COURT OF APPEALS
DECISION
DATED AND RELEASED

November 27, 1996

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

NOTICE

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

No. 95-2877

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

T & T MASONRY, INC., JOHN S. MILELLA, d/b/a W.C.I. REALTY, and GEORGE C. WIDULE, d/b/a PROPERTY EXCHANGE COMPANY,

Plaintiffs-Appellants,

TOM TORP and MARIANNE C. WIDULE, d/b/a PROPERTY EXCHANGE COMPANY,

Added-Plaintiffs-Appellants,

v.

ROXTON ASSOCIATES, c/o STEWART HARRISON, president, and STEWART HARRISON,

Defendants-Respondents,

MICHAEL SCHWANTES and CREATIVE REAL ESTATE ASSOCIATES, INC.,

Defendants-Respondents-Cross Appellants-Cross Respondents,

JOHN DOE, unknown title holder,

Defendant-Respondent,

FRANK MURPHY COWLES, JR.,

Defendant-Third Party Plaintiff-Respondent-Cross Respondent-Cross Appellant,

v.

CONTINENTAL CASUALTY COMPANY,

Third Party Defendant-Respondent-Cross Appellant-Cross Respondent,

MICHAEL SCHWANTES, CREATIVE REAL ESTATE ASSOCIATES, INC., and CONTINENTAL CASUALTY COMPANY,

Fourth Pty Plaintiffs,

HANAWAY, ROSS, HANAWAY, WEIDNER and BACHHUBER, S.C., and ABC INSURANCE COMPANY, a fictitious entity,

Fourth Pty Defendants-Respondents,

EDGEWATER BLUFF VILLAS, INC., CREATIVE COMMERCIAL REAL ESTATE, INC., CREATIVE REAL ESTATE ASSOCIATES, INC., ALLAN ROSS, JOHN SCHMIDTKE, HANAWAY, ROSS, HANAWAY, WEIDNER and BACHHUBER, S.C., and ASSOCIATED BANC - CORP.,

Added-Defendants-Respondents.

APPEAL and CROSS-APPEALS from a judgment of the circuit court for Waukesha County: ROGER MURPHY, Judge. *Reversed and cause remanded.*

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. This appeal is taken from a summary judgment dismissing claims arising from a failed real estate transaction. The cross-appeals are protective and seek reinstatement of cross-claims in the event that the summary judgment is reversed. We conclude that an issue of fact exists as to whether the financing contingency was unconditionally waived. We reverse the judgment dismissing claims between the parties and remand the case for further proceedings.

On April 26, 1993, Roxton Associates, by its president, Stewart Harrison, offered to purchase a shopping center owned by T & T Masonry, Inc. for three million dollars. A portion of the price would be paid by an exchange of 7.1 acres of vacant land known as the Edgewater property. Thomas Torp, president of T & T, accepted the offer. Real estate brokers John Milella and George Widule acted on behalf of T & T. Marianne Widule holds an ownership interest in the real estate brokerage firm which acted on T & T's behalf. T & T, Milella, the Widules and Torp are appellants in this appeal and will be collectively referred to as T & T.

The exchange agreement contained a requirement that the Edgewater property be zoned for construction of condominiums before the closing. It also included a financing contingency to be satisfied by May 16, 1993, or the "exchange will be null and void." The closing date was extended three times. Eventually, Roxton's purchaser's interest was assigned to Frank Murphy Cowles, Jr. The last written extension required the financing clause to be satisfied by August 25, 1993, and the closing to be held on August 31, 1993. On August 25, T & T was orally informed by Michael Schwantes, Cowles' real estate broker, that the financing was complete. On August 26, T & T received written confirmation signed by Cowles that "the finance contingency is hereby removed on August 24, 1993." The closing was never held.

T & T commenced this action to recover damages allegedly occasioned by Cowles' failure to close on the exchange agreement. T & T's claims against Cowles are for breach of contract and for fraudulent and negligent misrepresentations as to his net worth. T & T asserts fraudulent and negligent misrepresentation claims against Roxton Associates and Harrison. Negligence and misrepresentation claims are asserted against Schwantes, his real estate company and insurer, Creative Commercial Real Estate, Inc. and Continental Casualty Company respectively (hereafter, Schwantes). T & T also

brought claims against Cowles' attorneys for interference with contract. A negligence claim was asserted against Associated Banc-Corp., the bank Cowles was working with for financing.

