COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP40 **Cir. Ct. No. 2012CV69**

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

GAIL COLLETT AND MARION COLLETT,

PLAINTIFFS-RESPONDENTS,

V.

R. JAY RICHARDSON, KRISTI A. RICHARDSON AND SON-BOW FARMS, INC.,

DEFENDANTS-APPELLANTS,

ROBERT J. RICHARDSON,

DEFENDANT.

APPEAL from a judgment of the circuit court for Pierce County: JOHN A. DAMON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. R. Jay Richardson, Kristi Richardson and Son-Bow Farms, Inc., (collectively, the Richardsons) appeal a summary judgment granted in favor of Gail and Marion Collett. The Richardsons argue the circuit court erred by concluding that an option to purchase granted to them by the Colletts was invalid for lack of consideration. They also argue the Colletts' lawsuit to declare the option invalid is barred by the six-year statute of limitations for contract actions and by the equitable doctrine of laches.

¶2 We agree with the Richardsons that sufficient consideration supported the option to purchase. We therefore reverse in part. However, we remand for the circuit court to consider the Colletts' alternative arguments regarding the option's enforceability. In addition, we affirm the circuit court's conclusion that the Colletts' suit is not time barred.

BACKGROUND

¶3 The following facts are undisputed. The Colletts were the sole shareholders of Collett Farms, Inc., which owned and operated a 160-acre dairy farm in Pierce County. The Collets also personally owned approximately 119 acres of farmland across the road from the corporation's farm.

¶4 In the spring of 1993, the Colletts consulted their attorney and tax preparer, Robert Richardson, about the tax ramifications of a possible sale of their farm. At the time, attorney Richardson's son, R. Jay Richardson, was working for his father as an accountant and tax preparer. Attorney Richardson asked Jay to examine the Colletts' tax files to determine the Colletts' cost basis and calculate the potential tax if they sold the farm. Jay calculated the potential tax under three scenarios.

¶5 The Richardsons subsequently became interested in purchasing the Colletts' farm. The Colletts agreed to sell the Richardsons the 160-acre parcel owned by Collett Farms. At Jay's request, attorney Richardson drafted a purchase agreement to facilitate the transaction.[1]

¶6 The parties signed the purchase agreement on February 12, 1994. For tax purposes, the transaction was structured as a purchase of Collett Farms stock, rather than a direct purchase of the 160-acre farm. The agreement provided that the Colletts would transfer ten shares of stock to the Richardsons in exchange for $1,000. Collett Farms would then redeem additional shares from the Colletts for $114,000, which was payable to the Colletts in monthly installments. Collett Farms' payment obligation to the Colletts was "collateralized by a first mortgage lien" on the 160-acre parcel. The agreement also required Collett Farms to sell all farm personal property at auction and "use the proceeds therefrom for the redemption of [Collett Farms] stock[.]" The agreement stated the parties anticipated the sale to generate net proceeds of about $50,000. In addition, Collett Farms was required to pay the Colletts the cash balance of the corporate accounts, along with any patronage dividends. Collett Farms would also "remain liable" for payments to two former shareholders under outstanding redemption agreements.

[1] There is apparently some dispute about attorney Richardson's role in the transaction, and whether he was acting as the Colletts' attorney when he drafted the purchase agreement. The Richardsons assert attorney Richardson told the Colletts they "needed to seek independent professional advice regarding the … draft Purchase Agreement" and he "made clear to both parties that once Jay approached Gail about the purchase, [attorney Richardson's] only role was as scrivener of the draft agreement." Any disputes over attorney Richardson's involvement in the transaction are not material to our resolution of this appeal. *See* ***Maroney v. Allstate Ins. Co.***, 12 Wis. 2d 197, 202, 107 N.W.2d 261 (1961) (Disputed facts that are "immaterial to the questions of law presented ... do not afford a basis for denying summary judgment.").

