COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2019

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP953 **Cir. Ct. No. 2017CV1381**

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

MARLENE S. MEIER, VERNON E. MEIER, JOHN M. MEIER, EUGENE W. MEIER, KATHLEEN E. KETELBOETER, ROSE ANN SIEJA, JOSEPH V. MEIER AND BRENDA M. DELABARRE,

PLAINTIFFS,

V.

WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY, JAMES J. VANCE AND VANCE, WILCOX & LIPPERT, S.C.,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

VH LAND, LLC, SPRUCE HOLLOW LAND, LLC, MREC VH MADISON, LLC, VERIDIAN HOMES, LLC AND DAVID P. SIMON,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: VALERIE L. BAILEY-RIHN, Judge. *Reversed and cause remanded*.

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Wisconsin Lawyers Mutual Insurance Company and its insureds, attorney James Vance and law firm Vance, Wilcox & Martin, S.C. (collectively, Vance), appeal an order of the circuit court dismissing their amended third-party complaint[1] against VH Land, LLC, Spruce Hollow Land, LLC, MREC VH Madison, LLC, Veridian Homes, LLC, and David Simon (collectively, the Buyers). Vance, who was sued by former legal clients for legal malpractice in connection with the sale of their property to the Buyers, asserted third-party claims against the Buyers for contribution and indemnification for any liability Vance may have to the clients. The circuit court concluded that Vance's complaint fails to state claims for contribution or indemnification against the Buyers and dismissed those claims. For the reasons discussed below, we reverse.

BACKGROUND

¶2 The following facts are taken primarily from Vance's complaint. Because we are reviewing the circuit court's order granting a motion to dismiss for failure to state a claim, we must assume that these facts are true. *See* ***Data Key***

[1] We refer to Vance's amended third-party complaint simply as the complaint.

Partners v. Permira Advisers LLC, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693.

¶3 Marlene Meier, Vernon Meier, John Meier, Eugene Meier, Kathleen Ketelboeter, Rose Ann Sieja, Joseph Meier, and Brenda Delabarre (collectively, the Meiers) were the joint-owners of approximately 120 acres of farmland in Middleton, Wisconsin. In 2004, the Meiers entered into an agreement with VH Land to sell to VH Land all but approximately 6.6 acres of their farmland. Vance represented the Meiers in regard to that transaction. The Meiers hoped to develop the 6.6 acres, which we refer to as "the retained parcel," as commercial property. The agreement with VH Land contained a "Put Option" concerning the retained parcel. Under the Put Option, if the Meiers did not sell the retained parcel, the Meiers could exercise their rights under the Put Option and require the Buyers to purchase the retained parcel at a specified price. The sale agreement provided that any obligation under the Put Option was guaranteed by Veridian. Veridian was not a party to the sale agreement other than as the guarantor.

¶4 In 2005, VH Land assigned its rights under the 2004 sale agreement to Spruce Hollow Land, which was a wholly owned subsidiary of VH Land at that time. In 2005, the Meiers and Spruce Hollow entered into an amended agreement in which the Meiers agreed to convey to Spruce Hollow, by warranty deed, their entire parcel of land, including the retained parcel, and Spruce Hollow agreed to execute a warranty deed conveying title to the retained parcel back to the Meiers. The amended agreement provided that the Meiers' attorney, James Vance, would hold the deed to the retained parcel "in trust … until such time as the parties agree that it will be recorded as set forth in this [a]mended [agreement[."

¶5 In 2012, Spruce Hollow encountered economic difficulties and, in lieu of foreclosure, deeded to MREC certain property securing its debts, including the farmland previously owned by the Meiers. MREC performed a title search of the property sold by the Meiers, and the title search did not reveal the Meiers' interest in the retained parcel. As a result, MREC took title to the retained parcel free and clear of any interest.

¶6 In May 2015, the Meiers attempted to exercise their rights under the Put Option and demanded a closing date of thirty days and sale price of $929,442. However, no Buyer acted on the Put Option, and the Meiers filed a civil action against the Buyers. The Meiers and the Buyers reached a settlement and, as a result, that case was dismissed.

¶7 After settling their case against the Buyers, the Meiers brought this action against Vance for legal malpractice. The Meiers alleged that James Vance was negligent in his representation of them with regard to the sale of their property, in particular in failing to ensure that the original offer to purchase contained language ensuring enforceability of the Put Option, and in failing to record the warranty deed for the retained parcel.

¶8 Vance, in turn, filed a complaint against the Buyers for equitable contribution and equitable indemnification. The Buyers moved to dismiss Vance's complaint on the basis that it fails to state a claim for either contribution or indemnification. The circuit court granted the Buyers' motion and dismissed Vance's complaint. Vance appeals.

