**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 27, 2010**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2009AP1951** **Cir. Ct. No. 2006CV10494**

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

---

**TIMOTHY J. BROPHY, JR.,**

**PLAINTIFF-APPELLANT,**

**V.**

**JUSTIN C. ROTHSCHILD,**

**DEFENDANT-RESPONDENT.**

---

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 BRENNAN, J. Timothy J. Brophy, Jr. appeals from a circuit court order entered following a hearing on the parties' cross-motions for summary judgment, dismissing Brophy's complaint against Justin C. Rothschild. Brophy appears to argue that the circuit court: (1) misapplied the summary judgment

standards; (2) erred in considering "parole evidence"; and (3) erred in determining that Rothschild did not materially breach the parties' agreement.[1] Because all of Brophy's arguments are without merit, we affirm.

## BACKGROUND

¶2 The facts set forth are those left undisputed in the parties' summary judgment submissions before the circuit court. Facts that remain in dispute are noted.

¶3 On May 5, 2006, Rothschild made an Offer to Purchase ("Offer") an apartment building owned by Brophy, located at 1681 North Prospect Avenue in Milwaukee, Wisconsin ("the Property"). Following multiple counteroffers, the parties agreed on a purchase price of $810,000. The property was in foreclosure at the time the Offer was made.

¶4 The Offer contained a financing contingency provision, providing that the Offer was contingent upon Rothschild obtaining financing within forty days of acceptance. The Offer also contained a financing unavailability provision, stating: "If financing is not available on the terms stated in this Offer … [Rothschild] shall promptly deliver written notice to [Brophy] of same including

[1] We have summarized Brophy's arguments to the best of our ability based upon his submissions, but to the extent that some of his claims may remain unaddressed, we conclude that they are underdeveloped and insufficiently briefed, and, therefore, do not warrant our attention. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Additionally, we note that Brophy's briefs seem to fall below the quality we expect of counsel. He cites to numerous unpublished opinions released prior to July 1, 2009, *see* WIS. STAT. RULE 809.23(3) (amended July 1, 2009); fails to provide pin cites when necessary, *see* WIS. STAT. RULE 809.19(1)(e) (2007-08) and SCR 80.02; and fails to "[r]eference … the parties by name, rather than by party designation," *see* RULE 809.19(1)(i). We caution counsel to avoid these errors in the future. All references to the Wisconsin Statutes are to the 2007-08 version.

copies of lender(s)' rejection letter(s) or other evidence of unavailability." Upon receiving written notice of financing unavailability, the Offer directed that "[Brophy] shall then have 10 days to give [Rothschild] written notice of [Brophy]'s decision to finance this transaction on the same terms set forth in the financing contingency." If Brophy did not give notice of self-financing within ten days, the Offer would be "null and void."

¶5 The Offer also contained a default provision, outlining what qualifies as an actionable breach of the Offer. This provision states, in relevant part: "A material failure to perform any obligation under this Offer is a default which may subject the defaulting party to liability for damages or other legal remedies." Under the default provision, in the event that Rothschild defaulted, Brophy had the option to: "(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) … return the earnest money and … sue for actual damages."

¶6 Despite contacting several lenders, Rothschild was unable to obtain financing. Rothschild's friend and associate, William Kral, spoke with Mike Seramur, the real estate agent hired by Brophy to represent him in the transaction, explaining that Rothschild was having difficultly obtaining financing. Rothschild himself discussed his difficulty obtaining financing with the brokers involved in the transaction on multiple occasions. However, neither Rothschild nor anyone acting on his behalf provided Seramur or Brophy with written notice of Rothschild's inability to obtain financing.

¶7 On or about June 23, 2006, Rothschild and Kral verbally informed Seramur that Rothschild was unable to obtain financing to purchase the Property

and identified the lenders who had denied Rothschild financing. Brophy was not then in a position to self-finance the transaction.

¶8 Soon thereafter, Seramur drafted an Amended Offer to Purchase ("Amended Offer") that extended the closing date to July 28, 2006. Rothschild did not sign the Amended Offer, and on August 10, 2006, Rothschild, through his broker, sent Seramur a WB-45 Cancellation Agreement & Mutual Release, terminating the Offer.

¶9 Less than a month later, on August 21, 2006, the Property was foreclosed and sold at a sheriff's sale for $695,000.

¶10 Thereafter, in October 2006, Brophy filed a complaint against Rothschild for breach of contract, seeking the difference between the parties' agreed-upon purchase price and the amount for which the Property sold for at the sheriff's sale, as well as "costs incurred to maintain and sell the [P]roperty" following Rothschild's alleged default.

¶11 In April and May 2007, Brophy and Rothschild both filed motions for summary judgment.[2] A hearing on the motions was held before the circuit court on May 26, 2009. During the hearing, the circuit court set forth what it believed to be the undisputed facts, based upon the parties' submissions, and provided the parties an opportunity to correct the court on those facts that were still in dispute. No objections or corrections to the court's findings were made.

[2] This was not the parties' first run at summary judgment. However, the circuit court's prior summary judgment order was vacated and is irrelevant to the issues addressed on appeal.

