

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2011

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. 2010AP1396

Cir. Ct. No. 2008CV17664

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**DISCOUNT MEGA MALL MILWAUKEE CORPORATION, D/B/A
MEGAQUEST AND CRAIG KUPER,**

PLAINTIFFS-APPELLANTS,

v.

BADGER AUCTIONEERS, INC., D/B/A BADGER CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. Discount Mega Mall Milwaukee Corporation d/b/a Megaquest and Craig Kuper (collectively, “the appellants”) appeal a judgment and an order of the circuit court dismissing their action for declaratory judgment to determine the rights of Badger Auctioneers, Inc. to \$160,000, the amount Badger

Auctioneers maintains it was entitled to retain from funds it held in escrow as its buyer's fee pursuant to an auction agreement between it and the appellants. The appellants contend Badger Auctioneers is not entitled to the \$160,000 because, under the terms of their agreement, Badger Auctioneers was obligated to collect its buyer's fee from escrow money deposited with it on the day of the auction and it failed to do so. The appellants also contend that the circuit court erroneously exercised its discretion by refusing to allow Kuper's attorney to testify at trial. We affirm.

BACKGROUND

¶2 The following facts are taken from the record and from the findings of fact made by the circuit court. Badger Auctioneers entered into a written auction agreement with the appellants, wherein Badger Auctioneers agreed to conduct an auction of two separate real estate properties, one owned by Megaquest and one owned by Kuper. The auction agreement provided that in exchange for its services, Badger Auctioneers would "collect and retain a[n] 8% Buyer's Fee from all Buyers of the Real Estate portion of the sale." The auction agreement further provided that "[a]ny earnest monies/monies received shall be retained first and foremost by Badger [Auctioneers] to cover commission, expenses, and buyers' fee of the gross proceeds of the sale, [and] any monies in excess will be paid to [Megaquest]."

¶3 On the date of the auction, a representative of Greater New Birth Church approached Theodore Fleisner, the president and owner of Badger Auctioneers, and asked that he be permitted to bid at the auction. Pursuant to the auction agreement, Badger Auctioneers had the authority to receive from the high bidder either the full purchase price, or a deposit of 25% of the purchase price,

which would be given as earnest money to bind the purchaser. New Birth Church, however, had only \$50,000 to deposit in the event it was the high bidder. After approval had been obtained from a representative of Megaquest, New Birth Church was permitted to participate in the auction despite having less than the required 25% deposit.

¶4 New Birth Church was the high bidder at the auction, with a bid of \$2,275,000. The acknowledgement of bid signed by Badger Auctioneers and a representative of New Birth Church indicated that its bid price, combined with a buyer's fee of \$227,500, resulted in a "total purchase price" of \$2,502,500. An earnest money deposit was made by New Birth Church on the date of auction in the amount of \$50,000.

¶5 In order to fund the sale, New Birth Church required additional time. Without consultation with Badger Auctioneers, Megaquest and New Birth Church eventually executed a document entitled "Addendum to Auction, Sale Terms and Conditions." This addendum: (1) reduced the "total purchase price" to \$2,000,000; (2) extended the closing date; (3) required New Birth Church to deposit \$100,000 with Badger Auctioneers "as additional earnest money"; and (4) provided New Birth Church with the option of extending the closing date again, provided it deposited "an additional \$50,000.00 earnest money" with Badger Auctioneers. The Addendum did not reference Badger Auctioneers' buyer's fee. However, Badger Auctioneers agreed to reduce its buyer's fee from the original amount of \$227,500, which was specified in the acknowledgment of bid, to \$160,000.

¶6 Pursuant to the addendum, New Birth Church extended the closing date twice, and deposited with Badger Auctioneers an additional \$150,000. The

sale of the property eventually closed in November 2008. At the time, Badger Auctioneers held in escrow a total of \$200,000. Badger Auctioneers notified the appellants and New Birth Church that it would be withholding from closing \$160,000, of the \$200,000 it held, as its buyer's fee.¹

¶7 In December 2008, Megaquest filed a complaint with the circuit court seeking a temporary order enjoining Badger Auctioneers from disbursing to itself the \$160,000 it withheld from closing, and a declaratory judgment that Badger Auctioneers was not entitled to retain any of that money. The court denied Megaquest's request for a temporary injunction. The issue of Badger Auctioneers' entitlement to the \$160,000, however, was tried to the court.

