COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP264 **Cir. Ct. No. 2012CV64**

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

TRAVIS MATEJKA,

PLAINTIFF-APPELLANT,

V.

KARL MELNIK AND KARL MELNIK REVOCABLE TRUST,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Jackson County: THOMAS E. LISTER, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 LUNDSTEN, J. This is a dispute over a proposal to purchase property that has the potential to be used as a source of "fracking sand." After the deal fell through, the interested buyer, Matejka, filed suit seeking specific

performance. Matejka alleged that there was an enforceable land purchase agreement. Both parties moved for summary judgment.

¶2 Matejka argued before the circuit court, and now argues on appeal, that there was an agreement that included a typical land sale and an additional agreement that, if Matejka later sold the land for use as a frac sand mine, Matejka would pay the seller, Melnik, an additional sum of money. The circuit court granted summary judgment in favor of Melnik, and dismissed the suit. The circuit court concluded, in essence, that it was undisputed that the parties failed to agree on the frac sand component of an overall deal and this failure meant that there was no agreement as a matter of law. Matejka argues that he, not Melnik, is entitled to summary judgment, but also argues in the alternative that summary judgment is inappropriate because a disputed material fact remains. We agree with the circuit court that the undisputed facts require summary judgment in favor of Melnik.

Background

¶3 Melnik owns land in Jackson County that the parties believe may be suitable as a source of fracking sand.[1] According to Matejka, when he discussed purchasing Melnik's property with Melnik, the two men agreed there would be a "side deal" that would require Matejka to pay Melnik additional money if the property was later "flipped" for frac sand mining.

¶4 On January 20, 2012, Matejka delivered to Melnik two documents: a "Vacant Land Offer To Purchase" on a standard Department of Regulation and

[1] For purposes of resolving the dispute in this case, the nature of the various petroleum mining processes known as "fracking" is not relevant and we do not attempt to describe or explain "fracking sand."

Licensing form, filled out and signed by Matejka, and a separate untitled single-page document drafted by Matejka. The separate document reads, in pertinent part:

> Karl Melnik agrees to sell ... his property ... to Travis Matejka for a price of Five Hundred Twenty-Five Thousand Dollars ($525,000). It is also agreed that if this property is sold before Jan 20, 2022 for the use of a Frac Sand Mine that Travis Matejka agrees to pay Karl Melnik an additional One hundred and Ten Thousand Dollars ($110,000).

Under this language were places for signatures for Travis Matejka and Karl Melnik. Matejka does not dispute that he signed this document.

¶5 Matejka consistently refers to this separate document as an "addendum" to the Vacant Land Offer. The separate document, however, has no label, and the "Addenda" line in the Vacant Land Offer, which provides a place to incorporate an addendum, is blank. For that matter, there is no mention of the separate document any place in the Vacant Land Offer.

¶6 In his deposition testimony, Matejka refers to this separate document as a "side deal." When asked if he thought the separate document was part of the Vacant Land Offer, Matejka responded: "I don't think it was part of it, but we did discuss it as a side deal going forward that that – we would be willing to sign that." Matejka was then asked if he was saying that the separate document was "a side deal that was independent of the deal that was in [the Vacant Land Offer]," and Matejka responded, "Yes, I would say so." However, after agreeing that the separate document was an independent "side deal," Matejka additionally agreed that he understood they "couldn't close on [the Vacant Land Offer] without ... an agreement on [the side deal]."

¶7 We will discuss the legal effect of the separate document, and activity related to it, in the "Discussion" section below. For ease of discussion in this opinion, we will follow Matejka's lead in his deposition testimony and refer to the separate document as the "Side Deal Offer."

