COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1325 **Cir. Ct. No. 2005CV502**

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

THE PUB, INC.,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: ANDREW P. BISSONNETTE, Judge. *Affirmed*.

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

¶1 BRIDGE, J. Douglas Williams appeals the circuit court's summary judgment in favor of The Pub in a quiet title action. At issue is the duration of a right of first refusal, a right to share in profits from resale, and hunting rights that Douglas's father reserved in a Land Contract and Warranty Deed. The Pub argues

that the rights lasted only until the terms of the Land Contract were fulfilled, while Williams contends that the rights lasted in perpetuity. The circuit court ruled that the reserved rights have expired as a matter of law. We conclude that language in the Land Contract which purports to define the duration of the reserved rights is ambiguous, that the parties have offered no extrinsic evidence that shows which of the two constructions the parties intended at the time the contract was entered into, and that the applicable rules of contract construction lead to the conclusion that the reserved rights were extinguished at the time the terms of the Land Contract were fulfilled and the Warranty Deed was executed. Accordingly, we affirm.

BACKGROUND

¶2 This is an action to quiet title to real property pursuant to WIS. STAT. § 840.03 (2005-06).[1] The following facts are not disputed for purposes of this appeal. By a ten-year Land Contract executed on March 25, 1975, Douglas Williams' father, Maurice Williams, conveyed a-135 acre parcel of land in Columbia County to The Pub, Inc., a Wisconsin corporation. In the Land Contract, Maurice reserved a number of rights related to the property, including a right of first refusal over any future sale, the right to one-half the profit from any resale, the right to hunt on the property and the right to repurchase a four-acre portion of the property.[2] In addition, the Land Contract provided that once the

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

[2] The Land Contract also included the right to income generated by billboards located on the land. This reserved right was not identified in the Complaint as being one of the reserved rights at issue, and Williams does not discuss it in his briefs to this court. Accordingly, we do not address it. *See* ***Waushara County v. Graf***, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992) (appellate courts need not and ordinarily will not consider or decide issues which are not specifically raised on appeal).

purchase price was paid in full and all other conditions were performed, Maurice would deliver to The Pub a Warranty Deed in fee simple "except for other interests of which [The Pub] has actual or constructive notice."

¶3 On March 25, 1985, The Pub made its final installment payment. Three days later, Maurice exercised his option to repurchase four acres. On April 17, 1985, the parties then met for what they characterize as the "ultimate closing," at which the Warranty Deed was given to The Pub. The Deed granted title to The Pub, but excluded "hunting rights, rights of first refusal, and other rights of grantor and grantee set forth in said land contract."

¶4 Maurice demanded a deed back for the four acres, but The Pub refused. Litigation ensued in 1993. The circuit court ruled, and we affirmed, that the option had been appropriately exercised, and The Pub was ordered to convey the four acres back to Maurice, which it did.

¶5 The present action was commenced in 2005. Both parties filed motions for summary judgment. The principal issue was whether the reserved rights survived the fulfillment of the Land Contract and delivery of the Warranty Deed. The court concluded that it was not necessary to reach this issue because, as a matter of law, the lapse of time since the execution of the Land Contract in 1975 made it unreasonable for the provisions to continue to be enforceable. The court therefore granted summary judgment in favor of The Pub and denied Douglas's motion. Douglas appeals. We reference additional facts as needed in the discussion below.

