COURT OF APPEALS DECISION DATED AND FILED

November 8, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2006AP463

Cir. Ct. No. 2005CV2147

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

ANDREW CRAWFORD AND JANIE CRAWFORD,

PLAINTIFFS-APPELLANTS,

V.

MARINA DEVELOPMENT LLC, MCSHANE/KP MARINA 137 LLC, MCSHANE 137 WILSON LLC, KENTON PETERS & ASSOCIATES AND KENTON PETERS,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed*.

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

¶1 HIGGINBOTHAM, P.J. Andrew and Janie Crawford[1] appeal an order granting the defendants summary judgment on the Crawfords' action seeking equitable enforcement under WIS. STAT. § 706.04 (2005-06)[2] of an oral contract to convey a condominium at the Marina Condominiums development project ("Marina Condominiums") in downtown Madison. The Crawfords contend that the summary judgment materials support a reasonable inference that they had a valid contract to purchase the condominium meeting all the requirements of § 706.04, and the contract was breached by the defendants. The Crawfords further contend that the circuit court erred in dismissing on summary judgment all claims against Marina Development, LLC, Kenton Peters & Associates, and Kenton Peters, personally, because these defendants did not join the summary judgment motion of McShane/KP Marina 137 LLC and McShane 137 Wilson LLC. The court thus deprived them, the Crawfords assert, of the opportunity to develop arguments against the nonmoving defendants.

¶2 Based on undisputed facts, we conclude that the parties did not enter into a contract enforceable under WIS. STAT. § 706.04 because the Crawfords failed to assent to an agreement at the point in time when they assert the equitable contract was formed. We further conclude that the circuit court properly dismissed the claims against Marina Development, Kenton Peters & Associates, and Peters. We therefore affirm the circuit court's summary judgment order.

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[1] We refer to Andrew and Janie Crawford throughout this opinion by their first names except when referring to them as a couple.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Background

¶3 The relevant facts drawn from the summary judgment submissions are undisputed.[3] Because resolution of this case primarily turns on the facts, we set out the material facts in detail. In September 2004, Andrew and Janie Crawford initiated discussions with Kenton Peters about buying a condominium unit at the Marina Condominiums then under construction at 137 East Wilson Street in Madison. Peters, through his company, Marina Development, had an exclusive agreement at the time with McShane/KP Marina 137,[4] the owner of the Marina Condominiums, to list the properties.

¶4 On September 20, 2004, the Crawfords signed an agreement with Peters to reserve Unit LE-1 in the condominium project and paid a deposit of $2,500. The agreement stated that the Crawfords had reserved the condominium

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[3] The defendants moved to strike portions of the Crawfords' brief-in-chief on grounds that it relied extensively on an affidavit of Andrew, which, the defendants contend, contains numerous averments that are not based on personal knowledge or fail to assert admissible evidentiary facts. *See* WIS. STAT. § 802.08(3) (summary judgment affidavits "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence"). We denied the defendants' motion, noting that the defendants did not allege that the Crawfords had violated our briefing rules under WIS. STAT. § 809.19. Before the trial court, the Crawfords relied on Andrew's affidavit, and the defendants broadly argued that the affidavit contained statements not based on personal knowledge or that were not admissible as evidence. The trial court's decision did not directly address any of the alleged deficiencies.

We conclude that the only averments to which the defendants object that may be material to whether the Crawfords had an equitable contract to purchase the condominium are those based on conversations for which Andrew was undisputedly not present, and of which, therefore, Andrew had no personal knowledge. In subsequent footnotes, we set forth these particular averments where appropriate and the undisputed evidence that disproves each averment.

[4] The September 2005 affidavit of Joseph Lamelas states that ownership of McShane/KP Marina 137 LLC is divided among three entities: McShane 137 Wilson LLC, 137 Wilson LLC and Marina Development LLC. McShane 137 Wilson LLC and 137 Wilson LLC each have a 40% interest in McShane/KP Marina 137 LLC, while Marina Development LLC has a 20% interest. McShane Corporation, Joseph Lamelas' employer, owns McShane 137 Wilson LLC.

through September 30, 2004. The Crawfords did not submit an offer to purchase by that date; however, they remained interested in the condominium.

¶5 On October 19, 2004, Janie provided Peters a two-page typewritten list of requests and suggested purchase agreement terms, many relating to plans for the build-out of the condominium. The list indicates that the Crawfords intended to select the finishes for the condominium's interior themselves, and requests that the seller pay the Crawfords an allowance for each room based on the cost of the standard finishes. Peters' hand-written response to the request for a build-out allowance for each room states: "These items have not been broken out individually [by room]. We can discuss after offer is received."

