COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1795 **Cir. Ct. No. 2009CV964**

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

JEFFREY PARNAU AND RICHARDSON VENTURES, LTD.,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

DAVID WEIMAN, MARGARET WEIMAN AND FLYER PUBLICATIONS, INC.,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 BROWN, C.J. This lawsuit relates to a dispute between two small businesses about the purchase and sale of a periodical publication. The underlying contract was between two corporations, Flyer Publications, Inc. (the seller) and

Richardson Ventures, Ltd. (the buyer), but the lawsuit was commenced by Jeffrey Parnau, the owner of Richardson Ventures, against David Weiman, the owner of Flyer Publications, Inc. Eventually Parnau filed amended pleadings naming the proper corporate parties, but not before the statute of limitations on the corporation's contract claims expired.

¶2 We conclude that Parnau's individual lawsuit presenting nonviable claims against Weiman in the parties' individual capacities could not toll the statute of limitations on Richardson Ventures' breach of contract claims. We reverse and remand for further proceedings consistent with this opinion.

Facts

¶3 In April 2004, Parnau signed an offer to purchase World Airshow News, a magazine, and World Airshow Professional, a related catalog, from Weiman for $150,000. In May 2004, the two signed a contract for the sale and purchase. The contract states that it is "made and entered into" between four parties: Flyer Publications, Inc., as "Seller"; David Weiman, as "Shareholder" of Seller; Richardson Ventures, Ltd., as "Purchaser"; and Jeffrey Parnau as shareholder of the Purchaser. In the contract, the Seller (i.e., Flyer Publications) agreed to sell the magazine and catalog to the Purchaser (i.e., Richardson Ventures). Flyer Publications and Richardson Ventures made various undertakings, representations, and warranties to one another, and agreed that the contract "constitute[d] the entire and only agreement" between them and that "[a]ny agreements or representations respecting the periodicals or the purchase and sale … not expressly set forth in" the contract itself were "null and void."

¶4 The only references in the contract to obligations on the part of Weiman and Parnau as individuals are (1) each entity's representation that the sale

is "authorized by [its] Shareholders and Board of Directors," (2) an acknowledgement that Weiman would "not be considered an employee of" Richardson even though it was contemplated that he would help with producing the publications in 2004, and (3) Weiman's covenant not to compete with Richardson Ventures and to keep certain information confidential.

¶5 After taking over the business, Richardson Ventures allegedly discovered that Flyer Publications had made false representations about whether the magazine qualified as a periodical under United States Postal Service rules and about the publications' average gross revenues. In July 2009, the president and shareholder of Richardson, Jeffrey Parnau, sued the president and shareholder of Flyer Publications, David Weiman, on tort and contract theories based on these alleged misrepresentations and omissions.

¶6 In his answer to the complaint Weiman pled affirmative defenses of failure to state a claim upon which relief could be granted and failure to join indispensable parties. In September 2010, more than a year later, an amended summons and complaint was filed naming Richardson Ventures as an additional plaintiff and Flyer Publications along with Weiman's wife as an additional defendant. The defendants' answer to the amended complaint raised the affirmative defense that some of the causes of action were barred by statutes of limitation.

¶7 In October 2011, the defendants moved for summary judgment against all of the claims raised in the complaint. First, they argued that Parnau as an individual had no standing to bring any of the claims in the complaint because the only viable claims belong to his corporation, Richardson Ventures. As for the corporation's claims, the defendants argued that the contract claims were barred

by the six-year statute of limitations because the corporation was not even named as a party until September 2010, more than six years after the contract was executed. Finally, as for the tort claims, the defendants argued that the economic loss doctrine and the contract's integration clause barred all non-contract claims, and that in any event applicable statutes of limitations barred the tort claims too.

¶8 The circuit court denied the motion for summary judgment on the contract and warranty claims but granted summary judgment on the tort claims.[1] With respect to the statute of limitations defenses on breaches of contract, the court reasoned that "continuing obligations" and "an ongoing warranty" were breached after the contract was executed, and that the amended complaint was filed within six years from the time of those postclosing breaches. With respect to the tort claims, however, the court concluded that those were barred by the economic loss doctrine, because the alleged misrepresentations "go to a very central portion of the contract," rather than something extraneous to the contract, citing ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, 283 Wis. 2d 555, 699 N.W.2d 205.

¶9 Before trial, the plaintiffs withdrew their jury trial demand. Because the defendants had paid no separate jury fee, the court ruled that if the defendants wanted a jury trial they would need to file a motion for an extension of time to pay the fee. The defendants declined to file a motion, and the case proceeded to a bench trial in February 2013.

