COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0265 **Cir. Ct. No. 98CV002823**

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

RA MORTGAGE & FINANCIAL COMPANY,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

RONALD G. FEDLER,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Reversed and cause remanded with directions*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Ronald Fedler appeals a judgment of the circuit court. Fedler contends that the circuit court erred when it concluded that a

contract between Fedler and Russell Anderson was unambiguous and that Fedler breached the contract.[1] We conclude the contract is ambiguous. Because we are unable to resolve the ambiguity and, consequently, unable to determine whether Fedler breached the contract, we reverse and remand for further proceedings.

¶2 Anderson cross-appeals. He argues that the circuit court erred in awarding damages based on *quantum meruit*. As explained below, both parties assert that the circuit court erred in awarding damages. Also, as explained below, the resolution of this topic is tied to contract construction issues involving factual disputes and, therefore, is not amenable to resolution by this court. If, on remand, it is determined that no breach occurred, it will not be necessary to revisit the issue of damages. However, if a breach did occur, then we direct that damages be revisited.

Background

¶3 Fedler is a commercial and residential real estate developer. Anderson is a mortgage broker doing business as RA Mortgage & Financial. In 1994, Fedler was looking for refinancing for Douglas Terrace apartments, a property he owned in Racine. After St. Francis Bank denied Fedler's request for a loan, Fedler approached Anderson to see if Anderson would assist Fedler in obtaining the loan from St. Francis. Anderson intervened on Fedler's behalf and St. Francis Bank provided a loan to Fedler. Fedler and Anderson did not have an agreement as to how Anderson would be compensated for this service. Instead,

[1] Russell Anderson is the sole shareholder, officer, and employee of RA Mortgage. In this opinion, we will refer to Anderson as the plaintiff-respondent-cross-appellant, rather than RA Mortgage.

Anderson asked Fedler to pay him whatever Fedler thought appropriate. Fedler paid Anderson $5,000.

¶4 In February 1996, Anderson introduced Fedler to Erik Kunz, a loan officer at St. Paul Federal Bank. During that introduction, Kunz indicated to Fedler that St. Paul Federal Bank was interested in financing some of Fedler's projects. Anderson did not ask for, and Fedler did not pay, a fee for the introduction.

¶5 In August 1996, Fedler asked Anderson for assistance in obtaining refinancing for Autumnwood Apartments, an apartment complex Fedler owned in Madison. Anderson agreed orally to help Fedler for a ½% fee, that is, ½% of the loan amount. During the same time period Fedler and Anderson were discussing the Autumnwood transaction, the two were negotiating terms that involved Anderson helping Fedler procure other loans. That negotiation led to the written contract, executed in August of 1996, which is the subject of the dispute in this case.

¶6 The contract gave Anderson the right to procure financing "for projects to be built, acquired or refinanced" by Fedler. In return, Anderson agreed to charge a fee of ½%. The contract contained a provision prohibiting Fedler from contacting, dealing, or being otherwise involved in any other type of transaction with any banking or lending institution "introduced by" Anderson to Fedler without Anderson's permission. The contract specified that it was effective for

two years from the date on the agreement and applied to "any and all transactions entertained" by the parties.[2]

¶7 Shortly after they signed this contract in August of 1996, St. Paul Federal provided a refinance loan for Fedler's Autumnwood property. Fedler paid Anderson an amount equal to ½% of the loan. At the Autumnwood closing, Fedler informed Anderson that Fedler would not be using Anderson's services when refinancing two other properties owned by Fedler, the Casa Blanca and Hunter's Ridge apartment complexes. Fedler subsequently obtained refinancing loans from St. Paul Federal for his Casa Blanca and Hunter's Ridge properties. Fedler did not pay Anderson a fee in connection with these loans, and Anderson commenced this action, claiming he was contractually entitled to fees of ½% of the amount of the two loans.

¶8 The case went to trial. However, after the trial, the circuit court concluded that the contract was unambiguous, and the court entered judgment in favor of Anderson. When awarding damages, the court relied on *quantum meruit*, rather than applying the ½% formula in the contract. The court calculated its damage award by looking at the 1994 transaction in which Fedler gave Anderson $5,000 for assisting with the Douglas Terrace refinancing. The court doubled the $5,000 figure because the current dispute involves the refinancing of two properties: Casa Blanca and Hunter's Ridge.

