

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 2010

A. John Voelker
Acting 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. 2009AP2328

Cir. Ct. No. 2006CV492

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

SATORU KUWABARA AND MAY HSU,

PLAINTIFFS-RESPONDENTS,

V.

DENNIS BURD AND LAURA BURD,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Ozaukee County:
JOHN A. FIORENZA, Reserve Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Dennis and Laura Burd sold a house to Satoru Kuwabara and May Hsu (the Kuwabaras). The Burds appeal from a judgment obligating them to pay the Kuwabaras the amount it cost the Kuwabaras to make the home code compliant as set forth in the offer to purchase. We affirm.

¶2 On January 21, 2006, the parties entered into a residential real estate contract for the sale of the Burds' village of Thiensville home to the Kuwabaros. Thiensville ordinances require clear-water compliance inspections upon resale or change of ownership of any residence.¹ By an addendum to the offer to purchase, the parties agreed that the Burds would provide the Kuwabaros a certificate of code compliance prior to closing.

¶3 The offer to purchase set February 3 as the closing date. The Burds' realtor initially overlooked the need for a certificate of code compliance, delaying the inspection until January 31. The village inspector found that the residence had no sump pump or crock and was out of code compliance due to illegal cross-connections that discharged clear water into the sanitary system. The Burds were advised that they had to remedy the illegal sewer connection, install a working sump pump and crock and pay a new compliance permit and inspection fee. It is undisputed that the Burds did not provide the Kuwabaros with the necessary certificate of code compliance or occupancy permit prior to closing.

¶4 To permit the closing to go forward on February 3 despite the lack of a certificate of compliance, an amendment to the offer to purchase was drafted. The amendment set up an escrow agreement and provided that the Burds would install a sump pump at their expense within forty-five days of closing. The escrow agreement provided in relevant part:

¹ Clear-water code compliance is a means by which a municipality restricts the introduction of clear, unpolluted water into the sewer system to reduce the amount of water that has to be treated at the municipal treatment plant, thereby minimizing costs.

ESCROW AGREEMENT

Pursuant to the sale of property ... from DENNIS BURD and LAURA BURD, (SELLER), to SATORU KUWABARA and MARY [sic] HSU, (BUYER), HERITAGE TITLE SERVICES, INC., (ESCROWEE) agrees to hold the sum of \$2,000.00, from the Seller, in escrow on the following conditions:

ONE: This escrow is established for the purpose of facilitating payment of installation of a sum[p] pump.

TWO: Seller shall be responsible for procuring contractors and submitting final contractor statements to Escrowee.

THREE: Upon receipt of said final statements, Escrowee shall terminate this Agreement by paying said final statements out of the escrowed funds. Any funds that remain in escrow after said final statements have been paid in full shall be released to Seller.

FOUR: Seller shall be responsible for all costs which exceed the escrowed funds.

FIVE: Buyer agrees to cooperate fully with the Escrowee, Seller and contractors to facilitate the purpose of this escrow.

SIX: If on or before April 1, 2006, Escrowee is not in actual receipt of said final statements, then Escrowee shall be authorized to terminate this Agreement by releasing all escrowed funds to Buyer as liquidated damages. Thereafter, Seller shall be relieved from any and all responsibility or obligation for the costs of said work, and Buyer shall assume all responsibility for the same.

¶5 The installation was not accomplished by April 1. On April 11, the escrowee title company issued the Kuwabaras a \$2000 check from the escrow account. The Kuwabaras cashed the check and hired a plumbing contractor, ultimately paying \$7829.95 to bring the property into code compliance.

¶6 The Kuwabaras commenced a declaratory judgment and breach of contract action to recover their actual damages. The Burds moved for summary judgment. The court denied the motion without prejudice because a question of fact remained as to whether the parties' original intent in creating the escrow agreement was for a sump pump or to achieve code compliance. After further

discovery, the Burds filed a second motion for summary judgment. The court found that the issue remained unresolved and denied the motion without a hearing.

¶7 The matter went to a trial to the court. At the end, the court found that the documents were not at all ambiguous. It concluded that the escrow agreement addressed the sump pump only and did not deal with the illegal connection to the sanitary sewer. It also concluded that, because the Kuwabaros credited the \$2000 against the actual bill, they were not impermissibly taking it as liquidated damages and also asking for actual damages. *See Zimmermann v. Thompson*, 16 Wis. 2d 74, 76-77, 114 N.W.2d 116 (1962) (stating that the nonbreaching party to a real estate transaction has the option to seek either liquidated damages or actual damages, but not both). The court ordered judgment in favor of the Kuwabaros in the amount of \$5829.95 (\$7829.95 less the \$2000) plus costs.