¶8 On February 14, 2012, about three weeks after receiving the Vacant Land Offer, Melnik delivered to Matejka a counter-offer on a standard counter-offer form (hereafter the "Counter-Offer" or "Melnik's Counter-Offer"). In the Counter-Offer, Melnik proposed increasing the price to $551,250, a $26,250 increase over Matejka's proposed price. Melnik also proposed a closing date no later than "March 15." In standard preprinted language, the Counter-Offer states: "All terms and conditions remain the same as stated in the Offer to Purchase except the following ...." The only significant exception that followed, for purposes of this appeal, was the proposed increase in the price. Melnik's Counter-Offer makes no mention of the Side Deal Offer. Notably, although there was a place on the Side Deal Offer for Melnik to sign it, he did not deliver this document to Matejka, signed or otherwise.

¶9 The next day, February 15, 2012, Matejka signed Melnik's Counter-Offer, thereby indicating agreement to the Counter-Offer.

¶10 A closing was scheduled to take place on March 1, 2012. About two days before the scheduled closing, February 28, 2012, Melnik's attorney delivered a document entitled "Addendum To Offer To Purchase." This document described more specifically events relating to frac sand mining that would trigger an obligation on the part of Matejka to pay Melnik additional money. The document proposed a substantial increase in the amount Matejka would pay Melnik if the land was used for a frac sand related purpose. The increase was

from $110,000 to $450,000. Similar to Matejka's Side Deal Offer, Melnik's "Addendum To Offer To Purchase" has places for signatures for both Matejka and Melnik.

¶11 On February 29, 2012, Matejka informed Melnik by letter that he was "ready, willing and able" to close on the property "for a price of $551,250 based on the counter offer that Karl Melnik signed and dated 2-14-12." Matejka wrote: "This is a binding contract," and indicated that he would take legal action to enforce "this contract."

¶12 The closing did not take place, and Matejka filed suit seeking specific performance. Matejka's complaint appeared to seek enforcement of the Vacant Land Offer and the Counter-Offer, but not any agreement as to an additional payment to Melnik should the land later be used for a frac sand purpose. However, Matejka later presented argument indicating that he sought specific performance that included the Side Deal Offer. That is, Matejka sought to enforce an agreement in which he would pay $551,250 for the property and pay an additional $110,000 if the property was later "sold before Jan 20, 2022 for the use of a Frac Sand Mine."[2]

[2] Matejka's complaint seeking specific performance makes no reference to the $110,000 Side Deal Offer. Rather, the complaint attached only the Vacant Land Offer and the Counter-Offer. The first indication in the record we find that Matejka sought specific performance on the agreement that includes the $110,000 Side Deal Offer is in Matejka's brief in support of his motion for summary judgment. At the time the circuit court rendered its oral decision, the court commented on the possibility that Melnik agreed to sell his property for $551,250 without further "consideration" if the property were used as a frac sand mine. This prompted Matejka's counsel to attempt to make sure that the circuit court understood that Matejka took the position that Matejka's original offer included the Side Deal Offer and that there "was basically one offer that was extended to Mr. Melnik even though they were part of two separate documents." The circuit court appeared to respond to this by indicating that it had considered and rejected both scenarios.

¶13 Both parties moved for summary judgment, with Matejka arguing that there was an enforceable agreement and Melnik arguing there was not. The circuit court agreed with Melnik, and dismissed Matejka's lawsuit.

Discussion

¶14 Matejka argues that the circuit court erroneously granted summary judgment in favor of Melnik. We review summary judgment de novo. ***Jessica M.F. v. Liberty Mut. Fire Ins. Co.***, 209 Wis. 2d 42, 48, 561 N.W.2d 787 (Ct. App. 1997). Summary judgment is granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).

¶15 Matejka's primary argument is that he is entitled to summary judgment ordering specific performance on the contract because he made "one offer" to purchase Melnik's property and Melnik accepted this offer, thus forming an enforceable contract that Melnik breached. The components of Matejka's argument are not easily summed up, but they go like this. Matejka contends that he made a single offer in two parts, the Vacant Land Offer, including a purchase price of $525,000, and his Side Deal Offer, in which he offered to pay an additional $110,000 if he later sold the property for use as a frac sand mine. According to Matejka, Melnik's Counter-Offer necessarily included the $110,000 Side Deal Offer because the Counter-Offer was silent as to the Side Deal Offer and, per standard contract language in the offer, all terms not expressly altered in the counter-offer remained part of the offer accepted by the Counter-Offer. It follows, according to Matejka, that his acceptance of Melnik's Counter-Offer resulted in an agreement on both the initial purchase of the property and the terms

covering the possibility that Matejka would later sell the property for frac sand mining.

