COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP51 **Cir. Ct. No. 2005CV225**

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

JOHN M. MACIOLEK AND JANET A. MACIOLEK,

PLAINTIFFS-APPELLANTS,

V.

PATRICK L. ROSS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Waupaca County: RAYMOND S. HUBER, Judge. *Reversed and cause remanded with directions*.

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 VERGERONT, J. This appeal arises from a dispute over the proper method of delivery of a counteroffer in a residential real estate transaction. The circuit court concluded that the offer to purchase and the counteroffer, when read

together, unambiguously require that the acceptance of the counteroffer be personally delivered to the seller. Because the buyers, John and Janet Maciolek, delivered their acceptance of the counteroffer to the seller by mail, the circuit court concluded there was no binding contract. The court entered summary judgment in favor of the seller and dismissed the Macioleks' complaint for specific performance and damages. The Macioleks appeal, contending that the offer to purchase and the counteroffer, when read together, are ambiguous, thus presenting issues of fact that entitle them to a trial. They also contend the circuit court erred in rejecting their waiver and estoppel arguments.

¶2 We conclude the offer to purchase is ambiguous as to whether delivery may be made to the seller by mail. For the reasons we explain in the opinion, we do not decide whether, given that ambiguity, the counteroffer is ambiguous on this point. However, even if the counteroffer plainly requires acceptance of the counteroffer by personal delivery to the seller, we conclude there is a disputed issue of material fact as to whether the seller waived the requirement of personal delivery. Therefore, the circuit court erred in granting summary judgment and we reverse and remand for further proceedings.

BACKGROUND

¶3 For purposes of this appeal, the facts are not disputed unless otherwise noted. The Macioleks executed an offer to purchase property owned by Patrick Ross located at E1281 Round Lake Road in the Town of Farmington in Waupaca County. They used the WB-11 Residential Offer to Purchase form. The "Delivery of Documents and Written Notices" provision of the form to ("delivery of documents" provision), along with the Macioleks' additions in italics, are as follows:

> DELIVERY OF WRITTEN NOTICES. Unless otherwise stated in this Offer, delivery of documents and written notices to a Party shall be effective only when accomplished by one of the methods specified in lines 24 - 33.
>
> [Lines 24-26] (1) By depositing the document or written notice postage or fees prepaid in the U.S. Mail or fees prepaid or charged to an account with a commercial delivery service, addressed either to the Party, or to the Party's recipient for delivery designated at lines 27 or 29 (if any) for delivery to the Party's delivery address at lines 28 or 30.
>
> [Line 27] Seller's recipient for delivery (optional):_____
>
> [Line 28] Seller's delivery address: _____
>
> [Line 29] Buyer's recipient for delivery (optional):" *James R. Eilman*
>
> [Line 30] Buyer's delivery address: *933 N. Mayfair Road, Suite 311, Milwaukee, WI 53226*
>
> [Line 31] (2) By giving the document or written notice personally to the Party, or the Party's recipient for delivery if an individual is designated at lines 27 or 29.
>
> [Line 32] (3) By fax transmission of the document or written notice to the following telephone number:
>
> [Line 33] Buyer: *(414) 771-6377* Seller: __(__)_____

¶4 The Macioleks mailed the offer to purchase to Ross via express mail, postage prepaid, to the address E1281 Round Lake Road, Waupaca, Wisconsin, and Ross received it. Ross took the offer to purchase to his attorney's office and his attorney assisted him in drafting a counteroffer using the standardized WB-44 counteroffer form, which Ross signed. The counteroffer states that

> it is binding upon Seller and Buyer only if a copy of the accepted Counter-Offer is delivered to the Party making the Counter-Offer on or before April 4, 2005… Delivery of the accepted Counter-Offer may be made in any manner specified in the Offer to Purchase, unless otherwise provided in this Counter-Offer….

The counteroffer does not otherwise provide for the manner of delivery of the acceptance. While Ross was at his attorney's office, his attorney faxed the counteroffer to the Macioleks' attorney. The fax cover letter from Ross's attorney stated: "I enclose herewith a counteroffer signed by Mr. Ross. If this is acceptable with Mr. and Mrs. Maciolek, please fax me an acceptance."

¶5 The Macioleks signed the counteroffer and placed it in the U.S. Mail with a certificate of mailing on March 29, 2005, addressed to Ross at the Round Lake Road address. Ross received the accepted counteroffer prior to April 5th.

