COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3135 **Cir. Ct. No. 2008CV2345**

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

IMMOBOLIA GB, INC.,

PLAINTIFF-RESPONDENT,

V.

TITLETOWN REALTORS, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Titletown Realtors, Inc., appeals a judgment declaring that Immobolia GB, Inc., is entitled to the listing commission from a home sale. Although Titletown raises a number of issues, including Immobolia's standing and the sufficiency of its pleadings, the principal issue in this appeal is

whether Titletown adequately preserved its right to the commission by giving the sellers notice of a protected buyer. Like the circuit court, we conclude that Titletown's notice was insufficient because it was knowingly sent to an incorrect address. We affirm on all the issues Titletown raises.

BACKGROUND

¶2 Steve and Amy Sehring executed a standard WB-1 residential listing contract with Titletown in 2007. The contract granted Titletown the exclusive right to sell the Sehrings' home on Broadway and the right to a percentage commission based on the sale price. The contract was to expire on August 31, 2007, but was extended until October 31, 2007. The Sehrings moved out of the Broadway property at some point during the summer of 2007.

¶3 Sandra Ranck was the Sehrings' real estate agent at Titletown. In mid-October, Titletown terminated Ranck and Sandra Tilque assumed responsibility for the Sehrings' listing. There were no prospective buyers for the Sehrings' property at the time Titletown terminated Ranck. Afterwards, Ranck took a position with Immobolia.

¶4 A few days before October 31, a prospective buyer contacted Tilque. Tilque showed the Sehrings' property to the prospective buyer in late October, but the buyer did not submit an offer to purchase before the listing contract's expiration.

¶5 In the event that a sale to a prospective buyer was not consummated within the contract term, Titletown had the right to extend the contract for one year as to any "protected buyer." A "protected buyer" was defined as "any buyer who … negotiated to acquire an interest in the Property … during the term of this

Listing." "Negotiated" meant "to discuss the potential terms upon which buyer might acquire an interest in the Property or to attend an individual showing of the Property." There is no dispute the prospective buyer was a protected buyer under these definitions.[1]

¶6 To trigger the protected buyer provision, Titletown needed to timely notify the Sehrings of the protected buyer's identity. Titletown had a three-day notification window following the contract's expiration, after which Titletown's right to collect a commission on the sale lapsed:

> If the extension is based on negotiation, the extension shall be effective only if the buyer's name is delivered to the Seller, in writing, no later than three days after the expiration of the Listing, unless Seller was directly involved in discussions of the potential terms upon which the buyer might acquire an interest in the Property.

Per the listing contract, delivery could be accomplished by: (1) personally giving the notice to the Sehrings; (2) depositing the notice in the mail to the seller at an address identified elsewhere in the contract; or (3) transmitting the document to the Sehrings' fax number.

¶7 Titletown attempted notice by mail on November 2, 2007. However, Ranck, who was responsible for completing the WB-1 form, left blank the line on which the seller's address was to be written. At trial, Ranck testified that she would often omit the seller's address because sellers frequently move during the listing term. After Ranck was terminated, Tilque became responsible for sending the protected buyer notice. Tilque was aware the Sehrings had moved, but did not

[1] Immobolia apparently challenged at trial whether the negotiation was adequate to make the prospective buyer a protected buyer. However, the trial court concluded that a showing on October 24, 2007 constituted a negotiation. Immobolia has not disputed the matter on appeal.

know where. After a short and unsuccessful search for the Sehrings' new address, Tilque wrote "please forward" on the envelope and sent the notice to the Sehrings' old address.

¶8 The Sehrings entered into a listing contract with Immobolia for their Broadway property on November 8, 2007. Ranck was the listing agent. At the time, the Sehrings had not yet received any protected buyer notice from Titletown.

¶9 Shortly after the Sehrings listed the Broadway property with Immobolia, Ranck received a phone call from Titletown requesting to show the property to the protected buyer. Ranck objected and noted that the Sehrings had not informed her of any protected buyers from Titletown. Titletown sent Ranck a fax containing the November 2, 2007 protected buyer notice. The cover sheet of the fax stated, "The letter has not been returned back to [Titletown] as 'undeliverable' therefore at this time we are considering it delivered."

¶10 Soon after Titletown declared its protected buyer notice delivered, the notice was returned as undeliverable. On November 12, Titletown sent a second fax acknowledging the notice had been returned. Titletown then mailed a second notice to the Sehrings, this time to their correct address.

¶11 The prospective buyers signed an offer to purchase on November 15, 2007. The Sehrings decided to proceed with the sale, with Titletown handling the transaction.

¶12 On November 20, Titletown and Immobolia reached an agreement regarding how the brokers would approach the sale. The brokers agreed not to interfere with the transaction. They further agreed to hold the Sehrings responsible for only one commission. Finally, the brokers delayed resolution of

the commission dispute; their agreement concludes, "The brokers will negotiate the commission after the transaction has successfully closed."