[2] The contract physically consists of two pages, each with a set of signatures. They give the appearance of being two separate contracts. However, the pages were executed simultaneously and neither party suggests that it matters whether we consider the two pages to be two contracts or one. Often, the parties speak as if there were a single contract. In the absence of any dispute on this point, we will discuss the two pages as if they comprised a single contract.

Fedler's Appeal

A. Introduction

¶9 This is a contract interpretation case. "The interpretation and construction of a contract is a question of law that we review without deference to the trial court." ***Zimmerman v. DHSS,*** 169 Wis. 2d 498, 507, 485 N.W.2d 290 (Ct. App. 1992). "The ultimate aim of all contract interpretation is to ascertain the intent of the parties." ***Eden Stone Co. v. Oakfield Stone Co.,*** 166 Wis. 2d 105, 116, 479 N.W.2d 557 (Ct. App. 1991). "When the terms of a contract are plain and unambiguous, we will construe the contract as it stands." ***State v. Peppertree Resort Villas, Inc.,*** 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345. However, when the terms of a contract are "reasonably or fairly susceptible to more than one construction," the contract is ambiguous. ***Maas v. Ziegler,*** 172 Wis. 2d 70, 79, 492 N.W.2d 621 (1992). "When a contract provision is ambiguous, and therefore must be construed by the use of extrinsic evidence, the question is one of contract interpretation for [a fact finder]." ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996).

¶10 This case comes to us in an unusual posture. We are not reviewing a summary judgment order, but instead a judgment issued after a trial. The circuit court held a trial, presumably to resolve factual disputes, but then issued a decision concluding that the contract was unambiguous on its face, something that does not involve the resolution of factual disputes. The court concluded that the contract unambiguously provided that Anderson was entitled to compensation relating to the refinancing of Fedler's Casa Blanca and Hunter's Ridge properties. Thus,

although a trial was held, that trial yielded no fact finding regarding disputed extrinsic evidence of the parties' intent.

¶11 Our resolution of this case is further complicated by the fact that the parties commingle legal contract arguments with factual arguments. The parties' briefs often argue this matter as if we had the authority to find facts when the evidence is in dispute. We do not. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980) (the court of appeals may only consider undisputed evidence; it is not a fact-finding court). In the sections below, we attempt to parse out the legal arguments of the parties and address those. Based on those arguments, we conclude that, in at least one pertinent respect, the contract is ambiguous. We then explain why this ambiguity requires that we remand the case for further proceedings.

B. Whether the Contract Is Invalid for Lack of Specificity

¶12 Fedler first argues that contracts of this type must specify the particular loans, fees, and security. Fedler asserts that the contract here "merely contained Anderson's promise to offer his broker's services to Fedler for a fee of a half of a percent, as long as Fedler extended to Anderson an opportunity to procure all of Fedler's future financing needs." According to Fedler, the agreement was nothing more than an agreement to agree and, as such, was not a binding contract.[3]

[3] Fedler asserts in his appellate brief that "Anderson conceded at trial that the … agreement at best gave Anderson 'a shot' at being retained for future deals by Fedler." This statement mischaracterizes the testimony cited. When the part of the trial transcript cited by Fedler is read in context, it is apparent that Anderson was acknowledging only that Fedler might obtain financing not covered by the agreement because Fedler might exercise his right to cancel the agreement and then make contact with a lender that had not been introduced by Anderson. (continued)

¶13 We have reviewed the seven pages of argument Fedler offers in support of this argument, and the only legal support we find is Fedler's reliance on WIS. STAT. § 224.77 (1995-96) and WIS. ADMIN. CODE § RL 43.04, a statute and a code provision authorizing the regulation and discipline of mortgage brokers. Fedler asserts that the type of contract at issue here must clearly specify the loan, fee, and security because "mortgage broker competence requires" compliance with § 224.77 and § RL 43.04. Fedler, however, fails to explain why noncompliance with a statute and code provision directed at the regulation of mortgage brokers renders the *contract* in this case non-enforceable. We address this argument no further.

