COURT OF APPEALS DECISION DATED AND FILED

January 14, 2010

David R. Schanker
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. 2008AP2702

Cir. Ct. No. 2008SC406

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

DANIELLE MARIE DOOCY A/K/A DANIELLE MARIE OFTEDAHL,

PLAINTIFF-RESPONDENT,

V.

JILL R. ZOHIMSKY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] Jill Zohimsky appeals from a small claims judgment awarding Danielle Doocy $1,392 in Doocy's action against Zohimsky

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[1] This appeal is decided by one judge pursuant to Wis. Stat. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

for breach of a residential purchase contract. Zohimsky contends that the trial court erred in awarding Doocy the earnest money Zohimsky submitted with an offer to purchase residential property from Doocy, and in awarding Doocy attorney fees. Zohimsky also argues that she was denied due process because: (1) the trial court failed to provide its reasoning process in written form, (2) the trial court judge was biased, and (3) Doocy failed to notify Zohimsky that she obtained legal representation during the proceedings in this case. We reject each of these contentions, and affirm.

Defective Appellate Record

¶2 Initially, we observe that the record does not contain a transcript of the reporter's notes, as required by WIS. STAT. RULE 809.15(1)(a)13. Therefore, we do not know what findings of fact the trial court made or why the trial court ruled as it did. The transcript would have provided that information. As Zohimsky writes in her notice of appeal, the record contains the clerk's minutes, which provide a skeletal account of the nature of this lawsuit, and a copy of an offer to purchase, signed by Zohimsky and Danielle M. Oftedahl.[2] The offer states that it was drafted by Zohimsky. But we know nothing about the testimony of Zohimsky and Doocy, apparently the only two witnesses who testified.

¶3 This is not a mere formality, or an unimportant omission. A transcript of the trial is necessary for our review of the trial court's decision. *See* ***Manke v. Physicians Ins. Co. of Wisconsin, Inc.***, 2006 WI App 50, ¶60, 289

[2] At some point after the parties signed the contract but before this appeal was filed, Danielle Oftedahl married one Brian Doocy, and assumed his surname. Zohimsky does not complain of this difference in names.

Wis. 2d 750, 712 N.W.2d 40. Zohimsky could have ordered and paid for the transcript. The court reporter's name, Michelle Stello, is noted in the clerk's minutes. It was Zohimsky's "responsibility to present a complete record for the issues on which [she] seeks review, and we assume that any missing material that is necessary for our review, supports the [trial] court's determination." *See **id.*** Therefore, we will assume that all facts necessary for the trial court's judgment against Zohimsky were found against her and in favor of Doocy. This is an almost insurmountable hurdle for Zohimsky.

Statement of "Facts"

¶4 We have enclosed the word "facts" in quotations because, in the absence of a transcript, we have had to piece together the parties' arguments in an attempt to determine what actually happened. We are assisted by various parts of the record, which includes letters, the complaint, answer and counterclaim and other material. But the only facts which would be dispositive to this appeal are the facts found by the trial court, which would be found in the transcript Zohimsky failed to provide. Thus, whether the "facts" we will relate reflect what occurred at trial is uncertain.

¶5 On May 27, 2008, Zohimsky drafted and signed an offer to purchase property in Viroqua, Wisconsin, and presented the offer to Doocy's fiancé, Brian Doocy. Zohimsky and Brian Doocy brought the offer to Attorney George Hopkins. Also on May 27, 2008, Doocy signed the offer to purchase as the seller of the property. At some point, Zohimsky gave Hopkins a check for earnest money in the amount of $1000, to be held in Hopkins' trust account.

¶6 The purchase agreement provided that Zohimsky would purchase the property for $125,000. The agreement also stated that it was contingent on

Zohimsky's obtaining a mortgage loan at an annual interest rate not exceeding six percent. The financing section of the agreement stated that if financing were not available on the terms stated in the offer, Zohimsky must give Doocy written notice of her failure to obtain financing. Additionally, the contract allowed Doocy ten days to give Zohimsky written notice of her decision to finance the transaction.