¶7 The purchase agreement did not transfer ownership of the Colletts' personally-owned 119-acre parcel to the Richardsons. However, the following language in paragraph G. of the agreement purported to grant the Richardsons an option to purchase the 119-acre parcel:

> The parties further mutually agree that as additional consideration for this agreement Sellers will grant to Purchaser and/or Corporation an option to purchase property described as follows:
>
> [Legal description of the 119-acre parcel.]
>
> for the sum of *Est. FMV on R/E Tax Statements* upon the following terms and conditions:
>
> ~~The option may not be exercised prior to _____.~~
>
> ~~The purchase price shall be payable ____% down and the balance thereof in monthly installments based upon a ___ year amortization with interest on the outstanding balance at the rate of ___%.~~[2]

Immediately after the option clause, the agreement further provided:

> I.[3] Prior to the election/termination of said Option Agreement, Sellers agree to lease said premises to Corporation for a sum equal to $55.00 per tillable acre/crop year. The parties agree that said premises contain 87.1 tillable acres.

[2] The italicized language indicates a handwritten term that was added to a blank in the typewritten purchase agreement. The striking was also added by hand.

The Colletts assert the handwritten changes to paragraph G. were not present when they signed the purchase agreement. They also assert that they never intended to give the Richardsons an option to purchase the 119-acre parcel, they never discussed granting the Richardsons an option to purchase before signing the purchase agreement, and they were not aware until 2011 that the agreement purported to grant the Richardsons an option to purchase. The Richardsons dispute these assertions. However, any factual disputes about the Colletts' knowledge of or intent to grant an option are not material to our resolution of this appeal. *See* ***Maroney***, 12 Wis. 2d at 202.

[3] The purchase agreement does not contain a paragraph H.

> J. Purchaser herewith tenders to Seller the sum of $1,000.00 as consideration to bind this agreement with the mutual understanding that said sum shall be applied toward the purchase of stock referenced in Paragraph B.

¶8 The parties' relationship remained amicable through 2011. The Richardsons hired Gail Collett to work part time on the farm, and they agreed to rent increases for the 119-acre parcel on several occasions. However, in late 2011, the Colletts contacted the Richardsons and asked them to acknowledge that the option was invalid. The Richardsons refused, and, in February 2012, they notified the Colletts they intended to exercise the option. The Colletts responded on March 5, 2012, by filing a lawsuit against the Richardsons seeking to have the option declared invalid. The Colletts' lawsuit also asserted a malpractice claim against attorney Richardson. The Richardsons counterclaimed for specific performance of the option, or, alternatively, for damages.

¶9 The Colletts and the Richardsons filed cross-motions for summary judgment. The Colletts argued the option was unenforceable because: (1) there was no independent consideration for the option; (2) the option clause was merely a promise to grant an option, not an enforceable option to purchase; and (3) the option clause did not set forth a specific time period for exercising the option. The Richardsons argued the option was valid, and they also asserted the Colletts' declaratory judgment claim was barred by the six-year statute of limitations for contract actions and by the doctrine of laches.

¶10 The circuit court granted summary judgment in favor of the Colletts. The court reasoned that, under ***McLellan v. Charly***, 2008 WI App 126, 313 Wis. 2d 623, 758 N.W.2d 94, an option to purchase requires consideration that is completely separate and independent from consideration furnished for any other contract terms. The court found that, here, "[a]ll the consideration paid in the

purchase contract went to buy the stock in the corporation." In other words, the Richardsons furnished consideration only for their purchase of the 160-acre farm, and they did not provide any independent consideration for the option to purchase the 119-acre parcel. The court therefore concluded the option was invalid for lack of independent consideration. As a result, the court did not address the Colletts' alternative arguments that the option was unenforceable.

¶11 The court also determined the Colletts' declaratory judgment claim was not barred by the statute of limitations or laches. Consequently, the court entered a judgment declaring the option to purchase "unenforceable and void." In addition, the court dismissed the Colletts' malpractice claim against attorney Richardson, reasoning that, without a valid option, the Colletts could not prove any damages stemming from attorney Richardson's conduct. The Richardsons now appeal.[4]

DISCUSSION

¶12 We review summary judgment decisions independently, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2).[5] The Richardsons contend the circuit

[4] The Colletts have filed a separate appeal challenging the dismissal of their claim against attorney Richardson "to preserve their claim against him in the event the option is found to be valid." Briefing in that appeal has been stayed pending resolution of the Richardsons' appeal.

