COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1985 **Cir. Ct. No. 2010CV2583**

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

GERALD G. VAN DYN HOVEN,

PLAINTIFF-APPELLANT,

V.

COMMUNITY FIRST CREDIT UNION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: GREGORY B. GILL, JR., Judge. *Affirmed*.

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Gerald Van Dyn Hoven appeals from an order enforcing a settlement. Van Dyn Hoven argues the circuit court improperly bound him to a settlement inconsistent with the agreement made in court and placed on the record. We reject Van Dyn Hoven's argument and affirm.

BACKGROUND

¶2 Van Dyn Hoven owned and operated a group of automobile dealerships (the "VDH dealerships") within the greater Fox Valley area. The VDH dealerships became a significant issue during divorce proceedings between Van Dyn Hoven and his former wife Marcelene. One of the terms of the divorce judgment provided that Van Dyn Hoven could either sell the VDH dealerships or purchase Marcelene's interest in them. The judgment allowed Van Dyn Hoven one year to take such action. Ultimately, a circuit court order was entered granting Marcelene the right to market the VDH dealerships, and Van Dyn Hoven was given the right to match any third-party offer for the dealerships.

¶3 On January 7, 2009, Bergstrom Corporation submitted a letter of intent to purchase the VDH dealerships. The letter of intent proposed a closing on or before February 16, 2009. Van Dyn Hoven met with Community First Credit Union (Community First) personnel to consider a loan request, but Van Dyn Hoven was informed that his request was denied. Nevertheless, Van Dyn Hoven sent written notice of his intent to match Bergstrom's offer.

¶4 Van Dyn Hoven continued to work with Community First, and although it agreed to look at the situation further, Community First reaffirmed on February 16 that it would not provide a loan to Van Dyn Hoven. Van Dyn Hoven was unable to otherwise obtain necessary funding, and the court confirmed on February 19 that the VDH dealerships would be sold to Bergstrom, which used, in part, funds from a loan obtained from Community First to make the purchase.

¶5 Van Dyn Hoven commenced an action against Community First in circuit court alleging seven causes of action. The primary basis for the claims at that time stemmed from the belief that Community First had improperly utilized

confidential information from Van Dyn Hoven to obtain business from Bergstrom. That theory was abandoned, and eventually Van Dyn Hoven abandoned all but three of his claims: negligence; breach of fiduciary duty; and breach of duty to disclose. Community First moved for summary judgment and also moved for sanctions under WIS. STAT. §§ 805.03 and 804.12(2), including costs and actual attorney fees.[1] The circuit court granted summary judgment and dismissed Van Dyn Hoven's claims on December 27, 2013. The court specifically refrained from addressing the motion for sanctions, indicating the matter would be dealt with at a subsequent hearing. Before that hearing occurred, Van Dyn Hoven appealed.[2]

¶6 On May 2, 2014, a sanctions hearing was held. The circuit court inquired as to whether "either party discussed the possibility of dismissing the appeal and waiving costs and fees?" After a lengthy recess, the parties informed the court they had settled the case and the following exchange occurred:

> THE COURT: We are back on the record. We have the same parties as before.
>
> No particular reason, I'll ask [Van Dyn Hoven's attorney] Mr. Burnett. Mr. Burnett, what's the status?
>
> ATTORNEY BURNETT: The status, your honor, is that we have the case settled. We apologize for the length of time it took, and with the court's permission and [Community First attorney] Mr. Ehrke's indulgence, I'll just put the terms on the record.
>
> THE COURT: That will be fine. Mr. Ehrke?

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

[2] This court later ruled the appeal was filed prematurely as no final order had been entered.

ATTORNEY EHRKE: That's fine, Judge.

ATTORNEY BURNETT: The plaintiff agrees to pay the sum of $37,500 to Community First payable to Mr. Ehrke's trust account, that the parties will execute a general release, that the case and the pending appeal at the Court of Appeals will be dismissed with prejudice and without further costs at the—upon payment of those funds. And I think that's it.

THE COURT: Very good.

ATTORNEY EHRKE: I might add, Judge, we're agreed that the payment would be within 30 days, that is, on or before June 1st. I think we're in agreement on that.

Along with the general release, counsel will execute any necessary stipulation and order for dismissal on the merits with prejudice with no further costs, as he indicated. That will be the case both at the trial court level and the Court of Appeals, whatever is necessary to get the appeal done.

And under the circumstances, Judge, we're asking you to hold your decision on our pending motion for cost and sanctions in abeyance for 30 days.

THE COURT: Very good.

ATTORNEY EHRKE: And if the payment is not received and the check doesn't clear by June 1st, then I've advised Mr. Burnett that I will come back for the full judgment of all of our costs together with additional costs and other terms and sanctions that might be appropriate.

THE COURT: Okay. And, Mr. Burnett, those additions are consistent with your understanding?

ATTORNEY BURNETT: I understand that there may be consequences in the event that payment is not made.

THE COURT: And also understanding, although I had given my early indications as to where I thought I had—would go with this, Mr. Burnett, you obviously did not have an opportunity to respond, I may have been convinced otherwise, and I point that out only to mean that if we did come back, I would still give both parties a full opportunity to explain their respective positions.

ATTORNEY BURNETT: Thank you.

