COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1030 **Cir. Ct. No. 2012CV4969**

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

RICKY E. HENSEN,

PLAINTIFF-APPELLANT,

V.

HENSEN ASSOCIATES, LLP,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JUAN B. COLÁS, Judge. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Ricky Hensen appeals a summary judgment order that dismissed his petition for the dissolution of a business partnership. He challenges the exclusion of a number of exhibits that he submitted with his summary judgment materials, and contends that those exhibits in conjunction with

his other materials were sufficient to establish material disputes of fact on several potential theories for dissolution. For the reasons explained below, we affirm the circuit court.

BACKGROUND

¶2 Ricky Hensen formed Hensen Associates, LLP (Associates or the partnership) with his brothers Eugene Hensen and Ronald Hensen in 1984. The primary purpose for forming the partnership was to purchase and develop land, which was rented to another family owned business, Hensen Manufacturing, Inc. (Manufacturing). During the partnership's entire history, it had acquired only two adjoining parcels of land—one of which was still vacant, and the other of which had improvements that had been custom built to serve the needs of its sole tenant, Manufacturing, whose rents constituted the only past source of revenue for Associates (apart from a one-time eminent domain proceeding on a portion of one of the parcels). Eugene acted as the managing partner for Associates, and eventually bought out Ronald's interest in the partnership, which also made Eugene the majority shareholder. In 1997, Ricky and Eugene executed a new partnership agreement, which is the subject of the present dissolution action.

¶3 In 2009, Manufacturing's cabinet-making business was slowing down significantly due to market conditions, and the company had reached the limit of its line of credit. In order to help Manufacturing with its cash flow problems, Associates borrowed $200,000 from a local bank—using as collateral a mortgage on its property, an assignment of leases and rents, and a general business security agreement. Associates then loaned the money to Manufacturing so that Manufacturing could pay down its line of credit with the bank.

¶4 The following year, as the recession continued and Manufacturing's cash flow problems worsened, Associates took out a $700,000 loan—again secured by a mortgage on its property, an assignment of leases and rents, and a general business security agreement—in order to loan Manufacturing additional money for its operational costs, paying down its line of credit, and paying off the 2009 loan. Each of Manufacturing's shareholders, including Ricky, executed personal guarantees to secure the $700,000 loan, but Manufacturing did not sign a promissory note or offer any collateral to Associates. In light of the large payments Manufacturing was going to have to make on the $700,000 loan, as well as the continued slow pace of cabinet orders, Eugene renegotiated Manufacturing's lease to temporarily reduce the rent, and also put a moratorium on Associates' monthly distributions to its shareholders.

¶5 Ricky opposed the $700,000 loan, Manufacturing's reduced rent, and the moratorium on distributions to Associates' shareholders, on the ground that this unfairly undermined his interest in the value of the land and business that he had spent thirty years helping to build. However, Ricky stated in his deposition that he did not want to exercise his contractual right to withdraw from the partnership because, under the terms of the partnership agreement, his compensation would be limited to 65% of the fair market value of his share to be paid out over a period of up to ten years, and Ricky preferred to be paid full market share, sooner rather than later. Instead, Ricky filed the present action seeking statutory dissolution of the partnership, and now appeals from the circuit court's order granting summary judgment in Associates' favor. Additional facts will be set forth as necessary in our discussion below.

STANDARD OF REVIEW

¶6 This court reviews summary judgment decisions de novo, applying the same legal standard and methodology employed by the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751. Our methodology begins with an examination of the pleadings to determine whether the complaint states a claim and the answer joins issue. ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). Assuming the pleadings are sufficient, we then examine the moving party's supporting materials (such as depositions, answers to interrogatories, admissions, and affidavits summarizing admissible testimony and documentary evidence) to determine whether the movant's materials establish a prima facie case for summary judgment, and if so, whether the materials submitted by the opposing party are sufficient to place in dispute any material facts that would require a trial. ***Id.***; *see also* WIS. STAT. § 802.08(2) (2013-14).[1]

DISCUSSION

Affidavits and Exhibits

¶7 Before we discuss the merits of the summary judgment motion, we address a threshold question of what materials were properly before the court. The party opposing a summary judgment motion must submit any affidavits at least

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

five days prior to a scheduled hearing, unless the circuit court sets an alternate date in a scheduling order. WIS. STAT. § 802.08(2). Affidavits submitted in support or opposition to a motion for summary judgment must be based upon personal knowledge and evidentiary facts that would be admissible in evidence. § 802.08(3).