[5] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

court erred by granting the Colletts summary judgment because: (1) the option to purchase was supported by consideration, and is therefore valid; (2) the Colletts' claim is barred by the six-year statute of limitations for contract actions; and (3) the Colletts' claim is barred by laches. The Colletts dispute these assertions, and they also contend the option is unenforceable for two alternative reasons. We first address whether the option is enforceable. We then turn to the Richardsons' arguments that the Colletts' declaratory judgment claim is time barred.

I. Consideration for the option

¶13 Every contract requires an offer, acceptance, and consideration. ***Piaskoski & Assocs. v. Ricciardi***, 2004 WI App 152, ¶7, 275 Wis. 2d 650, 686 N.W.2d 675. "Consideration may be either a benefit to the promisor or a detriment to the promisee[,]" but in either case, the benefit or detriment must be bargained for. ***McLellan***, 313 Wis. 2d 623, ¶27. "A consideration of even an indeterminate value, incapable of being reduced to a fixed sum, can be sufficient to constitute legal consideration." ***Id.*** (quoting ***St. Norbert Coll. Found., Inc. v. McCormick***, 81 Wis. 2d 423, 430-31, 260 N.W.2d 776 (1978)). We are concerned with the existence, not the adequacy, of consideration. ***Id.***

¶14 Whether the circuit court applied the correct legal standard to determine the existence of consideration, and whether the facts constitute consideration under the correct standard, are questions of law that we review independently. ***Id.***, ¶28. Based on the undisputed facts, the circuit court determined the option to purchase the Colletts' 119-acre parcel was invalid because it was not supported by any consideration separate from the consideration furnished for the sale of the 160-acre farm. The court relied on ***McLellan*** for the proposition that an option to purchase requires consideration that is completely

separate and independent from any consideration provided for other terms of the contract containing the option. ***McLellan***, however, does not stand for that proposition.

¶15 In ***McLellan***, the seller granted the buyer an option to purchase a parcel of property for $675,000 within 180 days. ***Id.***, ¶8. The option agreement contained detailed provisions describing the terms of the potential sale. Specifically, the agreement contained a provision requiring the buyer to lease the property back to the seller after closing and a provision requiring the seller to repurchase the property for a discounted price at the buyer's election during the two-year period following the sale. ***Id.***, ¶¶8, 33 n.7. After the parties signed the option agreement, another party expressed an interest in purchasing the property for $1 million. ***Id.***, ¶¶9, 11. The buyer then attempted to exercise his option to purchase the property, but the seller refused to honor the option, asserting it was unenforceable for lack of consideration. ***Id.***, ¶¶11-12. The circuit court found that the leaseback and repurchase provisions in the agreement were sufficient consideration for the option. ***Id.***, ¶13. It reasoned the seller had "asked for the leaseback provision so that he could continue to use the property for storage" and had "negotiated a reduction in the price in the repurchase provision [the buyer] requested[.]" ***Id.*** Thus, the court found that both provisions benefitted the seller.

¶16 On appeal, this court reversed. We concluded that, for an option to constitute a binding contract, "there must be some consideration for the option that is *separate from the consideration for the sale of the property*." ***Id.***, ¶24 (emphasis added). We explained the reasoning underlying this rule is that

> an option contract and a contract of sale are two separate contracts: the former is a contract that vests the optionee with the unilateral right to accept the continuing offer during a stated period of time, while the sale contract

> comes into being only if and when the optionee exercises the option.

Id., ¶25. We observed that the leaseback and repurchase provisions in the parties' agreement would apply only if the buyer ultimately exercised the option. ***Id.***, ¶33. Thus, any benefit those provisions provided to the seller was completely contingent on the sale taking place—if the sale did not occur, the seller would be left with no benefit whatsoever. ***Id.*** We therefore concluded the leaseback and repurchase provisions were "consideration for the [future] sale contract, but not separate consideration for the option contract." ***Id.***

¶17 ***McLellan*** stands for the proposition that a valid option to purchase requires consideration separate from the consideration that will ultimately be exchanged if the option is exercised and a sale of the subject property takes place. ***McLellan*** does not, however, hold that an option to purchase requires consideration completely independent from the consideration provided for other terms of the contract containing the option. Neither the circuit court nor the Colletts have cited any Wisconsin case that stands for that proposition.

