COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-1356

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

PED, INC., AND FRIENDSHIP LIVING CENTERS, INC.,

PLAINTIFFS-RESPONDENTS,

V.

KENNETH R. LOEBEL, SHIRLEY M. LOEBEL, ARNOLD J. GAZINSKI, ANN M. GAZINSKI, RONALD J. HOEPFL, NAN K. HOEPFL, JOHN D. SCHROEDEL, GARY E. SIMMONS AND PENNY A. SIMMONS,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-JOINT-APPELLANTS,

PAUL SCHMIT, AL STUMPF AND JOAN STUMPF,

DEFENDANTS-THIRD-PARTY PLAINTIFFS,

V.

F.D., INC.,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Reversed and cause remanded.*

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

PER CURIAM. Kenneth R. Loebel and other owners of condominium units (the owners) in the Avondale development appeal from a judgment disposing of their claims against entities involved in Avondale's development and management.

This case arises out of disputes relating to the amenities that the owners believed were going to be provided at Avondale. In particular, the owners expected that Avondale would ultimately be an adult community with a nine-hole golf course, clubhouse, swimming pool and tennis courts. When all of these amenities did not materialize and the owners protested, Friendship Living Centers, Inc. (FLC) and its wholly-owned subsidiary, PED, Inc. (PED), brought a declaratory judgment action against the owners[1] to obtain a determination that they could not be held liable to the owners for representations regarding Avondale made by River Ridge Joint Venture (RRJV), Avondale's initial developer.

FLC's and PED's second amended complaint for declaratory judgment alleged that PED, a wholly-owned subsidiary of FLC, owns, develops and sells real estate in Avondale, which was initially intended to be an adult housing development subject to covenants, conditions and restrictions (the Master Declaration). FLC provides administrative and financial support to its subsidiaries, including PED. Avondale's initial developer was RRJV, a joint

[1] According to the second amended complaint for declaratory judgment, many Avondale unit owners settled their claims in 1993.

venture formed in 1986 between F.D., Inc., and Siewert Development. F.D. was initially a wholly-owned subsidiary of Friendship Village of Greater Milwaukee, Inc. and then became a subsidiary of FLC.

The complaint alleges that Loebel purchased his unit during 1989-90 from RRJV and received disclosure materials for Avondale at that time. The contracts relating to Loebel's purchase included terms that acknowledged the information contained in Avondale's Master Declaration and bylaws, and stated that Loebel's condominium was subject to those documents. The materials also included a merger clause stating that the documents supersede all prior understandings and agreements. The declaratory judgment complaint alleges that the disclosure materials did not include any representations regarding a golf course or other recreational amenities and that any such representations did not become part of Loebel's contract due to the merger clause.

In 1991, RRJV encountered financial problems due to lagging condominium unit sales. RRJV sold Avondale to PED, another wholly-owned subsidiary of FLC. PED became the successor declarant under the Master Declaration. As a result of a marketing study, PED proposed building single-family housing and condominium units on the remaining Avondale property instead of the amenities. The proposed changes required rezoning. Loebel and other owners sought to block the rezoning and claimed that PED, as successor to RRJV, was liable either for misrepresentation damages or to proceed with the development of the golf course and other amenities mentioned in the Avondale marketing materials the owners received at the time they purchased their condominiums. PED and FLC sought declaratory relief to address these disputes.

We now turn to the appellate issues and incorporate additional facts and a description of the proceedings in the circuit court as needed to resolve those issues. Loebel argues that the court erroneously concluded on summary judgment that his counterclaim for misrepresentation under § 100.18, STATS., 1993-94, was barred by that statute's three-year statute of limitations. Loebel alleged that PED/FLC represented in the course of marketing Avondale condominiums that the development would include a golf course, swimming pool, clubhouse, tennis courts and other recreational amenities. Loebel alleged that these statements were untrue, deceptive and/or misleading.

On summary judgment, the court noted that Avondale sales representatives stated that there would be amenities in the project. By 1992, questions were being raised about the future of the development and in 1993 the owners were advised that the golf course was being eliminated from the development plan. The owners were asked to execute releases waiving any claims arising out of representations made in the Avondale marketing materials that were not also contained in the sales contract, deed or condominium documents to the extent that those representations conflicted with the proposal to eliminate the golf course and add single-family housing.

The court concluded that Loebel's counterclaim under § 100.18, STATS., was untimely because he asserted it more than three years after he purchased his unit. Loebel argues that his claim did not accrue prior to January 15, 1993, the date of PED's memorandum to the Avondale condominium associations' boards of directors stating that the golf course would be eliminated.[2]

[2] Loebel does not seek the application of a discovery rule to the three-year limitations period. This is precluded by ***Skrupky v. Elbert***, 189 Wis.2d 31, 53-56, 526 N.W.2d 264, 273-74 (Ct. App. 1994).

PED argues that the deceptive advertising claim accrued when the purchase contracts were entered into and expired three years later.

Section 100.18, STATS., is the deceptive advertising statute. The statute contains the following limitations period: "No action may be commenced under this section more than 3 years after the occurrence of the unlawful act or practice which is the subject of the action." Section 100.18(11)(b)3.

Loebel argues that the unlawful act or practice was PED's January 15, 1993, stated intention to eliminate the golf course from the Avondale development. We agree.[3] For purposes of the § 100.18, STATS., claim, the representations regarding the golf course cannot be deemed deceptive until they were abandoned in January 1993.[4] Loebel timely asserted his deceptive advertising claim in his November 17, 1993 answer and counterclaim. *See* § 100.18(11)(b)3. The circuit court erred in dismissing the claim on statute of limitations grounds.