¶16 However, we agree with the circuit court that the undisputed facts show there was not a single offer and, consequently, Matejka's acceptance of Melnik's Counter-Offer did not result in an agreement covering both the underlying sale and what would happen if Matejka later took advantage of the property for its value as a source of fracking sand.[3]

¶17 The undisputed material facts are these. There is no reference to the Side Deal Offer in the Vacant Land Offer. Although there is a place in the standard Vacant Land Offer form to indicate that an addendum is incorporated in the offer, Matejka left this portion of the offer blank. This was no mere oversight. Matejka agreed at his deposition that he considered what he termed the "side deal" to be "independent" of the Vacant Land Offer. Consistent with this view, nothing in the Side Deal Offer suggests that there is an intent to *incorporate* that offer into the Vacant Land Offer. For example, the Side Deal Offer is not labeled as an addendum. Instead, it reads like a separate agreement, complete with full-name signature lines.

¶18 This evidence shows that Matejka presented two separate but related offers, not a single offer in two documents. Melnik did not sign or, at that time, counter the Side Deal Offer. Melnik's Counter-Offer to the Vacant Land Offer

[3] We acknowledge that the circuit court indicated at one point during its oral decision that there might be ambiguity with respect to whether there had been a single offer incorporating the Side Deal Offer. But we read the circuit court's comments to mean that, while the court considered that possibility, it ultimately rejected it. Regardless, our review is de novo, and we discern no ambiguity.

made no mention of the frac sand issue. As to that topic, no agreement was reached.[4]

¶19 In his attempt to persuade us that he made a single offer in two separate documents, Matejka relies on case law that misses the mark.

¶20 First, Matejka points to cases explaining that, when multiple agreements dealing with the same subject matter are executed at the same time, such agreements, although formally separate, should be construed together and treated as if they were, in substance, one agreement. Matejka relies on ***Harris v. Metropolitan Mall***, 112 Wis. 2d 487, 334 N.W.2d 519 (1983); ***Bank of Sheboygan v. Fessler***, 218 Wis. 244, 260 N.W. 441 (1935); and ***Seaman v. McNamara***, 180 Wis. 609, 193 N.W. 377 (1923). However, in each of those cases our supreme court addressed separate *executed* agreements relating to the same subject matter. *See* ***Harris***, 112 Wis. 2d at 493, 496 (land contract and lease affecting the same property that were executed on the same date); ***Bank of Sheboygan***, 218 Wis. at 246 (note and mortgage affecting the same property that were executed at the same time); ***Seaman***, 180 Wis. at 611 (note and separate contract affecting the same subject matter that were executed on the same day). These cases, and the case law they discuss, might apply if both of Matejka's offers had been accepted, but they were not.

[4] This raises the prospect that there was a completed agreement to sell the property under the conditions found in the Vacant Land Offer and Melnik's Counter-Offer, without any provision for an additional payment if Matejka later sold or otherwise used the property for frac sand mining. Indeed, the complaint Matejka filed to initiate this lawsuit might be read as an effort to enforce an agreement with no frac sand mining terms. However, Matejka either never intended to make this argument or he has abandoned it. Accordingly, we address this possibility no further.

