**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

February 18, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-0138**

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

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**JOHN P. LIVESEY, SR., AND BONNIE M. LIVESEY,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**AURORA HEALTH CARE, INC., AND**
**AURORA MEDICAL GROUP, INC.,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. John P. Livesey, Sr. and Bonnie M. Livesey appeal from a summary judgment in favor of Aurora Health Care, Inc. and Aurora Medical Group, Inc. (Aurora). We affirm.

An appeal from a grant of summary judgment raises an issue of law which we review de novo by applying the same standards employed by the trial court. *See* ***Brownelli v. McCaughtry,*** 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *See* ***Streff v. Town of Delafield,*** 190 Wis.2d 348, 353, 526 N.W.2d 822, 824 (Ct. App. 1994).

John Livesey is a commercial real estate developer, manager and lessor. This dispute involves an Oshkosh retail shopping center owned by Bonnie and managed by John. Expecting to have vacant medical clinic space in the shopping center at the end of December 1993, John (hereafter, Livesey) contacted Donald Nestor, Aurora's senior vice president for business and finance, in March 1993 about the available clinic space. Nestor told Livesey that Aurora planned to open a clinic in Oshkosh in early 1994. In the ensuing weeks, Livesey and Nestor negotiated[1] various lease terms and agreed that Livesey's counsel would draft a lease.

After an exchange of draft leases, numerous contacts between Livesey and Nestor, and a meeting at the proposed clinic space to discuss the disposition of the prior tenant's fixtures, Livesey sent an October 12, 1993 letter confirming what he believed to be Aurora's commitment to buy the fixtures. In response, Aurora's counsel sent Livesey's counsel a letter in which he stated that "Aurora has made no 'commitment' to purchase any equipment or fixtures (or

[1] Livesey contends that he and Nestor agreed on many lease terms. We need not address Livesey's characterization of the negotiations for reasons which will become apparent later in this opinion.

even to lease the space) as referenced in the [October 12] letter. We were offended by the letter suggesting Aurora is becoming committed by its inactivity. Please understand that Aurora makes its commitments in writing.... We would expect when the Lease is signed that a part of the deal would include the equipment. But until the Lease is signed Aurora has made no commitments." Livesey's counsel informed him of the letter and Livesey contacted Nestor who, according to Livesey, disavowed the letter and reassured Livesey that they had a deal.

Further exchanges regarding lease drafting occurred. In a November 16, 1993 letter commenting on Livesey's most recent lease draft, Aurora's counsel stated that, "We hope we can work out an arrangement [between Aurora and Livesey]. Obviously, we need to have a fully executed lease before Aurora Medical Group, Inc. is bound." In his deposition, Livesey's counsel recognized that Aurora was not bound in the absence of a signed lease.

On December 1, 1993, Nestor, Livesey and their counsel met at Aurora's offices. Livesey contends that he and Nestor discussed lease terms and agreed to the remainder of the terms later that month. Aurora's summary judgment submissions indicate that Livesey did not raise the issue of the contradictory messages he was receiving from Nestor and counsel regarding Aurora's intentions vis-à-vis the proposed clinic space. Aurora also contends that neither Livesey nor his counsel ever expressed Livesey's view that Aurora was bound to lease the clinic space based on Nestor's December 1 oral representations.

On December 17, 1993, Livesey's counsel forwarded a third draft lease to Aurora. The draft was stamped "draft" and stated at paragraph 24h that the lease would be effective only upon execution and delivery by the parties.

Additional drafting continued into February 1994. Thereafter, discussions regarding an option to purchase ensued.

Livesey's counsel acknowledged in March 1994 that negotiations were continuing and a draft lease and option to purchase were submitted in June and September 1994. Discussions continued into 1995. In April 1995, Nestor advised Livesey in writing that Aurora had decided not to open a clinic on Livesey's property. The letter also stated that Aurora was prepared to purchase the clinic fixtures from Livesey at his cost ($15,000). Aurora opened several clinics in the Oshkosh area in the first half of 1995.

Livesey sued Aurora under § 706.04, STATS., for breach of lease on promissory estoppel and unjust enrichment grounds, and common law unjust enrichment, promissory estoppel and misrepresentation (intentional, strict responsibility, and negligent). The trial court granted summary judgment to Aurora because, inter alia, Livesey did not reasonably rely upon Nestor's representations.

