COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2699

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

PROPERTY VALUATION ASSOCIATES, INC.,

PLAINTIFF-APPELLANT,

V.

TOWN AND COUNTRY SUPERMARKETS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN E. McCORMICK, Judge. *Affirmed.*

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

PER CURIAM. Property Valuation Associates, Inc. (PVA), appeals from the trial court judgment, following a bench trial, dismissing its complaint against Town & Country Supermarkets, Inc. (T&C). PVA argues that the trial court erred in concluding that it was not entitled to a contingent fee for services it performed under its contract with T&C. We affirm.

PVA is a real estate consulting firm specializing in services to property owners to assist them in property tax disputes with assessors and taxing authorities. On March 14, 1995, T&C contracted with PVA to provide such services for commercial properties it owned including the New Market Retail Center in Hales Corners, the property that came to be involved in this case. PVA's "Consultant Agency Agreement" with T&C provided, in relevant part:

> PVA will negotiate the assessment of THE PROPERTY with the assessment official(s), file any appeals, and appear before any board which, in PVA's opinion, is necessary to obtain the most favorable assessment for THE PROPERTY.
>
> PVA shall have the right to determine the extent to which it is appropriate to pursue negotiations and whether or not to appeal the assessed value of THE PROPERTY. PVA shall have no obligation to appeal any assessment of THE PROPERTY which, in PVA's own opinion, it does not feel it can successfully challenge.
>
> The cost incurred in the performance of the above described services will be the responsibility of PVA….
>
> ….
>
> The PROPERTY OWNER will pay a contingency fee of fifty percent (50%) of any "tax savings" … realized for the assessment year 1995 and a fee of fifty percent (50%) of any "tax savings" achieved for the assessment year 1996.

For several months in 1995, after the Village of Hales Corners assessed T&C's store, PVA provided services to T&C in several ways including reviewing leases and expense data, advising how to respond to the assessor's requests for information, commissioning and paying for a full appraisal of the property, and preparing for the Village's "open book" hearing on the assessment. During this same period, however, the Village retained National Appraisal

Corporation (NAC) to reassess commercial properties, including T&C's. NAC assessed the T&C property at a rate substantially lower than that of the initial assessment and "very close" to that of the appraiser PVA had hired. Based on the NAC reassessment, the City lowered T&C's property tax.

Thus, although PVA had provided services on T&C's behalf, its efforts had no bearing on the Village's reduction of T&C's property tax. Nevertheless, PVA billed T&C for fifty percent of the tax savings T&C realized by virtue of the difference between the Village's initial assessment and the Village's NAC reassessment. As a result of T&C's refusal to pay, PVA sued claiming it was entitled to payment under the contract. The trial court disagreed, concluding that the contract was ambiguous and that PVA was "not entitled to recover a contingent fee from [T&C] because the Agreement is void for lack of consideration, illusory, and ambiguous."

The construction of a contract and the determination of whether a contract is ambiguous present questions of law we review *de novo*. *See* ***Erickson v. Gundersen***, 183 Wis.2d 106, 115, 515 N.W.2d 293, 298 (Ct. App. 1994). "In determining whether a contract is ambiguous, we look only to the contents of the document or documents themselves." ***Id***. at 117, 515 N.W.2d at 299.

The critical contract language provides that "PVA will negotiate the assessment of the property with the assessment officials, file any appeal, and appear before any board which, in PVA's opinion, is necessary to obtain the most favorable tax assessment for the property." It proved unnecessary for PVA to do any of these things for T&C to obtain the more favorable tax assessment and, indeed, PVA provided none of these specific services.

PVA argues, nonetheless, that it provided services for which it is due the contingency fee. At the trial, the parties examined whether, under terms of PVA's promotional brochure, which they implicitly agreed constituted part of their agreement, T&C was required to pay the contingency based on the services PVA had provided. The brochure states, in part:

> PVA will perform a no cost, no obligation evaluation of your property. If we believe that there are inaccuracies or inequities in your property assessment, PVA will work for you on a contingency basis. You only pay based on a percentage of the tax savings you receive–if, and only if PVA works successfully to lower your taxes. If we find your assessment is fair and equitable, you owe us nothing.

It is helpful to examine these terms sentence by sentence.

Under the first sentence, PVA clearly assumed responsibility for its services in obtaining an appraisal of the T&C property, at "no cost" to T&C.

Under the second sentence, PVA's "work … on a contingency basis" could only come about if PVA believed there were inaccuracies or inequities in the assessment based, presumably, on a comparison of the Village's assessment and PVA's "no obligation evaluation." Arguably, therefore, PVA's work, subsequent to the Village's initial assessment *and subsequent to PVA's evaluation*, could be performed on a contingency basis.

Under the third sentence, however, T&C was obligated to pay the contingency fee "if, and only if PVA works successfully *to* lower [T&C's] taxes." (Emphasis added.) Not surprisingly, the parties aim most of their arguments at this ambiguous sentence. "To" could mean "in an effort to," or "resulting in the lowering of"; the former reading favoring PVA, the latter, T&C.

Under the fourth sentence, T&C owed nothing if PVA found the Village's assessment fair and equitable. This sentence also is ambiguous, failing to clarify whether the Village's initial assessment or reassessment would form the basis for PVA's finding.

Thus, assuming the terms of the brochure to be part of the parties' agreement, the agreement is ambiguous. Further, because the terms of the contract provided nothing to resolve the ambiguity in the words of the brochure, we reject PVA's argument that the contract was unambiguous and "[t]he intent of the parties in this contract was obvious." The trial court correctly concluded that the parties' full agreement was ambiguous.

When a contract is ambiguous, the parties' intent becomes a factual issue for the trial court to resolve. *See* ***Wausau Underwriters Ins Co. v. Dane County***, 142 Wis.2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987). "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Section 805.17(2), STATS. "An appellate court must accept a reasonable inference drawn by a trial court from established facts if more than one reasonable inference may be drawn." ***Pfeifer v. World Serv. Life Ins.***, 121 Wis.2d 567, 571, 360 N.W.2d 65, 67 (Ct. App. 1984).

We recognize that PVA provided services and incurred costs in preparation for what it reasonably expected to be necessary to assist T&C at the "open book" hearing. Its agreement, however, failed to account for the contingency where the reduced assessment did not result from its efforts. Thus, the trial court reasonably concluded that the parties had agreed that T&C would pay for PVA's services only if the contractually specified services actually proved

"necessary to obtain the most favorable tax assessment for the property" or, in the words of the brochure, actually were employed "successfully to lower [T&C's] taxes." *See* ***Hunzinger Constr. Co. v. Granite Resources Corp.***, 196 Wis.2d 327, 339, 538 N.W.2d 804, 809 (Ct. App. 1995) (any ambiguity in a contract is to be interpreted against the drafter). Accordingly, we affirm.

By the Court.–Judgment affirmed.

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