STANDARD OF REVIEW

¶6 We review a grant of summary judgment by applying the same methodology as the circuit court, and our review is de novo. ***Pinter v. American Family Mut. Ins. Co.***, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. A party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

DISCUSSION

¶7 The following are the relevant provisions of the Land Contract and the Warranty Deed:

1. *Land Contract*

> RIGHT OF FIRST REFUSAL: Should the Purchaser *at any time* receive an offer of purchase in the above described premises, he shall relay in writing the terms and conditions of the Purchase on to the Vendor herein at his last known mailing address. *The Vendor* shall then have thirty (30) days within which to make an identical offer, which offer shall be accepted by the Purchaser herein. This paragraph shall be construed to effectuate the intentions of the parties, those intentions being that the Vendor shall be allowed to match the offer of any prospective Purchaser and retake title to the land. (Emphasis added.)
>
> ….
>
> PROFIT SHARING: Should the Purchaser *at any time* resell the above described property, the Vendor, his heirs and assigns, shall be entitled to one-half of the profit from the sale….(Emphasis added.)
>
> HUNTING RIGHTS: Any two members of the immediate family of Maurice Williams shall have a right to enter upon the described land for purposes of hunting. Any two members of the immediate family of John J. Schwoegler shall have the right to enter upon any land in

> Sauk or Columbia Counties owned by Maurice Williams for purposes of hunting. These mutual covenants are personal and are not to run with the land. All rights in this paragraph are independent of the rest of this contract and can be terminated by the Vendor at will by sending written notice to the Purchaser at its business address….
>
> ….
>
> TITLE: The Vendor hereby agrees that in case the aforesaid purchase price with the interest and other moneys be paid in full and all the conditions herein provided shall be duly performed at the times and in the manner above specified, he will on demand, thereafter cause to be executed and delivered to the Purchaser, a good and sufficient Warranty Deed, *in fee simple, of the premises above described … free and clear of all legal liens and encumbrances … except for easements and restrictions of record, and except for other interests of which the Purchaser has actual and constructive notice.* (Emphasis added.)

2. *Warranty Deed in Fulfillment of the Land Contract*

> **Witnesseth,** That the said Grantor, for a valuable consideration conveys to Grantee the following described real estate in Columbia County, State of Wisconsin: [description of real property]….
>
> ….
>
> *Together with all and singular the hereditaments and appurtenances thereto belonging;*
>
> *And grantor warrants that the title is good, indefeasible in fee simple and free and clear of encumbrances except hunting rights, rights of first refusal, and other rights of grantor and grantee set forth in said land contract and will warrant and defend the same.* (Emphasis added.)

¶8 Our objective in interpreting contracts is to ascertain the parties' intent, giving terms their plain and ordinary meaning. ***Goldstein v. Lindner***, 2002 WI App 122, ¶12, 254 Wis. 2d 673, 648 N.W.2d 892. Whether the terms of a written contract are ambiguous is a question of law which we review de novo.

Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co., 2000 WI 26, ¶24, 233 Wis. 2d 314, 607 N.W.2d 276. A contract provision is ambiguous when it is reasonably and fairly susceptible to more than one construction. ***Jones v. Jenkins,*** 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979).

Right of First Refusal and Profit Sharing

¶9 We first observe that, unlike the Profit Sharing provision which refers to "the Vendor, his heirs and assigns," the Right of First Refusal refers only to "the Vendor." Thus, by the plain language of the Land Contract, the Right of First Refusal is reserved solely to Maurice, not to his son Douglas.

¶10 We next turn to the meaning of the phrase "at any time," which is used with respect to both the Right of First Refusal and Profit Sharing provisions. Douglas argues that the term means at any time in perpetuity, while The Pub contends that the term means at any time during the life of the Land Contract. We conclude that the term is fairly susceptible of either construction and is therefore ambiguous.

¶11 If a contract is ambiguous, evidence extrinsic to the contract may be used to determine the parties' intent. ***Moran v. Shern,*** 60 Wis. 2d 39, 47, 208 N.W.2d 348 (1973). In support of its position, The Pub offers the following extrinsic evidence in the form of a letter which Attorney Kammer sent to his client Maurice on March 21, 1985, as the term of the Land Contract drew to a close. In it, he stated as follows:

> You called this date and asked me some tough questions about this land contract that I prepared for you in 1975….
>
> ….