Livesey's summary judgment materials focused on the interactions between him and Nestor and their respective counsel. However, the summary judgment record reveals dispositive and uncontested fact: Aurora repeatedly advised Livesey in writing that it would not be bound to any agreement unless said agreement was signed by the parties. It is undisputed that the parties never executed a written lease for the clinic space or a written agreement to purchase fixtures. As will be discussed below, this undisputed fact supports summary judgment in favor of Aurora on all of Livesey's claims.

On appeal, Livesey concedes that the parties never executed a written lease but that there are material factual issues regarding the parties'

agreement to the essential terms of the clinic lease which should have precluded summary judgment. While § 706.04, STATS., permits enforcement of a transaction in land which does not satisfy one or more of the formal requirements of § 706.02, STATS., we conclude that this statute does not afford relief to Livesey. In order for a real estate transaction to be enforceable under § 706.04, it must be shown that the parties had an agreement relating to the real estate. *See* ***Nelson v. Albrechtson,*** 93 Wis.2d 552, 561, 287 N.W.2d 811, 816 (1980). Here, Aurora made clear in writing that it would not be bound until a written agreement was executed. Aurora was entitled to assert this position in negotiations. To say otherwise would put a substantial chill on all bargaining, business or otherwise. *See* ***Skycom Corp. v. Telstar Corp.,*** 813 F.2d 810, 815 (7th Cir. 1987). Additionally, terms of the agreement remained open, e.g., the starting date for the lease and an option to purchase. Based on the foregoing, there was no agreement between the parties. Therefore, Livesey's claims under § 706.04 fail.

Having addressed Livesey's claims under § 706.04, STATS., we turn to his common law promissory estoppel and misrepresentation claims. Reasonable reliance is a component of intentional and strict liability misrepresentation and promissory estoppel. *See* WIS J I—CIVIL 2401 (Misrepresentation: Intentional Deceit); WIS J I—CIVIL 2402 (Misrepresentation: Strict Responsibility); and ***U.S. Oil Co. v. Midwest Auto Care Servs.,*** 150 Wis.2d 80, 92, 440 N.W.2d 825, 829 (Ct. App. 1989) (promissory estoppel). Because Aurora made clear in writing that it would not be bound in the absence of a signed agreement, the trial court did not err in holding that, as a matter of law, Livesey did not reasonably rely on Nestor's oral representations which were inconsistent with the written statements. We agree. Where the facts are undisputed, reasonable reliance is a question of law. *See* ***Ritchie v. Clappier,*** 109 Wis.2d 399,

406, 326 N.W.2d 131, 134 (Ct. App. 1982). A representation upon which no reasonable reliance may be placed will not support a misrepresentation action. *See* ***id.*** at 404, 326 N.W.2d at 134. In the absence of disputed facts regarding reasonable reliance by Livesey, summary judgment for Aurora was proper.

Turning to Livesey's negligent misrepresentation claim, an element of that claim is a representation of present or preexisting fact that was false. *See* ***Consolidated Papers, Inc. v. Dorr-Oliver, Inc.,*** 153 Wis.2d 589, 593, 451 N.W.2d 456, 459 (Ct. App. 1989). Here, it is undisputed that Nestor expressed Aurora's intention to open a clinic in Oshkosh. This was not a false representation because Aurora ultimately did open clinics in Oshkosh, albeit not on Livesey's property. We reject Livesey's claim that Aurora represented that it would open a clinic in his shopping center. As stated earlier, Aurora made clear that its agreements were made in writing. Therefore, Aurora cannot be bound by representations of its intentions regarding the clinic space. The record supports summary judgment for Aurora on this claim.

Finally, we turn to Livesey's unjust enrichment claim. The elements of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention by the defendant of the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value. *See* ***Puttkammer v. Minth,*** 83 Wis.2d 686, 688-89, 266 N.W.2d 361, 363 (1978). Livesey did not show a material issue of fact regarding the benefit conferred upon Aurora of Livesey's removal of the rental property from the lease market during the parties' negotiations. At the summary judgment hearing, Livesey argued that the benefit conferred upon Aurora was that Aurora had a fallback lease option should its other negotiations with other landlords in the

Oshkosh area fall through. The trial court questioned whether damages associated with Livesey's act of taking the property off the market such that a benefit was conferred upon Aurora could be measured. We agree with the trial court that Livesey did not demonstrate a material factual dispute regarding the benefit conferred upon Aurora such that Livesey could avoid summary judgment on this claim.

The preceding analysis also disposes of Livesey's claim relating to the fixtures Livesey purchased from the previous clinic tenant. Aurora never signed an agreement to purchase the fixtures.

*By the Court.*—Judgment affirmed.

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