¶13 Immobolia filed suit on September 24, 2008, alleging that Titletown wrongly refused to relinquish the commission. Following a bench trial, the circuit court agreed. In the court's view, Titletown was responsible for ensuring all terms, including the seller's address, were included in the listing contract. The court further determined the contract required actual receipt of the notice within three days. Titletown's notice was found deficient because it was knowingly sent to the wrong address. Finally, the trial court held that the agreement between the brokers gave Immobolia standing to challenge Titletown's retention of the commission. The court ultimately determined

> that [Titletown] did fail to exercise appropriate diligence, that it did not provide proper actual notice or even, really, constructive notice to the [Sehrings] under the terms that are required within the contract itself, and so I would find for [Immobolia] as to the claim that [it] is entitled to a commission because there was no competing contract.

DISCUSSION

¶14 Titletown raises five issues on appeal. First, Titletown argues Immobolia's pleadings do not provide a sufficient basis for the circuit court's decision. Second, Titletown claims Immobolia has no standing to challenge Titletown's retention of the commission. Third, Titletown asserts its protected buyer notice adequately preserved its right to the commission. Titletown's fourth and fifth arguments implicate the equitable doctrines of estoppel and clean hands, respectively.

I. Sufficiency of the Pleadings

¶15 Titletown contends Immobolia's pleadings are insufficient to support the trial court's decision. Specifically, Titletown observes that Immobolia's complaint alleges an incorrect expiration date for the listing agreement between Titletown and the Sehrings—August 31, 2007—and fails to reflect that the agreement was extended until October 31. Titletown contends that, because of the incorrect expiration date, Immobolia's claim for declaratory relief was not adequately raised by the pleadings and could only be tried by Titletown's consent. *See* WIS. STAT. § 802.09(2).[2]

¶16 "Wisconsin has abandoned the highly formal concepts of common law form pleading in favor of a more functional concept of 'notice' pleading." ***Tews v. NHI, LLC***, 2010 WI 137, ¶62, 793 N.W.2d 860. Accordingly, a pleading need only contain a demand for judgment and a "short and plain statement of the claim, identifying the transaction or occurrence … out of which the claim arises and showing that the pleader is entitled for relief." WIS. STAT. § 802.02(1). This "notice pleading" rule is "intended to facilitate the orderly adjudication of disputes; pleading is not to become a 'game of skill in which one misstep by counsel may be decisive of the outcome.'" ***Korkow v. General Cas. Co. of Wis.***, 117 Wis. 2d 187, 193, 344 N.W.2d 108 (1984) (quoting ***Canadian Pac. Ltd. v. Omark-Prentice Hydraulics***, 86 Wis. 2d 369, 373, 272 N.W.2d 407 (Ct. App. 1978)).

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶17 The operative question is whether Immobolia adequately advised Titletown of the basis for its claim. In its complaint, Immobolia alleged that Titletown's listing contract with the Sehrings expired, that Titletown failed to extend the contract by providing a timely protected buyer notice, and that Titletown improperly retained possession of the broker's commission from the sale of the Sehrings' home. The complaint put Titletown on notice that Immobolia was challenging the enforceability of Titletown's listing contract.

¶18 We do not view the date of expiration as essential to the sufficiency of Immobolia's complaint. The date Titletown's listing contract expired is relevant to Immobolia's claims in only one respect: to determine the date by which Titletown had to provide a protected buyer notice. As long as Immobolia alleged that Titletown's listing contract expired, and that Titletown failed to provide timely notice of a protected buyer, the precise date of expiration was immaterial. The allegations provided sufficient notice of the basis for Immobolia's claim and, if true, demonstrated that Immobolia was entitled to relief.

¶19 In essence, the complaint's failure to state the correct expiration date was a technical error that does not undermine the sufficiency of the pleadings. "Pleadings are not an end in themselves but a means to the proper presentation of a case. Pleadings are to assist, not to deter, the disposition of the case on its merits." ***State v. Peterson***, 104 Wis. 2d 616, 629, 312 N.W.2d 784 (1981). We decline to undo the results of a court trial simply because the plaintiff failed to allege a date not material to the substance of the allegations.

