COURT OF APPEALS DECISION DATED AND FILED

November 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-1526-FT

Cir. Ct. No. 03-CV-6

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

TOWN OF CABLE SANITARY DISTRICT NO. 1,

PLAINTIFF-RESPONDENT,

V.

TELEMARK INTERVAL OWNERS ASSOCIATION, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Bayfield County: JOHN H. PRIEBE, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. This appeal arises from an action to enforce a contract for a land purchase. Telemark Interval Owners Association, Inc., appeals

a summary judgment in favor of the Town of Cable Sanitary District No. 1.[1] Telemark argues that the circuit court erred when it concluded: (1) The District did not have to comply with WIS. STAT. ch. 32 condemnation procedures and (2) the District had not "waived its rights under the purported contract." We agree with the circuit court that the District was not required to comply with ch. 32 because it was negotiating a purchase, not condemning the property. We therefore affirm that portion of the judgment. However, we conclude that a genuine issue of material fact exists regarding the status of the contract. Consequently, we reverse that portion of the judgment and remand for further proceedings.

Background

¶2 Telemark holds title to certain property in Bayfield County. Prior to February 1, 2002, Telemark and the District negotiated a contract in which Telemark would sell forty acres of the property to the District for $60,000, or $1,500 per acre. Telemark signed the contract on February 1, 2002.

¶3 In June 2002, the District submitted a new description of land it wished to acquire. This parcel consisted of original forty acres plus an adjacent twenty-three acres.

¶4 In a letter dated July 3, Telemark disapproved of the new description, writing it believed "with the Sanitation District's changing of the description … and request to purchase other lands … [the] District has chosen not to accept the previous agreement to purchase the original 40 acre parcel. …

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[Telemark] previously had agreed to sell … [the] 40 acre parcel … [and] will honor that agreement if the [District] wishes to purchase only that parcel."

¶5 Then, by a letter dated July 12, Telemark's attorney contacted the District, informing it he believed the original purchase contract to be invalid because it was signed on February 1, 2002, when the contract stated that acceptance had to be made by November 10, 2001.[2] The attorney stated he also believed the contract was invalid because the District failed to comply with requirements found in WIS. STAT. ch. 32.[3]

¶6 On November 11, 2002, the District indicated it would have the sixty-three-acre parcel appraised and stated it would purchase the land for the appraised price "if feasible."[4] The District claims this was an effort at compromise. The appraisal came back with a value of $245,000, approximately $3,900 per acre, for the land and compensation for the diminution in value of Telemark's remaining property that surrounded the parcel.

¶7 Because $245,000 was an unfeasible purchase price, the District abandoned "further efforts to compromise" and sought to purchase only the forty

[2] The circuit court concluded that the record indicated the parties mutually agreed to extend the date for acceptance because there was no indication that time was of the essence. The parties do not challenge that ruling.

[3] The specific errors Telemark complained of, both here and before the circuit court, are the District's failure to pass a resolution of necessity, failure to secure an appraisal, and failure to notify Telemark of its rights. *See* WIS. STAT. §§ 32.05(1), (2), and (2b); 32.06(1), (2), and (2b).

[4] This document, included in the record, is captioned "RE: Letter of November 5, 2002." However, no letter from November 5 is included in the record. We can only speculate that this November 5 letter included a demand for an appraisal on the sixty-three-acre parcel.

acres originally agreed upon. Telemark refused to sell the land at the $60,000 contract price and the District brought this action to enforce the contract.

¶8 In the circuit court, the parties brought competing motions for summary judgment. The court granted the District's motion to enforce the contract and denied Telemark's motion to have the contract declared void. Telemark appeals.

Discussion

¶9 We review summary judgments de novo, using the same methodology as the circuit court. *See* ***M&I First Nat'l Bank v. Episcopal Homes Mgmt.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2); ***M&I***, 195 Wis. 2d at 496-97. We will reverse a summary judgment only if we determine that either material facts are in dispute or the circuit court incorrectly decided legal issues. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). Statutory interpretation is also a question of law we review de novo. ***In re Agnes T.***, 189 Wis. 2d 520, 525, 525 N.W.2d 268 (1995).

Compliance with WIS. STAT. ch. 32

¶10 Telemark argues that the District was required but failed to comply with WIS. STAT. ch. 32, specifically WIS. STAT. §§ 32.05 or 32.06.[5] For authority, it relies on an attorney general's opinion on WIS. STAT. ch. 32. *See* 68 Op. Att'y Gen. 3 (1979). We, however, are not bound by the attorney general's opinion. ***State ex rel. Wisconsin Senate v. Thompson***, 144 Wis. 2d 429, 460, 424 N.W.2d 385 (1988).

