COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0405 **Cir. Ct. No. 03PR000259**

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

IN RE THE ESTATE OF MARGARET L. PRENTICE:

JOHN E. PRENTICE, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARGARET L. PRENTICE,

APPELLANT,

V.

CALVARY MEMORIAL CHURCH OF RACINE, INC.,

RESPONDENT.

APPEAL from an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed.*

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

¶1 NETTESHEIM, J. The Estate of Margaret L. Prentice appeals from a probate court order allowing the claim of Calvary Memorial Church of Racine, Inc. (Calvary) for specific performance of a contract for the sale of real estate.

The Estate argues that the contract is unenforceable because: (1) the closing date of the sale did not occur within the time limits set out in the contract, and (2) the contract is both procedurally and substantively unconscionable. The Estate also raises two evidentiary issues: (1) the probate court erred by excluding Calvary's postcontract proposals to increase the purchase price as inadmissible offers of settlement pursuant to WIS. STAT. § 904.08 (2001-02),[1] and (2) the probate court erred by considering two other concurrent sales between the parties. We reject the Estate's arguments and affirm the order allowing Calvary's claim.

BACKGROUND

¶2 The history of this case is undisputed. In 1968, John J. Prentice and his wife, Margaret, owned adjoining lots 8, 9, 10 and 11 in Block 2 of the Orchard Home Addition in Racine, Wisconsin.[2] Lots 10 and 11 were vacant properties while the Prentices' residence was located on lots 8 and 9. We will refer to lots 10 and 11 as the "vacant lots" and lots 8 and 9 as the "residence lots."

¶3 On May 16, 1968, the Prentices and Calvary entered into a contract for the sale of the residence lots. The contract stated a purchase price of $15,000, of which Calvary paid $100 as a down payment. The contract included the following unusual provision regarding the closing of the sale:

> This transaction shall be closed at the offices of [Buyer's attorney] at such time as the Sellers shall designate by a ninety-day prior written notice, given to the Buyer. *If such ninety-day written notice has not been given prior to the*

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] Actually, the Prentices owned only a portion of lot 8. When we refer to that lot, we are limiting our reference to that portion owned by the Prentices.

> *death of both of the Sellers, this transaction shall be closed on or before ninety (90) days after the death of the last one of the Sellers to die.* (Emphasis added.)

In addition, the contract provided that the Prentices could remove the residence from the property within thirty days after closing. Calvary recorded the contract on May 27, 1968.

¶4 On May 21, 1968, five days after the sale of the residence lots, the Prentices sold the vacant lots to Calvary for $10,000. Unlike the sale of the residence lots, the sale of the vacant lots was an outright sale with no delayed closing. Calvary purchased all of the Prentices properties in order to provide additional parking space.

¶5 The Prentices did not seek to close the sale of the residence lots during John's lifetime.[3] After John's death, Calvary approached Margaret with offers to increase the purchase price from $15,000 to $30,000 and later to $35,000 if she would agree to an immediate closing. Margaret declined. In addition, Margaret's daughter offered to "buyout" Calvary's interest in the contract because the family wanted to keep the family residence. Calvary declined. Margaret died on April 28, 2003.

¶6 Following Margaret's death, the Prentice children continued to negotiate with Calvary. They offered to pay Calvary $70,000 in exchange for Calvary surrendering its interest in the contract. Calvary declined. Still later, John E. Prentice, Margaret's son, sent a letter to Calvary asking that Calvary increase the purchase price to the current value of the property. At a meeting of

[3] John died on February 20, 2001.

both parties, Calvary advised that while it was willing to discuss a settlement, it would not agree to surrender its interest in the contract.[4]

¶7 On August 13, 2003, more than ninety days after Margaret's death, John E. Prentice petitioned for informal administration of Margaret's estate, and in due course he was named as personal representative. On September 11, 2003, Calvary filed a claim against the Estate seeking specific performance of the contract for the sale of the residence lots. The Estate objected, contending that the contract was "null and void" because no closing had occurred within ninety days of Margaret's death and because the contract was otherwise procedurally and substantively unfair.

¶8 The Estate moved for summary judgment seeking dismissal of Calvary's claim.[5] Following written briefs from the parties and a hearing on the motion, the probate court issued a bench decision denying the Estate's motion and, instead, allowing Calvary's claim for specific performance.[6] The Estate appeals.

[4] As part of any settlement, Calvary stated that it would consider paying for the cost of moving the family residence.

[5] The Estate also sought an order directing that the recording of the contract "be vacated or discharged."

[6] WISCONSIN STAT. § 802.08(6) permits a court to grant summary judgment to a party against whom summary judgment is asserted even though that party has not moved for summary judgment.

DISCUSSION

Timeliness of the Closing

¶9 As noted, the parties contract called for a closing during the Prentices' lifetimes upon ninety days written notice to Calvary, or, if no closing occurred under those circumstances, "on or before ninety (90) days after the death of the last one of the Sellers to die." Here, the Prentices did not seek to close the sale during their lifetimes. Therefore, the provision in play is that requiring a closing on or before ninety days of the death of the survivor, here Margaret.

