COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1313 **Cir. Ct. No. 2016CV1087**

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

ADRIKOS REAL ESTATE HOLDING LLC,

PLAINTIFF-RESPONDENT,

V.

REID MURPHY AND BEST CYCLES & AUTOS INC.,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Reversed and cause remanded with directions.*

¶1 HAGEDORN, J.[1] Reid Murphy and his company, Best Cycles & Autos, Inc. (Best Cycles), appeal from an order of eviction. Murphy maintains

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

that a tenancy agreement gave him and his company the right to occupy the premises. The circuit court concluded that the tenancy agreement was unenforceable and granted the eviction. We conclude that the agreement was enforceable, but we remand to the circuit court to determine—given the unique facts of this case—whether the tenancy agreement operates as a perpetual lease, and if so, its reasonable duration.

BACKGROUND

¶2 Murphy agreed to sell his business, Best Cycles, along with the associated real estate (the Property) to Andy Haros[2] for $550,000. The parties executed the agreement on February 12, 2016; the agreement provided for a closing date of March 15, 2016. For reasons the parties dispute, the closing was never consummated. Murphy maintains that Haros materially breached the contract by not closing, while Haros insists that the financing contingency in the agreement was never satisfied. That dispute continues in litigation not before us, though it is relevant to the meaning and duration of the lease as explained below.[3]

¶3 On March 18, 2016, the parties executed a second agreement, this time to purchase the Property only (the Real Estate Agreement). The parties' explanation of this agreement differs as well. Murphy avers that the Real Estate Agreement was merely an attempt to mitigate the damages caused by Haros's breach of the February 12 agreement by carving out the real estate and business

[2] Haros is the sole owner of Adrikos Real Estate Holding LLC. Prior to closing on the Property, Haros assigned his rights in the Real Estate Agreement to Adrikos. For ease of reading, we will refer to Haros rather than Adrikos.

[3] The parties provide the case number for the action—2016CV835—but do not provide any additional details.

purchases into separate transactions. Murphy further maintains that he "retains all rights set forth" in the February agreement. Haros, on the other hand, contends that the Real Estate Agreement is completely independent of the February 12 agreement.

¶4 On the day the Real Estate Agreement was to close—indeed, at the same closing table—Haros countersigned a third agreement Murphy had prepared providing that Murphy would have the right to continue occupying the Property Haros was purchasing under certain circumstances (the Tenancy Agreement). The Tenancy Agreement listed Haros and Murphy as the "parties" and read as follows:

> WHEREAS, the parties have entered into an agreement for the purchase and sale of real property located at 18580 West National Avenue in the City of New Berlin and State of Wisconsin (the "Property").
>
> Accordingly, for good and valuable consideration, the parties hereby agree as follows:
>
> 1. The seller, Murphy, shall retain the right to occupy the Property for a period of 15 days following the closing date of the agreement for the purchase and sale of the Property in order to remove his property from the premises and continue to conduct his business.
>
> 2. Thereafter, the seller, Murphy, shall retain the right to occupy the Property until such date that parties reach an agreement for the purchase and sale of Best Cycles and Autos, a business currently owned and operated by Murphy.
>
> 3. Murphy shall have the option to exercise his right to occupy the Property under paragraphs 1 and 2 with no rent due.

¶5 The closing on the Real Estate Agreement was completed on March 30, 2016, and the Property was transferred to Adrikos Real Estate Holding LLC—a company solely owned by Haros. Although the parties differ on the

precise reason, the parties agree that Haros has not purchased Best Cycles and no other agreement to purchase the business has been reached.

¶6 Subsequently, Haros brought this action to evict Murphy from the Property. After a trial, the circuit court made no findings of fact; it instead expressed its view that the Tenancy Agreement made no sense and granted the eviction on the grounds that it was an unenforceable agreement to agree. Murphy appeals this order.

DISCUSSION

¶7 Although multiple issues are raised by the parties, the main question presented is whether the Tenancy Agreement gives Murphy the right to continue occupying the Property rent free. We conclude that the Tenancy Agreement is enforceable. However, we also conclude that the agreement may operate as a perpetual lease and remand for further proceedings to determine a reasonable duration for the lease.

