COURT OF APPEALS
DECISION
DATED AND FILED

August 9, 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. 2006AP1497 **Cir. Ct. No. 2004CV212**

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

WAYNE H. HANSON AND NANCY HANSON,

PLAINTIFFS-RESPONDENTS,

V.

MARION WINSNES C/O IONE ERLIEN, ATTORNEY IN FACT, AND HELGE E. VESTNES,

DEFENDANTS-APPELLANTS,

MALVIN WINSNES,

DEFENDANT,

ROBERT TODAHL, ERICA TODAHL, CSMC, INC., D/B/A CENTRAL STATES MORTGAGE CAPITAL FINANCIAL, LLC, KEITH STEARNS, AND WYNTER STEARNS,

DEFENDANTS-CO-APPELLANTS,

MERS AND FIRST HORIZON HOME LOAN CORPORATION,

INTERVENORS-CO-APPELLANTS.

APPEALS from an order of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Reversed and cause remanded with directions.*

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

¶1 LUNDSTEN, J. These appeals stem from a circuit court order permitting Wayne and Nancy Hanson to purchase property pursuant to a right of first refusal. The court permitted the purchase even though the Hansons did not seek to enforce their right for over a year after they learned that the property had been sold to a third party. The appellants are individuals and entities with an interest in the property and the finality of its sale. They seek reversal on a number of grounds, including laches and waiver. We conclude that the Hansons' attempt to enforce their right of first refusal is barred by laches. We therefore reverse and remand with directions that the circuit court dismiss the Hansons' claims.

Background

¶2 In 1992, Wayne and Nancy Hanson purchased real estate from Malvin and Marion Winsnes. At the same time, they executed an agreement for a right of first refusal to approximately 52 additional acres of land.[1] The right of first refusal provided that, if the Winsneses decided to sell the additional 52 acres, they would first offer it to the Hansons on the same terms offered to a third party. The agreement included an acknowledgment that the parties had been represented by attorneys and had engaged in negotiations concerning the property. The

[1] The parties do not seem to agree on the precise number of acres. This is not important to our decision.

Hansons' attorney provided them with an unsigned draft of the agreement, and the signed agreement was recorded with the register of deeds.

¶3 By the end of 2002, Malvin Winsnes was deceased and Marion Winsnes was incompetent. In early February 2003, the Hansons learned of a pending sale of the property to a third party, Helge Vestnes. At some point before the sale to Vestnes was finalized, Everett Erlien, who was Marion Winsnes's brother and married to Marion Winsnes's attorney-in-fact, verbally offered to sell the property to the Hansons. The Hansons, however, did not seek to purchase the property or to assert their right of first refusal. On March 31, 2003, Marion Winsnes's attorney-in-fact conveyed the property to Vestnes.[2]

¶4 After the sale, Vestnes removed timber from the property and had five parcels on the property annexed to the Village of Strum. In addition, Vestnes made improvements to the "farmstead" on the property by putting a roof on a home on the farmstead and drilling a well. Wayne Hanson knew of Vestnes's logging activities and the improvements.

¶5 In February 2004, Vestnes sold the portion of the property containing the improved home to Robert and Erica Todahl. Hanson became aware of the sale to the Todahls around the time of the sale. Vestnes also sold one of the annexed lots to Keith and Wynter Stearns.

¶6 In November 2004, the Hansons sued various parties who had an interest in the property or the finality of its sale, including Marion Winsnes,

[2] The Hansons apparently believed, incorrectly, that the sale was final by the time they learned of it. This fact, whether disputed or not, is immaterial to our resolution of this case. What is important is that the Hansons knew of the sale by early 2003.

Vestnes, the Todahls, the Stearns, Central States Mortgage, Inc., and Mortgage Electronic Registration Systems, Inc. The Hansons sought to enforce their right of first refusal and requested a variety of remedies, including specific performance. In other words, the Hansons sought to negate the prior sales of the property (or portions of it) and to purchase the improved property at the price Vestnes paid for it in March 2003.

¶7 The Hansons claimed, in effect, that they did not realize or did not remember that they possessed an enforceable written right of first refusal for the property until May 2004, when the attorney who represented them in the agreement contacted them about a sale of related property. The Hansons claimed that, before that date, they lacked knowledge of the right of first refusal.

¶8 The Hansons moved for summary judgment. They asserted that Winsnes had breached the terms of the right-of-first-refusal agreement. They argued that verbal notice of the sale was insufficient under both the terms of the agreement and the statute of frauds. The defendants raised various defenses, including laches and waiver.

