COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1405 **Cir. Ct. No. 2008CV8044**

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

JOHN GRISWOLD,

PLAINTIFF-APPELLANT,

V.

DEAN ROGICH AND KIM JOHNSEN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN J. DI MOTTO, Judge. *Reversed*.

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. John Griswold appeals the circuit court's order granting summary judgment dismissing his leaky-basement claims against Dean Rogich and Kim Johnsen. The circuit court held that Griswold's reliance on Rogich's representations that the four-unit apartment building he and Johnsen sold to

Griswold did not have a leaky basement was unreasonable as a matter of law. We reverse.

I.

¶2 Griswold bought the building from Rogich and Johnsen, who, according to Rogich's affidavit, got the building from their father, who bought it in 1955. Rogich testified at his deposition that their father lived in the building from 1964 until he died. Rogich's affidavit also says that Rogich had "lived in the building for a few months" when their father died in 2006.[1] Rogich handled "[a]ll pre-closing discussions" with Griswold.

¶3 As required by WIS. STAT. § 709.02(1), Rogich filled out real-estate condition reports, the first dated January 7, 2007. The report, contrary to Rogich's affidavit, represented that he had "lived on the property for 1½ years." Rogich testified at his deposition, however, that this was "a mistake," claiming that it was apparently "supposed to be one-and-one-half months." He also testified that he only lived in the building in August of 2006 and October of 2007, and could not remember where he lived between those two months. He said that he was in the building's basement "maybe five times."

¶4 The January 7 real-estate condition report represented that Rogich was not "aware" of "defects in the basement or foundation (including cracks, seepage and bulges)." The paragraph where Rogich disclaimed awareness of "defects in the basement" further noted: "*Other basement defects might include,*

[1] At his deposition, Rogich first testified that his father died in 2007, but then said it was September 3, 2006.

but are not limited to, flooding, extreme dampness or wet walls, unsafe concentrations of mold, or defects in drain tiling or sump pump." (Italics in original.) The condition report also represented that Rogich was not "aware of other defects affecting the property."

¶5 The second real-estate condition report, dated September 16, 2007, similarly denied that either Rogich or Johnsen knew about "defects in the basement or foundation (including cracks, seepage and bulges)." "Basement defects" were further defined to "include, without limitation, moisture or dampness; defective drain systems; building or walls not plumb." (Partial uppercasing omitted.)

¶6 WISCONSIN STAT. § 709.03 has the real-estate condition-report form required by WIS. STAT. § 709.02(1) and recites that "'am aware' means to have notice or knowledge." *See* § 709.03 B. 1. That definition is on both of the real-estate-condition reports, as required by § 709.03.

¶7 Griswold's affidavit asserted that he had known Rogich for some time and claimed to have "talked" to him "five to seven times per summer at church festivals and Summerfest." On the other hand, Rogich testified that although he first met Griswold twenty-five years earlier, he was but a casual acquaintance, running into him "[m]aybe once every five years." Griswold's affidavit claims that he had asked Rogich "on several occasions whether the basement had ever leaked," and that Rogich "repeatedly told me that the basement had never leaked." Further, Griswold's affidavit also says he "visited the property on about five separate occasions before I purchased it," and that "nothing that I saw in the basement contradicted [Rogich]'s representation." Griswold's deposition testimony was consistent with his affidavit: "I asked him several times,

has there ever been water in the basement. No, there has never been water in the basement."[2]

¶8 Griswold hired Terry Dunsworth, who ran a building-inspection business, to inspect the building. Dunsworth gave Griswold a report of the inspection that, with the inspection agreement, runs approximately seventy printed pages. Most of the report is made up of forms that define the scope of the inspection as well as tips and advice. The report asserted that there was "No Visible Damage Noted" to the basement laundry wall. The report also cautioned that the building was "occupied": "The home is occupied by seller/tenant with their personal belongings and furniture which may limit some areas to inspect."

¶9 In connection with what the report calls the "BASEMENT/STRUCTURE," Dunsworth's report asserted: "Conditions were observed in the east basement wall which may have been caused by expansive soil conditions, causing bowing, bulging, or cracking of the wall. Wall is leaning inward approximately 1" using a 6' plumb level. This is a structural concern. I recommend further evaluation by an independent foundation consultant or Structural engineer." (Underlining omitted.) The report also noted: "Efflorescence/dampness observed on the foundation wall usually indicates ongoing moisture/seepage. Improve drainage around house to reduce the possibility of water intrusion or damage." Dunsworth testified at his deposition

