COURT OF APPEALS
DECISION
DATED AND RELEASED

January 28, 1997

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. 95-3064

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

Renaissance Faire Limited Partnership,
A Wisconsin Limited Partnership,

Plaintiff-Appellant,

v.

Welding Services Group, An Illinois General Partnership, The Flex-Cable/Kirkhof Group, An Illinois General Partnership, Balaguer Corp., An Illinois Corporation, Orbitron Holding Company, An Illinois Corporation, Richard Balaguer and Scott A. Lefky,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: ARLENE D. CONNORS, Judge. *Reversed and cause remanded with directions*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

WEDEMEYER, P.J. Renaissance Faire Limited Partnership, a Wisconsin limited partnership (hereinafter, "Renaissance") appeals from a judgment in favor of Flex-Cable/Kirkhof Group, an Illinois limited partnership (hereinafter, "FCKG") dismissing all of its claims against FCKG.

Renaissance raises several instances of trial court error. We however deem two issues to be dispositive: (1) whether the trial court erred in not deciding as a matter of law whether the May 1st agreement satisfied the statute of frauds, §§ 704.03(1) and 706.02(1)(c), STATS.; and (2) whether the trial court erred in concluding that the agreement was indivisible. Because the trial court erred in not deciding as a matter of law whether the May 1st agreement was enforceable under the statute of frauds, and because it erroneously concluded that the agreement was indivisible, we reverse and remand with directions.

I. BACKGROUND

This is the second appeal relating to an agreement that allegedly existed between Renaissance and FCKG.[1] To assist the reader's understanding, we briefly summarize the history of the parties' relationship.

On May 1, 1987, Renaissance and FCKG executed a written agreement. This agreement provided that Renaissance would lend $150,000 to FCKG to enable it to acquire certain assets to be used in FCKG's business. Upon receipt of the loan, FCKG, in turn, agreed to lease from Renaissance 40,000 square feet of commercial real estate for twenty years. As further consideration, FCKG granted Renaissance an option, which expired June 1, 1988, to purchase a one-third interest in FCKG for the sum of $300,000. FCKG agreed to provide Renaissance with financial statements and other relevant information so that Renaissance could determine whether to exercise the option. In addition, both parties agreed to use their "best efforts" to obtain a $500,000 loan for FCKG from the United States Department of Commerce Economic Development Administration (EDA). This was to be done on or before December 1, 1987.

[1] The decision emanating from the first appeal can be found at ***Renaissance Faire Limited Partnership v. Welding Services Group***, No. 93-1270 (Wis. Ct. App. Jan. 11, 1994, unpublished).

The agreement further provided that if the loan could not be secured from the EDA, Renaissance would have the option to lend $500,000 to FCKG on or before December 1, 1987. If Renaissance allowed the option to lapse, FCKG then had the option to cancel the lease or require Renaissance to lend it another $150,000. If FCKG elected to cancel the lease, it had to give written notice on or before December 5, 1987.

On May 6, 1987, Renaissance made the initial loan to FCKG of $150,000. FCKG, however, did not execute a lease with Renaissance, nor did the principals of FCKG respond to any requests for financial data about FCKG. Furthermore, neither party made a formal application for a loan from the EDA. On December 5, 1987, FCKG gave written notice of its cancellation of obligation to enter into the lease with Renaissance because it did not receive the $500,000 from EDA or Renaissance. Prior to giving notice, FCKG repaid the $150,000 loan.

In January 1990, Renaissance commenced an action against FCKG and its partners for breach of contract and misrepresentation. We reversed a summary judgment granted to FCKG and remanded the case for trial on the breach of contract and misrepresentation claims. At the trial, the jury found in effect that FCKG did not breach its contract with Renaissance and was not liable for deceptive misrepresentation. Renaissance now appeals only from the judgment dismissing the breach of contract claim.[2]

II. DISCUSSION

[2] Renaissance asserts the following additional points of error: (1) If, as the trial court ruled, the statute of frauds defense presents a jury issue, it committed reversible error in failing to instruct the jury on the subject of which terms had to be in writing to satisfy the statute, and in framing question 1 in the verdict without references to the applicable statute and question 2 in such a way as to permit an inconsistent jury verdict; (2) even if the contract to make a lease was unenforceable under the statute of frauds, Renaissance was entitled to have the jury determine whether the defendants breached their obligation to provide financial information; (3) that the defendants are equitably and judicially estopped from asserting a statute of frauds defense; and (4) that the trial court erred in excluding extrinsic and parol evidence relevant to whether defendants Balaguer and Lefky signed the May 1, 1987 agreement in their individual capacities. We decline to address these additional issues, however, because our decision disposes of the case. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

