**COURT OF APPEALS DECISION DATED AND FILED**

**January 19, 2012**

**A. John Voelker**
**Acting Clerk of Court of Appeals**

**NOTICE**

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**Appeal No. 2011AP707** **Cir. Ct. No. 2009CV1121**

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

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**WEST TOWNE HOTEL ASSOCIATES, LLC,**

**PLAINTIFF-APPELLANT,**

**V.**

**CBL & ASSOCIATES MANAGEMENT, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Dane County: JUAN B. COLAS, Judge. *Affirmed.*

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

¶1 LUNDSTEN, P.J. This appeal concerns a contract dispute between West Towne Hotel Associates and CBL & Associates Management. Under the contract, West Towne agreed to purchase land from CBL for the purpose of building a hotel. Eventually, CBL terminated the contract, and a dispute arose

over which party was entitled to the earnest money deposited by West Towne. The circuit court, on summary judgment, resolved the earnest money contract dispute in favor of CBL. West Towne appeals. Because we agree with the circuit court's interpretation of the contract, we affirm.

## *Background*

¶2 On August 12, 2008, West Towne entered into a contract to purchase land from CBL. West Towne intended to build a hotel on the property. West Towne deposited $125,000 in earnest money with an agent. The contract provided that, if the parties closed on the sale, the earnest money would go toward the purchase price of $1,500,000. The contract also provided various contingencies addressing which party would receive the earnest money if a party terminated or breached the contract.

¶3 On November 25, 2008, CBL notified West Towne that CBL was invoking a termination option available if the parties failed to reach an agreement on certain easements in a specified time period. CBL also asserted that the failure to reach an easement agreement, combined with a separate breach by West Towne relating to governmental approvals, entitled CBL to the earnest money. West Towne responded that the contract required CBL to give West Towne notice of the breach and ten days to cure and, because CBL failed to give West Towne this opportunity to cure, West Towne was entitled to the return of the earnest money.

¶4 West Towne filed an action seeking a declaration that it was entitled to the earnest money. CBL counterclaimed, similarly seeking a declaratory judgment in its favor. The suit and counter-suit contained various claims and conflicting factual allegations, but on appeal all that remains are questions of

contract interpretation. The circuit court concluded that there were no disputed material facts, and resolved the matter on summary judgment in favor of CBL.[1]

## ***Discussion***

¶5 The parties' dispute requires that we construe their contract and, in doing so, we apply the following general contract interpretation principles:

> The interpretation of a contract is a question of law that we review independently of the circuit court. "If the terms of a contract are plain and unambiguous, we construe the contract as it stands and apply its literal meaning." However, if we determine that a contract provision is ambiguous, we look to extrinsic evidence to discern the contract's meaning.

***BV/B1, LLC v. InvestorsBank***, 2010 WI App 152, ¶19, 330 Wis. 2d 462, 792 N.W.2d 622 (citations omitted). Also, "[w]hen possible, contract language should be construed to give meaning to every word, 'avoiding constructions which render portions of a contract meaningless, inexplicable or mere surplusage.'" ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶45, 326 Wis. 2d 300, 786 N.W.2d 15 (citation omitted). Neither party here develops an argument that the contract provisions we must construe are ambiguous. Thus, we address the contract "'as it stands.'" *See* ***BV/B1***, 330 Wis. 2d 462, ¶19.

¶6 CBL invoked section 6(e) of the contract. We discuss this provision in greater detail below. For now, it is sufficient to explain that the remedy portion of section 6(e) has two parts. First, section 6(e) permits CBL to terminate the contract if the parties fail to reach an easement agreement within a specified time.

[1] We acknowledge that West Towne asserts that there is a factual dispute regarding its compliance with a particular section of the contract, section 5(f). But this factual dispute argument hinges on an underlying legal argument that we reject, *see* ¶18, below.

Second, section 6(e) directs that, if CBL elects to terminate under this provision, the earnest money goes to CBL if West Towne "breached *any* obligation under" the contract (emphasis added).[2]

¶7 As to the first part, there is no dispute that the easement agreement was not reached in the specified time, that CBL was entitled to terminate the contract, and that CBL did terminate the contract.

¶8 The dispute here concerns the earnest money part and, in this regard, we structure our opinion around West Towne's arguments. West Towne first argues that it did not breach the contract. Alternatively, West Towne contends that, even if it did breach the contract, CBL did not satisfy a general contractual notice requirement for CBL to receive the earnest money. We reject both arguments.

