COURT OF APPEALS DECISION DATED AND FILED

May 28, 2009

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. 2008AP1111

Cir. Ct. No. 2006CV4153

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

BANK OF DEERFIELD,

PLAINTIFF-APPELLANT,

V.

DAVID R. DINKEL, LIBERTY COMMONS LLC AND DON P. KOSITZKE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. This case arises from a transaction in land that is subject to the statute of frauds, WIS. STAT. § 706.02.[1] The buyer, Bank of Deerfield, argues that the circuit court erred by granting summary judgment on the question of whether the seller, David Dinkel, or his company, Liberty Commons, was bound to sell the land to the Bank despite the expiration of the parties' written contract. The Bank also argues that the circuit court erred in granting summary judgment on the Bank's interference with contract claim against another party. We agree with the Bank that the circuit court should not have granted summary judgment to Dinkel and Liberty Commons, but reject the Bank's interference with contract claim. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

Background

¶2 On June 12, 2003, the Bank and Dinkel executed a written contract under which Dinkel agreed to sell land in the Village of Deerfield to the Bank for a parking lot. We will refer to this contract as the "parking lot agreement" or the "written agreement." We will refer to the land as the "parking lot property." It is undisputed that the parking lot property was part of a larger tract of land that Dinkel did not own but intended to purchase from the Deerfield School District. We will refer to this larger tract of land as the "school district property."

¶3 The parking lot agreement specified that it was contingent on the school district accepting Dinkel's contemporaneous offer to purchase the school district property. Dinkel's offer to the school district was good through June 30,

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

2003. The school district did not accept Dinkel's offer by that deadline, although Dinkel and the school district later reached an agreement that the school district would sell the school district property to Dinkel.

¶4 Dinkel transferred his interest in the school district property to Liberty Commons, a limited liability company whose members were Dinkel, his wife, and Don Kositzke. A dispute arose as to whether Dinkel or Liberty Commons remained bound to sell the parking lot property to the Bank. The Bank sued Dinkel, his wife, Kositzke, and Liberty Commons, alleging claims that included breach of contract, intentional interference with contract, and equitable relief.[2]

¶5 On summary judgment, the circuit court concluded that the parking lot agreement between Dinkel and the Bank expired by its own terms as of the June 30, 2003 deadline. The court also rejected various arguments by the Bank that Dinkel or Liberty Commons nonetheless remained bound to sell the parking lot property to the Bank and that Kositzke intentionally interfered with the Bank and Dinkel's contractual relationship. Accordingly, the court entered a judgment dismissing the Bank's claims. The Bank appeals. We reference additional facts as needed below.

Discussion

¶6 We review summary judgment *de novo*, applying the same standards as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no

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[2] Dinkel's wife was dismissed from the case and is not a party to this appeal.

genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). When deciding whether there are genuine issues of material fact, we view the evidence, and the reasonable inferences from that evidence, in a light most favorable to the non-moving party. *See* ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 566-67, 278 N.W.2d 857 (1979).

¶7 This case involves a transaction in land that is subject to the statute of frauds, WIS. STAT. § 706.02. The statute requires a writing to evidence a transaction for the sale of land. ***Nelson v. Albrechtson***, 93 Wis. 2d 552, 556, 287 N.W.2d 811 (1980).

¶8 Here, the parties had a writing, namely, the parking lot agreement. We agree with the circuit court, however, that the undisputed facts show that the parking lot agreement expired by its own terms on June 30, 2003. There is no dispute that the parking lot agreement was contingent on the school district accepting Dinkel's contemporaneous offer to purchase the school district property by June 30, 2003, and that the school district did not accept Dinkel's offer by that deadline.

¶9 The Bank nonetheless argues that the circuit court erred in granting summary judgment to Dinkel and the other defendants. We address each of the Bank's specific arguments, but we first summarize the evidence on which the Bank relies in arguing that Dinkel or Liberty Commons[3] remained bound to sell the parking lot property to the Bank.

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[3] In the remainder of this opinion, we will often refer only to Dinkel, regardless whether we mean Dinkel individually, Liberty Commons, or both Dinkel and Liberty Commons.