[2] The defendants' appellate brief points to Griswold's earlier testimony at his deposition that when Griswold asked Rogich "if there was ever water in the basement," Rogich replied that "He never had water in the basement." Rogich and Johnsen contend that this somehow absolves them because, as they write in their brief: "Thus, Griswold admitted that Rogich said that he never had water in the basement, not that there never was water in the basement at all." (Underlining in original.) We caution counsel that this type of specious sophistry does not belong in any assertion to *any* court.

that "efflorescence" is a deposit of "mineral salts extracted from the concrete by water and it's deposited on the inside when water evaporates." Dunsworth's report indicated with a checkmark or no checkmark next to the preprinted text that the basement wall had "Crack" but no "Mildew/Mold." It also reported in connection with the basement wall: "No Visible Damage Noted." In his affidavit, however, Dunsworth asserted: "During the course of the inspection I discovered certain conditions in the basement including wall cracks, bulges and signs indicating possible moisture penetration in the basement." He further averred that he "expressed my concerns about those observations verbally and pointed them out to John Griswold at the inspection in the presence of the seller, Dean Rogich." According to Dunsworth's affidavit, "Mr. Griswold stated that he was not concerned with those conditions because he was familiar with them, having previously owned and been involved with properties containing similar conditions." Nevertheless, Dunsworth says in his affidavit, "I did note conditions and recommend in my report that he have the basement reviewed by a specialist anyway." Griswold testified at his deposition, however, that Dunsworth was reassuring: "He said that it's an older basement, it's an older building, every older building has, you know, little issues like that, nothing to be concerned about.… The way he described it to me, it sounded to me like it was just a common thing."

¶10 Dunsworth testified at his deposition that he showed Griswold an area of the wall during the inspection that showed some "efflorescence and dampness." He admitted, however, that a person cannot "tell whether the basement leaks" by "looking at the fact that there's efflorescence." This was consistent with Griswold's affidavit: "Mr. Dunsworth told me that the efflorescence that he noted on the basement walls was something that was common in older basements and that it did not mean that the basement leaked."

Additionally, Griswold averred that Rogich "was present at the home inspection and reiterated to Mr. Dunsworth and [me] that the basement had never leaked."

¶11 Griswold asserts in his affidavit that he was not concerned about the "bowed basement wall" because Rogich "told me that it had been that way for years." Further, according to Griswold, "Mr. Dunsworth told me that the recommendation in his report to consult with additional professionals about this wall was a standard form comment that he routinely included in his reports."

¶12 Griswold bought the building when Rogich agreed to reduce the price by $5,000. Griswold explained in his affidavit that the money was to reimburse him for costs needed "to replace the lintels above the windows on the north wall." Rogich's deposition testimony differed. He said that the $5,000 reduction was "[f]or all the defects, to cover all the defects. … The basement, the roof."

¶13 The basement leaked, and this appeal concerns whether Griswold's breach-of-contract claim, his statutory-misrepresentation claim under WIS. STAT. § 943.20(1)(d) (a crime to get "property of another by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made") (civil action for damages permitted by WIS. STAT. § 895.446(1)), and his false-advertising claim under WIS. STAT. § 100.18 survive summary judgment.[3] The circuit court held that they did not, explaining in the crux of its oral decision that Griswold's

[3] Griswold's other claims against Rogich and Johnsen were dismissed by stipulation and are not at issue on this appeal.

reliance on the two property-condition reports and Rogich's oral representations was not "reasonable" as a matter of law:

> I find based on the evidentiary submissions that the reliance by Mr. Griswold is so unreasonable, it is so far out that it was not a material inducement to [Griswold]. That's based on the inspection, the inspector's advice to do more. Bring in other experts more knowledgeable than the inspector. And it was used by [Griswold] to extract a reduction in price. There is no reliance here that was a material inducement. Any reliance is so unreasonable that this is that rare case [where summary judgment on "reasonableness" can be granted].

II.

¶14 A party is entitled to summary judgment if "there is no genuine issue as to any material fact" and that party "is entitled to a judgment as a matter of law." WIS. STAT. RULE 802.08(2). We review *de novo* a circuit court's rulings on summary judgment, and apply the governing standards "just as the trial court applied those standards." ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). Further, we look at the parties' submissions in a light most favorable to the party against whom summary judgment is sought, ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2005 WI 114, ¶30, 283 Wis. 2d 384, 401, 700 N.W.2d 27, 35, and all reasonable inferences are to be assessed against the party seeking summary judgment, ***Lecus v. American Mut. Ins. Co. of Boston***, 81 Wis. 2d 183, 189–190, 260 N.W.2d 241, 244 (1977). ***Lecus*** recites the familiar standard:

> The question upon review of an order granting a motion for summary judgment is not necessarily whether the inferences that have been drawn are reasonable but whether the record reveals there are competing inferences that could be considered reasonable. We have no quarrel with the inferences drawn by the trial court nor the findings of fact it did make, but that is not the function of a motion for summary judgment. We have stated innumerable times

> a motion for summary judgment does not contemplate nor permit a trial upon affidavits or depositions, and that if there are any material facts in dispute or competing reasonable inferences the party resisting the motion is entitled to a trial.