¶8 Ricky filed a batch of summary judgment materials about ten days after the deadline that had been specified in a scheduling order. Included in this batch of materials were seventeen exhibits that were described in an accompanying affidavit signed by Ricky's attorney, J. Thomas Haley. The partnership moved to strike the exhibits and Haley's affidavit on the grounds that they were untimely filed, the exhibit documents contained hearsay, and the attorney had not shown any personal knowledge of the documents' contents. In response to the motion to strike, Haley filed a revised affidavit, to which the partnership filed another motion to strike. A few weeks later, Ricky also filed a "supplemental" affidavit that explained Ricky's own personal knowledge of all but the first three exhibits cited in counsel's original and revised affidavits, in conjunction with a third affidavit from Haley, acknowledging that counsel had improperly "cited" the exhibits in his earlier affidavits.

¶9 The circuit court excused the delinquency on Ricky's first batch of summary judgment materials and also deemed Haley's revised affidavit to be timely, but struck all but one paragraph from Haley's revised affidavit and all but one of the exhibits that had accompanied Haley's original affidavit for lack of personal knowledge, without making explicit reference to Ricky's subsequently filed supplemental affidavit into consideration.

¶10 Ricky does not dispute that Haley's affidavits were flawed. Instead, Ricky argues that the circuit court erred by not considering the exhibits that had accompanied Haley's original affidavit in conjunction with Ricky's subsequently filed supplemental affidavit. Ricky does not, however, even acknowledge the untimeliness of his supplemental affidavit, much less offer any legal authority that would have compelled the circuit court to accept his late submission. Accordingly, this court will limit its review of Ricky's summary judgment materials to those for which his delinquency was excused—namely, his own original affidavit and that of his brother Ronald, plus the single paragraph of Haley's revised affidavit and accompanying exhibit that were not struck.

Lack of Material Facts in Dispute

¶11 Ricky cites two statutory grounds for dissolution in his appellate brief: (1) that the managing partner has been "guilty of such conduct as tends to affect prejudicially the carrying on of the business;" and/or (2) that the managing partner has "willfully…breach[ed]…the partnership agreement" making it "not reasonably practicable to carry on the business partnership." *See* WIS. STAT. § 178.27(1)(c) and (d). The parties do not dispute that Ricky's complaint was sufficient to state a claim on these two theories and that Associates joined issue in its response and provided sufficient evidence in its summary judgment materials to make a prima facie case for dismissal. The issue before us, then, is whether any of the information in Ricky's original affidavit and attached exhibits, his brother Ronald's affidavit, or the first paragraph of Haley's revised affidavit and the accompanying first exhibit created a material factual dispute with respect to one of the claimed grounds for relief.

¶12 With regard to any prejudice to the ongoing business of the partnership, Associates' summary judgment materials made a prima facie case that—because the sole revenue stream of Associates throughout its history had been its rental income from Manufacturing—Eugene's decisions to have Associates loan Manufacturing large sums of money and to reduce Manufacturing's rent in order to keep it afloat worked for, not against, Associates' ability to carry on its business of collecting rent from the premises it leased to Manufacturing. Ricky argues that, if Manufacturing was unable to pay its full rent, the most economically reasonable course of conduct would have been for Associates to instead rent the property to a third party.

¶13 Ricky's argument completely ignores the undisputed facts that the premises were already leased to Manufacturing, that the buildings on Associates' property were custom designed for Manufacturing's cabinet-making business and that—according Ricky's own deposition—the acute financial distress under which Manufacturing was unable to make full rental payments was largely attributable to a general economic downturn. Ricky did not produce any evidence that Manufacturing was subject to eviction for any delinquency in its rent or other breach of its lease prior to the renegotiation; that any other tenant was likely to be found for the custom-designed buildings if Associates did evict Manufacturing or Manufacturing went out of business; or that if any such replacement tenant could be found, the market rental rate of the premises during the recession would be significantly higher than the reduced rental payments Manufacturing was making. To the contrary, Ricky testified that he was not aware of any other potential tenant. In sum, Ricky's summary judgment materials did not include any factual basis for his claim that Eugene could have avoided the moratorium on distributions to

Associates' shareholders by renting its property to a third party, and therefore created no material factual dispute for trial.

¶14 With regard to Ricky's claim that Eugene willfully breached the partnership agreement in a manner that made it impractical to continue the partnership, Ricky points to a series of provisions in the partnership agreement—as well as an implied contractual covenant of good faith and a statute relating to fiduciary duty—that he contends Eugene violated. We address each of the provisions Ricky cites in turn.

¶15 Section 3.5(a) of the partnership agreement, pertaining to conflicts of interest, authorizes any of the partners to enter into "transactions that may be considered to be competitive with" or "a business opportunity on his or her own behalf that may be beneficial to the Partnership." Ricky contends that Associates' $700,000 loan transactions from the bank and to Manufacturing were not "beneficial to the Partnership." Section 3.5(a) is completely inapplicable, however, because Eugene was not a party to either loan in his personal capacity, and the complaint does not allege that Eugene entered into any other transactions in his personal capacity that would be competitive with the partnership's business. Rather, it was the partnership itself that entered into loan transactions with the bank and Manufacturing.

