

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2014AP2856

Cir. Ct. No. 2012CV1263

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

SHIRLEY M. JOHNSON AND SHIRLEY M. JOHNSON REVOCABLE TRUST,

PLAINTIFFS-RESPONDENTS,

v.

MELVIN C. JOHNSON AND JOHNSON LANDHOLDINGS COMPANY,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County:
RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve
Judge.

¶1 KESSLER, J. Melvin Johnson appeals an order of the circuit court granting Shirley Johnson's motion to enforce a settlement agreement. We affirm.

BACKGROUND

¶2 On February 1, 2012, Shirley Johnson filed the partition action underlying this appeal against Melvin Johnson.¹ According to the complaint, Shirley owned interests in two adjoining parcels of land located at 7350 North 76th Street, Milwaukee (Parcel One), and 7350R North 76th Street, Milwaukee (Parcel Two). Parcel One was acquired by Shirley in 1998 following her divorce from her late ex-husband, Arlyn Johnson. Prior to Arlyn's death in 2008, Parcel Two was owned by Johnson Landholdings Company (JLC), a partnership formed by brothers Melvin and Arlyn Johnson. Upon Arlyn's death in Wyoming, the personal representative in the probate of Arlyn's estate recorded a personal representative's deed for Parcel Two, conveying Arlyn's interest to Shirley.

¶3 Shirley filed the partition action underlying this appeal, which was one of multiple lawsuits between Shirley and Melvin following Arlyn's death. There have been at least two other lawsuits between Melvin and Shirley involving Arlyn's estate and Shirley's alleged interest in the estate—one in Door County, Wisconsin, and one in Wyoming. In the present case, Shirley alleged that she and Melvin were "unable to reach any mutually acceptable agreement" as to their ownership of the properties. The complaint requested a court order declaring the parties' respective interests in the parcels and the appointment of an independent arbitrator to manage the sale of the properties, among other things. In his answer, Melvin denied that Shirley had an ownership interest in Parcel Two, but made no mention of the Wyoming deed transferring that interest to Shirley. The circuit court ordered mediation.

¹ Because all of the relevant parties in this action share the same last name, we hereinafter refer to the parties by their first names.

¶4 Following mediation, Shirley and Melvin, each represented by counsel, reached a Settlement Agreement. The Agreement, signed by Melvin on June 5, 2013,² as relevant to this appeal provided:

1. On or before 6 months from the latest date this agreement is executed by any of the parties, Melvin Johnson shall pay [Shirley Johnson] \$175,000.00 ... (time being of the essence; see below for remedies related to a failure to make this payment*).
2. Upon the payment of \$175,000.00 contemplated above, the plaintiffs ... shall release all claims against Melvin Johnson relative to the Property and all claims against and interests in Johnson Landholdings Company and shall convey their entire interests in the Property by Quitclaim Deed to Melvin Johnson ... and shall transfer any interest in Johnson Landholdings Company.

....

4. Simultaneously with the conveyance of the property to Melvin Johnson, Melvin Johnson, for himself and as authorized representative of Johnson Landholdings Company, shall execute and record in favor of the plaintiffs ... a mortgage encumbering the Property ... to the extent of \$150,000.00 ... upon payment to the mortgagee of no less than \$75,000 by or on behalf of Melvin Johnson no later than 18 months from the latest date this agreement is executed (time being of the essence) the mortgagee shall immediately execute a Full Satisfaction of such mortgage[.]
5. A failure by Melvin Johnson to make the ... payment contemplated herein shall allow the mortgagee to pursue those remedies stated in the mortgage, which shall be the sole remedies for a default[.]

**If Melvin Johnson fails to make payment of the initial \$175,000.00, then, the following shall occur:*

The Property shall be immediately listed for sale with a Wisconsin-licensed real estate broker or brokers of the Plaintiffs' selection at an offered price of One Million Dollars \$1,000,000.00.... Upon the sale of the Property,

² Shirley signed the Settlement Agreement on March 29, 2013.

the net proceeds of sale shall be shared equally between the plaintiffs and defendants, except that any charges paid from closing ... shall be deducted exclusively from the Defendants' proceeds....

....

Conditioned upon receipt of the consideration and completion of the obligations set forth above, Plaintiffs and Defendants ... hereby mutually release and forever discharge each other and any Released Parties, from any and all claims, liens, demands, obligations, ... causes of action, ... and liabilities of any nature whatsoever, ... whether known or unknown, ... which relate to, arise from, or are in any manner connected to the Property.

