COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1827 **Cir. Ct. No. 2013SC8059**

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

JON OSSONINIK,[1]
D/B/A MILWAUKEE CHIMNEY ROOF,

PLAINTIFF-RESPONDENT,

V.

AURORA FOUNDATION, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PEDRO COLON, Judge. *Reversed; cause dismissed.*

¶1 CURLEY, P.J.[2] Aurora Foundation, Inc., appeals the trial court's grant of summary judgment on John Ossoinik, doing business as Milwaukee

[1] While the case caption spells the plaintiff-respondent's name "Ossoninik," the parties note that this name has been misspelled at various points in the record. This court will henceforth use what appears to be the correct spelling, "Ossoinik," and directs that upon remittitur, the caption be corrected to reflect the correct spelling of the plaintiff-respondent's name.

Chimney Roof's claim for attorneys' fees. On appeal, Aurora argues that the trial court erred in granting summary judgment in Ossoinik's favor and that Ossoinik's claim for attorneys' fees must be dismissed. Specifically, Aurora argues that Ossoinik lacks standing, as his company, Milwaukee Chimney Roof, is the proper plaintiff; and that the law does not allow for an award of attorneys' fees in this case. This court agrees that Ossoinik's claim for attorneys' fees must be dismissed. Consequently, this court reverses the judgment without addressing the standing issue, which is moot, and dismisses Ossoinik's claim.

BACKGROUND

¶2 The facts are not in dispute. Jon Ossoinik owns Milwaukee Chimney Roof. As one might deduce from the name, Milwaukee Chimney Roof cleans and repairs chimneys and roofs.

¶3 In November 2012, Aurora hired Milwaukee Chimney Roof to inspect, clean, and repair residential property that had been damaged by fire. Because the fire displaced the property's residents, "there was an emergency situation" and Aurora "needed action fast." Aurora contacted one if its vendors, Hopson Oil Company, to see if Hopson Oil could perform chimney sweeping services or recommend another company that could do so. Hopson Oil recommended Milwaukee Chimney Roof. Milwaukee Chimney Roof had never done any work for Aurora before, however, so it was not a regular vendor in

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[2] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Aurora's computer system. According to Aurora, adding Milwaukee Chimney Roof as an "approved vendor" in its system would take three to four weeks.

¶4 Because of Aurora's urgent need for services, and because of the delay that would be caused if Aurora added Milwaukee Chimney Roof as an approved vendor, the parties agreed to a payment system in which Aurora would pay an already-approved vendor—in this instance, Hopson Oil—and that vendor would in turn pay Milwaukee Chimney Roof. In an affidavit, Ossoinik affirmed not only that he was "ok" with this payment plan, but also that Hopson Oil agreed to the plan, too. Consequently, Milwaukee Chimney Roof performed the chimney-sweeping services and submitted an invoice for $3195.

¶5 Per the agreement, Aurora paid Hopson Oil for the services Milwaukee Chimney Roof performed; however, Hopson Oil failed to hold up its end of the agreement. Hopson Oil deposited the $3195 into its operating account with Wells Fargo Bank. Because Hopson Oil was on a borrowing base certificate, its account was swept by Wells Fargo every night, with the funds being used to pay down Hopson Oil's line of credit and other expenses. Shortly thereafter, Hopson Oil filed for bankruptcy. The funds were never paid to Milwaukee Chimney Roof. Ossoinik asked Aurora to issue a check for $3195 directly to Milwaukee Chimney Roof, but Aurora refused, saying that it would not pay twice for the work.

¶6 Consequently, Ossoinik filed the instant action to recover the $3195 from Aurora, and Milwaukee Chimney Roof filed a "Motion for Turn Over of Property Belonging to Milwaukee Chimney Roof, Inc." (some formatting altered) in the Hopson Oil bankruptcy action. Milwaukee Chimney Roof did not serve

notice of the motion on Aurora, and Aurora was not present at any hearings held in bankruptcy court.