¶9 The circuit court granted the Hansons' motion. The court concluded that the verbal notice the Hansons received was insufficient. The court also concluded that equitable defenses such as laches and waiver did not apply. The court reasoned that the Hansons had made a "mistake," but acted promptly once they realized in May 2004 that they had an enforceable right of first refusal, and that the defendants should have known that the Hansons possessed the right because it was recorded with the register of deeds. Winsnes, Vestnes, the Todahls, the Stearns, Central States Mortgage, Mortgage Electronic Registration Systems,

and First Horizon Home Loan Corporation appeal.[3] We reference additional facts as needed below.

Discussion

¶10 The appellants seek reversal on a number of grounds, including that: (1) written notice of the third-party offer to purchase was not required; (2) the sufficiency of the verbal notice remains a genuine issue of material fact, precluding summary judgment; (3) the Hansons' claims are barred by laches; and (4) the Hansons waived their right of first refusal.

¶11 We conclude that the Hansons' claims are barred by laches. Because this conclusion disposes of those claims, we do not address the appellants' other arguments.

¶12 As already indicated, this case comes to us on summary judgment. We perform summary judgment analysis *de novo*, applying the same method employed by circuit courts. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). Summary judgment is appropriate when undisputed facts show that a party is entitled to judgment as a matter of law. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751. This holds true for the equitable defense of laches. "Where the facts are undisputed and there is only one reasonable inference, the court may conclude as a matter of law that the elements [of laches] are met." ***Sawyer v. Midelfort***, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999). Moreover, we may apply laches if we

[3] First Horizon Home Loan Corporation intervened below.

conclude that all of the elements of laches are present. *See* ***Schafer v. Wegner***, 78 Wis. 2d 127, 132-33, 254 N.W.2d 193 (1977).[4]

¶13 The laches defense operates "'as a bar upon the right to maintain an action by those who unduly slumber upon their rights.'" ***Flejter v. Estate of Flejter***, 2001 WI App 26, ¶41, 240 Wis. 2d 401, 623 N.W.2d 552 (Ct. App. 2000) (quoting ***Likens v. Likens***, 136 Wis. 321, 327, 117 N.W. 799 (1908)). The test for laches does not necessarily require that claimants sit on their rights for an extraordinarily long period of time:

> "There is no fixed rule as to the lapse of time necessary to bar a suitor in a court of equity. Each case must stand upon its own particular facts. Great lapse of time, if reasonably excused and without damage to the defendant, has been ignored; while slight delay, accompanied by circumstances of negligence, apparent acquiescence, or change of defendant's position, has been held sufficient."

Flejter, 240 Wis. 2d 401, ¶41 (quoting ***Likens***, 136 Wis. at 327).

¶14 The test for laches requires that the party seeking laches prove that (1) the claimant unreasonably delayed in bringing the claim, (2) the defense lacked knowledge that the claimant would assert the right on which the suit is based, and

[4] In ***Schafer v. Wegner***, 78 Wis. 2d 127, 254 N.W.2d 193 (1977), the supreme court applied laches on review of a summary judgment after determining that the elements were met as a matter of law. *See* ***id.*** at 131-33. We note that there is language in ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶17, 290 Wis. 2d 352, 714 N.W.2d 900, suggesting that courts in at least some contexts have the discretion not to apply laches even when all elements are met. Specifically, the supreme court in ***Coleman*** said: "If the defense of laches is proved, whether to apply laches and dismiss the habeas petition [filed in the court of appeals and alleging ineffective assistance of appellate counsel] is left to the discretion of the court of appeals." ***Id.*** But we conclude that the present case is more akin to ***Schafer*** than to ***Coleman***. Here, as will be seen, we conclude, as did the ***Schafer*** court, that all of the elements of laches are present. We further note that the Hansons do not argue that, if all of the elements of laches are present, laches nonetheless may not be applied against them without remand to the circuit court.

(3) the defense is prejudiced by the claimant's delay. ***Sawyer***, 227 Wis. 2d at 159; *see also* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900.