¶10 The Estate contends that the contract lapsed by its own terms because no closing occurred within ninety days following Margaret's death. However, "time is not ordinarily regarded as of the essence unless the contract so states or the circumstances indicate that such was the intent of the parties." ***Huntoon v. Capozza***, 57 Wis. 2d 447, 452, 204 N.W.2d 649 (1973). This is so even where a contract states a definite time for performance. ***Rottman v. Endejan***, 6 Wis. 2d 221, 226, 94 N.W.2d 596 (1959). One way for the parties to indicate that time is of the essence even if the contract does not so say is to state the effect of nonperformance at the time stated. *See* ***id***. We may also look to the facts and circumstances surrounding the contract to determine if the parties intended time to be of the essence. ***Employers Ins. of Wausau v. Jackson***, 190 Wis. 2d 597, 617, 527 N.W.2d 681 (1995). Finally, the subsequent conduct of the parties may also offer insight on this question. ***Id***.

¶11 With these principles in mind we turn to this case. First, we observe that the contract, although stating a mechanism for establishing when a closing should be held, does not recite that time is of the essence. Second, the contract is silent as to the consequences if a closing did not occur within the time limits set

out in the agreement. Third, we see nothing in the facts and circumstances surrounding the contract which suggests that time was to be of the essence with regard to the date of the closing. In fact, the circumstances suggest just the opposite. The Prentices negotiated a contract for the guaranteed sale of their property but which functionally reserved to them the equivalent of a life estate. Thus, the contract foresaw that the sale might not even close during the Prentices' remaining lifetimes. In light of that, it strains commonsense to conclude that a closing which did not strictly adhere to the ninety-day provision would doom the agreement.

¶12 Moreover, to the extent that anyone sought to close the sale, it was Calvary, not the Prentices or their heirs. After John's death, Calvary offered to close at an increased sales price, but Margaret declined. While Margaret was entitled to reject this overture since only she could trigger the ninety-day provision during her lifetime, it nonetheless supports Calvary's argument that the Prentices did not deem time to be of the essence as to the closing provision.

¶13 We uphold the probate court's ruling that time was not of the essence as to the contract and that the failure to close the sale within the time limitations of the contract did not render the contract unenforceable.[7]

Procedural and Substantive Unconscionability

¶14 The Estate argues that the enforcement of the contract produces an unconscionable result because it allows Calvary to purchase the property,

[7] Given our holding, we need not address Calvary's alternative argument that the Estate has waived any failure to close the sale within the ninety-day period.

currently valued at $70,000, for $15,000 per the parties' 1968 agreement. Unconscionability has two components—procedural unconscionability and substantive unconscionability. "To tip the scales in favor of unconscionability requires a certain quantum of procedural plus a certain quantum of substantive unconscionability." ***Discount Fabric House of Racine, Inc. v. Wis. Tel. Co.***, 117 Wis. 2d 587, 602, 345 N.W.2d 417 (1984). Important to this case, unconscionability is determined as of the time the parties entered into the agreement. *See* ***Gertsch v. Int'l Equity Research***, 158 Wis. 2d 559, 578, 463 N.W.2d 853 (Ct. App. 1990).

¶15 Procedural unconscionability requires consideration of the factors bearing on a meeting of the minds. ***Deminsky v. Arlington Plastics Mach.***, 2003 WI 15, ¶27, 259 Wis. 2d 587, 657 N.W.2d 411. Substantive unconscionability pertains to the reasonableness of the contract terms themselves. ***Id.*** In this case, most of the facts bearing on the unconscionability question travel to both the procedural and substantive components of the inquiry. Therefore, we will address both components in a single discussion.

¶16 Although not an exhaustive list, among the relevant considerations to a claim of procedural unconscionability are the parties' age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the terms were possible, and whether there were alternative sources of supply for the goods in question. ***Discount Fabric House***, 117 Wis. 2d at 602.

¶17 The Estate makes no claim that the Prentices' age at the time of the contract supports its claim of unconscionability. Although the record does not

expressly indicate the level of the Prentices' education or business experience, we will allow that these factors favor the Estate. We also will assume that Calvary drafted the contract. However, we are not persuaded that these factors outweigh the convincing power of the remaining factors which favor Calvary.

¶18 Most importantly, the Prentices held the upper hand in the parties' negotiations because they owned the asset coveted and needed by Calvary. The Prentices were under no obligation to sell, and they make no claim that they were overwhelmed by Calvary during the negotiations. Nor do they make any claim that the $15,000 purchase price did not represent the then fair value of the property. Moreover, the Prentices negotiated a provision that enabled them to sell their property while potentially retaining its enjoyment and use for the duration of their lifetimes. In addition, if they did sell, the Prentices retained the right to remove the residence from the property.

¶19 While the record does not establish that an attorney represented the Prentices in this transaction, we observe that counsel did represent the Prentices as to the concurrent sale of the vacant lots. In light of that, the probate court understandably was tempted to conclude that this same counsel had represented the Prentices with regard to the sale of the residence lots. But even if not, the court correctly observed, "clearly the Prentices would have had ample opportunity to seek his advice on the sale of the property."

