COURT OF APPEALS
DECISION
DATED AND RELEASED

January 31, 1996

No. 95-0850

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

RUSSELL A. JORGENSEN and JEAN M. JORGENSEN,

Plaintiffs-Appellants,

v.

DEAN G. KATZ and JUDY C. KATZ,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Waukesha County: MARK GEMPELER, Judge. *Reversed and cause remanded*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Russell A. and Jean M. Jorgensen appeal from a judgment granting summary judgment dismissing their action against Dean G. and Judy C. Katz for the Katzes' alleged failure to make a good faith effort to satisfy the financing contingency in a residential offer to purchase. We conclude that competing inferences arise from the totality of the record which preclude summary judgment. We reverse the judgment and remand the action.

The record reveals the following undisputed facts. On February 4, 1993, the Katzes offered to purchase for $67,000 real estate owned by the Jorgensens. The Katzes' father, Gerald Katz, a licensed real estate broker, prepared the offer to purchase. The offer was made contingent upon the Katzes' ability to obtain "a firm written commitment for a conventional mortgage loan for $60,300.00 with initial interest not to exceed 8.125% per annum for a term of not less than thirty (30) years." By the Jorgensens' counteroffer, the purchase price was reduced to $65,500 and the closing date moved to on or before March 16, 1993.

On February 12, 1993, the Katzes applied for a mortgage of $67,950 with an initial interest rate of 6% at The Equitable Bank S.S.B. A credit report was ordered and completed by February 24, 1993. That report revealed a number of delinquent credit accounts and an outstanding judgment against Judy. By a letter of March 25, 1993, the Katzes were formally notified that their application had been rejected because of delinquent credit obligations.

The Jorgensens' property was subject to a sheriff's foreclosure sale on April 12, 1993. The Katzes' $50,500 bid was accepted. Having cleared up credit problems and being gifted money by Gerald toward a larger down payment, the Katzes purchased the Jorgensens' property with a mortgage from Equitable.

The Jorgensens commenced this action for breach of contract. The complaint alleges that the Katzes failed to take reasonable and necessary efforts to procure financing at the terms and conditions indicated in the offer to purchase. As damages they sought the difference between the purchase price of $65,500 and the price at which the property was sold of $50,500. The trial court concluded that there was no dispute of fact that the Katzes made reasonable efforts to obtain financing.[1]

[1] The trial court relied on an affidavit from a loan officer at Equitable stating that even if the Katzes had applied for a loan within the terms of the offer to purchase, the loan would have been denied. We read the trial court's decision to assume that there was a breach of contract but that it was not causal to the Jorgensens' damages.

We do not review a trial court's decision granting summary judgment; we independently apply the methodology set forth in § 802.08(2), STATS., to the record de novo. *See* ***Wegner v. Heritage Mut. Ins. Co.***, 173 Wis.2d 118, 123, 496 N.W.2d 140, 142 (Ct. App. 1992). The methodology we apply in summary judgment analysis has been stated often and we need not repeat it. ***Id.*** Summary judgment should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

The moving party bears the burden of demonstrating the absence of a genuine issue as to any material fact with such clarity as to leave no room for controversy. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). The inferences to be drawn from the moving party's proofs should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. ***Id.*** at 338-39, 294 N.W.2d at 477.

Wisconsin recognizes that "`every contract implies good faith and fair dealing between the parties to it, and a duty of cooperation on the part of both parties.'" ***Super Valu Stores v. D-Mart Food Stores***, 146 Wis.2d 568, 577, 431 N.W.2d 721, 726 (Ct. App. 1988) (quoting ***Estate of Chayka***, 47 Wis.2d 102, 107 n.7, 176 N.W.2d 561, 564 (1970)). There is no Wisconsin case which defines the efforts required of real estate purchasers to satisfy the financing contingency in an offer to purchase. The Jorgensens suggest that the duty of good faith is breached when the loan applied for does not precisely meet the terms stated in the offer to purchase.[2] We decline to adopt such a rule, particularly in light of the language in the offer to purchase which gives the buyer the option of obtaining financing upon different terms.[3] Whether a purchaser has exercised

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[2] The Jorgensens cite ***Wiggins v. Shewmake***, 374 N.W.2d 111 (S.D. 1985); ***Schottland v. Lucas***, 396 So.2d 72 (Ala. 1981); and ***Beekay Realty Corp. v. Cayre***, 256 So.2d 539 (Fla. App. Ct. 1972), in support of their proposition. We do not read these cases to establish the per se rule the Jorgensens suggest.

[3] The financing contingency provides in part:

> Buyer shall furnish Seller with firm written mortgage loan commitment for stated financing or may furnish Seller with firm written mortgage loan commitment for financing with terms that may be different than

good faith in trying to obtain financing so as to complete the transaction under the offer to purchase is a matter to be determined on a case-by-case basis.

Looking at the totality of the summary judgment record here, we conclude that competing inferences arise as to whether the Katzes exercised reasonable diligence in obtaining financing in order to complete the transaction with the Jorgensens. We look to three circumstances as giving rise to an inference which defeats summary judgment. First, in just a little more than two weeks from the letter rejecting their loan application, the Katzes were able to obtain a loan for $55,000 from Equitable. Second, the severe credit problems which prevented the approval of the Katzes' loan were cleared up in short order. Additionally, the Katzes applied for a loan that was not only in excess of the purchase price and in excess of the amount stated in the financing contingency in the offer to purchase, but which sought a lower interest rate as well.