A. Statute of Frauds.

Renaissance first contends that the trial court erred in not deciding as a matter of law whether the May 1st agreement was enforceable under the statute of frauds. Sections 704.03(1) and 706.02(1)(c), STATS.[3]

Whether a given set of facts, i.e., documents, complies with the provisions of a statute, i.e., the statute of frauds, is a question of law which we review independently. ***First Bank v. H.K.A. Enters., Inc.***, 183 Wis.2d 418, 423, 515 N.W.2d 343, 345 (Ct. App. 1994). When a statute of frauds defense is raised on given facts, the task of the court addressing the defense is to apply the calls of the statute to the documents claimed to constitute the contract to conclude whether there is compliance. Here such an exercise did not take place at the trial court level and thus we reverse and remand with directions.

There is no gainsaying that the documents with which the trial court and the parties were concerned consisted of an agreement to lease, a lease form with blanks, a promissory note, and a document of guaranty. From our

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[3] Section 704.03(1), STATS., provides in pertinent part:

> ORIGINAL AGREEMENT. A lease for more than a year, or a contract to make such a lease, is not enforceable unless it meets the requirements of s. 706.02 and in addition sets forth the amount of rent or other consideration, the time of commencement and expiration of the lease and a reasonably definite description of the premises, or unless a writing signed by the landlord and the tenant sets forth the amount of rent or other consideration, the duration of the lease and a reasonably definite description of the premises and the commencement date is established by entry of the tenant into possession under the writing.

Section 706.02(1)(c), STATS., provides in pertinent part:

> Transactions under s. 706.01 (1) shall not be valid unless evidenced by a conveyance which: (c) Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered.

review of the record, despite evident ambivalence on the trial court's part as to the enforceability of the total contractual relationship between the parties, we are left with the trial court's bottom line decision at motions after verdict that "it was a jury question whether all the essential terms were reduced to writing, or the material terms, if you wish to use that designation, reduced to writing."[4]

The documents that the trial court had before it contained information relating to the identity of the leasehold interest, the term of the lease, the time of its commencement, the rate of rental per square foot, and the area and location contemplated to be rented. Attached to the May 1, 1987 agreement was a form lease containing a number of blanks relating to "lessor's work," "lessee's work," "use of the premises," the "security deposit" and "personal guarantees of the lease obligation." The state of these documents is undisputed. Thus, it was for the trial court to decide whether any of the information that could be placed in the blanks was a material term, condition, reservation or contingency upon which the leasehold interest would arise, be

[4] From the very beginning of the trial, the trial court concluded that the agreement between the parties was clear and unambiguous and therefore, extrinsic or parole evidence would not be admitted. At the close of Renaissance's case, FCKG moved for a directed verdict arguing alternatively that no contract existed between the parties or that any contractual relationship was unenforceable because of noncompliance with the statute of frauds. The trial court ruled there was a contract.

After the evidentiary phase of the trial was completed, FCKG again moved for a directed verdict at which time, the trial court ruled that the contract was enforceable. In so ruling, the court explained, in part, that the blanks in the lease form "did not rise to the level of material impact.... These gentlemen agreed on all the major points. They had some minor points that had to be ironed out.... They had a general understanding. I think the lessor's work and the lessee's work was minor.... It's clear to me that the fundamental elements of the contract were ... clearly stated in the May 1, 1987 agreement."

At the special verdict and instruction conference, FCKG asked for a contract formulation question and a separate statute of frauds question. Renaissance objected to the statute of frauds question because the issue was a question of law and, in effect, because the trial court had already answered the question by its earlier rulings. The trial court initially decided that no statute of frauds question would be submitted, but then reversed itself opining that while it believed the contract was enforceable, it would allow the jury to address the issue. In summary, the court determined that "the court should not as a matter of law rule that the lease met all the requirements of the statute of frauds."

extinguished or limited. We conclude, therefore, that the trial court erred in not deciding the issue as a matter of law.

