COURT OF APPEALS
DECISION
DATED AND RELEASED

September 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-3227

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

RICHARD ZEININGER and URSULA ZEININGER,

Plaintiffs-Appellants,

v.

AFFORDABLE BUILDERS OF WISCONSIN, INC., PETER VANDER WIELEN and SUSANN VANDER WIELEN,

Defendants-Respondents.

APPEAL from an order of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

BROWN, J. After protracted litigation involving the construction of a house, the builder agreed to buy it back to settle the claim. The homeowners, Richard and Ursula Zeininger, agreed that this settlement

could be subject to the construction firm's ability to obtain financing. On the last day of the financing period, a letter was delivered to the Zeiningers indicating that the construction firm's owners, Peter and Susann Vander Wielen, had obtained the necessary loan. The Zeiningers claim that the notice of financing was defective under the law governing real estate purchase contracts. We hold, however, that the overall transaction was dominated by the agreement to settle the lawsuits and that the notice was sufficient. We therefore affirm the trial court's order that the terms of the settlement be specifically performed.

In May 1992, the Zeiningers entered into a contract with Affordable Builders of Wisconsin, Inc., the Vander Wielens' construction firm. The deal required Affordable Builders to build a home to specifications set by the Zeiningers. The project was finished in about ten weeks, near the end of July.

The Zeiningers apparently were dissatisfied with the work, and in May 1993, they brought suit against Affordable Builders and Peter Vander Wielen alleging that the house was negligently constructed. The Zeiningers subsequently amended their claim to include Susann Vander Wielen and to add allegations that she misrepresented the time needed for construction. The Vander Wielens, in turn, responded with claims of their own. They alleged that

the Zeiningers had failed to meet the payment schedule set out in the construction contract.

During the course of discovery and pretrial scheduling, the court ordered the parties to try mediation.[1] This move met with success and the parties entered into a settlement agreement on September 13, 1994.

The settlement agreement had two main parts. The terms pertaining to the real estate transfer, including the financing provision, were set out on a standardized WB-11 "Residential Offer to Purchase." Here, Affordable Builders agreed to buy the house back from the Zeiningers for $102,300. This document, however, referenced an attachment which set out the terms for settling the litigation involving the Zeiningers, Affordable Builders and each of the Vander Wielens.[2] Nevertheless, the financing provision is at the focus of this appeal.

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[1] The trial court acted pursuant to § 802.11(1)(m), STATS., which grants the court general authority to enter pretrial orders which "may aid in the disposition of the action." We applaud the trial court's effort to facilitate an out-of-court settlement and note that § 802.12(2), STATS., endows the trial court with specific authority to order "alternative dispute resolution."

[2] The agreement set out in the attachment provided, in relevant part:

> The parties hereto acknowledge that Affordable Builders of Wisconsin, Inc. is offering to purchase the Zeininger's home as a compromise to … [the lawsuit]. Richard Zeininger, Ursula Zeininger, Affordable Builders of Wisconsin, Inc., Peter Vander Wielen and Susann Vander Wielen do hereby agree that if the Zeiningers accept … [their offer] and if this sale is consummated, … [the lawsuit], including all claims and counterclaims therein, shall be dismissed, with prejudice to all parties, without costs to any party ....

The financing contingency provided the Vander Wielens with thirty days to obtain a variable-rate loan for the full purchase price at a rate for the first year not to exceed 9.5%. If they could not get a financing commitment within this time frame, the Zeiningers had the option to terminate the agreement.

After business hours on Friday, October 13, the last day of the financing period, a letter from Transamerica Financial Services was slipped through the mail slot of the Zeiningers' attorneys. It stated:

To whom it may concern:

> The loan applied for by Mr. and Mrs. Pete Van Der Wielen [sic] has been approved at Transamerica Financial Services, subject to us receiving a valid title with proper closing at Evans Title Company in Appleton, WI.
>
> This approval is valid until 11/30/94.

Nonetheless, on Monday morning the Zeiningers, through their attorney, sent a facsimile (followed by a letter) to the Vander Wielens' attorney invoking their right to cancel because they did not receive sufficient notice of financing within the thirty-day limit.

In November, the Vander Wielens[3] moved for an order compelling enforcement of the settlement agreement. The Zeiningers raised several

[3] The record demonstrates that there has been some confusion about who comprises the defending parties. Although "Affordable Builders of WI, Inc." was specifically named as the party bringing the motion, the trial court's subsequent order refers to the "defendant Affordable Builders of Wisconsin, Inc." *and* to the "defendants" who presumably include both Affordable Builders and each of the Vander Wielens. The Zeiningers' argument concerning this issue and our substantive conclusion are set out in the body of the opinion.

arguments before the trial court attempting to show that the agreement had been properly terminated. Each pertained to specific details of the standardized purchase agreement which they claimed had not been fulfilled. *See, e.g.*, ***Woodland Realty, Inc. v. Winzenried,*** 82 Wis.2d 218, 223-24, 262 N.W.2d 106, 109 (1978). We will review each of these charges seriatim.

Before embarking on our analysis, it is important to emphasize that this appeal concerns the interpretation of a *settlement* agreement, not a garden-variety real estate purchase agreement.[4] In either case, we are guided by contract law. *See* ***Fleming v. Threshermen's Mut. Ins. Co.,*** 131 Wis.2d 123, 132, 388 N.W.2d 908, 911 (1986). However, when reviewing the particular circumstances here presented, we may relax the rules of interpretation to give force to the important policy of encouraging extra-judicial settlement of disputes. *See* ***Radlein v. Industrial Fire & Casualty Ins. Co.,*** 117 Wis.2d 605, 622, 345 N.W.2d 874, 883 (1984); ***Peiffer v. Allstate Ins. Co.***, 51 Wis.2d 329, 337-38, 187 N.W.2d 182, 185-86 (1971). Nonetheless, interpretation of a settlement agreement presents a question of law which we review de novo. *See* ***Borchardt v. Wilk,*** 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). With these principles in hand, we now turn to the specific issues here raised.

