COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2560 **Cir. Ct. No. 2006CV9251**

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

TIMOTHY J. BROPHY, JR.,

PLAINTIFF-APPELLANT,

V.

WEISS, BERZOWSKI, BRADY, LLP,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

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

¶1 FINE, J. Timothy J. Brophy, Jr., appeals a judgment entered on a jury verdict dismissing his breach-of-contract claim against Weiss, Berzowski, Brady, LLP. Brophy claims that: (1) the Weiss firm violated a real-estate contract

when it disbursed Brophy's earnest money to the seller; or, in the alternative, (2) the contract was illusory and unenforceable. We affirm.

I.

¶2 This case has its genesis in a commercial real estate transaction between Brophy and U.S. Paradise Company, LLC. During the transaction, Harvey Goldstein, Esq., represented Brophy, and Richard Sindic, Esq., from the Weiss firm represented two partners in U.S. Paradise, Vikas Kohli and Baldev Sachdeva. Brophy paid a total of $100,000 in earnest money, which was deposited in the Weiss firm's trust account. The parties dispute who is entitled to the earnest money.

¶3 In January of 2005, Brophy offered to buy property at 1137 North 13th Street in Milwaukee from U.S. Paradise. As material, lines 181–185 in Brophy's Offer to Purchase provided:

> [CONVEYANCE OF TITLE: Upon payment of the purchase price, Seller shall convey the Property by warranty deed (or other conveyance as] provided herein) free and clear of all liens and encumbrances, except: municipal and zoning ordinances and agreements entered under them, recorded easements for the distribution of utility and municipal services, recorded building and use restrictions and covenants, general taxes in the year of closing and as approved by Buyer (provided none of the foregoing prohibit present use of the Property), which constitutes merchantable title for purposes of this transaction.

(Underlining in original.) U.S. Paradise accepted Brophy's offer in a counter-offer, which required, among other things, that Brophy would buy the property in an "'as-is' condition, without representations or warranties of any kind or nature." Brophy accepted the counter-offer's conditions.

¶4 The closing was set for March 15, 2005. Brophy did not attend, and, by letter to Goldstein dated the following day, Sindic indicated that he viewed Brophy's non-attendance at the closing as a breach of Brophy's contract with U.S. Paradise. The letter "demand[ed]" that the closing take place no later than March 31, 2005. On March 21, 2005, the City of Milwaukee Department of Neighborhood Services issued a raze order for an apartment building on the property.

¶5 The closing did not take place by March 31, as Sindic had demanded, but, rather, in April of 2005, the parties amended the contract. The Amendment changed the closing date to May 31, 2005, and waived lines 181–185 in the Offer to Purchase: "The contingency set forth on lines 181-185 of the Offer is hereby waived." It also provided, as relevant, that: "Buyer is responsible for all costs and with defense of condemnation and raze orders and proceedings involving City of Milwaukee, including reasonable attorney's fees with attorney of seller's choice." (Uppercasing omitted.)

¶6 On June 21, 2005, the City of Milwaukee Standards and Appeals Commission affirmed the raze order, and notified the parties that "[a]ny appeal of this order must be filed with the Milwaukee County Circuit Court within 30 days of the date of this decision." Brophy did not appeal.

¶7 Despite several extensions, Brophy did not close on the property. By letter dated July 8, 2005, Sindic told Goldstein that Brophy was "in breach of the contract" and that Kohli and Sachdeva "inten[ded] to exercise their rights" to terminate the offer and keep the earnest money under the default provision in the Offer to Purchase, which provided, as material:

> Seller and Buyer each have the legal duty to use good faith and due diligence completing the terms and conditions of this Offer. A material failure to perform any obligation under this Offer is a default which may subject the defaulting party to liability for damages or other legal remedies.
>
> *If Buyer defaults, Seller may:*
>
> ….
>
> (2) *terminate the Offer and have the option to: (a) request the earnest money as liquidated damages*; or (b) direct Broker to return the earnest money and have the option to sue for actual damages.[1]

[1] The Offer to Purchase also provided:

> HELD BY: Unless otherwise agreed, earnest money shall be paid to and held in the trust account of the listing broker (buyer's agent if Property is not listed or seller if no broker is involved) until applied to purchase price or otherwise distributed as provided in the Offer. *CAUTION: Should persons other than a broker hold earnest money, an escrow agreement should be drafted by the Parties or an attorney. If someone other than Buyer makes payment of earnest money, consider a special disbursement agreement.*
>
> DISBURSEMENT: … If this Offer does not close, the earnest money shall be disbursed according to a written disbursement agreement signed by all Parties to this Offer (Note: Wis. Adm. Code § RL 18.09(1)(b) provides that an offer to purchase is not a written disbursement agreement pursuant to which the broker may disburse). If the disbursement agreement has not been delivered to broker within 60 days after the date set for closing, broker may disburse the earnest money: (1) as directed by an attorney who has reviewed the transaction and does not represent Buyer or Seller; (2) into a court hearing a lawsuit involving the earnest money and all Parties to this Offer; (3) as directed by court order; or (4) any other disbursement required or allowed by law. Broker may retain legal services to direct disbursement per (1) or to file an interpleader action per (2) and broker may deduct from the earnest money any costs and reasonable attorneys fees, not to exceed $250, prior to disbursement.

(Underlining, uppercasing, and italics in original.) Neither party claims that there was an escrow agreement or that Sindic was a broker.

(Underlining in original; italics and footnote added.)

¶8 By letter dated July 28, 2005, Sindic told Goldstein that he had disbursed the earnest money to Kohli and Sachdeva:

> [I]n accordance with my written Notice of Default, dated July 8, 2005, the earnest money payments totaling $100,000 which were held in the Weiss Berzowski Brady LLP client trust account, were disbursed to members of US Paradise Company LLC today at noon. As you know, the July 8, 2005 letter gave your client[] notice that my clients elected to take the $100,000 earnest money payment as liquidated damages and now will proceed to resell the property to mitigate their losses.

