COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2846

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

REAL ESTATE ENTERPRISES, LLC,

PLAINTIFF-RESPONDENT,

V.

JUNE J. MARTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: LAWRENCE F. WADDICK, Judge. *Affirmed.*

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

PER CURIAM. June J. Marth has appealed from a judgment granting Real Estate Enterprises, LLC (Enterprises), specific performance of a contract for the sale of two residential condominium lots. Judgment was entered pursuant to a motion for summary judgment filed by Enterprises. We affirm the judgment.

When reviewing a grant of summary judgment, we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. *See* ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis.2d 548, 555, 508 N.W.2d 610, 612 (Ct. App. 1993). We first examine the pleadings to determine whether a claim has been stated and whether a material issue of fact is presented. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476 (1980). If the pleadings set forth a claim for relief and a material issue of fact, our inquiry shifts to the moving party's affidavits or other proof to determine whether a prima facie case for summary judgment has been presented. *See* ***id.*** at 338, 294 N.W.2d at 476-77. If the moving party has made a prima facie case, the affidavits or other proof of the opposing party must be examined to determine whether there exist disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to trial. *See* ***id.*** at 338, 294 N.W.2d at 477.

The undisputed facts in this case establish that on August 13, 1995, Marth signed and accepted an offer to purchase whereby she agreed to sell two condominium lots to Michael Nagel "or/assigns." The accepted offer provided that the seller was required to include in the purchase price "[p]ark fees as required by the city of West Bend for 8 units." The contract also required Marth to convey clear title, thus requiring her to satisfy all liens and encumbrances prior to transfer of title. The contract provided that if the seller defaulted, the buyer could: (1) sue for specific performance, or (2) terminate the offer and request the return of the earnest money, sue for actual damages, or both.

The offer specified a closing date of October 16, 1995. On October 13, 1995, the Greenbriar Homeowners Association filed a lien against the property for unpaid condominium fees. A title insurance commitment

subsequently obtained by Marth was conditioned upon payment or release of this lien claim.

Pursuant to a written amendment signed by both Nagel and Marth, the closing date was subsequently changed to November 10, 1995. On October 27, 1995, Nagel assigned his interest in the contract to Enterprises, a limited liability corporation in which Nagel and Donald G. Kuechler were members. Subsequently, Marth failed to close and Enterprises commenced this action for specific performance of the accepted offer to purchase, a remedy specifically permitted under the contract.

Marth argues at length that the trial court erred in granting a motion in limine which precluded her from presenting extrinsic evidence related to the execution of the contract and discussions and events following its execution. She contends that the trial court's ruling thus prevented her from establishing that the contract was orally modified prior to the closing date to provide that Enterprises or Nagel would pay the park fees and that the condominium fees would be deducted from the purchase price and placed in escrow until their validity was determined in another court action. She also argues that the trial court erred in granting summary judgment when discovery had not yet occurred, thus preventing her from obtaining evidence to support her claims that the contract was modified and that specific performance of the contract was inequitable.

The trial court acted properly in granting the motion in limine and rejecting Marth's claim that summary judgment was premature because discovery had not yet occurred. As pointed out by the trial court, this case had been pending for sufficient time to permit discovery before summary judgment was granted. Most importantly, further discovery would have been unavailing to Marth because

evidence she was seeking to present regarding oral modifications to the parties' contract was inadmissible.

In making this determination, we note that the parties' contract fell within the statute of frauds under §§ 706.01(1) and 706.02, STATS., and thus could not be modified by oral agreement. *See* ***Borkin v. Alexander,*** 26 Wis.2d 432, 436, 132 N.W.2d 587, 590 (1965). Moreover, oral testimony is admissible under the parole evidence rule only when it clarifies an existing ambiguity in a written contract and cannot be admitted to establish an understanding at variance with the terms of the written document. *See* ***Conrad Milwaukee Corp. v. Wasilewski,*** 30 Wis.2d 481, 488, 141 N.W.2d 240, 244 (1966). If the contractual language is unambiguous, it must be enforced as written. *See* ***Dykstra v. Arthur G. McGee & Co.,*** 92 Wis.2d 17, 38, 284 N.W.2d 692, 702-03 (Ct. App. 1979), *aff'd*, 100 Wis.2d 120, 301 N.W.2d 201 (1981).

Contractual language is ambiguous only when it is reasonably susceptible of more than one construction. *See* ***Borchardt v. Wilk***, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). Construction of a contract, including the determination of whether its terms are ambiguous, is a legal question which we decide de novo. *See* ***id.***

The terms of the parties' contract were clear and unambiguous. The contract expressly provided that park fees as required by the city of West Bend for eight condominium units were included by the seller in the purchase price being accepted by her. Marth therefore could not present evidence to indicate that after execution of the contract, Nagel or Enterprises orally agreed to pay the park fees, nor could she demand that in addition to paying the purchase price, Nagel or Enterprises pay the $6000 assessed by the city as park fees. Similarly, the contract

unambiguously required Marth to convey clear title at closing, thus requiring her to satisfy the condominium liens filed against the property and precluding her from presenting evidence that Nagel or Enterprises orally agreed that rather than paying the condominium fees, the amount of the fees could be deducted from the purchase price and placed in escrow. The trial court therefore properly granted a motion in limine precluding the presentation of such evidence and properly determined that further discovery on those topics was unnecessary.

