COURT OF APPEALS DECISION DATED AND FILED

April 8, 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. 2009AP1167

Cir. Ct. No. 2007CV4775

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

MAI HER LEE VANG,

PLAINTIFF-APPELLANT,

CHONG VANG,

APPELLANT,

V.

WRC SPORTS COMPLEX, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: DIANE M. NICKS, Judge. *Affirmed and cause remanded for further proceedings*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 LUNDSTEN, J. WRC Sports Complex entered into an agreement to purchase farmland from Mai Her Lee Vang. The agreement had a contingency, and the parties dispute whether WRC Sports properly gave timely notice declaring the agreement void. When WRC Sports failed to close on the designated day, Mai Her Lee Vang sued for breach of contract and sought forfeiture of WRC Sports' earnest money. The circuit court granted summary judgment in favor of WRC Sports, ruling that WRC Sports timely invoked the contingency and, therefore, did not breach the contract. The circuit court also granted WRC Sports' motion to impose sanctions under WIS. STAT. § 802.05 (2007-08)[1] and denied Vang's motion to sanction WRC Sports. We affirm the circuit court. In addition, we conclude that this appeal is frivolous under WIS. STAT. RULE 809.25(3). Accordingly, we remand for a determination of costs.

Background

¶2 On August 15, 2007, Vang and WRC Sports executed a written contract under which Vang agreed to sell certain land to WRC Sports. The contract contained a contingency that permitted WRC Sports to opt out if the land was not rezoned. Pertinent here, the contract provided: "Said contingencies to be satisfied unless buyer delivers notice prior to 10/31/07 & contract is null & void & earnest money returned." The contract provided that "[d]eadlines expressed as a specific day of the calendar year or as the day of a specific event, such as closing, expire at midnight of that day." Pursuant to the contract terms, WRC Sports provided earnest money of $4000.

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

¶3 The parties later amended the contract. In addition to increasing the earnest money to $10,000 and providing a later closing date, the amended contract stated that the deadline in the contingency language quoted above was "to be changed to November 28, 2007." The amended contract also stated that "[a]fter November 28, 2007, the earnest money to be non-refundable to buyer." All other terms in the offer to purchase remained the same.

¶4 Prior to midnight on November 28, 2007, WRC Sports' agent faxed notice to Vang's agent that the contingency had not been satisfied. The communication stated that the Town of Cottage Grove did not approve the rezoning of the land, that the offer was null and void, and that the earnest money was to be returned to WRC Sports.

¶5 After the amended contract's closing date passed, Vang filed suit, claiming that WRC Sports breached the amended contract. Vang sought a declaratory judgment that the earnest money be released to her. WRC Sports moved to dismiss the suit. It also moved for sanctions pursuant to WIS. STAT. § 802.05(3), alleging that Vang's claims were frivolous. Vang responded with a counter-motion for sanctions, alleging that WRC Sports' motion was filed for purposes of harassment.

¶6 On summary judgment, the circuit court concluded that the amended contract's zoning contingency was unambiguous and had set a deadline of midnight on November 28, 2007. Based on the evidence that WRC Sports' agent faxed the required notice prior to midnight on November 28, the circuit court denied Vang's motion and granted WRC Sports' motion for summary judgment. Accordingly, the court ordered the earnest money returned to WRC Sports. In a subsequent order, the circuit court addressed the motions for sanctions.

Concluding that Vang's lawsuit was frivolous, the court ordered Vang's attorney to pay sanctions in the amount of $10,478.77. The court then entered final judgment. Vang and her attorney appeal.

Discussion

¶7 The circuit court granted summary judgment in favor of WRC Sports. We review summary judgment *de novo*, applying the same standards as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). A party is entitled to summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

A. Whether WRC Sports Breached The Amended Contract

¶8 Vang argues that the language "prior to November 28, 2007," unambiguously means the time period ending at midnight of November 27, 2007, and, therefore, the notice sent to Vang from WRC Sports on November 28, 2007, was late. We disagree. To the contrary, we conclude that the only reasonable reading of the contract is that WRC Sports had until midnight on November 28 to provide notice.

