COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1176 **Cir. Ct. No. 2007CV1268**

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

REALTY INVESTMENTS, LLC AND BOSTON, INC.,

PLAINTIFFS-RESPONDENTS,

V.

ASH PARK, LLC AND HOLMGREN WAY INVESTMENTS, LLC,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

DANIEL MEISSNER AIA, LLC AND ABC INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment and orders of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Ash Park, LLC and Holmgren Way Investments, LLC appeal a judgment and two orders directing them to demolish part of a structure located on land owned by Holmgren Way Investments. Ash Park and Holmgren Way Investments raise seven claims of error. We disagree and affirm the circuit court.

BACKGROUND

¶2 Ash Park owned two vacant lots, Lot 1 and Lot 2, at the corner of Holmgren Way and Willard Drive in the Village of Ashwaubenon. In 2005, Realty Investments purchased Lot 1 from Ash Park for $2.2 million. The purchase and sale agreement required the parties to enter into an "Easement with Covenants and Restrictions Affecting Land" (ECR). Both parties and their attorneys took part in drafting and editing the ECR. The ECR runs with the land, and any subsequent owner of property described in the ECR is bound by its provisions. Section 4(e)(6) of the ECR requires that "no improvements shall be constructed, erected, expanded or altered on [Lot 2] until the plans for the same … have been approved in writing by [Realty Investments], which consent shall not be unreasonably withheld or delayed."

¶3 Realty Investments and Boston, Inc., constructed an Ashley Furniture Home Store on Lot 1 at a cost of about $3 million. Terry Gerbers, one of Ash Park's principals, subsequently transferred the southwest corner of Lot 2 to Holmgren Way Investments. The parties refer to this area as the "restaurant lot." On May 2, 2007, Holmgren Way Investments began construction of a building, the "future addition," on the restaurant lot. Holmgren Way Investments did not obtain prior approval from Realty Investments, as required by section 4(e)(6) of the ECR.

¶4 On June 5, 2007, Realty Investments' counsel informed Ash Park the construction on the restaurant lot violated the ECR because Realty Investments had not been given the opportunity to approve the plans. Realty Investments asserted its belief that the plans would reveal additional ECR violations. On June 13, after receiving the future addition plans, Realty Investments' counsel informed Ash Park the plans directly violated the ECR. Realty Investments asked Ash Park to stop construction on the future addition and threatened legal action if construction continued. Ash Park refused to stop construction and alleged there were no substantive violations of the ECR.

¶5 Realty Investments filed suit to enjoin construction of the future addition. After a one-day bench trial, the trial court found that Ash Park and Holmgren Way Investments materially breached section 4(e)(6) of the ECR by failing to obtain Realty Investments' approval of the plans prior to construction. The court also found that Ash Park and Holmgren Way Investments materially breached section 1(f) of the ECR by building the future addition outside the permitted building area of the restaurant lot. After a subsequent three-day trial to determine the proper remedy, the trial court ordered Ash Park and Holmgren Way Investments to demolish the southern 3,977 square feet of the future addition, the portion that violated section 1(f). Ash Park and Holmgren Way Investments appeal.

DISCUSSION

¶6 Ash Park and Holmgren Way Investments argue the trial court erred by: (1) incorrectly interpreting the ECR; (2) determining that failure to provide Realty Investments with a copy of the future addition plans was a material breach of the ECR; (3) failing to find that Realty Investments waived enforcement of the

ECR; (4) refusing to balance the equities before fashioning an equitable remedy; (5) erroneously exercising its discretion in ordering the future addition demolished; (6) finding that Ash Park was liable for violations of the ECR; and (7) executing proposed findings of fact that are contrary to the record. We disagree and affirm.