Our conclusion, however, that the trial court erred in not deciding the statute of frauds question as a matter of law, does not end here. The error has other ramifications, which we shall now explore. If the trial court concludes that the agreement to lease does satisfy the statute of frauds, the breach of contract question must then be answered by a jury. If the trial court reaches an opposite conclusion, it must consider the nature of the agreement, which we now address.

B. Divisibility of the Contract.

Renaissance next contends that the trial court erred in failing to submit to the jury more than one breach of contract question. It asserts that even if part of the May 1st agreement was unenforceable under the statute of frauds, that the entire agreement would not be void because the agreement is severable or divisible. Accordingly, certain portions of the agreement could still be enforced. Based on this, it argues that the trial court should have submitted one or more breach of contract questions.

In ***Spensley Feeds, Inc. v. Livingston Feed & Lumber, Inc.***, 128 Wis.2d 279, 381 N.W.2d 601 (Ct. App. 1985) we stated:

> Divisibility is "a general technique by which a court can mitigate the harshness of a rule that bars a party from enforcing an agreement by apportioning the performances into corresponding pairs of part performances and then enforcing the agreement as to only one part."

Id. at 285-86, 381 N.W.2d at 604 (quoting Restatement (Second) of Contracts, sec. 183 comment a, at 27 (1981)). Put another way, if the contract is "to take the whole or none," it is indivisible. ***Davies v. J.D. Wilson***, 1 Wis.2d 443, 474-75, 85 N.W.2d 459, 475 (1957). Whether a contract is divisible is a mixed question of

fact and law. ***Spensley***, 128 Wis.2d at 286, 381 N.W.2d at 604-05. What the parties agreed to is a question of fact. ***Id.*** Whether the agreement is divisible is a question of law. ***Id.***

We conclude that the agreement of May 1, 1987, is divisible. Of initial importance, we note that throughout the course of the trial, the court ruled that the agreement between the parties was clear and unambiguous, thereby not allowing any extrinsic or parole evidence as to the meaning of the terms of the agreement. Thus, there was no factual dispute as to what the parties agreed and we have only to decide as a matter of law if the May 1st agreement is divisible.

The document, denominated "the May 1st agreement" consists of two and one-half pages of eight paragraphs in single space type. The first paragraph is of an introductory nature setting forth the purpose of the document "to outline the agreement" between FCKG, an Illinois limited partnership and Renaissance, a Wisconsin limited partnership.

Paragraph two declares that the parties will execute a lease agreement whereby FCKG will lease 40,000 sq. ft. of the westerly part of the first floor of Renaissance Faire Shopping Center located at 801 South 60th Street in West Allis, Wisconsin, for twenty years beginning June 1, 1988.

Paragraph three requires Renaissance, at the time the lease is executed, to lend FCKG $150,000 to be repaid within four years.

Paragraph four requires at the time Renaissance lends FCKG $150,000 FCKG give an option to Renaissance to purchase a one-third ownership interest in FCKG for $300,000. The option is to remain in effect until June 1, 1988. FCKG warrants that it owns the Flex-Cable and Kirkhof Transformer businesses which are the subject of the option. FCKG further agrees to provide Renaissance with all financial and other information which it may request in order to decide whether to exercise the option to purchase.

In the fifth paragraph each party agrees to exert its best efforts to obtain a loan of $500,000 from the EDA for FCKG on or before December 1, 1987. If this financial assistance cannot be obtained from the EDA, Renaissance has an option to lend FCKG the same amount of money on or before December 1, 1987.

The sixth paragraph provides that if the EDA loan is not obtained, and Renaissance does not elect to lend the $500,000, FCKG then has the right to either cancel the lease or require Renaissance to lend it an additional $150,000 which also would be repaid within four years. This paragraph also requires that if FCKG decides to cancel the lease, it must give written notice of the cancellation on or before December 8, 1987. Upon notice of cancellation, FCKG must repay the initial $150,000 loan it borrowed from Renaissance or else FCKG will be deemed to be asking for the additional $150,000 loan mentioned earlier in this paragraph. If FCKG elects to receive the additional $150,000, Renaissance must comply on or before December 31, 1987.

