COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP932 **Cir. Ct. No. 2004CV11190**

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

ABIGAIL S. HUGG, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES B. HUGG,

PLAINTIFF-RESPONDENT,

V.

ANTON T. KASTNER AND 1609 E. NORTH AVE., LLC,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.[1]

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

[1] Although the dispositive document in the Record is called a "decision," the parties agree and we conclude that it is the final order from which this appeal may be properly taken. *See* WIS. STAT. § 808.03(1).

¶1 FINE, J. Anton T. Kastner and 1609 E. North Ave., LLC, appeal the trial court's ordering specific performance of a contract for the sale of real estate to James B. Hugg.[2] Kastner and 1609 E. North Ave. claim that the trial court erred because Kastner was entitled to treat Hugg's delay in closing as a breach of the contract. We affirm.

I.

¶2 In 1994, Kastner accepted an offer from Hugg to buy property at 1609 East North Avenue in Milwaukee for Hugg's use as an automobile repair and body shop.[3] The offer provided that Hugg would buy the property for $145,000 or eighty percent of the fair market value at closing, whichever was greater. Under an attachment to the offer, Hugg could occupy the property from October 1, 1994, until closing at a rent of $400 per month plus eight percent of gross sales. The maximum amount of rent was set at $2,000 per month subject to adjustment according to the annual consumer price index.

¶3 The attachment contained several "buyer's contingencies" and "seller's covenants." (Capitalization and underlining omitted.) The contingencies obligated Hugg as "buyer" to get, among other things, financing and an environmental report:

> Buyer's obligation to conclude this transaction is contingent upon the consummation of the following:

[2] James B. Hugg passed away while this case was pending. Abigail S. Hugg, James Hugg's daughter and the personal representative of his estate, was substituted as the plaintiff. All references to "Hugg" here are to James Hugg.

[3] Hugg and his then-wife, Julie Hugg, signed the offer. The Huggs divorced in December of 2003. Pursuant to the judgment of divorce, Julie Hugg's interest in the property was awarded to Hugg.

> 1. Buyer obtaining a first mortgage loan commitment for a loan in an amount not less than seventy-five percent (75%) of the purchase price of the Property, providing for an initial interest rate not to exceed eight and one-half percent (8.5%) per annum for the first three (3) years of the loan, amortized over a period of twenty (20) years for a term of not less than ten (10) years.
>
> 2. Buyer obtaining an environmental report and/or other information deemed reasonable or necessary by Buyer, from an engineer or other expert of Buyer's choice, which indicates to the satisfaction of Buyer that:
>
> (a) The Property, including without limitation, subsoils and ground water, is free from pollutants, contaminants, hazardous or toxic materials or wastes, petroleum products and other health or environment threatening materials;
>
> (b) The Property contains no polychlorinated biphenyls, asbestos or formaldehyde;
>
> (c) There are no underground storage tanks located on the Property;
>
> (d) Any underground storage tanks that were ever located on the Property and all contaminated soils associated therewith, if any, have been removed from the Property and disposed of in a lawful manner; and
>
> (e) The Property is otherwise in compliance with all environmental laws, rules, regulations and ordinances.

Kastner as "seller" was obligated, as material, to remediate any petroleum contamination on the property:

> Prior to closing, Seller shall remediate any and all petroleum contamination of the Property (the "Work"). Upon completion of the Work, Seller shall obtain written confirmation from the Department of Natural Resources or from a registered engineer acceptable to Buyer that the Work has been completed in accordance with all applicable laws, rules and regulations. Further, prior to closing, Seller shall restore the Property to substantially the same condition it was in prior to the Work, including, but not limited to, repaving the parking area.

(Acronym omitted.) The attachment provided that the "transaction shall be closed thirty (30) days after written notice from Buyer to Seller that all contingencies set forth herein have been satisfied or waived or at such other time as may be agreed to by Buyer and Seller." Neither the offer nor the attachment, however, set a specific date for closing or performance of the contingencies.

¶4 Hugg occupied the property in October of 1994. He subsequently spent between $105,000 and $190,000 on improvements, and, in March of 1996, opened the automobile repair and body shop.