*A. Whether West Towne Breached The Contract*

¶9 CBL contends that West Towne breached an obligation found in section 5(f) of the contract. Section 5(f) concerns "Governmental Approvals," and requires that West Towne apply for defined approvals, and any other approvals West Towne deems necessary, within 20 days of the effective date of the contract. More specifically, section 5(f) states, in relevant part:

> (f) West Towne, at West Towne's sole cost and expense, *shall, within twenty (20) days of the Effective Date*

[2] In the contract provisions we discuss below, the contract at times refers to "default" and at other times to "breach." Similarly, the contract at times refers to the contract ending when a party "terminates" and at other times refers to the contract being "canceled." The parties do not explain that there is a difference in meaning between "default" and "breach" or between "terminates" and "canceled" that matters to the issues presented. Accordingly, we treat the terms in each pair as interchangeable.

> *apply for*, commence to obtain, and diligently and continuously pursue until receipt thereof, *all approvals* (excluding only subdivision approval) relating to zoning, preliminary plats, development and annexation agreements, preliminary site plans, signage, curb cuts, permits, and all other governmental and quasi-governmental approvals necessary, in West Towne's reasonable business judgment, for West Towne to demolish the existing buildings on the Property and construct, on the Property, a 120-130 room prototypical mid to upscale full service nationally branded hotel ….

(Emphasis added.)[3] Thus, as to approvals relating to zoning and other listed topics, West Towne was required to "*apply for*, commence to obtain, *and* diligently and continuously pursue" such approvals.

¶10 West Towne admits that it did not apply for the approvals within 20 days. According to West Towne, its failure to apply in the 20-day time frame was not a breach because, under a correct interpretation of the contract, there is either no binding 20-day requirement or no 20-day requirement at all. In the following paragraphs, we address and reject each of West Towne's arguments in this regard.

*1. The Termination Clause*

¶11 West Towne essentially argues that it could not have breached the 20-day approvals requirement because the entire approvals section is for West Towne's benefit. West Towne's argument is premised on the following language, also found in section 5(f), which gave West Towne a termination option if the approvals "are not obtained":

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[3] Because it is undisputed that CBL is the "seller" and West Towne is the "buyer" as those terms are used in the contract, for ease of reading, when we quote the contract, we have substituted "CBL" for "seller" and "West Towne" for "buyer." In all other respects, our quotes are verbatim unless otherwise indicated by brackets.

> *In the event that all or some of the Governmental Approvals are not obtained* by ... [180] days from the Effective Date (the "Governmental Approvals Period"), West Towne *may terminate this Contract* by delivery to CBL of notice thereof prior to expiration of the [180-day] Governmental Approvals Period …. Such notice shall indicate with specificity, which Governmental Approvals have not been obtained. If West Towne timely so terminates, the Earnest Money and all interest thereon shall be returned to West Towne. *If West Towne does not give such notice ..., then West Towne shall be deemed to have waived the Governmental Approvals Condition* ….

(Emphasis added.) Thus, the contract allowed West Towne to terminate and recoup the earnest money if West Towne did not actually obtain the necessary approvals and it gave notice in the specified time period.

¶12 West Towne seemingly reasons that, because this option protects West Towne in the event that the approvals are not obtained, then it follows that everything in the approvals section of the contract is for West Towne's protection. West Towne further appears to reason that, therefore, nothing in the approvals section can be enforced against West Towne as a breach, including the requirement that West Towne apply for approvals within 20 days.

¶13 West Towne relies on the general legal proposition that "a party to a contract can waive a condition that is for his benefit." *See* ***Godfrey Co. v. Crawford***, 23 Wis. 2d 44, 49, 126 N.W.2d 495 (1964). But West Towne does not persuasively demonstrate that the 20-day approvals requirement was for its benefit.

¶14 CBL contends that the 20-day requirement was designed to protect CBL, not West Towne. CBL explains that the "apply for" approvals obligation prevented West Towne from: (1) never seeking the approvals or tardily seeking them; *and* (2) invoking the termination option when the approvals "are not

obtained" within 180 days and recouping the earnest money, all the while tying up CBL's property for as many as 180 days. Stated differently, the provision benefits CBL by requiring that West Towne promptly take concrete steps necessary for the sale to close. West Towne does not meaningfully respond to this facially valid argument.

¶15 To sum up, the gist of the portion of section 5(f) that West Towne relies on is that, if West Towne complies with its otherwise specified obligations to obtain the necessary approvals and nonetheless fails to obtain those approvals, West Towne may terminate the contract. Section 5(f)'s termination option says nothing about West Towne's obligations to apply for and pursue the approvals in the first instance.