¶9 In August of 2005, Goldstein filed an action in the circuit court seeking to enjoin the razing of the apartment building. The circuit court dismissed the case. Brophy did not appeal.

¶10 Brophy then sued the Weiss firm in this action, alleging that it "breached its contract with Brophy by disbursing the earnest money to US Paradise Company LLC and by failing to return to Brophy the earnest money as requested."

¶11 The case was tried to a jury. The jury determined that the Weiss firm did not "violate any duty owed to Timothy J. Brophy, Jr. in disbursing the $100,000.00."

¶12 Brophy filed a motion after the verdict seeking an "order pursuant to Wis. Stat. Sec. 805.14(4) and (5) for a ruling on Plaintiff's claim for return of earnest money as an [*sic*] matter of law and Judgment Notwithstanding the Verdict." The circuit court denied Brophy's motion and entered judgment on the jury's verdict.

II.

¶13 We will sustain a jury verdict "if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 351, 611 N.W.2d 659, 672. "We must review a jury's verdict with great deference and indulge in every presumption in support of the verdict." ***Anderson v. Alfa-Laval Agri, Inc.***, 209 Wis. 2d 337, 352, 564 N.W.2d 788, 795 (Ct. App. 1997). "This presumption is even more true when the verdict has the trial court's approval." ***Ibid.***

¶14 Brophy contends that Sindic should have returned the earnest money because the raze order was a cloud on the title that entitled Brophy to void the contract. This claim turns on whether the April of 2005 Amendment eliminated the provision that U.S. Paradise provide Brophy with merchantable title. This presents a question of law that we decide *de novo*. *See* ***Teacher Ret. Sys. of Texas v. Badger XVI Ltd. P'ship***, 205 Wis. 2d 532, 555, 556 N.W.2d 415, 424 (Ct. App. 1996) (interpretation of a contract is a question of law we review *de novo*).

¶15 The relevant terms are clear. As we have seen, the Amendment "waived … [t]he contingency set forth on lines 181-185 of the Offer." Lines 181–185 of the Offer to Purchase provided:

> [CONVEYANCE OF TITLE: Upon payment of the purchase price, Seller shall convey the Property by warranty deed (or other conveyance as] provided herein) free and clear of all liens and encumbrances, except: municipal and zoning ordinances and agreements entered under them, recorded easements for the distribution of utility and municipal services, recorded building and use restrictions and covenants, general taxes in the year of closing and as approved by Buyer (provided none of the foregoing prohibit present use of the Property), which

> constitutes merchantable title for purposes of this transaction.

(Underlining in original.) When this language is read in conjunction with the Amendment's provision that Brophy was "responsible for all costs and with defense of condemnation and raze orders and proceedings involving City of Milwaukee, including reasonable attorney's fees with attorney of seller's choice," it is clear that Brophy waived the provision that U.S. Paradise provide title "free and clear of all liens and encumbrances," including the order to raze the apartment building. *See* ***Woodward Commc'ns, Inc. v. Shockley Commc'ns Corp.***, 2001 WI App 30, ¶9, 240 Wis. 2d 492, 498, 622 N.W.2d 756, 759–760 ("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.").

¶16 Brophy claims, however, that he did not waive the merchantable-title provision because the Amendment did not mention lines 194–198 of the Offer to Purchase, which provided:

> PROVISION OF MERCHANTABLE TITLE: Seller shall pay all costs of providing title evidence. For purposes of closing, title evidence shall be acceptable if the commitment for the required title insurance is delivered to Buyer's attorney or Buyer not less than 3 business days before closing, showing title to the Property as of a date no more than 15 days before delivery of such title evidence to be merchantable, subject only to liens which will be paid out of the proceeds of closing and standard abstract certificate limitations or standard title insurance requirements and exceptions, as appropriate.

(Underlining and uppercasing in original.) The general "evidence of title" provisions in lines 194–198, however, do not trump the specific waiver-of-title requisites set out in lines 181–185. *See* ***Thomsen-Abbott Constr. Co. v. City of***

Wausau, 9 Wis. 2d 225, 234, 100 N.W.2d 921, 926 (1960) (specific contract provisions take precedence over general provisions). As we have seen, Brophy unambiguously assumed the risk that the property could be razed. Accordingly, distribution of the earnest money to Kohli and Sachdeva did not breach the contract.

¶17 Brophy claims in the alternative that if he waived receipt of merchantable title, the contract as amended was illusory "because the Seller [was] required to deliver nothing." We disagree.

> An illusory promise is a promise in form only: one that its maker can keep without subjecting him- or herself to any detriment or restriction. An archetypal example of an illusory promise is the statement that "I promise to do as you ask if I please to do so when the time arrives." A promisor can keep that promise by either doing as the promisee asks or not, and so the promisor maintains total freedom to do as he or she wants. Since the maker of an illusory promise assumes no detriment or obligation, an illusory promise is not regarded as consideration. If a party to a purported contract has, in fact, made only illusory promises and therefore not constrained him- or herself in any way, he or she has given no consideration and therefore no contract exists. Because no contract exists, neither party has a cause of action for breach.

Devine v. Notter, 2008 WI App 87, ¶4, No. 2007AP812 (quoted source and citations omitted). The raze order did not make the amended contract illusory. U.S. Paradise did not control whether the property would be razed. Rather, as we have seen, Brophy agreed to take upon himself "all costs and [the] defense of condemnation and raze orders." The contract between Brophy and U.S. Paradise still required transfer of the property to Brophy, whether the building was razed or not.

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.