¶8 At trial, the appellants argued that Badger Auctioneers was solely responsible for collecting its buyer's fee at the auction and it was not permissible for it to attempt to collect that fee from monies owing to the appellants in consideration for extending the closing date, pursuant to the addendum. The appellants sought to present the testimony of Harvey Goldstein, Kuper's attorney who apparently prepared the addendum. The appellants took the position that there are ambiguities in the agreement and addendum, and that Goldstein's testimony was relevant in that it would shed light on the appellants' intent with respect to the addendum, which used the terms "earnest money" and "total purchase price" to describe the extension fees and the modification to the prior sale agreement, terms which were also used in the auction agreement and acknowledgement of bid.

¹ The closing statement reflected that Badger Auctioneers would receive \$16,482 from the sale of the property owned by Kuper, and \$143,518 from the sale of the property owned by Megaquest.

¶9 The court refused to allow Goldstein to testify. The court reasoned that the appellants' intent was "of no concern" to Badger Auctioneers, which was not a party to the addendum, and that Goldstein's subjective intent was not relevant to the issue at hand. The court stated that the language of the agreement and addendum spoke for themselves and that Goldstein's intent "is of no relevance to this matter under the circumstances." The court went on to determine that, as specified in the acknowledgment of bid, the original "total purchase price" was \$2,502,500, which included the bid price and buyer's fee; it also determined, however, that the appellants and New Birth Church agreed that the "total purchase price" would be reduced to \$2,000,000, and Badger Auctioneers agreed that they would reduce their buyer's fee to \$160,000, which is 8% of \$2,000,000, rather than the buyer's price it had originally agreed upon. The court determined that when Badger Auctioneers complied with their auction agreement with the appellants, it agreed to a lesser buyer's fee to facilitate the closing, and it:

acted accordingly [when it] held back the moneys that [it was] entitled to hold back, namely 8[%] on the purchase price which for whatever reason was negotiated down to be two million, and that was a total purchase price which necessarily would have incorporated whatever fees or auction expenses were to be included in the total purchase price as noted on the acknowledgement of bid.

¶10 Based on the above findings, the court dismissed the action with prejudice and judgment was entered accordingly. Megaquest appeals.

DISCUSSION

¶11 Megaquest contends that the circuit court erred when it determined that Badger Auctioneers is entitled, as its buyer's fee, to the \$160,000 of escrow funds it withheld from closing. Megaquest also contends that the circuit court

erroneously exercised its discretion when it refused to permit Goldstein to testify at trial. We address each contention in turn below.

I. Badger Auctioneers' Entitlement to a Buyer's Fee of \$160,000

¶12 The appellants contend the circuit court erred in determining that, under the plain terms of the auction agreement, Badger Auctioneers is entitled to retain as its buyer's fee the \$160,000 it withheld from closing.

¶13 Prior to closing, New Birth Church deposited \$200,000 with Badger Auctioneers—\$50,000 at the auction and, pursuant to the addendum, an additional \$150,000 to extend the closing date. The appellants argue that under the plain terms of the auction agreement, Badger Auctioneers is entitled to retain towards its buyer's fee, “[a]t best,” only the initial \$50,000 deposited with it because that is the only amount Badger Auctioneers collected from New Birth Church on the church's bid at the auction. The appellants assert that Badger Auctioneers is not entitled to retain towards its buyer's fee any portion of the additional \$150,000 deposited with it because the auction agreement does not give Badger Auctioneers the right to retain towards its buyer's fee funds deposited with it “months after the auction sale,” which served as consideration for the appellants' agreement to extend the closing date.