¶5 Sometime in 2000, Hugg: (1) retained Michael P. Carlton, Esq., who specialized in environmental law, to determine whether there was any petroleum contamination on the property; and (2) took steps to get financing. In an October 6, 2000, letter to a potential source of financing, Carlton confirmed his understanding that the source was:

> willing to authorize a loan at 75% of the City of Milwaukee's current assessment of $256,000, or $192,000, assuming you receive an acceptable environmental report. I will today be contacting reputable environmental consultants to commission an ASTM Phase I environmental site assessment for the property, to be completed as soon as possible.[4]

(Paragraphing omitted; footnote added.)

¶6 In December of 2000, Carlton commissioned the Phase I environmental site assessment. The investigation showed that an underground

[4] "ASTM" apparently stands for the American Society for Testing and Materials. *See* http://www.astm.org/ABOUT/aboutASTM.html#_7.

storage tank had once been on the property. Carlton then commissioned a Phase II environmental site assessment.

¶7 By notice dated June 29, 2001, addressed to Hugg, Kastner purported to terminate Hugg's tenancy. In a July 20, 2001, letter, a real-estate lawyer with Carlton's firm told Kastner that Hugg was "ready, willing and able to proceed to closing." The letter asked Kastner to "advise[]" Hugg's lawyer of "1-2 appraisers that you would be comfortable using" so that Hugg could "make arrangements to complete the appraisal," and requested "confirmation" that Kastner had "remediated the petroleum contamination on the Property." When the lawyer did not hear from Kastner, he and Carlton sent additional letters to Kastner dated August 9, September 7, and October 2, 2001, asking Kastner to contact them regarding the appraisal and "environmental clean-up." Kastner did not respond in writing.

¶8 Hugg then had the property appraised. According to the appraiser, as of November 6, 2001, the fair market value of the property in its as-is condition was $235,000, and in its prior-to-remodeling condition was $122,000.

¶9 By letter dated January 14, 2003, Kastner notified Hugg that he was increasing the rent from the then-current payment of $2,500 per month to $4,000 per month. In a January 24, 2003, letter, Carlton wrote to Kastner protesting the rent increase, and saying that Hugg wanted to close on the property:

> Mr. Hugg is no longer content to let this matter remain unresolved. It is essential that Mr. Hugg and his representatives be able to meet in person with you and your representatives to discuss any and all issues related to sale of the property and to come to an agreement in the very near future. Unless you are able to come to an agreement with Mr. Hugg regarding sale of the 1609 East North Avenue property to him in the very near future, he will

> have no choice but to commence a legal action in circuit court to enforce the contract.

Kastner did not respond.

¶10 In February of 2003, Kastner transferred the property to 1609 E. North Ave., a corporation owned by his grandson, Anthony Kastner. In the fall of 2004, Anthony Kastner accepted another buyer's offer to purchase the property for $525,000.

¶11 Hugg brought this action in December of 2004 seeking, as material, specific performance of the contract. Kastner and 1609 E. North Ave. claimed, however, that the contract between Hugg and Kastner was void because Hugg did not close within a reasonable time. *See* ***Flores v. Raz***, 2002 WI App 27, ¶11, 250 Wis. 2d 306, 313, 640 N.W.2d 159, 163 (Ct. App. 2001) ("the general rule is that where there is an absence of a provision as to the time for performance, a reasonable time is implied"). Specifically, the defendants alleged that Kastner had several conversations with Hugg in the mid-to-late 1990s about closing, during which Hugg told Kastner that he was unable to obtain financing.

¶12 The case was tried to the court in November of 2006. Hugg and Daniel G. Zimmer, a commercial real estate appraiser, testified. According to Hugg, while he had several conversations with Kastner about closing, Kastner never set a closing date:

> Q I'd like you to tell me in 1995 anything Mr. Kastner said to you about closing the property?
>
> A I believe he had come by, and here I'm not one hundred percent certain, but I know he and I always entertained conversations about purchasing or not purchasing, and/but we seemed to mutually work things out.
>
> ….

> Q Did Mr. Kastner ever set a date by which he told you you had to close?
>
> A No.

Regarding the petroleum contamination, Hugg explained to the court that he "took it upon [him]self[]" to have some environmental work done "to see if we can start getting some answers as to how big the contamination was. Mr. Carlton suggested because in talking with various lenders that we had to have the site cleaned up. And so we went ahead and order[ed] these reports to be done." (Paragraphing omitted.)