¶6 Around this time, Peters urged the Crawfords to submit a 5% deposit on Unit LE-1. Peters testified he told the Crawfords that the 5% deposit was necessary to "signify their sincerity and interest in buying." On October 20, 2004, the Crawfords sent Peters a check from the Red River Company, Andrew's business, in the amount of $23,748 made out to Marina Development. The check was recorded as "earnest money" by Andrew in the check registry for the account.[5] Peters held the check at the time without depositing it.

[5] Andrew's affidavit refers to the earnest money as a "down payment check," and attests that "[t]he Defendants specifically told Janie that the $23,784.00 was the down payment for the Condominium." Andrew avers that the "defendants" (here, Kenton Peters, the person with whom Andrew testified he and Janie dealt exclusively during this period of time) told Janie something, but does not state that he witnessed the conversation. In fact, it is undisputed that Andrew was not present for this or any conversation with Peters in which Peters said anything that led Andrew to believe that the Crawfords had a valid offer to purchase:

> Q: What is it that you contend that Kenton Peters said verbally that leads you to believe that you have a valid offer to purchase on this condominium?

(continued)

¶7 On October 27, 2004, Marina Development faxed an unsigned offer to purchase Unit LE-1 to the Crawfords' attorney. The offer was drawn up using a standard form, WB-14 Residential Condominium Offer to Purchase, approved by the Wisconsin Department of Regulation and Licensing, and includes an "Addendum A" drafted by Peters. The offer lists a purchase price of $495,195.00.[6] It contains the following relevant provisions:

- **BINDING ACCEPTANCE** This Offer is binding upon both Parties only if a copy of the accepted Offer is delivered to Buyer on or before October 29, 2004.
- **ENTIRE CONTRACT** This Offer, including any amendments to it, contains the entire agreement of the Buyer and Seller regarding the transaction. All prior negotiations and discussions have been merged into this Offer.
- <u>LEGAL RIGHTS/ACTION</u>: Broker's disbursement of earnest money does not determine the legal rights of the Parties in relation to this Offer.

¶8 Addendum A includes the following relevant provisions:

- 3.3.4 Buyers selections of materials and finishes shall be recorded on the "Schedule of Buyers Selections" and "Buyers Upgrades" which will be attached to and become a part of this Offer.
- 6.1.1 Upon execution and delivery of this Offer to Purchase Agreement to Sell or the listing Broker, Buyer shall pay to the Seller an amount equal to 5% of the

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A: What is it that Kenton Peters said to me or said in general?

Q: Where you were present.

A: Nothing.

[6] The date of the unsigned offer to purchase is mistakenly listed as "11/21/2003." The parties agree that the correct date was on or around October 27, 2004.

purchase price. This sum shall be referred to as the INITIAL PAYMENT.

- 6.1.2 If Seller fails to execute this Agreement within the time period provided in lines __ of the WB-14 OFFER TO PURCHASE FORM, the INITIAL PAYMENT shall be promptly returned to Buyer.

- 6.1.4 Buyer and Seller agree that the initial payment shall be considered earnest money as specified in Chapter 452 of the Wisconsin Statutes and related Administrative Code Provisions ….

- 11.1 Buyer hereby agrees to purchase a Unit designed as “Finished;” and understands that the Unit will be built and completed in accordance with “Specifications for the Construction and Finishing of the MARINA Home,” attached to and made a part of this agreement; and in accordance with the Schedule of Buyer’s Selections, Buyer Upgrades, and Change Orders mutually agreed to by Buyer and Seller.

- 19.0 Entire Agreement. This Agreement constitutes the entire Agreement between Buyer and Seller, and no amendments, supplements, or riders shall be effective unless in writing and executed by Seller and Buyer. No representations, warranties, undertakings or promises other than those expressed herein whether oral, implied or otherwise shall be considered a part of this transaction.

- 20.0 No Reservation. The submission by Seller of this Agreement to a prospective buyer for examination does not constitute an offer by Seller to sell, or a reservation of or an option for any unit. This instrument shall not become a contract until executed by Buyer and Seller in the manner set forth herein.

¶9 The “Specifications for the Construction and Finishing of the MARINA Home” referenced in Article 11.1 above contains the following provision:

> 10.14.12. This Agreement expresses all agreements between the parties concerning the subject matter hereof and supersedes all previous understanding relating thereto, whether oral or written, and shall be binding …. It is agreed and understood that there are no oral agreements.

> Everything to be included or excluded is described in this Agreement. All changes to plans and specifications shall be in writing or a change order.

