

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 3, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

**Appeal No. 03-0171
STATE OF WISCONSIN**

Cir. Ct. No. 00CV000171

**IN COURT OF APPEALS
DISTRICT II**

KATHLEEN HANSEN & ASSOCIATES,

PLAINTIFF-APPELLANT,

v.

GERALD J. KALLAS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
DONALD J. HASSIN, Judge. *Affirmed and cause remanded with directions.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 SNYDER, J. Kathleen Hansen & Associates (KHA) appeals from an order dismissing its claim against Gerald J. Kallas and awarding attorney's fees to Kallas. KHA contends that Kallas entered into a commercial real estate transaction that obligated him to pay KHA a six percent commission under their Buyer Agency Contract. KHA also contends that the amount of attorney's fees

that the trial court awarded to Kallas was unreasonable. We disagree and affirm the order of the court. We remand for a determination of the reasonable appellate attorney's fees.

FACTS

¶2 Hansen is a licensed real estate broker doing business as Kathleen Hansen & Associates. In 1997, Hansen developed an interest in commercial real estate owned by AMS Golf, LLC. KHA contacted AMS to determine whether AMS was interested in selling the property and, if so, to offer KHA's brokerage services. AMS told KHA that they did not want to sign a listing contract, but that the property was for sale.

¶3 KHA contacted potential buyers, including Kallas. Kallas entered into a Buyer Agency Contract with KHA, which provided that KHA would receive a six percent commission if Kallas obtained a binding written agreement to purchase the AMS property. No commission was due if Kallas was granted an option to purchase. The contract also stated that, should litigation arise between KHA and Kallas, the prevailing party would be entitled to reasonable attorney's fees.

¶4 Kallas submitted an offer to purchase the AMS property on June 18, 1998. AMS rejected the offer. After further discussion with AMS, Kallas submitted a second offer and AMS responded with a counter offer. Kallas and AMS continued negotiations and on August 5, AMS tendered a new counter offer, which Kallas accepted.

¶5 The final agreement required Kallas to pay initial earnest money in the amount of \$10,000 and to make six additional cash payments of \$15,000 per

month. The terms gave Kallas the authority to set the closing date between September 1, 1999, and November 1, 1999. Should the transaction fail to close, the agreement provided that AMS would retain any payments made. Specifically, the contract states that “[t]he retained earnest money shall be deemed to be earned at the time of payment and shall be [AMS’s] sole remedy against [Kallas] in the event that this transaction fails to close for any reason.” Furthermore, AMS was “obligated to close ... upon twenty (20) days prior written notice” from Kallas of the date he wished to close the transaction “within the September 1, 1999, to November 1, 1999 time frame.”

¶6 Kallas planned to “flip” the property by purchasing it and immediately selling all but a small portion of the property to another developer the same day. When the other developer walked away from the deal, AMS offered to extend the timeline for Kallas to purchase the property if Kallas would continue to pay AMS a fee for that option. Kallas declined and the contract terminated.

¶7 KHA brought suit against Kallas, arguing that Kallas and AMS had entered into a “binding written agreement to convey ... the property,” which triggered the Buyer Agency Agreement provision for a six percent commission of the purchase price. KHA amended the complaint to add a bad faith claim against Kallas as well.

¶8 A three-day jury trial took place in August 2002. At the close of evidence, both KHA and Kallas stipulated that the court should decide whether the contract between AMS and Kallas was an option or an offer to purchase. They further stipulated that, should the court decide that the contract was an option, there was no issue for the jury to decide and the court could enter summary

judgment in Kallas's favor. The trial court determined that the agreement was an option contract and, by directed verdict, dismissed KHA's claim on the merits.

¶9 Kallas then requested attorney's fees pursuant to the Buyer Agency Contract. Kallas submitted bills in the amount of \$63,577. After arguments by both parties as to the reasonableness of the fees, the court ordered KHA to pay \$53,975.37 of Kallas's attorney's fees.