¶7 The bankruptcy court denied Milwaukee Chimney Roof's motion, determining that its "remedy must be against either Wells Fargo, to which its funds are traceable, or against Aurora." In a written decision, the bankruptcy court stated that Aurora's conduct in proposing and taking part in the aforementioned payment agreement was unconscionable:

> Aurora sought to avoid the administrative work required to establish a new vendor in its accounting system and instead paid for the services performed by Milwaukee Chimney by payment to a completely unrelated third party, Hopson Oil…. Aurora … engaged in unconscionable conduct when it obtained emergency services and then violated its own payment protocols by paying a third party rather than the party is contracted with….
>
> This matter never would have come before this Court had Aurora treated Milwaukee Chimney with the professional courtesy and consideration normally owed to a service provider, and paid it directly. Although this result was not likely anticipated by Aurora at the time of payment, its improper actions resulted in Milwaukee Chimney remaining uncompensated for the services it performed.

¶8 Following the bankruptcy court's decision and order, Wells Fargo paid $3195 to Milwaukee Chimney Roof. In the meantime, Ossoinik realized that he had not yet billed Aurora for $300 for work completed, and amended his complaint accordingly. Aurora paid Ossoinik the $300.

¶9 Ossoinik also amended his complaint to include a claim for attorneys' fees pursuant to ***Weinhagen v. Hayes***, 179 Wis. 62, 190 N.W. 1002 (1922). Because Wells Fargo had paid the $3195 originally billed and Aurora had paid the subsequent $300 bill, the only issue before the court was whether

Ossoinik was entitled to attorneys' fees. Ossoinik filed a motion for summary judgment on this issue, and Aurora in turn filed a motion to dismiss.

¶10 The trial court granted Ossoinik's motion. It reasoned that while the ***Weinhagen*** rule did not apply under the facts of the case, attorneys' fees were nevertheless warranted under the equitable indemnification doctrine as described in ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2012 WI 70, 342 Wis. 2d 29, 816 N.W.2d 853. The trial court reasoned that because Ossoinik would not have had to file his motion in bankruptcy court had Aurora simply paid him directly, Aurora should be liable for the attorneys' fees Ossoinik incurred in pursuing payment. Aurora now appeals.

ANALYSIS

¶11 On appeal, Aurora argues that the trial court erred in granting summary judgment in Ossoinik's favor and that Ossoinik's claim for attorneys' fees must be dismissed. Specifically, Aurora argues that Ossoinik lacks standing, as his company Milwaukee Chimney Roof is the proper plaintiff; and that the law does not allow for an award of attorneys' fees in this case. This court agrees that Ossoinik's claim for attorneys' fees must be dismissed. Consequently, it will not address the standing issue because it is moot.

(1) Ossoinik's claim for attorneys' fees must be dismissed.

¶12 This court reviews the trial court's grant of summary judgment *de novo*, applying the same methodology as the trial court. *See* ***Young v. West Bend Mut. Ins. Co.***, 2008 WI App 147, ¶6, 314 Wis. 2d 246, 758 N.W.2d 196. The rest of the summary judgment standard is well-known, and this court need not explain in detail it here. *See* WIS. STAT. § 802.08; ***Alliance Laundry Sys., LLC,***

v. Stroh Die Casting Co., 2008 WI App 180, ¶12, 315 Wis. 2d 143, 763 N.W.2d 167. It suffices to say that this court will only grant summary judgment "where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." *See* § 802.08(2). Likewise, this court reviews whether attorneys' fees are appropriate *de novo*. *See* ***Estate of Kriefall***, 342 Wis. 2d 29, ¶16.

¶13 While Aurora argues that there is no legal basis for Ossoinik's claim for attorneys' fees, Ossoinik provides three bases under which the trial court's decision should be upheld: issue preclusion; the equitable indemnification doctrine; and the ***Weinhagen r***ule. We address each of Ossoinik's contentions in turn.

(a) Issue preclusion does not apply because the issue of attorneys' fees was not previously litigated.

¶14 Ossoinik first contends that this court should uphold the trial court's award of attorneys' fees on the basis of issue preclusion. According to Ossoinik, the bankruptcy court's admonishment of Aurora for its "unconscionable" conduct should now be binding on Aurora; in other words, because the bankruptcy court described Aurora's conduct as "unconscionable," the issue of whether attorneys' fees are warranted is settled, and settled in Ossoinik's favor. Unfortunately for Ossoinik, this argument is not supported by law.