DISCUSSION

¶9 Vance contends that the circuit court erred in determining that Vance's complaint fails to state claims against the Buyers for equitable contribution and equitable indemnification. Below, we set forth our standard of review and then explain why we conclude that the complaint does state a claim for contribution and for indemnification.

A. Standard of Review

¶10 Our standard of review for considering whether a circuit court properly granted or denied a motion to dismiss for failure to state a claim is well established.[2] We review a motion to dismiss a complaint for failure to state a claim de novo. ***Id.***, ¶¶17-19. To withstand a motion to dismiss, a complaint "must plead facts, which if true, would entitle the plaintiff to relief." ***Id.***, ¶21; *see* WIS. STAT. § 802.02(1) (2017-18).[3] We accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom. ***Data Key Partners***, 355 Wis. 2d 665, ¶19. We may not add any facts to the complaint, and

[2] The record on appeal contains documents submitted to the court by affidavit. These documents include the original purchase offer and the amended purchase offer. WISCONSIN STAT. § 802.06(2)(b) permits a circuit court to convert a motion to dismiss to a motion for summary judgment when matters outside the pleadings are "presented to and not excluded by the court." However, to convert a motion to dismiss to a motion for summary judgment, all parties must be given a reasonable opportunity to present all pertinent material, ***id.***, and the circuit court is required to "notify the parties of its intent to convert a motion to dismiss for failure to state a claim to one for summary judgment." ***CTI of Ne. Wis., LLC v. Herrell***, 2003 WI App 19, ¶5, 259 Wis. 2d 756, 656 N.W.2d 794. In its order granting the Buyers' motion to dismiss, the circuit court did not treat the motion as one for summary judgment, nor is there any indication that the court gave notice to the parties that it intended to convert the motion. Accordingly, we will treat the Buyers' motion as one to dismiss the complaint for failure to state a claim, and ignore materials outside the pleadings.

[3] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

we do not accept as true any legal conclusions that are stated in the complaint, and such conclusions, alone, are insufficient to withstand a motion to dismiss. ***Id.***

B. Equitable Contribution

¶11 As stated, the Meiers sued Vance for legal malpractice. The Meiers allege that: they unsuccessfully attempted to exercise their rights under the Put Option; they sued the Buyers for breach of contract, piercing the corporate veil, fraud, and unjust enrichment; and they ultimately reached a settlement with the Buyers for an amount "substantially less than the value of the Put Option because of the probability based on the negligence of [Vance] … that the [circuit] court would hold the Put Option unenforceable." The Meiers allege that Vance was negligent in failing to take actions to ensure that the Put Option would continue to be enforceable if interest in the property sold by the Meiers was transferred, and by failing to record notice of the Put Option or the warranty deed, granted by Spruce Hollow to the Meiers, for the retained parcel.

¶12 Vance, in turn, filed a complaint asserting a claim for equitable contribution, or reimbursement, against the Buyers in the event that Vance is liable to the Meiers. "[C]ontribution distributes [a] loss [among persons liable for the same harm] by requiring each person to pay his [or her] proportionate share of the damages on a comparative fault basis." ***Swanigan v. State Farm Ins. Co.***, 99 Wis. 2d 179, 196, 299 N.W.2d 234 (1980). The right to equitable contribution "'arises when one has paid more than his [or her] just proportion of a joint liability.'" ***Matthies v. Positive Safety Mfg. Co.***, 2001 WI 82, ¶12, 244 Wis. 2d 720, 628 N.W.2d 842 (quoted source omitted). The party seeking equitable contribution from another party must prove the following: (1) the parties are joint tortfeasors; (2) the parties have common liability to the same person as a result of their

concurring negligence; and (3) the party seeking contribution bears an unequal portion of the common burden. ***Fire Ins. Exchange v. Cincinnati Ins. Co.***, 2000 WI App 82, ¶8, 234 Wis. 2d 314, 610 N.W.2d 98, and ***Farmers Mut. Auto. Ins. Co. v. Milwaukee Auto. Ins. Co.***, 8 Wis. 2d 512, 519, 99 N.W.2d 746 (1959).

¶13 The first prerequisite for contribution is that the parties be joint tortfeasors. Our supreme court has stated that in Wisconsin, joint tortfeasors include both those who act in concert and those whose conduct is independent and separate, but concurs to cause an injury to a third person. *See* ***Wisconsin Nat. Gas Co. v. Ford, Bacon & Davis Const. Corp.***, 96 Wis. 2d 314, 330-31, 291 N.W.2d 825. The supreme court in ***Wisconsin Natural Gas Co.*** was discussing joint tortfeasors in the context of joint and several liability. All parties rely on ***Wisconsin Natural Gas Co.***, so we see no reason that the court's description should not apply in the context of contribution. The second prerequisite for contribution is common liability. The party claiming contribution "must plead and prove … his [or her] own negligence," as well as "the negligence of the other tort-feasors, and their common liability." ***Farmers Mut. Auto. Ins. Co.***,.8 Wis. 2d at 519. The parties' common liability must exist "at the time of the [injury]." ***Id.***

¶14 The Buyers argue that Vance's complaint fails to state a claim for contribution because it does not allege facts that, if true, establish these prerequisites for contribution. We disagree.