¶10 KHA appeals, arguing that the trial court's determination that the contract between AMS and Kallas was an option rather than an agreement of sale was "erroneous as a matter of law." KHA further argues that the attorney's fees awarded to Kallas were unreasonable. We disagree.

DISCUSSION

¶11 The Buyer Agency Contract between KHA and Kallas states in relevant part:

(3) Success Fee. Buyer shall pay Broker a fee for Broker's efforts ... according to one of the following three subsections:

(a) If a purchase of the property is obtained or a binding written agreement between Owner and Buyer to convey the property is obtained, a fee equal to the greater of \$_____ or 6% of the agreed price. Broker's fee shall be payable at closing or on the date set for closing in the binding written agreement to convey.

(b) If an option has been granted by a seller, a fee of N/A, payable when granted, plus a fee of _____ if the option is exercised or assigned during the term of the option or any extension thereof, regardless of when the exercise or assignment occurs.

(c) Other (i.e. lease, exchange): N/A

KHA maintains that the agreement between Kallas and AMS was a binding agreement to convey the property and obligated Kallas to pay the six percent commission on the agreed upon sale price of \$3,600,000.

¶12 Whether the contract between AMS and Kallas was an agreement of sale or an option to purchase presents us with an issue of contract interpretation. The interpretation of a contract is a question of law that we review without deference to the trial court. *Zimmerman v. DHSS*, 169 Wis. 2d 498, 507, 485 N.W.2d 290 (Ct. App. 1992). Our goal in contract interpretation is to determine and give effect to the parties' intentions. *Wis. Label Corp. v. Northbrook Prop. & Cas. Ins. Co.*, 2000 WI 26, ¶23, 233 Wis. 2d 314, 607 N.W. 2d 276. We look to the plain language of the contract. The relevant terms are as follows:

Earnest Money and Closing Date. Commencing on September 1, 1998, Buyer shall pay to Seller an additional earnest monthly payment of \$15,000 to be retained by Seller and credited against the purchase price in the event this transaction closes. Buyer shall make additional monthly payments of \$15,000 on the first of each month ("Due Date") for each of the next five (5) months for total monthly payments of \$90,000 (6 x \$15,000) in addition to the initial earnest money payment of \$10,000 for a total of \$100,000 in earnest money. All earnest money payments shall be retained by Seller in the event that this transaction fails to close. In the event that any \$15,000 payment is not made within five (5) days of the Due Date, Seller may cancel this Offer to Purchase by written notice to Buyer thereafter, retaining all earnest money, without further responsibility or liability to Buyer. The retained earnest money shall be deemed to be earned at the time of payment and shall be Seller's sole remedy against Buyer in the event that this transaction fails to close for any reason.

The closing date shall be no later than November 1, 1999, and no earlier than September 1, 1999. Seller is obligated to close this transaction upon twenty (20) days prior written notice by Buyer to Seller of the date Buyer wishes to close this transaction within the September 1, 1999, to November 1, 1999, time frame.

¶13 KHA argues that the plain language of the agreement demonstrates an offer to purchase which, following the AMS counter offer, resulted in binding acceptance and a promise to convey the property. KHA presents four arguments to support its contention.

¶14 First, KHA argues that the agreement is not an option because it does not limit AMS's power to revoke the offer. Next, KHA contends that the language is characteristic of a sales agreement rather than an option. KHA points out, for example, that the form used by Kallas to write the contract was an "Offer to Purchase," and that the agreement contains a contingency (an underground storage tank provision). Third, KHA asserts that because the contract treats the earnest money as a credit toward the purchase price, there was no separate consideration paid for an option granted to Kallas. Finally, KHA maintains that by including a provision for paying KHA a six percent commission, Kallas revealed his intent to enter into a purchase agreement rather than an option.

