COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2331 **Cir. Ct. No. 2010CV871**

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

TODD VERDONE AND JULIE FREIMUND,

PLAINTIFFS-APPELLANTS,

V.

WADS WOODWORKS, INC. AND ELIZABETH WADZINSKI,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Todd Verdone and Julie Freimund (collectively "Verdone"), pro se, appeal a judgment dismissing their suit against Wads Woodworks, Inc. and Elizabeth Wadzinski. Verdone contends the circuit court erred by granting summary judgment in Wads' favor on the majority of his claims;

by dismissing any remaining claims after a trial to the court; and by dismissing the suit against Wadzinski, in her individual capacity, for failure to state a claim. Verdone also challenges the denial of his motions to amend the complaint and to disqualify the judge. We reject Verdone's arguments and affirm the judgment.

BACKGROUND

¶2 In July 2008, Verdone entered into a contract with Wads for the construction and delivery of kitchen cabinets. The cabinets were delivered on April 9, 2009, and Verdone installed the cabinets himself. On June 4, 2010, Verdone contacted Wads demanding that it fix alleged defects in the cabinets. When Wads refused, Verdone filed the underlying action alleging the following contract breaches: (1) failure to provide solid oak wood cabinets; (2) no electrical outlets on the breakfast bar; (3) no lattice pantry doors; (4) no crown molding; (5) delayed delivery of the cabinets; (6) problems with the doors closing, not being straight and/or not being level; and (7) no mortise and tenon joints on the doors. Wadzinski, in her individual capacity, moved to be dismissed from the action, and Wads moved for summary judgment.

¶3 The court dismissed Wadzinski and granted summary judgment on most of Verdone's claims. The court denied Verdone's subsequent motion to amend the complaint with fraud and other tort claims and also rejected Verdone's motion to disqualify the judge. After a trial to the court, Verdone's remaining claims were dismissed. This appeal follows.

DISCUSSION

¶4 Verdone intimates the circuit court erred by dismissing the suit against Wadzinski, in her individual capacity.[1] Wadzinski was dismissed on the ground that the complaint did not allege fraud or any other tort for which she could be held liable. We review a motion to dismiss for failure to state a claim independently, accepting as true the facts alleged in the complaint. *See* ***Town of Eagle v. Christensen***, 191 Wis. 2d 301, 311-12, 529 N.W.2d 245 (Ct. App. 1995).

¶5 Here, the contract at issue was between Verdone and Wads, and the complaint alleged only contract breaches. Although the court acknowledged that subsequent filings by Verdone included fraud allegations, Verdone was required to plead "the who, what, when, where and how" of a fraud claim in his complaint. ***Friends of Kenwood v. Green***, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271; *see also* WIS. STAT. § 802.03(2)[2] ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). Because there was no allegation in the complaint itself that could

[1] We note that the purported issues, as briefed, are not clear. Further, Verdone's brief has little supporting argument and contains conclusory allegations and assumptions with minimal application of the law to the facts. Although we may decline to address arguments that are inadequately briefed, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992), we will address Verdone's arguments as best we understand them.

[2] All references to the Wisconsin Statutes are to the 2011-12 version.

be construed to state a cause of action against Wadzinski in her individual capacity, the circuit court properly dismissed her from the suit.[3]

¶6 Verdone also challenges the circuit court's decision to grant Wads summary judgment on the majority of his claims.[4] We review a grant of summary judgment independently, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶7 Verdone alleged Wads breached the contract by utilizing solid oak wood on only the front of the cabinets. The contract, however, contains the following cabinet description: "Solid OAK wood" and "All maple grain washable laminate interiors." Further, the contract specified that all merchandise "must be inspected at time of delivery" and, if the merchandise was defective, Wads was to be notified within twenty-four hours of delivery. Significantly, the contract also provided: "If you wish to return any item to the shop, do not install it. No rework will be done on cabinetry installed." Because the contract specified laminate

[3] The court properly noted, in the alternative, that even if Verdone had pleaded tort claims against Wadzinski, such claims would be barred by the economic loss doctrine, which requires contracting parties to pursue only contractual remedies for economic losses caused by an alleged breach of contract. ***Linden v. Cascade Stone Co.***, 2004 WI App 184, ¶¶7–8, 276 Wis. 2d 267, 687 N.W.2d 823 (citations omitted). Tort claims barred by the economic loss doctrine do not state claims upon which relief could be granted.

[4] As a preliminary matter, Verdone appears to argue that the summary judgment motion was untimely under WIS. STAT. § 802.08(1) because it was filed more than eight months after the summons and complaint were filed. That statute provides, however, that a party may move for summary judgment at any time "within eight months of the filing of a summons and complaint *or within the time set in a scheduling order*." (Emphasis added.) Here, the parties' deadlines were governed by a scheduling order and the motion was timely under that order.

interiors and Verdone installed the cabinetry, the circuit court properly granted summary judgment on this claim.

¶8 Verdone challenged the breakfast bar design, claiming it failed to meet state code for electrical outlets. As the court noted, it is undisputed that Verdone was the general contractor and secured all building permits. Further, Verdone did not request inclusion of electrical boxes in the breakfast bar and approved the project plans. Summary judgment for this alleged breach was properly granted.

¶9 Verdone also challenged Wads' conceded failure to provide lattice pantry doors. It is undisputed, however, that the lattice pantry doors were an impossibility with the selected "triple beaded mitered door." Wads remedied this departure from the contract by constructing and delivering replacement pantry doors. Verdone accepted delivery and payment was made. The court, therefore, properly granted summary judgment on this claim.

