COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP469 **Cir. Ct. No. 2011CV599**

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

BRAD STUBBE AND ROBYN STUBBE,

PLAINTIFFS-APPELLANTS,

V.

TY HAMLAND AND JANA HAMLAND,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V.

CONTEMPORARY REAL ESTATE SERVICES, LLC,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County: MICHAEL MORAN, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Brad and Robyn Stubbe appeal a summary judgment granted in favor of Ty and Jana Hamland and Contemporary Real Estate Services, LLC. The Stubbes sued the Hamlands after the Hamlands backed out of a contract to purchase the Stubbes' home. The Hamlands sought contribution or indemnification from Contemporary, their real estate broker. The circuit court dismissed all claims, concluding the Hamlands were not obligated to proceed with their purchase of the Stubbes' home because the financing contingency in the purchase contract was not satisfied. We agree and affirm.

BACKGROUND

¶2 The following facts are undisputed. On January 21, 2010, the Hamlands submitted an offer to purchase the Stubbes' home for $165,000, using the standard "WB-11 Residential Offer to Purchase" form. The offer contained the following financing contingency:

> **FINANCING CONTINGENCY:** This Offer is contingent upon Buyer being able to obtain a written USDA first mortgage loan commitment as described below, within 30 days of acceptance of this Offer. The financing selected shall be in an amount of not less than $165,000.00 for a term of not less than 30 years, amortized over not less than 30 years. Initial monthly payments of principal and interest shall not exceed $885.76. Monthly payments may also include 1/12th of the estimated net annual real estate taxes, hazard insurance premiums, and private mortgage insurance premiums. The mortgage may not include a prepayment premium. Buyer agrees to pay discount points and/or loan origination fee in an amount not to exceed __% of the loan. If the purchase price under this Offer is modified, the financed amount, unless otherwise provided, shall be adjusted to the same percentage of the purchase price as in this contingency and the monthly payments shall

> be adjusted as necessary to maintain the term and amortization stated above.

The offer further specified that only a fixed rate mortgage with an interest rate of five percent or less would satisfy the financing contingency. It also provided:

> **Buyer and Seller agree that delivery of a copy of any written loan commitment to Seller (even if subject to conditions) shall satisfy Buyer's financing contingency if, after review of the loan commitment, Buyer has directed, in writing, delivery of the loan commitment. Buyer's written direction shall accompany the loan commitment. Delivery shall not satisfy this contingency if accompanied by a notice of unacceptability.**
>
> **CAUTION: The delivered commitment may contain conditions Buyer must yet satisfy to obligate the lender to provide the loan. BUYER, BUYER'S LENDER AND AGENTS OF BUYER OR SELLER SHALL NOT DELIVER A LOAN COMMITMENT TO SELLER OR SELLER'S AGENT WITHOUT BUYER'S PRIOR WRITTEN APPROVAL OR UNLESS ACCOMPANIED BY A NOTICE OF UNACCEPTABILITY.**

¶3 After several days of negotiation, the Stubbes accepted the Hamlands' second counter offer, agreeing to a purchase price of $166,000. Neither the first nor the second counter offer modified the financing contingency in the original offer to purchase. The two counter offers and the original offer to purchase therefore became a binding contract to purchase the Stubbes' home, subject to the financing contingency. *See* ***Gregory v. Selle***, 58 Wis. 2d 367, 374, 206 N.W.2d 147 (1973) (acceptance of offer to purchase creates a binding purchase contract).

¶4 A few days later, the Hamlands received a letter from Envoy Mortgage that stated, "*Congratulations!* Your mortgage loan request on the above-referenced property has been approved." However, the letter went on to note that the Hamlands' approval was subject to certain terms and conditions. The

Hamlands did not provide written consent or direct Contemporary to deliver the Envoy letter to the Stubbes. Contemporary nevertheless faxed the letter to the Stubbes' realtor, who was authorized to accept delivery of documents on their behalf.

¶5 The Hamlands subsequently sent the Stubbes a "WB-41 Notice Relating to Offer to Purchase," which terminated their offer to purchase the Stubbes' home "[d]ue to financing unavailability[.]" Attached to the notice was a statement of credit denial from Envoy Mortgage. It stated the Hamlands' mortgage application had been denied based on a failure to meet USDA underwriting guidelines.

¶6 The Stubbes sued the Hamlands for breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment, and quantum meruit. The Hamlands, in turn, filed a third-party complaint against Contemporary seeking contribution or indemnification. The Stubbes then moved for partial summary judgment on the "narrow issue" of whether delivery of the Envoy letter satisfied the Hamlands' financing contingency. The Hamlands and Contemporary moved for summary judgment on all of the Stubbes' claims.

¶7 The circuit court granted summary judgment in favor of the Hamlands and Contemporary. The court reasoned that delivery of the Envoy letter did not satisfy the financing contingency because: (1) the letter was not a loan commitment, under the terms of the purchase contract; and (2) even if the letter were a loan commitment, the Hamlands never provided written consent for its delivery to the Stubbes. Because the financing contingency was not satisfied, the court concluded the Hamlands did not breach the purchase contract by refusing to close the transaction. The court further concluded the Stubbes could not prevail

on their remaining claims. The court noted that dismissal of the Stubbes' claims would resolve the Hamlands' claims against Contemporary. It therefore entered a judgment dismissing all of the Stubbes' and the Hamlands' claims.

¶8 The Stubbes subsequently filed an amended summons and complaint asserting additional claims against the Hamlands and Contemporary. The Hamlands and Contemporary argued these amended pleadings were improper because the summary judgment had completely disposed of the case at the circuit court level. Consequently, the Stubbes filed a notice of appeal from the summary judgment.

