COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP575 **Cir. Ct. No. 2013CV611**

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

DAVID STOCK AND JENNIFER STOCK,

PLAINTIFFS-APPELLANTS,

V.

NEW YORK LIFE INSURANCE AND ANNUITY CORPORATION AND NEW YORK LIFE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Manitowoc County: GARY L. BENDIX, Judge. *Affirmed*.

Before Reilly, P.J., Hagedorn and Stark, JJ.

¶1 PER CURIAM. David and Jennifer Stock appeal an order denying their motion for summary judgment and granting summary judgment in favor of New York Life Insurance Company (NYL) and New York Life Insurance and

Annuity Corporation (NYLIAC).[1] As the Stocks cannot prove that they own the funds at issue, they cannot prevail on the theft and conversion claims against NYL and NYLIAC. We affirm.

¶2 In March 2011, the Stocks signed a Financial Planning Agreement with Jay Wille of Eagle Strategies LLC and paid Eagle $10,000 for the creation of a financial plan. Eagle cashed the Stocks' check and deposited it in one of its accounts along with other funds used for ordinary business purposes.

¶3 The agreement provided that the plan was to be delivered within nine months; the Stocks received their plan in about eleven. They did not protest the untimeliness or seek pre-delivery termination and a refund as the agreement permitted. However, a few months later, they complained their plan was "inadequate" and sought return of the $10,000 fee. Wille told them it was too late.

¶4 In early 2013, the Stocks contacted Eagle for a refund. Eagle, a wholly-owned subsidiary of NYL, does not have an in-house legal or complaint-resolution department but, pursuant to a service agreement between the two companies, uses NYL employees to perform those functions on its behalf. Eagle referred the Stocks to NYL. They filed a formal complaint and requested a return of the $10,000 fee.

¶5 NYL, on behalf of Eagle, made five settlement offers to refund the $10,000 "[i]n the interest of customer relations." The letters of negotiation stated that the refund was offered "in full settlement of this matter" and was "not to be

[1] The Stocks sued both NYL and NYLIAC, although NYLIAC played no role in the events at issue. The Stocks' brief does not argue that the grant of summary judgment to NYLIAC was improper.

construed as an admission of liability on the part of New York Life or any other party." In exchange, NYL demanded that the Stocks release NYL, its agents/employees, and Wille from all liability. The Stocks refused and filed this action against NYL alleging conversion and theft under WIS. STAT. § 943.20(1)(b) (2013-14).[2]

¶6 The parties filed cross-motions for summary judgment. The Stocks supported their motion with the letters of negotiation and "Exhibit X," a Consolidated Agent Report relating to Wille. Exhibit X referenced the on-going negotiations and stated, "In the interest of customer relations, and in accordance with Plan document Section 10(a) which gives the client the right to cancel if not timely delivered, NYL extends an offer to refund $10,000 remitted." The Stocks asserted that the exhibit permitted an inference that NYL had possession or control of the $10,000. The circuit court concluded that the exhibit described settlement negotiations and thus was not admissible under WIS. STAT. § 904.08. The court granted NYL's motion and denied the Stocks'. This appeal followed.

¶7 In reviewing a grant of summary judgment, this court is governed by the same standards as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We do not defer to the circuit court but analyze and apply the law independently. ***Radlein v. Industrial Fire & Cas. Ins. Co.***, 117 Wis. 2d 605, 613, 345 N.W.2d 874 (1984). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

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

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶8 The elements of conversion are: (1) intentionally controlling or taking property belonging to another, (2) without the owner's consent, (3) resulting in serious interference with the owner's possessory rights to the property. ***Bruner v. Heritage Cos.***, 225 Wis. 2d 728, 736, 593 N.W.2d 814 (Ct. App. 1999); *see also* WIS JI—CIVIL 2200. The plaintiff must be "entitled to immediate possession" of a "chattel" over which the defendant has wrongfully retained dominion or control. ***Farm Credit Bank of St. Paul v. F & A Dairy***, 165 Wis. 2d 360, 371, 477 N.W.2d 357 (Ct. App. 1991).