¶10 Janie responded to the unsigned offer to purchase on October 27 by submitting to Peters an "Addendum B."[7] Among the items included in Addendum B is a handwritten list of requests: "(1) bathrooms furnished by buyer w/credit (2) fireplace furnished by buyer w/credit for fireplace plus wall existing on plan (3) floors furnished by buyer except in bedrooms, which will be carpeted through seller (4) higher doors done at extra price through seller."

¶11 The Crawfords did not sign the offer to purchase by October 29, 2004, the date the offer expired by its own terms. However, they continued to review finishing options for the interior of Unit LE-1. With regard to the parties' failure to execute a written agreement at this time, Janie testified as follows:

> In my naiveté I probably thought that we could wrap it all up in a big package and that time was not—you know, at that point he was not trying to sell it to the other lady. If I had been worried that he was going to try to sell it to somebody else, I clearly would have been pushing as would Andy.

¶12 On November 22, 2004, the Crawfords received a letter from Peters describing the transfer of his exclusive authority to list the Marina properties to First Weber Company. The letter stated in part:

> Dear Andrew & Janie,
>
> I write to discuss with you a reorganization that is taking place in the marketing of MARINA. Having created the project and sold almost half of the new MARINA

[7] "Addendum B" consists of Janie's two-page typewritten list of requests submitted October 19, 2004, with handwritten notes added by Peters and Janie, including the list of requests referenced above.

> homes, I recognize the need to engage a larger work force to complete the marketing campaign and to provide the high quality of service to Buyers that MARINA offers.
>
> I will therefore, transfer my exclusive sales authority to FIRST WEBER Company, an outstanding Real Estate Brokerage firm located here in Madison. But I will be available and active in selling units.
>
> This realignment of responsibilities will enable me and my firm to focus our attention on assisting those Buyers who have bought from me, as they finalize the interior finishing and buildout of their new home. It is very important to me personally, that each of you whom I have gotten to know during the marketing process, is completely satisfied and content in making your decision to live at MARINA. MARINA is a very personal project. It is YOUR new home. It should be all that you want it to be. This reorganization effort will enable me to make sure that we fulfill the commitment made to you when inviting you to make MARINA your new home.
>
> As one element of this transition, an interior decorating firm has been included in the team that will assist Buyers in finishing the interior of their home. You are welcome to seek their assistance if you wish. However, I must admit, that I would be sad not to be able to continue working with you and "cutting the celebratory ribbon" together. So, I cordially invite you to allow me and my firm to work with you in this important phase of the project.…

¶13 The Crawfords became confused about who had the authority to deal with them regarding the condominium. Shortly before December 1, 2004, the Crawfords' attorney, Tom German, met with Peters, who assured German that he "was authorized to sell the condos" and that the Crawfords were "supposed to deal with him." Peters reiterated this position at a meeting with German sometime shortly after December 1. German gave further testimony about his dealings in late November and early December 2004 with Peters:

> A: It seemed to me that there had to be some decision yet on a couple parts of the agreement. It was important to the Crawfords to have the fireplace in [the agreement], and they wanted to make sure that they could

> put that fireplace in there, and if it had to be done as part of the condo package, how much was going to be the cost for that.
>
> . . . .
>
> Q: During any meeting that you had with Mr. Peters did he ever verbally accept any offer to purchase with respect to the Crawfords?
>
> A: [A] rider that I had drafted incorporated all of the discussions that we had during that meeting…. That was the best attempt I could do at that point to bring the documents together. And at that point, you know, Kenton said Well, this should do it then.
>
> ….
>
> Q: So what you understand is that Kenton said That should do it, and that's as close as you think he said that he was agreeing to any of this?
>
> A: Uh-huh.

¶14 On December 1, 2004, Janie met briefly with Sheridan Glen of First Weber.[8] Around this time, German prepared a document entitled "Rider #1" which addressed many of the Crawfords' issues regarding the interior finishes and build-out of the condominium. On December 10, German faxed some documents to Glen relating to the design of a fireplace in the unit which included the following handwritten note on the cover page: "Dear Sheridan: Please fax me a copy of the listing agreement as you promised. We cannot proceed until it is clear to us who has the authority to act on behalf of the owner." Throughout December 2004, the Crawfords continued to review and select interior finishes and build-outs for Unit LE-1. Glen testified in deposition that most buyers at Marina executed

[8] Andrew testified that at the December 1 meeting Glen said to Janie, "Don't worry, we're going to get you your unit." It is undisputed that Andrew was not present for this conversation.

written agreements to purchase their condominiums before deciding on build-out options and finishes, which could be set forth later in amendments to the purchase agreement.