II. Standing

¶20 "Standing is a concept that restricts access to judicial remedy to those who have suffered some injury because of something that someone else has

either done or not done." ***Krier v. Vilione***, 2009 WI 45, ¶20, 317 Wis. 2d 288, 766 N.W.2d 517. To have standing, the plaintiff must have suffered or be threatened with an injury to an interest that is legally protectable. ***Chenequa Land Conservancy, Inc. v. Village of Hartland***, 2004 WI App 144, ¶16, 275 Wis. 2d 533, 685 N.W.2d 573. The injury must be such that the party has a personal stake in the outcome of the suit and is directly affected by the issues in controversy. ***Village of Slinger v. City of Hartford***, 2002 WI App 187, ¶8, 256 Wis. 2d 859, 650 N.W.2d 81. We construe standing in declaratory judgment actions liberally, in favor of the complaining party, as declaratory judgment affords relief from an uncertain infringement of a party's rights. ***State ex rel. Village of Newburg v. Town of Trenton***, 2009 WI App 139, ¶10, 321 Wis. 2d 424, 773 N.W.2d 500. Whether a party has standing is a question of law, which we review de novo. ***Chenequa Land Conservancy***, 275 Wis. 2d 533, ¶12.

¶21 Like the circuit court, we conclude Immobolia has standing to assert its declaratory judgment claim. The potential injury to Immobolia is apparent. There are two listing contracts and only one commission. The commission is currently in Titletown's possession, and Titletown believes it is legally entitled to keep it. The present action would provide Immobolia an opportunity to recover the disputed commission.

¶22 Titletown claims Immobolia has no standing to bring suit because it was not a party to the original listing contract between Titletown and the Sehrings. Titletown points out that no right, remedy or benefit of that listing contract was intended for Immobolia's benefit, and asserts that only the Sehrings have the right to challenge the adequacy of the protected buyer notice. *See* ***Village of Slinger***, 256 Wis. 2d 859, ¶18 (general rule is that only a party to a contract may enforce or challenge it unless the contract is made for the benefit of a third party).

¶23 Titletown's privity argument is a nonstarter. The contract in dispute is the one between Titletown and Immobolia.[3] Although that agreement implicates the parties' rights and responsibilities under the competing listing contracts, it independently grants standing because Titletown and Immobolia agreed, among other things, to "negotiate the commission after the transaction has successfully closed."[4] The agreement implicitly acknowledges that Immobolia may be entitled to the commission, depending on whether Titletown provided sufficient notice of a protected buyer.

III. Notice

¶24 Titletown asserts its November 2, 2007 mailing constituted proper notice and triggered the protected buyer provision of its listing contract with the Sehrings. This argument requires us to measure Titletown's conduct against the requirements of the listing contract. Interpretation of a contract is a question of law that we review de novo. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶12, 322 Wis. 2d 189, 776 N.W.2d 838.

[3] But for the contract between Titletown and Immobolia, the Sehrings might have been liable for two commissions. The adversary parties in this suit would then be Titletown and the Sehrings, not Titletown and Immobolia.

[4] Titletown has not argued the brokers' contract is an unenforceable agreement to reach an agreement. *See* ***Dunlop v. Laitsch***, 16 Wis. 2d 36, 42, 113 N.W.2d 551 (1962). We have no duty to consider issues other than those presented to us, ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992), and will not abandon our neutrality to develop arguments for litigants, ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987). We therefore do not reach the question of whether the brokers' agreement imposes an enforceable obligation on the parties.

¶25 Like the circuit court, we conclude the notice was not "delivered" because it was knowingly sent to an incorrect address.[5] Delivery, as relevant here, requires "depositing the document or written notice … in the U.S. Mail or a commercial delivery system, addressed to the Party, at the Party's address." Although Ranck failed to record the Sehrings' address in the listing contract, that omission did not give Titletown license to send the notice to whatever address it chose. The contract evinces the parties' intent that notice be sent to an address where the seller is likely to receive it.[6] *See* ***Blum v. 1st Auto. & Cas. Ins. Co.***, 2010 WI 78, ¶18, 326 Wis. 2d 729, 786 N.W.2d 78 (primary objective of contract construction is to ascertain and give effect to the parties' intent). An interpretation permitting the broker to knowingly send a protected buyer notice to the seller's former address is unreasonable and absurd; no seller would agree to such a term.

¶26 Undisputed evidence at trial established that Titletown knowingly sent the notice to an incorrect address. Tilque stated that at the time she sent the notice, she knew the Sehrings had moved and no longer lived at the Broadway property. The "please forward" notation on the notice envelope establishes that Tilque also knew the Sehrings were no longer accepting mail at the Broadway address.

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[5] However, we disagree with the circuit court's conclusion that Titletown's first notice was untimely. Contrary to the circuit court's determination, under the standard WB-1 residential listing contract, timeliness is measured by the date of mailing, not the date of receipt. ***Burkett & Assocs. v. Teymer***, 2009 WI App 67, ¶19, 318 Wis. 2d 525, 767 N.W.2d 623. The contract expired on October 31, 2007, and Titletown mailed the notice on November 2, within three days of expiration. The notice would have been effective if it had been properly addressed.