¶16 Section 3.5(b) of the partnership agreement, also pertaining to conflicts of interest, states in relevant part: "No transaction with the Partnership shall be voidable solely because a Partner has a direct or indirect interest in the transaction if either the transaction is fair to the Partnership or the disinterested [partner(s)], … knowing the material facts of the transaction and the Partner's Interest, authorize, approve or ratify the transaction." Ricky contends that Eugene

had a personal interest in saving Manufacturing at the expense of Associates because Eugene had on one or more prior occasions stated that he wanted to leave Manufacturing to his children. Ricky argues that whether the $700,000 loan transaction was "fair to the Partnership" should be a factual question for the jury. As we have already explained above, however, there are no factual assertions in Ricky's summary judgment materials from which a jury could reasonably determine that Associates would have been better off financially if Eugene had not taken steps to have Associates assist Manufacturing. Moreover, there is no dispute in the summary judgment materials that Ricky signed a personal guarantee for the loan. We agree with the circuit court that signing a loan guarantee cannot be reasonably interpreted as anything other than legal approval of the loan, whatever misgivings or objections Ricky may have had or expressed prior to executing the guarantee.

¶17 Section 3.5(c) of the partnership agreement, also pertaining to conflicts of interest, states in relevant part: "A Partner, including the Managing Partner, may enter into transactions with the Partnership … provided however, such transactions shall be on substantially similar terms to those terms that could be obtained in a commercially reasonable transaction with an unrelated third party." Ricky argues that the $700,000 loan to Manufacturing was not made in a commercially reasonable manner and/or that it should be a jury question whether the loan was commercially reasonable. Again, however, this provision is inapplicable because the $700,000 loan to Manufacturing was not a transaction between Eugene and the partnership.

¶18 Section 5.1 of the partnership agreement, titled "Duties of Managing Partner and Authority of Managing Partner to Bind the Partnership," provides that the managing partner shall take "all actions that may be necessary or appropriate:

(1) for the continuation of the Partnership's valid existence … and (2) [for] the carrying on of the day-to-day business activities and affairs of the Partnership and (3) for the acquisition, development, maintenance and operation of the property owned by the Partnership …." Section 5.4 of the partnership agreement further specifies a number of powers that the managing partner can unilaterally exercise without the consent of the other partners in order to carry out "the ordinary and usual business affairs of the Partnership." Among those powers are borrowing and lending money, incurring liabilities and entering into contracts on the partnership's behalf, mortgaging or pledging property owned by the partnership, and executing all documents or instruments reasonably deemed by the managing partner to be necessary or appropriate to fulfill his duties.

¶19 Ricky argues that Eugene exceeded the scope of his powers under these and similar Article V provisions because the $700,000 loan to Manufacturing was not carried out in the "day-to-day business activities and affairs" of the partnership. However, Ricky does not point to any portion of the partnership agreement that defines or limits what the day to day business of Associates was or that would prohibit Associates from loaning money to its tenant, Manufacturing other than Section 2.1—which authorizes the partnership to "engage in any lawful business permitted to be conducted by a partnership under the laws of Wisconsin." Ricky does not contend that any of Eugene's or Associates' actions were illegal. Moreover, the only reasonable inference that can be drawn from the fact that the partnership agreement gives the managing partner such broad powers to borrow and loan money, incur liabilities and pledge the partnership's property is that all of the those activities were expressly contemplated as regular business activities that could arise during the partnership.

¶20 Next, Ricky contends that Eugene violated an implicit covenant of good faith and fair dealing by acting in the best interest of Manufacturing at the expense of Associates. This argument seems to center on Eugene's failure to secure collateral for Associates' loan to Manufacturing. However, Ricky did not present any summary judgment materials showing Manufacturing owned any significant property that was not already pledged, which would explain why it could not secure its own loan from the bank in the first place.

¶21 Moreover, we note that the prefatory clauses to the partnership agreement include notations that "the partnership owns certain real estate," "the Partnership has leased the Real Estate to [Manufacturing], pursuant to certain written leases," and "both of the Partners are also shareholders of [Manufacturing]." It is plain from those prefatory clauses that the relationship between the partners and Manufacturing was central to the partnership's existence, and therefore taking steps to maintain the relationship cannot reasonably be construed as acting in bad faith.

¶22 Finally, Ricky argues that Eugene violated his fiduciary duty under WIS. STAT. § 178.18(1) by using partnership property to his own benefit rather than that of the partnership. Once again, however, this argument relies upon Ricky's assertion that Associates would somehow have been financially better off if its sole source of income had been allowed to go out of business, without any factual basis for that assertion in the summary judgment materials.

By the Court.—Order affirmed.

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