C. Whether the Contract Applies Only to the Autumnwood Property

¶14 The parties agree that there is no fee owing in connection with Fedler's Autumnwood property. According to Fedler, this means that he owes Anderson nothing under the contract because it applies only to the Autumnwood property.

¶15 The contract provides that it applies to "any and all transactions entertained by the signatories, including subsequent follow up, repeat, extended, or renegotiated transactions, as well as to the initial transaction—regardless of the success of the project." Fedler argues that the phrase "all transactions entertained by the signatories" is a reference solely to the Autumnwood loan because this was

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Perhaps more to the point here, Anderson was not conceding that the agreement did not cover St. Paul Federal and he was not conceding that he merely had an agreement that contemplated the possibility of future agreements. Of course, if Anderson had made such a concession, Anderson would have been admitting there was no contract, and this case would have been easily disposed of by the circuit court.

the only loan that Anderson had been retained to procure at the time the contract was signed. Fedler argues that the above language shows that the contract applied only to the Autumnwood loan and any "follow-up" loans in connection with that property.

¶16 If Fedler is arguing that the contract unambiguously covers only the Autumnwood property, his argument misses the mark. There is no express reference in the contract to Autumnwood, something one would expect if it were limited to Autumnwood. Instead, the language used is, on its face, broad and not restricted to a particular property: "any and all transactions." Moreover, Fedler's argument relies on extrinsic evidence. He asks this court to look at the larger context of the negotiation and infer that the parties both intended to restrict the contract to the Autumnwood property. But, of course, that is not a proper non-ambiguity argument because it involves the consideration of extrinsic evidence. *See* ***Farm Credit Servs. of N. Cent. Wis., ACA v. Wysocki***, 2001 WI 51, ¶12, 243 Wis. 2d 305, 627 N.W.2d 444.[4]

¶17 We conclude there is nothing ambiguous about the phrase "any and all transactions entertained by the signatories." This language unambiguously applies to just what it says, "any and all transactions entertained by the signatories." If there are limitations on which transactions, "entertained" by the

[4] Fedler points to his own testimony indicating that he thought the contract covered only the Autumnwood property. However, this is no help at all without corresponding undisputed evidence that this was also Anderson's understanding. In addition, we agree with Anderson that Fedler's Autumnwood argument is inconsistent with the Fedler argument we address next: that the contract applied only to introductions made after the date of the contract. Since Anderson made the St. Paul Federal introduction prior to the date of the contract, the contract would not, under Fedler's interpretation, apply to *any* subsequent financing involving St. Paul Federal, including the Autumnwood property. But, as we shall see, Fedler argues that the contract was intended to apply to subsequent Autumnwood financing occurring during the term of the contract.

parties, are covered by the contract, such limitations must be found elsewhere in the contract. The remaining limitations argued by Fedler are discussed below.

D. Whether the Contract Unambiguously Applies Only to Lenders Introduced After the Date of the Contract

¶18 Fedler argues that the contract applies only to banks and lending institutions *introduced* to Fedler by Anderson *after* the date of the contract. Under this view, no financing deals between Fedler and St. Paul Federal would be covered by the contract because Anderson introduced these parties before the contract was executed. We think Fedler's interpretation of the contract is reasonable, but we think Anderson's contrary interpretation is also reasonable. Accordingly, we conclude the contract is ambiguous with respect to whether it covers introductions made prior to the contract.

¶19 The non-circumvention provision states, in pertinent part:

> This instrument shall confirm that each of the named signatories, separately and individually, and their associates hereby agree that they … will not make any contact with, deal or otherwise involve in any transaction with any banking or lending institution … introduced by [Anderson] … without permission of [Anderson]….
>
> ….
>
> This agreement is a perpetuation guarantee for 2 years from the date [of this contract] and is to be applied to any and all transactions entertained by the signatories, including subsequent follow up, repeat, extended, or renegotiated transactions, as well as to the initial transaction—regardless of the success of the project.