¶14 The construction of a contract for the sale of real estate presents a question of law, which we review de novo. *Galatowitsch v. Wanat*, 2000 WI App 236, ¶11, 239 Wis. 2d 558, 620 N.W.2d 618. We construe contracts to achieve the intent of the parties, giving terms their plain and ordinary meaning. *Goldstein v. Lindner*, 2002 WI App 122, ¶12, 254 Wis. 2d 673, 648 N.W.2d 892. If the words of a contract convey a clear and unambiguous meaning, our analysis ends. *Id.*

¶15 The pertinent part of the auction agreement provided that “Badger [Auctioneers] will collect and retain a[n] 8% Buyer’s Fee from all Buyers of the Real Estate portion of the sale” and that “[a]ny earnest monies/monies received shall be retained first and foremost by Badger [Auctioneers] to cover ... buyers’ fee of the gross proceeds of the sale, any monies in excess will be paid to [Megaquest].”

¶16 The appellants assert that the auction agreement is ambiguous. However, we have reviewed the auction agreement and, like the circuit court, conclude that its terms are susceptible to only one reasonable interpretation and it is thus 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 any ambiguity, we interpret the auction agreement as its language dictates. *See Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. We conclude that under the plain terms of the auction agreement, Badger Auctioneers was entitled to a buyer’s fee of 8%, to be collected from all buyers of the real estate sold at auction. Any earnest money deposited with Badger Auctioneers would first and foremost be retained by Badger Auctioneers to cover its 8% buyer’s fee. The agreement does not, as the appellants suggest, provide that Badger Auctioneers may collect its buyer’s fee only from earnest money initially deposited with it on a bid at the auction. Nor is there any language in the auction agreement that limits the sources from which the buyer’s fee may be collected, or require that the buyer’s fee be collected from the successful bidder at the auction, or forever be forfeited. Under the clear terms of the agreement, Badger Auctioneers had the right to withhold its buyer’s fee from *any* earnest money in its possession, at any time. Thus, under the

auction agreement, Badger Auctioneers could withhold its buyer's fee from any earnest money it had in its possession at closing.²

¶17 The appellants next argue that Badger Auctioneers is not entitled to any portion of the additional \$150,000 deposited with Badger Auctioneers following the auction because it was not their intent with respect to the addendum for the \$150,000 to be earnest money. They assert instead that they intended the \$150,000 be treated as either additional financial consideration for them alone in exchange for their agreement to extend the closing date, or liquidated damages in the event the closing did not take place.

¶18 We concluded above in paragraph 16 that the auction agreement is unambiguous. We have also reviewed the addendum and conclude that it too is unambiguous in its terms. “If [a] contract is unambiguous, our attempt to determine the parties’ intent ends with the four corners of the contract, without consideration of extrinsic evidence.” *Town Bank v. City Real Estate Dev., L.L.C.*, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476 (quoted source omitted). What the parties believed the contract to be is not determinative because objective rather than subjective intent is the test. *Shelley v. Moir*, 138 Wis. 2d 218, 222, 405 N.W.2d 737 (Ct. App. 1987).

¶19 The addendum refers to the \$150,000 as “additional earnest money.” We see nothing ambiguous with this phrase. Additionally, not only does the

² The appellants also argue that the circuit court erred in finding that they “waived Badger[] [Auctioneers’] obligation to collect and retain its buyer’s [fee] at the time of the auction sale.” The circuit court did not find that the appellants waived an obligation to collect its buyer’s fee at the auction. Regardless, as we state in ¶16, Badger Auctioneers was not obligated to collect its buyer’s fee at closing.

addendum delineate the \$150,000 as earnest money, it functions as earnest money in the classic sense.³ The addendum provides that the \$150,000 was to be “applied toward the purchase price at closing,” but would be forfeited in the event that New Birth Church failed to close on the property. Accordingly, we conclude that under the addendum, the \$150,000 was earnest money.

¶20 Finally, the appellants argue that the circuit court miscalculated the amount of a buyer’s fee to which Badger Auctioneers is entitled. The appellants argue that the reduced “total purchase price” of \$2,000,000 included an 8% buyer’s fee, as well as a reduced bid price. According to the appellants, the bid price would equal \$1,851,852 and a buyer’s fee of only \$148,148, which combined would total \$2,000,000.