¶15 Issue preclusion limits "'the relitigation of issues that have been actually litigated in a previous action.'" ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999) (citation omitted). As the party asserting issue preclusion, Ossoinik "carries the burden to establish that it should be applied." *See* ***id.*** "'[C]ourts consider an array of factors in deciding whether issue

preclusion is equitable in a particular case,'" *see, e.g.*, ***id.*** at 222 (citation omitted); *see also* ***Lindas v. Cady***, 183 Wis. 2d 547, 559, 515 N.W.2d 458 (1994). One important requirement is that "issue preclusion requires that the issue sought to be precluded must have been actually litigated previously." *See* ***Lindas***, 183 Wis. 2d at 559.

¶16 In this case, issue preclusion cannot apply because the issue of attorneys' fees was not previously litigated. While the bankruptcy court observed that Aurora's violation of "its own payment protocols by paying a third party rather than the party it contracted with" was "unconscionable," it did not actually consider whether Ossoinik should be awarded attorneys' fees. That particular issue was never before the bankruptcy court. Indeed, Ossoinik admits as much in his brief. Thus, because the matter was not previously litigated, *see* ***Lindas***, 183 Wis. 2d at 559, this court cannot apply issue preclusion to conclude that attorneys' fees are warranted.

(b) *Attorneys' fees are not permitted under the equitable indemnification doctrine.*

¶17 Ossoinik next argues that this court should uphold the trial court's award of attorneys' fees under the doctrine of equitable indemnification. "Equitable indemnification 'shifts the entire loss from one person who has been compelled to pay it to another who, on the basis of equitable principles, should bear the loss.'" ***Estate of Kriefall***, 342 Wis. 2d 29, ¶34 (citation omitted). For example, in ***Estate of Kriefall***, the Sizzler restaurant franchise paid the Kriefall family—whose young daughter Brianna died after eating food from one of its restaurants that was contaminated with E. coli, *see* ***id.***, ¶3—$1.5 million in anticipation of the litigation that would follow Brianna's death, *see* ***id.***, ¶39. At trial, however, the jury found that the Sizzler franchise was not liable at all, but

that Excel Corporation, the company that processed and distributed the contaminated meat, was eighty percent liable and E & B Management Company, the company that operated the Sizzler restaurant which served the food that ultimately caused Brianna's death, was twenty percent liable. *See* ***id.***, ¶¶3-6, 9. Sizzler consequently sought equitable indemnification from Excel for its pre-settlement payment of $1.5 million to the Kriefall family, under the theory that Sizzler was exposed to liability based on Excel's wrongful acts, and that the duty to pay for the Kriefalls' damages was actually Excel's. *See e.g.*, ***id.***, ¶41. The supreme court agreed with Sizzler and applied the doctrine of equitable indemnification, concluding that Excel should pay Sizzler the $1.5 million. *See* ***id.***, ¶40. It did so in part because "Sizzler's payment, if unreimbursed[,] would benefit the tortfeasor, Excel." *See* ***id.***, ¶45.

¶18 Ossoinik uses ***Estate of Kriefall*** to argue that but for Aurora's refusal to pay him after Hopson Oil went bankrupt, Ossoinik would not have had to go to the trouble of suing Hopson Oil in order to get paid. He argues that "Aurora … had the duty to pursue recovery of the $3,195 from Hopson Oil," and therefore, "the costs for all this litigation should be shifted to Aurora (including litigating this appeal)."

¶19 The problem with Ossoinik's argument is that equitable indemnification is not a doctrine that allows for the recovery of attorneys' fees. Ossoinik points to no case allowing for attorneys' fees on the basis of equitable indemnification. Even ***Estate of Kriefall*** does not support him. In ***Estate of Kriefall***, the Sizzler franchise sought and received the $1.5 settlement it paid to the Kriefalls, *see* ***id.***, 342 Wis. 2d 29, ¶39, but it did not seek *attorneys' fees* under the equitable indemnification doctrine, *see* ***id.***, ¶71 (Sizzler sought attorneys' fees under the ***Weinhagen*** rule.). Nor did Sizzler ultimately recover attorneys' fees.