¶20 Fedler argues that the above "introduced by" language applies only to lenders Anderson introduced to Fedler during the life of the contract. We agree with Fedler's argument that this interpretation is reasonable because there is no

language indicating that the contract applies to introductions made before the contract was signed and contracts normally cover obligations prospectively. As Fedler points out, on its face the contract applies for a two-year period, commencing on the date the contract was executed.

¶21 Anderson proffers a contrary reasonable interpretation. Anderson argues that the contract can be read as being directed at financing transactions occurring after the contract was executed, including transactions with lenders introduced to Fedler by Anderson before the contract was executed. According to Anderson, this interpretation is reasonable because there is no language in the contract limiting the term "introduced by" to introductions made after the contract was executed. We agree. We also conclude that this interpretation is reasonable because both Fedler and Anderson agree that there are scenarios in which the contract covers multiple consummated loans, even if such loans flowed from a single introduction. This is important because it means the payments to Anderson are tied to the number and the amount of loans, not to the number of introductions.

¶22 Accordingly, we conclude the contract is ambiguous with respect to whether it covers introductions made prior to the contract.[5]

[5] Notably, Fedler does *not* argue that he should prevail because the contract unambiguously gave him the right to terminate the contract at any time and that he did terminate the agreement prior to consummation of the Casa Blanca and Hunter's Ridge loans. In his reply brief, Fedler refers to the fact that he sent a letter informing Anderson that he was exercising his right to terminate the agreement, but not in the context of arguing that the termination letter deprives Anderson of a right to fees under the contract. We do not suggest that this argument has merit, but rather note its absence before this court because the argument *was* made before the circuit court.

E. Why Remand Is Necessary

¶23 Because the contract is ambiguous, we must determine whether the record before us permits the application of other legal analysis to resolve that ambiguity. We conclude that it does not.

¶24 As noted previously, the parties' briefs often argue this matter as if we were a fact-finding court. Rather than relying on undisputed extrinsic evidence, and explaining why such evidence is undisputed, the parties point to disputed evidence and argue that we should accept their interpretation of such evidence. For example, both parties ask us to draw factual inferences from the circumstances prior to and at the time of the execution of the contract. Similarly, both parties point to a letter written by Anderson after the contract was executed and ask that we draw factual inferences from that letter.[6] These arguments, however, must be directed to the circuit court. We may only consider undisputed

[6] Fedler points to a letter Anderson wrote after the dispute over the contract arose. In that letter, Anderson wrote: "The second page is a non-disclosure and non-circumvention agreement which has a term of two (2) years and protects me on any future transactions with the signatory, etc. from dealing with any one that I introduce to them from the date of the agreement." Fedler argues that this letter constitutes an admission by Anderson that Anderson thought the agreement only applied to introductions made after the date of the agreement. The problem with Fedler's argument is that he is asking this court to make a factual finding based on extrinsic evidence. It is obvious from the content of the trial testimony that Anderson did not agree that the contract was intended to exclude introductions made prior to the execution of the contract. This is not the sort of evidence that is not subject to dispute. If Anderson had been questioned on the topic, he might have explained that he simply did not mean what he said. The letter is not a contract. Anderson is not bound by its unambiguous language. Rather, on this topic it is merely evidence of what Anderson was thinking at the time of contracting. Plainly, this topic was in dispute at trial, and the circuit court did not resolve this factual dispute.

Anderson contends that the letter "can be read to simply mean that from the date of the Agreement, Anderson was protected as to any future transactions with lenders who were introduced to Fedler by Anderson at any time." Anderson also points out that, since he included St. Paul Federal on the list of lenders subject to the provision, the letter indicates Anderson believed the contract applied to St. Paul Federal.

evidence; we are not a fact-finding court. *See* ***Wurtz***, 97 Wis. 2d at 107 n.3; ***Spencer v. Spencer***, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987) ("Where [extrinsic] evidence permits more than one reasonable inference concerning the parties' intent, the trial court, not the appellate court, must make the factual determination and resolve the ambiguity.").