> The question then is whether or not the parties inten[d]ed for these various lingering interests to survive the closing in April. I don't know what the answer is to that.
>
> ….
>
> I have this suggestion to offer: Why don't we go ahead and draw the deed to these boys and reserve from the deed the profit sharing agreement, your right to re-buy, and all that sort of thing. If they start to raise cain about the form of the deed, we'll know that they don't intend for this thing to survive the closing and we'll have to do something about it….

¶12 In response, Douglas refers to the following passage from Attorney Kammer's deposition:

> Q. And would you also agree with me, sir, that when Mr. Williams came to you 10 years after the Land Contract was prepared and asked you whether or not the rights that we've discussed, particularly profit sharing and rights of first refusal, would survive the closing of giving a warranty deed in fulfillment of the Land Contract, you didn't know the answer?
>
> A. That's true and false both. I knew the answer. I was pretty damn sure that it was going to survive. But he asked me the question point-blank, and I was concerned giving a blanket answer saying, yes, you absolutely are, honest to God, safe no matter what happens. So, I wrote him a letter, and the letter said, gee, I sure hope so, but I'm not absolutely certain. I was hedging because I wasn't absolutely positive.
>
> But I had drafted this stuff with such skill that his rights would survive. I thought I had, but I didn't want to put down in writing that I had actually achieved this goal for him. But I thought I had.

¶13 The letter and deposition testimony were attached as appendices to Attorney Kammer's affidavit in support of Douglas's motion for summary judgment. Affidavits in support of or in opposition to summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would

be admissible in evidence." WIS. STAT. § 802.08(3). Assuming without deciding that the letter and Attorney Kammer's deposition testimony meet this standard, we conclude that this evidence does not show the intent of the parties in 1975 with respect to the reserved rights at issue.

¶14 In the letter from Attorney Kammer to Maurice, Attorney Kammer states that he, Kammer, does not know the answer to what the parties intended with respect to the duration of the reserved rights. Moreover, it is not reasonable to read the letter as evidence of *Maurice's* intent at the time the contract was entered into. ("You called this date and asked me some tough questions…. The question then is whether or not the parties intended for these various lingering interests to survive the closing in April.") In his deposition testimony, Attorney Kammer states that he "was pretty damn sure that it was going to survive." However, this is not evidence of what *Maurice* intended at the time the contract was entered into.

¶15 We conclude that the parties have offered no extrinsic evidence that shows which of the two possible constructions of "at any time" the parties intended at the time the Land Contract was executed. We next resort to the rules of contract construction *See* ***Capital Invs., Inc. v. Whitehall Packing Co.***, 91 Wis. 2d 178, 190, 280 N.W.2d 254 (1979).

¶16 Douglas argues that real estate covenants that last indefinitely are not per se invalid. While we agree with this general proposition, "courts [are] reluctant to interpret a contract as providing for a perpetual [or unlimited] right unless the intention of the contracting parties to provide for the same is clearly stated." *See* ***id.*** at 193. "[T]he longer the period for performance[,] the heavier the burden on the enforcing party to prove that the extended duration was intended." ***Id.*** at 194 (quoting ***Consumers Ice Co. v. United States***, 475 F.2d 1161, 1166

(1973)). As discussed above, we have concluded that the intention of the parties to provide for perpetual "lingering interests" in the property in the present case is not clearly stated. Moreover, we have concluded that Douglas has not presented evidence of a contrary intent.