I. The trial court's interpretation of the ECR

¶7 Ash Park and Holmgren Way Investments argue the trial court incorrectly interpreted the ECR in finding they materially breached section 1(f). The interpretation of a contract is a question of law that we review independently. ***Ehlinger v. Hauser***, 2008 WI App 123, ¶19, 313 Wis. 2d 718, 758 N.W.2d 476, *aff'd*, 2010 WI 54, 325 Wis. 2d 287, 785 N.W.2d 328. If the terms of a contract are plain and unambiguous, we construe the contract as it stands and apply its literal meaning. ***J.G. Wentworth S.S.C. Ltd. P'ship v. Callahan***, 2002 WI App 183, ¶11, 256 Wis. 2d 807, 649 N.W.2d 694. However, if we determine that a contract provision is ambiguous, we look to extrinsic evidence to discern the contract's meaning. *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996). A contract is ambiguous where its terms are reasonably susceptible to more than one interpretation. ***Id.***

¶8 Here, the contract language is not ambiguous. Section 1(f) reads:

> Notwithstanding the foregoing, the Owners of any Lot may add additional building areas or change, delete, enlarge, reduce or otherwise modify existing Building Areas on each Party's Lot, so long as (i) *such changes do not in any manner modify the westerly boundary of the fronts of the building footprints located on … Lot 2 … or the southerly boundary of the fronts of the building footprints located on … Lot 2 ….* (Emphasis added.)

Section 1(f) specifically prohibits placing the footprint of any new building in Lot 2 to the south or west of a building footprint shown on the ECR site plan. The ECR site plan shows a building footprint in the restaurant lot, which is part of Lot 2. There is no question that the future addition is located to the south and west of the restaurant lot footprint. Given the plain language of the ECR, Ash Park and Holmgren Way Investments materially breached section 1(f) by constructing the future addition south and west of a Lot 2 building footprint.

¶9 Ash Park and Holmgren Way Investments argue that under Wisconsin law, specific provisions in contracts should govern over general provisions. *See* ***Goldman Trust v. Goldman***, 26 Wis. 2d 141, 148, 131 N.W. 2d 902 (1965). They therefore contend the future addition is not governed by section 1(f), because section 1(f) applies to Lot 2 in general, whereas sections 4(e)(1) and 4(e)(2) are specific to the restaurant lot. However, nothing in sections 4(e)(1) or 4(e)(2) exempts the restaurant lot from section 1(f). Section 4(e)(1) contains a height restriction for freestanding buildings located in the restaurant lot, and Section 4(e)(2) restricts the square footage of restaurant lot improvements. These restrictions are independent of the restriction in section 1(f). Section 1(f) is applicable to the restaurant lot irrespective of any additional restrictions imposed by other sections of the ECR.

¶10 Contrary to Ash Park and Holmgren Way Investments' argument, interpreting the ECR in this way does not render section 4(e)(2) superfluous. Section 4(e)(2) provides, "[t]he improvements situated in the southwest portion of Lot 2 shall not exceed a total floor area of 10,000 square feet per acre of land, whether in one or more buildings." The restaurant lot consists of 1.1 acres of land, thus permitting 11,000 square feet of floor area, which is 4,760 square feet more than the area of the restaurant lot footprint. However, sections 1(f) and 4(e)(2) are

independent development restrictions, one dealing with building location and the other dealing with size. Our interpretation of the ECR does not disregard section 4(e)(2). It merely finds that sections 1(f) and 4(e)(2) are not in conflict.

¶11 Ash Park and Holmgren Way Investments also argue the ECR should be construed against Realty Investments, as if the ECR were an adhesion contract. *See* ***Caporali v. Washington Nat'l Ins. Co.***, 102 Wis. 2d 669, 675-76, 307 N.W.2d 218 (1981). However, both sides took part in drafting and editing the ECR and were represented by counsel throughout the drafting process. Because the parties to the ECR were sophisticated business entities represented by counsel, the ECR should not be construed against either party.