A. Summary Of Evidence

¶10 The Bank points to the following evidence, which we list in rough chronological order:

- Between June 1, 2003, and October 2003, Dinkel affirmatively represented to the Bank that, in consideration for the Bank financing Dinkel's purchase of the school district property and other consideration to which the parties had agreed, Dinkel would convey the parking lot property to the Bank.

- In September 2003, Dinkel submitted a new offer to the school district for the school district property in which he stated that "the Bank of Deerfield will purchase the parking lot."

- At some point in September 2003, at Dinkel's request, Bank president Sigurd Bringe appeared at a school board meeting in apparent support of Dinkel's attempt to purchase the school district property, but did not actually voice support.

- When the school district countered Dinkel's September 2003 offer with a higher price, Dinkel negotiated with Bringe over the phone in October 2003 to obtain a proportionately higher price from the Bank for the parking lot property.

- During the rezoning process for Liberty Commons, Dinkel represented to the village board in zoning applications and other submissions that the Bank would purchase the parking lot property.

- On or about January 13, 2004, Dinkel asked the Bank for a loan for the school district property, and the Bank, relying on Dinkel's representation that the Bank would be permitted to purchase the parking lot property, extended Dinkel a preferential loan rate.

- In September 2004, one of the defendants informed the defendants' architect that "[t]he majority of the parking lot … will be transferred to the Bank."

- On or about February 9, 2005, Bringe agreed at Dinkel's request to speak in favor of Liberty Commons before the village board and to tell the board that the Bank supported the project because the parking lot

> agreement was in force and effect and would operate to the Bank's and the community's benefit.[4]

¶11 Having summarized this evidence, we turn to address the Bank's more specific arguments. Our discussion does not address what the result would be under general contract rules if the statute of frauds did not apply. Rather, we start from the proposition that there must be compliance with this statute, and then assess whether the Bank demonstrates an applicable exception. The Bank makes arguments relating to two possible types of exceptions—waiver and whether the parties had an enforceable oral agreement under WIS. STAT. § 706.04.

B. Waiver

¶12 The Bank argues that, under an exception found in case law, the evidence supports a finding that Dinkel waived the June 30, 2003 deadline. The Bank argues that this question involved an issue of intent that may not be resolved without a trial. We are not persuaded.[5]

¶13 The Bank does not tell us what the legal standards are for deciding whether a party's acts or omissions constitute a waiver of a contract deadline, let

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[4] The Bank also asserts that, at various times, Dinkel "ratified and affirmed" the parking lot agreement. Apart from the evidence that we have summarized, however, the Bank does not point to specific evidence showing what Dinkel did or said to ratify or affirm the parking lot agreement. In addition, the Bank does not develop a legal argument as to ratification or affirmation of a contract. Accordingly, we conclude that the Bank's "ratified and affirmed" assertion adds nothing, factually or legally, to the arguments we address in the text of this opinion.

[5] We use the term "waiver" here as it is used by the parties and in the case law cited. We do not attempt to determine whether the "waiver" argument is more aptly labeled a "forfeiture" argument. Nonetheless, we note that the supreme court recently explained the common misuse of the terms "waiver" and "forfeiture." *See* ***State v. Ndina***, 2009 WI 21, ¶¶28-29, No. 2007AP5-CR ("forfeiture" describes the failure to make the timely assertion of a right, whereas "waiver" describes the intentional relinquishment or abandonment of a known right).

alone what may constitute waiver when a transaction falls under the statute of frauds. The Bank cites two waiver cases involving land transactions, ***Godfrey Co. v. Crawford***, 23 Wis. 2d 44, 126 N.W.2d 495 (1964), and ***Clear View Estates, Inc. v. Veitch,*** 67 Wis. 2d 372, 227 N.W.2d 84 (1975), but does not discuss the facts of those cases or offer an explanation as to how their reasoning supports the Bank's argument.

¶14 Thus, we could stop here and decline to address the Bank's waiver argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address issues that are inadequately briefed). We will, however, briefly discuss why neither ***Godfrey*** nor ***Clear View Estates*** persuades us that the Bank's waiver argument is a winning one.