¶8 Interpreting a lease—a written contract—is a question of law we review de novo. ***Tufail v. Midwest Hosp., LLC***, 2013 WI 62, ¶22, 348 Wis. 2d 631, 833 N.W.2d 586. When we interpret contracts, our goal is to carry out the parties' intent reflected in the language of the contract. ***MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust***, 2015 WI 49, ¶37, 362 Wis. 2d 258, 864 N.W.2d 83; *see also* ***Tufail***, 348 Wis. 2d 631, ¶¶25-26 (explaining that the parties' "intent is evidenced by the words they chose"). Contract language is interpreted according to its plain and ordinary meaning, "consistent with 'what a reasonable person would understand the words to mean under the circumstances.'" ***Tufail***, 348 Wis. 2d 631, ¶28 (citation omitted). We do not make the parties' contract for

them; we "determine what the parties contracted to do." ***Id.***, ¶29 (citation omitted).

¶9 Haros' chief argument—tracking the circuit court's decision—is that the Tenancy Agreement is unenforceable because it is merely an agreement to agree.[4] Haros is correct that an agreement to make an agreement at some future time is unenforceable. *See* ***Dunlop v. Laitsch***, 16 Wis. 2d 36, 42, 113 N.W.2d 551 (1962). But we read the Tenancy Agreement differently.

¶10 Paragraph one provides that Murphy has the right to occupy the Property for the fifteen days following closing. Paragraph two applies "Thereafter"—i.e., after the fifteen days has expired. It allows Murphy to continue to occupy the Property until such time as the parties reach an agreement regarding Best Cycles. These paragraphs compliment each other. Each provides a separate occupancy right covering a different period of time. The Tenancy Agreement, plainly read, means if the parties had reached an agreement for the sale of Best Cycles within the fifteen days after closing, then Murphy's right to occupy the Property would end after the fifteen days. Should an agreement for the

[4] Haros additionally argues that because the real estate was transferred to Adrikos—the company of which he is the sole owner—the Tenancy Agreement is unenforceable because it was signed by him only in his personal capacity. This does not pass the smell test. As the sole member of Adrikos, Haros was an agent of his company, and "[t]he act of any member … for apparently carrying on in the ordinary course of business the business of the limited liability company binds the limited liability company." *See* WIS. STAT. § 183.0301(1) & (2). Haros' brief and conclusory argument does not explain how he could have signed the Tenancy Agreement, which controls occupancy rights to the Property, and signed an agreement to purchase the Property the same day, but yet be free from any obligations in the Tenancy Agreement. We need not address insufficiently developed arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

Haros also moved to strike portions of Murphy's reply brief. We see no merit to this motion and deny it.

sale of Best Cycles fail to materialize, however, the contract explicitly allows Murphy to continue to occupy the Property beyond the fifteen days. Paragraph three makes clear all occupancy under paragraphs one or two is rent free. This is not an agreement to agree; it is an agreement that has, as one of the triggering conditions, a future agreement.

¶11 This brings us to Haros' alternate argument that because the Tenancy Agreement does not specify a particular end date to Murphy's occupancy, it is terminable at will, and therefore he could rightfully evict Murphy at any time.[5] As support, Haros cites ***Irish v. Dean***, 39 Wis. 562, 568 (1876), for the general proposition that an agreement lacking a duration clause is terminable at will by either party. However, the Tenancy Agreement does contain a duration clause—the lease will operate "until [the] parties reach an agreement for the purchase and sale of Best Cycles and Autos." Thus, the agreement is not terminable at will.

¶12 While the Tenancy Agreement is not terminable at will, it nevertheless raises the question of whether it will ever be terminable. It is unclear how long it will take for the parties to "reach an agreement for the purchase and sale of Best Cycles and Autos" (as the contract provides) or whether such an

[5] Haros also claims the Tenancy Agreement is invalid due to lack of consideration. A party who seeks "to avoid a contract has the burden of proving failure of consideration." ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 838, 520 N.W.2d 93 (Ct. App. 1994). Haros' argument appears to boil down to an assertion that no money was exchanged. This is not enough to rebut the presumption of consideration, particularly in light of the contract's plain invocation of the broader Real Estate Agreement being context for this Tenancy Agreement. In light of the scant development in Haros' argument, we will not address it further. *See* ***Pettit***, 171 Wis. 2d at 646-47 (court of appeals need not address undeveloped arguments).

agreement will ever occur. In that respect, the agreement may operate as a perpetual lease.