II. Failure to provide the future addition plans to Realty Investments prior to construction

¶12 Ash Park and Holmgren Way Investments argue their failure to provide the future addition plans to Realty Investments prior to construction was not a material breach of the ECR. Whether a party's breach of a contract is material is a question of fact to be determined by the fact finder. ***Management Computer Servs.***, 206 Wis. 2d at 184 (citing ***Shy v. Industrial Salvage Material Co.***, 264 Wis. 118, 125, 58 N.W.2d 452 (1953)). We will not reverse factual findings made by a trial court unless they are clearly erroneous. WIS. STAT. § 805.17(2).[1] When more than one reasonable inference can be drawn from credible evidence, we must accept the inference drawn by the trier of fact. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

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

¶13 A breach is material when it destroys the essential object of the contract. ***Management Computer Servs.***, 206 Wis. 2d at 183. In determining whether a breach destroys the essential object of the contract, a court may consider the character of the promised performance, the purposes it was expected to serve, and the extent to which nonperformance has defeated those purposes. ***M&I Marshall & Ilsley Bank v. Pump***, 88 Wis. 2d 323, 333, 276 N.W.2d 295 (1979). A significant consideration is the "extent to which the injured party will be deprived of the benefit he or she reasonably expected." ***Management Computer Servs.***, 206 Wis. 2d at 184 (citing RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981)).

¶14 Here, the trial court found that Ash Park and Holmgren Way Investments' failure to give Realty Investments the future addition plans prior to construction was a material breach of the ECR. This finding is not clearly erroneous. The overriding purpose of the ECR was to address where, how, and under what circumstances improvements could be constructed on the subject property. Realty Investments specifically contracted for the right to see and approve construction plans before building commenced. This right was important, because Realty Investments wanted to ensure that sight lines from Holmgren Way to the Ashley Furniture Home Store would be protected in the event of new construction. The trial court found that Realty Investments relied on section 4(e)(6) of the ECR to ensure that new construction would not begin before Realty Investments had the opportunity to protect its sight lines. By depriving Realty Investments of the right to review construction plans, Ash Park and Holmgren Way Investments deprived it of a benefit it reasonably expected. Ash Park and Holmgren Way Investments' breach of section 4(e)(6) was material.

¶15 Ash Park and Holmgren Way Investments cite ***Ranes v. American Family Ins. Co.***, 212 Wis. 2d 626, 632, 569 N.W.2d 359 (Ct. App. 1997), for the proposition that failure to give notice under a contract is not a material breach unless it prejudices the nonbreaching party. However, ***Ranes*** involved a coverage dispute between insurer and insured, not a commercial contract dispute between two sophisticated businesses. As such, ***Ranes*** invoked the settled insurance law principle that the failure of an insured to provide notice of settlement to his own insurer is not a material breach of the policy unless it prejudices the insurer. ***Id.*** This insurance law principle is irrelevant to the present commercial context.

¶16 Ash Park and Holmgren Way Investments also argue their failure to give notice was not material because Realty Investments could not have reasonably withheld consent had the plans been timely presented. However, the trial court found that Realty Investments could have reasonably withheld consent because the construction plans showed that the future addition violated section 1(f) of the ECR. This finding of fact is not clearly erroneous. Section 1(f) specifically prohibits placing the footprint of any new building to the south or west of the restaurant lot footprint shown on the ECR site plan. However, a substantial portion of the future addition was constructed to the south or west of the restaurant lot footprint. Because the future addition violated section 1(f) of the ECR, Realty Investments reasonably could have withheld consent.

III. Waiver of ECR enforcement

¶17 Ash Park and Holmgren Way Investments next argue Realty Investments waived its right to object to the future addition plans by waiting to object until one month after construction began. They also argue Realty Investments waived its right to claim a breach of section 1(f) by failing to assert

such a breach until trial. Waiver determinations present mixed questions of fact and law. ***All Star Rent A Car v. DOT***, 2006 WI 85, ¶15, 292 Wis. 2d 615, 716 N.W.2d 506. We will not set aside the trial court's findings of fact unless clearly erroneous, WIS. STAT. § 805.17(2), but the application of the facts to the legal standard of waiver is a question of law that we review independently, ***Meyer v. Classified Ins. Corp.***, 179 Wis. 2d 386, 396, 507 N.W.2d 149 (Ct. App. 1993).