¶6 A dispute subsequently arose over whether the parties had a binding contract, with the Macioleks asserting they did and Ross asserting they did not. The Macioleks filed this action alleging an anticipatory breach of contract and seeking specific performance and consequential damages. Ross moved to dismiss for failure to state a claim on which relief could be granted, asserting that there was no contract because the acceptance of the counteroffer was not personally delivered to him. The Macioleks opposed the motion and filed their affidavits and Ross's deposition; Ross filed his affidavit in reply. Because of the parties' evidentiary submissions, the court treated the motion to dismiss as one for summary judgment. *See* WIS. STAT. § 802.06(2)(b).[1]

¶7 The evidentiary submissions show there is a dispute over whether, as Janet avers, she spoke to Ross after the Macioleks received the counteroffer and told him they were accepting all the terms of the counteroffer; according to Janet, Ross said that was fine and they should mail the signed counteroffer to him, which

[1] All references to the Wisconsin statutes are to the 2003-04 version unless otherwise noted.

they then did. Ross avers in his affidavit that he could not remember such a conversation and he disputes that it took place. Both Macioleks also aver that, based on conversations with Ross after April 5, they believed Ross thought they had a binding contract, and it was not until April 26 that he told them he did not want to go through with the offer based on changes in his personal life. The Macioleks' affidavits describe costs incurred and opportunities lost in reliance on the belief that they had a binding contract. Ross acknowledged in his deposition that he believed he had a contract with the Macioleks until about April 26.

¶8 The Macioleks argued in their brief in opposition to Ross's motion that the offer to purchase was ambiguous on the method of delivery to the seller and the evidence showed the parties intended that mail delivery to Ross was permissible. They also argued that, because the offer to purchase was mailed to Ross and he did not object or specify in the counteroffer another specific method, and because his attorney wrote to the Macioleks' attorney that he could fax an acceptance, Ross waived the right to insist on personal delivery or should be estopped from doing so. In addition, at oral argument in the circuit court the Macioleks argued as additional grounds for waiver or estoppel that Ross had told Janet to mail the acceptance and that he did not object when he received the acceptance by mail but waited several weeks to do so.

¶9 Ross objected to the court's consideration of any evidence outside the offer to purchase and the counteroffer because, he asserted, the contract was fully integrated, was unambiguous, the conditions for acceptance could not be waived, and the parol evidence rule prevented consideration of "estoppel theories."

¶10 The circuit court concluded that the offer to purchase unambiguously requires the acceptance of the counteroffer to be delivered personally and that no change was made to that in the counteroffer. As for the Macioleks' waiver and estoppel arguments, the court stated that, in the absence of authority that these could "overrule the statute of fraud," the court was of the view that it could consider only the written documents. When the Macioleks' counsel said he had not researched this issue, the court stated it was dismissing the case for the reasons it had explained, but it would consider additional authority if that were provided.

¶11 The court subsequently denied the Macioleks' motion for reconsideration of the dismissal. We will discuss this motion in more detail later in the opinion.

DISCUSSION

¶12 On appeal, the Macioleks contend that the circuit court erred in concluding that the offer to purchase and the counteroffer unambiguously require that they personally deliver the counteroffer to Ross. They also contend that the circuit court erred in rejecting their waiver and estoppel arguments.

¶13 Summary judgment in favor of a party is proper when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). In reviewing a summary judgment, we employ the same methodology as the circuit court, and our review is de novo. ***Green Springs Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987).

I. Construction of Offer to Purchase and Counteroffer

¶14 We address first the Macioleks' contention that the offer to purchase is ambiguous as to what method of delivery is required for documents delivered to

Ross. Because of this ambiguity, they assert, the counteroffer is ambiguous on the method of delivery of acceptance of the counteroffer. Ross responds that the circuit court correctly concluded that the offer to purchase plainly permits only personal delivery to the seller because there is no mailing address or fax number filled in for the seller. Because the counteroffer does not provide otherwise, Ross continues, the counteroffer plainly requires that the Macioleks personally deliver acceptance of the counteroffer to him.

¶15 At the outset, we make two observations. First, we are not construing a contract to ascertain the contracting parties' intent. The issue in this case is whether there is a contract, which depends, as an initial matter, on construction of the offer to purchase and the counteroffer. The method for construing these documents is similar to that of construing a contract in that we analyze the language of the written instrument to determine the intent of the drafter and, if the language is plain, we accept that as the drafter's intent. *See* ***Keinz v. J.L. French Corp.***, 2003 WI App 140, 266 Wis. 2d 124, ¶9, 667 N.W.2d 751 (addressing construction of contract). If, on the other hand, the language is ambiguous, that is, is capable of two or more reasonable meanings, then further analysis is required to determine the drafter's intent. *See* ***id.***, ¶10. Whether language in a written instrument is plain or ambiguous presents a question of law, which we review de novo. *See* ***Lynch v. Crossroads Counseling Center, Inc.***, 2004 WI App 114, 275 Wis. 2d 171, ¶19, 684 N.W.2d 141.