The parties to this Settlement Agreement hereby certify that each has had the opportunity to consult with legal counsel concerning their rights and ... that each party has read all of this Settlement Agreement document and fully understands and agrees to be bound by the terms hereof.

(Emphasis added.)

¶5 Melvin did not make the initial \$175,000 payment. Consistent with the terms of the Settlement Agreement, Shirley contacted a licensed Wisconsin real estate broker to draft a listing contract. Melvin refused to sign the listing contract and stated that he would not list or consent to selling the properties. Shirley filed a motion to enforce the Settlement Agreement.

¶6 Melvin, represented by new counsel, opposed the motion, arguing that the Settlement Agreement was unenforceable because Shirley had no legal interest in Parcel Two. Specifically, Melvin argued that the property was wrongfully conveyed to Shirley after Arlyn's death by the personal representative in the Wyoming probate proceeding; thus, Shirley obtained Parcel Two as a result of fraud or mistake. Melvin also argued that the Settlement Agreement contained unenforceable agreements to agree. The circuit court held a hearing and granted Shirley's motion. This appeal follows.

DISCUSSION

¶7 Melvin raises two issues on appeal. He alleges that the circuit court erroneously exercised its discretion when it: (1) found that the Settlement Agreement contained no unenforceable “agreements to agree”; and (2) found that Melvin waived any claims of fraud, mistake and illegality with regard to the Settlement Agreement. Melvin is incorrect.

Standard of Review.

¶8 This case presents a mixed question of fact and law. After a settlement agreement is construed, the issue of whether it should be enforced is committed to the circuit court’s discretion. *Phone Partners Ltd. P’ship v. C.F. Commc’ns Corp.*, 196 Wis. 2d 702, 710, 542 N.W.2d 159 (Ct. App. 1995). An appellate court will sustain a discretionary decision if the circuit court considered the relevant facts, applied a correct standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Id.* However, courts may consider principles of contract construction when construing a stipulation for settlement of a civil action. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶13, 257 Wis. 2d 421, 651 N.W.2d 345. Construction of a contract presents a question of law which this court reviews *de novo*. See *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). “Where the terms of a contract are plain and unambiguous, we will construe it as it stands.” See *id.*

I. The circuit court properly construed the Settlement Agreement, which does not contain an agreement to agree.

¶9 Melvin argues that the following portions of the Settlement Agreement constitute “agreements to agree in the future,” rendering the Agreement unenforceable:

If Melvin Johnson fails to make payment of the initial \$175,000.00, then, the following shall occur:

The Property shall be immediately listed for sale with a Wisconsin-licensed real estate broker.... *The Plaintiffs and Defendants shall each execute such listing contract(s) and shall cooperate between themselves and with the broker in the effort to procure a purchaser.*

....

If one party wishes to accept an offer, and the other party does not, so long as a contingency is placed into the sale contract which would make the parties’ obligation to sell conditioned upon the arbitrator’s or court’s approval of the contract, then the parties shall proceed in good faith to come to a binding (but conditional) agreement with the prospective purchaser before proceeding to arbitration or court determination.

(Emphasis added.)

¶10 An agreement to agree at a future time is unenforceable because there is no meeting of the minds as to the agreement’s essential terms. *See Dunlop v. Laitsch*, 16 Wis. 2d 36, 42, 113 N.W.2d 551 (1962). Melvin’s argument ignores the fact that the clauses he complains of were to take effect *only if he* failed to make the initial payment (to which *he* agreed) of \$175,000. Melvin also ignores the provisions of the Agreement which require *both parties* to participate in the creation and execution of a listing contract which is only necessary if, as occurred here, Melvin refuses to abide by the Agreement. Arbitration occurs if the parties disagree on whether to accept an offer to purchase

the property. Thus, but for Melvin’s refusal to participate in the listing contract—which became necessary only because of his refusal to abide by the Agreement—none of the terms of the listing contract would be unknown. When sale became necessary because of Melvin’s refusal to act as required by the Agreement, the Agreement solved the problem of a listing price for the properties, established the division of responsibilities regarding the sale, and allocated the proceeds of the sale between Melvin and Shirley.