On summary judgment the trial court determined that the real estate exchange agreement was not enforceable. All claims against Cowles were dismissed. The trial court also dismissed T & T's negligence claims against Schwantes. Schwantes cross-claimed against Cowles for breach of contract, indemnification based on intentional misrepresentations, contribution based on negligent misrepresentation, and vicarious liability for the acts and omissions of Harrison, Cowles' alleged employee. These claims were dismissed by the trial court and Schwantes cross-appeals to reinstate these claims if the summary judgment dismissing T & T's claims is reversed. Cowles cross-claimed against Schwantes for negligence and misrepresentation. Cowles cross-appeals from the dismissal of his cross-claims.

We review decisions on summary judgment by applying the same methodology as the trial court. ***M & I First Nat'l Bank v. Episcopal Homes***, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995); *see* § 802.08(2), STATS. That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***M & I First Nat'l Bank***, 195 Wis.2d at 496-97, 536 N.W.2d at 182.

Although we review summary judgment de novo, ***id.*** at 496, 536 N.W.2d at 182, it is necessary here to first address what appears to be inconsistent conclusions made by the trial court. The trial court determined that there was no dispute of fact that Cowles' waiver of the financing contingency was timely. However, it then concluded that the exchange contract was unenforceable because the financing contingency was never satisfied. It found that the bank agreed only to make a loan to Cowles in partnership with another entity and that the partnership never came into existence.

We agree with T & T that once the financing contingency was waived by Cowles, the failure to obtain the financing could no longer be an escape hatch for Cowles. *See* ***Godfrey Co. v. Crawford***, 23 Wis.2d 44, 49, 126 N.W.2d 495, 498 (1964) (the buyer's waiver of a condition that is for his benefit

has the same effect of a consummated satisfaction of that condition and obligates the buyer to pay the balance of the purchase price at closing). After waiver of the financing contingency, it was as if it had never been a part of the contract.

The trial court concluded that Cowles' waiver was "of no legal effect" because "Cowles' waiver depended upon a contingency which was never achieved." This ruling has two facets: Cowles was mistaken as to the facts when he tendered his waiver and the waiver was conditional. The summary judgment record gives rise to conflicting inferences about whether Cowles possessed sufficient knowledge and intent to effect a waiver or whether a known condition was placed on the waiver. The facts and circumstances surrounding the waiver of financing contingency are sufficiently complex to raise reasonable doubts about whether either T & T or Cowles is entitled to summary judgment on the contract claim. Matters of complex factual proof usually cannot be decided on the basis of affidavits and depositions. ***Peters v. Holiday Inns, Inc.***, 89 Wis.2d 115, 129, 278 N.W.2d 208, 215 (1979). "[S]ummary judgment does not lend itself to many types of cases, especially those which are basically factual and depend to a large extent upon oral testimony." ***Balcom v. Royal Ins. Co.***, 40 Wis.2d 351, 357, 161 N.W.2d 918, 921 (1968) (quoted source omitted). We conclude that summary judgment was inappropriate here.

Cowles argues that the trial court's judgment may be affirmed on the allegedly undisputed facts that: (1) the financing contingency was not timely waived; (2) other contract deadlines expired; (3) the required condition precedent regarding zoning of the Edgewater property was not met; and (4) the "naked assignment" of the exchange agreement to Cowles "gave Cowles the **right** to purchase the shopping center, but not the duty to purchase." Schwantes contends that the parties abandoned the exchange agreement and thereby rendered it unenforceable.

The timely waiver of the financing clause turns on the parties' intent and conduct as to whether time was of the essence or timely performance was waived. *See* ***Stork v. Felper***, 85 Wis.2d 406, 411, 270 N.W.2d 586, 589 (Ct. App. 1978) (conduct of parties may be used to show whether time was of the essence in the minds of the parties); ***Clear View Estates, Inc. v. Vetich***, 67 Wis.2d 372, 378, 227 N.W.2d 84, 88 (1975) (timely performance can be waived or time for performance extended either expressly or impliedly by parties' conduct).