¶25 Fedler argues that we may resolve the ambiguity by construing the contract against the drafter, namely Anderson. We agree with Fedler that one rule of contract construction is that ambiguity is construed against the drafting party. *See, e.g.,* ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶24, 233 Wis. 2d 314, 607 N.W.2d 276. We also acknowledge that several cases, such as ***Wisconsin Label*** and the case Fedler relies on, ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 506, 577 N.W.2d 617 (1998), might be read in isolation to suggest that whenever a contract is ambiguous we may go directly to the construe-against-the-drafter rule. However, when the construe-against-the-drafter rule is discussed more precisely, it is explained that this is a tie-breaker rule which is applied only after extrinsic evidence has been examined. *See* ***Bidlack v. Wheelabrator Corp.***, 993 F.2d 603, 609 (7th Cir. 1993); ***Roth v. City of Glendale***, 2000 WI 100, ¶51, 237 Wis. 2d 173, 614 N.W.2d 467 (Sykes, J., concurring). Thus, we may not apply this tie-breaker rule of contract construction when there has been no factual resolution by a fact finder regarding extrinsic evidence.

¶26 Because the circuit court resolved the contract dispute here by concluding the contract was unambiguous, a conclusion with which we disagree, the circuit court did not attempt to resolve the ambiguity by means of resolving factual disputes regarding extrinsic evidence. On remand, the circuit court is directed to attempt to resolve the contractual ambiguity we describe above—i.e.,

whether the contract covers introductions made prior to the execution of the contract—by first examining extrinsic evidence on that point. If this effort fails to resolve the ambiguity, the circuit court may construe the contract against Anderson using the construe-against-the-drafter rule. We are not suggesting that no other rule of contract construction has application here. It may be that on remand the parties will advise the circuit court of some applicable rule not discussed in their appellate briefs. We hold only, based on the arguments made before us, that the construe-against-the-drafter rule may not be applied before the circuit court has attempted to resolve the contractual ambiguity by reviewing extrinsic evidence.

Anderson's Cross-Appeal

¶27 The parties agree that the circuit court erred in awarding *quantum meruit* damages. Anderson cross-appeals, arguing that the award should have been higher because it should have been based on the ½% fee agreement in the contract. Fedler argues that Anderson proved no damages. Like Anderson, Fedler ties his damages argument to his interpretation of the contract.

¶28 We agree with the parties that the circuit court erred in awarding *quantum meruit* damages based on an amount Fedler had agreed to pay Anderson in 1994 for services in connection with a particular loan. However, we are unable to resolve the damages dispute for the same reason we must remand regarding whether a breach occurred in the first place. The resolution of this question is inextricable from the resolution of the dispute over the interpretation of the contract itself. We conclude that the contract does not unambiguously provide what the result should be under the facts in this case. We do, however, agree with

Anderson that guidance is provided by ***Thorp Sales Corp. v. Gyuro Grading Co.***, 111 Wis. 2d 431, 331 N.W.2d 342 (1983). The supreme court in ***Thorp*** explained:

> In ***Schubert v. Midwest Broadcasting Co.***, 1 Wis. 2d 497, 502, 85 N.W.2d 449 (1957), we said:
>
> "The fundamental idea in allowing damages for breach of contract is to put the plaintiff in as good a position financially as he would have been in but for the breach."
>
> *See*, also, ***United Leasing & Financial Services, Inc., v. R.F. Optical, Inc.***, 103 Wis. 2d 488, 492, 309 N.W.2d 23 (Ct. App. 1981).
>
> Thus, the award of damages for a breach of contract should compensate an injured party for losses that necessarily flow from the breach. ***Repinski v. Clintonville Federal Savings & Loan Asso.***, 49 Wis. 2d 53, 181 N.W.2d 351 (1970); ***Lommen v. Danaher***, 165 Wis. 15, 161 N.W. 14 (1917).
>
> An injured party is entitled to the benefit of his agreement, which is the net gain he would have realized from the contract but for the failure of the other party to perform. The agreement of Gyuro was that Thorp Sales was to be compensated for its auction services by receiving 8 percent of the auction proceeds. Because of Gyuro's conduct, Thorp Sales was prevented from performing and Thorp was denied the benefit of its bargain.

Id. at 438-39.

¶29 Therefore, if on remand the circuit court determines that Fedler breached the contract, the parties can renew their damages arguments and the circuit court will need to resolve that dispute.

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

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