¶18 Waiver is a voluntary and intentional relinquishment of a known right. ***Attoe v. State Farm Mut. Auto Ins. Co.***, 36 Wis. 2d 539, 545, 153 N.W.2d 575 (1967). Intent to waive is an essential element of waiver and may be inferred as a matter of law from the conduct of the parties. ***Hanz Trucking, Inc. v. Harris Bros.***, 29 Wis. 2d 254, 265, 138 N.W.2d 238 (1965).

¶19 Realty Investments did not waive its right to object to the future addition plans. Although construction of the future addition began on May 2, 2007, Realty Investments did not have visible notice of the extent of the construction or the location of the building until early June when the wood framing was erected. On June 5, Realty Investments sent written notice of its objection and specifically stated its belief that "the improvements are not within the area … permitted for improvement under the provisions of the ECR." Then, only two days after it received the construction plans, Realty Investments advised Ash Park and Holmgren Way Investments that the plans "on their face illustrate violations … of the ECR." Realty Investments gave written notice of its objection soon after visible commencement of construction on the site and reiterated its objection after it received the construction plans. Such conduct does not constitute waiver of Realty Investments' rights under section 4(e)(6) of the ECR. It is also disingenuous of Ash Park and Holmgren Way Investments to claim Realty Investments gave them late notice when they failed to properly disclose the plans.

¶20 Ash Park and Holmgren Way Investments also contend Realty Investments waived its right to claim a breach of section 1(f) by failing to assert such a breach until trial. However, Ash Park and Holmgren Way Investments did not make this argument before the trial court or in their trial briefs. Ash Park and Holmgren Way Investments' failure to argue waiver before the trial court results in their forfeiture of this argument in the instant appeal. *See* ***Jackson v. Benson***, 218 Wis. 2d 835, 901, 578 N.W.2d 602 (1998).

IV. The trial court's balancing of the equities

¶21 Ash Park and Holmgren Way Investments argue the trial court erred by refusing to balance the equities before fashioning an equitable remedy. A trial court's decision to grant equitable relief is discretionary and will not be overturned absent an erroneous exercise of discretion. ***Pietrowski v. Dufrane***, 2001 WI App 175, ¶5, 247 Wis. 2d 232, 634 N.W.2d 109. In fashioning an equitable remedy, the trial court must reconcile competing interests and balance the equities. ***Pure Milk Prod. Coop. v. National Farmers Org.***, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979).

¶22 Ash Park and Holmgren Way Investments' assertion that the trial court refused to balance the equities is incorrect. The trial court's findings of fact show that it weighed the equities and exercised appropriate discretion in ordering removal of the future addition. The court wrote:

> The equities in this matter do not favor Holmgren Way Investments or Ash Park in that (a) neither of such defendants furnished the plaintiffs with plans in advance of the commencement of construction; (b) neither of the plaintiffs caused the defendants to incur any expenses in constructing the Future Addition; (c) such defendants were timely advised of their violations of the ECR at a time when construction of the Future Addition was in an early stage and when only some landscaping and some framing

> and siding materials were evident in place; (d) neither of the defendants furnished their designer, architect or builder with a complete copy of the ECR and the defendants did not furnish the Village of Ashwaubenon with a full copy of the ECR; (e) the defendants could have avoided considerable expense had they ceased construction of the Future Addition in early June 2007, rather than deliberately proceeding to incur additional costs after having been notified of breaches of the ECR; (f) if a substantial portion of the Future Addition were not ordered demolished and removed to grade, such would provide a benefit to the defendants and would allow material breaches of the ECR to work to the advantage of the defendants and to the detriment of the plaintiffs; and (g) the plaintiffs at all times had a right to rely on the provisions of the ECR which forbad the construction of the future addition in the location where the defendants chose to construct it.