¶16 Second, because the offer to purchase and the counteroffer are the WB-11 and WB-44 forms, we recognize that the parties are not the drafters of most provisions and, thus, their intent is not relevant to determining the meaning of those provisions. We have, for example, resolved ambiguity in standard provisions in the WB-11 offer to purchase form by considering which of two

constructions is more reasonable based on purposes of the form and principles of law, rather than on the intent of the individual parties. *See* ***Galatowitsch v. Wanat***, 2000 WI App 236, ¶¶3, 15-19, 239 Wis. 2d 558, 620 N.W.2d 618 (construing terms in the WB-11 offer to purchase form after the parties entered into an agreement). However, in this case we are concerned with writings the Macioleks added to the offer to purchase form and, as to those, it is appropriate to speak of the drafter's intent.

¶17 Turning now to the language of the offer to purchase, we conclude the delivery of document provision is ambiguous as to the permissible methods of delivery to the seller. The Macioleks added in the appropriate blanks a buyer's recipient, mailing address, and a fax number. Thus, it is plain that any one of the three methods of delivery to the Macioleks will be effective, as long as mail deliveries comply with the standard provisions in lines 24-30 and are addressed as designated in lines 29-30, and, similarly, as long as fax deliveries are to the telephone number designated in line 33. There is, in contrast, no address or fax number specified for the seller. One reasonable construction of these lines being blank is that the Macioleks intended that delivery to Ross be only personal delivery.

¶18 However, we do not agree with the circuit court and Ross that this omission plainly means that the Macioleks intended to eliminate the two other methods for delivery to Ross. No lines are crossed out in the delivery of documents provision, whereas certain other standard provisions in the offer to purchase *are* crossed out. One would reasonably expect that the Macioleks would cross out whatever standard lines in the delivery of documents provision they intended to eliminate from the offer to purchase, as they did elsewhere. In addition, when preparing an offer to purchase, the buyer may not know what

method a seller wants the buyer to use in delivering documents to the seller, whether the seller has a recipient for delivery, or the seller's preferred mailing address and fax number. Finally, the buyer may not care how delivery to the seller is to be made and may choose to leave this up to the seller. For these reasons, the blanks left for the seller's information for mailing and fax delivery, with nothing crossed out, may reasonably be construed as an expression of the Macioleks' intent that all three methods of delivery to Ross are acceptable to them.

¶19 In reaching this conclusion, we are not deciding that it is advisable for buyers to do this, or that this is what the drafters of the form intended buyers to do when they do not have information on sellers' delivery preferences or mailing and fax information. We simply conclude that the delivery of documents provision in this offer to purchase is ambiguous on the question whether the Macioleks intended that delivery to Ross be only by personal delivery.[2]

¶20 Before turning to the counteroffer, we address an additional argument the Macioleks make with respect to the offer to purchase. They assert that ambiguity is created by this portion of the "delivery/receipt provision" of the offer to purchase (lines 221-222): "Personal delivery to, or actual receipt by, any named Buyer or Seller constitutes personal delivery to, or actual receipt by Buyer or Seller." The Macioleks contend that this means that, if there is either personal delivery or actual receipt by the seller, then the seller has received personal delivery. We agree with the circuit court and Ross that this is not a reasonable

[2] We emphasize that we are not presented with a situation in which Ross timely and properly accepted the offer to purchase, thereby creating a binding contract. Thus, we are not deciding what effect the ambiguity we have identified would have in that situation—for example, if, after a contract was created, a dispute arose over whether a document or notice was properly delivered to Ross.

construction of this provision. This provision plainly applies when there is more than one named buyer or more than one named seller. In that situation, the question may arise as to whether personal delivery, as provided for in the delivery of documents provision, must be to each named buyer or named seller; similarly, in that situation the question may arise as to whether the "actual receipt" by "Buyer" of the notice specified in the "continued marketing" provision (lines 282-288) must be actual receipt by each named buyer. Lines 221-222 answer these questions "no." "Actual receipt" in these lines is not an alternative to the delivery of documents provision and does not create an ambiguity when read in conjunction with it.[3]