¶15 The parties dispute a number of facts. In particular, they dispute the content of conversations between Wayne Hanson and Everett Erlien regarding the impending sale of the property to Vestnes. They also dispute the number of conversations. The appellants point to evidence that Wayne Hanson and Erlien spoke regarding the sale of the property on three occasions between December 25, 2002, and February 2003; that on each occasion Wayne Hanson declined an offer to purchase; and that Hanson indicated to Erlien at that time that Hanson wished only to purchase a strip of woods but had no money to do so. The Hansons, in contrast, acknowledge that there were at most two discussions between Wayne Hanson and Erlien. They deny that Wayne Hanson ever said he could not afford to buy the property. The Hansons claim there is no evidence showing that they were ever offered the property on the terms offered to Vestnes.

¶16 There is no dispute, however, that the Hansons did not assert their right of first refusal or seek to purchase the property until at least May 2004. We conclude that the parties' factual disputes need not be resolved because the undisputed facts, and facts we assume to be true because they favor the Hansons, show that the Hansons' attempt to enforce their right of first refusal is barred by laches.

¶17 The Hansons' primary argument, based on the first laches element, is that they did not unreasonably delay because they were not aware they had a written enforceable right of first refusal until May 2004, when contacted by their attorney. Rather, according to the Hansons, they mistakenly believed they had an

unenforceable oral agreement for a right of first refusal. We will assume, because the assumption favors the Hansons, that, by the time of the pending sale of the 52 acres in early 2003 and until contacted by their attorney in May 2004, the Hansons did not have actual knowledge of an enforceable right of first refusal. Nonetheless, we conclude that the Hansons *should have known* of their right and that their failure to learn of their right was unreasonable. Stated another way, the Hansons had constructive knowledge of their right. We base this conclusion on the following facts, which are undisputed for purposes of summary judgment:

- The right of first refusal, executed as part of a larger property sale agreement, was a separate two-page document titled "AGREEMENT FOR RIGHT OF FIRST REFUSAL."

- The Hansons both signed the right-of-first-refusal agreement.

- The right-of-first-refusal agreement included an acknowledgment that the parties had been represented by attorneys and had engaged in negotiations concerning the property that was subject to the right.

- The Hansons' attorney gave them a copy of an unsigned draft of the right-of-first-refusal agreement.[5]

- Wayne Hanson testified at his deposition that, at the time he signed the agreement, he understood he had a right of first refusal and the right to purchase the property. Hanson testified that he "supposed" the right was explained at the time, but he "just didn't remember it."

- Nancy Hanson testified at her deposition that, although she did not remember their attorney specifically telling them they had a right of first refusal as a result of the 1992 transaction, they had gone to the attorney's office to sign it and "to me it was just – I mean, I'm sure he explained it to us; but I mean, I just signed."

[5] The Hansons do not suggest that the terms of the unsigned draft differ materially from the final signed agreement.

¶18 The Hansons argue that the unreasonable delay element of laches requires actual knowledge. The Hansons avoided laches in the circuit court because the circuit court accepted this argument. In support of their argument, the Hansons cite ***Mutual Federal Savings & Loan Ass'n v. American Medical Services, Inc.***, 66 Wis. 2d 210, 223 N.W.2d 921 (1974), and ***Kaiser v. City of Mauston***, 99 Wis. 2d 345, 299 N.W.2d 259 (Ct. App. 1980), *overruled on other grounds by* ***DNR v. City of Waukesha***, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994).

¶19 ***Mutual Federal***, however, says just the opposite: "Constructive notice *is* enough." ***Mutual Fed.***, 66 Wis. 2d at 219 (emphasis added); *see also* ***Tele-Port, Inc. v. Ameritech Mobile Commc'ns, Inc.***, 2001 WI App 261, ¶11 n.3, 248 Wis. 2d 846, 637 N.W.2d 782 ("'Where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such to put a man of ordinary prudence upon inquiry.'" (quoting ***Melms v. Pabst Brewing Co.***, 93 Wis. 153, 174, 66 N.W. 518 (1896))); ***Tele-Port***, 248 Wis. 2d 846, ¶11 ("'Plaintiffs may not ignore means of information reasonably available to them, but must in good faith apply their attention to those particulars which may be inferred to be within their reach.'" (quoting ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 340, 565 N.W.2d 94 (1997))).

