COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1053 **Cir. Ct. No. 2003CV187**

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

ROBERT J. OLLMAN AND AMY M. OLLMAN,

PLAINTIFFS-RESPONDENTS,

V.

SCOTT H. PECOR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Scott Pecor appeals from an order declaring a promissory note signed by Robert Ollman legally unenforceable. He argues that the note unambiguously requires Ollman to pay him $150,000 despite the inclusion of an alternative payment method that never came to fruition. We affirm

the order because there was no consideration for the promissory note and the note is ambiguous.

¶2 Pecor owned a home on North Lake Shore Drive in Mequon. He tried to interest Ollman in purchasing the home. Pecor had listed the home for sale for $449,000. After viewing the home, Ollman indicated that it needed significant work and he was not interested in purchasing it. On December 1, 2001, Ollman and his wife, Amy Ollman, signed an offer to purchase the Lake Shore home for $270,000.

¶3 On December 1, 2001, the parties entered into a lease agreement for Pecor to rent the Ollmans's residence on Fairfield Road in Mequon. The lease was for five one-year terms and required Pecor to pay rent equal to the Ollmans's monthly mortgage, taxes, and insurance. The lease was to commence with the Ollmans's successful purchase of the Lake Shore home. The purchase transaction closed on December 14, 2001, and the settlement statement reflected that the purchase price was $270,000.

¶4 At the center of the litigation is a $150,000 promissory note dated December 14, 2001,[1] signed by Ollman and witnessed by Pecor. The note states that "FOR VALUE RECEIVED" Ollman promises to pay Pecor $150,000 in the manner set forth on an attachment. The attachment to the note provides:

> This note for $150,000 is a five year balloon note due in full on or before December 14, 2006. The note may be paid in the following manner:

[1] Ollman testified that the note was prepared and dated by Pecor and that it was done the same day as the offer to purchase to take effect on the day of closing.

> #1 Scott Pecor has the option to purchase the borrowers residence located at 9735 N. Fairfield Rd., Mequon, WI. The option price is to be $100,000 and is to close no later than 12/14/2006 or a mutually agreed upon time and date. This option is assignable.
>
> #2 Scott Pecor will take the remaining $50,000 in trade for carpentry services which are mutually agreed upon.
>
> #3 Scott Pecor agrees to lease the home at 9735 N. Fairfield Rd., Mequon, WI for the duration of this option term. The rate is to be NNN lease equal to the borrowers current MTG ($980/MO), taxes ($250/mo) and insurance ($300/year). The total rent is $1255/mo. ~~Any principle reduction from monthly payment will be credited to Pecor at closing.~~

¶5 After the real estate closing, Pecor moved into the Fairfield home and the Ollmans moved into the Lake Shore home. Pecor failed to timely pay the rent and was evicted from the Fairfield home in August 2002. In October 2002, Pecor recorded with the Register of Deeds an "affidavit" indicating that in July 2002 he gave notice of his intent to exercise an option to purchase the Fairfield home and that he intended to do so. The Ollmans commenced this action alleging slander of title and for a declaration that Pecor's breach of the lease negates the option to purchase, promissory note, and any interest Pecor asserts in the Fairfield home.

¶6 The case was tried to the court. In their trial brief the Ollmans argued that the note did not set forth an unconditional promise to pay. They explained that the note and its attachment was to document the parties' intent that Pecor would cover the expenses of the Fairfield home until such time that Pecor was able to purchase the home and that the arrangement was dependent on Pecor's timely payment of rent, insurance, and taxes. They also argued that there was no

consideration to support the promissory note because Ollman did not owe Pecor any money before, during, or after signing the document. Pecor's post-trial brief asserted that the purchase price of the Lake Shore home was $420,000, his $449,000 listing price less a discount for not having to pay a broker's fee. He argued that the promissory note was unambiguous as a promise to repay a $150,000 debt and merely offered two options of paying the debt: cash on or before the balloon date, or by selling the Fairfield home to Pecor for $100,000 and the performance of $50,000 worth of carpentry services in trade. He claimed that any breach of the lease agreement was irrelevant to the enforcement of the promissory note.

¶7 The circuit court found that none of the documents related to the sale of the Lake Shore home referenced a promissory note for any additional sum due and that no mention was made of the note when Pecor was evicted. It found that the Lake Shore home was in need of substantial repair when the Ollmans purchased it and that they would not pay top dollar for it. The court also noted that the sale may not have been an arm's-length transaction since Pecor was in some financial distress with a pending divorce and threatened foreclosures on other properties. The court explicitly rejected Pecor's testimony about how the transaction was structured because the contradictory and confusing nature of the note was inexplicable in light of Pecor's knowledge and experience as a former licensed real estate broker. The court concluded that the payment provisions in the attachment to the promissory note were ambiguous. It determined that all three clauses regarding payment must be read together because the parties agreed that the Ollmans could not afford to carry both houses and the Ollmans would be holding an unrentable property if it remained subject to Pecor's ability to exercise the option to purchase at any time. It also concluded that there was not proof of a

valid contract as it was devoid of terms and conditions that would establish that there was a meeting of the minds. The court found that Pecor had a plausible basis for filing the affidavit of interest against the Fairfield home but declared the promissory note null and void and ordered the removal of Pecor's affidavit against the home.

