COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1257 **Cir. Ct. No. 01 SC 28941**

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

LAND TITLE SERVICES, INC.,

PLAINTIFF-APPELLANT,

V.

DONALD W. KEMNITZ, JR.,

DEFENDANT,

KARA L. KEMNITZ,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

¶1 FINE, J. Land Title Services, Inc., appeals from a small-claims judgment dismissing its claims against Kara L. Kemnitz after a bench trial. We affirm.

I.

¶2 In 2000, Deanda J. and Delane Stiff purchased the house of Donald W. and Kara Kemnitz at a foreclosure sale, and received a warranty deed from the Kemnitzes. The Kemnitzes had not paid their property taxes for 1998. Title insurance naming the Stiffs as insureds was issued for the property by Transnation Title Insurance Company. Among the exceptions to Transnation's title-insurance policy was "General taxes for the year 1998 and subsequent years."

¶3 The Transnation policy was obtained for the sellers, the Kemnitzes, by Land Title, a title-insurance agent. Land Title paid off the property's tax liability even though neither it nor Transnation was legally obligated to do so. Although Land Title's general counsel testified that it was Land Title's responsibility to pay the claim "pursuant to the contract between Land Title and Transnation," no contract setting forth that obligation was entered into evidence or referred to again during the trial. Rather, he gave these reasons for Land Title paying the back taxes:

> Really two reasons and both pretty common-sense reasons. Number one: Title insurance companies never win these cases; they always lose. They are the big pots of gold at the end of rainbows. They are the deep pockets. So more often than not, the ruling comes down adverse to the title company, and the Court normally indicates to [*sic*] pay the claim. Now there's a claim made by the Stiffs unpaid taxes [*sic*], they weren't paid.
>
> Number two: The County Treasurer notice, Exhibit No. 3, clearly indicates that from a running 18 percent per year. [*Sic*] Every day after the claim is made that goes by, that dollar number, it's never going to go down, always is going to go up. So the attitude of the title insurers or underwriters is to pay the claim, to get it done, to stop the bloodletting and then sort it all out, to get it paid, get the buyer happy, in this case, the Stiffs. Nobody likes to have a claim against their property, a judgment lien makes people very nervous. Real estate is very sacred to people. They covet having it free and clear.

He later admitted on cross-examination that "[t]here would have been nothing beyond those reasons" to explain Land Title's decision to pay the 1998 property taxes.

¶4 Although Land Title's general counsel testified that the subrogation clause in Transnation's policy permitted Land Title to "in essence for all practical purposes step[] into the shoes" of the Stiffs when Land Title paid the overdue property taxes, he explained this comment by pointing to a clause in Transnation's policy that gave *Transnation*, and not Land Title, subrogation rights whenever it has "paid a claim under this policy."

¶5 Land Title paid the back taxes in March of 2001. On January 30, 2002, the Stiffs assigned "to Land Title any rights or causes of action belonging" to them as a result of their having received a warranty deed for the Kemnitzes' property that inaccurately represented that there were no tax liens against the property other than for "general taxes levied in the year of closing," which, as noted, was 2000. Consideration for the assignment was specified as: "Land Title's payment of the 1998 real estate taxes on the Property in March, 2001."

¶6 The trial court found that Land Title was not subrogated to any claims that the Stiffs might have had against the Kemnitzes, and that there was no consideration for the 2002 assignment by the Stiffs to Land Title. The trial court also held that it would be "unjust at this juncture to require the Kemnitzes to pay Land Title for the very thing that Land Title provided the insurance for, that [the] Kemnitzes paid for, that [the] Stiffs became the successor and [*sic*] rights to." Further, the trial court held that neither Transnation nor Land Title was obligated to pay the 1998 taxes, and thus "it was a volunteered payment by Land Title." Accordingly, the trial court dismissed Land Title's claim.

II.