See ***id.***, ¶80. Moreover, this court has previously declined a party's attempts to use the equitable indemnification doctrine as a basis for recovering attorneys' fees. *See* ***Riccobono v. Seven Star, Inc.***, 2000 WI App 74, ¶32, 234 Wis. 2d 374, 610 N.W.2d 501 ("The payment of attorney fees and costs in a coverage dispute between two insurance companies has never been awarded in Wisconsin on the basis of the doctrine of equitable indemnification and we decline to do so here."). This court will not contradict that decision here.

¶20 Therefore, because equitable indemnification is not a doctrine that allows for the recovery of attorneys' fees, this court cannot and will not use it as a basis to grant Ossoinik summary judgment on his claim for attorneys' fees.

(c) Attorneys' fees are not warranted under the ***Weinhagen*** *rule.*

¶21 Ossoinik's final argument on appeal is that attorneys' fees are warranted under the ***Weinhagen*** rule, which is an exception to the general rule that litigants are responsible for their own attorneys' fees:

> "The general rule is that costs and expenses of litigation … are not recoverable in an action for damages, nor are such costs even recoverable in a subsequent action; but where the wrongful acts of the defendant has involved the plaintiff in litigation with others, or placed him in such relation with others as to make it necessary to incur expense to protect his interest, such costs and expense should be treated as the legal consequences of the original wrongful act."

See ***id.***, 179 Wis. at 65 (citation omitted).

¶22 Under the ***Weinhagen*** rule, a party may only recover attorneys' fees if: "(1) the party from whom fees are sought … committed a wrongful act against the party seeking attorney fees; and (2) the commission of such wrongful act forced the party seeking fees into litigation with a third party, or required the party

seeking attorney fees to incur expenses protecting that party's interests against claims arising from the wrongful act." ***Estate of Kriefall***, 342 Wis. 2d 29, ¶74. "'[W]rongfulness' requires something similar to fraud or breach of a fiduciary duty to the party seeking attorney fees." ***Id.***, ¶76.

¶23 Ossoinik argues that Aurora's decision to pay Hopson Oil, rather than Ossoinik directly, was wrongful because it ultimately resulted in Ossoinik's having to litigate for the money after Hopson Oil went bankrupt. He cites no case in which attorneys' fees were awarded under such a scenario, however. He merely relies on the bankruptcy court's opinion that Aurora acted "unconscionably" to support him. This court disagrees.

¶24 "Wrongfulness" under the ***Weinhagen*** rule requires behavior much more egregious than what Aurora did here. Ossoinik has not alleged that Aurora acted in any way even approaching fraud or a breach of fiduciary duty. *See* ***Estate of Kriefall***, 342 Wis. 2d 29, ¶76. The trial court found, and Ossoinik does not dispute, that Aurora did not act "with any kind of ill-intention or any kind of malice or anything that would constitute any kind of fraud." Indeed, Ossoinik said that he was "ok" with the agreement, and Aurora did in fact directly pay him the extra $300 it owed when he amended his complaint. The more apt description of what occurred here is that both Aurora and Ossoinik "cut corners" by hastily entering into what became an unfortunate payment agreement so that Aurora could have its property cleaned and Ossoinik could be compensated as quickly as possible. Aurora did not, however, act wrongfully under the law. Therefore, because Aurora did not act wrongfully in its dealings with Ossoinik, Ossoinik is not entitled to attorneys' fees under the ***Weinhagen*** rule.

¶25 In sum, Ossoinik has not articulated any theory under which recovery of attorneys' fees is possible. This court consequently agrees with Aurora that Ossoinik's claim for attorneys' fees must be dismissed.

(2) Because Ossoinik's claim is dismissed, Aurora's claim that Ossoinik lacks standing is moot.

¶26 As noted, Aurora argues on appeal that Milwaukee Chimney Roof—not Ossoinik "d/b/a" Milwaukee Chimney Roof—is the proper plaintiff in this case and that Ossoinik lacks standing to pursue his claim. Given that the case has been dismissed on other grounds, however, the standing issue is moot. *See* ***Outagamie Cnty. v. Melanie L.***, 2013 WI 67, ¶80, 349 Wis. 2d 148, 833 N.W.2d 607 ("As a general rule, this court 'will not consider a question the answer to which cannot have any practical effect upon an existing controversy.'") (citation omitted). This court will not address it further.

By the Court.—Judgment reversed; cause dismissed.

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