¶9 The Stocks persist in calling the $10,000 "their" money, but once they voluntarily paid the fee to Eagle as consideration for the promise to create a plan, they relinquished all ownership rights in it. Nothing in the Stock-Eagle agreement, the negotiation letters, or Exhibit X contradicts that. NYL was not a party to the Stocks-Eagle agreement. Its involvement by negotiating with the Stocks through its arrangement with Eagle did not transfer ownership from Eagle to NYL. Because Eagle retained possession, control, and ownership of the money, the Stocks' remedy is a breach of contract claim against Eagle, not an action under WIS. STAT. § 943.20(1)(b) against NYL. *See* ***Aslanukov v. American Express Travel Related Servs. Co.***, 426 F. Supp. 2d 888, 892-93 (W.D. Wis. 2006).

¶10 The Stocks cite ***Cook v. Public Storage, Inc.***, 2008 WI App 155, 314 Wis. 2d 426, 761 N.W.2d 645, and ***H.A. Friend & Co. v. Professional Stationery, Inc.***, 2006 WI App 141, 294 Wis. 2d 754, 720 N.W.2d 96, for the proposition that a party to a contract can recover on theft and conversion claims when the contract is breached. In both cases, unlike here, the plaintiff owned the

property at issue. At best the Stocks own a breach-of-contract claim against Eagle and/or Wille, but they no longer own the $10,000 and will not unless a court rules otherwise. Breach of contract is not before us here: it was not pled, Eagle or Wille were not named as parties, and disputes regarding the agreement must be arbitrated pursuant to its terms.

¶11 The Stocks also contend it was reversible error for the circuit court to exclude settlement negotiation documents from consideration under WIS. STAT. § 904.08.[3] Such evidence is not admissible to prove liability. ***Id.*** A circuit court's ruling admitting or excluding evidence is reviewed for the court's exercise of discretion in accordance with accepted legal standards and the facts of the record. ***Chomicki v. Wittekind***, 128 Wis. 2d 188, 195, 381 N.W.2d 561 (Ct. App. 1985). The Stocks argue that the court erred because they offered the documents for "another purpose," i.e., to support an inference that NYL had custody or control of the money they paid to Eagle. Their argument fails.

¶12 Proving custody or control is essential to Stocks' claims. *See* ***Bruner***, 225 Wis. 2d at 736. Using the negotiation documents to support an inference thereof is a back-door way of using them to establish NYL's liability.

[3] WISCONSIN STAT. § 904.08 provides in relevant part:

> Evidence of … offering … a valuable consideration in … attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability …. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

That is precisely the wrong the statute is meant to guard against. With the documents ruled inadmissible, there was no evidence of custody and control.

¶13 Even if the court had admitted the documents, summary judgment nonetheless was properly granted to NYL. *See* ***Mueller v. Mizia***, 33 Wis. 2d 311, 318, 147 N.W.2d 269 (1967) (immaterial whether ground assigned by circuit court is incorrect if record reveals factual underpinning to support proper findings). The documents do not lead to a reasonable inference that NYL exercised custody and control of or seriously interfered with possessory rights to money belonging to the Stocks. *See* ***Bruner***, 225 Wis. 2d at 736.

¶14 The Stocks also argue that the Economic Loss Doctrine does not bar their tort claims as there was no contract between them and NYL and the contract with Eagle was one for services. *See* ***Insurance Co. of N. Am. v. Cease Elec., Inc.***, 2004 WI 139, ¶36, 276 Wis. 2d 361, 688 N.W.2d 462 (contracts for services outside scope of ELD). This point is purely academic. What bars their tort claims is that they no longer owned the $10,000 once they paid the fee to Eagle.

¶15 Finally, the Stocks argue that, as Eagle is a wholly owned subsidiary of NYL, NYL controlled "their" money. In the circuit court they argued that NYL's relationship to Eagle "is interesting but not relevant to the current dispute." We will leave it at that.

By the Court.—Order affirmed.

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