¶8 Although not explicitly addressed by the circuit court, we first address the issue of whether consideration supports the enforcement of the promissory note.[2] "The want or failure of consideration as between the original parties to a promissory note is always open to investigation." ***Haase v. Ramsay***, 10 Wis. 2d 220, 221, 102 N.W.2d 226 (1960). Whether consideration supports a contract is a question of fact. ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 838, 520 N.W.2d 93 (Ct. App. 1994). However, we may address it upon the findings of fact made by the circuit court and the evidence presented. *See* ***Yao v. Chapman***, 2005 WI App 200, ¶41, __ Wis. 2d __, 705 N.W.2d 272, *review denied*, 2006 WI 3, 286 Wis. 2d 662, 708 N.W.2d 693 (evidence as to consideration is so lacking that as a matter of law no contract was achieved). The circuit court's findings of fact are sustained unless clearly erroneous. WIS. STAT. § 805.17(2) (2003-04).[3] We review the evidence in the light most favorable to the findings made and accept the circuit court's resolution of the conflicts in the testimony and reasonable inferences drawn from the evidence it found credible. *See* ***Global Steel Prods.***

[2] The circuit court first addressed whether the agreement was ambiguous. We may affirm on grounds different than those relied on by the circuit court. ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Corp. v. Ecklund Carriers, Inc., 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. The circuit court is the arbiter of the credibility of witnesses. ***Id.***

¶9 "The party seeking to avoid a contract has the burden of proving failure of consideration." ***NBZ***, 185 Wis. 2d at 838. The promissory note states "FOR VALUE RECEIVED." This phrase raised a rebuttable presumption that consideration for the note was in fact given. ***Wortley v. Kieffer***, 70 Wis. 2d 734, 739, 235 N.W.2d 296 (1975). The question is whether the Ollmans produced sufficient evidence to rebut the presumption. We conclude they did.

¶10 Ollman testified that he did not owe Pecor $150,000 on the day that the promissory note was signed. He indicated that he did not agree to pay more than $270,000 for the Lake Shore home. The circuit court rejected Pecor's testimony that the real purchase price for the Lake Shore home was $429,000. It specifically found that with problems that the Lake Shore home had, no buyer would pay top dollar or Pecor's asking price. Implicitly the court found that the purchase price of the Lake Shore home was $270,000. That finding is not clearly erroneous since the offer to purchase and the settlement statement corroborate the $270,000 sale price. The Ollmans established that the purchase price for the Lake Shore home was $270,000 and that the note was not given as part of the purchase.

¶11 "To constitute consideration, a performance or a return promise must be bargained for." RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1979). The performance or return promise is bargained for if "it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." ***Id***. at § 71(2). There was no evidence of an exchange of promises regarding a $150,000 obligation. At best the promissory note establishes consideration for the option to purchase by Pecor's promise to lease the Fairfield

home. However, that does not establish consideration for the payment of $150,000. For a lack of consideration, the promissory note and its attachment are unenforceable.

¶12 Having decided that the promissory note is unenforceable for a lack of consideration, we need not address the circuit court's conclusion that the note is ambiguous. However, even if we were to reach that issue, we would sustain the circuit court's determination. Whether a written contract is ambiguous is a question of law which we review independently of the circuit court. *See* ***Erickson v. Gundersen***, 183 Wis. 2d 106, 115, 515 N.W.2d 293 (Ct. App. 1994). "A document is ambiguous when its words and phrases are reasonably susceptible to more than one construction." ***Spencer v. Spencer***, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987).

¶13 The attachment to the promissory note purports to establish the method of payment. The attachment first states that the note is a five-year balloon note due in full on or before December 14, 2006. It then states that the note "may be paid in the following manner" and lists three separate paragraphs. However, as the circuit court found, the use of three separate paragraphs is ambiguous because standing alone neither payment option fully satisfies the $150,000 indebtedness. Also, the phrase "may be" is not sufficiently definite to designate whether payment is to be made only by one of the methods in the three following paragraphs or if a balloon payment is required if one of the three methods is not used. Since the attachment purports to set forth the payment method, the details in the three paragraphs are susceptible of being read as the only payment methods. Further, it is not clear whether the "option price" of $100,000 was intended to be the purchase price of the Fairfield home or the value of the five-year option to be

credited against the indebtedness. The note failed to unambiguously and unconditionally require payment.

¶14 Finally, we conclude that the evidence supports the circuit court's conclusion that the three paragraphs must be read together. The parties' intent was to allow Pecor to lease the Fairfield house until he could purchase it. Pecor acknowledged that the parties intended to swap houses. Yet he never explained why the Ollmans would agree to sell him a home worth $175,000 (with an $130,000 mortgage) for just $100,000. Pecor's continuous lease of the Fairfield residence was essential because the Ollmans could not carry both houses. Once Pecor breached the lease condition, the option to purchase was rendered unenforceable. The affidavit of interest he filed against the property was properly removed.

By the Court.—Order affirmed.

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