¶15 The Bank cites ***Godfrey*** for the rule that "a party to a contract can waive a condition that is for his benefit." *See* ***Godfrey***, 23 Wis. 2d at 49. This is an accurate statement of the holding in ***Godfrey***, but it does not tell us what is required to achieve waiver. The condition that was waived in ***Godfrey*** was that the parties' contract would become void absent rezoning of the property by a specified date. ***Id.*** at 46-47. The zoning change was for the protection of the buyer. ***Id.*** at 48-49. The buyer waived the deadline in writing prior to the specified date by which the condition needed to be met. ***Id.*** at 47, 49.[6] The ***Godfrey*** court concluded that the buyer could waive the condition *prior* to the specified date because the seller had no "protectible interest" in the zoning change; rather, the seller's interest was in knowing, on the specified date, that one of two

[6] We have not attempted to determine whether it matters that the waiver in ***Godfrey Co. v. Crawford***, 23 Wis. 2d 44, 126 N.W.2d 495 (1964), was in writing. The ***Godfrey*** court did not address the topic, and neither does the Bank here.

things would be true: either (1) the buyer would be bound to pay the balance of the purchase price, or (2) the contract would be at an end, freeing the seller to sell to someone else. ***Id.*** at 49-50. The ***Godfrey*** court's reasoning necessarily implies that the buyer could not have waived the condition *after* the specified date had passed because, at that point, both parties had an interest in whether the condition was satisfied. At that point in time, "waiver" by the buyer would have been unfair to the seller.

¶16 Here, the Bank apparently assumes that after the June 30, 2003 deadline had passed, Dinkel could waive the deadline because the deadline protected only Dinkel's interests, not the Bank's. Whatever merit this assumption may have, it is not supported by ***Godfrey***. If anything, ***Godfrey*** undercuts the argument because the apparent reasoning in ***Godfrey*** is that both parties to a contract have at least some interest in knowing, at the expiration of a deadline, whether the contract remains in force.

¶17 Assuming without deciding that the Bank could rely on ***Godfrey***, based on events occurring *before* the deadline on June 30, 2003, the Bank's evidence is insufficient. The Bank points only to evidence that between June 1, 2003, and October 2003 Dinkel affirmatively represented to the Bank that, in consideration for the Bank financing Dinkel's purchase of the school district property and other consideration to which the parties had agreed, Dinkel would convey the parking lot property to the Bank. The Bank's record citation for this assertion refers to one of its interrogatory responses, which includes the following:

> *As a general matter*, Sigurd Bringe and David R. Dinkel spoke approximately every other week over a two year period *between June 2003 and Spring 2005* and, in *virtually all* of those discussions, the Parking Lot Purchase Agreement was mentioned or discussed…. *[B]etween June 1, 2003 and October 2003*, David R. Dinkel

> represented to the Bank of Deerfield that in consideration for Bank financing of his purchase of the [school district property] and other consideration described in the Parking Lot Purchase Agreement, he would convey the [parking lot property] to the Bank of Deerfield.

(Emphasis added.) This evidence, however, does not show whether Dinkel made pertinent representations to the Bank before June 30, 2003. Rather, the evidence shows only the more general proposition that Dinkel made the representation one or more times between June 1, 2003, and October 2003. Considering that the Bank would have had the burden to prove waiver at trial, *see* ***Christensen v. Equity Coop. Livestock Sale Ass'n***, 134 Wis. 2d 300, 303, 396 N.W.2d 762 (Ct. App. 1986), the Bank's evidence is too non-specific to survive summary judgment. *See* ***Transportation Ins. Co. v. Hunzinger Const. Co.***, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (Ct. App. 1993) (assuming sufficient time for discovery, in order to survive summary judgment the party asserting a claim on which it bears the burden of proof at trial must make a showing sufficient to establish the existence of an element essential to that party's case).