¶15 We are not persuaded by KHA's arguments. Though KHA insists that the key feature of an option is a seller's limited power to revoke, our supreme court said:

An option to purchase when consideration is given therefor[e] is a continuing promise by the landowner to sell real estate to another at a specified price and within a specified period of time. The distinguishing feature of an option is that it does not bind the purchaser to purchase or exercise the option.

Clear View Estates, Inc. v. Veitch, 67 Wis. 2d 372, 377, 227 N.W.2d 84 (1975). Both parties also cite to the California case of *Allen v. Smith*, 94 Cal. App. 4th 1270, 1279 (2002), which states:

Whether any particular document is ... an "option" or "an agreement of sale" depends on the nature and terms of the

document and the obligation of the parties, regardless of how the parties may label or identify the document. The test is whether ... there is a mutuality of obligation. If both parties are obligated to perform, it is an agreement of sale; if only one party (the optioner-offeror) is obligated to perform, it is merely an option. (Citation omitted.)

We agree that the California case reflects Wisconsin's approach to the law of options. The factors we look for in the contract between AMS and Kallas, therefore, are whether there was consideration made for the option and whether Kallas was bound to complete the purchase—in other words, whether there was mutuality of obligation.

¶16 The contract required Kallas to make monthly earnest money payments to AMS and AMS agreed that Kallas could purchase the property for a specified amount within a limited time period. The key characteristic of these earnest money payments is that they were deemed “earned at the time of payment.” Unlike earnest money in a purchase agreement, these payments were not a remedy for default by Kallas. No default or breach of contract triggered AMS's entitlement to the earnest money, it was theirs as soon as it was paid. Though KHA argues that no consideration was given for the option, there is no other reasonable characterization of the earnest money paid by Kallas to AMS.

¶17 To determine mutuality of obligation, we turn to the contract provisions on default. Notably, the traditional remedies for a purchaser's default, such as specific performance and actual damages, were struck from the contract. When Kallas decided not to purchase the property, AMS retained the earnest money payments and the contract terminated. We agree with Kallas's explanation that he was “required to pay AMS for this opportunity, [but was] not required to purchase the property and AMS has no ability to force a sale because of the lack of remedies available to AMS in the agreement.”

¶18 KHA's final contention is that the intent of the parties to effect a sale and pay the brokerage commission is manifested in the contract itself. The contract states in relevant part: "Seller shall pay Kathleen Hansen & Assoc., a six percent (6%) commission upon the sale of the Property." We agree that Kallas and AMS intended to pay the commission *if* the sale took place. The phrase "upon the sale of the Property" did not, however, create a binding agreement to convey the property. It simply confirmed AMS's obligation to KHA in the event Kallas exercised his option.

¶19 We conclude that the contract between AMS and Kallas was an option to purchase and not an agreement of sale. Because the Buyer Agency Contract does not require a commission or fee for KHA unless a "binding written agreement between Owner and Buyer to convey is obtained," no commission is due.

¶20 The Buyer Agency Contract further provided that "[s]hould litigation arise between the parties in connection with this contract, the prevailing party shall have the right to reasonable attorney's fees." Following the court's dismissal of KHA's claim, Kallas requested attorney's fees pursuant to the terms of the contract. He submitted bills in the amount of \$63,577. The court reduced the amount by approximately \$10,000 and ordered KHA to pay \$53,975.37.¹ KHA challenges the award, arguing that the trial court erred by failing to reduce the fees further.

¹ The court reduced the fees awarded to Kallas by reasoning that the argument that the option contract defeated KHA's claim as a matter of law could have been brought on the first day of the jury trial instead of the third day. The court therefore disallowed fees incurred for the second and third days of trial.

¶21 When a trial court determines reasonable attorney’s fees, we sustain that determination unless the court erroneously exercises its discretion. *Allied Processors v. W. Nat’l Mut. Ins. Co.*, 2001 WI App 129, ¶46, 246 Wis. 2d 579, 629 N.W.2d 329. We adopt this deferential standard of review because the trial court is in a position to observe the amount and quality of work performed and has the expertise to evaluate the reasonableness of the fees. *Id.* Trial courts properly exercise their discretion when they apply the correct law to the relevant facts and, through a rational process, reach a reasonable result. *Id.* In this case, KHA does not dispute Kallas’s entitlement to fees as the prevailing party, nor does KHA challenge the reasonableness of the hourly rate charged by Kallas’s attorney.

