COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP33 **Cir. Ct. No. 2008CV678**

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

KENNETH METTE,

PLAINTIFF-APPELLANT,

V.

IRONBAR, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed and cause remanded*.

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

¶1 PER CURIAM. Kenneth Mette, *pro se*, appeals from a judgment dismissing his specific performance and breach of contract claims against The Ironbar, L.L.C., and declaring that Mette has no interest in the property located at 1301 Milwaukee Avenue in South Milwaukee (hereafter, "the property"). Mette

argues that it was Ironbar, and not Mette, who breached the contract and, therefore, summary judgment should not have been granted and attorney fees should not have been awarded to Ironbar. Mette also contends that Ironbar was unjustly enriched. Mette asks this court to reverse the judgment and restore ownership of the property to him. We reject his arguments and affirm the judgment. We also grant Ironbar's request for appellate attorney fees pursuant to the contract, and we remand to the trial court for a determination of reasonable appellate attorney fees.

BACKGROUND

¶2 The facts that led to the filing of this case, as well as the procedural facts concerning the numerous hearings and briefs filed, are long and complicated. Ultimately, most of those facts do not affect our resolution of the case and we will therefore include in this background section only those background and procedural facts relevant to our resolution of the issues presented.

¶3 It is undisputed that on January 15, 2005, Mette and Ironbar entered into an installment agreement (hereafter, "the contract") pursuant to which Mette would take over the property, which included a tavern, and ultimately become its owner. The contract, which was drafted by Mette and his attorney, stated in relevant part:

> The Purchaser hereby covenants and agrees to pay to the Seller, at such place as the Seller may from time to time designate in writing, the price of **ONE HUNDRED TWENTY NINE THOUSAND ($129,000) DOLLARS** (hereinafter referred to as the "Purchase Price"), in the manner following, to-wit:
>
> 1. **Twenty Thousand Dollars ($20,000.00) Dollars**, plus or minus prorations, at the execution of this Installment Agreement (hereinafter referred to as the "First Closing"); and

> 2. The balance of **One Hundred Nine Thousand ($109,000) Dollars**, plus interest at the rate of Zero **(0%) Percent** per annum, in full, on or before the earlier of: i) within **forty five (45) days** of the closing of the sale of the Purchaser's property located at 110 West North Avenue, Northlake, Illinois; or ii) December 31, 2006 (hereinafter referred to as the "Second Closing"). A final payment (hereinafter referred to as the "Balloon Payment") shall be made as hereinafter provided.
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> 3. The parties hereto acknowledge that the Premises are subject to an existing mortgage (the "Mortgage") and that the Purchaser is assuming all liabilities of relative [sic] to the Mortgage, up to the sum of $93,000. In the event the payoff of the Mortgage exceeds $93,000, the Purchaser will be credited any amou[n]ts in excess thereof towards the Purchase Price. The Purchaser may use any or all of the Balloon Payment topayoff [sic] any mortgages and any other amounts to be paid by the Seller, with the remainder, if any, to be paid to the Seller.

(Bolding in original.)

¶4 The closing did not occur on December 31, 2006, or at closings Mette thereafter attempted to schedule. The entire mortgage became due on December 31, 2006, but it was not paid. The bank continued to accept monthly payments from Mette through October 2007, but in January 2008 the bank filed a foreclosure action.[1]

¶5 In January 2008, Mette, acting *pro se*, filed this action against Ironbar. Mette asserted that Ironbar had breached the contract in a variety of ways, including: (1) "failing to payoff [sic] the mortgage on the Property when it matured and exposing Mette and the Property to the risks and costs associated with a mortgage foreclosure"; (2) "wrongfully attempting to obtain more funds

[1] The foreclosure action was ultimately dismissed and will not be discussed in this decision. *See* 2008CV1267 (Milwaukee County Cir. Ct.).

from Mette than is rightfully due"; and (3) "failing to complete the rightful transfer of title to the Property to Mette as provided in the Contract." (Some uppercasing omitted.) Mette sought specific performance of the contract, asserting that Ironbar had "failed, refused and [was] otherwise unable to close the transaction … on the date provided for in the Contract."

¶6 Ironbar filed an answer and a counterclaim for declaratory relief. Ironbar sought a declaration of the parties' respective rights, including a declaration that "Mette has no right, title or interest in or to the Property." Ironbar asserted that "Mette has never had sufficient funds available to fulfill his obligations" under the contract, Ironbar was "no longer willing to convey the property" to Mette, and Mette "no longer has any right to acquire the Property or to satisfy the outstanding mortgage." Ironbar also sought its attorney fees related to the case, pursuant to an attorney fee provision in the contract.