¶21 Having concluded that there is an ambiguity in the offer to purchase regarding the permissible methods of delivery to the seller, we turn to the language of the counteroffer. Because the counteroffer does not provide otherwise, delivery of the accepted counteroffer may be made in any manner specified in the offer to purchase. The ambiguity in the offer to purchase thus adds complexity to the analysis of the meaning of the counteroffer on this point. Neither party addresses this issue: Ross because his position is that the offer to purchase is not ambiguous, and the Macioleks because they focus on evidence outside the language of the

[3] In their motion for reconsideration, in support of their argument that the offer to purchase is ambiguous, the Macioleks submitted the affidavit of a real estate agent that addressed the customary practices of filling out the delivery of documents provisions in the offer to purchase form. The circuit court did not consider this because of its view that it was not proper to consider any evidence outside of the offer to purchase and the counteroffer. Because we have already concluded there is ambiguity in the delivery of documents provisions as filled out by the Macioleks, we do not consider this affidavit.

counteroffer.[4] We observe that it is not obvious that the ambiguity in the offer to purchase makes the counteroffer ambiguous. If Ross understood the delivery of documents provision to mean that delivery to him may be only by personal delivery, then the failure to specify any other manner of delivery in the counteroffer would seem to mean that Ross intended that delivery of acceptance of the counteroffer be only by personal delivery. On the other hand, if Ross understood that all three methods of delivery to him were acceptable to the Macioleks and if the three methods were acceptable to him, arguably he would supply the mail and fax information for himself in the counteroffer. We do not resolve the question of the proper construction of the counteroffer because we conclude that, even if it plainly means that acceptance must be by personal delivery, there are disputed issues of fact as to whether Ross waived that requirement. We address this issue next.

II. Waiver

¶22 The Macioleks contend that the circuit court erred in concluding that the doctrine of waiver could not be applied to prevent Ross from asserting that the

[4] The Macioleks assert that, because they delivered the offer to purchase to Ross by mail and he did not object to that method of delivery and responded with a counteroffer, he implicitly authorized delivery of acceptance of the counteroffer by mail. However, the cases he cites in support of this argument do not involve situations where an offer to purchase or counteroffer addresses methods of delivery. *See* ***E.M. Boerke, Inc. v. Williams***, 28 Wis. 2d 627, 635, 137 N.W.2d 489 (1965); ***Mansfield v. Smith***, 88 Wis. 2d 575, 588, 277 N.W.2d 740 (1979). We therefore agree with Ross that these cases do not support the Macioleks' argument; and they do not explain how Ross's receipt without objection of the mailed offer to purchase bears on our construction of either the offer to purchase or the counteroffer. In particular, the Macioleks do not address whether the offer to purchase is itself a document whose delivery is subject to the delivery of documents provision. It appears that the parties took opposing positions on this issue in the circuit court, but the Macioleks do not discuss it on appeal. We therefore do not further discuss whether Ross's action on the offer to purchase without objecting to mail delivery implicitly authorized mail delivery of acceptance of the counteroffer.

acceptance of his counteroffer was not delivered as required by the counteroffer.[5] Ross first responds that the Macioleks did not raise this issue in the circuit court and therefore we should not review it on appeal. We conclude that the Macioleks did argue the issue of waiver in the circuit court: they argued this in their brief in opposition to Ross's motion and at the hearing on the motion.[6] The circuit court was apparently not persuaded by this argument and was concerned that the statute of frauds prevented the application of these doctrines. The Macioleks' motion for reconsideration did not address the statute of frauds; instead they repeated arguments they had already made and made new arguments on the ambiguity of the documents. In their reply brief they provided authority for their waiver argument that they had not previously provided the court—primarily, ***C.G. Schmidt, Inc. v. Tiedke***, 181 Wis. 2d 316, 321, 510 N.W.2d 756 (Ct. App. 1993), which we address below. The parties debate whether the court considered the new authority and was still not persuaded or whether the court declined to consider it because it was untimely. Our reading of the court's comments leaves us uncertain on this point, but we need not resolve it. Because the Macioleks did raise the

[5] The Macioleks use the term "waiver/estoppel" and do not differentiate between the two. However, they are distinct doctrines with distinct requirements. *See* ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 9, 571 N.W.2d 656 (1997). Waiver is the voluntary and intentional relinquishment of a known right. ***Id.*** Equitable estoppel is an equitable doctrine a court may apply when the party asserting it has established four elements: (1) action of non-action; (2) on the part of the party against whom estoppel is asserted; (3) which induces reasonable reliance thereon by other party, either in action or non-action; and (4) which is to his or her detriment. ***Id.*** at 11-12. Because the authority the Macioleks cite relies on waiver, that is the doctrine we discuss. We do not decide whether equitable estoppel is applicable, because the Macioleks do not discuss the application of the elements of this doctrine to the facts of this case. However, our ruling that the parol evidence rule does not bar consideration of evidence that would support waiver also applies to equitable estoppel: in other words, if equitable estoppel is otherwise applicable, we conclude that, for the reason we discuss in paragraph 25, the parol evidence rule does not preclude its application.

