COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3075 **Cir. Ct. No. 2006CV575**

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

JOEL A. WALLSKOG,

PLAINTIFF-APPELLANT,

V.

EAST-WEST DEVELOPMENT, LLC,

DEFENDANT,

RED MAPLE REAL ESTATE, LLC AND PAUL ROYCE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Reversed and cause remanded.*

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Joel A. Wallskog appeals from a judgment entered following the circuit court's summary judgment order dismissing Wallskog's

breach of contract claim against East-West Development, LLC; Red Maple Real Estate, LLC; and Paul Royce. Wallskog argues that the circuit court erred in entering summary judgment because a genuine material issue of fact exists as to the truthfulness of Royce's disclosures on the Real Estate Condition Report. We agree, reverse the judgment, and remand the case back to the circuit court for trial.

BACKGROUND

¶2 This case involves the sale and development of a portion of land in the Highgate Subdivision in Mequon located in Ozaukee County. The Highgate Subdivision is a 60-acre tract of land consisting of eleven lots, each of which is at least five acres. East-West Development, LLC is the owner and developer of the Highgate Subdivision, and Red Maple Real Estate, LLC is the listing broker for the subdivision's vacant lots. Royce owns both East-West and Red Maple; Royce operates the companies from his home, and his wife is the only other employee. (We refer to defendants collectively as "Royce.") Royce has been a licensed real estate broker for thirty-one years and has been an independent real estate developer since 1990. Prior to 1990, he worked for a development company run by his parents.

¶3 In June 2005, Wallskog purchased Lot 4 in the Highgate Subdivision on which to construct a home. The subdivision was, until his purchase, completely undeveloped. Royce was Wallskog's only contact with respect to the purchase of the lot. Royce prepared and signed documents for sale including the Real Estate Condition Report.

¶4 The Real Estate Condition Report asked the following questions pertinent to this appeal:

> (15) Are you aware of subsoil conditions which would significantly increase the cost of development including, but not limited to, subsurface foundations … high groundwater, soil conditions (e.g. low load bearing capacity) or excessive rocks or rock formations on the Property?
>
> …
>
> (18) Are you aware of any other conditions or occurrences which would significantly increase the cost of development or reduce the value of the Property to a reasonable person with knowledge of the nature and scope of the condition or occurrence?

The questions in the report provided for the possible answers of "yes," "no," or "unsure." Royce answered "no" to both questions. The report goes on to require a detailed narrative explanation of any "yes" or "unsure" answers. By these answers, Royce represented that he was not aware of any conditions affecting the property, including, but not limited to, subsoil conditions which would significantly increase the cost of development.

¶5 In lines 54-57, the Offer to Purchase[1] incorporates the Real Estate Condition Report, stating that:

> Seller represents to Buyer that as of the date of acceptance Seller has no notice or knowledge of conditions affecting the Property … other than those identified in Seller's Real Estate Condition Report dated May 17, 2005, which was received by Buyer prior to Buyer signing this Offer and which is made a part of this Offer by reference and enclosed herein.

[1] The Offer to Purchase is unsigned by Wallskog and in fact indicates that Wallskog presented Royce with a counteroffer after receiving it. Although we do not have a copy of the parties' final contract in the record, it appears undisputed that the language in the Offer to Purchase in the record is identical to the language in the parties' final contract.

¶6 After his purchase of Lot 4 in 2005, Wallskog began construction on his home. Immediately after construction began, the excavator noted the existence of high groundwater when excavating the basement. Wallskog alleges that the high groundwater condition necessitated changes to the home's foundation and the footing structure, and caused significant increases in Wallskog's building costs.

¶7 In November 2006, Wallskog brought suit against Royce asserting breach of contract.[2] Wallskog alleged that Royce's answers on the Real Estate Condition Report, as incorporated into the Offer to Purchase, "misrepresent[ed] the true condition of Lot 4" and amounted to breach of contract. Royce denies any misrepresentation.

¶8 Royce moved for summary judgment. He contended that Wallskog failed to produce any evidence suggesting that Royce had knowledge of the high groundwater condition when he completed the Real Estate Condition Report. Royce further argued that Wallskog's claims were barred because he failed to obtain independent soil testing as provided for in the Offer to Purchase. The Offer to Purchase stated that the offer was contingent upon Wallskog obtaining "[w]ritten evidence at [Wallskog's] expense from a qualified soils expert that the Property is free of any subsoil condition which would make the proposed development impossible or significantly increase the costs of such development." The parties agree that Wallskog did not obtain independent testing from a soil expert.