¶18 The other waiver case the Bank cites, ***Clear View Estates***, is readily distinguishable. That case involved an option to purchase a large tract of land in which the buyer would annually purchase a part of that land, with each annual transaction to close by the same date each year. ***Clear View Estates***, 67 Wis. 2d at 374-75. For eight consecutive years, the parties began their annual negotiation for a parcel before the deadline, but failed to finalize their transaction until after that deadline. ***Id.*** at 375-76, 379. In the ninth year, the seller attempted to hold the buyer to the deadline and cancel the option. ***Id.*** at 376. The ***Clear View Estates*** court concluded that the seller had waived its right to enforce the deadline. The court's analysis relied on the course of conduct between the parties. *See* ***id.*** at 378-81. Here, there is no similar course of conduct between the parties.

¶19 For the reasons stated, we reject the Bank's waiver argument.

C. Oral Agreement Under WIS. STAT. § 706.04

¶20 The Bank contends that the circuit court's grant of summary judgment to Dinkel and Liberty Commons was not appropriate because there was a factual dispute as to whether the parties had an enforceable oral agreement. Specifically, the Bank argues that the parties had an enforceable oral agreement under WIS. STAT. § 706.04, which sets forth equitable exceptions to WIS. STAT. § 706.02. The Bank argues that, at a minimum, there is a dispute of material fact as to the applicability of § 706.04. For the reasons that follow, we agree.

¶21 An oral land transaction agreement is enforceable if it meets the requirements found in WIS. STAT. § 706.04.[7] *See, e.g.*, ***Spensley Feeds, Inc. v.***

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[7] WISCONSIN STAT. § 706.04 provides:

> **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 elements of the transaction are clearly and satisfactorily proved and, in addition:
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> **(1)** The deficiency of the conveyance may be supplied by reformation in equity; or
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> **(2)** The party against whom enforcement is sought would be unjustly enriched if enforcement of the transaction were denied; or
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> **(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:

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Livingston Feed & Lumber, Inc., 128 Wis. 2d 279, 282, 287, 381 N.W.2d 601 (Ct. App. 1985) (involving an oral agreement, and stating that § 706.04 "allows enforcement in equity of an agreement which is invalid under the statute of frauds"). The party seeking enforcement must, as a threshold matter, clearly and satisfactorily prove each of the "elements" of the transaction in question. WIS. STAT. § 706.04; ***Brevig v. Webster***, 88 Wis. 2d 165, 174-75, 277 N.W.2d 321 (Ct. App. 1979). In addition, the facts must satisfy at least one of the three statutory exceptions: reformation in equity, unjust enrichment, or equitable estoppel. *See* § 706.04(1)-(3).

1. Elements Of The Transaction

¶22 The elements that must be "clearly and satisfactorily prove[n]" under WIS. STAT. § 706.04 correspond to those that must be evidenced by a written instrument under the statute of frauds: identification of the parties, identification of the land to be conveyed, and other material terms. *See* ***Nelson***, 93 Wis. 2d at 560 & n.3; *see also* WIS. STAT. § 706.02(1). The identity of the parties is undisputed. But the parties disagree on whether any oral agreement they might have had sufficiently identified the land and the price to be paid for it.

(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.

a. Identification Of The Property

¶23 The parties apparently agree that any oral agreement between them would have assumed that the parking lot property was described by reference to a map that the parties attached to their original written agreement. They disagree, however, on whether this map was sufficiently precise for purposes of WIS. STAT. § 706.04.

¶24 The map in the record depicts the surrounding land, including several established boundaries, in addition to showing hand-drawn proposed boundaries for the parking lot property. Some of the hand-drawn boundaries appear to track existing boundaries.

¶25 Dinkel argues that the hand-drawn boundaries did not properly identify the land because they included land that was owned by third parties. We deem this argument to be beside the point because it is self-evident that such land was not to be included in the parties' transaction.

¶26 Dinkel also seems to be arguing that, because there is evidence that the parties agreed to survey the land before making a final decision as to new boundaries, the map was too imprecise to identify the property. To the extent that this is Dinkel's argument, we reject it. The Bank submitted the affidavit of a former village board member who is a surveyor. He explained how the map could be used, along with familiar features of the land, in order to survey the land and establish all boundaries as needed with a reasonable degree of certainty for purposes of a conveyance. A fact finder could reasonably infer from the surveyor's affidavit that the map sufficiently identified the parking lot property. *See* ***Zapuchlak v. Hucal***, 82 Wis. 2d 184, 196, 262 N.W.2d 514 (1978) ("surveyor's map … was competent extrinsic evidence which aided the written

description in identifying with reasonable certainty the land to be conveyed"); ***Padgett v. Szczesny***, 138 Wis. 2d 150, 154-55, 405 N.W.2d 714 (Ct. App. 1987) (conveyance "need not specifically describe the land if it refers to the land in such terms that the court can identify the land to be conveyed with reasonable certainty").