¶15 On December 14, 2004, Janie Crawford met with Glen and representatives of Brownhouse, an architectural design firm involved with the project, regarding the interior finishes and build-out options for the condominium.[9]

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[9] In his affidavit, Andrew avers that at this December 14 meeting "representatives of Brownhouse and Glen confirmed our understanding that we had purchased the Condominium." In their brief opposing the motion to strike, the Crawfords did not dispute the defendants' assertion that Andrew was not present at the December 14 meeting. And Andrew's deposition testimony indicates he was not present for the conversation:

> Q: With respect to Sheridan Glen, did Sheridan Glen ever tell you that you were an owner of the condominium unit?
>
> A: Not in those exact words.
>
> Q: Well, what did he tell you which [in] any way, shape, or form relates to whether or not you're an owner?
>
> A: To me personally?
>
> Q: Yes.
>
> A: Nothing.
>
> ….
>
> Q: So other than asking you what you would like to put in this condominium unit, is there anything else that Sheridan Glen said that you believe relates to any representation that he told you that you own this unit?
>
> A: You've got to repeat that one …. I'm sorry.
>
> (Reporter reads back last question)
>
> A: No.
>
> ….

(continued)

On December 15, 2004, Peters deposited the Crawfords' $23,748 check in the bank.

¶16 In November 2004, Glen and Joseph Lamelas, an employee of McShane Corporation who began overseeing sales of the Marina Condominiums on November 1, 2004, revised the prices of the remaining unsold units at Marina. They set the price of Unit LE-1 at $640,900. Lamelas informed Janie about the new price.

¶17 On February 9, 2005, Janie faxed to Glen a copy of the October 27, 2004 offer to purchase that included the Crawfords' undated signatures. Janie and

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> Q: Turning to paragraph 17 on page 3, "The representatives of Brownhouse and Sheridan Glen confirmed our understanding that we had purchased the Condominium." Did I read that correctly?
>
> A: Yes.
>
> Q: And with respect to your conversations with Brownhouse and Sheridan Glen, we've spoken about those today?
>
> A: Yes.
>
> Q: So there's nothing other than what we've talked about that led you to this conclusion?
>
> A: No.
>
> Q: So you think that they confirmed your understanding because they were talking about what was going into the unit?
>
> A: No. It's because Sheridan Glen on December 1st said Don't worry, we're going to get you your unit.
>
> Q: But he didn't tell you that; that's what you claim your wife heard from him?
>
> A: Yes.

Andrew each testified that they did not recall when they signed the offer to purchase; Janie acknowledged that it was "possible" that they signed it after January 1, 2005, and German testified that as of December 1, 2004, no written document was acceptable to the Crawfords. The fax cover sheet contained the following handwritten message from Janie:

> Sheridan—
>
> As I said on the phone, I was getting ready to return the Rider #1 draft to Tom German on the day I met you [December 1, 2004]. Therefore, the WB-14 [Residential Condominium Offer to Purchase] was to be amended. We ceased communication with Kenton at that time per your instruction. My husband is sending you by mail copies of the cancelled checks and the preliminary agreement we signed….

Janie testified that the "preliminary agreement" referenced in the cover sheet message was the offer to purchase that was sent by Peters to the Crawfords on October 27, 2004.[10]

¶18 No representative of McShane/KP Marina 137 LLC signed the Crawfords' offer to purchase provided to Glen on February 9, 2005. At some point in early 2005, Lamelas spoke with Janie by phone and offered to return the

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[10] Janie testified as follows:

> Q: I'm just asking you is [the WB-14 Residential Condominium Offer to Purchase] the preliminary agreement that you're talking about?
>
> A: When I say preliminary agreement, I am referring to it.
>
> Q: To [the W-14 Offer to Purchase]?
>
> A: Yes, in the context of where we—of the conversations.

Crawfords' check of $23,784. Janie said she would just send it back to him if he returned it. Lamelas and Janie continued discussions about Unit LE-1 through May 2005. On May 19, 2005, Lamelas stated in an e-mail to German that he would no longer wait on the discussions with the Crawfords and would begin building out the interior of the condominium.