PED contends that § 100.18, STATS., does not apply because condominiums are governed by ch. 703, STATS. We reject this argument. Section 100.18 has a broad reach and is intended "to protect the public from all untrue, deceptive or misleading representations made in face-to-face sales …." ***Grube v. Daun,*** 173 Wis.2d 30, 57, 496 N.W.2d 106, 116 (Ct. App. 1992). In ***Grube,*** the court stated that § 100.18 applies to sales of real estate. *See* ***id.***

[3] In so stating, we do not suggest an answer to the factual question of whether such representations were made as part of the purchase of Loebel's condominium or comment on the legal consequences of such representations. Rather, we merely mark the event that commenced the limitations period set forth in § 100.l8(11)(b)3, STATS.

[4] PED does not assert that the owners were advised at an earlier date that the golf course was being eliminated.

Finally, we reject PED's contention that the reference to "person" in § 100.18(11)(b)2, STATS.,[5] necessarily confines the liable party to live persons and excludes firms, corporations or associations. This argument flies in the face of the stated purpose of the statute and would insulate most entities from liability which the legislature has clearly chosen to impose. Moreover, "person" includes "all partnerships, associations and bodies politic or corporate," § 990.01(26), STATS., unless such a construction produces "a result inconsistent with the manifest intent of the legislature," § 990.01. Here, it is PED's construction that is inconsistent with the manifest intent of the legislature.

We turn to the circuit court's rejection on summary judgment of Loebel's claim that PED, as successor to RRJV, is liable in strict responsibility misrepresentation for the representations made in the Avondale materials regarding the golf course and other amenities. Loebel alleged that F.D., Inc., RRJV and Avondale Realty represented that Avondale would include a golf course and other amenities and that F.D. and RRJV should have known that these representations were untrue or misleading. Loebel alleged that he justifiably relied on these representations.

We review decisions on summary judgment by applying the same methodology as the circuit court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995); § 802.08(2), STATS. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

[5] Section 100.18(11)(b)2, STATS., provides: "Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees ...."

See ***M & I First Nat'l Bank***, 195 Wis.2d at 496-97, 536 N.W.2d at 182. Summary judgment cannot be granted if there is a dispute regarding material facts or if different inferences might be drawn from the facts. *See* ***Leverence v. United States Fidelity & Guar.,*** 158 Wis.2d 64, 74, 462 N.W.2d 218, 222 (Ct. App. 1990).

The court held that there were no actionable misrepresentations relating to the golf course. Because this decision is premised on fact finding, which is inappropriate on summary judgment, we reverse. Strict responsibility misrepresentation requires an untrue factual representation that the listener believes to be true and upon which he or she relies to his or her detriment. *See* ***Grube***, 173 Wis.2d at 53-54, 496 N.W.2d at 114. Additionally, the representation must be made on personal knowledge concerning a matter about which the declaring party purports to have knowledge so that the declaring party "may be taken to have assumed responsibility as in the case of warranty." ***Id.*** at 55, 496 N.W.2d at 115.

The court noted that the Master Declaration and related documents make representations about recreational amenities, including the golf course. However, the court reasoned that because the documents deny the condominium owner an ownership interest in the course and regulate the owner's use of the course, the representations would not be actionable in strict responsibility misrepresentation. We disagree and conclude that the qualifications regarding the amenities do not necessarily insulate the representations from being actionable. We think this is a jury question.

Loebel alleges that PED and FLC lacked authority to change the planned scope of the Avondale development with regard to amenities, the type of housing in the development and age restrictions (i.e., adults only). Loebel alleges a connection among the various entities involved in the development of Avondale as

follows: FLC is the parent corporation of F.D., the two entities have common officers and boards of directors, and F.D. was grossly undercapitalized at its incorporation. FLC dominated and controlled the policy and business practices of F.D. and F.D. served as a business conduit for FLC. PED was created by FLC in January 1991, is the alter ego of F.D., shares the same officers, directors and purpose as F.D., and was grossly undercapitalized at its incorporation. FLC used its control over F.D. and PED to harm Loebel and perpetrate a violation of § 100.18, STATS. Accordingly, Loebel sought to have PED declared the alter ego of F.D. and to hold FLC liable for PED's and F.D.'s acts, omissions and misrepresentations.

The court found competing inferences regarding the creation of PED and the dissolution of RRJV (the initial developer and a joint venture between F.D. and Siewert Development). However, the court did not deem these competing inferences material because it had previously granted summary judgment regarding the alleged misrepresentations about the golf course and other amenities. According to the court, its "previous decision [regarding misrepresentation] in effect negated a finding of fraud or misrepresentation as to those particular claims." The court concluded that Loebel had not identified any particular representation for which F.D., PED or FLC should be held liable. However, because we have reversed the court's disposition of Loebel's § 100.18, STATS., deceptive advertising and strict responsibility misrepresentation claims, we must also reverse its decision on whether other entities, if any, can be held liable because the latter decision was premised in part on the former. Additionally, the complex nature of the case and the circuit court's acknowledgment of conflicting inferences regarding the creation of PED and the dissolution of RRJV require a trial. *See* ***Peters v. Holiday Inns, Inc.***, 89 Wis.2d

115, 129, 278 N.W.2d 208, 215 (1979) (matters of complex factual proof usually cannot be decided on the basis of affidavits and depositions).

Finally, Loebel disputes the circuit court's approval of the 1993 amendment to the age restriction and adults-only provisions of the Master Declaration. The court found that the declaration was properly amended and that the deletion of the age restriction was valid. Because this claim is linked to Loebel's claim that PED is the alter ego of F.D., we conclude that it should also be addressed at trial.[6]

By the Court.—Judgment reversed and cause remanded.

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

[6] Any argument not addressed in this opinion is deemed rejected. *See* ***State v. Waste Management of Wis., Inc.,*** 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1977) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").