COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1016 **Cir. Ct. No. 2008CV43**

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

RANDY MOLINI,

PLAINTIFF-APPELLANT,

V.

FARM URBAN REALTY AND RAYMOND G. HART,

DEFENDANTS,

BUSWELL PAGE ASSOCIATES,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Jackson County: THOMAS E. LISTER, Judge. *Affirmed*.

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 DYKMAN, P.J. Randy Molini appeals from a judgment awarding Buswell Page Associates (BPA) specific performance of the real estate contract between Molini and BPA. Molini argues that the trial court erred in granting specific performance to BPA on summary judgment because (1) the trial court proceeded under the erroneous belief that it did not have discretion to deny specific performance; (2) there are genuine issues of material fact as to whether specific performance is equitable; (3) specific performance is not a proper remedy for a seller under a contract for the sale of real estate; (4) the doctrine of laches bars BPA's action for specific performance; and (5) the contract terminated as a matter of law when the parties did not meet the closing date under the contract. We reject each of these contentions, and affirm.

Background

¶2 The following undisputed facts are taken from the summary judgment submissions. On May 24, 2007, Molini offered to purchase real estate from BPA for $300,000, using a standard WB-15 commercial offer to purchase form. BPA counter-offered to sell its property to Molini for $400,000. After a series of subsequent counter-offers by both Molini and BPA, the parties agreed on a purchase price of $375,000, with Molini providing $5,000 in earnest money.

¶3 The parties' contract set a closing date of August 31, 2007. The contract also included a financing contingency, which provided:

> This Offer is contingent upon buyer being able to obtain: …. a conventional … (fixed) … rate first mortgage loan commitment … within 60 days of acceptance of this offer….
>
> [T]he annual rate of interest shall not exceed 6.5% ....
>
> ….

> If financing is not available on the terms stated in this Offer (and Buyer has not already delivered an acceptable loan commitment for other financing to Seller), Buyer shall promptly deliver written notice to seller of same including copies of lender(s)' rejection letter(s) or other evidence of unavailability…. Seller shall then have 10 days to give buyer written notice of Seller's decision to finance this transaction on the same terms set forth in the financing contingency, and this Offer shall remain in full force and effect, with the time for closing extended accordingly. If Seller's notice is not timely given, this Offer shall be null and void.

Additionally, the contract provided that "time is of the essence," and therefore "failure to perform by the exact date or deadline is a breach of contract." It also provided that:

> If Buyer defaults, Seller may:
>
> (1) sue for specific performance and request the earnest money as partial payment of the purchase price; or
>
> (2) terminate the Offer and have the option to (a) request the earnest money as liquidated damages; or (b) direct Broker to return the earnest money and have the option to sue for actual damages.

¶4 The parties subsequently amended their contract to extend their closing date, setting a final closing date of October 17, 2007. The contract, as amended, required Molini to provide proof of financing by October 11, 2007.

¶5 On October 10, 2007, Molini informed BPA that he was unable to obtain financing under the terms of the contract, and sought a cancellation and release of the parties' contract. Molini also demanded return of his $5,000 earnest money.

¶6 In a notice dated October 18, 2007, BPA stated that it was invoking its right to finance the sale, as provided under the parties' contract.[1] BPA's notice proposed a closing date of October 30, 2007.

¶7 Molini refused to close. On February 11, 2008, he brought this action against BPA to recover his earnest money. BPA counterclaimed on March 3, 2008, seeking specific performance of the contract. BPA moved for summary judgment, arguing that the undisputed facts established that Molini breached the contract by refusing to close upon BPA's offer to finance the sale. Molini argued that BPA's offer of financing was ineffective because it occurred after the parties' closing date under their amended contract, and that there were disputed issues of fact as to whether specific performance was equitable in this case.

¶8 The trial court granted summary judgment to BPA. It explained:

> The Court finds that the defendant's demand for specific performance here is based upon a contractual remedy which is expressly provided under the terms of the parties' contracts. In such matters, the Courts have come down on the side of following more along the lines of contractual law than equitable law.
>
> It is my judgment that given the clear provision of this contract, which was the subject of apparently a great deal of ongoing negotiations, had a lengthy history of counteroffers, initial sales price was higher than the amount ultimately agreed to as a sales price, I find that when the defendant exercised defendant's right to extend an opportunity for financing, that they had a time to do that, and the closing date did not terminate the contract.

[1] Molini asserts he received the notice on October 19, 2007. Whether the notice was effective on October 18 or October 19 is irrelevant, as either day was within ten days of Molini's notice on October 11.

