COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP996 **Cir. Ct. No. 2009CV1924**

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

ARROWHEAD SYSTEMS, INC.,

PLAINTIFF-APPELLANT,

V.

JAMES W. PARKER,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Arrowhead Systems, Inc., appeals an order dismissing its breach-of-contract and misrepresentation claims against James W. Parker and an order denying its motion for reconsideration. The trial court also

dismissed Parker's similar claims against Arrowhead, but Parker does not cross-appeal. We affirm.

¶2 Arrowhead manufactures material-handling equipment for the food and beverage industries internationally. In late 2006, Parker, a seasoned salesman, approached Arrowhead's owner and CEO, Tom Young, about a possible position. The men had known each other many years. Holding himself out as highly knowledgeable about the commercial baking industry, Parker told Young that he maintained professional relationships with individuals with purchasing authority at over a dozen target companies, that those individuals had bought from him in the past and would do so again, and that, with his marketing skills, industry experience, and personal contacts, Arrowhead could expect to reach sales volumes in just a few years rivaling those Parker claimed he achieved with prior employers.

¶3 In August 2007, Arrowhead and Parker agreed that Parker would act as a consultant to help Arrowhead develop, design and manufacture a new line of commercial bakery equipment and would be Arrowhead's agent to market and sell the product line. In October, Parker, Young, Arrowhead's president and chief operating officer, and a newly hired engineer/ project manager attended a bakery trade show in Orlando. The group had no drawings or design concepts to present, but went to assess the competition and learn more about the bakery marketplace.

¶4 A New Zealand bakery equipment manufacturer, ECS, had a display at the bakery show. ECS manufactured the type of bakery equipment Parker recommended Arrowhead manufacture. Parker suggested that licensing ECS products and bringing them to the United States would reduce Arrowhead's learning curve and give it a product line already known in the bakery industry. Negotiations between ECS and Arrowhead culminated in a licensing agreement in

August 2008. Systems comprising ECS equipment and Arrowhead conveyors were ready for sale in November 2008.

¶5 Virtually no sales of the new product line resulted over the next two years. Claiming Parker failed to perform his end of the agreement, Arrowhead terminated the parties' relationship and filed suit. It alleged that Parker's multiple representations as to his experience and abilities were vastly inflated and falsely made to induce Arrowhead to enter into the agreement. Arrowhead asserted statutory and common law misrepresentation and breach of contract. It sought to recover the $218,010.57 in expenses it claims it incurred in connection with the contract and the $1,750,000 it claims it reasonably could have expected to earn in profits over three years. Parker cross-claimed.

¶6 After a bench trial, the court dismissed both parties' claims on the basis that neither met its burden of proof. Arrowhead filed a motion for reconsideration asking the court to make appropriate findings of fact and conclusions of law in its favor. The court denied the motion. Arrowhead appeals.

¶7 Arrowhead contends it produced sufficient evidence to satisfy its burden of proof as to its WIS. STAT. § 100.18 (2011-12),[1] negligent and strict responsibility misrepresentation, and breach-of-contract claims. Whether a party has met its burden of proof is a question of law, which this court can review de novo. ***Seraphine v. Hardiman***, 44 Wis. 2d 60, 65, 170 N.W.2d 739 (1969). We accept the trial court's factual findings unless they are clearly erroneous, however, *see* WIS. STAT. § 805.17(2), and defer to its credibility findings, *see* ***Seraphine***, 44

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

Wis. 2d at 65. Further, we review the record in the light most favorable to the trial court's findings. ***Rohde-Giovanni v. Baumgart***, 2003 WI App 136, ¶18, 266 Wis. 2d 339, 667 N.W.2d 718. Applying these standards here, we must affirm.

¶8 To prevail on a WIS. STAT. § 100.18 claim, a plaintiff must prove that the defendant's representation was made to "the public" with the intent to induce an obligation, was untrue, deceptive or misleading, and caused the plaintiff to suffer a pecuniary loss. ***K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.***, 2007 WI 70, ¶19, 301 Wis. 2d 109, 732 N.W.2d 792. Reasonable reliance need not be proved. ***Novell v. Migliaccio***, 2008 WI 44, ¶29, 309 Wis. 2d 132, 749 N.W.2d 544.

¶9 This argument merits little attention. Arrowhead simply asserts that it "was a member of 'the public' within the meaning of the statute. Kailin v. Armstrong, supra." Arrowhead's "supra" references in its brief to ***Kailin v. Armstrong***, 2002 WI App 70, 252 Wis. 2d 676, 643 N.W.2d 132, do not address that point. We need not consider undeveloped arguments, ***Clean Wis., Inc. v. Public Serv. Comm'n***, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768, or develop a party's arguments for it, ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. As Arrowhead has not established a violation of WIS. STAT. § 100.18, we must deny its request to remand the matter for the trial court to determine its attorney fees pursuant to § 100.18(11)(b).