¶9 When ascertaining the meaning of a contract, the "contract terms should be given their plain or ordinary meaning." ***Huml v. Vlazny***, 2006 WI 87, ¶52, 293 Wis. 2d 169, 716 N.W.2d 807. "'[T]he meaning of particular provisions in the contract is to be ascertained with reference to the contract as a whole.'" ***Folkman v. Quamme***, 2003 WI 116, ¶24, 264 Wis. 2d 617, 665 N.W.2d 857 (citation omitted). "If the contract is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract, without consideration of

extrinsic evidence." ***Huml***, 293 Wis. 2d 169, ¶52. Language is ambiguous if it is "'reasonably and fairly susceptible to more than one construction.'" ***Dieter v. Chrysler Corp.***, 2000 WI 45, ¶15, 234 Wis. 2d 670, 610 N.W.2d 832 (citation omitted). "Whether a contract is ambiguous is itself a question of law which an appellate court decides independently of the trial court's decision." ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987).

¶10 Two aspects of the contract, in combination, demonstrate that the parties intended that the deadline be midnight on November 28, 2007.

¶11 First, the contract provides that "[d]eadlines expressed as a specific day of the calendar year or as the day of a specific event, such as closing, expire at midnight of that day." The disputed provision has a deadline expressed as a specific day of the calendar year, November 28, 2007. Therefore, the contract directs that "November 28, 2007," be read as midnight of that day. It follows that notice "prior to November 28" means notice prior to midnight of November 28.

¶12 Second, the contract, as amended, states that "[a]fter November 28, 2007, the earnest money to be non-refundable to buyer." The only reasonable reading of this provision is that the earnest money becomes nonrefundable at midnight of November 28. Reading this provision in tandem with the notice deadline, WRC Sports had until midnight on November 28, 2007, to give notice and thereafter the earnest money was to be nonrefundable. Vang's reading is unreasonable because it creates a one-day gap—notice must be provided by midnight on November 27, but the earnest money does not become nonrefundable until one day later, at midnight on November 28. The failure to give timely notice

triggers forfeiture of the earnest money. A gap between this trigger and its consequence cannot reasonably be explained.

¶13 Vang contends that any ambiguity should be construed against the drafter, WRC Sports. However, that rule does not apply because, as we have seen, the language is not ambiguous. Moreover, even if the disputed language was ambiguous, further analysis would not help Vang. "If the language within the contract is ambiguous, two further rules are applicable: (1) evidence extrinsic to the contract itself may be used to determine the parties' intent and (2) ambiguous contracts are interpreted against the drafter." ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426. Here, the extrinsic evidence shows that Vang's proffered interpretation is patently unreasonable.

¶14 The contract reveals that the November 28, 2007, notice contingency was tied to zoning approvals by the Town of Cottage Grove and Dane County. Extrinsic evidence would show that the Town of Cottage Grove was scheduled to make its zoning decision on November 28, 2007, and, in fact, on that date did decline to rezone the property. Obviously, the parties selected the deadline to coincide with the Town's zoning decision. It would be absurd for the parties to agree that WRC Sports must give notice declaring their agreement with Vang void *prior to* the anticipated date of the zoning decision.

¶15 In sum, the contract unambiguously sets a deadline of November 28 at midnight, and WRC Sports sent notice prior to that deadline. Therefore, WRC Sports did not breach the contract. We affirm judgment in favor of WRC Sports.

B. Sanctions Imposed By The Circuit Court

¶16 Vang claims that the circuit court erred when it granted WRC Sports' motion for WIS. STAT. § 802.05 sanctions. Reiterating the argument she made before the circuit court, Vang asserts that her claims have a reasonable basis in the law. She also argues that the circuit court erred when it denied her motion to sanction WRC Sports. She repeats her assertion that WRC Sports' motion for sanctions was for the purpose of harassing her and her attorney.

¶17 WISCONSIN STAT. § 802.05 provides that sanctions may be imposed if a filing or pleading violates any of the following:

> (a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
>
> (c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

WIS. STAT. § 802.05(2). At issue here is whether the "legal contentions stated in [Vang's filings] are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." WIS. STAT. § 802.05(2)(b). More specifically, the question is whether there was a reasonable basis in the law to argue for Vang's proposed construction of the contract. "[W]hether a legal theory is justified by existing law or a good faith argument for a change in the law presents a question of law, and our review on

this issue is therefore de novo." ***Wisconsin Chiropractic Ass'n v. Wisconsin Chiropractic Examining Bd.***, 2004 WI App 30, ¶16, 269 Wis. 2d 837, 676 N.W.2d 580.