¶22 Instead, KHA argues that the attorney’s fees should have been reduced to \$11,995 because Kallas ultimately prevailed on a theory of defense that could have been successfully asserted in a summary judgment motion, thereby avoiding all of the expenses associated with the jury trial. In support of its contention, KHA asserts that the court can “consider whether costs could have been avoided by a reasonable and prudent effort.” *See Aspen Servs., Inc. v. IT Corp.*, 220 Wis. 2d 491, 499, 583 N.W.2d 849 (Ct. App. 1998). KHA fails to mention, however, that it could have obtained a ruling on the matter at an earlier date as well. It appears that KHA, while maintaining that the court erred in finding that the contract was an option, now argues that the defense should have raised the issue earlier, allowing KHA to lose sooner and avoid additional attorney’s fees. KHA was proposing that it should “get[] the benefit of the Court having made a decision to dismiss the action despite the fact that [KHA] doesn’t agree the case should have been dismissed.” KHA acknowledged that this was their position. The court responded, “That doesn’t make any sense to me.” We agree.

¶23 The trial court summed up the situation as follows:

I find it kind of ironic that [KHA] who sues knowing that there is an understanding between the parties that ... whoever prevailed, could make a request for reasonable attorneys fees ... [is] now about the fact that well, Judge, [KHA] doesn't want to pay the attorneys fees for the defendant who she sued and who she forced to defend ... and now the defense to the associated costs in large part are well actually our case wasn't very good to start with, Judge, and should have been dismissed on summary judgment.... Is this not what's wrong with the general tenor of the way we go about litigation? That because someone defended a lawsuit involving hundreds of thousands of dollars, prevailed in whatever fashion, now makes claims for the cost of that defense that in reality, Judge, you ought not award it because the defense was in essence an untimely one, although it was successful, it's a defense that should have been made early in the case because we didn't really have a case arguably to start with.

¶24 The court went on to find that Kallas's attorney's hourly rate was reasonable, and, after arduously reviewing the billing statements, determined which tasks were reasonable or unreasonable in the course of this litigation and adjusted the award accordingly.² See *Standard Theaters v. Transp. Dept.*, 118 Wis. 2d 730, 749, 349 N.W.2d 661 (1984). We conclude that the trial court's award of attorney's fees to Kallas was not an erroneous exercise of discretion.

¶25 Kallas raises the issue of attorney's fees incurred to defend on appeal. He is entitled to these pursuant to the Buyers Agency Contract and under *Radford v. J.J.B. Enters. Ltd.*, 163 Wis. 2d 534, 472 N.W.2d 790 (Ct. App. 1991). In *Radford* we held that an award of attorney's fees is not limited to those fees incurred at trial, but include appellate fees as well. *Id.* at 551. We remand this

² The record includes forty-two pages of transcript wherein the court considers the itemized bills submitted by Kallas, KHA's argument in favor of an early "cut off" date for the fees, and whether various "trial prep" entries on the bills were reasonable.

matter to the trial court for a determination of reasonable appellate attorney's fees incurred by Kallas in responding to the appeal.

CONCLUSION

¶26 We hold that the agreement between AMS and Kallas is an option to purchase because it did not obligate Kallas to purchase the property, it provided consideration to AMS for extending the opportunity to purchase, and the earnest money was the sole remedy to AMS if Kallas did not purchase the property. We further hold that the award of attorney's fees to Kallas by the trial court was reasonable. We remand for calculation of Kallas's reasonable appellate attorney's fees to be paid by KHA.

By the Court.—Order affirmed and cause remanded with directions.

Not recommended for publication in the official reports.

