COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2010 **Cir. Ct. No. 2013SC2721**

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

JOE DEBELAK PLUMBING & HEATING COMPANY, INC.,

PLAINTIFF-RESPONDENT,

V.

DANIEL BISHOP, INDIVIDUALLY, AND, D/B/A OMEGA FAMILY RESTAURANT,

DEFENDANT-APPELLANT,

KONSTANTIOS MALTEZOS, D/B/A OMEGA FAMILY RESTAURANT AND ANASTASIOS EVRENIADIS, D/B/A OMEGA FAMILY RESTAURANT,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed in part, reversed in part, and cause remanded for further proceedings.*

¶1 FINE, J. Daniel Bishop appeals the circuit court order denying his motion for frivolous-action sanctions against Joe DeBelak Plumbing & Heating Company, Inc., and also denying him costs for having prevailed on DeBelak's claims against him. We affirm in part, reverse in part, and remand for further proceedings.

I.

¶2 On January 18, 2013, represented by the law firm representing DeBelak on this appeal, DeBelak filed a small-claims action against "Daniel Bishop, individually and d/b/a Omega Family Restaurant" and the others named in the caption here. (Uppercasing omitted.) The complaint alleged, as material:

- "Upon information and belief, Defendants, Bishop, [Konstantios] Maltezos and [Anostosios] Eureniadis, are individuals who do business in Wisconsin as the Omega Family Restaurant."

- "On or about September 5, 2011, DeBelak entered into an agreement with the Defendants whereby DeBelak would supply labor and materials to Defendants for construction projects. A true and correct copy of the invoices are attached hereto and incorporated as Exhibit A." (Bolding omitted.)

- "Defendants have breached the parties [*sic*] agreement by refusing to pay DeBelak pursuant to that agreement."

The complaint also asserted a second claim against Bishop and the others for "unjust enrichment" (bolding and uppercasing omitted), alleging that they "were unjustly enriched by receiving the labor and materials provided by DeBelak." Attached to the complaint were bills DeBelak sent to "Omega Family Restaurant"

for the work DeBelak alleged it did. DeBelak served Bishop on February 16, 2013, and filed an amended summons on February 15, 2013.

¶3 Bishop filed his answer on April 26, 2013, which denied that he owed DeBelak anything because, the answer alleged, he "is not doing business in Milwaukee County as Omega Family Restaurant." The answer also indicated that Bishop would be seeking "sanctions pursuant to §802.05." Bishop filed with his answer a "motion for sanctions pursuant to §802.05(3)" that was dated February 22, 2013. (Bolding and uppercasing omitted.) The motion was signed by Bishop's attorney, and recited that he called DeBelak's lawyer and told him that "the Omega Restaurant identified in the complaint was in fact owned by a corporation and that Daniel Bishop sold his interest in that corporation in May, 2010." The motion further asserted that the lawyer with whom he spoke "disclaimed any knowledge of the information behind the summons and complaint and referred the matter to" the lawyer who signed and filed the summons and complaint. That lawyer, according to the motion, "indicated that it was not his obligation to investigate the facts before filing a lawsuit, and despite the undersign's [*sic*] request, has not produced any information substantiating a complaint against Daniel Bishop." Lawyers *do*, of course, have an obligation to investigate *before* filing suit. WIS. STAT. RULE 802.05(2) (Lawyers must make "an inquiry reasonable under the circumstances" before filing a lawsuit.); *see* ***Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 550–551, 597 N.W.2d 744, 754–755 (1999).

¶4 On April 30, 2013, DeBelak filed a motion returnable in small-claims court, seeking an order under WIS. STAT. RULES 804.09(2) and 804.12(1) to compel Bishop to "comply with" DeBelak's "request for production of documents, electronic information, etc., regarding any and all ownership

information regarding Omega Family Restaurant within Bishop's possession or control." An affidavit submitted in support of the motion by a lawyer from the firm representing DeBelak (who, interestingly, was the lawyer whom the motion for sanctions asserted had "disclaimed any knowledge of the information behind the summons and complaint") averred that lawyers with the firm representing DeBelak "have requested" that Bishop "provide information and documents regarding, among other things," Bishop's "ownership interest in Omega Family Restaurant." The affidavit averred that DeBelak had made the request "on a number of occasions."