¶11 “A contract requires mutual assent of the parties and ‘must be definite as to the parties’ *basic* commitments and obligations.” See *Ehlinger v. Hauser*, 2010 WI 54, ¶57, 325 Wis. 2d 287, 785 N.W.2d 328 (citation omitted; emphasis added). Here, the parties agreed to even more than the “‘basic commitments and obligations.’” See *id.*, (citation omitted). The record clearly establishes a meeting of the minds as to the basic commitments and obligations of Melvin and Shirley. The essential terms of the Settlement Agreement are clear. See *id.*

II. The circuit court properly concluded that Melvin waived the ability to argue fraud, mistake or illegality.

¶12 Melvin contends that Shirley “falsely represented that she had a legal interest in parcel 2” because the personal representative’s deed conveying Arlyn’s remaining interest in Parcel Two to Shirley was illegal. Specifically, Melvin contends that title to Parcel Two should have been conveyed to JLC after Arlyn’s death, not to Shirley, and this makes the Settlement Agreement unenforceable. Melvin is wrong.

¶13 A settlement agreement may be set aside if there is evidence of fraud, see *Benz v. Zobel*, 255 Wis. 542, 39 N.W.2d 713 (1949), or of a mutual

mistake of fact, *see Gielow v. Napiorkowski*, 2003 WI App 249, ¶22, 268 Wis. 2d 673, 673 N.W.2d 351. Mutual mistake exists where both parties are unaware of a fact material to their agreement. *Id.* (citing WIS JI—CIVIL 3072). This unawareness, “however, must arise from a lack of knowledge of the possibility that the fact may or may not exist.” *Gielow*, 268 Wis. 2d 673, ¶22.

¶14 Melvin’s arguments fail for multiple reasons. First, there is not a shred of evidence in the record that Shirley knew Wyoming law was misapplied when she received the deed from the personal representative in the Wyoming probate. *See Benz*, 255 Wis. at 555 (actionable fraud requires an intent to defraud). Melvin, with the same counsel representing him now, participated in the Wyoming proceedings. The record here does not demonstrate that Melvin or his counsel advised the Wyoming court of any objections to the personal representative’s deed to Shirley.

¶15 The record unequivocally demonstrates that Melvin was aware of Shirley’s interest in Parcel Two and was aware of potential irregularities in the title at least three years prior to signing the Settlement Agreement. In 2010, Melvin’s current counsel, Attorney James Aschenbrener, submitted an affidavit to the District Court of Tenton County, Wyoming, in a separate lawsuit over Arlyn’s estate involving both Shirley and Melvin, and other parties. The attorney’s affidavit alleges fraud against Shirley pertaining to a contract dispute underlying the Wyoming action. The affidavit acknowledges claims Melvin may have against Shirley in Wisconsin for failing to pay taxes on “some Milwaukee real estate jointly owned by Melvin Johnson and SJ.” In 2011, Attorney Aschenbrener, in a separate Door County lawsuit against Shirley, asserted that as a result of Shirley and Arlyn’s divorce, Shirley “acquired a 25% interest in some Milwaukee real estate (Melvin/Shirley real estate) in which Melvin owns a 50% interest. As a

result of the final decree from the probate of Arlyn's Estate in January 2008, Shirley acquired another 25% of the Melvin/Shirley real estate." Indeed, the parties even discussed the transfer of Arlyn's interest in Parcel Two to Shirley and concerns about title irregularities during mediation. The record amply supports the circuit court's finding that Melvin knew about Shirley's interest in Parcel Two well before signing the Settlement Agreement.

¶16 Melvin and Shirley were both represented by counsel when they negotiated and signed the Settlement Agreement. By the specific terms of the Settlement Agreement, Melvin has personally waived the right to now dispute Shirley's interest in the property. The Settlement Agreement plainly states that as part of the Agreement, the parties "mutually release and forever discharge each other and any Released Parties, from any and *all claims*, liens, demands, obligations, ... causes of action, ... and liabilities of any nature whatsoever, ... *whether known or unknown*, ... which relate to, arise from, or are *in any manner connected to the Property*." (Emphasis added.) Melvin cannot now argue that the Agreement should be set aside simply because he was now told by his lawyer that the personal representative in Wyoming made a mistake under Wyoming law.

¶17 Rather than litigate his now asserted title concerns, Melvin chose to enter the Settlement Agreement resolving all issues between Shirley and himself pertaining to this property. The circuit court was notified that a settlement agreement had been reached on May 28, 2013. The circuit court properly exercised its discretion when it enforced the Settlement Agreement.

By the Court.—Order affirmed.

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