¶11 The attorney general was asked whether the Department of Natural Resources, authorized under WIS. STAT. § 23.09 to acquire land, must follow WIS. STAT. ch. 32 condemnation proceedings when the landowner initiates the department's acquisition of his land. 68 Op. Att'y Gen. at 3. The attorney general noted that the distinction between acquisition and condemnation, both of which are authorized by statute, can be difficult to draw.[6] ***Id.*** at 5. As such, WIS. STAT. ch. 32 should be followed any time there is a possibility of condemnation. ***Id.***

¶12 However, in light of the dual nature of the statute, "the Department need not comply with ch. 32 … unless it actually intends to condemn the specific property involved. … It is important that there be no intent, under any

[5] WISCONSIN STAT. § 32.05 deals with the condemnation procedures for "sewers and transportation facilities." WISCONSIN STAT. § 32.06 deals with "procedure in other than transportation matters." For purposes of this appeal, it is irrelevant which statute actually applies to these facts.

[6] We note that WIS. STAT. § 60.77(5)(h) grants the governing commissions of sanitary districts the authority to "Lease or acquire, including by condemnation, any real property situated in this state …." This means that condemnation is one manner of acquiring land, but it is not the only manner. A district need not condemn the land, particularly if there is a willing and cooperative seller.

circumstances, to condemn, otherwise the purpose of ch. 32 … is circumvented."[7] ***Id.***

¶13 Telemark argues that the opinion requires compliance with WIS. STAT. ch. 32 unless there is no intent to condemn the property. Moreover, Telemark contends that a government will always intend to condemn property when it wishes to purchase a parcel of land but is confronted with a landowner reluctant to sell the land. The District disagrees with Telemark's interpretation of the opinion, arguing that the factual differences limit its application. Moreover, the District points out there is no evidence it had any intent to condemn Telemark's property.

¶14 We will assume without deciding that Telemark's interpretation of the attorney general's opinion is correct—that any time there is an intent to condemn property, WIS. STAT. ch. 32 procedures must be followed. Intent of the parties is a question of fact. ***Marten Transp. Ltd. v. Hartford Spec. Co.***, 194 Wis. 2d 1, 14, 533 N.W.2d 452 (1995). The only evidence in this summary judgment record is an affidavit from the District's commission president that the District had no intention of condemning Telemark's land. Telemark presents no countervailing affidavit or other evidence to the contrary. Consequently, there is no factual dispute as to the District's intent. Therefore, we conclude that the District's failure to follow WIS. STAT. §§ 32.05 or 32.06 is irrelevant because such compliance is unnecessary in a negotiated purchase with no intent to condemn.

[7] As the attorney general noted, WIS. STAT. §§ 32.19 to 32.27 must be followed in any property acquisition, whether made through condemnation or some other method. 68 Op. Att'y Gen. 5-6 (1979). The applicability of and compliance with those sections are not at issue on appeal.

Status of the February 2001 Contract

¶15 Telemark argues that the District waived its rights under the February contract. The District responds that it was merely attempting to settle its dispute with Telemark, and that evidence of attempts to settle are inadmissible. *See* WIS. STAT. § 904.08.[8] The circuit court concluded that although there were additional negotiations after the February contract was signed, there was no change to the initial contract and no "waiver" by the District.

¶16 We, however, discern a factual question here: whether the District intended to relieve Telemark of its obligations under the February contract, intended to withdraw or abandon the contract, or intended to renegotiate the contract. The record before us supports at least two competing factual inferences.

¶17 The first possible inference is that the District signaled a willingness to abandon the original contract and renegotiate a new purchase contract when it submitted a proposal to purchase sixty-three acres, not forty. When Telemark's attorney essentially and unilaterally revoked the February contract, the District agreed to have the sixty-three-acre parcel appraised. After all, failure to secure an

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[8] WISCONSIN STAT. § 904.08 states:

> Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

appraisal of the forty-acre parcel was one of Telemark's complaints. This agreement to appraise the sixty-three-acre parcel and purchase it if feasible could be viewed as the District's agreement to abandon the February contract or relieve Telemark of its obligations so that the parties could negotiate a new contract for the sale of the sixty-three-acre parcel.

¶18 Alternatively, it may be inferred that the District never abandoned the February contract. When Telemark rejected the request for the sixty-three-acre parcel, it reaffirmed its willingness to sell the forty acres originally bargained for. However, its attorney stepped in to invalidate the contract. In an attempt to settle the dispute, the District conditionally agreed to an appraisal of the sixty-three-acre lot, contingent upon receiving an appraised price the District could afford. However, the failure to obtain an affordable price meant that the District declined to relieve Telemark of its contractual obligations, seeking to purchase the forty acres under the original contract and accepting that it could not acquire the larger parcel.

¶19 Because there are at least two competing factual inferences, summary judgment was inappropriate. Again, intent of the parties is a question of fact. ***Marten Transp.***, 194 Wis. 2d at 14. As such, we cannot resolve this issue on appeal and we remand the case on the contract issue only.[9]

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[9] Telemark also raised an issue regarding misrepresentation. This argument revolves around construction of a waste water treatment plant. The District indicates that the plant will be built elsewhere and Telemark does not re-address this issue in its reply brief. We therefore determine this argument is moot and we do not discuss it further.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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