¶18 Here, as we have already explained, Vang's suit was based on an unreasonable reading of the contract's language specifying a notice deadline. There was no basis in the law to argue that the notice provision could reasonably be interpreted as expiring at midnight on November 27. Not only is such reading unreasonable when the contract is viewed in isolation, but also the surrounding circumstances made it obvious to any reasonable person that the deadline's purpose was to allow WRC Sports the opportunity to learn of the anticipated Town zoning decision before the notice deadline expired.

¶19 Vang complains that the circuit court erred by failing to grant her sanction motion against WRC Sports. Vang points to a series of brief exchanges between WRC Sports' attorney and Vang's attorney discussing the merits of the case. Typical of these exchanges, WRC Sports' attorney stated that "[t]his is my last request that you dismiss the complaint against WRC Sport[s] Complex, with prejudice. If I have to file the answer, I will seek sanctions and fees." Vang claims that this approach was improper and that it culminated in an improper motion for sanctions.

¶20 We conclude that the circuit court properly declined to impose sanctions against WRC Sports' attorney. The necessary corollary to the conclusion that the circuit court acted reasonably when sanctioning Vang's attorney is that WRC Sports was justified in pursuing that sanction. Further, the communications cited were direct and brief and cannot reasonably be said to have constituted harassment.

¶21 Therefore, we affirm the circuit court's grant of WRC Sports' motion for sanctions and its denial of Vang's motion for sanctions.

C. Frivolous Appeal

¶22 WRC Sports seeks costs, fees, and reasonable attorney fees pursuant to WIS. STAT. RULE 809.25(3). WRC Sports argues that Vang and her attorney either "knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." RULE 809.25(3)(c)2.

¶23 In ***Larson v. Burmaster***, 2006 WI App 142, ¶45, 295 Wis. 2d 333, 720 N.W.2d 134, we explained:

> WISCONSIN STAT. RULE 809.25(3) authorizes the court to award costs and attorney fees upon determining that an appeal is frivolous. As relevant here, an appeal is frivolous if "[t]he party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." Sec. 809.25(3)(c)2. Whether an appeal is frivolous is a question of law. [***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621]. An appellate court considers "what a reasonable party or attorney knew or should have known under the same or similar circumstances." ***Id.*** "As with lawyers, a pro se litigant is required to make a *reasonable investigation* of the facts and the law before filing an appeal." ***Holz v. Busy Bees Contracting Inc.***, 223 Wis. 2d 598, 608, 589 N.W.2d 633 (Ct. App. 1998) (emphasis added). If an appeal is found to be frivolous, "the court *shall* award to the successful party costs, fees, and reasonable attorney fees under this section." Sec. 809.25(3)(a) (emphasis added). "To award costs and attorney fees, an appellate court must conclude that the entire appeal is frivolous." ***Howell***, 282 Wis. 2d 130, ¶9.

¶24 Applying these standards, we declare the appeal frivolous. To repeat once more, Vang's suit was based on an unreasonable reading of the contract's language specifying a notice deadline. There was no basis in the law to argue that the notice provision could reasonably be interpreted as expiring at midnight on November 27. Not only was Vang's reading unreasonable when the contract is viewed in isolation, but also the surrounding circumstances made it obvious to any reasonable person that the deadline was intended to coincide with the anticipated zoning decision. Therefore, we remand for the assessment of costs and fees pursuant to WIS. STAT. RULE 809.25(3).

Conclusion

¶25 In sum, we affirm the circuit court's judgment granting summary judgment to WRC Sports and imposing sanctions against Vang's attorney and denying Vang's motion to sanction WRC Sports. We also remand for an assessment of costs and fees under WIS. STAT. RULE 809.25(3).

By the Court.—Judgment affirmed and cause remanded for further proceedings.

Not recommended for publication in the official reports.