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[4] We thus dismiss the Zeiningers' concern that our analysis may set dangerous precedent because it will affect the manner in which the standard WB-11 "Residential Offer to Purchase" is interpreted. As explained above, our analysis is tempered because we are faced with a settlement agreement. This was not an arm's-length, market transaction. While a standardized form was used to lay out some of the terms, it specifically referenced a separate attachment which operated to dismiss the suit upon consummation of the sale. This latter provision expressed the primary reason why the Vander Wielens made the purchase offer (that is, to settle the lawsuit) and thus dominated the overall transaction.

The Zeiningers first contend that the financing provision was not fulfilled because the eleventh-hour notice named "Mr. and Mrs. Pete Van Der [sic] Wielen" and made absolutely no reference to Affordable Builders. They then cite several cases which all emphasize the important policy of keeping a corporation distinct from its shareholders. *See, e.g.,* ***Stebane Nash Co. v. Campbellsport Mut. Ins. Co.,*** 27 Wis.2d 112, 121-22, 133 N.W.2d 737, 743-44 (1965). They seem to suggest that finding this notice defective because it did not indicate that "Affordable Builders" had obtained the loan will serve this goal.

We do not accept the Zeiningers' legal policy arguments because the record indicates that both Affordable Builders and each of the Vander Wielens were within the scope of the settlement agreement. While Peter signed the purchase offer as president of Affordable Builders, other sections of the settlement agreement make clear references to both Peter and Susann as individuals. We conclude, therefore, that this alleged defect was not substantial enough to controvert the purpose of the financing provision; that is, give the Vander Wielens (and their construction firm) some time to obtain financing so that they could buy the troubled house and bring an end to the litigation. *See* ***Borchardt***, 156 Wis.2d at 427, 456 N.W.2d at 657.

The Zeiningers next argue that the Vander Wielens' financing commitment was defective because it was only valid through November 30, 1994, while the settlement agreement specified that closing would not occur until at least December 13, 1994. The trial court dismissed these concerns

reasoning that the parties would likely make an appropriate adjustment in the closing date.

Nevertheless, the Zeiningers claim that the validity of the settlement agreement should not turn on "[t]he possible happening of future events." However, they overlook the current factual record. A submission from the Vander Wielens' lender indicates that the closing date problem could be easily circumvented by closing the loan in November, but leaving the funds in escrow with the title company. The Vander Wielens also submitted an executed agreement between themselves and the title company which would allow this second transaction to go forward.

Although the Zeiningers stress that there was no indication that the Vander Wielens would be able to secure these secondary commitments at the time the notice of financing was delivered, they fail to present any evidence demonstrating how they were negatively affected. We do not believe that this minor flaw, in and of itself, is sufficient grounds for upsetting the settlement. The financing contingency served only to protect the Vander Wielens should they not be able to get a loan. Once they approved, and sent notice to the Zeiningers, they signaled their intent to carry out the main element of the settlement, that is, to buy the house back.

Similarly, the Zeiningers also complain that the financing terms that the Vander Wielens actually secured did not meet the specifications laid out in the settlement. But they still fail to demonstrate how they were adversely affected. In substance, the settlement agreement required the Vander Wielens

to buy the house for $102,300, contingent only on their ability to obtain a variable rate loan not to exceed 9.5% for the first year. The lender, however, gave the Vander Wielens access to $115,000 at a fixed rate of 14%. As the Zeiningers illustrate, the actual loan subjects the Vander Wielens to monthly payments several hundred dollars more than the maximum they were willing to accept under the settlement agreement.

We acknowledge that these differences could be described as "material deviations" in a common real estate purchase agreement. *See* ***Woodland Realty***, 82 Wis.2d at 224, 262 N.W.2d at 109. Nevertheless, the Zeiningers have not demonstrated how the Vander Wielens' acceptance of stiffer loan terms affected their ability to sell the house at the $102,300 price specified in the settlement agreement.

The Zeiningers' final argument is that the after-hours delivery of the financing commitment was not timely. The procedure outlined in the standardized purchase form required the Vander Wielens to physically deliver a document evidencing that they had obtained the necessary financing before thirty days had expired. Even after thirty days, the deal was not dead until the Zeiningers delivered written notice informing the Vander Wielens that they were terminating the contract. Here, the Zeiningers point to a facsimile sent to the Vander Wielens early the following Monday in which they officially noticed their intent to terminate the purchase agreement. However, the language of the letter itself demonstrates that they were fully aware that the Vander Wielens had obtained the needed financing.

The letter describes how the notice delivered that prior Friday "hardly fulfills the requirements of the Offer to Purchase …. It hardly constitutes a financing commitment at all." However, the Zeiningers have not provided a factual basis demonstrating the cause of their confusion, nor have they shown how the Vander Wielens' slipshod delivery affected their ability to dispose of the house at the agreed price. As a result, after reviewing the affidavits and other record material submitted by the parties, we conclude that the letter delivered to the Zeiningers late Friday afternoon was a loan commitment under the terms of the settlement agreement.

Since the Zeiningers have failed to present any factual basis suggesting that the terms of the settlement agreement have not been satisfied, we conclude that the Vander Wielens are entitled to pursue the rights afforded them under the agreement. We therefore affirm the trial court's order compelling the Zeiningers to fulfill the terms of this settlement agreement.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.