¶18 Moreover, as the Richardsons point out, according to the RESTATEMENT (SECOND) OF CONTRACTS § 80(1) (1981), when a contract contains multiple promises, there is consideration for each promise "if what is bargained for and given in exchange would have been consideration for each promise in the set if exchanged for that promise alone." Stated differently, "two or more promises may be binding even though made for the price of one. A single performance or return promise may thus furnish consideration for any number of promises." RESTATEMENT, *supra*, § 80 cmt. a.

¶19 Here, the option to purchase was part of a purchase agreement that contained multiple promises. The Colletts gave the Richardsons stock in Collett Farms—and, as a result, ownership of the 160-acre parcel—in exchange for $1,000 and an agreement that Collett Farms would redeem the Colletts' remaining stock. As collateral, the Colletts received a first mortgage lien on the 160-acre parcel. As the new owners of Collett Farms, the Richardsons were required to: (1) hold a personal property auction; (2) apply the auction proceeds to the stock redemption agreement; (3) pay the Colletts patronage dividends and the cash balance of corporate accounts; and (4) make payments under two outstanding redemption agreements. "[A]s additional consideration for this agreement," the purchase agreement also purported to grant the Richardsons an option to purchase the Colletts' 119-acre parcel. The agreement further stated that, until the option was exercised or terminated, the Colletts would lease the 119-acre parcel to the Richardsons in exchange for rental payments. Finally, the agreement required the Richardsons to pay the Colletts $1,000 "as consideration to bind this agreement[,]" and the parties agreed that sum would be applied to the Richardsons' purchase of Collett Farms stock.

¶20 Under these circumstances, we decline to hold that the option to purchase was invalid for lack of consideration. The option was part of a contract that encompassed multiple exchanges. Real estate, stock, and money were transferred, debt obligations were assumed, and a rental agreement was entered into. Unlike in ***McLellan***, these benefits and detriments were contemporaneous with the granting of the option. They were not contingent on a future sale of the 119-acre parcel.

¶21 Further, the purchase agreement specifically required the Richardsons to pay the Colletts a $1,000 down payment "as consideration to bind

this agreement[.]" The Colletts argue, without citation to authority, that because the $1,000 payment was ultimately applied to the purchase of Collett Farms stock it cannot also serve as consideration for the option. The Colletts' argument ignores the contract's plain language, which unambiguously states that the $1,000 payment was made to bind the entire agreement, not just the purchase of Collett Farms stock.

¶22 In addition, the option to purchase was tied to the purchase agreement's lease provision. Immediately after the option clause, the purchase agreement stated the Colletts would lease the 119-acre parcel to the Richardsons "[p]rior to the election/termination of said Option Agreement[.]" Thus, the lease provision was explicitly connected to the option to purchase. In ***Bozzacchi v. O'Malley***, 211 Wis. 2d 622, 627, 566 N.W.2d 494 (Ct. App. 1997), which involved a lease agreement containing an option to purchase, we concluded the tenant's rental payments were "a significant part of the consideration for the option." Applying that reasoning here, the Richardsons' rental payments to the Colletts were also consideration for the option to purchase the 119-acre parcel. The circuit court therefore erred by concluding the option was invalid for lack of consideration.

II. Alternative arguments about the option's enforceability

¶23 The Colletts next argue that, even if sufficient consideration supports the option to purchase, it is nevertheless unenforceable for two reasons. First, the Colletts argue the purchase agreement contains a mere promise to provide an option at some point in the future, rather than an enforceable option to purchase. Second, the Colletts contend that, because the purchase agreement does not specify a time period for exercising the option, the Richardsons were required to

exercise the option within a reasonable time. *See* ***Fleischman v. Zimmermann***, 258 Wis. 194, 197, 45 N.W.2d 616 (1951) ("[W]here no time is fixed in the option for its acceptance the law will imply that a reasonable time is intended."). The Colletts argue the Richardsons' eighteen-year delay in exercising the option was not reasonable, and the option is therefore void.