¶13 Wisconsin law does not favor perpetual contracts, and we "are 'reluctant to interpret a contract as providing for a perpetual contractual right unless the intention of the contracting parties to provide for the same is clearly stated.'" ***MS Real Estate Holdings, LLC***, 362 Wis. 2d 258, ¶31 (citation omitted). Courts should be reluctant to interpret a contract as creating a perpetual right in any contract where "there exists a visible possibility that a contract might extend in practical perpetuity." ***Capital Investments, Inc. v. Whitehall Packing Co.***, 91 Wis. 2d 178, 194, 280 N.W.2d 254 (1979).

¶14 Leases for a perpetual duration are construed similarly: we interpret leases to avoid a perpetual term whenever possible. *See* 49 AM. JUR. 2D *Landlord and Tenant* § 113 (2006). "It is well established that perpetuities are not favored in the law, and that an instrument will not be construed as creating a perpetuity unless the intention to do so is clear and plainly manifest." ***Gray v. Stadler***, 228 Wis. 596, 600, 280 N.W. 675 (1938); *see also* ***Harry v. C & C Admin., LLC***, No. 2015AP2054, unpublished slip op. ¶11 (WI App June 8, 2016), *review denied*, 2017 WI 8, ¶1, 374 Wis. 2d 156, 895 N.W.2d 841 (quoting ***Stadler*** and explaining that "a lease 'will not be construed as creating a perpetuity'" unless the parties clearly intend to do so).

¶15 Just because the plain language of the lease may appear to result in a perpetual occupancy right does not mean that the parties clearly intended it to vest a perpetual right in one of the parties. *See* ***Stadler***, 228 Wis. at 600 (refusing to interpret a lease without a specified number of automatic renewals as operating in perpetuity because "[t]here is nothing in the document … that indicates that the

parties had in mind the creation in the lessee of a right in perpetuity"); *see generally* ***Harry***, No. 2015AP2054, unpublished slip op. ¶12 (agreeing with other jurisdictions that an agreement that does not demonstrate "an unequivocal intention" that it is to operate in perpetuity will not be treated as such). Language indicating an intent to create a lease in perpetuity includes terms such as "forever," "for all time," and "in perpetuity." *See* 49 AM. JUR. 2D *Landlord and Tenant* § 144 (2006). Absent such specific language, we assume the parties did not create a perpetual right of occupancy.

¶16 Despite a perpetual occupancy right being a potential outcome based on the language of the Tenancy Agreement, the parties did not clearly indicate in their contract language that this result was intended. In such circumstances, the court should "imply a reasonable time for performance." *See* ***Farley v. Salow***, 67 Wis. 2d 393, 402, 227 N.W.2d 76 (1975). "What constitutes a reasonable time within the facts of a given case presents a question of fact." ***Delap v. Institute of Am., Inc.***, 31 Wis. 2d 507, 512, 143 N.W.2d 476 (1966) (quoting ***Shy v. Industrial Salvage Material Co.***, 264 Wis. 118, 124, 58 N.W.2d 452 (1953)).

¶17 In this limited eviction proceeding, this court is unable to determine whether the agreement operates as a perpetual lease. That possibility depends in part on the collection of rights that may exist in the February agreement currently being litigated or other agreements between the parties, none of which are before us on appeal. The parties dispute the extent and applicability of the agreement to purchase the business—the apparent backdrop to the Tenancy Agreement. If Murphy is indeed under no obligation to sell Best Cycles, for example, this could result in a perpetual rent-free occupation of the Property. Such an outcome would require the court to determine a reasonable duration for that occupancy right—a finding also dependent on the various rights and responsibilities flowing from

broader business dealings between the parties. Therefore, we remand to the circuit court to determine whether the Tenancy Agreement does operate as a perpetual lease, and if so, to determine a reasonable duration for the lease given the unique facts of this case.

CONCLUSION

¶18 The terms of the Tenancy Agreement do not constitute an unenforceable agreement to agree, but rather a valid agreement with a subsequent agreement as a triggering event. It is valid and enforceable. However, because the Tenancy Agreement may operate as a perpetual agreement and the parties did not clearly indicate that as their intent, the circuit court must determine whether the Tenancy Agreement constitutes a perpetual agreement, and if so, what constitutes a "reasonable time" for its duration. Therefore, we reverse the circuit court's order granting the eviction and remand with instructions for determining the proper duration of the Tenancy Agreement.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.