¶21 Matejka also relies on language in a concurring opinion in ***Racine Harley-Davidson, Inc. v. State Division of Hearings & Appeals***, 2006 WI 86, 292 Wis. 2d 549, 717 N.W.2d 184. But ***Racine Harley-Davidson*** also deals with a different situation. In that case, the concurrence states that courts must sometimes look to separate documents to "ascertain the terms of a contract." ***Id.***, ¶118 (Roggensack, J., concurring). Viewed in isolation, this language might appear to support Matejka here. But the concurrence goes on to explain that "even though it is generally true that contracts that are fully integrated cannot be supplemented with additional terms, a contract is not completely integrated if it omits an agreed upon term that is necessary to carrying out the intent of the parties," ***id.***, ¶119 (citation omitted), and, in the case before the supreme court, the meaning of the signed agreements could not "be fully ascertained without reference to" a separate document, ***id.***, ¶120. That is, the concurrence explains that sometimes reference to a separate document is necessary to discern the meaning of a term in a contract or to supply a necessary term. Such is not true here. The Side Deal Offer neither sheds light on the meaning of a term in the Vacant Land Offer nor supplies a necessary term omitted from that offer. Obviously, Melnik could have opted to sell his property without insisting on an additional future payment relating to fracking sand.

¶22 Accordingly, we reject Matejka's argument that he is entitled to summary judgment because there was a single offer that was countered by Melnik and finalized when Matejka accepted the Counter-Offer. What remains is Matejka's argument that there is a material factual dispute that prevents summary judgment in favor of Melnik.

¶23 In determining that Matejka's suit for specific performance should be dismissed on summary judgment, the circuit court relied on its view that it was

undisputed that there had been no agreement on a necessary component of the overall deal. This conclusion involved deducing that it was the intent of both Matejka and Melnik that they reach agreement on the terms of *both* the underlying property sale *and* an additional payment if the property was used as a source of fracking sand. Matejka points to this part of the circuit court's oral decision and contends that it is improper speculation about what was in the minds of the parties. Matejka relies on case law holding that questions of intent are generally questions that need to be resolved by a trier of fact. *See* ***Household Utils., Inc. v. Andrews Co.***, 71 Wis. 2d 17, 29, 236 N.W.2d 663 (1976) ("There is no meeting of the minds where the parties do not intend to contract and the question of intent is generally one to be determined by the trier of fact."). However, even though intent questions generally need to be resolved by a trier of fact, the circuit court is correct that there is no genuine dispute here that Matejka and Melnik intended that there be an agreement on both topics before the property sale would occur.

¶24 As recounted in the background section of this opinion, Matejka testified during his deposition that he understood that he and Melnik would not close on the Vacant Land Offer without an agreement on what would happen if the property was used for frac sand mining, which Matejka referred to as the "side deal."[5] Similarly, during Melnik's deposition, Melnik explained that the closing was canceled because he and Matejka had not agreed on "all of the terms" which, viewed in context, was Melnik's reference to his prior deposition testimony indicating that he and Matejka had a dispute over how much, and the conditions

[5] Matejka argues that his deposition testimony shows only that he believed the Vacant Land Offer and the Side Deal Offer "are two separate physical documents." We disagree. As we have seen, Matejka clearly stated that it was his understanding that there needed to be an agreement with respect to both topics. *See supra*, ¶6.

under which, Matejka would pay Melnik more money if the property was used for a frac sand mining activity. Accordingly, the submissions support the circuit court's conclusion that it was undisputed that the closing was dependent on there being an overall agreement, including the frac sand issue, and that no such agreement was reached.

¶25 Matejka argues in his reply brief that the fact that Melnik set in motion title work, in preparation for a closing, shows that Melnik believed the parties *had* a complete agreement. Matejka states that the title company evidence made it "clear ... that Mr. Melnik believed he was party to an enforceable agreement that was set to close March 1, 2012."[6] We disagree. It is undisputed that Melnik made a frac sand counter-offer in the days leading up to the scheduled closing. If Matejka had accepted that counter-offer, the parties would have agreed on all the terms of both agreements and the closing could have proceeded as scheduled. Taking steps to be ready if the parties could agree does not show that the parties did agree.

Conclusion

¶26 Because we agree with the circuit court that the undisputed facts require summary judgment in favor of Melnik, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[6] Melnik attempts to persuade us that Matejka, rather than Melnik, ordered the title work. We do not resolve this dispute. Rather, we assume disputed facts in a manner that favors the party against whom summary judgment is entered. Here, we assume that Matejka is correct that Melnik ordered the title work.