¶17 In addition, "where one construction would make a contract unusual and extraordinary while another [construction] equally consistent with the language used would make [the contract] reasonable, just, and fair, the latter must prevail." ***Capital Invs., Inc.,*** 91 Wis. 2d at 193 (quoting ***Bank of Cashton v. LaCrosse County Scandinavian Town Mut. Ins. Co.***, 216 Wis. 513, 518, 257 N.W. 451 (1934)). The circuit court referred to the terms of the Land Contract as "highly unusual," and Douglas himself likewise concedes that the "lingering interests" provisions are "unusual." The Pub contends that it would be unreasonable for the rights at issue to continue to have prospective effect in perpetuity. We agree. For example, under Douglas's construction, a resale of the property occurring 50 or 100 years after the original transaction would automatically trigger the Profit Sharing provision. As the circuit court observed, this would present significant problems for the parties and the court in attempting to come up with competent evidence of the original transaction and an accurate history of the parcel over time in order to arrive at a reasonable calculation of how to split the profit from the sale after so many years had passed. This is particularly true in light of the fact that, under Douglas's construction, the Profit Sharing provision would continue to be enforceable after the death of the original vendor. We conclude that the more reasonable, just and fair interpretation of the Land Contract is that the reserved rights persisted until the terms of the Land Contract were fulfilled and the Warranty Deed executed.

Hunting Rights

¶18 This provision grants hunting rights to "[a]ny two members of the immediate family of Maurice Williams…." Although the provision does not state who is to designate the family members entitled to the hunting rights, the parties appear to not dispute that Douglas is one such member, and we assume that to be the case for purposes of our analysis. The provision states that the hunting rights are "personal and are not to run with the land." No time limit is provided. We conclude that the hunting rights provision is fairly susceptible to being interpreted as either lasting only for the duration of the Land Contract, or as lasting for an indefinite period of time, and is therefore ambiguous. *See* ***Jones***, 88 Wis. 2d at 722.

¶19 Although the "at any time" language is not used with respect to hunting rights, the parties do not argue that they intended the hunting rights provision was to be treated any differently than the remaining reserved rights. Instead, the parties refer to the various rights collectively. Accordingly, the same rules of contract construction discussed above apply to the reserved Hunting Rights.[3]

[3] In addition, to the extent that the Hunting Rights provision may be construed to mean that the rights are indefinite, the rule in ***Schneider v. Schneider***, 132 Wis. 2d 171, 175, 389 N.W.2d 835 (Ct. App. 1986), is also applicable ("when a contract is of indefinite duration, we will imply a reasonable time for performance"). We did not employ the rule in ***Schneider*** in the context of construing the Right of First Refusal and Profit Sharing provisions because that rule is used, as it was in ***Schneider***, to *fill in* a date when the contract leaves the duration of a provision undefined and thus indefinite. The parties do not contend that the Right of First Refusal and Profit Sharing provisions are indefinite; either they last for the life of the Land Contract or they last in perpetuity. In contrast, the Hunting Rights provision is at least arguably of indefinite duration.

¶20 Finally, we note that Douglas does not argue that even if the rights at issue were not reserved in the Land Contract, the parties separately and independently intended to reserve the rights in the Warranty Deed. For the above reasons, we conclude that the Right of First Refusal, the Profit Sharing provision and the Hunting Rights provision were extinguished at the time the terms of the Land Contract were fulfilled and the Warranty Deed was executed.[4]

¶21 Douglas offers an undeveloped argument that The Pub's claim with respect to the duration of the reserved rights is barred by the doctrine of issue preclusion.[5] This doctrine provides that a final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences. *See* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶19, 279 Wis. 2d 520, 694 N.W.2d 879. The Pub replies that Douglas did not raise this issue in the circuit court, and that he has therefore waived the argument. We agree, and decline to address this argument. *See* ***Waushara County v. Graf***, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[4] Because we conclude that the reserved rights at issue were extinguished as of the time the Warranty Deed was executed, it is not necessary to attempt to harmonize the terms of the 1975 Land Contract with the provisions of the 1985 Warranty Deed as they relate to these provisions.

[5] Douglas's brief makes cursory reference to both "issue preclusion" and "fact preclusion." He does not define what "fact preclusion" means. Moreover, certain of his statements can be interpreted to refer to issues that were actually litigated in the prior proceeding (issue preclusion), *see* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995), while others appear to refer to claims that could have been raised in the prior proceeding (claim preclusion), *see* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶22, 279 Wis. 2d 520, 694 N.W.2d 879. In any event, neither of these theories was argued below.