The seventh paragraph sets forth the type of lease that is to be used and provides for an attached copy. Additionally, the type of promissory note, guarantees and options are to be in forms satisfactory to Renaissance. Lastly, the eighth paragraph describes the manner in which the agreement is to be executed.

FCKG asserts that the constituent parts of the agreement do not stand alone but are interconnected. Arguing by way of analogy, it reasons that the agreement is a tripod and if any of the legs, i.e., the lease, the EDA loan or the option fall, then the whole tripod falls. We are not persuaded.

It is uncontroverted that a lease was to be executed by the parties for twenty years commencing June 1, 1988. It is also undisputed that Renaissance lent FCKG $150,000 without the lease being executed in exchange for which FCKG gave to Renaissance an option to buy a one-third interest in the business of FCKG by June l, 1988. The term of the option was not conditioned on the happening of any other event. The purchase price for the interest was $300,000 with a proviso that any unpaid loan balance existing between the parties could constitute part payment of the purchase price.

Although it appears because of the obligation of both parties to use their best efforts to obtain an EDA loan, that the lease of twenty years and the option to purchase one-third of FCKG are interdependent, there are two elements present that lead us to a contrary conclusion. First, December 1, 1987, was the final day either to obtain the $500,000 EDA loan or for Renaissance to act on its right to tender the same amount of money as a loan. If Renaissance didn't exercise its right, then FCKG had the right until December 5, 1987, to cancel the lease or alternatively to require Renaissance to lend it another $150,000. For reasons unknown, FCKG chose to cancel the lease.

At the same time, again for reasons unknown, when the loan for $150,000 was given without the lease being executed, its liquidation was considered by the terms of the agreement as an alternative method of partially paying off the total $300,000 purchase price given in the option which did not expire until June 1, 1988. Second, FCKG, quite apart from any condition associated with the lease, was obligated to forward to Renaissance "financial statements and financial and other information" as Renaissance might request to assist it in deciding whether to exercise the option which remained open until June 1, 1988, well beyond the December 1, 1987 deadline.

Doubtless, this entire transaction was cast in a business setting. Renaissance was interested in leasing the premises it owned and FCKG was looking for a site to conduct its business. In addition, however, FCKG was in need of capital to run its business. To satisfy this need, FCKG was willing to extend options to sell part of its business if capital would be forthcoming. There is no question that FCKG conditioned a part of its desire to acquire funds on an alternative plan to seek additional funds from Renaissance in the form of a $150,000 loan, but instead chose to cancel its lease obligation.[5] Whether this result was the original intention of the parties is of no consequence now because of the trial court's parole evidence rulings. There remained extant, however, the option granted to Renaissance at the initial infusion of $150,000 which did not expire until June 1, 1988. From this review, we conclude that the May 1st agreement was not a "take the whole or none" proposition, *see* ***Davies***, 1 Wis.2d at 474-75, 85 N.W.2d at 475, but was divisible and the issue of whether the option obligation was breached remains unanswered.

[5] We note also that when, on December 5, 1987, FCKG notified Renaissance of its intention to cancel its obligation, it couched its cancellation notice in terms of "obligation to enter into a lease."

III. CONCLUSION

We remand with the following directives: (1) the trial court must decide as a matter of law whether any part of the May 1st agreement is enforceable under the statute of frauds; and (2) having concluded that the agreement is divisible, if any part of the agreement is enforceable either under the statute of frauds or parts outside the ambit of the statute's coverage, they should be included in any additional breach of contract questions submitted to the new jury, provided the evidence warrants it. We leave all other evidentiary and substantive law questions unanswered, allowing the trial court on remand to revisit them in a new trial setting.

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

Not recommended for publication in the official reports.

SCHUDSON, J. (*concurring*). Although I believe the majority has reached the correct conclusion, I have misgivings about its opinion.

I acknowledge that, under Wisconsin Court of Appeals Internal Operating Procedures, § VI(5)(a), the majority's opinion in a case of this nature "may ... give only the reasons for the decision with a minimal analysis of the reasoning." I also acknowledge that, under IOP § VI(5)(c), "[t]he opinion writer" need not revise an opinion to address a colleague's concerns. Still, I believe the majority opinion in this case fails to reflect the careful preparation and to offer the clear reasoning every case deserves.

Accordingly, although I concur in the majority's conclusion, I respectfully do not join in its opinion.