[2] Wallskog also alleged intentional misrepresentation, negligent misrepresentation, and strict liability misrepresentation. Wallskog later conceded that these claims were no longer available because of the state supreme court's decision in ***Below v. Norton***, 2008 WI 77, 310 Wis. 2d 713, 751 N.W.2d 351 (holding that the economic loss doctrine bars tort claims in the residential real estate context when the loss is purely economic).

¶9 Wallskog offered several pieces of evidence from which he alleged a fact finder could infer that Royce had knowledge of the high groundwater problem on Lot 4. First, Wallskog offered a 2001 survey performed by Landcraft Survey and Engineering, Inc. Landcraft performed a wetland investigation of the subdivision, testing the property at fourteen different locations. The survey delineated two wetlands within the subdivision and found groundwater at twelve inches below the surface in several instances. Royce was given a copy of the report.

¶10 Second, Wallskog offered Eric Schmitz's report and testimony. Royce hired Schmitz to perform testing in the subdivision to determine the appropriate septic system for each lot. Schmitz observed high groundwater on Lot 1 (not Wallskog's lot) and indicated this observation in his report. On Lot 4 (Wallskog's lot) Schmitz found seasonal saturation at depths twenty-four to thirty-two inches. Royce says that he did not fully understand what the results of the soil report meant.

¶11 Finally, Wallskog also introduced the affidavit of Dr. Allan Poeschl, a professional engineer and soil tester, who evaluated soil on Lot 4 after the high groundwater problem was discovered during excavation. Dr. Poeschl found that "[t]he cause of the problem was that the groundwater level was located about 2 feet or less from the surface of the lot," and pointed to several indicators that would alert "an experienced and competent real estate developer and/or a contractor that high groundwater existed" on Lot 4: (1) Lot 4's proximity to the wetland areas; (2) Lot 4's "flatness" or "lack of elevation"; (3) soil maps demonstrating problematic soil on Lot 4; and (4) Schmitz's report.

¶12 The circuit court granted Royce's motion for summary judgment, finding that Wallskog presented "no direct evidence" that Royce "had actual knowledge of [the high groundwater condition]" when answering "no" on the Real Estate Condition Report. The court stated that "[Royce's knowledge] has to come from an inference from some of the affidavits" and held that such an inference could not be made from the affidavits presented by Wallskog.

¶13 Moreover, the court held that by not doing his own investigation, Wallskog waived his right to rely on the representation in the Real Estate Condition Report: "[Wallskog] had a chance pursuant to [the] contract to do testing. [He] decided not to. And [he] went ahead and … got the lot and during the construction phase found out that the subsoil had high groundwater and it was going to cost [him] extra to deal with it." The court concluded that it "just [could not] find based on the affidavits that were filed or any reasonable inference from them that there[] [was] a breach of contract … based upon [Royce's] representation." Recognizing that summary judgment was a "drastic remedy," the court nonetheless dismissed Wallskog's breach of contract claim. Wallskog appeals.

DISCUSSION

¶14 We review the denial or grant of a summary judgment motion *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-17, 401 N.W.2d 816 (1987). "[S]ummary 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." ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995). We will reverse a decision granting summary judgment if the circuit court incorrectly decided legal issues or if material facts are

in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). In our review we, like the circuit court, are prohibited from deciding issues of fact; our inquiry is limited to determining whether a material factual issue exists. ***Id.*** Any reasonable doubts as to the existence of a factual issue must be resolved against the moving party. ***Maynard v. Port Publ'ns, Inc.***, 98 Wis. 2d 555, 563, 297 N.W.2d 500 (1980).

¶15 The parties all agree that summary judgment is not appropriate in this case if a question of fact remains as to whether Royce was aware of the high groundwater problem in Lot 4 when he completed the Real Estate Condition Report. The report itself indicates that Royce was unaware of any such condition.