DISCUSSION

I. Final judgment

¶9 As a preliminary matter, the Stubbes contend the circuit court's summary judgment is not a "final judgment" for purposes of appeal. WISCONSIN STAT. § 808.03(1)[1] provides that a party may appeal a final judgment or order to the court of appeals "as a matter of right[.]" A judgment or order is final if it "disposes of the entire matter in litigation as to one or more of the parties." ***Id.***

¶10 Citing ***Wambolt v. West Bend Mutual Insurance Co.***, 2007 WI 35, 299 Wis. 2d 723, 728 N.W.2d 670, the Stubbes argue the summary judgment in this case is not final because it lacks a statement of finality. In ***Wambolt***, our supreme court stated, "[T]o further limit the confusion regarding what documents are final orders or judgments for the purpose of appeal, we will, commencing

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

September 1, 2007, require a statement on the face of a document that it is final for the purpose of appeal." ***Id.***, ¶50. However, the court also stated that, absent a finality statement, appellate courts should "construe ambiguities [in the order or judgment] to preserve the right of appeal." ***Id.*** The court recently clarified that the focus of the ambiguity inquiry is the language of the judgment itself, not the presence or absence of a finality statement. ***Admiral Ins. Co. v. Paper Converting Mach. Co.***, 2012 WI 30, ¶29, 339 Wis. 2d 291, 811 N.W.2d 351. Accordingly, "[t]he absence of a finality statement cannot be used to create ambiguity when it is unambiguous that the order or judgment disposed of the entire matter in litigation as to one or more of the parties." ***Id.***

¶11 Here, the summary judgment unambiguously disposed of the entire matter in litigation as to all of the parties. The judgment stated:

> 4. All of the Plaintiffs' claims shall be and are hereby DISMISSED.
>
> 5. All of the Defendants' claims shall be and are hereby DISMISSED.

The judgment unambiguously dismissed all of the claims at issue in the case. Thus, although it lacked a finality statement, it was nevertheless a final judgment for purposes of appeal.

II. Summary judgment—breach of contract claim

¶12 The Stubbes next contend the circuit court improperly granted summary judgment on their breach of contract claim. We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate where there is no genuine issue of material fact

and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶13 Based on the undisputed facts, we conclude the financing contingency in the purchase contract was never satisfied. We reach this conclusion for two reasons.

¶14 First, the Envoy letter was not a loan commitment, under the financing contingency's terms. The financing contingency required a "loan commitment" for a "USDA first mortgage" with "fixed rate financing" not to exceed five percent. The Envoy letter did not describe itself as a "loan commitment." It did not specify that Envoy would provide a USDA mortgage. It listed the interest rate as "market," rather than specifying a fixed rate of five percent or less. The Envoy letter therefore failed to qualify as a loan commitment under the unambiguous terms of the financing contingency.

¶15 The Stubbes argue there is a disputed issue of material fact as to whether the Envoy letter qualified as a loan commitment. As evidence of this dispute, they point to the affidavit of their expert witness, James Rufledt, the president of Integrity First Bank. Rufledt averred that he would treat the Envoy letter as a loan commitment. However, if contract language is unambiguous, we construe that language according to its plain and ordinary meaning, without considering extrinsic evidence. *See* ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476. Here, the financing contingency unambiguously required a loan commitment for a USDA loan with a fixed interest rate of five percent or less. It is undisputed that the Envoy letter did not satisfy these conditions. The Rufledt affidavit is therefore immaterial because,

under the plain language of the financing contingency, the Envoy letter did not qualify as a loan commitment.

¶16 Second, even if the Envoy letter did qualify as a loan commitment, delivery of the letter to the Stubbes did not satisfy the financing contingency. The purchase contract states that delivery of a written loan commitment to the sellers satisfies the financing contingency "if, after review of the loan commitment, Buyer has directed, in writing, delivery of the loan commitment." The contract also provides that "Buyer's written direction shall accompany the loan commitment." The contract further states, "Caution: .... Buyer, Buyer's lender and agents of Buyer or Seller shall not deliver a loan commitment to Seller or Seller's agent without buyer's prior written approval …." (Capitalization omitted.) Thus, the purchase contract unambiguously requires the buyer's written consent before delivery of a loan commitment to the seller can satisfy the financing contingency. It is undisputed that the Hamlands did not provide written consent for delivery of the Envoy letter to the Stubbes. Consequently, delivery of the Envoy letter did not satisfy the financing contingency.

¶17 A financing contingency in a contract to purchase real estate is a condition precedent to the buyer's performance. *See* ***Gerruth Realty Co. v. Pire***, 17 Wis. 2d 89, 91, 115 N.W.2d 557 (1962). The purchase contract is not enforceable against the buyer until the condition precedent has taken place. *See* ***Woodland Realty, Inc. v. Winzenried***, 82 Wis. 2d 218, 223, 262 N.W.2d 106 (1978). Because the financing contingency in this case was never satisfied, the Hamlands were not obligated to proceed with their purchase of the Stubbes' home. Accordingly, they did not breach the purchase contract by failing to close the transaction. The circuit court properly granted summary judgment on the Stubbes' breach of contract claim.

III. Summary judgment—the Stubbes' remaining claims

¶18 The Stubbes also argue that, even if the circuit court properly granted summary judgment on their breach of contract claim, it improperly dismissed their contractual duty of good faith, unjust enrichment, and quantum meruit claims. The Stubbes have not presented a developed argument that the circuit court erred by dismissing these claims. They do not explain how any factual disputes are material to their contractual duty of good faith claim. They do not describe the elements of unjust enrichment or quantum meruit claims, nor do they explain how the facts of the case relate to these elements. They merely argue that "[t]here was not enough in the summary judgment record to strip the Stubbes of all these claims or the right to have a trial on these claims." We will not abandon our neutrality to develop arguments for a party. ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.