COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0969

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

THIRD WORLD, LLC,

PLAINTIFF-RESPONDENT,

V.

ROBERT WIESE AND LANA WIESE,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Robert and Lana Wiese appeal from a judgment ordering them to convey land to Third World, LLC. The trial court granted summary judgment in favor of Third World after it sued the Wieses for the specific performance of a land sale agreement. The Wieses argue that the trial court erred when it granted summary judgment because material facts are in

dispute regarding their affirmative defenses of mutual mistake, fraud, and equitable estoppel and unclean hands. We affirm.

I. BACKGROUND

¶2 This case arises from a dispute over the terms of an agreement between the Wieses and Virginia B. Pierce, LLC. The Wieses and Pierce agreed to divide Block 46, a piece of property located in the Third Ward District of Milwaukee. Block 46 consisted of several buildings on four parcels of land and comprised one city block bounded by East Chicago, North Jackson, East Menomonee, and North Jefferson Streets.

¶3 Block 46 was owned by the Forrer Holding Company. The Wieses were interested in purchasing the western portion of the block, or parcel four. Forrer wanted to sell the land in one transaction, so the Wieses and Pierce signed an "Agreement for Purchase and Division of Land," in which Pierce agreed to purchase the eastern half of the property, or parcels one through three. Pierce subsequently assigned its interest to Third World, LLC.

¶4 Under the Agreement, the Wieses offered to purchase all of Block 46. The Wieses and Pierce then asked Forrer to convey parcel four directly to the Wieses and parcels one through three directly to Pierce. The Wieses and Pierce agreed that once Forrer conveyed the land, the parties would adjust the boundaries according to Paragraph Six of the Agreement, which states, as material:

> Pierce will convey to the Wieses that portion of 525 East Chicago Street which lies outside of and west of the west wall of the existing building on that parcel and *the Wieses will convey to Pierce that portion of 180 North Jefferson Street which lies outside of and east of the east wall of the existing building on that parcel.* (Emphasis added).

¶5 A vacated City of Milwaukee alley is in the space between the buildings. The original property line divided the parcels in the middle of the alley. The Wieses received all of the land west of the line and Pierce received all of the land east of the line. The Wieses claim that they believed the vacated alley was all of the land between the buildings. During closing, however, the Wieses learned that the vacated alley was only a portion of the land between the buildings, thus, they would have to transfer more land to Third World than they originally anticipated.

¶6 At closing, Forrer conveyed Block 46 to the Wieses and to Third World pursuant to the Agreement. The Wieses subsequently refused to convey all of the land "east of the east wall of the existing building" to Third World, claiming that they only agreed to convey their portion of the vacant alley. Third World sued the Wieses for specific performance of Paragraph Six of the Agreement. The Wieses raised the affirmative defenses of mutual mistake, fraud, and equitable estoppel and unclean hands. Third World moved for summary judgment and a declaratory judgment.

¶7 The trial court granted summary judgment in favor of Third World, concluding that the "language [of Paragraph Six] plainly states that the Wieses were to convey the portion of land east of their building to the end of the old property line of the parcel they bought … therefore[,] the terms of Paragraph 6 must stand as a matter of law." The trial court also concluded that: (1) the Wieses' mistake in thinking that the alley was the only land between the buildings was not material because the Wieses owned half of the land between the buildings and they were free to convey any portion they wished; (2) the Wieses' claim of fraud was not supported by the evidence; and (3) it could not grant equitable relief because the Wieses did not present facts sufficient to establish any wrongdoing.

The trial court finalized this decision in a judgment, which ordered the Wieses to convey all of the land "outside of and east of the east wall of the existing building on that parcel."

II. DISCUSSION

¶8 Neither party disputes the trial court's conclusion that the terms in Paragraph Six of the Agreement are clear. When a contract is unambiguous, its construction is a question of law we review *de novo*. ***Koenings v. Joseph Schlitz Brewing Co.***, 126 Wis. 2d 349, 366, 377 N.W.2d 593, 602 (1985). Our goal in interpreting a contract is to ascertain the parties' intent. ***Goossen v. Standaert***, 189 Wis. 2d 237, 246, 525 N.W.2d 314, 318 (Ct. App. 1994). A meeting of the minds does not require the parties to subjectively agree to the same interpretation at the time of contracting. ***Nauga, Inc. v. Westel Milwaukee Co.***, 216 Wis. 2d 306, 313, 576 N.W.2d 573, 576 (Ct. App. 1998) (quoted source omitted). Instead, mutual assent is judged by an objective standard—we look to the express words the parties used in the contract. ***Id.***

¶9 A court may not depart from the plain meaning of a contract when it is free from ambiguity to relieve one party of a disadvantageous term. ***Algrem v. Nowlan***, 37 Wis. 2d 70, 79, 154 N.W.2d 217, 221 (1967). Where the intent of the parties is made clear by the language and the nature of the agreement, we need not resort to extrinsic evidence to determine that intent. ***Bruns v. Rennebohm Drug Stores, Inc.***, 151 Wis. 2d 88, 94, 442 N.W.2d 591, 594 (Ct. App. 1989).