> The real estate provision—the real estate contract seems to state that if the contract has to be extended because the defendant makes an offer to provide financing, that the closing would be extended accordingly as well, and it seems to me that that's a reasonable interpretation of all the terms of the contract; therefore, [the] Court finds that the defendant in this matter is entitled to summary judgment on defendant's prayer for specific performance.

Molini appeals.

Standard of Review

¶9 We review a trial court's decision on summary judgment de novo, applying the same standard as the trial court. ***Sherry v. Salvo***, 205 Wis. 2d 14, 21, 555 N.W.2d 402 (Ct. App. 1996). Under summary judgment methodology, "[i]f there is no dispute as to the material facts or inferences, … summary judgment is appropriate and we proceed to consider the legal issue or issues raised by the motion." ***Id.*** at 21 n.3. Summary judgment is only properly granted where the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2007-08).[2]

¶10 Whether to grant or deny specific performance is within the trial court's discretion. *See* ***Anderson v. Onsager***, 155 Wis. 2d 504, 511-14, 455 N.W.2d 885 (1990). We will uphold a trial court's discretionary determination if "'the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Id.*** at 513-14 (quoting ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)). We review the language of a contract de novo.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Klinger v. Prudential Prop. & Cas. Ins. Co., 2005 WI App 105, ¶7, 282 Wis. 2d 535, 700 N.W.2d 290.

Discussion

¶11 Molini argues that the trial court erred in granting summary judgment to BPA because the trial court erroneously believed it did not have any discretion in determining whether to grant or deny specific performance as a remedy. Molini argues that, contrary to the trial court's holding, specific performance is an equitable remedy, and therefore whether to grant specific performance is within the discretion of the court. *See* ***Edlin v. Soderstrom***, 83 Wis. 2d 58, 70, 264 N.W. 2d 275 (1978). Thus, Molini asserts, the trial court's statement that it had no discretion to deny specific performance to BPA established that the trial court erred in granting specific performance in this case. Molini further contends that a trial court may not grant specific performance on summary judgment, but rather must hold an evidentiary hearing to weigh the equities to properly exercise its discretion. BPA responds that the trial court properly recognized that it had very limited discretion to deny specific performance, and then properly exercised its discretion by examining the relevant contract language and the undisputed facts on summary judgment to determine that specific performance was the proper remedy. We agree with BPA.

¶12 In ***Anderson***, 155 Wis. 2d at 506, the supreme court held that the trial court had erroneously exercised its discretion by denying the buyer's motion for specific performance of a contract to purchase land, "[b]ecause there were no legal or factual reasons why the court should not have exercised its power to order specific performance." The court held that "unless in the course of a trial court's exercise of discretion there are revealed factual or legal considerations which

would make specific performance of the contract unfair, unreasonable or impossible, specific performance of a contract to sell land should be ordered as a matter of course." ***Id.*** at 512-13. The ***Anderson*** court also reiterated the validity of its prior holding in ***Heins v. Thompson & Flieth Lumber Co.***, 165 Wis. 563, 163 N.W. 173 (1917), that on a contract for the sale of land, "'the parties being competent to contract, and having made an agreement reasonably certain in all its parts, and not objectionable for unfairness or inequity, there is no room for the exercise of judicial discretion as to whether it should be specifically performed.'" ***Anderson***, 155 Wis. 2d at 513 (quoting ***Heins***, 165 Wis. at 573).

¶13 Here, the trial court relied on ***Anderson*** to find that it had limited discretion in determining whether to deny BPA's request for specific performance, as a remedy available to BPA under the parties' contract. It then turned to the submissions on summary judgment, which established that the parties had extensively negotiated the contract, to determine that specific performance was appropriate. Because the trial court applied the proper law in setting forth the limited scope of its discretion, and considered the evidence in the record, we reject Molini's argument that the court erroneously exercised its discretion in this regard.

¶14 We also reject Molini's argument that the trial court erred in granting specific performance on summary judgment. Molini cites no law holding that a request for specific performance of a contract for the sale of land requires an evidentiary hearing. To the contrary, we recently upheld a summary judgment ordering specific performance of a contract for the sale of land in ***Ash Park, LLC v. Alexander & Bishop, Ltd.***, 2009 WI App 71, 317 Wis. 2d 772, 767 N.W.2d 614.

¶15 Next, Molini argues that there were disputed issues of material fact as to whether specific performance was equitable in this case before the trial court, precluding summary judgment. Specifically, Molini argues that there are disputes as to "the current value and condition of the building, whether the seller mitigated its damages, and the buyer's intended usage," as well as "the buyer's current ability to pay." Assuming that these would be proper factors for the trial court to consider in determining whether specific performance is an equitable remedy, Molini's argument fails because he submitted nothing on summary judgment as to these issues.[3] Because the summary judgment record reveals no disputed issues of fact or inferences, summary judgment was appropriate.