¶19 On July 1, 2005, the Crawfords sued Marina Development, LLC, McShane/KP Marina 137 LLC, McShane 137 Wilson LLC, Kenton Peters & Associates, and Kenton Peters, personally. The complaint advances three causes of action. First, it asserts a claim for breach of contract based on allegations that the defendants reneged on their agreement to sell the condominium to the Crawfords, stating that the Crawfords "purchased the Condominium through communications with Peters," who was acting as a representative of the sellers. Second, it asserts a claim of fraud based on an allegation that Peters induced the Crawfords to provide Peters with a "down payment" of $23,784 but did not deliver the condominium "for the agreed upon Purchase Price." Finally, it asserts a claim of misrepresentation under WIS. STAT. § 100.18, alleging that Peters made fraudulent statements to the Crawfords regarding the purchase price, their ownership of the condominium and the cost and quality of the interior design and build-out amenities. The complaint seeks the following relief: (1) a temporary injunction prohibiting the defendants from commencing or continuing any interior build-out of the condominium; (2) specific performance transferring the condominium to the Crawfords with the interior design and build-out amenities requested; (3) actual and punitive damages; and (4) attorney fees and costs.

¶20 The Crawfords filed a motion for a temporary injunction to stop construction and marketing of Unit LE-1, and an affidavit of Andrew in support of the motion. In response, defendants McShane/KP Marina 137 LLC and McShane

137 Wilson LLC moved for summary judgment. Marina Development, LLC, Kenton Peters & Associates, and Peters, personally, were not parties to the motion for summary judgment. The Dane County Circuit Court, Judge Michael N. Nowakowski, denied the Crawfords' motion for a temporary injunction. After the McShane companies and the Crawfords submitted affidavits, the circuit court granted the summary judgment motion of the McShane companies, and *sua sponte* granted summary judgment in favor of the nonmoving defendants as well. The Crawfords appeal.

Standards of Review

¶21 We review a circuit court's order granting summary judgment de novo, applying the same methodology as the circuit court. *See* ***C.C. Midwest, Inc. v. City of Janesville***, 2007 WI 93, ¶13, __ Wis. 2d __, 734 N.W.2d 428. This methodology is well established and need not be repeated here. *See, e.g.* ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980), *abrogated on other grounds by* ***Olstad v. Microsoft Corp.***, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139. Summary judgment is appropriate 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." WIS. STAT. § 802.08(2).

¶22 Whether the Crawfords' claims against the defendants survive summary judgment turns on the question of whether an equitable contract to purchase Unit LE-1 enforceable under WIS. STAT. § 706.04 existed between the Crawfords and the defendants. This requires the application of undisputed facts to a legal standard, a question of law we review de novo. *See* ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2005 WI 114, ¶31, 283 Wis. 2d 384, 700 N.W.2d 27.

Discussion

¶23 The Crawfords contend that reasonable inferences precluding summary judgment may be drawn from affidavits and other submissions supporting the conclusion that they entered into an agreement with Peters to purchase Unit LE-1 enforceable under WIS. STAT. § 706.04 that was breached by the defendants. They also argue that, if we conclude that summary judgment was appropriately granted to McShane/KP Marina 137 LLC and McShane 137 Wilson LLC, we should at least reverse the circuit court's *sua sponte* order of summary judgment dismissing claims of fraud and misrepresentation against the nonmoving defendants because the order denied the Crawfords the opportunity to develop arguments against these defendants. They further argue that disputed issues of material fact preclude summary judgment on their claims of fraud and misrepresentation. We address these arguments in turn.

Existence of a Contract Enforceable under WIS. STAT. § 706.04

¶24 Chapter 706 of the Wisconsin statutes governs "every transaction by which any interest in land is created, alienated, mortgaged, assigned or may be otherwise affected in law or in equity," subject to certain exclusions not applicable here. WIS. STAT. § 706.001(1). As a general rule, transactions under ch. 706 must meet the requirements of the common-law doctrine of the statute of frauds. *See* ***Nelson v. Albrechtson***, 93 Wis. 2d 552, 556, 287 N.W.2d 811 (1980). This doctrine is codified by WIS. STAT. § 706.02(1),[11] which states that a transaction

[11] WISCONSIN STAT. § 706.02(1) provides in full:

> Transactions under s. 706.001(1) shall not be valid unless evidenced by a conveyance that satisfies all of the following:

(continued)

creating an interest in land "shall not be valid unless evidenced by a conveyance"; a "conveyance" is defined in WIS. STAT. § 706.01(4) as "a written instrument" satisfying the requirements of § 706.02.

¶25 However, in the absence of a written instrument, an agreement conveying an interest in land may be enforceable in whole or in part if the provisions of WIS. STAT. § 706.04[12] are met. ***Nelson***, 93 Wis. 2d at 556. An

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> (a) Identifies the parties; and
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> (b) Identifies the land; and
>
> (c) Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered; and
>
> (d) Is signed by or on behalf of each of the grantors; and
>
> (e) Is signed by or on behalf of all parties, if a lease or contract to convey; and
>
> (f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01(7) except conveyances between spouses, but on a purchase money mortgage pledging that property as security only the purchaser need sign the mortgage; and
>
> (g) Is delivered. Except under s. 706.09, a conveyance delivered upon a parol limitation or condition shall be subject thereto only if the issue arises in an action or proceeding commenced within 5 years following the date of such conditional delivery; however, when death or survival of a grantor is made such a limiting or conditioning circumstance, the conveyance shall be subject thereto only if the issue arises in an action or proceeding commenced within such 5-year period and commenced prior to such death.

