court to conclude that Development Associates did not intend to purchase the outlots.

¶18 Development Associates notes that the metes and bounds description, which included the outlots within its boundaries, was added to the proposed options to purchase submitted in 1987 and 1988, the executed 1988 offer to purchase, the 1988 warranty deed and the mortgage and title policy. Development Associates also points to Galen Manternach's testimony that, in the 1989 transaction, Development Associates expected that the green space running along the lakeshore would be included in the purchase of Lot 2 because, according to Galen, he believed the green space had been included in the purchase of Lot 1 the year before. Galen testified that Development Associates gave up its designs on the greenway to Lot 2 only after being compelled to do so in negotiations.

¶19 We observe, however, that the trial court disregarded Galen's testimony and concluded that the metes and bounds description did not reflect the parties' mutual understanding of the true boundaries of the property. The court found that the metes and bounds description was merely a "description of convenience," a term of art defined by Attorney Groeneweg as a description used by the parties to a real estate deal in place of a survey that had yet to be completed.

¶20 There is ample evidence in the record to support the court's finding that the metes and bounds description was a description of convenience that did not reflect the agreed upon property boundaries. Kahler, Groeneweg and Ken Carlson, the land surveyor hired by East Briar to prepare a new survey plat, each provided testimony supporting the view that the new plat reflected the true boundaries of the property to be conveyed. Kahler testified that the outlots were not part of Lot 1 and were never for sale. He further testified that he conveyed this information to his clients, and they decided to pursue the transaction anyway.

¶21 Finally, we reject Development Associates' claim that East Briar failed to prove that the mistake was mutual because it did not present evidence from a principal of East Briar about whether East Briar intended to convey the outlots to Development Associates. East Briar Attorney Thomas Groeneweg testified that it was generally understood that the outlots were not for sale. Although Groeneweg testified that he did not negotiate the specific terms of the deal, he had regular contacts with Attorney Kahler about the property to be transferred. Letters from Kahler addressed to Groeneweg regarding the transaction demonstrate that Groeneweg represented East Briar in, at the very least, a support capacity. The fact that Groeneweg was not a principal of East Briar did not preclude him from testifying about whether East Briar intended to sell the outlots to Development Associates, and we see no reason why the court could not rely in part on Groeneweg's testimony in determining that the 1988 deed was the result of a mutual mistake.

CONCLUSION

¶22 In sum, we conclude that the evidence was sufficient to support the trial court's finding that the parties did not intend to include Outlots 1 and 2 in the 1988 purchase of Lot 1, and that the trial court's conclusions were not contrary to agency law principles. We therefore affirm the court's finding of mutual mistake and the judgment ordering reformation of the 1988 deed conveying Lot 1 of the Council Bluff Addition to Development Associates.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.