¶15 Vance alleges that the Buyers "failed to exercise reasonable care to … properly search the public records for notice of the [Meiers'] interest in the [retained] [p]arcel." In Vance's answer to the Meiers' complaint against Vance,

which Vance's complaint incorporates by reference and includes as an exhibit,[4] Vance denies the Meiers' allegation against Vance that "Vance failed to record the retained parcel warranty deed or present Spruce Hollow with the original retained parcel warranty deed." Vance "[d]en[ies] that a document disclosing [the Meiers'] interest in the [r]etained [p]arcel was not recorded with the Dane County Register of Deeds." Vance also "[a]dmit[s] that a title insurance commitment prepared by Preferred Title effective May 18, 2012 did not disclose the Notice of Ownership recorded by the Dane County Register of Deeds on April 23, 2012 as document number 4864900."

¶16 Read reasonably and drawing from those allegations all reasonable inferences, Vance's complaint alleges that Vance did file a specific document disclosing the Meiers' interest in the retained parcel with the Register of Deeds, that a title search did not disclose that document, and that reasonable care was not undertaken by the Buyers in conducting their search of public records for notice of the Meiers' interest in the property. We conclude that Vance's complaint alleges sufficient facts establishing the first prerequisite for contribution, namely that they are joint tortfeasors, as a result of the Buyers' failure to "properly search the public records" for notice that Vance alleges existed.

¶17 The second requirement for contribution to lie is that the parties must have common liability "at the time of the [injury]." ***Id.*** The Meiers'` complaint against Vance alleges that "James J. Vance was negligent in not recording notice of the Put Option." This allegation does not allege that Vance

[4] WISCONSIN STAT. § 802.04(3) provides: "Statements in a pleading may be adopted by reference … in another pleading …. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

was negligent at any specific point in time. Vance's complaint alleges that the Buyers' "alleged negligent acts did not cause any alleged injury to the [Meiers] until third-party defendant MREC [] recorded the … Special Warranty Deed" and that "[t]he alleged negligence of the [Buyers] was concurrent with the alleged negligence of [Vance]." Read reasonably and given all reasonable inferences, the allegations of Vance's complaint state that Vance's alleged negligence was ongoing, and that there was no injury to the Meiers until the ongoing negligence of Vance and the recording of the warranty deed by MREC converged to concurrently cause injury. We conclude that Vance's complaint alleges sufficient facts establishing the second prerequisite for contribution, namely that they have a common liability to the Meiers as a result of their alleged negligence.

¶18 In sum, we conclude that Vance's complaint contains sufficient allegations that Vance and the Buyers were joint tortfeasors and had common liability at the time the Meiers were alleged to have been injured. Accordingly, we conclude that Vance's complaint was sufficient to state a claim for contribution against the Buyers and that, therefore, dismissal of Vance's third-party contribution claim was erroneous.

C. Equitable Indemnification

¶19 The right of equitable indemnity exists "'where one person is exposed to liability by the wrongful act of another in which he does not join.'" ***Brown v. LaChance***, 165 Wis. 2d 52, 64, 477 N.W.2d 296 (Ct. App. 1991) (quoted source omitted). Equitable indemnification differs from equitable contribution in a number of ways. Unlike equitable contribution, where liability is shared, "[i]ndemnification 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." ***Swanigan***, 99 Wis. 2d at 196. In addition, the parties do not have to be joint tortfeasors, *see* ***Teacher Ret. Sys. Of Texas v. Badger XVI Ltd. P'ship***, 205 Wis. 2d 532, 546, 556 N.W.2d 415 (Ct. App. 1996), or, stated another way, have common liability. *See* ***General Accident Ins. Co. of Am. v. Schoendorf & Sorgi***, 195 Wis. 2d 784, 798, 537 N.W.2d 33 (Ct. App. 1995), *modified on other grounds*, 202 Wis. 2d 98, 549 N.W.2d 429 (1996). The elements of equitable indemnity are: (1) the payment of damages beyond the payor's fair share; and (2) a lack of liability. ***Brown***, 165 Wis. 2d at 64.

