COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0672

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

BERNARD G. MANSKE AND LUELLA G. MANSKE,

PLAINTIFFS-APPELLANTS,

V.

ROYAL BANK F/K/A BANK OF ELROY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Juneau County: JOHN W. BARDY, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

VERGERONT, J. Bernard and Luella Manske appeal the trial court order granting summary judgment in favor of Royal Bank and denying their motion for partial summary judgment against the Bank. They contend that the trial court erred when it concluded that, as a matter of law, the Bank did not violate the terms of the warranty deed that conveyed a parcel of land in Juneau

County to the Manskes. We conclude that the purchase agreement merged with the warranty deed and that the Bank breached the warranty of title in the deed. We also conclude the defense of equitable estoppel is not available to the Bank on the facts of this case. We therefore reverse and remand.

BACKGROUND

The Manskes and the Bank executed a "WB-12 Farm Offer to Purchase" on February 28, 1990, under which the Manskes agreed to purchase a parcel of land in Juneau County from the Bank.[1] The Bank had acquired the property in a foreclosure action. The land was described in the purchase contract as "a part of SE 1/4, Section 7, Town of Plymouth, Juneau County, WI, containing 3 acres more or less."

The purchase contract stated:

> Seller shall, upon payment of the purchase price, convey the property by warranty deed, or other conveyance provided herein, free and clear of all liens and encumbrances, excepting: municipal and zoning ordinances, recorded easements for public utilities serving the property, recorded building and use restrictions and covenants, general taxes levied in the year of closing.…

The following language pertinent to this appeal was added to the form language: "Seller does not know acreage figures as land has not been surveyed by Seller"; "ATTENTION: Seller makes no guaranties or warranties of any kind relating to any of the above, acreages, boundaries, etc. Buyer accepts property in as is condition" (under the heading "Exceptions to warranties and

[1] The offer to purchase also concerned a parcel of land in Monroe County, but that is not involved in this appeal.

representations stated in Lines 79 to 91"); and "Seller has not occupied this property. Seller does not make any guaranties of any kind" (under the heading "Special provisions").

On March 12, 1990, the Manskes and the Bank entered into a land contract, which contained this description of the Juneau County parcel:

> Also a part of the Southwest Quarter of the Northwest Quarter (SW1/4 NW1/4) described as follows: Commencing at the Southeast corner of the said Southwest Quarter of the Northwest Quarter (SW1/4 NW 1/4); thence West on the Quarter line to the center of the highway; thence along the center of said highway North a sufficient distance to run east back to the eighth line; thence to the place of beginning, enclosing 2 and 96/100 acres, located in Section Seven (7), Township Fifteen (15) North, Range Two (2) East, Juneau County, Wisconsin.

The land contract provided that after the vendor was paid in full and other prescribed conditions were met, "Vendor will on demand, execute and deliver to the Purchaser, a Warranty Deed, in fee simple, of the Property, free and clear of all liens and encumbrances, except any liens or encumbrances created by the act or default of Purchaser."

After the Bank was paid in full under the land contract, it executed a warranty deed on October 29, 1991, to the Manskes that contained the same description of the property as that in the land contract. The deed stated that the Bank "warrants that the title is good, indefeasible in fee simple and free and clear of encumbrances except easements and rights-of-way of record, municipal and zoning ordinances and recording [sic] building restrictions and will warrant and defend the same." The deed was recorded with the Juneau County Register of Deeds.

A dispute later arose between the Manskes and their neighbors over title to a strip of property that, the Manskes assert, was included in the property described in the Bank's warranty deed. The Manskes sued the Bank, asserting claims of breach of warranty deed, breach of contract, intentional misrepresentation and negligent misrepresentation. The Manskes sought compensatory and punitive damages and an order directing the Bank to convey by warranty deed "the full extent of the Property." The complaint alleged that the Manskes had built a house on the disputed strip of property before discovering the title dispute.

The Bank moved for summary judgment, arguing that the Manskes were estopped from asserting any claim against the Bank and that the Bank had made no misrepresentations. In support of their motion, the Bank submitted, among other materials, copies of letters from their attorney to the Manskes. One letter, dated the same date as the land contract, advised the Manskes that the property was acquired in a foreclosure proceeding and further stated:

> The Bank has agreed to provide you with title evidence after the execution of the land contract. You may take the title evidence to any attorney you wish, knowing that I represent the Bank of Elroy.
>
> Please be advised that part of the description attached hereto (marked in yellow) is, in my opinion, inadequate. It is unclear where the land is located and I recommend a survey be done. Title insurance will be ordered as to said parcel. If you wish to have a survey done first, you must let me know. If you wish to consult an attorney before closing, that is your option.

Another letter dated April 9, 1990, stated that the abstract of title had been updated and title insurance issued, and if the Manskes wished to have an attorney examine them, the Bank would forward them.

The Manskes opposed summary judgment for the Bank and sought a "partial summary judgment" in their favor, arguing that the undisputed facts showed that the Bank had failed to provide clear title to the property described in the warranty deed. They submitted materials which, they asserted, showed that the east sixty-six-foot strip of land described in the warranty deed was not owned by the Bank but was owned by the Brunner Trust. The Bank did not submit materials controverting the title of the disputed strip of property.

The trial court concluded that, because the provisions and conditions of the purchase contract merged in the warranty deed, the Manskes were informed by the purchase contract that they were receiving no warranties, and therefore they constructed a building on the property at their own risk. The trial court dismissed the complaint.