¶7 There are two main issues presented by this appeal. First, whether, when there is no statutory or contractual right of subrogation, a person who pays a claim of another without any legal obligation to do so is subrogated to whatever rights the person on whose behalf the payment is made may have had against the person who was liable for the claim. Translated to the facts of this case: Is Land Title subrogated to whatever rights the Stiffs may have had against the Kemnitzes in connection with the unpaid 1998 taxes? Second, whether an assignment of a claim against a person who may be liable on that claim is valid when the assignment is made to the person who paid the claim by the person for whose benefit the payment was made, but the assignment is executed well after the payment. Translated to the facts of this case: Is the 2002 assignment by the Stiffs to Land Title of whatever claim they might have had against the Kemnitzes valid when Land Title paid the Kemnitzes' 1998 tax obligation well before the assignment's execution?

A. *A volunteer's subrogation rights.*

¶8 As the trial court found here, Land Title paid the 1998 back taxes as a volunteer; it was under no legal obligation to do so. In the absence of a statutory or contractual right of subrogation, and here there is neither, a volunteer has no rights of subrogation. ***New Amsterdam Cas. Co. v. Acorn Products Co.***, 42 Wis. 2d 127, 132, 166 N.W.2d 198, 200 (1969) ("'Subrogation is an equitable doctrine, not dependent upon contract or privity, which is available when someone other than a mere volunteer pays a debt or demand which should have been satisfied by another. The purpose of the doctrine is to avoid unjust enrichment.'") (quoted source omitted). That payment is made without compulsion does not

necessarily make the payor a "mere volunteer." ***Jindra v. Diederich Flooring***, 181 Wis. 2d 579, 607, 511 N.W.2d 855, 864 (1994) ("Absolute and clear legal liability of the payor has not been a fixed prerequisite to obtaining subrogation rights."). Thus, potential, but not yet actualized, liability will suffice. ***Id.***, 181 Wis. 2d at 607–608, 511 N.W.2d at 864. For example, ***Rowley Plastering Co. v. Marvin Gardens Dev. Corp.***, 883 P.2d 449, 451 (Ariz. Ct. App. 1994), held that a party "who settles under threat of civil proceedings or to protect its own interests is not a mere volunteer."

¶9 Land Title had the burden of proving at least an inchoate or potential obligation to pay the 1998 tax bill. *See* ***Jindra***, 181 Wis. 2d at 599, 511 N.W.2d at 861 (party seeking subrogation must prove its entitlement to it). Although Land Title may have felt that it was good business to pay the 1998 tax bill, we have found no authority, and Land Title has pointed us to none, that establishes that business reasons or even reasons based on a payor's sense of fairness suffices to trigger subrogation rights that are not based, at least in the first instance, on contract or statute. *Cf.* ***Employers Cas. Co. v. Transport Ins. Co.***, 444 S.W.2d 606, 610 (Tex. 1969) ("'Whether the payment of the debt of another is for the purpose of protecting an interest of the one who pays the debt; whether it is paid because of a moral obligation; whether it is a payment by a volunteer--all of these considerations are irrelevant in a case of conventional subrogation.'") (quoted source omitted). Accordingly, although Kara Kemnitz may be getting a windfall, we agree with the trial court that Land Title did not establish under Wisconsin law its right to subrogation.

B. *Assignment of claim.*

¶10 The trial court held that the Stiffs' 2002 assignment of their "claim" against the Kemnitzes failed because there was no consideration for the assignment at the time it was made. We agree.

¶11 It is blackletter law that a valid contract requires consideration. ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 837, 520 N.W.2d 93, 96 (Ct. App. 1994). Whether there is consideration for a contract is a question of fact, and the trial court's finding in that regard will be upheld unless it is clearly erroneous. ***Id.***, 185 Wis. 2d at 838–839, 520 N.W.2d at 97; WIS. STAT. RULE 805.17(2).

¶12 When the assignment was executed, the Stiffs had nothing to gain by making the assignment, and nothing to lose by not making it; they relinquished nothing by making the assignment and got nothing in return. ***NBZ, Inc.***, 185 Wis. 2d at 839, 520 N.W.2d at 97. Although Land Title's general counsel testified that the assignment document was a written memorial of an earlier agreement, the trial court did not accept that testimony, and, on this record, we cannot say that its finding that there was no consideration for the assignment is clearly erroneous.[1]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[1] In an undeveloped argument, Land Title also argues that Kara Kemnitz does not have standing to contend that there was no consideration for the assignment from the Stiffs. We will not consider undeveloped arguments. ***Barakat v. Dep't of Health & Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).