b. Price

¶27 As to price, the most pertinent evidence in the parties' summary judgment materials is a portion of the deposition testimony of the Bank's president, Sigurd Bringe. Bringe testified that, during his October 2003 phone conversation with Dinkel, Dinkel sought a higher price from the Bank for the parking lot property. Dinkel talked about whether he would submit a higher offer to the school district and asked Bringe whether the Bank would be willing to pay "proportionate[ly]" more for the parking lot property. Bringe agreed that the Bank would increase its offer proportionately. Bringe and Dinkel did not, however, perform any calculations or discuss a particular number.

¶28 Dinkel argues that there was no agreement on price because the questioning of Bringe at his deposition included questions about the assumed "base" amount needed to determine the proportion the Bank agreed to pay. According to Dinkel, it is unclear whether the "base" amount Bringe was referring to was Dinkel's original $341,000 offer or his later $326,000 offer. Given this ambiguity, Dinkel contends, there is no evidence supporting a finding on the agreed proportion of the eventual total purchase price and, thus, no agreement on price. We disagree.

¶29 There is some ambiguity in the pertinent part of Bringe's deposition, but it nonetheless provides a basis for a reasonable fact finder to find that Bringe's

reference to paying "proportionately more" was a reference to the original $341,000 total offer price and the $105,000 lot price, which yields a 30.8% proportion ($105,000 divided by $341,000). It is a sensible interpretation of the discussion that the Bank was agreeing to pay an amount for the parking lot property that was in the same proportion as the original agreement. Despite the uncertainty about the eventual parking lot property price, Bringe could have agreed to this knowing that Dinkel had ample self-interest in not overpaying for the total property.

¶30 Moreover, it is not reasonable to interpret Bringe's testimony as asserting that he agreed to pay proportionately more based on the subsequent $326,000 total offer price. This "base" yields a 32.2% proportion. An agreement to that effect would mean that, if the total purchase price ended up being the same as in the original agreement, $341,000, the Bank would pay more for the lot than it originally agreed to pay (32.2% of $341,000 is $109,802). The readily apparent context of the telephone discussion Bringe testified about was that Dinkel was asking whether the Bank would pay more if the eventual total purchase price was greater than the sums discussed earlier. It makes no sense that either man thought that, if the total price did not go up, the Bank would still pay more. It follows that a reasonable fact finder could conclude, based on Bringe's testimony, that there was an agreement that "proportionately more" was a reference to a comparison of the original figures.[8]

[8] Dinkel does not argue that this type of "proportion" price agreement cannot constitute the price element of a transaction for purposes of WIS. STAT. § 706.04. Dinkel does make a one-paragraph argument that the Bank cannot show all of the elements of the transaction because the parties initially agreed to split the costs of the survey and of rezoning without indicating what those costs would be. This argument is insufficiently developed and, in any event, appears to lack merit. *See* ***Krauza v. Mauritz***, 78 Wis. 2d 276, 280-81, 254 N.W.2d 251 (1977) (it is (continued)

2. Applicability Of The Three Statutory Exceptions

¶31 Having concluded that there are, at a minimum, disputes of material fact as to whether the Bank can establish the elements of the transaction for purposes of WIS. STAT. § 706.04, we must ask whether the circuit court erred in determining that summary judgment was nonetheless appropriate as a matter of law on each of the three statutorily specified exceptions.

¶32 The Bank relies on all three exceptions, and we begin by summarily rejecting its reliance on the "reformation in equity" exception in WIS. STAT. § 706.04(1). The Bank's argument assumes that this subsection applies only when there is fraud or "mutual mistake." Assuming, without deciding, that the Bank is correct in this regard, the flaw in the Bank's analysis is that the evidence the Bank points to does not support a conclusion of fraud or mutual mistake.