The Manskes appeal, contending that the trial court erred in granting summary judgment in favor of the Bank and in denying their motion for partial summary judgment because, based on the undisputed facts, the Bank breached the warranty deed.

DISCUSSION

We review a trial court's grant of summary judgment de novo, applying the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment is appropriate if there are no genuine issues of disputed fact and a party is entitled to judgment as a matter of law. ***Germanotta v. Nat'l Idem. Co.***, 119 Wis.2d 293, 296, 349 N.W.2d 733, 735 (Ct. App. 1984).

The Manskes argue that the trial court did not correctly apply the merger doctrine under which, they contend, the purchase contract merged into the warranty deed and the plain terms of the warranty deed prevail. The Bank responds that the court's aim in construing a deed is to arrive at the intent of the parties, and the parties intended that the Bank make no warranties regarding the land conveyed, as demonstrated by the terms of the purchase contract.

We agree with the Manskes that the terms of the deed superseded the provisions of the purchase contract on which the Bank relies. Under the doctrine of merger, the terms of a purchase contract do not survive the deed, but rather, the deed supersedes those terms, except when the terms in the purchase contract are "collateral" to the functions of the deed. ***Miles v. Mackle Bros., Div. Deltona Corp.***, 73 Wis.2d 84, 87-88, 242 N.W.2d 247, 250 (1976). Collateral provisions "are of such a nature as to permit an inference that the parties did not intend to extinguish them in the deed. Generally these are of the type that are intended to be performed even after the delivery of a deed, such as warranties as to the conditions of the property or agreements to make improvements or repairs." ***Id.*** at 88, 242 N.W.2d at 250. In ***Miles*** the court held that because the matter of taxes was specifically referred to in the purchase contract and also specifically referred to in the deed, they were not collateral: "No item in the purchase contract can be said to be 'collateral' that is specifically and expressly provided for in the deed…." ***Id.***

As the trial court correctly recognized here, the provisions in the purchase contract on which the Bank relies were not collateral. The Bank does not argue otherwise. That being the case, the provisions in the deed warranting clear title to the property described in the deed (with exceptions that are not applicable here) supersede the provisions in the purchase contract concerning the lack of warranties relating to the property described in that contract.

Although it is true that when we construe a deed we aim to ascertain the intent of the parties, it is also true that the primary source of the parties' intent is what is written "within the four corners of the deed." ***Grosshans v. Rueping***, 36 Wis.2d 519, 528, 153 N.W.2d 619, 623 (1967). It is only when a deed is ambiguous that intent of the parties may be demonstrated by extrinsic evidence. ***Id.*** There is no ambiguity in the language of this warranty deed that would permit resorting to evidence outside the deed.

The Bank also argues that it is entitled to summary judgment based on the doctrine of equitable estoppel. Under this doctrine, a party has a defense to a claim if it proves by clear, satisfactory and convincing evidence that the claimant engaged in action or nonaction which induced reliance by the defendant to his or her detriment. *See* ***City of Madison v. Lange***, 140 Wis.2d 1, 6-7, 408 N.W.2d 763, 765 (Ct. App. 1987). The Bank contends that the undisputed facts show that it did everything it could to warn the Manskes of problems with the title, but the Manskes ignored this and did not seek professional counsel; the Bank relied on the Manskes' "insistence that the transaction go forward … and conveyed the land"; and this was to the Bank's detriment because it is being sued by the Manskes. The Manskes contend that equitable estoppel is not applicable to defeat their claims for several reasons, some legal and some factual.

We conclude that the doctrine of equitable estoppel is not applicable under the facts of this case. In reaching this decision, we have considered all the materials the Bank has submitted to show its communications with the Manskes concerning the property, and we treat those as undisputed facts for purposes of our decision. The defense of equitable estoppel, as the Bank wishes to apply it here, is the equivalent of considering extrinsic evidence to interpret the deed, something we have already held the case law does not allow. There is no evidence that the

Manskes made misrepresentations to the Bank to induce the Bank to convey the property by warranty deed. Rather, it appears the Bank is arguing that even though it executed a warranty deed conveying the property to the Manskes, it is inequitable to hold the Bank to the plain language of the deed because it had previously expressed to the Manskes uncertainty whether it had clear title to the property it was conveying. However, as we have explained above, once the Bank executed a warranty deed that plainly warranted clear title to the property described, that language, not prior agreements and communications with the Manskes, controls. If the Bank did not know whether it had clear title and believed it had not agreed to convey clear title, it should have used other language in the conveyance. Equitable estoppel is not available under these circumstances as a defense to an action for breach of the unambiguous language of the warranty deed.

We conclude that the deed executed by the Bank unambiguously warrants that the title to the property described in the deed is "good, indefeasible in fee simple and free and clear of encumbrances," with exceptions that are not applicable here. The Bank has submitted no materials controverting those submitted by the Manskes to show that the east sixty-six-foot strip of land described in the deed is owned by the Brunner Trust, nor does the Bank argue that it did convey clear title to all the property described in the deed. We therefore conclude, as a matter of law, the Bank did breach the warranty that it was conveying good title.

We reverse the court's grant of summary judgment in favor of the Bank and remand to the trial court with directions to grant partial summary judgment in favor of the Manskes on their breach of warranty claim; to conduct

further proceedings on the remedy due the Manskes on this claim; and to conduct further proceedings on the Manskes' other claims as appropriate.

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

Not recommended for publication in the official reports.