[12] WISCONSIN STAT. § 706.04 provides in full:

> **Equitable relief**. A transaction which does not satisfy one or more of the requirements of s. 706.02 may be enforceable in whole or in part under doctrines of equity, provided all of the

(continued)

enforceable agreement under § 706.04 will be found only when "all of the elements of the transaction are clearly and satisfactorily proved." Additionally, one of the following circumstances must apply: "(1) The deficiency of the conveyance may be supplied by reformation in equity; or (2) The party against whom enforcement is sought would be unjustly enriched if enforcement of the transaction were denied; or (3) The party against whom enforcement is sought is equitably estopped from asserting the deficiency." WIS. STAT. § 706.04.

¶26 The Crawfords concede that they did not at any time enter into a written agreement to purchase Unit LE-1. They contend instead that a reasonable inference may be drawn that they had an equitable contract to purchase the

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> elements of the transaction are clearly and satisfactorily proved and, in addition:
>
> (1) The deficiency of the conveyance may be supplied by reformation in equity; or
>
> (2) The party against whom enforcement is sought would be unjustly enriched if enforcement of the transaction were denied; or
>
> (3) The party against whom enforcement is sought is equitably estopped from asserting the deficiency. A party may be so estopped whenever, pursuant to the transaction and in good faith reliance thereon, the party claiming estoppel has changed his or her position to the party's substantial detriment under circumstances such that the detriment so incurred may not be effectively recovered otherwise than by enforcement of the transaction, and either:
>
> (a) The grantee has been admitted into substantial possession or use of the premises or has been permitted to retain such possession or use after termination of a prior right thereto; or
>
> (b) The detriment so incurred was incurred with the prior knowing consent or approval of the party sought to be estopped.

condominium under WIS. STAT. § 706.04. The Crawfords argue that it may be reasonably inferred that they entered into such an agreement on October 20, 2004, when they gave Peters the $23,748 check. They argue that Peters' letter to them of November 22, 2004, confirms that Peters believed that the parties had an agreement to purchase the condominium. The Crawfords point to the letter's references to "Buyers." They note the letter states that interior decorating services are available to "buyers," and then states, "You are welcome to seek … assistance" from the decorators "if you wish." We reject these arguments, and conclude that the parties did not enter into an agreement enforceable under § 706.04 because an essential element of a valid transaction, mutual assent, was not demonstrated by the parties' conduct.

¶27 In ***Nelson***, the supreme court concluded that Norris and Mavis Albrechtson, joint owners of a commercial property, and Kerry Nelson, a prospective buyer, did not enter into an oral contract enforceable under WIS. STAT. § 706.04 to convey the property where Norris negotiated an agreement with Nelson, but Mavis did not assent to the agreement. *See* ***Nelson***, 93 Wis. 2d 552. In concluding that Mavis's lack of assent was fatal to the agreement, the ***Nelson*** court explained as follows:

> Although the lack of a grantor's signature is a formal defect which can be cured by application of sec. 706.04, Stats., the lack of a grantor's assent to the transaction, which the signature merely symbolizes, is not. In order for a real estate transaction to be enforceable under sec. 706.04, it must at least be proved that the grantor or grantors assented to it. *The assent of the parties is an essential element of even the most informal agreements.*

Id. at 561 (emphasis added).

¶28 We conclude, based on the undisputed material facts, that no reasonable inference can be made that the parties mutually assented to an agreement to sell Unit LE-1 to the Crawfords on October 20, 2004, the day the Crawfords contend an agreement was reached. Indeed, the Crawfords' own factual submissions support our conclusion that they did not assent to the terms of an offer to purchase the condominium until early 2005.