[6] In the circuit court, as on appeal, the Macioleks did not differentiate between the doctrines of waiver and equitable estoppel but asserted that both applied.

waiver issue before the circuit court, they have not waived it for purposes of their right to appellate review; and because our review is de novo, we need not ascertain the reason the circuit court rejected their arguments on that issue.

¶23 The Macioleks point to several pieces of evidence that, they argue, show that Ross waived the requirement of personal delivery of acceptance of the counteroffer. We address here their argument based on Janet's averment that Ross told her they should mail the acceptance.[7] The Macioleks contend that under ***C.G. Schmidt, Inc.***, 181 Wis. 2d 316, Ross may waive any condition of acceptance that was in his counteroffer for his benefit and that he did so when he told Janet she should mail the acceptance.

¶24 In ***Schmidt*** the issue, as here, was whether a real estate purchase contract was formed. The counteroffer in ***Schmidt*** stated that it had to be accepted by noon on August 20, 1990, but the counteroffer was not hand delivered to the buyer until shortly after that time; the buyer hand delivered an acceptance the next day. 181 Wis. 2d at 318-19. We decided that the case law establishing that a party may waive a condition in a contract that is for that party's benefit also applies to contractual conditions of acceptance. ***Id.*** at 321. We concluded that

[7] The other evidentiary grounds for waiver that the Macioleks rely on are not presented with sufficiently developed arguments. Their argument that Ross waived personal delivery by not objecting to mail delivery of the offer to purchase does not take into account the language of the counteroffer he subsequently made. Their argument that Ross waived personal delivery by not stating in his counteroffer that he did not want mail delivery of the acceptance is apparently premised on the preceding undeveloped argument. They also refer, as evidence of waiver, to the fax cover letter saying to fax the acceptance; but they do not adequately explain why that is relevant given that the Macioleks did not fax their acceptance. Finally, the Macioleks point to the evidence that Ross did not object to mail delivery of the acceptance of the counteroffer when he received it and did not object for several weeks; but they do not adequately explain why either of those facts are sufficient to find waiver or equitable estoppel if Ross did not tell Janet to mail the acceptance. Nothing in our opinion precludes the Macioleks from further developing these arguments at trial.

delivery of the counteroffer after expiration of the acceptance deadline constituted a "waiver of the temporal condition of acceptance," ***id.*** at 322, and we affirmed the circuit court's order of specific performance of the contract. ***Id.*** at 318.

¶25 Ross does not address ***C.G. Schmidt*** in his response, but instead argues, as he did in the circuit court, that the parol evidence rule prevents us from considering any evidence outside of the offer to purchase and the counteroffer. However, the statement of the parol evidence rule provided by Ross applies on its face *after* a contract is formed: the parol evidence rule states that

> [w]hen the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake.

Durkee v. Goodyear Tire & Rubber Co., 676 F. Supp. 189, 191 (W.D. Wis. 1987). In the case before us, the dispute is not over the terms of a contract but over whether there is a contract. Ross does not explain why the parol evidence rule applies in this situation. Accordingly, we conclude the parol evidence rule does not bar consideration of evidence, outside the offer to purchase and the counteroffer, to show waiver of a requirement that acceptance of the counteroffer be personally delivered to Ross.

¶26 We also conclude that ***Schmidt*** provides authority for the Macioleks' waiver argument. Assuming the counteroffer requires personal delivery of the acceptance, this requirement is presumably for Ross's benefit, and he does not argue otherwise. We see no reason why Ross could not waive this requirement and instead permit delivery of the acceptance by mail. If he told Janet, as she avers, that she should mail the acceptance, that would constitute a waiver of the

requirement of personal delivery. Because there is a dispute over whether he told her this, the Macioleks are entitled to a trial on this issue.

CONCLUSION

¶27 We conclude the offer to purchase is ambiguous on whether delivery may be made to Ross by mail. We do not decide whether, given that ambiguity, the counteroffer is ambiguous on this point. Even if the counteroffer plainly requires acceptance of the counteroffer to be personally delivered to Ross, we conclude there is a disputed issue of material fact whether Ross waived the requirement of personal delivery. Therefore, the circuit court erred in granting summary judgment. We reverse and remand for further proceedings.

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

Not recommended for publication in the official reports.