"[T]he issue of intent is not one that properly can be decided on a motion for summary judgment. Credibility of a person with respect to his subjective intent does not lend itself to be determined by affidavit." ***Lecus v. American Mut. Ins. Co. of Boston***, 81 Wis.2d 183, 190, 260 N.W.2d 241, 244 (1977) (quoted source omitted). Thus, the question of timely waiver of the financing contingency is too factually complex for summary judgment.

We reject Cowles' assertion that the sales contract was unenforceable because other deadlines had expired. The fact that earlier deadlines for obtaining financing expired in the absence of satisfaction does not invalidate the contract. The amendments extending the closing and financing contingency removal dates govern.

We also reject Cowles' claim that the agreement was unenforceable because the zoning provision with respect to the Edgewater property was never satisfied. The record demonstrates that T & T and Cowles had reached a meeting of the minds that the Edgewater property would not be given in exchange. The closing documents were prepared for a cash sale. Torp indicated that it was Cowles' choice as to whether the Edgewater property would be given as part of the purchase price. The failure to meet the zoning contingency was not material after the parties agreed that the property would not be exchanged. Although the agreement to permit Cowles to choose whether the property would be given an exchange may be characterized as an abandonment of the exchange agreement, the determination of whether the parties so intended is not for summary judgment.

We summarily reject Cowles' claim that the assignment of the purchase agreement did not bind him to the terms. The assignment document incorporated the original purchase agreement and bound Cowles to its terms. ***Peterson v. Johnson***, 56 Wis.2d 145, 149, 201 N.W.2d 507, 509 (1972) (assignee is personally liable when he or she enters into an express agreement with the purchaser assuming the contractual obligation). Not only that, Cowles entered into amendments to the agreement. He was in contractual privity with T & T.

In summary, we reverse the judgment dismissing T & T's claims. The question of whether there was a timely, valid and unconditional waiver of the financing contingency does not lend itself to summary judgment because of

the complex factual proof. Because of the factual complexity, we cannot enter partial summary judgment in favor of T & T on its cross-motion for summary judgment. The same is true with respect to T & T's fraud claim against Cowles.

We must address the dismissal of claims against all other defendants. As to negligence claims against Schwantes, the trial court could not "find from the evidence in this record that there is sufficient proof that Schwantes ... was negligent." This is not the proper summary judgment standard. Again, the factual proof required is very complex and does not lend itself to summary judgment. In addition, dismissal of the negligence claims against Schwantes was predicated in part on the unenforceability of the exchange agreement. We reverse the dismissal of T & T's claims against Schwantes.

The trial court's decision does not reference the claims against Roxton Associates and Harrison. Those parties have not participated in this appeal. The dismissal of claims against those parties is also reversed.

The trial court explicitly dismissed the action as to "added defendants," including Cowles' attorneys, Associated Banc-Corp. and Edgewater Bluff Villas, Inc., on the ground that the exchange agreement was unenforceable. Those parties were not required to file answers to the complaint against them and did not participate in the summary judgment proceeding. Although the viability of the claims against these defendants is questionable, it has not yet been litigated. Our reversal based on the possibility that the exchange agreement is enforceable requires that we reverse the dismissal of T & T's claims against the "added defendants."

We turn to the cross-appeals of Cowles and Schwantes. We have reversed the judgment dismissing T & T's claims against these two parties. It follows that the cross-claims between them should be revived.

Schwantes argues in his cross-respondents' brief that "under no scenario" should the trial court's dismissal of T & T's claim against Schwantes for punitive damages be overturned. The claim for punitive damages is so closely related to matters that are not appropriate for summary judgment that

we are unable to rule as a matter of law that the claim should be dismissed. *See* ***Shopko Stores, Inc. v. Kujak***, 147 Wis.2d 589, 600-01, 433 N.W.2d 618, 623 (Ct. App. 1988) (summary judgment is a poor substitute for trial of such issues).

By his cross-appellants' brief, Schwantes seeks an order disqualifying Cowles' attorneys from further representation of Cowles because they are potential witnesses. The trial court did not address Schwantes' motion for disqualification because the motion was deemed moot after dismissal of the entire action. The motion is not properly before this court. We are not in a position to rule on the motion or to give an advisory opinion.

No costs to the parties on the cross-appeals.

By the Court.—Judgment reversed and cause remanded.

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