¶33 We turn to the two remaining exceptions, unjust enrichment and equitable estoppel. Under the unjust enrichment exception, WIS. STAT. § 706.04(2), an oral agreement may be enforced if "[t]he party against whom enforcement is sought would be unjustly enriched if enforcement of the transaction were denied." Unjust enrichment requires "(1) a benefit that has been conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the benefit; and (3) acceptance and retention by the defendant of the benefit, under circumstances such that it would be inequitable to retain the benefit without payment." ***Staver v. Milwaukee County***, 2006 WI App 33, ¶24, 289 Wis. 2d 675, 712 N.W.2d 387. Under the equitable estoppel exception, § 706.04(3), a party

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unnecessary, for purposes of WIS. STAT. § 706.04, that the parties agree on terms such as closing costs and proration of taxes).

against whom enforcement is sought is equitably estopped from asserting a deficiency 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 … [for our purposes here]
>
> ….
>
> (b) The detriment so incurred was incurred with the prior knowing consent or approval of the party sought to be estopped.

WIS. STAT. § 706.04(3).

¶34 In arguing that the unjust enrichment and equitable estoppel exceptions in WIS. STAT. § 706.04 apply, the Bank relies on evidence that it extended a preferential interest rate to Dinkel on a loan for Dinkel's Liberty Commons project. We agree with the Bank that, viewing this evidence in a light most favorable to the Bank, a fact finder could reasonably find that the Bank gave Dinkel this favorable interest rate because Dinkel agreed to sell the parking lot property to the Bank, which, in turn, would support a conclusion that Dinkel was unjustly enriched. Similarly, such facts would support the conclusion that Dinkel should be equitably estopped from asserting that any oral agreement between the parties is unenforceable.[9]

[9] The Bank also relies on evidence that Bringe attended one or more village board meetings in support of the Liberty Commons project involving the school district property, along with evidence that the board's decision was affected by the Bank's support for the project or by the belief that the Bank would be purchasing the parking lot property. We need not address this argument because of our conclusion that the preferential interest rate evidence could support a conclusion of unjust enrichment or equitable estoppel.

¶35 In granting summary judgment, the circuit court concluded that, even if there was unjust enrichment or equitable estoppel, enforcing an oral agreement for the purchase of the parking lot property was not a proper remedy because the Bank had an adequate remedy at law in the form of damages. We agree with the Bank, however, that, in contracts for the sale of land, the rule under ***Anderson v. Onsager***, 155 Wis. 2d 504, 455 N.W.2d 885 (1990), is that specific performance is a proper remedy unless "there are revealed factual or legal considerations which would make specific performance of the contract unfair, unreasonable or impossible." *See* ***id.*** at 512-13. As we read the circuit court's decision, the court failed to apply the ***Anderson*** standard, and we cannot conclude as a matter of law that specific performance in this case would be unfair, unreasonable, or impossible.[10]

[10] As an alternative ground to affirm the circuit court's decision, Dinkel argues that the Bank in its complaint failed to adequately plead breach of an oral agreement. We disagree. The complaint not only references the October 2003 conversation between Dinkel and Bringe, but also states a claim in equity based on unjust enrichment and estoppel, the subjects of WIS. STAT. § 706.04. This was sufficient to put Dinkel on notice that the Bank's claims might include an assertion that the parties had an oral agreement that was enforceable under § 706.04. Dinkel also argues that the Bank waived this issue on appeal because the Bank has not challenged the circuit court's ruling that the Bank failed to adequately plead breach of an oral agreement. We question whether the court made such a ruling. Regardless, the arguments that the Bank *does* make necessarily, if implicitly, constitute a challenge to any such ruling.

As another alternative ground for upholding the circuit court's decision, Dinkel argues that common law principles of waiver, equitable estoppel, and laches should prevent the Bank from asserting any of its claims. The circuit court did not reach these questions, and suffice it to say here that the parties' briefing demonstrates to us that these questions are not amenable to resolution as a matter of law on summary judgment. We do, however, agree with Dinkel that the Bank has abandoned any claims it may have had for tortious interference with contract by Liberty Commons, conspiracy, or breach of the duty of good faith and fair dealing.