¶5 The affidavit submitted by DeBelak's lawyer attached a letter dated March 14, 2013, from the lawyer to Bishop's lawyer in "response to" the motion for sanctions that Bishop had served on DeBelak before filing it. The letter indicated that DeBelak deemed the motion to be "without merit," and indicated that DeBelak "will, therefore, proceed to move forward with obtaining judgment against your client Daniel Bishop." The letter recounted that DeBelak had done work for the Omega Family Restaurant and that the "evidence will demonstrate that at no time did anyone from the Omega Family Restaurant represent to DeBelak or hold out any indication that the restaurant was either owned or operated by a corporate entity." The letter cited ***Benjamin Plumbing, Inc. v. Barnes***, 162 Wis. 2d 837, 470 N.W.2d 888 (1991), which held that a person contracting for an undisclosed principal corporation was personally liable on the contract, and that the contracting party had the burden of giving notice that he or she was acting on behalf of a corporation. ***Id.***, 162 Wis. 2d at 855–856, 470 N.W.2d at 896.

¶6 The letter further explained DeBelak's position *vis a vis* the action against Bishop and Bishop's motion for sanctions:

> Based on the lack of information provided DeBelak by your clients [Bishop's lawyer also represented another of the defendants, whose case is not implicated by this appeal], there is no way for DeBelak to conclude that Omega Family Restaurant is anything other than a sole proprietorship for which the owners assume individual liability.
>
> What we do know is that the Defendants were or continue to be owners of the Omega Family Restaurant. Despite our requests, your clients have not provided us with any evidence that Omega Family Restaurant was operating as a corporate entity at the time it asked DeBelak to do the work. Your clients have not provided us with any evidence supporting their claims that they were (or are) shareholders of a corporation, or that they were no longer shareholders at the time of the agreement between the parties as they now claim. In fact, all our inquiries to your clients regarding any information on their involvement in making the agreement with DeBelak (or, if not them, who was) has [*sic*] fallen on deaf ears.

¶7 On May 29, 2013, Bishop sought summary judgment dismissing DeBelak's claims against him and asked for frivolous-action sanctions. In support, it attached Bishop's affidavit, which averred the following:

- Omega Family Restaurant was owned by a corporation and that Bishop sold his "interest in the corporations [*sic*] that owned the restaurant in May 2010," which was before DeBelak did the work encompassed by the claims. The affidavit attached a "stock purchase agreement" (bolding and uppercasing omitted) dated May 21, 2010, indicating that under that agreement Bishop sold his interest in the corporation ("Omega V, Inc.") to another of the shareholders.

- "I never ordered any services from the plaintiff, Joe DeBelak Plumbing & Heating Company, Inc., for the restaurant or for any

other reason. I never had any contract with the plaintiff. I never received any invoices from the plaintiff."

¶8 On June 21, 2013, one of DeBelak's lawyers filed an affidavit that explained why it had named Bishop as a defendant. As material here, it averred:

- Before filing the action, the lawyer learned that his law firm had "represented the Seller in the sale of the ownership interest in Omega V, Inc. (which used to own Omega Family Restaurant), to Daniel Bishop, together with other individuals, in July of 2006."

- Before filing the action, he did "electronic research which revealed that Omega V, Inc., as well as Bishop, in his individual capacity, had been sued one year prior to DeBelak having performed the work which is the subject of this litigation." The affidavit named the case along with its Milwaukee County case number.

- His "electronic research" indicated that the "Wisconsin Department of Financial Institutions administratively dissolved Omega V, Inc., on March 27, 2012."

- "Bishop's sale of his ownership interest in the restaurant in 2010, was a private sale. Any information regarding the sale was not available to the public and not readily ascertainable without conducting discovery within the context of litigation."

- "Shortly after the return date hearing in this action on February 15, 2013, Bishop's counsel contacted me and asserted Bishop had sold his ownership interest prior to DeBelak's work. I requested on a number of occasions that Bishop's counsel provide evidence

> confirming his assertions. Neither Bishop or [*sic*] his counsel ever provided me with any documents to confirm Bishop's sale of his ownership interest in the restaurant in 2010." The affidavit attached the letter dated March 14, 2013, from DeBelak's lawyers to Bishop's lawyer, from which we have already quoted.
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> • The affidavit claimed that the first time DeBelak's lawyers got the requested confirmation of Bishop's involvement with the Omega Family Restaurant was when they received Bishop's affidavit with Bishop's motion for summary judgment and in support of the earlier served and filed motion for frivolous-action sanctions.

Ultimately, DeBelak agreed to dismiss Bishop from the action. The circuit court signed an order to that effect that decreed that costs should not be awarded to "either party."

II.