¶7 In October 2008, Ironbar moved for summary judgment. It asserted that the reason the closing did not occur in December 2006 was that the closing statement that Mette prepared sought a $78,335.70 credit for paying off the mortgage. The proposed closing statement indicated that once that credit and other smaller credits were applied, Mette would pay Ironbar nothing at closing. The motion for summary judgment further asserted that it was undisputed that two subsequent proposed closing statements prepared by Mette, dated November 2007 and February 2008, also proposed giving Mette a credit for paying the mortgage.

¶8 Mette, now represented by counsel, opposed the motion for summary judgment. He argued that "[w]hether the purchase price was $129,000 or $129,000 plus the assumption of Ironbar's current mortgage" was a disputed issue of material fact. (Some capitalization omitted.) He also asserted that

numerous other facts were in dispute, such as whether the alleged unavailability of Ironbar's agent made the completion of the contract impossible.

¶9 The trial court held two motion hearings. At the second hearing, the trial court granted Ironbar's motion for summary judgment. The trial court determined it was undisputed that Mette had failed to "close the deal" by December 31, 2006. The court recognized that the reason the closing did not occur was that Mette did not tender the full amount of the purchase price, based on Mette's view that the contract did not require him to pay a total of $129,000 plus the cost of the existing mortgage. The trial court concluded that the contract was not ambiguous and that under its terms, Mette was required to pay the purchase price plus the mortgage. Therefore, the trial court concluded, Mette breached the contract when he did not tender the payment and close on or before December 31, 2006.

¶10 The trial court then noted that Mette may be entitled to some reimbursement for what he paid in taxes or improvements or repairs to the property. The trial noted:

> So let me be clear about this. There is no purchase contract…. That is null and void. The question now is how do you pick up the pieces in a fair appropriate way consistent with the other details, like the forfeiture and voiding details in this installment agreement. I think rather than hearing you today on this, it would be most appropriate for me to give you the opportunity to discuss it amongst yourselves and come up with something.

¶11 Subsequently, the parties attempted to reach an agreement on any reimbursement owed to Mette, but they were unsuccessful. The trial court then ordered the parties to file briefs concerning Mette's right to recover payments he made, pursuant to contract or *quantum meruit* theories. Mette's brief was due in

March 2009, but he never filed one. Ironbar filed its brief in April 2009, asserting that Mette was not entitled to any credit for improving the property pursuant to a contract provision addressing improvements.[2] Ironbar also noted that Mette had never pled a claim for unjust enrichment, so that theory would not provide a potential recovery. Finally, Ironbar argued that it was entitled to its attorney fees associated with the action, pursuant to the contract, and provided an itemized statement of attorney fees.[3]

¶12 Mette did not file a response to Ironbar's brief. He did, however, file a *pro se* notice of appeal. Ultimately, this court dismissed the appeal for lack of jurisdiction because it was not taken from a final judgment. Meanwhile, the trial court gave Mette, now acting *pro se*, another opportunity to file a memorandum in support of his request for reimbursement for costs that he claimed he spent repairing and improving the property. Mette filed a brief in July 2009.

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[2] The contract provided in relevant part:

> In the event of the termination of this Installment Agreement by lapse of time, forfeiture or other wise, [sic] all improvements, whether finished or unfinished, which may be put upon the Premises by the Purchaser shall belong to and be part of the Premises of the Seller without liability or obligation on the Seller's part to account to the Purchaser therefore of [sic] for any part thereof.

[3] The contract provided in relevant part:

> In the event that either party should find it necessary to retain an attorney for the enforcement of any provisions hereunder occasioned by the fault of the other party, the party not in default shall be entitled to recover for [sic] reasonable attorneys' fees and court costs incurred whether said attorneys' fees are incurred for the purpose of negotiation, trial, appellate or other legal service.

¶13 The trial court heard oral arguments concerning Mette's reimbursement request on October 21 and October 30, 2009.[4] In a written order, the trial court concluded that Mette was not entitled to any reimbursement, stating that Mette's brief failed to address the legal arguments in Ironbar's brief and comply with WIS. STAT. § 802.08 (2009-10),[5] and that the issues raised in Mette's brief "do not affect the outcome of this case." The trial court also determined that Ironbar was entitled to attorney fees under the contract and that $54,487 in attorney fees was a reasonable amount. This appeal follows.