¶24 The Colletts raised these arguments in the circuit court, but the court did not address them because it concluded the option was invalid on other grounds. It would be inappropriate for this court to address the Colletts' alternative arguments in the first instance. While the Colletts' argument that the option clause is a mere promise to provide an option presents a pure question of law, their appellate briefs do not develop the argument sufficiently for us to make an informed ruling. We therefore conclude it would be more appropriate for the circuit court to address this argument on remand, preferably with the aid of more extensive briefing. If the circuit court determines the option is enforceable, it must then determine whether the Richardsons exercised the option within a reasonable time. The circuit court is obviously in a better position than this court to make the factual determinations necessary to resolve the Colletts' reasonable time argument. *See* ***Minguey v. Brookens***, 100 Wis. 2d 681, 689, 303 N.W.2d 581 (1981); *see also* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980) (court of appeals may not find facts).

¶25 We therefore remand for the circuit court to consider, first, whether the option clause constitutes a mere promise to provide an option, rather than a binding offer to purchase. If the court concludes the option clause is binding, it must then determine whether the Richardsons exercised the option within a reasonable time.

III. Statute of limitations

¶26 We next address the Richardsons' argument that the Colletts' declaratory judgment claim is barred by WIS. STAT. § 893.43, the statute of limitations for contract actions. Subject to an exception not relevant here, § 893.43 states that "[a]n action upon any contract, obligation or liability, express or implied … shall be commenced within 6 years after the cause of action accrues or be barred." The Richardsons contend the Colletts' cause of action to declare the option unenforceable accrued on February 12, 1994, the date the purchase agreement was signed. They therefore argue the Colletts were required to file their claim by February 12, 2000.

¶27 We disagree. Our supreme court has held that, under WIS. STAT. § 893.43, "a contract cause of action accrues at the moment the contract is breached." ***CLL Assocs. Ltd. P'ship v. Arrowhead Pac. Corp.***, 174 Wis. 2d 604, 607, 497 N.W.2d 115 (1993). The Colletts' complaint does not allege that the Richardsons breached any term of the purchase agreement. Instead, it asks the court to declare whether one of the agreement's terms is enforceable. Because the Colletts' claim is not premised on a breach of the purchase agreement, no claim has accrued for purposes of § 893.43. Consequently, § 893.43 does not bar the Colletts' claim.

IV. Laches

¶28 Alternatively, the Richardsons argue the Colletts' declaratory judgment claim is barred by the doctrine of laches.[6] "Laches is an equitable doctrine whereby a party that delays making a claim may lose its right to assert that claim." ***Zizzo v. Lakeside Steel & Mfg. Co.***, 2008 WI App 69, ¶7, 312 Wis. 2d 463, 752 N.W.2d 889. Laches is distinct from a statute of limitations, and it may be found even if the applicable statute of limitations has not yet run. ***Id.*** The three elements of laches are: (1) unreasonable delay by the party seeking relief; (2) lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming; and (3) prejudice to the party asserting laches caused by the delay. ***Id.***

¶29 The Richardsons cannot establish that the Colletts unreasonably delayed filing their declaratory judgment action. Under the purchase agreement, it was the Richardsons, not the Colletts, who were empowered to exercise the option. The Richardsons waited eighteen years to exercise the option, and they did so only after the Colletts asked them to acknowledge the option was invalid. Until the Richardsons attempted to exercise the option, the Colletts had no reason to seek a judgment declaring the option unenforceable. In our opinion, the real issue is not whether the Colletts unreasonably delayed filing their declaratory

[6] The section of the Richardsons' appellate brief addressing laches is entitled "Laches and Equitable Estoppel." However, aside from asserting that the Richardsons "relied on those terms that gave them the right to rent the land and ultimately the right to purchase it for fair market value[,]" the Richardsons do not develop an argument that the Colletts are equitably estopped from seeking to declare the option invalid. They do not list the elements of equitable estoppel, nor do they explain how those elements are satisfied in this case. We need not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

judgment claim, but whether the Richardsons unreasonably delayed exercising the option. As discussed above, the circuit court may have to make that determination on remand, if it concludes the option to purchase is otherwise enforceable. *See supra*, ¶¶23-25.

¶30 No WIS. STAT. RULE 809.25(1) costs to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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