¶16 The parties dispute whether there is sufficient evidence to create a genuine issue of material fact regarding Royce's knowledge of the high groundwater problem. We conclude that sufficient evidence does exist from which a reasonable fact finder could conclude that Royce was aware of the high groundwater problem on Lot 4; consequently, we reverse the circuit court's grant of summary judgment and remand the case back to the circuit court for trial.

¶17 Wallskog relies on three key pieces of evidence submitted on motion for summary judgment: the Landcraft survey, Schmitz's report, and Dr. Poeschl's affidavit. The Landcraft survey revealed multiple wetland areas around the subdivision and multiple potential problem areas with respect to high groundwater. Schmitz's report revealed high groundwater on Lot 1, which was uphill from Lot 4. Royce admits to receiving both reports but claims neither report directly noted any high groundwater problem in language that was understandable to a non-expert like himself.

¶18 Dr. Poeschl's affidavit directly contradicts Royce's testimony that he was unaware of the high groundwater problem on Lot 4 and that he did not understand the information in the soil reports. In fact, Dr. Poeschl explicitly set forth four indicators that he believed should have alerted "an experienced and competent real estate developer and/or a contractor that high groundwater existed" on Lot 4: (1) Lot 4's proximity to the wetland areas; (2) Lot 4's "flatness" or "lack of elevation"; (3) soil maps demonstrating problematic soil on Lot 4; and (4) Schmitz's report.

¶19 While Royce is correct that there is no "smoking gun" demonstrating that there was a high groundwater problem on Lot 4 (as opposed to Lot 1), Wallskog does not need such direct evidence to survive a motion for summary judgment. He only needs to produce such evidence from which a reasonable jury could infer that Royce knew of the high groundwater problem. *Cf.* ***Harman v. La Crosse Tribune***, 117 Wis. 2d 448, 457, 344 N.W.2d 536 (Ct. App. 1984) (affirming the circuit court's grant of summary judgment because the plaintiff "presented no factual material from which a reasonable jury could infer that the shareholders lacked good faith").

¶20 The Landcraft survey, the Schmitz report, and Dr. Poeschl's affidavit provide evidence from which a reasonable jury could infer that Royce was aware of the high groundwater problem on Lot 4. The Landcraft survey and the Schmitz report provide empirical evidence of water near and around Lot 4, and Dr. Poeschl's affidavit states that those reports should have put Royce on notice of the problem on Lot 4. Indeed, while Royce contends that the reports "were all Greek to him," a rational jury could conclude otherwise, noting that Royce is an experienced real estate developer and broker and that Dr. Poeschl believes that an experienced real estate developer and broker would have been aware of the high

groundwater problem in Lot 4. Questions of credibility, like this one, are best left for the jury to decide. *See* ***Lambrecht v. Kaczmarczyk***, 2001 WI 25, ¶85 n.45, 241 Wis. 2d 804, 623 N.W.2d 751.

¶21 In the alternative, Royce argues that Wallskog's breach of contract claim is barred because Wallskog did not complete his own independent soil testing as required by the inspection contingency in the Offer to Purchase. The Offer to Purchase states that Wallskog was purchasing the property for the "Construction of a Single Family Dwelling" and that the Offer to Purchase was contingent upon Wallskog obtaining:

> Written evidence at [Wallskog's] expense from a qualified soil expert that the Property is free of any subsoil condition which would make the proposed development impossible or significantly increase the cost of such development.

It is undisputed that Wallskog failed to obtain the opinion of an independent soil expert, but he asserts that he did not do so based on Royce's assurances that soil testing on Lot 4 had been completed.

¶22 If a party to a contract is induced to manifest his or her assent to the contract by means of a fraudulent or material misrepresentation by another party to the contract, the contract is voidable if the former justifiably relied on the misrepresentation. ***First Nat'l Bank & Trust Co. of Racine v. Notte***, 97 Wis. 2d 207, 222, 293 N.W.2d 530 (1980). Such being the case, we cannot determine if Wallskog waived his claim at this stage in the litigation if Wallskog can walk away from the Offer to Purchase at any time because it is a voidable contract. Accordingly, a determination as to whether Wallskog waived his breach of contract claim is contingent on finding that Royce misrepresented his knowledge of the high groundwater problem on Lot 4, and as we have previously set forth,

that is a question of fact for a jury to decide. Consequently, that question is also remanded to the circuit court.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.