COURT OF APPEALS
DECISION
DATED AND FILED

August 4, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP002638 **Cir. Ct. No. 2007CV012169**

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

JOHN CHOWANEC,

PLAINTIFF-RESPONDENT,

V.

JAMSTEP PROPERTIES, LLC,

DEFENDANT-APPELLANT,

JAMES C. STEPHENS,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 BRENNAN, J. Jamstep Properties, LLC, appeals from a judgment entered in favor of John Chowanec following the summary judgment ruling that

Jamstep breached the real estate contract between the two. The court also dismissed Jamstep's claim seeking rescission of the contract. Jamstep argues in this appeal that the trial court erred in dismissing its rescission claim, which was based on misrepresentations Chowanec made prior to the sale. The trial court correctly ruled, as a matter of law, that there could be no justifiable reliance on any verbal misrepresentations because Jamstep drafted the contract, and that contract included provisions asserting that the "BUYER ACCEPTS THE PROPERTY 'AS-IS, WHERE-IS' SELLER MAKES NO WARRANTIES EXPRESSED OR IMPLIED." Accordingly, we affirm.

BACKGROUND

¶2 This case arises following the sale of real estate. Jamstep is a limited liability company engaged in the practice of real estate sales and development. The sole member of Jamstep is James C. Stephens. Stephens is a real estate broker and a non-practicing lawyer. Stephens was interested in some vacant real estate along the Milwaukee River located at 2176 North Riverboat Road in the City of Milwaukee, which was owned by Chowanec. During the spring and summer of 2005, Stephens and Chowanec had meetings and conversations about Jamstep's interest in putting a multi-unit condominium on the property. During these discussions, Stephens alleges that Chowanec made false misrepresentations about the property, including the property border, the number of units that could be built and that the property had tested clean in environmental analysis.

¶3 On August 29, 2005, Jamstep submitted a commercial offer to purchase the real estate and an addendum to the offer. Stephens drafted both the offer and the addendum. Chowanec accepted the offer on September 9, 2005.

Pursuant to the addendum, which was incorporated into the offer to purchase, Jamstep made monthly, non-refundable earnest money payments to Chowanec totaling $150,000. On March 10, 2006, the parties executed an amendment to the offer to purchase increasing the purchase price, changing the closing date and requiring Jamstep to make $16,000 monthly earnest money payments from May 2006 until May 2007 or until the closing, whichever came first.

¶4 Jamstep then learned that the foundry sand on the property was contaminated and would need to be cleaned. It sent a letter to Chowanec alleging that Chowanec had made false representations in this regard. Jamstep advised Chowanec that it would make no more payments and wanted its $150,000 back. Chowanec refused to return the money.

¶5 The closing on the offer never took place. In December 2006, Jamstep filed a "MEMORANDUM OF INTEREST" with the Milwaukee County Register of Deeds indicating that it had an equitable ownership interest in the property based on the offer. Chowanec sold the property to an unrelated third party. The memorandum of interest, however, showed up as a cloud on the title and Jamstep refused to remove it. As a result, Chowanec filed this action, seeking a declaratory judgment to quiet title, and making claims of breach of the offer, piercing the corporate veil, malicious slander of title, and interference with contractual relations. Jamstep filed an answer and counterclaim seeking rescission of the contract based on misrepresentation, for unfair trade practices under

WIS. STAT. § 100.18 (2005-06)[1], and property loss through fraudulent misrepresentation, contrary to WIS. STAT. §§ 895.80 (2003-04) and 943.20.

¶6 In June 2008, Chowanec filed a motion seeking summary judgment, asking for an award of contract damages and dismissal of the counterclaim. During the pendency of the motion, the parties resolved everything except Chowanec's claim that Jamstep breached the offer contract and Jamstep's counterclaim seeking rescission of the contract based on misrepresentation.

¶7 The matter was brought to the trial court for a hearing on the summary judgment motion on August 11, 2008. After arguments from counsel, the trial court ruled in favor of Chowanec, holding that Jamstep could not prove any justifiable reliance on the misrepresentations given the language of the contract itself:

> So that when I examined the contract and what was bargained for, it does not appear to me as if this is a contract that is voidable by way of rescission even if one acknowledges that the misrepresentations were made.
>
> I don't think it could have been stated more clearly that the buyer accepted the property as is, and, not only that, but that the buyer reflected the reality of that by protecting himself with the modifications that are contained in Addendum A.

¶8 The counterclaim was dismissed and judgment was entered in favor of Chowanec. Jamstep now appeals.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

DISCUSSION

¶9 The issue in this case is whether the contractual language, as a matter of law, operated to eliminate any justifiable reliance on warranties or promises made in conversations that took place prior to the submission of the offer. We affirm the trial court's decision.