¶10 Regarding Wads' alleged failure to provide crown molding, the contract specifies that although "trim" is shown on layout drawings, it "must be listed on the price sheet to be included in the contract," and "[i]f it is not listed in the pricing area, it is shown for graphics only." The contract indicates that "no" moldings were ordered. Summary judgment was properly granted on this claim as well.

¶11 Verdone also alleged that Wads failed to deliver the cabinets by the end of March 2009, as promised under the contract. Wads explained, however, that design changes to the home itself altered the delivery date. Specifically, it is undisputed that Wads was unable to take final measurements necessary to complete the cabinets until February 2009, when the house was ready for such

measurements. The cabinets were then delivered on April 9, 2009. Although not delivered as expected under the contract terms, this claimed breach was not actionable as Verdone contributed to the delay.

¶12 Verdone also challenges the circuit court's denial of his motion to amend the complaint with fraud and other tort claims. Whether to permit an amendment to a complaint later than six months after it has been filed is committed to the sound discretion of the circuit court. ***Columbia Propane, L.P. v. Wisconsin Gas Co.***, 2003 WI 38, ¶13, 261 Wis. 2d 70, 661 N.W.2d 776. A circuit court properly exercises its discretion when it considers the relevant facts, applies the correct law, and articulates a reasonable basis for its decision. ***Krebs v. Krebs***, 148 Wis. 2d 51, 55, 435 N.W.2d 240 (1989).

¶13 Here, Verdone sought to amend the complaint more than two years after it was filed. The circuit court noted that the amended complaint was mostly a "rehash" of earlier claims that had been dismissed on summary judgment. To the extent it alleged fraudulent representations in violation of WIS. STAT. § 100.18, Verdone conceded at the motion hearing that although he had been aware of the alleged violation of this statute, he "was setting back, waiting to use that when [he] got Wadzinski on the stand." Citing WIS. STAT. § 802.09(1), Verdone argues that leave to amend a pleading "shall be freely given at any stage of the action when justice so requires." Justice, however, does not require amending a complaint where the delay is grounded in an attempt to ambush a witness, and the amendment otherwise rehashes earlier claims. The circuit court properly denied the motion to amend the complaint.

¶14 Next, Verdone argues the record does not support the circuit court's decision to dismiss his remaining claims following a court trial. When reviewing

the sufficiency of the evidence after trial to the court, we must affirm the court's decision unless it is clearly erroneous. *See* WIS. STAT. § 805.17(2). Further, when acting as factfinder, the circuit court is the ultimate arbiter of witness credibility. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶15 With respect to Verdone's claim that there were no mortise and tenon joints on the doors, the court found that Verdone's own expert conceded the cabinets were not negligently constructed, and the double dowels utilized were "about equal to mortise and tenon" and "served the same purpose."[5] With respect to Verdone's claims that the cabinet doors would not close and were not straight or level, the court found that Verdone failed to meet his burden of proving that the alleged defects were directly caused or related to inadequate construction. Rather, the court found that any defects were due to improper installation, humidity or a combination of both. The court further emphasized that to the extent the cabinets were delivered "in a substandard format," Verdone installed them without any complaint to Wads, contrary to the contract terms. The evidence supports the court's decision to dismiss Verdone's claims.[6]

[5] Although Verdone provided us with the transcript of the circuit court's oral pronouncement, he did not provide us with the full transcript of the court trial. It is an appellant's responsibility to provide this court with transcripts. When an appellant fails to do so, our review is limited to the portions of the record available to us. *See* ***Ryde v. Dane County Dep't of Soc. Servs.***, 76 Wis. 2d 558, 563, 251 N.W.2d 791 (1977). Further, "when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling." ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993).

[6] To the extent Verdone appears to raise arguments regarding a motion for reconsideration he filed, our jurisdiction in this appeal is limited to reviewing the "Findings of Fact, Conclusions of Law & Judgment" entered on October 8, 2013.

¶16 Finally, Verdone contends the circuit court judge should have recused himself "due to willful and deliberate bias and prejudice [sic] conduct."[7] Verdone's claim, however, is based on what he interprets as "wholesale disregard, misapplication, and failure to recognize controlling precedent." Nothing in the record supports Verdone's argument, and "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." ***Liteky v. United States***, 510 U.S. 540, 555 (1994).

¶17 Finally, in its brief, Wads argues that Verdone's appeal is frivolous and requests an award of actual attorney fees and costs pursuant to WIS. STAT. RULE 809.25(3). In order for parties before this court to have the proper notice and opportunity to be heard, parties wishing to raise frivolousness must do so "by making a separate motion to the court," thereby allowing the parties and counsel a chance to be heard. ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621. Here, Wads did not file a separate motion but, rather, made the request in its respondent's brief. Our supreme court has cautioned, however, that "a statement in a brief that asks that an appeal be held frivolous is insufficient notice to raise this issue." ***Id.*** Because Wads failed to file a separate motion, its request is denied.

By the Court.—Judgment affirmed.

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

[7] We note with concern that Verdone's brief utilizes sharp and unwarranted criticism of the circuit court judge. We advise Verdone that "disrespectful criticisms made in this court upon the judges of the court below, are offensive, not only to those courts but to [ours]." ***Hanson v. Milwaukee Mechs.' Mut. Ins. Co.***, 45 Wis. 321, 324 (1878).