¶21 A buyer’s fee for Badger Auctioneers of \$227,500 was expressly agreed to on the day of the auction. Badger Auctioneers voluntarily agreed to reduce its buyer’s fee to \$160,000. It did not agree to reduce it any further. That the appellants agreed to a reduced selling price is of no consequence to Badger Auctioneers, which was not made a party to any negotiations relating to that price reduction. The appellants’ argument is, thus, without merit.

¶22 We conclude that Badger Auctioneers was entitled to a buyer’s fee of \$160,000, and that the circuit court did not err in concluding otherwise.

³ Earnest money is defined by BLACK’S LAW DICTIONARY 584 (9th ed. 2009) as: “A deposit paid (often in escrow) by a prospective buyer (esp. of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the buyer defaults.”

II. Plaintiff Counsel's Testimony

¶23 Megaquest contends the circuit court erroneously exercised its discretion in not permitting Goldstein to testify at trial. Megaquest argues that the auction agreement was ambiguous as to Badger Auctioneers' rights with respect to the collection of its buyer's fee, and Goldstein's testimony would have provided insight as to Kuper's and Megaquest's intent regarding the purpose of the additional amounts called for in the addendum for extension of the closing date.

¶24 Whether to allow an attorney to testify in a case in which he or she is an advocate is a discretionary decision for the circuit court. *State v. Foy*, 206 Wis.2d 629, 644, 557 N.W.2d 494 (Ct. App. 1996). When reviewing a discretionary decision of the circuit court, we examine the record to determine if the court logically interpreted the facts and applied the proper legal standard. *State v. Rogers*, 196 Wis. 2d 817, 829, 539 N.W.2d 897 (Ct. App. 1995).

¶25 “There is ... a longstanding ethical prohibition against an attorney testifying for his or her client in most cases.” *Foy*, 206 Wis. 2d at 643; *see French v. Hall*, 119 U.S. 152, 154-55 (1886). The comment to Wisconsin Supreme Court Rules of Professional Conduct for Attorneys, SCR 20:3.7, which addresses lawyers as witnesses, explains that the combination of roles of advocate and witness can prejudice the opposing party because it may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. SCR 20:3.7 cmt. *See also Foy*, 206 Wis. 2d at 643. In light of the ethical concerns, “courts should not usually permit an attorney who is an advocate in a trial to testify in that trial, especially where the value of the testimony is small or collateral to the ultimate issues.” *Id.* A court may, however, allow an attorney to testify when justice so requires. *Id.*

¶26 In denying permission for Goldstein to testify, the court stated that in light of the unambiguous language of the agreement and addendum, Goldstein’s proposed testimony was of no relevance. We agree.

¶27 As we concluded above in paragraphs 16 and 18, the language of the auction agreement and the addendum is unambiguous. It is a basic tenet of contract law that “if the contract is unambiguous, the court’s attempt to determine the parties’ intent ends with the language of the contract, without resort to extrinsic evidence.” *Town Bank*, 330 Wis. 2d 340, ¶39. The subjective intent of the appellants regarding the additional earnest money specified in the addendum would not have been relevant to the court’s analysis. See *Shelley*, 138 Wis. 2d at 222 (when a contract is unambiguous, the parties’ objective intent, not subjective intent, is the test). Accordingly, we conclude that the circuit court did not erroneously exercise its discretion by not permitting Goldstein to testify at trial.

CONCLUSION

¶28 For the reasons discussed above, we affirm the judgment and order of the circuit court.⁴

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

⁴ Arguing this appeal was frivolous, Badger Auctioneers filed a motion pursuant to WIS. STAT. RULE 809.25(3) (2009-10) seeking an award of costs and attorney’s fees. To be frivolous, an appeal must be without any basis in law. *Black v. Metro Title, Inc.*, 2006 WI App 52, ¶15 n.3, 290 Wis. 2d 213, 712 N.W.2d 395. We cannot find that the appeal was without any basis in law. Therefore, the motion for frivolous costs is denied.