¶20 In support of the claim for indemnification, Vance sets forth, or incorporates by reference, the following allegations in the complaint:

- at all relevant times, third-party defendant David Simon was "an owner, officer, manager, owner of an entity member of, or an agent for, one or more of … VH Land, Spruce Hollow Land and Veridian Homes, and also an owner, officer, manager, owner of an entity member of, or an agent of … MREC."

- Simon signed the 2004 offer to purchase on behalf of Veridian, which was the guarantor of the Put Option, and Simon signed the July 2012 warranty deed conveying the Meiers' property, including the retained parcel, to MREC.

- Knowledge of the Meiers' interest in the retained parcel "must be imputed to all of the [] third-party defendants" in light of the "ownership, management and control relationship among the [Buyers]."

- The Buyers, thus, had "actual or constructive knowledge or notice of the [Meiers'] interest in the [retained parcel]" when the deed conveying the retained parcel to MREC was executed and delivered.

- The conveyance of the retained parcel to MREC "was an intentional attempt to deprive the [Meiers] of their interest in the [retained parcel] and their rights under the Put Option."

- If Vance "negligently caused [the Meiers] some damage or injury … and [the Buyers], one or all of them acting individually or by conspiracy … intentionally caused [the Meiers'] losses … [Vance has] the right to indemnification to the full extent of any liability [the Buyers] may have to [the Meiers]."

¶21 The crux of the right to equitable indemnification is a lack of liability on the part of the person seeking indemnification because of the wrongful act of the party from whom indemnification is sought. Here, Vance alleges that even if Vance was negligent in its representation of the Meiers, the Buyers must indemnify Vance because the Buyers "intentionally" caused the Meiers' losses.

¶22 A negligent tortfeasor has a right to indemnity from an intentional tortfeasor. ***Fleming v. Threshermen's Mut. Ins. Co.***, 131 Wis. 2d 123, 130, 388 N.W.2d 908 (1986). Vance's complaint alleges, separately and through incorporation by reference, that the Buyers committed multiple intentional torts. As we explain below, we conclude that, as to all but one of the alleged intentional torts, Vance's allegations are insufficient or Vance has abandoned that tort on appeal. However, we conclude that Vance's complaint does set forth sufficient facts to show that the Buyers intentionally interfered with a contractual relationship.

¶23 Vance alleges in Vance's complaint against the Buyers that Buyers' "conveyance of the [retained parcel] to MREC [], was an intentional attempt to deprive [the Meiers] of their interest in the [retained parcel] and their rights under the [p]ut [o]ption." It is not clear from Vance's allegations *what* particular intentional tort the Buyers committed, or that the elements of a particular intentional tort have been sufficiently alleged.

¶24 Vance's complaint incorporates by reference three intentional torts alleged in the Meiers' complaint against the Buyers. The Meiers alleged claims for fraud and civil theft. However, Vance does explain how and why the allegations by the Meiers meet the elements of each of those intentional torts. Again, absent that information, this court is left to guess whether Vance's complaint alleged sufficient facts to meet the elements of each of those intentional torts.

¶25 The Meiers also alleged that the Buyers tortuously interfered with a contract. The elements of a claim for tortious interference are: (1) the plaintiff had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with that relationship; (3) the interference by the defendant was intentional; (4) there was a causal connection between the interference and damages; and (5) the defendant was not justified or privileged to interfere. ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶18 n.8, 274 Wis. 2d 719, 685 N.W.2d 154. Vance argues, and we agree, that all of these elements were alleged in the Meiers' complaint.

¶26 The Meiers alleged that they had a contract for the Put Option with VH Land and Spruce Hollow. The Meiers alleged that third-party defendants David Simon and MREC interfered with that contract by "convey[ing] the

[retained parcel] away from the Meiers without payment … depriving the [Meiers] of their property and their rights under the [p]ut [o]ption." The Meiers alleged that the conveyance of the retained parcel away from the Meiers was done "intentionally" to "deprive the [Meiers] of their property and their rights under the [p]ut [o]ption." The Meiers alleged that because of the interference with their rights under the Put Option, they "were not paid the contractually agreed upon price for the [retained parcel]." Finally, the Meiers alleged that Simon and MREC "were not justified or otherwise privileged to interfere with [the Meiers'] contractual relationship with VH Land [] and Spruce Hollow []."

¶27 We conclude that these allegations are sufficient to show that the Buyers intentionally interfered with the Meiers' contractual rights under the Put Option. Accordingly, we conclude that the allegations in Vance's complaint state a claim for indemnification and, thus, dismissal of that claim was erroneous.

CONCLUSION

¶28 For the reasons discussed above, we conclude that Vance's complaint states claims for equitable contribution and equitable indemnification against the Buyers and we, therefore, reverse the circuit court's dismissal of Vance's complaint.

By the Court.—Order reversed and cause remanded.

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