*2. The "Reasonable Business Judgment" Clause*

¶16 West Towne argues that section 5(f) gives it discretion whether and when to apply for the approvals covered by that section. West Towne relies on the italicized language in the following sentence: "West Towne … shall, within twenty (20) days of the Effective Date apply for … all approvals (excluding only subdivision approval) relating to zoning, preliminary plats, development and annexation agreements, preliminary site plans, signage, curb cuts, permits, and all other governmental and quasi-governmental approvals necessary, *in West Towne's reasonable business judgment*, for West Towne to demolish the existing buildings on the Property and construct, on the Property, a ... hotel." (Emphasis added.) We disagree that this language helps West Towne. The "reasonable business judgment" clause in this sentence does not cover the approvals in the first part of the section (such as those relating to preliminary site plans), but rather modifies "all *other* ... approvals [that West Towne believes are] necessary." For that matter,

the provision does not state that West Towne has discretion over *when* to apply for the unspecified "other" approvals; rather, it only says that West Towne may exercise judgment to determine *which* "other" approvals are necessary for the project.

¶17 In sum, the plain language of section 5(f) states that "reasonable business judgment" applies to only unspecified "other" approvals that West Towne may believe are necessary.

### *3. The "Commence To Obtain" and "Diligently And Continuously" Language*

¶18 West Towne asserts that summary judgment was inappropriate because there are disputed factual issues about whether West Towne "commenced to obtain" or acted "diligently and continuously" with respect to approvals under section 5(f). This argument hinges on the legal proposition that West Towne's obligation was to apply within 20 days *or* commence to obtain *or* diligently and continuously pursue approvals. This disjunctive reading is, however, incorrect. The contract states that West Towne must "apply for, commence to obtain, *and* diligently and continuously pursue" the approvals (emphasis added). Thus, under the plain language, West Towne was required to "apply for" the approvals, *in addition to* the other things that West Towne asserts that it did.

### *4. West Towne's Absurdity Argument*

¶19 West Towne asserts that "it was not necessary to file [the] various applications with no logical sequence during the first twenty days." West Towne further refers to two particular types of approvals in the contract—signage and curb cuts approvals—and asserts that a requirement to apply for those approvals within 20 days would be "absurd." Specifically, West Towne asserts that "[i]t is

absurd to require West Towne Hotel to apply for approvals of signage and curb cuts before it obtained approval to demolish the existing buildings and approval to construct a 120-130 room hotel."

¶20 CBL responds that "nothing prevented West Towne from submitting [the] applications to the City in a timely fashion under the Agreement." West Towne does not rebut this assertion. Instead, West Towne explains that some applications would not have been immediately considered, but rather would have awaited other contingencies to be met. Accordingly, at best West Towne demonstrates that it would have been unnecessary to make these applications so early in the process. Nothing in West Towne's arguments shows that applying so soon would have been absurd. And, again, West Towne does not rebut the proposition that the 20-day deadline served CBL's interests. Thus, one might question the wisdom of West Towne agreeing to apply for all specified approvals within such a short time frame, but it is clear that West Towne did agree and that the requirement is not absurd.

*5. CBL's Alleged Concession*

¶21 Finally, West Towne seems to argue that the termination letter sent to West Towne by an attorney for CBL constitutes an admission that the contract did not require submission of applications within the 20 days, but rather required only "diligent" pursuit of approvals in some general sense. West Towne points out that the letter does not mention the 20-day failure, but instead only specifically complained of West Towne's failure "to pursue diligently its governmental approvals."

¶22 West Towne's argument is flawed because it amounts to a request that we consider extrinsic evidence of the parties' intent without first

demonstrating ambiguity. Indeed, the case West Towne relies on involved the construction of ambiguous contract language. *See* ***Zweck v. D P Way Corp.***, 70 Wis. 2d 426, 435, 234 N.W.2d 921 (1975) ("It is a well-settled principle of Wisconsin law that, *where contract terms may be taken in two senses*, evidence of practical construction by the parties is highly probative of the intended meaning of those terms and the court will normally adopt that interpretation of the contract which the parties themselves have adopted." (emphasis added)). Accordingly, we discuss the argument no further.

¶23 In sum, we agree with CBL and the circuit court that the undisputed facts show that West Towne breached section 5(f)'s 20-day "apply for" requirement.

*B. Whether CBL Was Required To Give Notice And An Opportunity To Cure*

¶24 West Towne's notice and right to cure argument depends on our construction of two provisions in the contract. We first set out those provisions, and then turn to West Towne's arguments.