[1] An additional claim, for violation of WIS. STAT. § 895.446, was dismissed without plaintiffs' opposition on statute of limitations grounds and is no longer part of this action.

¶10 In March 2013 the court issued a written decision. In it, the court revisited the statute of limitations issues and reiterated its reasoning that "the individuals as shareholders had certain … obligation[s] to perform" after the closing. Because those postclosing obligations happened less than six years before the amended complaint was filed, they were not extinguished. In the alternative, the court reasoned that the statute of limitations argument was defeated by operation of WIS. STAT. § 803.01 or WIS. STAT. § 803.03. Under § 803.01, the court held that the corporate parties were "real parties in interest" whose late joinder had the same effect as if they were parties in the lawsuit when it began. Under § 803.03, the court reasoned that Parnau had been a "proper party" on the contract claims and thus his starting his lawsuit tolled the statute of limitations for other necessary parties.

¶11 As for damages, the court ruled that the unpaid purchase price owed on the counterclaim was offset by the plaintiffs' damages on the contract claims. The court concluded that the plaintiffs were entitled to reasonable attorney's fees plus costs. After a motion for clarification was filed, the court stated that its judgment meant that both the corporation and the individual defendants were liable for those fees and costs.

¶12 The defendants appealed, arguing that all of the plaintiffs' claims were barred because Parnau had no contract claims as an individual and all of the corporation's claims were time barred, and that the jury trial should have been allowed. The plaintiffs cross-appealed, arguing that the tort claims should not have been dismissed.

Standard of Review

¶13 The key issues in this case arise out of the circuit court's decisions on the defendants' motions for summary judgment. The circuit court granted summary judgment on the tort claims, holding that the economic loss doctrine barred them. The circuit court denied summary judgment on the contract claims, holding that Parnau had viable individual contract claims against the defendants, that the statute of limitations should be calculated from a point in time after the closing, and that in any case the timely filing of Parnau's claims tolled the statute of limitations on Richardson Ventures' claims.

¶14 We review a grant of summary judgment de novo, using the same method as the circuit court. ***Park Bank v. Westburg***, 2013 WI 57, ¶36, 348 Wis. 2d 409, 832 N.W.2d 539. Application of the economic loss doctrine to particular claims is a question of law we review de novo. ***Kaloti Enters.***, 283 Wis. 2d 555, ¶10. Whether a particular party has standing is also a question of law, ***Park Bank***, 348 Wis. 2d 409, ¶37, as is the application of a statute of limitations, *see* ***Estate of Hegarty ex rel. Hegarty v. Beauchine***, 2001 WI 300, ¶12, 249 Wis. 2d 142, 638 N.W.2d 355.

The Economic Loss Doctrine Barred Non-Contract Claims in this Case

¶15 To facilitate the rest of the analysis, we begin with the cross-appeal on the economic loss doctrine issue. The economic loss doctrine is a judicially-created rule that precludes contracting parties from asserting tort causes of action as means to recover economic or commercial losses arising out of a contract. ***Kaloti Enters.***, 283 Wis. 2d 555, ¶27. The doctrine's purposes include "preserv[ing] the distinction between contract and tort by requiring transacting parties to pursue only their contractual remedies" for economic damages and

"encourag[ing] the party best situated to assess the risk [of] economic loss, the commercial purchaser, to assume, allocate, or insure against that risk." ***Id.***, ¶28 (citations omitted).

¶16 The plaintiffs do not dispute that the economic loss doctrine would ordinarily bar tort claims for damages arising out of a contract for sale of business assets, but they claim that the narrow "fraud in the inducement" exception to the economic loss doctrine recognized in ***Kaloti Enterprises***, 283 Wis. 2d 555, ¶¶42, 50, applies here. In ***Kaloti Enterprises***, the exception applied because the misrepresentation in question went to a matter entirely outside of the contract—the closing of the market for the goods in question. ***Id.***, ¶45. Unbeknownst to the purchaser, who bought Kellogg's products for resale as a secondary supplier, Kellogg had recently made changes to its marketing scheme that essentially closed the resale market. ***Id.*** The defendants had a duty to disclose that information, and their failure to do so took place before the contract was entered into and was not interwoven with the contract. ***Id.***, ¶¶44-45.