[6] In its fax to Ranck, Titletown implicitly conceded that its failure to properly address a mailed notice would compromise its right to a commission. The fax states, "The letter has not been returned back to [Titletown] as 'undeliverable' therefore at this time we are considering it delivered." Thus, even Titletown believed a notice returned as undeliverable would not be effective.

¶27 We also conclude Titletown failed to exercise reasonable diligence in providing notice of a protected buyer. The listing contract required Titletown to "[d]iligently exercise reasonable skill and care in providing brokerage services to all parties." Titletown's efforts to ascertain the Sehrings' new address consisted only of two phone calls on November 1 and a review of tax documents and the phone book on November 2. At trial, Tilque conceded she could have asked Ranck for the new address, conducted an online search, or called the Sehrings at work. Even if the Sehrings' new address was truly undiscoverable, the contract allowed Titletown to give notice personally or by fax. Either method would have been more appropriate than sending a letter to an incorrect address.

IV. Estoppel

¶28 Titletown also claims Immobolia is estopped from contesting the commission because Ranck, while employed with Immobolia, purportedly acknowledged Titletown procured the buyer. Titletown's argument rests on Tilque's testimony that Ranck called and said she was "upset with what was happening … and she won't fight commission because I had attempted the delivery [of the protected buyer notice]."

¶29 As an initial matter, we note that Tilque's testimony was disputed at trial. Ranck and another Immobolia employee testified that while they agreed to allow the transaction to move forward, they made clear Immobolia would not waive its right to a commission on the sale of the home. This court is in no position to resolve factual disputes. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987) ("The credibility of witnesses and weight to be given their testimony are matters for the trial court to decide.").

¶30 Even if we were to accept Tilque's testimony suggesting Ranck waived Immobolia's commission, we would still reject Titletown's estoppel argument. Although Titletown does not specify, we assume it intends to assert the defense of equitable estoppel. To establish equitable estoppel, a party must demonstrate: (1) action or nonaction (2) by the party against whom estoppel is asserted (3) that induces reasonable reliance by the party asserting estoppel (4) to the party's detriment. ***Kamps v. DOR***, 2003 WI App 106, ¶20, 264 Wis. 2d 794, 663 N.W.2d 306. Titletown has not indicated how Immobolia's alleged waiver induced reasonable reliance. Indeed, Titletown's agreement to resolve the commission issue after closing suggests Titletown disregarded any statement of waiver by Immobolia.

V. Clean Hands

¶31 Titletown also claims Immobolia has acted with unclean hands. "For relief to be denied a plaintiff in equity under the 'clean hands' doctrine, it must be shown that the alleged conduct constituting 'unclean hands' caused the harm from which the plaintiff seeks relief." ***Security Pac. Nat'l Bank v. Ginkowski***, 140 Wis. 2d 332, 339, 410 N.W.2d 589 (Ct. App. 1987). It must clearly appear that the things from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct. ***Id.*** We review a decision to grant or deny relief based on clean hands for an erroneous exercise of discretion. *See* ***Lake Bluff Hous. Partners v. City of S. Milwaukee***, 2001 WI App 150, ¶14, 246 Wis. 2d 785, 632 N.W.2d 485.

¶32 Titletown's argument is based on Ranck's employment history. Titletown claims that Ranck, as the agent responsible for filling out the listing contract, created the basis for this litigation by leaving the seller's address blank.

In Titletown's view, Immobolia, as Ranck's subsequent employer, cannot seek relief for her error while at Titletown.

¶33 Titletown fails to explain how Ranck's failure to complete the address line of the listing contract constitutes wrongful or unlawful conduct. The circuit court expressly found that Ranck's error was unintentional and was not meant to undermine Titletown's right to a commission:

> As to the unclean hands, I know there was some testimony about why a termination occurred. I'm not quite sure that this is the circumstance in which anybody could be looked upon as having unclean hands. Basically, these are two competing organizations. As it happened, an employee, an agent of one, transferred, apparently, against her will, that is, she was terminated, to the other, and I don't find, first of all, particularly with respect to the broker, that there are unclean hands in any way. There's been no testimony that there was some grand collusion here and that the whole purpose of taking on that former employee … was somehow to arrive at this litigation and to make this claim.

The circuit court's conclusion is adequately supported by the trial testimony[7] and is not clearly erroneous.

[7] Ranck testified that it was her practice not to fill in the seller's address on the listing form:

> [L]ine 260, [which asks for the seller's address], I fill that in every time now, but prior—it's not a big part of the contract because … I don't go to look on this line in my contracts as to where I need to send something. I go to where I know that they live. And it certainly, it changes. Most of the listings that I have, they don't live at that address. They live at another address or they moved or they're moving or they're out of the state. This isn't where you go to look for it. You go to where you know that they are. So in my practice, when I have a contract that's up, the day that it's up, I submit the names and away it goes to where they live, not necessarily that address.

By the Court.—Judgment affirmed.

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