STANDARD OF REVIEW

¶14 We review *de novo* the grant and denial of summary judgment, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

[4] The transcript of October 30, 2009, has not been filed with the circuit court and is not part of the appellate record. On March 19, 2010, we issued an order extending the deadline for Mette to pay the court reporter for the transcript so that it could be filed. We indicated that if Mette failed to pay for the transcript by April 2, 2010, and inform us that he had done so, or failed to seek to extend that deadline, the "appeal would proceed with only those transcripts that are already in the circuit court file." We did not receive any subsequent correspondence from Mette or the court reporter concerning the October 30, 2009 transcript and it was never filed in the circuit court. "It is the appellant's responsibility to ensure completion of the appellate record and 'when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling.'" ***State v. McAttee***, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (citation omitted).

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

DISCUSSION

¶15 At the outset, we note that Mette's *pro se* brief does not contain any references to legal authority. Based on Mette's failure to include references to legal authority, we could choose not to consider his arguments at all. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). However, we will briefly address his arguments and explain why we are affirming the trial court. To the extent we do not address a particular argument, we reject it because it is undeveloped, inadequate or raised for the first time in the reply brief. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285 (we do not decide undeveloped arguments); ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we do not decide inadequately briefed arguments); ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989) (court generally will not consider issues raised for the first time in a reply brief).

¶16 Mette's first argument is that summary judgment should not have been granted because he did not breach the contract. We are not convinced. Like the trial court, we have reviewed the contract language and conclude that it is unambiguous. *See* ***Jones v. Jenkins***, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979) (A contract provision is ambiguous when it "is reasonably and fairly susceptible to more than one construction."). Absent an ambiguity, we must interpret the contract as the language dictates. *See* ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. The contract provided that Mette would pay $129,000 and "assum[e] all liabilities … relative to the Mortgage, up to the sum of $93,000." It is undisputed that Mette was not prepared

to pay the entire balance due under the contract and, therefore, he breached the contract when he failed to close on the property by December 31, 2006. Based on that breach, Mette was not entitled to enforcement of the contract and summary judgment was proper.

¶17 Mette's second argument is that attorney fees should not have been granted because Ironbar, not Mette, breached the contract. In effect, Mette argues that we should reverse the attorney fee award because the summary judgment should not have been granted. Because we affirm the summary judgment, this is not a basis to overturn the attorney fee award.

¶18 In his reply brief, Mette argues for the first time on appeal that the attorney fee award should be reversed because it was excessive. We decline to consider the merits of this argument. First, this argument was not raised in Mette's opening brief, and we therefore decline to address it. *See* ***Schaeffer***, 150 Wis. 2d at 144. In addition, the trial court's analysis of the attorney fees was part of its oral decision on October 31, 2009. As we explained in Footnote 1, that transcript is not part of the record on appeal, and we therefore assume it supports the trial court's decision.[6] *See* ***State v. McAttee***, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 ("It is the appellant's responsibility to ensure completion of the appellate record and 'when an appellate record is incomplete in

[6] Ironbar has included in its appendix a copy of what appears to be a transcript of the October 30, 2009 motion hearing. However, the transcript was never filed in the circuit court and is therefore not part of the record; it will not be considered on appeal. *See* ***Roy v. St. Lukes Medical Center***, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256 ("We are limited to matters in the record, and will not consider any materials in an appendix that are not in the record.") (citations omitted).

connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling.'") (citation omitted).

¶19 Mette's third argument is that Ironbar was unjustly enriched. As detailed above, the trial court gave Mette several opportunities to articulate the legal basis for his argument that he was entitled to credit for improvements to the property. Mette failed to file a brief in March 2009 and then failed to respond to Ironbar's brief. When he was given yet another opportunity to file a written brief, he did not address the legal issues raised in Ironbar's brief or explain why he was legally entitled to credit despite the contract provision stating that if the contract is terminated, property improvements belong to the seller and the seller has no obligation to pay the purchaser. Mette failed to preserve this issue for appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604-06, 563 N.W.2d 501 (1997) (discussing need to adequately raise issues at the trial court). Furthermore, Mette's two-paragraph argument on this issue is inadequately briefed and fails to address the applicability of the contract's forfeiture provisions. We reject his argument. *See* ***Vesely***, 128 Wis. 2d at 255 n.5.

¶20 Finally, Ironbar in its response brief asked this court to award it its attorney fees incurred on appeal, pursuant to the attorney fee provision in the contract, which provides for the payment of attorney fees incurred "for the purpose of negotiation, trial, appellate or other legal service." *See* Footnote 3. In his reply brief, Mette did not address Ironbar's assertion that it is entitled to reasonable attorney fees pursuant to the contract. Ironbar's argument is therefore deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not rebutted are deemed admitted). We remand to the trial court for a determination of reasonable appellate attorney fees incurred by Ironbar responding to this appeal.

By the Court.—Judgment affirmed and cause remanded.

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