In her brief Marth also argues at length that she was deprived of her right to demonstrate that specific performance was unwarranted. In discussing this issue she relies on case law describing specific performance of a real estate contract as an equitable remedy.

Enterprises' demand for specific performance was based upon a contractual remedy expressly provided under the terms of the parties' contract. The contract specifically provided that if the seller defaulted, the buyer could sue for specific performance.

Assuming cases discussing specific performance as an equitable remedy are applicable here, Marth is incorrect when she argues that specific performance is not available when a buyer has an adequate remedy in money damages. When a party seeks the equitable remedy of specific performance of a contract for the sale of land, courts are required to order specific performance as a matter of course unless factual or legal considerations are revealed which make specific performance of the contract unreasonable, unfair or impossible. *See* ***Anderson v. Onsager,*** 155 Wis.2d 504, 512-13, 455 N.W.2d 885, 889 (1990).

Nothing in the affidavits filed by Marth in the trial court provided a basis for determining that Enterprises was not entitled to specific performance. In

her affidavit Marth indicated that she did not notice the park fees provision at the time she signed the contract, that if she had noticed it she would have expected the fees to be small, and that she never considered that the park fees might be more than $6000 or that condominium assessments in excess of $5000 would be filed. Affidavits filed by Marth's daughter, Sharon, contained similar allegations. However, even accepting these allegations as true, they provide no basis for determining that specific performance and summary judgment were unwarranted. Marth signed and accepted an offer to purchase which obligated her to pay park fees and provide clear title. The fact that she did so without first determining the amount of the fees or whether any unpaid assessments existed which might lead to the filing of a lien provides no reasonable or equitable basis to deprive Enterprises of its contractual right to specific performance of the contract.[1]

In contending that specific performance was unwarranted, Marth also reiterates her argument that she needed more discovery time to seek out facts to support her claim that specific performance was inequitable. However, as

[1] Marth argues that the award of specific performance was unfair because Nagel represented that Donald G. Kuechler was not involved in the real estate deal, and she would not have accepted the contract if she had known of his involvement. These contentions provide no basis for relief. Marth specifically contracted to sell the property to Nagel "and/or assigns." Moreover, the only affidavit submitted by her in opposition to summary judgment which mentions Kuechler was an affidavit from Sharon which was filed on May 20, 1996. In that affidavit Sharon stated that, *after* August 13, 1995, she asked Nagel whether Kuechler was involved in the proposed deal and Nagel told her that he was not. Because Marth had already accepted the contract on August 13, 1995, and agreed to sell the property to Nagel or his assigns, her belated interest in whether Kuechler was involved does not render enforcement of the contract unfair or unreasonable.

In her affidavits, Sharon also alleged that Marth would have closed if Nagel had reduced their alleged oral agreements regarding park fees and an escrow account to writing, and discusses alleged attempts to close after November 10, 1995. While Marth relies on these allegations to argue that specific performance was unwarranted, what she is really alleging is that Enterprises was not willing to close on terms other than those set forth in the written contract. Because Enterprises was not required to do so, these allegations provide no basis for determining that specific performance or summary judgment were improper.

previously noted, this case was pending for sufficient time to permit discovery. In any event, because Marth herself was a party to the signing of the contract, the facts regarding its execution were known to her and set forth in the affidavits submitted by her. They simply provided no basis for denying summary judgment to enforce the clear and unambiguous agreement.

Marth's final argument is that the affidavit submitted by Enterprises in support of its summary judgment motion was defective because the attesting witness was Enterprises' attorney, who did not have personal knowledge of the facts alleged in it and was barred in his role as counsel from participating as a witness. Based upon the record before this court on appeal, it appears that Marth waived this argument by failing to raise it with clarity in the trial court. *See* ***Allen v. Allen,*** 78 Wis.2d 263, 270, 254 N.W.2d 244, 248 (1977); ***Evjen v. Evjen,*** 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992). In addition, counsel's affidavit merely set forth historical facts supported by attached documents which indicated that the offer to purchase was signed by Marth, that the closing date as scheduled in the contract was amended, and that closing had not occurred. Counsel's allegations replicated the allegations made in an affidavit signed by Nagel and filed in the trial court on January 16, 1996, at the time of Enterprises' first motion for summary judgment. Because Nagel's affidavit was part of the trial court record at the time summary judgment was granted and established a prima facie right to summary judgment, no basis exists to disturb the trial court's award.[2]

By the Court.—Judgment affirmed.

[2] Marth contends that the judgment is deficient because it did not specify the precise terms upon which she must close the deal. The answer is clear. She must close the contract upon the terms set forth in the offer to purchase and acceptance.

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