¶17 We agree with the circuit court that in the case at hand, in stark contrast to ***Kaloti Enterprises***, the alleged misrepresentations go right to the heart of the contract in question. The two false representations and omissions alleged in the complaint were that (1) World Airshow News did not qualify as a periodical under postal service rules and (2) the annual average gross revenue from the publications was $113,000, when in fact revenues for the preceding year were only $79,642. These allegations could hardly be more directly related to the value of assets being purchased and sold in the contract. The publication is described as a "periodical" within the terms of the contract itself. The profitability of the publications is related directly to "the quality or the characteristics of the goods for which the parties contracted," rather than an extraneous matter like in ***Kaloti***

Enterprises. *See* ***id.***, ¶42. We affirm the circuit court's determination that the economic loss doctrine barred the non-contract causes of action here.

Parnau Had No Viable Claims for Damages Based on the Allegations Here

¶18 Turning to the contract claims, the first issue is whether the individual shareholder, Parnau, was a proper party to enforce those claims. "The general rule is that only a party to a contract may enforce it." ***Sussex Tool & Supply, Inc. v. Mainline Sewer and Water, Inc.***, 231 Wis. 2d 404, 409, 605 N.W.2d 620 (Ct. App. 1999). Even where a corporation has accrued a legal right to damages, a shareholder generally has no right to bring a direct action for damages, where the primary injury is to the corporation. ***Park Bank***, 348 Wis. 2d 409, ¶¶42-43 (citing ***Rose v. Schantz***, 56 Wis. 2d 222, 229-30, 201 N.W.2d 593 (1972)). In such cases, "the [individual shareholder] plaintiff does not have either option or opportunity to pursue the direct action road to recovery" but may only proceed in a derivative action. ***Rose***, 56 Wis. 2d at 230.

¶19 We reject the circuit court's reasoning that the contract created individual contract rights for Parnau against Weiman. All of the representations and warranties by the selling party in this contract were made by the "Seller," defined as Flyer Publications, to the "Purchaser," defined as Richardson Ventures. Certain provisions of the contract, irrelevant here, such as the noncompete and confidentiality clauses and the plans for Weiman to help publish the first few issues of the magazine after the sale, do identify particular obligations for Weiman. But no provision of the contract creates rights in Parnau to sue Weiman individually for breach of the representations and warranties made by the Seller, Flyer Publications, to the Buyer, Richardson Ventures, about the assets. In fact, a clause at the end of the contract expressly clarifies that the individuals are signing

the contract "solely as acknowledgement of their respective obligations as set forth herein and not as individual warranties of any corporate representations or obligations."

¶20 The contract also includes an integration clause, which states that it "constitutes the entire and only agreement between the parties" and that "[a]ny agreements or representations respecting the periodicals or the purchase and sale" not appearing in the contract "are null and void." An integration clause like this makes irrelevant any extrinsic evidence concerning the parties "collateral or antecedent understandings." ***Dairyland Equip. Leasing, Inc. v. Bohen***, 94 Wis. 2d 600, 608, 288 N.W.2d 852 (1980). So, the parties' entire agreement about this purchase and sale of the publications is encompassed by the contract.

¶21 Looking at the complaint, the only harms alleged relate to disputes about the value of the assets. The contract by its terms makes the purchase and sale of those assets a transaction between two corporate entities, and extinguishes any legal rights that may have been created by representations made during the parties' precontract negotiations. In these circumstances, Parnau had no right to sue, as an individual, to enforce the contract. The proper party to a suit for recovery of the damages alleged here was the purchaser, Richardson Ventures.

The Statute of Limitations Extinguished Richardson Ventures' Contract Claims

¶22 Having concluded that no tort claims were viable, and that Parnau as an individual never had any viable contract claims, we turn to the only viable claims arising out of the plaintiffs' allegations in this case: Richardson Ventures' contract claims.

¶23 The statute of limitations for contract claims in Wisconsin is six years. WIS. STAT. § 893.43. All actions for breach of contract "shall be commenced" no more than six years "after the cause of action accrues." ***Id.*** The time the action accrues is at the time of the breach. *See* ***CLL Assocs. Ltd. P'ship v. Arrowhead Pac. Corp.***, 174 Wis. 2d 604, 609, 497 N.W.2d 115 (1993). Unlike in tort actions, in contract actions there is no "discovery rule" tolling the statute of limitations until such time as the breach of contract is discovered. ***Id.*** So in the case at hand, where the claims are based on representations and warranties in the contract for sale of business assets, the statute began running at the time that contract was executed. This occurred on June 1, 2004, so the statute of limitations had expired by June 2010.

¶24 We reject the circuit court's determination that the defendant's actions and statements in the fall of 2004 constituted independent breaches of contractual warranties and obligations that created new causes of action. As ***CLL Associates*** explains:

> a 90-year line of precedent holds that '[i]n an action for breach of contract, the cause of action accrues and the statute of limitations begins to run from the moment the breach occurs. This is true whether or not the facts of the breach are known by the party having the right to the action.'