¶9 Bishop sought sanctions under WIS. STAT. RULE 802.05(3), and later in conjunction with his motion for summary judgment also sought sanctions under WIS. STAT. RULE 895.044(1). RULE 802.05 permits (by use of the word "may") imposition of frivolous-action sanctions if "the court determines that sub. (2) [of RULE 802.05] has been violated."[1] WISCONSIN STAT. RULE 802.05(2), referenced in RULE 802.05(3), reads, as material:

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[1] WISCONSIN STAT. RULE 802.05(3) reads in full:

> SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that sub. (2) has

(continued)

been violated, the court may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated sub. (2) or are responsible for the violation in accordance with the following:

(a) *How initiated*. 1. "By motion." A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate sub. (2). The motion shall be served as provided in s. 801.14, but shall not be filed with or presented to the court unless, within 21 days after service of the motion or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion reasonable expenses and attorney fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

2. "On court's initiative." On its own initiative, the court may enter an order describing the specific conduct that appears to violate sub. (2) and directing an attorney, law firm, or party to show cause why it has not violated sub. (2) with the specific conduct described in the court's order.

(b) *Nature of sanction; limitations*. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subds. 1. and 2., the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation subject to all of the following:

1. Monetary sanctions may not be awarded against a represented party for a violation of sub. (2)(b).

2. Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(continued)

> REPRESENTATIONS TO COURT. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:
>
> (a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
>
> (c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

WISCONSIN STAT. RULE 895.044(1) applies to frivolous-action sanctions for "continuing" as well as commencing an action deemed frivolous. It provides:

> A party or a party's attorney may be liable for costs and fees under this section for commencing, using, or continuing an action, special proceeding, counterclaim, defense, cross complaint, or appeal to which any of the following applies:
>
> (a) The action, special proceeding, counterclaim, defense, cross complaint, or appeal was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense, cross complaint, or appeal was

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> (c) *Order*. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

> without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

¶10 The denial or grant of a motion for frivolous-action sanctions is a matter within the circuit court's reasoned discretion. *See* ***Ivancevic v. Reagan***, 2013 WI App 121, ¶26, 351 Wis. 2d 138, 152, 839 N.W.2d 416, 423–424 (citations and quoted sources omitted):

> Our review of the circuit court's decision that an action was commenced frivolously is deferential. Determining what and how much pre-filing investigation was done are questions of fact that will be upheld unless clearly erroneous. The determination as to how much investigation should have been done is also a matter within the circuit court's discretion. The circuit court's discretionary decisions will be sustained so long as the circuit court "'examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'"

We review *de novo* whether the circuit court applied a proper legal standard: "[W]hether the facts found by the trial court support a finding of no basis in law or fact is a question of law which we review *de novo*. All doubts regarding whether a claim is frivolous "'are resolved in favor of the party or attorney' whom it is claimed commenced or continued a frivolous action." ***Keller v. Patterson***, 2012 WI App 78, ¶22, 343 Wis. 2d 569, 586, 819 N.W.2d 841, 849 (citations, quoted sources, and one set of quotation marks omitted). Further, a circuit court's findings of fact are implicit in its decision that necessarily encompasses findings that are needed to support that decision. ***State v. Martwick***, 2000 WI 5, ¶31, 231 Wis. 2d 801, 817, 604 N.W.2d 552, 559. Moreover, the court of appeals may not find facts; rather that is the sole responsibility of the circuit court. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980).

¶11 A firm may not file an action without taking reasonable steps to determine that the action is supported by evidence that the party filing the action reasonably believes that it will be able to prove. *See* WIS. STAT. RULE 802.05(2). Further, and of special significance here, the rule also recognizes that some things are incapable of certainty before discovery; thus, "allegations and other factual contentions" may be made without that pre-filing certainty "if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." RULE 802.05(2)(c). Thus, given the explanation of the pre-filing research that DeBelak's law firm said that it did, which the circuit court was entitled to believe, we cannot say that the circuit court was wrong in concluding that DeBelak did not *file* a frivolous action under RULE 802.05.

¶12 Our conclusion that the circuit court did not erroneously exercise its discretion in denying Bishop's motion for frivolous-action sanctions under WIS. STAT. RULE 802.05(2), does not end the matter because, as we have seen, Bishop later expanded his request for frivolous-action sanctions to encompass WIS. STAT. RULE 895.044's proscription against the "continuation" of an action that the party either knew or should have known was not supportable by evidence that it could prove. The circuit court's extensive colloquy with the lawyers and its oral decision does not appear to have addressed that issue; namely, whether DeBelak's willingness to dismiss its action against Bishop was sufficiently tardy to bring RULE 895.044 into play. Thus, we have to remand the matter to the circuit court for findings on that issue. Further, the circuit court never explained why it was denying Bishop routine costs under WIS. STAT. §§ 799.25(10) & 814.04(1) even though Bishop prevailed in getting DeBelak's claims against him dismissed. The circuit court should re-visit that matter on remand as well.

By the Court.—Order affirmed in part, reversed in part, and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.