¶10 Negligent and strict responsibility misrepresentation claims share three common elements: (1) the defendant made a representation of fact; (2) the representation was untrue; and (3) the plaintiff believed the representation to be true and relied on it to his or her detriment. ***Ollerman v. O'Rourke Co.***, 94

Wis. 2d 17, 25, 288 N.W.2d 95 (1980). A party's reliance must be reasonable. ***M & I Bank v. First Am. Nat'l Bank***, 75 Wis. 2d 168, 183, 248 N.W.2d 475 (1977). The reasonableness of one's reliance on a misrepresentation is judged after reviewing the facts of the case, including "the intelligence and experience of the misled individual and the relationship between the parties." ***Bank of Sun Prairie v. Esser***, 155 Wis. 2d 724, 734, 456 N.W.2d 585 (1990).

¶11 The trial court concluded that Arrowhead's reliance was not reasonable. Arrowhead owner and CEO Young testified that Arrowhead had not made prior marketing efforts in the commercial baking industry and that Parker, who Young had known for over thirty years, was a "master" who could "sell oil to the Arabs." Arrowhead's expert testified that the United States bakery industry had been shrinking for nearly half a century before Parker even began his negotiations with Arrowhead and by 2007 was contracting at an increasingly rapid rate. The court found that despite being a "sophisticated business operation" with "ample opportunity" between the parties' initial contact and their agreement to "evaluate, consider [and] investigate" Parker's claims, Arrowhead failed to do so. These findings are not clearly erroneous. We agree that Arrowhead's reliance was not reasonable. Arrowhead had the time and means to assess whether the "master" also was selling it something it did not need.

¶12 "In evaluating a breach-of-contract claim, a court must determine whether a valid contract exists, whether a party has violated its terms, and whether any such violation is material such that it has resulted in damages." ***Steele v. Pacesetter Motor Cars, Inc.***, 2003 WI App 242, ¶10, 267 Wis. 2d 873, 672 N.W.2d 141. "[W]hether the facts found by the trial court constitute a breach of contract is a legal issue we review de novo." ***Id.***

¶13 The parties here did not have a formal written contract. Rather, Arrowhead sent Parker a letter "to formalize the general agreement" between it and Parker. The letter set forth one- and three-year goals it "expected to achieve" in sales of the product line. The letter also identified Parker's duties. He was to show the engineering group the product line and educate them regarding "terms, names, acronyms and labels," identify key design and focus areas so as to establish Arrowhead as a player in the market, brainstorm ways to develop basic design concepts, contact previously identified "preferred customers" to "generate interest and schedule visits" while the engineering group developed basic design concepts, and act as Arrowhead's agent to market and sell the bakery product line. Arrowhead's pretrial report called the agreement between the parties a "consulting agreement."

¶14 The trial court found that the contract was poorly thought out and unrealistic and, "from the get-go," mutually not complied with:

> There was no product manager hired until after the parties had anticipated that there would be basic design concepts, features, and parameters, along with drawings to be ready prior to the bakery show. There wasn't even a[n] engineer on board to start that until a couple of days before the bakery show. There were no drawings at the bakery show. There were no basic design concepts at the bakery show. The parties all testified the bakery show was a learning experience, an exposure opportunity.
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> ….
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> It appears further that the consulting aspect of this really was from its inception all the way through November of '08. That is when the defendant had available to him something to sell, that's when plans were drawn up, that's when binders were put together, that's when information went out. To do much sales before that is not really beneficial or fruitful because there really wasn't anything to sell…. [T]he product was ready for sale in November of '08. And certainly there [are] some difficulties with the holidays and sales potentially in December, so really

> realistically probably the first of the year was when the sales could have been developed and actively pursued.

¶15 The court found that blame for the contract's failure lay at both parties' feet. Parker was deficient in making contacts and conducting sales; Arrowhead was deficient in providing support and a product to sell and in recognizing, as its own expert testified, that a new entrant in the tight-knit bakery market would need significant time to gain acceptance. The court also found that market conditions played a role. None of these findings is clearly erroneous.[2] Arrowhead did not sufficiently prove its breach-of-contract claim. We affirm.

By the Court.—Orders affirmed.

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

[2] Arrowhead asserts in its brief that the trial court was "wrong" that the ECS product first became available in November 2008 because "the full line of ECS products was available to Parker to sell a full year earlier." As Arrowhead offers no record cite for this claim, that "fact" is not properly before us and we do not consider it. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) ("[I]t is not the duty of this court to sift and glean the record *in extenso* to find facts which will support an [argument]"); ***Parr v. Milwaukee Bldg. & Constr. Trades***, 177 Wis. 2d 140, 144 n.4, 501 N.W.2d 858 (Ct. App. 1993) ("Ordinarily, assertions of fact that are not part of the record will not be considered.").