¶10 Our review of the trial court's grant of summary judgment is *de novo*, and we apply the same standards as did the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987). First, we examine the pleadings to determine whether a proper claim for relief has been stated. ***Id.*** If

the complaint states a claim and the answer joins the issue, our inquiry then turns to whether any genuine issues of material fact exist. ***Id.*** WISCONSIN STAT. § 802.08(2) (1999-2000) sets forth the standard by which summary judgment motions are to be judged:[1]

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

¶11 First, the Wieses claim that the trial court erred when it granted summary judgment on their defense of mutual mistake of fact. "A mutual mistake is one reciprocal and common to both parties, where each alike labors under a misconception in respect to the terms of the written instrument." ***Continental Cas. Co. v. Wisconsin Patients Comp. Fund***, 164 Wis. 2d 110, 117, 473 N.W.2d 584, 587 (Ct. App. 1991). The Wieses rely upon an affidavit of Lana Wiese, the deposition testimony of Peter Moede, a representative of Pierce, and two quitclaim deeds to support their claim that both parties mistakenly believed that the land between the buildings only consisted of a vacant alley. We will not examine this evidence, however, because the terms of Paragraph Six are clear.[2] Paragraph Six states that the Wieses will convey to Pierce "that portion of 180 North Jefferson

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

[2] The Wieses claim that a map and a drawing of Block 46 with markings indicating the boundary lines are insufficient to support Third World's motion for summary judgment. They also claim that the drawing is not properly authenticated. These matters, however, are not material to our decision because we do not look to extrinsic evidence where the terms of a contract are clear. ***Bruns v. Rennebohm Drug Stores, Inc.***, 151 Wis. 2d 88, 94, 442 N.W.2d 591, 594 (Ct. App. 1989). We also do not decide whether Lana Wiese's affidavit is a "sham" affidavit because this, too, is not material to our decision. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

Street which lies outside of and east of the east wall of the existing building on that parcel." Nowhere does the Agreement use the term alley. There is only one reasonable interpretation of Paragraph Six—the Wieses agreed to convey *all* of the property east of the building.

¶12 Moreover, if the Wieses were uncertain as to how much land was included in the Agreement, they could have, in the exercise of due diligence, inspected the property. *See* ***Carney-Rutter Agency v. Central Office Bldgs.***, 263 Wis. 244, 253, 57 N.W.2d 348, 352 (1953) ("Men, in their dealings with each other, cannot close their eyes to the means of knowledge equally accessible to themselves and those with whom they deal, and then ask courts to relieve them from the consequences of their lack of vigilance.") (quoted source omitted). "[A] self-serving statement … that a party did not understand the contract to mean what it says (or appears to say) will not suffice [to show a mutual mistake.]" ***Grun v. Pneumo Abex Corp.***, 163 F.3d 411, 421 (7th Cir. 1998) (alteration in original) (quoted source omitted). Accordingly, the Wieses cannot now be relieved of the terms of Paragraph Six because they deem them to be disadvantageous.[3]

¶13 Second, the Wieses' claim that they were misled by a false representation by Third World concerning the space between the buildings.[4] The

[3] The Wieses also claim that the location of the vacant alley is material to the Agreement. We agree with the trial court, however, that the location of the alley is not material because, as a matter of law, the Agreement clearly states that the Wieses will convey all of the land east of the building without reference to an alley.

[4] The Wieses claim that Third World misrepresented the space between the buildings because it knew that the space was more than an alley but failed to disclose this information. "If there is a duty to disclose a fact, the failure to disclose that fact is treated under the law as a representation that the fact does not exist." ***Ramsden v. Farm Credit Servs. of N. Cent. Wis.***, 223 Wis. 2d 704, 714 n.3, 590 N.W.2d 1, 5 n.3 (Ct. App. 1998). Thus, we will refer to the Wieses' allegations that Third World failed to disclose information as a representation.

Wieses are not clear, however, as to whether their claim is one of intentional misrepresentation or negligent misrepresentation. A false representation is an element of both intentional and negligent misrepresentation; thus, as we discuss below, the Wieses cannot satisfy their burden on summary judgment regardless of which form of misrepresentation they allege because they do not point to *any* representation by Third World that the only space between the buildings was the alley. ***Grube v. Daun***, 173 Wis. 2d 30, 53–54, 496 N.W.2d 106, 114 (Ct. App. 1992) (the common elements of intentional misrepresentation and negligent misrepresentation are: (1) the defendant made a factual representation; (2) the representation was untrue; and (3) the plaintiff believed the representation to be true and relied upon it to his or her detriment). *See also* ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 290, 507 N.W.2d 136, 139 (Ct. App. 1993) (while the moving party has the burden to establish that there are no triable issues of material fact on summary judgment, the nonmoving party has the burden to set forth specific facts to establish the elements on which they have the burden of proof at trial).

¶14 The Wieses claim that if Third World knew that the space between the buildings was more than the alley, its failure to disclose this information before the Wieses signed the Agreement is an actionable misrepresentation. The Wieses rely on their assertion that, at some point during negotiations, representatives of Third World knew that the alley was not the entire space between the buildings. This alone is not enough to establish that Third World made a false representation. The Wieses cannot point to a specific instance where Third World made a representation that the space between the buildings was only an alley. Furthermore, the Wieses have not presented any evidence demonstrating that

Third World was aware of the Wieses' alleged misunderstanding, but intentionally or negligently failed to correct it.

¶15 Finally, the Wieses claim that the trial court erred when it concluded that the Wieses did not produce any facts to support their defenses of equitable estoppel and unclean hands. To deny relief to "a plaintiff in equity under the 'clean hands' doctrine, it … 'must clearly appear that the things from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct.'" ***Security Pac. Nat'l Bank v. Ginkowski***, 140 Wis. 2d 332, 339, 410 N.W.2d 589, 593 (Ct. App. 1987) (quoted source omitted). As discussed above, the Wieses fail to show that Third World engaged in any wrongdoing. Accordingly, we affirm the trial court's grant of summary judgment.

By the Court.—Judgment affirmed.

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