¶8 The Burds raise three arguments on appeal. They contend that: (1) by proceeding with the closing without having received a certificate of code compliance, the Kuwabaros waived their right to receive one; (2) the amendment, escrow agreement and release of the escrowed funds together operate as an accord and satisfaction that now bars the breach of contract claim; and (3) accepting the \$2000 as liquidated damages bars the Kuwabaros' claim for actual damages.

¶9 Resolving these issues requires that we examine the language of the offer to purchase, addendum, amendment and escrow agreement. In construing a contract, we attempt to ascertain the intent of the parties as expressed in the contract language. *See Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. If the language is plain, we apply it as the expression of the parties' intent and construe it as it stands. *Id.* Whether contract

language is plain or ambiguous is a question of law subject to our de novo review, as is the meaning of plain contract language. *Lynch v. Crossroads Counseling Ctr., Inc.*, 2004 WI App 114, ¶19, 275 Wis. 2d 171, 684 N.W.2d 141.

¶10 The offer to purchase and the addendum to the offer to purchase were drafted contemporaneously. The addendum included a provision stating:

CODE COMPLIANCE/OCCUPANCY: Seller shall provide to Buyer, prior to closing, any Certificate of Code Compliance or Occupancy Permit as may be required by the municipality. Seller agrees to complete:

A. All work orders required to obtain the above Certificate of Code Compliance or Occupancy Permit.

The offer to purchase provided that “[t]he warranties, representations and covenants made in this offer survive closing.”

¶11 We conclude that the intent is clear. The parties agreed that the Burds would provide the certificate of code compliance that Thiensville requires when ownership of a residence changes hands. While they agreed it would be accomplished prior to closing, they also agreed that should it not occur by then the promise to do so survived the closing. Those documents plainly seat responsibility with the Burds.

¶12 The escrow agreement changes nothing. We agree with the trial court that it, too, is unambiguous. The escrow agreement expressly states that it was “established for the purpose of facilitating payment of installation of a sum[p] pump.” The pump was installed and the money was paid. Although installing the sump pump did not remedy the illegal cross-connection to the sewer, nothing in the language in any way suggests that the parties intended the sump pump alone to supplant their earlier agreement regarding the certificate of code compliance.

Accomplishing that put the cost of the entire job at \$7829.95. Accordingly, the Burds still owed \$5829.95.

¶13 Trying another tack, the Burds argue that accord and satisfaction bars the Kuwabararas' claims because the Kuwabararas cashed and retained the \$2000 check. For a contract of accord and satisfaction to arise, the obligor must offer performance in satisfaction of a disputed claim, the creditor must understand that full satisfaction is intended, and the creditor must accept the offer. *Van Sistine v. Tollard*, 95 Wis. 2d 678, 681-82, 291 N.W.2d 636 (Ct. App. 1980).

¶14 On February 3, the village faxed a letter to "Sharon" at the title company explaining that the property had no sump pump and was not in compliance with the municipal code due to the cross-connection. The parties also drafted the escrow agreement on February 3. The agreement plainly provided that it was for a sump pump, that any excess funds remaining after all invoices were paid were to be returned to the Burds and that the Burds were responsible for costs that exceeded the escrowed funds. The \$2000 clearly was a deposit held in trust that the parties anticipated might or might not be sufficient.

¶15 By the time the title company issued the Kuwabararas a check on April 11, they had gotten estimates ranging from approximately \$4000 to about \$9000 to bring the house into compliance. Not the language of the escrow agreement nor the surrounding facts reasonably lead to the conclusion that the Kuwabararas understood that full satisfaction was intended by the escrowed \$2000 or that they accepted it as such.

¶16 The Burds then assert that the Kuwabararas opted to take the \$2000 as liquidated damages, thus precluding them from claiming actual damages. This presumes that the \$2000 can be construed as liquidated damages. Determining the

proper construction of this contract language presents a question of law, which we review de novo. See *Galatowitsch v. Wanat*, 2000 WI App 236, ¶11, 239 Wis. 2d 558, 620 N.W.2d 618.

¶17 Resolving this question is tied to our earlier conclusion that the escrow agreement was limited to installing the sump pump. The escrow agreement does not say that the Kuwabaras relinquished a claim for any item other than a sump pump in exchange for \$2000. Even without the provision by which the Burds agreed to be responsible for all costs over the escrowed funds, the language of the escrow agreement does not free the Burds from the obligation to provide a certificate of code compliance. To do so cost an additional \$5829.95.

¶18 In sum, we conclude the escrow agreement unambiguously addressed only the sump pump installation. The Burds' distinct contractual obligation in the addendum to the offer to purchase to provide a certificate of code compliance survived the closing. We affirm the judgment.

By the Court.—Judgment affirmed.

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