The Katzes claim that they were only able to obtain the subsequent loan because money gifts from Gerald increased their down payment and eliminated the need for mortgage insurance. However, a factual issue exists as to whether those gifts were made early enough to obtain the financing within the terms of the offer to purchase. Gift affidavits were dated March 18 and 23, 1993, for a total gift of $6500. Similarly, the record reflects that in early February and March 1993, Judy was making payments to satisfy accounts listed as delinquent on the credit report.

(..continued)

> above, within 25 days of acceptance of this offer to purchase, or Seller may after said days at Seller's option, cancel this agreement provided Seller has canceled this agreement prior to receipt of required financing commitment, and all monies paid by Buyer shall be returned to the Buyer in accordance with the terms of the offer to purchase. In the event Buyer applies for financing with terms different from the financing terms set forth herein, and receives a firm written mortgage loan commitment for such financing, Buyer waives the right to cancel this contract on the basis of such difference(s) in the terms of said financing.

The Jorgensens argue in their reply brief that this clause operates to protect the seller from a buyer who does not make a good faith effort to obtain financing. To the extent their argument suggests that the clause permits a buyer to obtain financing on terms less favorable than those stated in the contract, their point may be well taken. However, we need not decide the effect of the clause here.

The Katzes argue that the March 25 rejection letter,[4] gift money and clearing of the credit problems came too late to save the transaction under the offer to purchase. They contend that once the closing date passed, the offer to purchase was null and void and they no longer had any duty to act. Although it is true that the offer included a March 16, 1993 closing date, the record gives rise to an inference that the parties continued the offer to purchase after the closing date passed. The affidavit of the Katzes indicates that after the rejection letter was received, they made inquiries at two other banks about the possibility of obtaining a loan "so as to enable us to close."[5] The affidavit also acknowledges that they continued to put effort into closing with the Jorgensens until April 9, 1993, when the Katzes learned of the pending foreclosure sale. A factual issue exists as to whether the parties continued the offer to purchase and whether good faith efforts to obtain appropriate financing were made.[6]

While we do not decide here whether the Katzes were obligated to seek a loan on the precise terms set forth in the offer to purchase, we note that they attempt to justify their decision to seek a loan in an amount in excess of that stated in the offer. The affidavits establish that an additional $10,000 was added to the loan amount for alterations, repairs and improvements to the property. However, the offer to purchase acknowledged the Katzes' knowledge that the property was in need of repair and stated that the sale was an "as is" condition. Gerald's affidavit indicates that when he drafted the offer to purchase, he was aware that the property was in need of substantial repairs, alterations and improvements and that the costs would be approximately $10,000. Thus, rather than supporting a conclusive finding that the Katzes acted in good faith in seeking the loan for an excess sum, a competing inference arises

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[4] The Katzes argue that they did not have an obligation to make a second loan application when the initial application was not even decided until the closing date had passed. They submit that such an application would have been futile.

[5] The record is silent as to the possible terms the Katzes inquired of.

[6] The affidavit of the Katzes' attorney explains that one of the "apparent impediments" to financing was a judgment against Judy. The affidavit states that it took Judy's attorney "a period of time beyond the original closing date in the offer to purchase to obtain a release and dismissal of that judgment." However, the record is silent as to when the judgment was released. In light of the loan Equitable made after the Katzes' purchase at the foreclosure sale, just days after the Katzes apparently abandoned any notion of completing the sale, an issue of fact also exists as to how long the judgment remained an impediment to the loan.

that the financing contingency did or should have anticipated the need for additional funds.

Finally, the Katzes argue that even if they concede arguendo that they breached the offer to purchase, as a matter of law there were no damages. Their argument is based on what they characterize as "uncontested evidence" that they would have been rejected for a loan even if they had requested the amount specified in the contract. The "uncontested evidence" is the affidavit of Equitable's loan officer stating that due to credit problems, the Katzes would have been denied a loan on the terms stated in the offer. This proof is valid only as to what Equitable would have done. The financing contingency was not limited to one bank. While we do not decide what obligation the Katzes had to seek a loan at other financial institutions, summary judgment cannot be based on speculation that suitable financing was unattainable. This is particularly true in light of the fact that the Katzes were able to purchase the property days later and intended to do so at the contract price.[7] We have already determined that the record gives rise to issues of fact as to the ability of the Katzes to timely obtain appropriate financing. These factual issues likewise bear on whether the alleged breach of the contract was causal as to the Jorgensens' damages.

Upon reversal of the judgment, we reject the Katzes' contention that the appeal is frivolous. Their motion for costs and attorney's fees under RULE 809.25(3), STATS., is denied.

By the Court.—Judgment reversed and cause remanded.

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

[7] The Katzes' affidavit indicates that they were prepared to bid as much as $65,000 at the sheriff's sale. The Katzes' first bid was $50,500 and there were no competing bids.