COURT OF APPEALS
DECISION
DATED AND RELEASED

November 27, 1996

NOTICE

No. 96-1418-FT

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

PATRICIA POCHTARUK and JOHN SACHAREWYCZ,

Plaintiffs-Respondents,

v.

GEORGE KOWAL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Columbia County: LEWIS W. CHARLES, Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM.[1] George Kowal appeals from a money judgment in favor of Patricia Pochtaruk and her father, John Sacharewycz (the

[1] This is an expedited appeal under RULE 809.17, STATS.

respondents). The court awarded damages on various claims against Kowal arising from a real estate transaction. With one minor exception, we reject Kowal's arguments. On remand, the trial court shall enter a modified judgment reducing the respondents' monetary award by $94.95.

Kowal owned a motel complex consisting of seven old cabins, a house, two garages and a new forty-two unit motel building with an uncompleted manager's residence. Early in 1991, Pochtaruk, as an interested buyer, conducted a lengthy inspection of the premises. Pochtaruk later testified that during the inspection, Kowal represented to her that the motel whirlpool had all necessary permits for operation. The inspection did not include areas Kowal maintained for his private use, including four rooms in the new motel, and the house.

The respondents decided to buy the motel, and returned in May 1991 to close the deal. The parties executed a land contract with two additional contracts or riders attached. The first, rider A, contained the following clause: "The purchasers have inspected the premises being purchased and are aware of the condition of said premises, acknowledging that the apartment adjoining the office is not completed, and purchasers agree to purchase said premise in `AS IS' condition ... and shall complete the work required at their own expense...." The parties also agreed that Kowal could continue living in the house on the premises, and pay his share of utilities while doing so. Rider B provided that Kowal would remove property and trash from the larger garage, remove debris and construction waste adjacent to and in the basement of the motel building, and vacate the four motel rooms he had been using.

Kowal did not meet the deadlines for vacating the motel rooms or the garage. Nor did he remove his trash as promised in rider B, or pay his share of the utilities as promised in rider A. The respondents learned sometime after closing that the whirlpool did not have the necessary operation permits, and that they could not obtain those permits without substantial design modifications. Those modifications cost respondents $3,750. They also incurred repair costs for damage in one of Kowal's four motel rooms, after he finally vacated them.

In May 1993, in order to remove Kowal from the premises, the respondents paid Kowal the balance on the land contract and received a warranty deed. The parties also executed a possession agreement, requiring that Kowal promptly vacate the premises, which he did. However, he left behind large amounts of trash.

The respondents commenced this action in 1994, seeking recovery of the costs they incurred when Kowal breached his implied and express warranties on the property, and the rider provisions in the land contract. After a bench trial, the trial court found that Kowal breached the contract and awarded damages for whirlpool and room repair ($4,607), removal of trash ($952), and failure to pay utilities ($1,000). On appeal, Kowal argues that the "AS IS" provision of rider A waived all warranties such that the respondents could not recover on the whirlpool and room damage claims, that respondents waived all claims through inaction and acquiescence, and that they failed to adequately prove damages for the utility charges, and for a $94.95 plumbing charge.

The trial court properly determined that the "AS IS" clause in rider A did not protect Kowal from the respondents' warranty claims. Kowal contends that the clause plainly excludes all express or implied warranties because the "AS IS" provision plainly applied to the entire motel complex. We disagree. One can also reasonably construe the provision as applying only to the unfinished manager's apartment, which the clause expressly references. A contract such as this one, with two reasonable interpretations, is ambiguous. ***Central Auto Co. v. Reichert***, 87 Wis.2d 9, 19, 273 N.W.2d 360, 364-65 (Ct. App. 1978). If a contract is ambiguous, the fact-finder may resort to extrinsic evidence to construe it. ***Id***. Here, extrinsic evidence in the form of Pochtaruk's testimony showed an intent to apply the "AS IS" provision only to the unfinished apartment. Kowal did not offer any evidence to the contrary. That ends the matter, because the trial court's finding based on Pochtaruk's undisputed testimony is not clearly erroneous.

The trial court properly rejected Kowal's waiver claim. As Kowal notes, the respondents made little or no effort to assert their claims against him before they commenced this action. He argues that the latest point for asserting those claims, without waiver by either inaction or acquiescence, was when the parties terminated the land contract and executed the possession agreement in

May 1993. However, the respondents presented testimony that Kowal consistently engaged in threatening, harassing and intimidating behavior toward them, and toward motel guests, while he remained on the property. Attempts to discuss financial matters only aggravated the situation. On occasion the police were called. This evidence of Kowal's course of conduct allowed the court to reasonably conclude that the respondents did not waive their claims against Kowal because they had no choice but to postpone asserting them until their contractual relationship was terminated and Kowal had moved from the premises. An enforceable waiver must be voluntary. ***Shannon v. Shannon***, 145 Wis.2d 763, 775, 429 N.W.2d 525, 530 (Ct. App. 1988).

Evidence supports the trial court's $1,000 award for utility charges. The trial court stated that the award was nothing more than "guesswork and speculation" that would be reversed if appealed. However, if anything, the award was too small. The respondents presented evidence that one water and one electrical meter served Kowal during his tenure at the motel between May 1991 and May 1993, and that the total charge on those meters was $4,949. Pochtaruk estimated that Kowal's share of this charge was $3,525, with the remaining use attributed to the seldom rented older cabins. There was no evidence to the contrary. Without such evidence, Kowal cannot reasonably argue error in a substantially lower award, which averages to $41 per month for full utility service to a large occupied house and detached garage.

Evidence does not support the $94.95 award for plumbing repair. Pochtaruk could not recall whether the repaired damage, in one of the new motel rooms, occurred before the respondents assumed possession of the motel. Without such evidence, Kowal could not be held liable.[2] On remand, the trial court shall enter judgment reduced by $94.95 with costs to the respondents.

[2] The respondents do not address this issue in their brief. That in itself is sufficient grounds for reversal. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for entry of a modified judgment.

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