

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2008

David R. Schanker
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. 2007AP120

Cir. Ct. No. 2005CV1084

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JON D. ANDERSON AND CARY A. ANDERSON,

PLAINTIFFS-RESPONDENTS,

V.

THOMAS J. JUZA CUSTOM HOME & DESIGN, INC.,

DEFENDANT-APPELLANT,

BARBARA A. KLEVESAHL AND THE JUZA TEAM, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County:
SUE E. BISCHER, Judge. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. Thomas J. Juza Custom Home & Design, Inc. (the builder) appeals a summary judgment decision awarding Jon and Cary Anderson (the home buyers) damages for the breach of a real estate contract. The issues raised on appeal are whether the offer to purchase was ambiguous with respect to the price or how payment would be made; whether there were material facts in dispute about whether the home buyers were ready to close on the scheduled closing date; and whether the economic loss doctrine should have barred the award of both specific performance and consequential damages for the builder's delay in performance. We resolve each of these issues against the builder and affirm the judgment.

BACKGROUND

¶2 The builder finished construction on a residential home in February 2005, and listed it for sale at a reduced price of \$499,999. On March 7, 2005, the Home buyers submitted an offer to purchase the house for the price of \$475,000 to be paid "in cash or equivalent at closing." The offer stated that "landscaping and in-ground sprinkler" were "items included in the purchase price." The offer also included an additional provision stating, "Seller will accept Buyer's deed for lot on corner of Glen Abbey and Durham Road for sum that was paid for it (\$53,000)."

¶3 The Home buyers arrived at the scheduled closing prepared to pay \$422,000, with a credit of \$53,000 for their empty lot, to equal \$475,000. They brought the deed to the lot to the closing, but did not bring other documents such as a title policy, a title commitment, a letter of special assessment, a paid tax receipt, a closing statement, a tax proration or real estate transfer fee, or disclosures which would be required to transfer certain real estate under WIS.

STAT. §§ 709.01 and 709.02 (2005-06).¹ The builder wanted the Home buyers to pay \$475,000 in addition to turning over the deed. It calculated that amount by deducting its own \$40,000 valuation of the empty lot from the asking price, then adding in an estimated cost of \$15,000 for landscaping and a sprinkler system.

¶4 The builder refused to close, and the home buyers brought suit. The builder claimed the offer to purchase was unenforceable because it was ambiguous and there was no true meeting of the minds. It also claimed that the home buyers had not been prepared to close. The trial court granted summary judgment in favor of the home buyers, ordering specific performance by selling the house for \$422,000 plus the deed to the empty lot, plus awarding \$9,286.24 in consequential damages.

STANDARD OF REVIEW

¶5 This court reviews summary judgment decisions *de novo*, applying the same methodology and legal standard employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. *Id.*, ¶24. We view the materials in the light most favorable to the party opposing the motion. *Id.*, ¶23.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶6 We construe contracts to achieve the parties' intent, 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.* However, if the contract language could be reasonably understood in more than one way, we may examine extrinsic evidence to determine the parties' intent and will construe any ambiguous contractual terms against the drafter, particularly when there is a substantial disparity of bargaining power between the parties. *Seitzinger v. Community Health Network*, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426; *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis. 2d 493, 506, 577 N.W.2d 617 (1998).

DISCUSSION

Enforceability of Offer to Purchase

¶7 The builder claims the offer to purchase was unenforceable because there was no meeting of the minds as to an essential term—namely the purchase price. In order to establish this lack of meeting of the minds, the builder relies upon affidavits averring that Thomas Juza and Barbara Klevesahl understood the contract to mean that the home buyers would pay \$475,000 in cash in addition to turning over a vacant lot for which they had paid \$53,000, in exchange for the house plus the addition of landscaping and a sprinkler system.

¶8 We agree that a contract is unenforceable if an essential term is indefinite and there was no meeting of the minds. *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 178-79, 557 N.W.2d 67 (1996). However, when contract language is unambiguous, we presume it reflects the parties' intent, and will not look beyond it to underlying

negotiations. *Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751.