*1. Contract Provisions At Issue*

¶25 The question here is whether the earnest money language in section 6(e) stands alone, or whether it must be read in conjunction with section 9(a), a default/earnest money provision requiring notice and an opportunity to cure. We first set out these two sections, and then address the parties' conflicting interpretations.

¶26 Section 6(e) required West Towne and CBL to engage in good faith negotiations to "finalize the forms of the 'Additional Easements'" within 90 days after the effective date of the agreement, with an option for CBL to extend that

time to 105 days. It is undisputed that CBL extended the time to 105 days and that the parties failed to reach an agreement in that time. Section 6(e) provides that, if an easement agreement is not reached, CBL may terminate the contract. And, it is undisputed that CBL exercised this option and that the contract was properly terminated. The dispute centers on language providing, in effect, that, if CBL terminates, CBL is entitled to the earnest money if there is also a breach by West Towne. Pertinent here, section 6(e) reads:

> If CBL terminates this Contract pursuant to this subsection (e), the Earnest Money shall be refunded to West Towne (provided West Towne has not breached any obligation under this Contract) ….

Although this language does not expressly state that if West Towne has breached an obligation the earnest money goes to CBL, that result is clear from a separate section of the contract. Section 3 explains that, after a due diligence period, a period that the parties agree had passed, the earnest money is nonrefundable to West Towne and shall be paid to CBL "except as otherwise expressly provided for herein." Therefore, for CBL to be entitled to the earnest money, all that must be true is that section 6(e) does not expressly provide otherwise.[4]

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[4] Section 3 of the contract states, in relevant part:

> Upon termination of this Contract by West Towne, if expressly permitted hereunder, or upon CBL's default, the Earnest Money and all interest earned thereon shall be returned to West Towne. In the event West Towne does not exercise any right to terminate this Contract prior to expiration of the Due Diligence Period, as hereinafter defined, then the Earnest Money shall be nonrefundable and shall be paid to CBL by the Escrow Agent upon CBL's written request except as otherwise expressly provided for herein.

We also note that West Towne complains that the circuit court incorrectly applied the specific/general rule of construction when comparing section 3 and section 9. However, we

(continued)

¶27 Accordingly, the two requirements under section 6(e) for CBL to obtain the earnest money are met because, first, there is no dispute that CBL properly terminated the contract under section 6(e) and, second, we have already concluded that West Towne breached an obligation under the contract, namely, section 5(f)'s "apply for" requirement. It follows that section 6(e), on its face, directs that the earnest money be paid to CBL.

¶28 West Towne contends that section 6(e) does not stand alone, but must be read in conjunction with the general default provisions in sections 9(a) and (b). Sections 9(a) and (b) give both parties the right to cancel the contract and obtain the earnest money if the other party defaults. Section 9(a) is at issue here because it covers a default by West Towne. Specifically, section 9(a) gives CBL the right to cancel the contract and obtain the earnest money if:

1) West Towne defaults,

2) CBL gives West Towne written notice of the default, and

3) the default remains uncured ten days after the written notice.[5]

We turn to West Towne's arguments and CBL's responses.

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discern no reason why such an error on the part of the circuit court, if it occurred, would affect our analysis. Moreover, West Towne does not proceed to make a developed specific/general argument that supports its interpretation.

[5] Section 9(a) of the contract provides, in pertinent part:

> In the event of a default by West Towne which remains uncured after ten (10) days written notice from CBL, CBL shall have as its sole and exclusive remedy the right to declare this Contract canceled, in which event the Earnest Money and all interest thereon shall be paid to CBL forthwith as liquidated damages and not as a penalty, this being in full satisfaction of any and all claims which CBL might have arising in any manner whatsoever out of this transaction ….

*2. The Parties' Arguments*

¶29 West Towne argues that section 6(e) is "incomplete" when it comes to earnest money because that section does not state what happens if CBL declares that West Towne has breached an obligation. According to West Towne, because section 6(e) is incomplete, it follows that section 9 provides the earnest money procedure omitted by section 6(e). West Towne essentially asserts that section 9 shows that the parties agreed to provide an opportunity to cure any breach and there is no reason why a breach invoked under section 6(e) creates an exception to the notice and right-to-cure requirements. We are not persuaded.

¶30 CBL responds that West Towne's argument is flawed because West Towne's interpretation renders the earnest money language in section 6(e) meaningless. We agree. To recap, West Towne contends that, for CBL to obtain earnest money under section 6(e), CBL must also satisfy the notice and right-to-cure requirements in section 9(a). But if that were true, then there would be no point to the language in section 6(e) directing that the earnest money go to CBL if West Towne breaches. That is, if West Towne's interpretation of 6(e)'s breach language is correct, and CBL must first satisfy 9(a), then CBL's right to cancel and obtain the earnest money rises or falls entirely by operation of 9(a) because if 9(a) is satisfied in favor of CBL, CBL may cancel and obtain the earnest money regardless of 6(e). It follows that, under West Towne's interpretation, the earnest money language in section 6(e) is meaningless.