In its decision and order, the trial court stated:

> In this situation, the equities are in favor of razing the portion of the future addition that violates the ECR, for the aforementioned reasons: the defendants consciously agree to the ECR, and then consciously materially breached two sections of it; for this Court to allow any other result would establish a policy that would benefit those who breach contracts. Finally, there was no reason for the defendants to violate the ECR, because they had a safeguard built into it that would prohibit the plaintiffs from unreasonably withholding their consent to plans for additions that were in accordance with the ECR.

The trial court's findings of fact and decision and order show that it balanced the equities before ordering equitable relief. In doing so, the court determined the equities do not favor Ash Park and Holmgren Way Investments. This determination was not an erroneous exercise of the trial court's discretion.

V. The trial court's equitable remedy

¶23 Ash Park and Holmgren Way Investments argue the trial court erred by ordering part of the future addition demolished. They argue this remedy is too harsh because it is disproportionate to the harm they caused. We will not reverse

an equitable remedy selected by the trial court unless the trial court erroneously exercised its discretion. ***Pietrowski***, 247 Wis. 2d 232, ¶5.

¶24 Here, the trial court properly exercised its discretion by ordering Ash Park and Holmgren Way Investments to demolish the part of the future addition that violates the ECR. Ash Park and Holmgren Way Investments argue this remedy is too severe and will have a significant adverse economic impact on them. However, any harm to Ash Park and Holmgren Way Investments is the result of their own wrongdoing. The hardship they now claim was created by their own conscious breach of the ECR and continuing to build after receiving notice of the breach. The trial court found that Ash Park and Holmgren Way Investments decided to proceed with construction without obtaining consent, hoping to finish construction prior to litigation and to make the argument that "what is done is done, and now that the future addition is built, it would simply be too harsh to order them to tear it down." The court therefore ordered the future addition demolished because it did not want to "establish a precedent for commercial contracting parties where one could blatantly violate a mandated provision in the hopes no court would enforce it because the remedy would be too drastic." The trial court refused to spare the future addition because it did not want Ash Park and Holmgren Way Investments to profit from their wrongful acts. This was not an erroneous exercise of the trial court's discretion.

¶25 Ash Park and Holmgren Way Investments cite two cases, ***Ogden v. Straus Building Corp.***, 187 Wis. 232, 202 N.W. 34 (1925), and ***Hall v. Liebovich***, 2007 WI App 112, 300 Wis. 2d 725, 731 N.W.2d 649, to support their assertion that the trial court's remedy is too harsh. As the trial court noted, these two cases are markedly distinguishable from the case at hand.

¶26 In ***Ogden***, a newly built hotel encroached slightly on adjoining property. ***Ogden***, 187 Wis. at 264-65. Neither the hotel company nor its neighbor was aware of the encroachment until after construction was complete. ***Id.*** at 265. The court declined to order removal of the offending portions of the hotel, noting that the violation was slight and unsubstantial and that the interested parties were unaware of the encroachment until after the structure was built. ***Id.*** at 268-70.

¶27 In ***Liebovich***, the defendant built a new house that violated a restrictive covenant. ***Liebovich***, 300 Wis. 2d 725, ¶1. The trial court properly refused to order removal of the offending house, finding that the defendant "made an honest mistake" and was unaware that his new home violated the restriction. ***Id.***, ¶¶9, 15.

¶28 ***Ogden*** and ***Liebovich*** are not helpful to Ash Park and Holmgren Way Investments because the violations in those cases were accidental and the encroachment in ***Ogden*** was minor. Here, the trial court found ninety-five percent of the future addition was intentionally built in an area prohibited by the ECR. This violation was neither accidental nor minor.