¶13 Zimmer testified that he appraised the property for a bank in September of 2005. According to Zimmer, the fair market value of the property at that time was $267,000.

¶14 The trial court also admitted Kastner's deposition in lieu of his testimony. At his deposition, Kastner testified that he asked Hugg "a few times" to close on the property, but "let [Hugg] go" because he "liked the guy":

> Q Did you ever go to Jim Hugg and ask him to close on the purchase of the property from you?
>
> A Yes, at -- for maybe the first three years or so. And then Mr. Hugg told me that he -- at one time told me he couldn't get the loan. And I let him go; I let Mr. Hugg go because I liked the guy, and I knew he couldn't do it. And all of a sudden they could do it, they got the money, because this -- what I was getting out of the property, what the other seller was going to sell me, what the property went up to.
>
> Q And so after the -- You said in the first three years. You mean after -- first three years after 1994?
>
> A Yes. I asked him a few times.
>
> Q Okay. But he said he couldn't at that time --
>
> A Right.

Q -- is that right?

A Right.

Q But you didn't push him on that; is that right?

A No.

Q Is that right?

A That's right, sir.

Q Then when was the next time you asked him to close?

A I didn't ask him after that.

Kastner acknowledged that he was aware that petroleum had leaked on the property, but did not do anything about it:

Q Do you recall whether or not there was ever any leakage of petroleum at the property?

A I was told there was.

Q Did you ever do anything with regard to that leakage?

A No.

Kastner testified that he knew that he had an obligation under the contract to remediate the petroleum contamination, but did not do so because he "wasn't forced to":

Q Do you recall having an obligation to remediate any and all petroleum contamination of the property?

A Yes.

Q Did you ever do anything to remediate that petroleum contamination?

A No.

Q Why not?

> A I wasn't forced to. What would have been -- happened, if I would have went into the same business I was, I would have done it.
>
> Q But you didn't do it, right?
>
> A No.

¶15 In a written decision, the trial court determined that Hugg had a valid contractual right to purchase the property when Kastner sold it to his grandson's company, 1609 E. North Ave., in February of 2003 and that Kastner breached that contract. The trial court rejected Kastner's contention that Hugg breached the contract when Hugg did not close within a reasonable time because, as it found: (1) Kastner acquiesced in Hugg's delay; and (2) Kastner did not fulfill his obligation to remediate the petroleum contamination. The trial court invalidated the sale to 1609 E. North Ave. and ordered specific performance, entitling Hugg to purchase the property for what the trial court determined, taking into account the 2001 and 2005 appraisals, to be a fair market value of $199,200. The trial court also ordered the "prompt completion of the remediation of the property at Mr. Kastner's expense." It suggested that, "[i]n lieu of prompt remediation," the parties may "mutually agree to completing the purchase prior to remediation with a credit for the costs associated with remediation to Mr. Hugg (assuming that to be acceptable to a lender)."

II.

¶16 The resolution of this appeal turns on the contract between the parties. The interpretation of a contract is a question of law that we review *de novo*. ***Woodward Commc'ns, Inc. v. Shockley Commc'ns Corp.***, 2001 WI App 30, ¶9, 240 Wis. 2d 492, 498, 622 N.W.2d 756, 759. We will not reverse the trial court's factual findings, however, unless they are clearly erroneous. WIS.

STAT. RULE 805.17(2); *see also* ***Handicapped Children's Educ. Bd. v. Lukaszewski***, 112 Wis. 2d 197, 205, 332 N.W.2d 774, 778 (1983) (applying clearly erroneous standard in breach-of-contract case).

¶17 Kastner and 1609 E. North Ave. claim that the trial court erred in its interpretation of the parties' obligations under the contract. Their arguments address two main areas of the trial court's decision, whether Kastner could treat Hugg's delay in closing as Hugg's breach of the contract when: (1) Kastner acquiesced in Hugg's delay; and (2) Kastner did not fulfill his obligation to remediate the petroleum contamination on the property. We address each issue in turn.

A.