¶20 In addition, the terms of the concurrent sales also augur against the Estate's claim of unconscionability. The total assessed value of all the lots at the time of the sales was $11,300, broken down as follows: $7500 for the residence lots and $1900 for each of the vacant lots. Thus, the Prentices negotiated a tidy

profit on the vacant lots besides obtaining purchase prices in excess of the assessed valuation for the residence lots.[8]

¶21 Like the probate court, we see nothing in the summary judgment evidence supporting the Estate's claim that the circumstances surrounding the parties' meeting of the minds was procedurally unconscionable. Likewise, we see nothing substantively unconscionable in the terms of the agreement itself.

Evidentiary Issues

Evidence of Calvary's Increased Offers

¶22 The Estate complains that the probate court refused to consider the evidence of Calvary's increased offers to Margaret on the question of unconscionability. The court rejected this evidence under WIS. STAT. § 904.08, which bars evidence of an attempt to compromise a claim.

¶23 The Estate relies on ***Ruediger v. Sheedy***, 83 Wis. 2d 109, 264 N.W.2d 604 (1978). There, the probate court had admitted evidence of a purported agreement between two heirs making certain charges against the decedent's estate that were not recited in the will. ***Id***. at 114. Noting that the agreement was made before the probate proceedings had even commenced, the probate court saw the purported agreement as evidence of an attempt to divide the estate by informal agreement between the parties. ***Id***. at 125. The supreme court upheld the probate court's ruling that the parties' agreement was not barred by the

[8] Later in this opinion, we reject the Estate's arguments that the trial court improperly considered these other sales and improperly relied on the tax assessor's "field notes" as evidence of the value of the vacant lots.

case law rule "that an unaccepted offer of compromise is not admissible as an admission against interest on the issue …." ***Id***.[9] The supreme court stated, "We cannot find that the efforts to compromise claims under a will which has not yet been admitted to probate and before a personal representative has been appointed … is an effort to compromise for which the evidentiary privilege should apply." ***Id***. at 126.

¶24 We reject the Estate's reliance on ***Ruediger***. Calvary's proposals to Margaret had nothing to do with any probate proceedings, past or future. Nor did Calvary's proposals attempt to modify the terms of any will or other testamentary disposition. Instead, Calvary's proposals were an attempt to "sweeten the pot" in an effort to achieve an earlier closing and diffuse any potential issue between the parties because of the appreciation in the value of the residence lots since the time the contract was negotiated. Therefore, we agree with the probate court's ruling that Calvary's proposals to Margaret were offers to compromise and therefore barred by WIS. STAT. § 908.04.

¶25 However, this evidence was also inadmissible on a separate and different basis. As we have already explained, a claim of contractual unconscionability is evaluated as of the time the parties entered into the contract. ***Gertsch***, 158 Wis. 2d at 578. Here, Calvary's proposals to Margaret came decades after the parties made their agreement. That evidence had no bearing on the Estate's claim of unconscionability.

[9] However, this rule did not bar evidence of independent facts occurring during compromise negotiations. ***Ruediger v. Sheedy***, 83 Wis. 2d 109, 126, 264 N.W.2d 604 (1978). The later enactment of WIS. STAT. § 904.08 barred evidence of both the unaccepted offer of compromise as well as the independent facts surrounding the negotiations. ***Ruediger***, 83 Wis. 2d at 126.

Evidence of the Vacant Lot Sales and Value of the Lots

¶26 The Estate complains that the probate court considered the sales of the vacant lots when addressing the Estate's unconscionability claim as to the residential lots. We summarily reject this argument. Whether evidence is admissible is a discretionary decision for the probate court. ***State v. Franklin***, 2004 WI 38, ¶6, 270 Wis. 2d 271, 677 N.W.2d 276. In order to assess the Estate's unconscionability claim and Calvary's defense to that claim, the probate court was entitled to consider the surrounding facts and circumstances. As noted, the sales of all of the Prentices' lots were accomplished within a five-day period. As such, the sales had the look of a "package deal" and the probate court understandably and properly looked to those other sales in assessing the Estate's unconscionability claim. We have done likewise in our earlier discussion on this issue. The probate court did not misuse its discretion in considering this evidence.

¶27 The Estate also contends that the probate court erroneously relied on the tax assessor's "field notes" when determining that the value of each vacant lot was $1900 in 1968. We deem this issue waived. The Estate did not present any summary judgment evidence in opposition to the affidavit present by Calvary referencing the assessor's field notes. Nor did the Estate file any reply brief to Calvary's summary judgment brief citing to the assessor's field notes. Finally, following Calvary's reference to the field notes in its argument at the summary judgment hearing, the Estate again failed to argue against this point. Now at this late hour, the Estate asks us to rule on an issue that it never raised and which the trial court never had an opportunity to address. We decline.

CONCLUSION

¶28 We hold that the parties' failure to close the sale within the time limits stated in the contract did not bar the probate court from enforcing the agreement. We further hold that the contract was not procedurally or substantively unconscionable. Finally, we hold that the trial court did not commit evidentiary error. We affirm the order allowing Calvary's claim for specific performance of the parties' agreement.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.