¶29 In October 2004, the Crawfords had not settled on interior build-out options and finishes. When Peters faxed the Crawfords an unsigned purchase agreement in late October, which included language in Addendum A regarding the selection of interior finishes and build-out options, the Crawfords responded by submitting "Addendum B" that made specific build-out and finish requests for the bathrooms, fireplace, floors and doors. On December 1, 2004, the Crawfords' attorney, German, prepared a document entitled "Rider #1," which contained specific terms regarding the interior finishes and build-out of the condominium. The record shows that throughout December the Crawfords continued to review and select interior finishes and build-outs for Unit LE-1, including meeting with representatives of Brownhouse to discuss these issues. Moreover, in deposition, Janie admitted that she and Andrew continued to negotiate with the sellers throughout this period regarding build-out and finish options intending to include the final terms in an offer to purchase: "In my naiveté, I probably thought that we could wrap it all up in a big package at that time …. If I had been worried that he was going to try to sell it to somebody else, I clearly would have been pushing as would Andy."

¶30 The Crawfords point to Glen's testimony that Marina buyers typically worked out build-out and finish issues after executing an agreement to purchase as support for their contention that that is what they were doing.

However, the Crawfords' actions in continuing to explore and negotiate build-out and finish options after October 20, 2004, and throughout December, taken together with Janie's testimony that they intended to include the options in the offer to purchase, demonstrates that there was no mutual assent.[13] The note in a December 10 fax from the Crawfords' attorney complaining that "[w]e cannot proceed until it is clear to us who has the authority to act on behalf of the owner" further indicates that an agreement to purchase had not been reached by that date.

¶31 The Crawfords acknowledge that paying the $23,748 deposit or "earnest" check to Peters on October 20, 2004, alone was insufficient to create an enforceable contract under WIS. STAT. § 706.04.[14] However, they argue that the payment, taken together with representations by Peters that the payment was needed for the Crawfords to purchase the condominium and Peters' references to the Crawfords as "buyers" in the November 22, 2004 letter, created a contract under § 706.04. We disagree.

¶32 Andrew testified that Peters told him that the $23,748 deposit was necessary to "signify their sincerity and interest in buying" the condominium. This statement merely indicates that the Crawfords should put down some money to demonstrate their interest in purchasing the condominium. In addition, the November 22 letter was a form letter, and refers to "buyers" only in the context of describing a change in the marketing of the Marina Condominiums. The only reasonable inference is that "buyers" as used here refers broadly to a group of

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[13] Also, unlike the Crawfords, the other buyers had executed written purchase agreements.

[14] And we know of no authority supporting the proposition that the payment of earnest money creates a contract to convey real estate.

persons who had negotiated with Peters for the purchase of a condominium, not all of whom may have executed a purchase agreement. The letter makes no specific reference to the Crawfords as the "buyers" of Unit LE-1, and there is nothing else about the letter from which a reasonable inference could be drawn that Peters believed the parties had settled on the terms of a purchase agreement.

¶33 Finally, to the extent that the Crawfords rely on their written offer to purchase faxed to Glen on February 9, 2005, as establishing mutual assent for an agreement to convey the condominium, their reliance is misplaced. It is undisputed that the sellers never signed the offer to purchase. In addition, the offer to purchase that was signed by the Crawfords and faxed on February 9, 2005, expired by its own terms on October 29, 2004. While neither Andrew nor Janie can recall when they signed the offer to purchase, it is undisputed that delivery of the offer to purchase, another essential element of an agreement, did not occur until February 9, 2005. Accordingly, we conclude that the circuit court properly granted the moving defendants' motion for summary judgment on the Crawfords' breach of contract claim.

¶34 We turn next to the issue of whether the circuit court properly entered summary judgment, *sua sponte*, in favor of the nonmoving defendants, Peters and his companies, Kenton Peters & Associates and Marina Development, LLC (hereinafter, collectively "Peters").

Summary Judgment in Favor of Nonmoving Defendants

¶35 As noted, the Crawfords assert two claims against Peters specifically, fraud[15] and misrepresentation under WIS. STAT. § 100.18.[16] They allege that Peters fraudulently induced them to pay the $23,784 without delivering the condominium "for the agreed upon Purchase Price." The Crawfords allege that Peters made material misrepresentations to them regarding the purchase price, their ownership of the condominium and the cost and quality of the interior design and build-out amenities.

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[15] Common-law fraud, sometimes referred to as intentional misrepresentation or fraudulent misrepresentation, requires proof of the following elements:

> (1) the defendant made a factual representation; (2) which was untrue; (3) the defendant either made the representation knowing it was untrue or made it recklessly without caring whether it was true or false; (4) the defendant made the representation with intent to defraud and to induce another to act upon it; and (5) the plaintiff believed the statement to be true and relied on it to his/her detriment.

Kaloti Enters., Inc. v. Kellogg Sales Co., 2005 WI 111, ¶12, 283 Wis. 2d 555, 699 N.W.2d 205 (citations omitted).