¶12 On May 28, 2009, issuing a decision from the bench, the court granted Rothschild's motion for summary judgment and dismissed Brophy's complaint with prejudice. The court found that the parties "stipulat[ed] that there was a breach"—in other words, that Rothschild's verbal notice that he could not obtain financing did not satisfy the terms of the Offer. However, because Brophy had actual notice of Rothschild's inability to obtain financing, the circuit court concluded that the failure to provide written notice was not a *material* breach, and therefore, under the Offer's default provision, Brophy could not recover damages. The circuit court noted that the breach:

> in no way affected Mr. Brophy's options. It did not cause the foreclosure and all the related costs associated with that. Those were caused by his inability to pay the mortgage which he was bound to do. Whether the notice was given in writing or whether the notice that Mr. Rothschild couldn't obtain financing was given verbally, that's not Mr. Rothschild's responsibility. This breach did not cause those damages.

Brophy appeals.

## STANDARD OF REVIEW

¶13 This case arises out of the circuit court's decision on cross-motions for summary judgment. Our review of cases on appeal from summary judgment is well-known. We review the denial or grant of a summary judgment motion *de novo*, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). The trial court, and therefore we, must grant summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2).

## DISCUSSION

### I. The circuit court did not misapply the summary judgment standards.

¶14 Brophy's first argument is that the circuit court erred by "appl[ying] the facts most favorable to the moving party in reaching it[]s ruling." More specifically, he appears to take issue with the circuit court's determination that the parties did not dispute the fact that Rothschild and Kral verbally notified Seramur[3] that Rothschild could not obtain financing. We conclude that Brophy waived his right to challenge this fact when he failed to rebut Rothschild's and Kral's affidavits and, again, when he expressly admitted to the circuit court that Brophy's "agent" was verbally notified.

¶15 To begin, we note that Brophy's statement of the law is not precise. On motion for summary judgment the circuit court is not obligated to consider only those *facts* in favor of the non-moving party. Rather, the circuit court must determine what the undisputed facts are and only draw *inferences* from those undisputed facts in favor of the non-moving party. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

¶16 In support of his motion for summary judgment, Rothschild submitted affidavits from both himself and Kral, each stating that they had verbally notified Seramur of Rothschild's inability to obtain financing. Brophy did not submit any evidence to refute that fact before the circuit court, and admits

[3] We assume that Seramur is Brophy's agent—and, therefore, knowledge imparted upon Seramur is imputable to Brophy—because Brophy has never argued to the contrary. *See* ***Ivers & Pond Piano Co. v. Peckham***, 29 Wis. 2d 364, 369, 139 N.W.2d 57 (1966). Indeed, before the circuit court, Brophy's counsel stated that "verbal notice was given to [Brophy's] agent which by law, obviously transmutes to Mr. Brophy."

before this court that Seramur "neither admitted nor denied having received verbal notice." By failing to refute Rothschild's and Kral's affidavits with "specific facts showing that there is a genuine issue for trial," Brophy implicitly admitted the fact was true. *See* WIS. STAT. § 802.08(3) ("When a motion for summary judgment is made and supported …, the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial."). Having foregone the opportunity to contest that fact before the circuit court, Brophy cannot now raise the issue here.

¶17 Moreover, during the May 26, 2009 hearing, when given an opportunity to correct the circuit court's findings, Brophy's counsel stated: "I'm not sure that Mr. Brophy himself ever received verbal notice. The verbal notice was given to his agent which by law, obviously transmutes to Mr. Brophy." Because Brophy conceded the fact before the circuit court, he cannot now claim that the circuit court erred in relying on the fact in support of its conclusion. That claim has been waived. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("'[W]aiver is the intentional relinquishment or abandonment of a known right.'") (citation omitted). Consequently, the circuit court did not err in finding that the fact that Rothschild gave Brophy verbal notice of his inability to obtain financing was undisputed.

[4] In his reply brief, Brophy argues that Rothschild's affidavit was inadequate. However, raising an issue for the first time in a reply brief violates our Rules of Appellate Procedure; therefore, we will not address the issue. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

## II. The circuit court did not err in considering "parole evidence."

¶18 Next, Brophy argues that the circuit court erred "when it allowed in evidence outside the four corners of the contract"—evidence that Brophy refers to as "parole evidence." (Emphasis omitted.) Again, it appears that at the crux of Brophy's argument is the circuit court's reliance on the fact that Rothschild and Kral verbally notified Seramur of Rothschild's inability to obtain financing. Brophy's argument misconstrues the circuit court's holding.

¶19 The parole evidence rule generally provides that extrinsic evidence of the negotiations or prior agreements of the parties to a written contract may be admitted only to explain any ambiguities in the final written document, and not to contradict any unambiguous terms therein. ***Marshall & Ilsley Bank v. Milwaukee Gear Co.***, 62 Wis. 2d 768, 777, 216 N.W.2d 1 (1974). Brophy contends that the circuit court relied on Rothschild's and Kral's affidavits to change the terms of the Offer, in violation of the parole evidence rule. Brophy states as follows:

> In this case[,] the court accepted parol[e] evidence and used it to determine that some type of "stipulation" was reached by the parties. This is clear error by the court because it changes the terms of the contract to which the parties agreed that notice of the failure of financing must be given in writing and that said notice must be accompanied by proof of the failure to secure financing.… If the parties had wanted oral notice to be valid they could have stated so in the contract, they did not.