¶10 The challenged ruling in this case arises following the trial court's decision on a summary judgment motion. Our review in cases on appeal from summary judgment is well-known. We review orders for summary judgments independently, employing the same methodology as the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We will affirm the trial court's decision granting summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2007-08). The dismissal of Jamstep's counterclaim involves the interpretation of the offer to purchase contract. Interpretation of a contract presents a question of law. *See* ***Edwards v. Petrone***, 160 Wis. 2d 255, 258, 465 N.W.2d 847 (Ct. App. 1990). The trial court's dismissal of the counterclaim presents an issue of law that we review *de novo*. *See* ***Badger Cab Co. v. Soule***, 171 Wis. 2d 754, 760, 492 N.W.2d 375 (Ct. App. 1992).

¶11 The language in the contract pertinent to this case appears at lines 293-94 of the offer to purchase. Stephens, in drafting Jamstep's offer, added the following language to the standard WB-15 Commercial Offer to Purchase form: "BUYER ACCEPTS THE PROPERTY 'AS-IS, WHERE-IS' SELLER MAKES NO WARRANTIES EXPRESS OR IMPLIED." In the addendum to the offer, at paragraph 5, Stephens included the following language: "'<u>AS IS' Transaction.</u>

Buyer takes the Property in 'AS IS' condition, with no warrants or representations from the Seller regarding the physical condition of the Property or any personal property included in the sale."

¶12 Jamstep asserts that despite this language, it is entitled to rescission because false representations were made during discussions prior to the time the offer was executed and whether it could justifiably rely on those misrepresentations presents a question of fact. We cannot agree.

¶13 To assert a valid rescission claim, Jamstep must demonstrate that: (1) a fraudulent or material misrepresentation was made; (2) reliance on the misrepresentation induced it to submit the offer and enter into the contract; and (3) that it was justified in relying on the representation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981). Here, the trial court assumed, as do we, that the false misrepresentations were in fact made and that reliance on them induced Jamstep to make the offer to purchase the property. We conclude, as did the trial court, that the language in the contract, as a matter of law, prevents any reasonable possibility that Jamstep was justified in relying on the verbal representations.

¶14 The contractual language clearly shouts out that the property is being sold "as-is" and the buyer is not making any warranties or representations. This language is clearly set forth in all caps. Stephens who is a non-practicing attorney and real estate agent drafted the contract specifically adding this language to the standard contract. He is a sophisticated party, who was in the business of buying and developing commercial real estate. This is not a contract of adhesion. Further, the contract includes language giving Jamstep the responsibility of "obtaining from an engineering or consulting firm acceptable to Buyer … written

geotechnical and environmental assessments (including soil borings or other intrusive investigation) showing" that the property was sufficient for Jamstep's purposes. The addendum also included language providing Jamstep with the responsibility to get a survey completed. Finally, the contract contains an integration clause which provided: "THIS OFFER, INCLUDING ANY AMENDMENTS TO IT, CONTAINS THE ENTIRE AGREEMENT OF THE BUYER AND SELLER REGARDING THE TRANSACTION. ALL PRIOR NEGOTIATIONS AND DISCUSSIONS HAVE BEEN MERGED INTO THIS OFFER." This clause incorporated all prior oral negotiations into the written agreement. Based on all of these circumstances, we concur with the trial court's conclusions:

> So that when I examined the contract and what was bargained for, it does not appear to me as if this is a contract that is voidable by way of rescission even if one acknowledges that the misrepresentations were made.
>
> I don't think it could have been stated more clearly that the buyer accepted the property as is, and, not only that, but that the buyer reflected the reality of that by protecting himself with the modifications that are contained in Addendum A.

¶15 Although Jamstep cites several cases in support of its claim for rescission, ***Whipp v. Iverson***, 43 Wis. 2d 166, 168 N.W.2d 201 (1969), ***First National Bank & Trust Co. v. Notte***, 97 Wis. 2d 207, 293 N.W.2d 530 (1980), and ***Schnuth v. Harrison***, 44 Wis. 2d 326, 171 N.W.2d 370 (1969), none of these cases involved contracts containing an "as-is" clause, which disclaimed all warranties and representations by the seller.

¶16 The claim in this appeal arises from a contract where an "as-is" clause *plus* a disclaimer of all warranties/representations was added to the contract. The "as-is" clause put the burden on Jamstep to determine the condition

of the property. *See* ***Omernik v. Bushman***, 151 Wis. 2d 299, 303, 444 N.W.2d 409 (Ct. App. 1989). An "as-is" clause in a real estate contract suggests that the property is not in perfect condition and the buyer cannot justifiably rely on the seller's failure to disclose defects. ***Id.*** (citing ***Universal Inv. Co. v. Sahara Motor Inn, Inc.***, 619 P.2d 485, 487 (Ariz. Ct. App. 1980)). The additional language disclaiming any warranties/representations by the seller put the burden on Jamstep to make sure that what was said in conversations prior to the execution of the contract was actually true because the disclaimer eliminated any justification for reliance on the previous warranties/representation. We conclude that the language placed into the contract *by Stephens*, as the sole member of Jamstep, removed any justifiable reliance on representations Chowanec made during earlier conversations.

¶17 Moreover, Stephens declined to file a reply brief to refute Chowanec's arguments. Accordingly, the failure to reply results in a concession to Chowanec's position. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (we may take as a concession the failure to refute a proposition asserted in a response brief in a reply brief).

By the Court.—Judgment affirmed.

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