Ibid. As we show below, this caveat applies to the circuit court's erroneous grant of summary judgment here.

¶15 Reasonable reliance is, in one way or another, material to Griswold's breach of contract claim, his claim under WIS. STAT. §§ 895.446 & 943.20(1), and his false-advertising claim under WIS. STAT. § 100.18. *See* ***Malzewski v. Rapkin***, 2006 WI App 183, ¶¶13–16, 21–22, 296 Wis. 2d 98, 109–111, 113–115, 723 N.W.2d 156, 161–162, 163–164 (Reasonable reliance is an element of a breach of contractual warranty in a real-estate transaction, and is also an element under § 943.20(1)(d) and the predecessor to § 895.446.). "The elements of false advertising, WIS. STAT. § 100.18, are: (1) the defendant made to the public an 'advertisement, announcement, statement or representation' relating to the purchase of merchandise; (2) the 'advertisement, announcement, statement or representation' was 'untrue, deceptive or misleading'; and (3) the plaintiff sustained a pecuniary loss because of the 'advertisement, announcement, statement or representation.'" ***Malzewski***, 2006 WI App 183, ¶23, 296 Wis. 2d at 115–116, 723 N.W.2d at 164 (some internal quotation marks and quoted source omitted). Reasonable reliance is not, however, strictly speaking an element of a § 100.18 claim: "[A] plaintiff is not required to prove reasonable reliance as an element of a § 100.18 misrepresentation claim. However, the reasonableness of a plaintiff's reliance may be relevant in considering whether the representation materially induced (caused) the plaintiff to sustain a loss." ***Novell v. Migliaccio***, 2008 WI 44, ¶3, 309 Wis. 2d 132, 136–137, 749 N.W.2d 544, 546 (sale of house with leaky basement). Thus, our task on our *de novo* review of the circuit court's

grant of summary judgment is to see whether under the summary-judgment rubric we have already set out, there are genuine issues of material fact for trial as to whether Griswold's claimed reliance on what he says Rogich told him, both orally and in the property-condition reports, was unreasonable as a matter of law. We conclude that it was not.

¶16 First, we have to take Griswold's assertions, both in his affidavit and at his deposition, as true. Although a factfinder at a trial could or could not believe Griswold, credibility may not be decided on summary judgment. Second, for the same reason, we also have to take Rogich's assertions in the summary-judgment Record as true. Third, the same standard applies to Dunsworth's assertions. Given the summary-judgment process, it is clear from our exhaustive recitation of the summary-judgment Record that there are disputes as to who said what. Further, Dunsworth's report that there was no "Visible Damage Noted" to the basement wall was inconsistent with his other contentions. Moreover, Dunsworth's deposition testimony concedes, as we have seen, that the efflorescence he saw during his inspection of the basement was far from conclusive evidence of a leaky basement. Additionally, as we have also seen, his written report focused on the basement's structural integrity and not whether it leaked. Significantly, Griswold's contention that Rogich "repeatedly told me that the basement had never leaked" was, if true, (1) Rogich's implicit representation that he knew whether the basement had ever leaked; and (2) his express representation that it did not. Also, although the circuit court opined that Griswold's alleged knowledge that the basement leaked "was used by [Griswold] to extract a reduction in price," we have seen that Griswold indicated that it was to reimburse him for the costs "to replace the lintels above the windows on the north wall." Again, summary judgment is not the place for credibility assessments.

¶17 As seen from ¶16, this case is different than ***Malzewski***, where the sellers disclosed to the buyer that "'there might be a little seepage in the walls/floors' of the basement." ***Malzewski***, 2006 WI App 183, ¶16, 296 Wis. 2d at 111, 723 N.W.2d at 162. *See also* ***id.***, 2006 WI App 183, ¶15, 296 Wis. 2d at 110, 723 N.W.2d at 162 ("[A] buyer aware of the 'true nature' of defects, or who has the right to discover the "true nature" of defects *that are disclosed,* cannot later complain when he or she goes ahead with the purchase.") (quoted source omitted; emphasis by ***Malzewski***). Here, if a jury or a bench-trial judge were to believe Griswold and not Rogich and Dunsworth, the true nature of the building's defect in connection with the leaky basement was not disclosed and any reliance by Griswold on Rogich's representations would not, as the circuit court concluded, be unreasonable as a matter of law. Accordingly, we reverse and remand for trial.

By the Court.—Order reversed.

Publication in the official reports is not recommended.