¶7 On May 28, 2008, Zohimsky informed Brian Doocy that she no longer wished to purchase the property. On May 29, 2008, Zohimsky sent a letter to Hopkins. In the letter, Zohimsky said that she was "rescinding" her offer under "Wisconsin's three day rescission rule" because she could not ascertain who the rightful owner of the property was. Doocy and Brian Doocy were copied on the letter to Hopkins.

¶8 On June 2, 2008, Hopkins wrote a letter to Zohimsky stating that Doocy considered Zohimsky's actions to be an anticipatory breach of a legally binding residential contract, and that if Zohimsky did not correct the breach within seven days, Doocy would keep the earnest money as liquidated damages. In the letter, he stated that Brian Doocy performed renovations on the property but that Doocy was the owner of the property. Furthermore, he stated that he was "unaware of any 'Wisconsin three day rescission rule'" and that she may have been referring to the rights granted under the Federal Truth in Lending Act, which had no bearing on this matter.

¶9 Doocy filed a complaint alleging that Zohimsky breached their contract and sought judgment for $1,500. Doocy stated that this included additional expenses of renegotiating an underlying land contract plus carrying costs. Mediation was unsuccessful and the case went to trial. The trial court found in favor of Doocy and awarded her $1,000 in damages and $392 for

attorney fees and costs. *See* WIS. STAT. §§ 799.25 and 814.04(1). Zohimsky appeals.

Discussion

¶10 Zohimsky argues that the small claims judgment in this action is invalid. She claims that she did not breach the contract because she was subject to duress and was unable to satisfy the financial contingency of the offer to purchase agreement. Alternatively, Zohimsky asserts that Doocy sought actual damages in her complaint and therefore may not recover earnest money as liquidated damages. Accordingly, Zohimsky claims that there was no basis for the trial court to award attorney fees. Finally, Zohimsky argues that she was denied due process of law because the judge was biased and failed to file a written opinion explaining his decision. We address each argument in turn.

¶11 Zohimsky argues that she did not breach the contract because she signed the contract under duress and was unable to meet the contract's financing contingency. We disagree. "The acceptance of an offer to purchase property results in a binding contract." ***Gregory v. Selle***, 58 Wis. 2d 367, 374, 206 N.W.2d 147 (1973). When Doocy signed Zohimsky's offer to purchase the Viroqua property on May 27, 2008, the parties entered into a valid and enforceable contract. *See* ***id.*** Zohimsky correctly states there are certain situations that would invalidate a binding contract. A contract signed by a party who was under duress and did not ratify or affirm the terms of the contract, would result in the contract being voidable. ***Kinship Inspection Serv., Inc.. v. Newcomer***, 231 Wis. 2d 559, 571-72, 605 N.W.2d 579 (Ct. App. 1999). "Duress involves wrongful acts that compel a person to manifest apparent assent to a transaction without his volition or cause such fear as to preclude him from exercising free will and judgment in

entering into a transaction." ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 110, 293 N.W.2d 155 (1980) (citation omitted). Whether a party was under duress is a question of fact. ***Id.*** at 108.

¶12 Zohimsky claims Brian Doocy physically restrained her and put undue pressure on her to buy the property. However, she apparently made this argument in the trial court and the trial court apparently found against her. Had Zohimsky filed the transcript of her trial, we could examine the trial court's reasons for disbelieving Zohimsky's claim of duress. Without a transcript, we assume the circuit court "implicitly made those findings of fact" necessary to support its decision. *See* ***County of Dunn v. Goldie H.***, 2001 WI 102, ¶44, 245 Wis. 2d 538, 629 N.W.2d 189. Therefore, even though Zohimsky might have stated at trial that she was under duress, the trial court was not required to accept Zohimsky's testimony even if it was uncontroverted. *See* ***Steinmann v. Steinmann***, 2008 WI 43, ¶¶56-57, 309 Wis. 2d 29, 749 N.W.2d 145. "The trial court is the arbiter of the credibility of the witnesses, as it had the opportunity to assess credibility, based on demeanor and other first-hand observations." ***Wright v. Wright***, 2008 WI App 21, ¶21, 307 Wis. 2d 156, 747 N.W.2d 690.