Finally, Dinkel makes other arguments that we deem too insufficiently developed for consideration. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address issues that are inadequately briefed). Those arguments include whether the Bank failed to join indispensable parties, whether there is a basis for asserting

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D. Interference With Contract Claim Against Kositzke

¶36 The Bank argues that the circuit court erred in granting summary judgment on its claim for interference with contract against Kositzke, one of Liberty Commons' other members. We reject this argument.

¶37 The elements of a claim for interference with a contract have been stated as follows:

> (1) the plaintiff had a contract or a prospective contractual relationship with a third party, (2) the defendant interfered with that relationship, (3) the interference by the defendant was intentional, (4) there was a causal connection between the interference and damages, and (5) the defendant was not justified or privileged to interfere.

Briesemeister v. Lehner, 2006 WI App 140, ¶48, 295 Wis. 2d 429, 720 N.W.2d 531. Several factors inform the fifth element, including the nature, type, duration, and timing of the defendant's conduct, whether the interference is driven by an improper motive or self-interest, and whether the conduct, even though intentional, was fair and reasonable under the circumstances. ***Id.***, ¶51.

¶38 The Bank argues that the first element can be satisfied in this case, regardless whether the Bank and Dinkel had an enforceable contract under the statute of frauds. We will go along with this assumption, without passing on its merit.

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a contract claim against Liberty Commons (as opposed to only Dinkel in his individual capacity), and whether Dinkel could have breached a contract to sell land to the Bank that he did not own.

¶39 The remainder of the Bank's arguments go almost exclusively to the fifth element, whether Kositzke's conduct was justified or privileged.[11] The Bank fails, however, to discuss how the evidence supports the second, third, and fourth elements. We deem this failure fatal to the Bank's argument because it is not apparent that the evidence could support findings that Kositzke intentionally interfered with the Bank's and Dinkel's contractual or prospective economic relations or that such interference was causal in any alleged harm to the Bank. Although the Bank does point to evidence that Kositzke thought the Bank should pay more for the parking lot property and thought that Dinkel should sell less of the property to the Bank, this evidence without more is insufficient. *See, e.g.*, ***id.***, ¶49 (plaintiff must prove that defendant's "'prime purpose'" was to interfere with the contractual relationship or that defendant "'knew or should have known that such interference was substantially certain to occur as a result of [defendant]'s conduct'" (quoting WIS JI—CIVIL 2780)); ***Wolnak v. Cardiovascular & Thoracic Surgeons***, 2005 WI App 217, ¶15, 287 Wis. 2d 560, 706 N.W.2d 667 (causation exists in Wisconsin where the defendant's actions are a "substantial factor" in producing the harm to the plaintiff).

Conclusion

¶40 In sum, we affirm the circuit court's grant of summary judgment to Kositzke on the Bank's tortious interference with contract claim. We reverse,

[11] In discussing the fifth element, the Bank focuses on the fact that Kositzke, an attorney, represented the Bank in past transactions. The Bank asserts that Kositzke's role in the present matter created a conflict of interest or involved improper use of confidential information obtained from his representation of the Bank in the past. Kositzke disputes the Bank's characterization of his past representation of the Bank. We need not resolve this dispute but note that, even if Kositzke violated the rules of professional conduct, this would not necessarily satisfy the fifth element.

however, the circuit court's grant of summary judgment to Dinkel and Liberty Commons on the Bank's claims for breach of contract and equitable relief. We remand for further proceedings on the latter claims.[12]

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.

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[12] We are troubled by disparaging comments in the Bank's briefs directed at the circuit court. Counsel for the Bank states that the circuit court placed "abject reliance" on one of Dinkel's arguments, that the court "conveniently overlooked" certain facts, and that the court made a "specious" conclusion. We remind counsel that the failure to maintain the proper level of respect toward the court constitutes a violation of the rules of professional conduct. *See* ***Filppula-McArthur v. Halloin***, 2001 WI 8, ¶39, 241 Wis. 2d 110, 622 N.W.2d 436. Counsel's comments here arguably violate the rules. We strongly encourage counsel to refrain from making such comments in the future and advise that such comments do nothing to advance the cause of a client before this court.