¶9 Here, we agree with the trial court that the language of the offer to purchase was unambiguous with respect to the purchase price, what was included in that price, and how the vacant lot was to be applied to the purchase price. Under the plain language of the contract, the purchase price was \$475,000 in cash or equivalent; that price already included the addition of landscaping and a sprinkler system; and the builder agreed to accept the deed to the home buyer's vacant lot "for sum that was paid for it (\$53,000)." The only reasonable interpretation of the last provision in light of the earlier provisions is that the builder agreed to place a value of \$53,000 on the vacant lot as a cash equivalent in meeting the purchase price of \$475,000.

¶10 Because the terms of the offer to purchase was unambiguous, parole evidence as to what the builder or its agent subjectively thought the offer meant is inadmissible and did not create any material factual dispute. Similarly inadmissible is evidence regarding the parties' differing understandings of the purchase price that the builder claims demonstrate that the home buyers "misrepresented" facts to it. The home buyers' understanding was plainly set forth in the offer to purchase, which the builder signed. It was undisputed in the summary judgment materials that the builder refused at closing to sell the residence at the price set forth in the accepted offer to purchase.

Readiness to Close

¶11 The builder contends that the home buyers' failure to bring any documents other than the deed to the empty lot constituted a breach of the contract, which allowed it to rescind the contract because the contract also contained a "time is of the essence" clause as to the date of closing.²

¶12 For the purposes of summary judgment, we accept the builder's allegation that the only document the home buyers brought with them to the closing with respect to the vacant lot was the deed itself, and did not bring other items such as title insurance. However, that allegation does not present a material factual dispute unless the terms of the offer to purchase required the buyers to bring additional documents. We see no such obligation anywhere in the offer to purchase.

¶13 Nor has the builder established that the home owners had any statutory obligation to bring additional documents to the closing. Real estate transfer fees do not need to be paid until an instrument "is submitted for recording." WIS. STAT. § 77.22. The standard disclosure form to which the builder refers is not required for "property that has not been inhabited," which would obviously include a vacant lot such as the one at issue here. WIS. STAT. § 709.01.

² The builder characterizes this contention as a counterclaim, while the home buyers characterize it as an affirmative defense which is barred by the builder's failure to file a timely answer to an amended complaint. We need not resolve that dispute, however, because the home buyers would prevail on the merits in either event.

¶14 We conclude that the summary judgment materials do not present any material factual dispute regarding whether the home buyers were ready to close. The undisputed facts show that the buyers were prepared to comply with the contract by quitclaiming the deed to their vacant lot to the builder as part of the purchase price and providing a check for the remaining amount.

Remedies

¶15 Finally, the builder contends that the offer to purchase and the economic loss doctrine each bar the award of both consequential damages and specific performance. However, the contract itself specifies that:

If Seller defaults. Buyer may:

- (1) sue for specific performance; or
- (2) terminate the Offer and request the return of earnest money, sue for actual damages, or both.

In addition, the Parties may seek any other remedies available in law or equity.

We agree with the trial court that the contract plainly allowed for other available remedies in addition to specific performance. Consequential damages for a delay in the performance of a land contract are generally available in addition to specific performance. *See **Pleasure Time, Inc. v. Kuss***, 78 Wis. 2d 373, 384, 254 N.W.2d 463 (1977). The home buyers presented evidence that interest rates had increased since the builder breached the contract. The trial court properly found the extra cost of financing was a foreseeable consequence of the builder's breach.

¶16 Since the trial court awarded damages based on a breach-of-contract theory, the economic loss doctrine is inapplicable. *See generally **Kaloti Enters., Inc. v. Kellogg Sale Co.***, 2005 WI 111, ¶27, 283 Wis. 2d 555, 699 N.W.2d 205

(citations omitted) (stating the economic loss doctrine “preclud[es] contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship”).

By the Court.—Judgment affirmed.

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