¶13 Moreover, it appears that Zohimsky failed to follow the terms of the contract regarding the financing contingency.[3] Under the terms of the offer to purchase the property, Zohimsky was required to obtain a thirty-year loan of $50,000 or more at an annual rate of interest not exceeding six percent. If

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[3] Once again, we are hampered by Zohimsky's failure to provide us with a transcript. We reiterate that in the absence of a transcript, we will assume all facts necessary to support the trial court judgment. *See* ***Manke v. Physicians Ins. Co. of Wisconsin, Inc.***, 2006 WI App 50, ¶60, 289 Wis. 2d 750, 712 N.W.2d 40.

Zohimsky failed to secure a loan in this amount, she was obligated to notify the owner, Doocy,[4] and provide copies of the lenders' rejection letter or other evidence of unavailability within twenty-one days of signing the contract, in order for the contract to be rendered void. There is no evidence in the record that Zohimsky notified Doocy about her failure to secure a loan in the required amount twenty-one days after signing the agreement. Zohimsky only provided a letter from the bank, stating what the interest rates were for a thirty-year fixed rate mortgage. That letter from the bank does not state whether Zohimsky even applied for a loan. More importantly, Zohimsky has not produced any documents establishing that she communicated her failure to secure a loan to Doocy within twenty-one days of signing the offer to purchase the property. Accordingly, we reject Zohimsky's argument that she did not breach a valid contract with Doocy.

¶14 Next, Zohimsky argues that the trial court improperly awarded Doocy actual damages. The trial court did not do that.

¶15 When a buyer defaults in a failed real estate transaction and the seller wants damages, the seller has the option of pursuing either liquidated damages or actual damages, but not both. ***Osborn v. Dennison***, 2009 WI 72, ¶48, 318 Wis. 2d 716, 768 N.W.2d 20. In ***Osborn***, the court stated that, "if the buyer defaults, the seller may terminate the offer and request the earnest money as liquidated damages ... the seller need not release the earnest money to the buyer

[4] Zohimsky questions whether Doocy is the actual owner of the property, but has not provided any evidence suggesting otherwise nor any reason why this court should think that Doocy is not the owner of the property. We can assume the circuit court "implicitly made those findings necessary to support its decision," including a finding that Doocy is the owner of the property. *See* ***Town of Avon v. Oliver***, 2002 WI App 97, ¶ 23, 253 Wis. 2d 647, 644 N.W.2d 260.

because the seller is requesting the buyer to release the money to the seller and thereby end the dispute." ***Id.*** (citation omitted). Conversely, the seller has the option of seeking actual damages, but in such event, the seller may not tie up the buyer's earnest money. ***Id.***, ¶49. Accordingly, the seller must release the earnest money back to the buyer to seek actual damages. ***Id.*** If the seller does not release the earnest money back to the buyer, the seller, through her own actions, has "limited [herself] to seeking the earnest money as liquidated damages." ***Id.***

¶16 While a seller must release a buyer's earnest money to pursue a claim for actual damages, nothing prevents a seller from advancing a claim for both types of damages in his or her complaint. Under WIS. STAT. § 802.02(1m), "[r]elief in the alternative or of several different types may be demanded." Thus, at the time a complaint is filed, an aggrieved seller can demand both liquidated damages and actual damages in a breach of contract matter. *See* WIS. STAT. § 802.02(1m).

¶17 Based on WIS. STAT. § 802.02(1m) and ***Osborn***, we affirm the circuit court's judgment that Doocy was entitled to the earnest money. Under WIS. STAT. § 802.02(1m), Doocy was permitted to seek both liquidated and actual damages in her complaint, even though she ultimately could not recover both forms of damages. We agree that Doocy sought actual damages in her complaint by stating she incurred additional expenses in renegotiating the land contract and had carrying costs through Zohimsky's breach of contract. At the same time, Doocy stated that she was seeking the earnest money. Thus, Doocy sought both liquidated and actual damages in her complaint, which is permitted under WIS. STAT. § 802.02(1m). By failing to release Zohimsky's earnest money to her, Doocy limited herself to seeking liquidated damages in the form of the earnest

money. *See* ***Osborn***, 318 Wis. 2d at 736. In accordance with ***Osborn***, the trial court awarded Doocy $1,000 in earnest money.[5]

¶18 The trial court judge was entitled to award Doocy attorney fees. Doocy was represented by an attorney. In small claims cases, an award of attorney fees is limited to the amount recoverable under WIS. STAT. § 814.04(1) and (6), "except if the amount of attorney fees is otherwise specified by statute." WIS. STAT. § 799.25(10). Under WIS. STAT. § 814.01(1), when judgment is entered for a value equal to or less than $5,000, but is $1,000 or more, a judge must award attorney fees in the amount of $300. Here, the trial court entered a judgment in Doocy's favor in the amount of $1,000. Therefore, the trial court judge was required to award Doocy $300 in attorney fees. *See* WIS. STAT. § 814.04(1).