¶18 Kastner and 1609 E. North Ave. contend that the trial court erred in ordering specific performance of the contract because: (1) Hugg's seven-year delay in closing was unreasonable and thus breached the contract; and (2) Hugg had anticipatorily breached the contract when he told Kastner that he would not be able to get financing.[5] These arguments fail because, as the trial court found, Kastner did not treat Hugg's delay as a breach of the contract. *See* ***Stolper Steel Prods. Corp. v. Behrens Mfg. Co.***, 10 Wis. 2d 478, 490, 103 N.W.2d 683, 690 (1960) ("'To warrant a rescission on this ground [anticipatory breach], the refusal to perform must be distinct, unequivocal, and absolute, and *must be acted upon as*

[5] Kastner and 1609 E. North Ave. also claim that the contact is unenforceable because the purchase price was indefinite. They did not, however, raise this issue before the trial court. Accordingly, we decline to address it on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (generally, appellate court will not review an issue raised for the first time on appeal).

such by the party to whom the broken promise was made.'") (quoted source omitted; brackets and emphasis by ***Stolper Steel***).

¶19 Specifically, in its written decision, the trial court found that:

> For reasons that are not entirely clear, neither party made any significant effort to fulfill their obligations under the contingencies in the offer to purchase until 2001. The evidence does suggest that Mr. Kastner made verbal inquiries of Mr. Hugg several times in the late 1990's as to when Mr. Hugg would be ready to close. Mr. Kastner asserts that Mr. Hugg, on one or more occasions, indicated that he could not proceed to closing based upon financial concerns. In Mr. Kastner's words, thereafter, "I let him go … [I] didn't push him on that."

The trial court thus concluded that Kastner, "by his conduct, acquiesced in Mr. Hugg's protracted delays in closing on the transaction." We agree. *See* ***Peyer v. Jacobs***, 275 Wis. 364, 367, 82 N.W.2d 202, 203 (1957) (Seller cannot claim that buyer breached by not timely closing a contract for the sale of real estate when the seller acquiesced in buyer's delay.).

B.

¶20 Kastner and 1609 E. North Ave. also claim that the trial court erred when it concluded that Kastner could not demand that Hugg close on the property until Kastner fulfilled his obligation to remediate petroleum contamination on the property. The defendants contend that: (1) there is no evidence that petroleum remediation was required; and (2) Hugg's inability to get financing was not dependant upon Kastner remediating the petroleum contamination. The Record and the trial court's findings of fact based on the Record are, however, to the contrary.

¶21 As we have seen, Kastner testified that he "was told" that petroleum had leaked on the property, but that he did not "do anything to remediate that petroleum contamination" because he "wasn't forced to." Additionally, several exhibits submitted at the trial show that there was petroleum contamination on the property.[6] Accordingly, the trial court's finding that Kastner "knew or should have known" that there was petroleum contamination on the property was not clearly erroneous. We thus agree with the trial court that under the contract Kastner was required to remediate this contamination.[7] Further, the contract does not condition Kaster's remediation obligation on Hugg's first establishing the extent of the contamination. *See* ***Woodward Commc'ns***, 2001 WI App 30, ¶9, 240 Wis. 2d at 498, 622 N.W.2d at 759–760 ("If the terms of the contract are plain and unambiguous, it is the court's duty to construe the contract according to its plain meaning even though a party may have construed it differently."). Indeed, Kastner had a duty to remediate the contamination independent of Hugg's obligation to get financing. It is undisputed that Kastner did not fulfill that duty.

[6] Documents showed an open claim for funds under the Petroleum Environmental Cleanup Fund, that a City of Milwaukee inspector found "contamination … in [the] hole" after an underground storage tank had been removed from the property, and that the Wisconsin Department of Natural Resources had an open investigation concerning petroleum contamination on the property.

[7] As we have seen, the contract provided:

> Prior to closing, Seller shall remediate any and all petroleum contamination of the Property (the "Work"). Upon completion of the Work, Seller shall obtain written confirmation from the Department of Natural Resources or from a registered engineer acceptable to Buyer that the Work has been completed in accordance with all applicable laws, rules and regulations. Further, prior to closing, Seller shall restore the Property to substantially the same condition it was in prior to the Work, including, but not limited to, repaving the parking area.

(Acronym omitted.)

Accordingly, the trial court correctly found that Kastner breached the contract when he sold the property to his grandson's company, 1609 E. North Ave. *See* ***Peyer***, 275 Wis. at 367, 82 N.W.2d at 204.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.