¶20 In ***Kaiser***, we apparently misread ***Mutual Federal***, incorrectly citing that case for the contrary proposition that "[c]onstructive notice is *not* enough." ***Kaiser***, 99 Wis. 2d at 359 (emphasis added). Faced now with the Hansons' reliance on ***Kaiser***, we must adhere to ***Mutual Federal***. "When a court of appeals decision conflicts with a supreme court opinion, we must follow the supreme court

opinion." ***Madison Reprographics, Inc. v. Cook's Reprographics, Inc.***, 203 Wis. 2d 226, 238, 552 N.W.2d 440 (Ct. App. 1996).[6]

¶21 The Hansons also refer us to the supreme court's decision in ***Pugnier v. Ramharter***, 275 Wis. 70, 81 N.W.2d 38 (1957), where the court seemed concerned with the claimants' actual knowledge of the relevant facts rather than with whether the claimants could be charged with constructive knowledge of those facts. *See* ***id.*** at 76. The court in ***Pugnier*** did not, however, establish that a claimant's actual knowledge of the facts is required before laches may apply. Furthermore, even if ***Pugnier*** could be said to stand for such a proposition, we would be bound by the supreme court's more recent decision in ***Mutual Federal***. *See* ***Kramer v. Board of Educ. of School Dist. of Menomonie Area***, 2001 WI App 244, ¶20, 248 Wis. 2d 333, 635 N.W.2d 857 ("[W]here supreme court decisions appear to be inconsistent, or in conflict, we follow the court's most recent pronouncement.").

¶22 In sum, we conclude with respect to the first element of laches that the Hansons unreasonably delayed in bringing their claim. We turn our attention to the remaining elements of laches.

¶23 With respect to the second element, the Hansons argue that the appellants cannot be deemed to have lacked knowledge of the Hansons' right-of-first-refusal agreement because the agreement was recorded with the register of deeds, putting the world on notice of their right. This argument fails to make the

[6] We have been unable to locate any case relying on ***Kaiser v. City of Mauston***, 99 Wis. 2d 345, 299 N.W.2d 259 (Ct. App. 1980), *overruled on other grounds by* ***DNR v. City of Waukesha***, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994), for the proposition that a claimant must have actual knowledge.

subtle but important distinction between a defending party's knowledge that a claimant may possess a right and a defending party's knowledge that the claimant "*would assert the right*." ***Sawyer***, 227 Wis. 2d at 159 (emphasis added). Laches is concerned with the latter.

¶24 We will assume that the appellants knew, or should have known, of the Hansons' recorded right. Still, the Hansons point to nothing in the record suggesting that the Hansons said or did anything to indicate that they would seek to enforce their right until well over a year after they found out about the sale of the property to Vestnes. Rather, the Hansons concede that they "did not immediately challenge the real estate transactions or assert their rights under the Right of First Refusal" because, as they have claimed, they only realized or remembered they had that right when their attorney contacted them in May 2004. We have already rejected this explanation for the Hansons' delay as unreasonable.

¶25 Moreover, the Hansons' failure to assert their right of first refusal while portions of the property were improved or resold undercuts the Hansons' argument that the appellants knew or should have known that the Hansons would seek to enforce their right. The Hansons stood by while Vestnes removed timber from the property and had five parcels on the property annexed to the Village of Strum. They also stood by while Vestnes made improvements to the property and resold a portion of the property to the Todahls. If the fact that the agreement was recorded tended to put the world on notice of its existence, the Hansons' continuing inaction tended to put the world on notice that the Hansons had no intention of enforcing their right.

¶26 With respect to the third laches element, the Hansons argue that the appellants would suffer no prejudice if the Hansons' right of first refusal is

enforced. The Hansons' sole basis for this argument is an assertion that *they* are the ones who will be prejudiced if their right is not enforced because their right of first refusal was not properly honored. This argument misses the mark. Laches does not depend on whether the Hansons' right of first refusal was honored. We can assume that it was not. The question is whether the *appellants* would be prejudiced if the Hansons are allowed to enforce their right to purchase the property at this late date despite the Hansons' unreasonable delay. In light of the significant actions taken by the appellants with respect to the property, including improvements and subsequent conveyances, it is readily apparent that the answer to that question is yes. The Hansons do not seriously dispute this point.[7]

¶27 In sum, we conclude that the Hansons' claims are barred by laches. Accordingly, we reverse the circuit court's order and remand with directions that the circuit court dismiss those claims.

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

Not recommended for publication in the official reports.

[7] The Hansons also argue that they did not have knowledge of the *terms* of the sale to Vestnes and that, without this information, they could not have "acquiesced" in the sale as required for laches to apply. Whether the Hansons knew the precise terms of the sale may be relevant to the merits of their claims, but it is not relevant to the appellants' laches defense.