¶16 Molini also argues that specific performance is not equitable in this case because it was granted to the seller, BPA, and Molini contends that specific performance of a contract for the sale of land is only equitable if granted to the purchaser. *See* ***Anderson***, 155 Wis. 2d at 511-12 ("The stated policy reason for compelling specific performance of contracts to sell land is that each parcel of property is unique and therefore no amount of money damages will enable the buyer to purchase its duplicate."). However, as BPA responds, we recently

[3] Molini cites to his brief in opposition to BPA's motion for summary judgment, where he argued that BPA had not established that it was entitled to specific performance and raised these same factual issues, contending that "[a]ll of the foregoing, and more, are necessary to fully and completely assess the equity and fairness of specific performance as a remedy. None of it can be provided in a summary judgment format." However, in opposing BPA's motion for summary judgment, Molini was required to provide the court with submissions to establish that factual issues existed. *See* ***Buckett v. Jante***, 2009 WI App 55, ¶22, 316 Wis. 2d 804, 767 N.W.2d 376. Molini has not provided any factual submissions as to the issues he claims are in dispute.

Additionally, we note that the only issue that Molini raises in his reply brief is that there are factual issues that need to be developed at a trial for the court to adequately assess whether specific performance is equitable in this case. Molini does not reply to BPA's other substantive arguments. We therefore deem these arguments conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979).

rejected this argument in ***Ash Park***, 317 Wis. 2d 772, ¶¶6-9. We explained in ***Ash Park*** that "we have recognized a vendor's right to sue for specific performance," even though the vendor may have an adequate remedy at law. ***Id.***, ¶9.

¶17 Molini then argues that even if specific performance is available to BPA as a remedy, it is precluded from seeking that remedy in this case by the doctrine of laches. *See* ***Bade v. Badger Mut. Ins. Co.***, 31 Wis. 2d 38, 47, 142 N.W.2d 218 (1966) ("The equitable doctrine of laches is a recognition that a party ought not to be heard when he has not asserted his right for unreasonable length of time … in such a manner so as to place the other party at a disadvantage."). Molini argues that BPA did not pursue its claim for specific performance until five months after the closing date in the parties' contract, placing Molini at a serious disadvantage considering the downturn of the real estate market within that time.

¶18 On the facts of this case, we have no basis to conclude that the doctrine of laches bars BPA's action for specific performance. The parties set a closing date of October 17, 2007; Molini sued BPA for return of his earnest money on February 11, 2008, approximately four months after the parties did not timely close the contract. BPA counterclaimed on March 3, 2008, approximately one month after Molini filed suit and five months after the parties failed to close. We perceive no unreasonable delay in this timeline. The doctrine of laches is inapplicable.

¶19 Finally, Molini argues that the trial court erred in granting summary judgment to BPA for specific performance of the contract because the contract terminated as a matter of law when the parties did not close on October 17, 2007, and BPA did not provide Molini with notice of its intent to finance the sale until October 19, 2007. Molini contends that BPA's notice of financing was ineffective

because it occurred after the contract terminated, and BPA's notice did not revive the terminated contract.

¶20 Molini's reading of the contract is unreasonable because it is contrary to the contract's plain language. *See* ***Klinger***, 282 Wis. 2d 535, ¶8 (we construe contracts "to give effect to the intent of the parties as expressed in the language" of the contract). The parties' contract provides that if Molini is unable to obtain the required financing, BPA

> shall then have 10 days to give [Molini] written notice of [BPA's] decision to finance this transaction on the same terms set forth in the financing contingency, and this Offer shall remain in full force and effect, with the time for closing extended accordingly. If [BPA's] notice is not timely given, this Offer shall be null and void.

Molini argues that because the contract also provides that "time is of the essence," the financing language cannot be read to mean that the closing date can be extended beyond the date set in the contract. We disagree; this is exactly what the contract provides. Molini cites no authority for the proposition that a contract containing the phrase "time is of the essence" cannot also contain a provision extending a set date for a specified amount of time under certain conditions. Here, the contract provides that time was of the essence, meaning that exact dates must be met; the contract set a closing date of October 17, 2007, but provided that if Molini was unable to obtain financing, BPA had ten days to elect to finance the sale, "with the time for closing extended accordingly." Molini notified BPA that he was unable to obtain financing on October 10, 2007, thus triggering the ten days for BPA to determine whether it would finance the sale, and extending the closing date accordingly. We perceive no conflict between the clear provisions of the contract. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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