The record belies Brophy's assertion.

¶20 The circuit court did not conclude, as Brophy contends, that "there was a 'stipulation' between the parties that no written notice was required." Rather, the circuit court held that the parties "stipulate[ed] that there was a breach as to the form" of the notice. The circuit court and the parties all agreed that the

Offer required written notice. The court went on to explain that the question of whether notice was actually received went to the next issue, the materiality of the breach. To argue that the circuit court used extrinsic evidence to alter the terms of the Offer does not accurately represent the circuit court's holding.

## III. The circuit court did not err in determining that Rothschild's breach was not material.

¶21 Finally, Brophy argues that the circuit court erred in concluding that Rothschild's breach was not material because: (1) Rothschild breached "an essential object of the agreement"; and (2) the question of whether a breach is material is properly addressed to the jury. Neither argument is persuasive.

¶22 As we previously noted, the circuit court concluded (and Rothschild concedes) that Rothschild breached the Offer when he failed to provide Brophy with written notice that he was unable to obtain financing. However, under the terms of the Offer, only "[a] *material* failure to perform any obligation under th[e] Offer is a default which may subject the defaulting party to liability for damages or other legal remedies." (Emphasis added.) A material breach is a breach "so serious as to destroy the essential object of the agreement." ***Ranes v. American Family Mut. Ins. Co.***, 219 Wis. 2d 49, 57, 580 N.W.2d 197 (1998).

¶23 The circuit court concluded that Rothschild's breach was not material and, therefore, that Brophy was not entitled to recover damages. Because the Property was undergoing foreclosure proceedings at the time the parties entered into the Offer, the circuit court held that even if Rothschild had provided Brophy with written notice of his inability to obtain financing, Brophy would not have been able to self-finance the deal and the building would have been sold at the sheriff's sale in August just the same. In other words, Rothschild's failure to

provide written notice had no effect on "the essential object of the agreement"—the sale of the Property. *See* ***id.*** We agree.

¶24 Brophy argues that "[a] breach of the contingency deadline, written notice and proof of the failure to find financing by the buyer is an essential object of the agreement as defined within the [Offer] itself." However, that portion of the Offer cited by Brophy in support of that conclusion only sets forth the Offer's time-is-of-the-essence clause.[5] It does not set forth the Offer's "essential object[ive]." *See* ***id.***

¶25 Further, Brophy argues that the question of whether the breach was material was one for a jury. Indeed, "[w]hether a breach is material is, *except in clear cases*, a question for the jury." ***Ash Park, LLC v. Alexander & Bishop, Ltd.***, 2009 WI App 71, ¶21, 317 Wis. 2d 772, 767 N.W.2d 614 (emphasis added). Unfortunately for Brophy, this is one of those clear cases.

---

[5] That portion of the Offer cited by Brophy states:

> PROPERTY ADDRESS: 1681 N. Prospect Ave., Milwaukee, WI 53202
>
> TIME IS OF THE ESSENCE "TIME IS OF THE ESSENCE" as to: (1) earnest money payment(s); (2) binding acceptance; (3) occupancy; (4) date of closing; (5) contingency deadlines and all other dates and deadlines in this Offer[.] If "Time is of the Essence" applies to a date or deadline, failure to perform by the exact date or deadline is a breach of contract. If "Time is of the Essence" does not apply to a date or deadline, then performance within a reasonable time of the date or deadline is allowed before a breach occurs.

We also note that Brophy does not argue that Rothschild's *verbal* notice did not comply with the time-is-of-the-essence clause.

¶26 Brophy admits that the Property was undergoing foreclosure proceedings at the time he entered into the Offer with Rothschild and that he could not have afforded to self-finance the deal. Given these facts, even if Rothschild had provided Brophy with written notice of his inability to obtain financing, as opposed to verbal notice, the result would have been the same; Brophy would have been unable to self-finance the deal, the Offer would have been null and void by its own terms, and the Property would have been sold in the August sheriff's sale.[6] Brophy's general assertion, made without any evidentiary support, that he would have avoided foreclosure had Rothschild provided him with written notice, is not enough to demonstrate that the breach was material.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

[6] Brophy argues for the first time in his reply brief that "there is legal authority which states that [Brophy] can force [Rothschild] to go through with the transaction even if financing is unavailable, if [Rothschild] fails to give the required written notice … and the circuit court has very little discretion to deny a vendor's request for specific performance." Again, we will not address issues raised for the first time in a reply brief. *See* ***Northwest Wholesale Lumber***, 191 Wis. 2d at 294 n.11. We also note that at no time prior to his reply brief on appeal has Brophy ever asked for specific performance as a remedy.