[16] WISCONSIN STAT. § 100.18(1) provides, in pertinent part:

> (1) No person, firm, corporation or association, or agent or employee thereof, with intent to sell … real estate … to the public … with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase … of any real estate … shall make … in this state … [a] statement or representation of any kind to the public relating to such purchase … of such real estate … or to the terms or conditions thereof … which is untrue, deceptive or misleading.

The elements of a claim under § 100.18(1) are as follows: "First, that with the intent to induce an obligation, the defendant made a representation to 'the public.' Second, that the representation was untrue, deceptive or misleading. Third, that the representation caused the plaintiff a pecuniary loss." ***K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc.***, 2007 WI 70, ¶19, __ Wis. 2d __, 732 N.W.2d 792 (citations omitted).

¶36 The Crawfords contend that the circuit court erred in granting, *sua sponte*, summary judgment in favor of Peters because the court's action denied them the opportunity to develop arguments supporting their claims against Peters. We disagree.

¶37 A circuit court's inherent discretion to consider issues *sua sponte* "is the natural outgrowth of the court's function to do justice between the parties." ***State v. Holmes***, 106 Wis. 2d 31, 39, 315 N.W.2d 703, 707 (1982). Whether a court properly exercises its discretion in deciding an issue *sua sponte* depends on whether it affords the parties notice and opportunity to argue the issue. *See* ***id.*** at 40-41 ("Any objection to the circuit court's raising of the issue *sua sponte* on the grounds of … the theoretical unfairness to the litigants is diminished or eliminated by the circuit court's giving the litigants notice of its consideration of the issue and an opportunity to argue the issue.").

¶38 Here, the record shows that the Crawfords developed arguments supporting their claims against Peters of fraud and misrepresentation in briefs to the circuit court. On page 23 of the Crawfords' circuit court brief in opposition to the defendants' motion for summary judgment appears the following heading: "2. DEFENDANTS COMMITTED FRAUD AND MISREPRESENTATION." The Crawfords devote pages 23-28 of their brief to arguments relating to these claims.

¶39 The affidavits and other evidentiary materials the Crawfords submitted to the circuit court on summary judgment addressed their arguments regarding Peters' alleged fraud and misrepresentation; included in the submissions are deposition testimony of Kenton Peters, as well as testimony of Janie Crawford relating to her dealings with Peters. The record belies the Crawfords' argument

that they were denied the opportunity to develop their claims against Peters. Moreover, the Crawfords fail to explain what additional material they would present if given the opportunity, and why they would then survive a motion for summary judgment brought by Peters. We therefore conclude that there was no procedural unfairness to the circuit court's order granting *sua sponte* summary judgment in favor of Peters.

¶40 Having concluded that it was not procedurally unfair for the circuit court to grant summary judgment to Peters, we turn to the question of whether the record supports summary judgment in favor of Peters. We conclude that the fact that the Crawfords did not reach an agreement to purchase Unit LE-1 with Peters is dispositive of the Crawfords' claims of fraud and misrepresentation against him.

¶41 The only loss the Crawfords claim to have suffered as a result of Peters' alleged fraud and misrepresentation is the loss of the condominium at the purchase price stated in the October 27 offer to purchase. They did not suffer this loss, however, because they never had an agreement to purchase. While noting that the Crawfords deposited a check for $23,784 on the condominium, the complaint does not claim a loss of this deposit as a result of Peters' alleged fraud and misrepresentation, and it is undisputed that Lamelas offered to return the deposit shortly after receiving the Crawfords' offer to purchase of February 9, 2005. Because we have concluded that the Crawfords did not have an agreement to purchase, they did not suffer any loss as a result of Peters' alleged fraud and misrepresentation. Thus, without a viable allegation of loss, their claims of common-law fraud and misrepresentation under WIS. STAT. § 100.18 fail. *See* ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶12, 283 Wis. 2d 555, 699 N.W.2d 205 (detrimental reliance is an element of common-law fraud); ***K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc.***, 2007 WI 70, ¶19, __

Wis. 2d __, 732 N.W.2d 792 (pecuniary loss is an element of § 100.18 misrepresentation). Accordingly, we conclude that Peters is entitled to summary judgment on the Crawfords' claims of fraud and misrepresentation.

Conclusion

¶42 In sum, we conclude that the parties did not enter into a contract enforceable under WIS. STAT. § 706.04 because the parties did not mutually assent to an agreement to convey the condominium. We therefore conclude that the circuit court appropriately granted summary judgment dismissing the Crawfords' breach of contract claim. We further conclude that the circuit court properly dismissed the claims of fraud and misrepresentation against Marina Development, Kenton Peters & Associates, and Peters. We therefore affirm the circuit court's summary judgment order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.