> THE COURT: That fact notwithstanding, I do want to compliment the parties on their ability to reach a resolution. Oftentimes keeping it in your hands certainly is the best result if it can be at all achieved so my compliments to all.
>
> I will hold, consistent with the parties[,] discussion, hold the motion in abeyance. I will anticipate receiving a formal dismissal within 30 days or thereabouts. If not, what I will do is I will leave it to the parties to initiate any further actions need to be had.
>
> ATTORNEY BURNETT: Thank you, your Honor.
>
> ATTORNEY EHRKE: Thank you, Judge.
>
> THE COURT: Thank you all. We are adjourned.

¶7 Van Dyn Hoven failed to make the required payment to defense counsel's trust account or execute settlement documents. Community First moved to enforce the settlement under WIS. STAT. § 807.05. In the alternative, Community First sought a decision and order on its pending motion for sanctions, including costs and actual attorney fees. After an evidentiary hearing at which Van Dyn Hoven testified,[3] the circuit court granted the motion to enforce the settlement. Van Dyn Hoven now appeals.

DISCUSSION

¶8 Enforceability of a settlement agreement is committed to the circuit court's discretion. *See* ***Phone Partner's Ltd. P'ship v. C.F. Commc'ns Corp.***, 196 Wis. 2d 702, 710, 542 N.W.2d 159 (Ct. App. 1995). We will sustain a discretionary decision if the circuit court considered the relevant facts, applied a correct standard of law, and reached a conclusion that a reasonable judge could

[3] Attorney Burnett and a paralegal at his law firm also testified at the hearing.

reach using a demonstrated rational process. ***Id.*** A circuit court's factual findings will be reversed only if clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶9 WISCONSIN STAT. § 807.05 provides:

> **Stipulations**. No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under ss. 807.13 or 967.08 and entered in the minutes or recorded by the reporter, or made in writing and subscribed by the party to be bound thereby or the party's attorney.

¶10 It is irrefutable that the settlement agreement in this case was enforceable under WIS. STAT. § 807.05, as it was "made in court" and "recorded by the reporter." In fact, Van Dyn Hoven acknowledges that "in part, he agreed to pay the sum of $37,500.00 and to dismiss the lawsuit and appeal." Nevertheless, Van Dyn Hoven insists "the settlement went beyond those terms." Namely, Van Dyn Hoven contends he understood that if he did not pay the $37,500 within thirty days, he would simply "be back before the … court on the issue of sanctions."[4] Van Dyn Hoven testified he believed he had thirty days to consider whether the settlement was a "good business decision."

¶11 However, following the evidentiary hearing held with respect to Community First's motion to enforce the settlement, the circuit court stated: "I don't find as credible the fact that Mr. Van Dyn Hoven was not of the opinion that this was a concluded event or, more specifically, that this event symbolized

[4] Van Dyn Hoven argues it was an "abuse of discretion" for the circuit court "to enforce the settlement as it did." We changed the terminology used in reviewing a circuit court's discretionary act from "abuse of discretion" to "erroneous exercise of discretion" in 1992. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992).

nothing more than a 30-day contemplation period. I find those arguments to be without merit." The court was not obligated to accept Van Dyn Hoven's testimony. Witness credibility is within the sole province of the fact finder. *See* ***Estate of Dejmal v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

¶12 The court further stated:

> While there was perhaps the possibility that the case could have been reopened, I've not heard any testimony or, more particularly, credible testimony that there was not a contemplation of the settlement on the day in question or, alternatively, to the extent that there were questions that Mr. Van Dyn Hoven did not have ample opportunity to have any ambiguities clarified before allowing his attorney to identify on the record that a settlement had been reached. Accordingly, I do not find that there is any valid basis for setting aside the settlement agreement which had been reached by and between the parties. I do order that the settlement agreement be enforced as agreed to on the record.

¶13 Based on the credible facts, the circuit court found that "it was contemplated that there was to be a settlement on May 2nd of 2014." As the court noted, Van Dyn Hoven sat silently in open court while his attorney represented, "The status, your honor, is that we have the case settled." His attorney then formalized the terms of the settlement on the record. These terms included Van Dyn Hoven paying $37,500 to defense counsel's trust account within thirty days and dismissing his lawsuit and appeal, thereby avoiding potential exposure to extensive sanctions. It also was agreed that counsel would complete releases and the paperwork necessary for dismissal.

¶14 The parties agreed there may be consequences in the event that payment was not timely made. However, as the circuit court stated, "it's not a settlement with an asterisk saying we have 30 days to change our mind." The

court held the sanctions motion in abeyance but indicated, I will "leave it to the parties to initiate any further actions need to be had." Van Dyn Hoven failed to fulfill the settlement terms, and Community First was within its rights to seek alternative remedies for his breach—enforcement of the settlement agreement or resolution of the pending sanctions motion. Its preference was for the former.

¶15 We conclude the circuit court properly contemplated the facts of the case in light of correct legal considerations and reached an appropriate decision. By doing so, the enforcement of the settlement agreement constituted a proper exercise of discretion.

¶16 Because our resolution of the enforceability of the settlement is dispositive of this appeal, we need not address the propriety of the circuit court's grant of summary judgment. *See* ***Norwest Bank Wis. Eau Claire, N.A. v. Plourde***, 185 Wis. 2d 377, 383 n.1, 518 N.W.2d 265 (Ct. App. 1994).

By the Court.—Order affirmed.

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