¶19 Finally, we conclude that Zohimsky was not denied due process when the trial court failed to file a written opinion stating its reasons for finding in favor of Doocy. WISCONSIN STAT. § 799.215 reads: "[U]pon a trial of an issue of fact by the court, its decision shall be given either orally immediately following trial or in writing and filed with the clerk within sixty days after submission of the cause, and shall state separately the facts found and the conclusions of law thereon; and judgment shall be entered accordingly." We must assume that the trial court gave its decision orally. *See* ***Manke***, 289 Wis. 2d 750, ¶60. Zohimsky

[5] The primary basis of Zohimsky's argument is that Doocy was not entitled to actual damages. Although the trial court did not specify that it awarded Doocy "liquidated damages," as opposed to "actual damages," we can infer that the trial court found Doocy was entitled to only liquidated damages, not actual damages. ***Oliver***, 253 Wis. 2d at 664 (stating that if the trial court "implicitly made those findings necessary to support its decision," we can "accept those implicit findings if they are supported by the record").

cites no authority holding that being told of a court's decision orally rather than in writing violates due process of law. We cannot serve as Zohimsky's advocate and brief this issue for her. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶20 Zohimsky's argument that the trial court's decision should be overturned because the trial court judge was partial fails to satisfy Wisconsin's judicial bias tests.[6] In ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298, we said that we presume that a judge is free of bias and prejudice. The burden of proof is on the party asserting judicial bias, and bias must be demonstrated by a preponderance of the evidence. ***Id.*** In determining if a trial court judge was biased, we apply both a subjective and an objective test. ***Id.*** Under the subjective test, we look to the judge's determination of whether he or she would have been able to act impartially. ***Id.*** Under the objective test, we must evaluate whether there are objective facts demonstrating that the judge was actually biased, which "requires that the judge actually treated the defendant unfairly." ***Id.***

¶21 We cannot apply the subjective test because apparently, Zohimsky never asked the trial court judge to recuse himself and thus the court never had to determine whether it could proceed impartially. Under the objective test, the

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[6] In her brief, Zohimsky cites ***Guthrie v. Wisconsin Employment Relations Comm'n***, 111 Wis. 2d 447, 452, 531, 331 N.W.2d 331 (1983), as establishing that the appearance of partiality is grounds for a due process violation claim. But, in ***Guthrie***, the court found that due process was violated when the judge had previously acted as counsel for one of the parties in the action, and was rendering a decision concerning that same party. ***Id.*** at 460. These facts are not present here. A judge is not partial merely because the judge finds for one party or the other. That is what judges do.

content of the clerk's minutes and the trial court's decision do not reveal actual bias. Zohimsky claims that because Doocy was an employee of Vernon County and her husband was subject to prior criminal proceedings presided over by the trial court judge, the trial court judge was biased in favor of Doocy. As to Doocy's husband, this confounds common sense. As to Doocy, Zohimsky has provided no evidence that Vernon County employees receive preferential treatment in that county's trial court. In sum, we have no reason to conclude that the trial court judge was biased.

¶22 We have no basis to overturn the trial court's judgment because Doocy failed to notify Zohimsky that she obtained legal representation for the trial proceedings. Zohimsky fails to cite any authority prohibiting Doocy from obtaining legal representation during the trial proceedings without notifying Zohimsky. Arguments unsupported by references to legal authority will not be considered. ***Pettit***, 171 Wis. 2d at 646-47. Additionally, Zohimsky should have known that Doocy could appear with an attorney. Small claims procedure specifically authorizes that. WIS. STAT. § 799.06(2). In any event, Zohimsky does not explain how the presence of an attorney affected the facts or the law in this case.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.