¶31 West Towne argues that section 9(a) expressly states that it is the sole means by which CBL may obtain the earnest money. West Towne points to section 9's "sole and exclusive remedy" language and asserts that this must mean that section 9 is the exclusive path to retain the earnest money based on any

breach. The problem with this argument is that section 9 does not purport to cover all scenarios. Section 9, and, in particular, section 9(a), addresses the fate of the earnest money if the sole basis for canceling the contract is a default by West Towne.[6] Section 9 does not address the specific situation covered by section 6(e): the right to terminate based not on a default, but on the parties' failure to reach an easement agreement. Under that different situation, section 6(e) contains a different earnest money forfeiture procedure.

¶32 West Towne also argues that we must adopt its interpretation of the contract because there is no good reason why the parties would have contracted to make it easier for CBL to obtain the earnest money simply because no easement agreement was reached. West Towne, however, provides no support for rewriting the contract language based on this mere observation. *See* ***BV/B1***, 330 Wis. 2d 462, ¶44 (generally speaking, parties may contract to "whatever terms they please").

¶33 To the extent West Towne argues that CBL's interpretation is absurd, West Towne has failed in that effort. It is true that courts avoid contract interpretations that are absurd, *see* ***Tang v. C.A.R.S. Prot. Plus, Inc.***, 2007 WI App 134, ¶40, 301 Wis. 2d 752, 734 N.W.2d 169, but West Towne points to nothing in CBL's interpretation that is absurd. To the contrary, putting additional pressure on West Towne to meet CBL's easement demands by linking the failure

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[6] Section 9(a) of the contract states, in pertinent part:

> In the event of a default by West Towne which remains uncured after ten (10) days written notice from CBL, CBL shall have as its sole and exclusive remedy the right to declare this Contract canceled, in which event the Earnest Money and all interest thereon shall be paid to CBL forthwith ….

to reach an agreement with an easier path to CBL obtaining the earnest money makes sense from CBL's point of view. At most, West Towne presents reasons why this procedure, with its no-notice route to earnest money forfeiture, is not structured to West Towne's advantage. Courts may not void clear contract obligations on this basis.[7]

¶34 Finally, although the parties do not discuss this, we observe that, on a nuts-and-bolts level, CBL's interpretation of section 6(e) makes the section workable across the range of possible breach scenarios. West Towne focuses on the particular sequence of events here in which CBL could have afforded West Towne notice and a ten-day right to cure before exercising its right to terminate under section 6(e). But there appear to be other situations in which West Towne's interpretation would be problematic. As we have seen, under section 6(e), CBL was entitled to terminate the contract on the 105th day after the effective date of the contract if the parties failed to reach an easement agreement. When CBL chose to terminate and additionally sought to retain the earnest money, section 6(e) required that it identify a breach by West Towne. Given this procedure, suppose the breach CBL identified occurred on day 100. Under section 6(e), CBL is required to terminate five days later on day 105. But if CBL must also satisfy the notice requirement in section 9(a), thereby giving West Towne ten days to

[7] In its reply brief, West Towne also cites a case for the proposition that, because CBL did not follow section 9, CBL's receipt of the earnest money is an invalid "penalty" because it is "grossly in excess" of any actual damages CBL would have suffered in the first 20 days of the contract. This argument ignores the fact that termination under section 6(e) did not occur until the 105th day of the contract and could not have occurred earlier than the 90th day. Moreover, this is a bald assertion unsupported by reference to the record. Because this argument was raised for the first time in West Towne's reply brief, we reject it and decline to address it further. *See* ***State v. Jacobs***, 2007 WI App 155, ¶4 n.1, 302 Wis. 2d 675, 735 N.W.2d 535 (we may decline to consider arguments raised for the first time in a reply brief).

cure, then CBL cannot terminate on day 105. Thus, under this scenario, West Towne's interpretation creates a conflict between section 6(e) and section 9(a). Because this observation about a potential conflict is not necessary to our decision, we do not dwell on it further, except to say that our review of the contract reveals provisions that West Towne seemingly could breach within ten days of section 6(e)'s 105-day time limit.

## ***Conclusion***

¶35 For the reasons discussed, we affirm the circuit court.

*By the Court.*—Judgment affirmed.

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