¶29 Ash Park and Holmgren Way Investments also argue the trial court's remedy is inappropriate because their actions caused little, if any, harm to Realty Investments. Ash Park and Holmgren Way Investments note that Realty Investments' appraisal expert was unable to quantify Realty Investments' damages. However, the trial court found that the offending portion of the future addition impairs the visibility of the Ashley Furniture Home Store and diminishes the value of the store and of Realty Investments' land. Unless remedied, the court determined this loss in value would be perpetual. Although difficult to quantify, the harm to Realty Investments was not minimal. Determining an actual numeric

value is not necessary because it was the protection of the sight line that Realty Investments negotiated in its contract. The remedy ordered by the trial court was not disproportionate to the harm Ash Park and Holmgren Way Investments caused.

VI. Ash Park's liability under the ECR

¶30 Ash Park and Holmgren Way Investments contend Ash Park cannot be liable to Realty Investments under the ECR because Ash Park no longer owns the real estate on which the future addition was built. The interpretation of a contract is a question of law that we review independently. ***Ehlinger***, 313 Wis. 2d 718, ¶19.

¶31 At the time of contracting, Ash Park was the "Developer" and owner of Lot 2. ECR section 4(e)(6) provides, "To the extent permitted by applicable laws, the Developer may subdivide and spin-off by certified survey map portions of Lot 2 …; upon any such subdivision the Owner of the largest portion of Lot 2, as subdivided, shall have the rights and obligations of the Developer under this ECR." When the ECR was signed, Lot 2 consisted of 6.94 acres. In 2007, Ash Park's principal transferred 1.1 acres of Lot 2 to Holmgren Way Investments. Following this transfer, Ash Park remained the "Developer" under the ECR, because it was still the owner of the largest portion of Lot 2. Ash Park therefore remains liable to Realty Investments under the ECR.

VII. The trial court's findings of fact

¶32 Ash Park and Holmgren Way Investments argue three of the trial court's findings of fact are contrary to the record. We will not set aside a trial court's findings of fact unless they are clearly erroneous, and we give due regard

to the trial court's opportunity to judge the credibility of the witnesses. WIS. STAT. § 805.17(2).

¶33 Ash Park and Holmgren Way Investments first object to the trial court's finding that "the walls of the future addition were constructed higher than was allowed by the ECR." The ECR provides that the front wall of a building in the restaurant lot may not be more than twenty-five feet high and all other walls may not be more than twenty feet high. Daniel Meissner, Ash Park's architect, confirmed that the future addition's rear wall was twenty-two feet high, two feet higher than the ECR allowed. Thus, the trial court's finding that the future addition's walls were constructed higher than the ECR allowed is not clearly erroneous.

¶34 Ash Park and Holmgren Way Investments next object to the trial court's finding that the future addition reduces the appeal and value of the Ashley Furniture Home Store and the real estate where it is located. The trial court based its finding on the affidavit of Peter Moegenburg, Realty Investments' real estate appraisal expert. Moegenburg stated, "It is my opinion that the construction of the Future Addition … reduces or diminishes the appeal and value of the Ashley Furniture Home Store and the real estate on which such store is situated." Moegenburg also stated the loss of value caused by the future addition would be perpetual, unless remedied. However, Moegenburg was unable to quantify the loss in value, due to uncertainty about the use of the future addition and difficulty obtaining useful comparable sales data. Even though Moegenburg could not quantify the loss in value, his testimony supports the trial court's finding that some diminution in value did occur. The trial court's finding of fact is not clearly erroneous.

¶35 Finally, Ash Park and Holmgren Way Investments object to the trial court's finding that they did not provide a complete copy of the ECR to their designer, architect or builder or to the Village of Ashwaubenon. At trial, Meissner testified he did not receive a full copy of the ECR until this lawsuit began. Edward Fisher, who provided architectural drafting services for the future addition, testified he first saw a full copy of the ECR at his deposition. Joash Smits, the construction project manager, testified he had a "verbal communication" with Terry Gerbers about the ECR. Todd Gerbers, the Village of Ashwaubenon building inspector and zoning administrator, testified he had never seen a copy of the ECR. The trial court's finding that Ash Park and Holmgren Way Investments did not provide a complete copy of the ECR to their designer, architect, or builder or to the Village of Ashwaubenon is supported by the record and is not clearly erroneous.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.