Id. at 609. All of the actions and statements made during that period in the fall of 2004 related to the purchaser's attempts to resolve concerns about the quality and profitability of the publications. The fact that the purchaser allegedly was discovering breaches of the representations and warranties in the contract at that time does not toll or extend the statute of limitations for those breaches.

¶25 We also reject the circuit court's alternative reasoning that the statute of limitations on the corporations' contract claims was tolled by statute. The circuit court first reasoned that tolling occurred under WIS. STAT. § 803.01(1), which provides as follows:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

This rule means that "commencement of the action by any of the persons holding a part of the claim will toll the statute of limitations as to all, provided that within a reasonable time after objection is made the other persons holding parts of the claim ratify the action or they are joined or substituted in the action." 3 JAY E. GRENIG and WALTER L. HARVEY, WISCONSIN PRACTICE SERIES: CIVIL PROCEDURE § 301.2 (4th ed. 2010). Before the enactment of this rule, the plaintiff's failure to join an insurer who was entitled to part of the plaintiff's claim would defeat the plaintiff's cause of action. *See* ***id.*** (discussing ***Borde v. Hake***, 44 Wis. 2d 22, 170 N.W.2d 768 (1969), *abrogated in part by* ***Heifetz v. Johnson***, 61 Wis. 2d 111, 122-23, 211 N.W.2d 834 (1973), *superceded by statute*, *see* WIS. STAT. § 803.03(2)(a)).

¶26 By its own terms, however, the rule does not apply here because there was no "commencement of the action" in question. Parnau was never a proper party to Richardson Ventures' contract claims. So, Parnau could not commence those actions. Parnau's commencement of other, nonviable contract actions did not toll the statute of limitations on the corporation's claims.

¶27 For similar reasons WIS. STAT. § 803.03(2)(a) did not toll the statute of limitations either. Under that statute,

> [a] party asserting a claim for affirmative relief shall join as parties to the action all persons who at the commencement of the action have claims based upon subrogation to the rights of the party asserting the principal claim, derivation from the principal claim, or assignment of part of the principal claim.

The statute contemplates joinder of parties who are necessary for resolution of "the principal claim." ***Id.*** The idea is that "the entire claim, including all of its constituent parts, is effectively commenced with the filing of one summons by the principal claimant." ***Bruner v. Kops***, 105 Wis. 2d 614, 624, 314 N.W.2d 892 (Ct. App. 1981) (quoting Charles A. Clausen and David P. Lowe, *The New Wisconsin Rules of Civil Procedure*, 59 MARQ. L. REV. 1, 89 (1976)).

¶28 WISCONSIN STAT. § 803.03(2) tolls the statute of limitations for subrogated claimants who have a right to part of a claim that was already commenced. ***Bruner***, 105 Wis. 2d at 624-25. That is a different situation from what we have here. Richardson Ventures is not a subrogated claimant. It is the only proper claimant. Parnau was never a proper party on the contract claims, so Richardson Ventures' contract claims were never commenced to begin with.

¶29 When the statute of limitations runs in Wisconsin, it "absolutely extinguishes the cause of action." ***Heifetz***, 61 Wis. 2d at 115. Richardson Ventures' causes of action were extinguished in June 2010, without ever having been commenced.

The Defendants Waived the Right to a Jury Trial

¶30 On appeal the defendants attempt to raise the jury trial issue that they abandoned below. The circuit court informed the defendants that if they wished to reinstate their jury trial right, they should file a motion. The defendants declined to do so and in fact informed the court they would "not be seeking to litigate the issue further." On appeal generally we will not consider issues that a party chose not to litigate in the circuit court. ***State v. Carprue***, 2004 WI 111, ¶36, 274 Wis. 2d 656, 683 N.W.2d 31.

Flyer Publications' Counterclaim for Nonpayment

¶31 As the plaintiffs acknowledge, the circuit court implicitly held in favor of the counterclaim for nonpayment, when it stated that the amount that the sellers had failed to pay would be offset against the plaintiffs' damages on the breach of contract claims. The monthly payment obligations in the contract were contemplated to continue through June 2006 and were personally guaranteed by Parnau, so we see no basis for reversing the circuit court's implicit determination that there was a viable counterclaim. However, since the statute of limitations extinguished the plaintiffs' contract claims that were part of the court's offset determination, any damages on the counterclaim will need to be revisited. The defendants-appellants-cross-respondents are entitled to costs on the appeal and cross-appeal.

By the Court.—Affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.