COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3349

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

DANIEL L. THEKAN,
D/B/A LANDMARK BUILDERS,

PLAINTIFF-APPELLANT,

V.

LINDA REVANE AND MICHAEL REVANE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Daniel L. Thekan, d/b/a Landmark Builders (Thekan), appeals from an order dismissing his action against Linda and Michael Revane. Because dismissal was proper, we affirm.

Thekan's amended complaint alleged that he entered into a $46,500 remodeling contract with the Revanes and that extras, i.e., work above and beyond the terms of the original contract, were to be billed at the rate of $18 per hour. Thekan claimed that he provided extras totaling $26,760, $6000 of which was paid by the Revanes. Thekan's complaint alleged that the remaining $20,760 represented extras completed to the Revanes' satisfaction and that their failure to pay for the extras unjustly enriched them by the value of the work and the materials provided. Thekan also alleged that the extras were provided and accepted without the use of written change orders as required by the contract. The Revanes admitted the existence of a written contract but denied that the alleged extras were outside the contract.

The Revanes moved to dismiss the amended complaint because a claim for unjust enrichment under an implied contract is inconsistent with a claim based upon the existence of a valid express contract. The Revanes further claimed that they did not request or authorize the extra work performed by Thekan.

The trial court concluded that because the parties had a written contract, Thekan could not maintain a claim for unjust enrichment. The court further noted that the exhibits to the amended complaint did not substantiate that the parties entered into written change orders as required by the contract. While Thekan pled the existence of a written contract, he did not allege that the Revanes violated the terms of the contract which required written change orders. The court found no theory under which Thekan could recover and dismissed the amended complaint.

> A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint. All facts pleaded and all reasonable inferences therefrom are admitted as true, but only for the purpose of testing the

> legal sufficiency of the claim, not for trial. A complaint should not be dismissed for failure to state a claim unless it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegations. The pleadings are to be liberally construed to do substantial justice to the parties. Whether a complaint states a claim upon which relief may be granted is a question of law and this court need not defer to the circuit court's determination.
>
> We test the sufficiency of the plaintiff's amended complaint by first setting forth the facts asserted in the complaint and then analyzing each of the five legal theories upon which the plaintiff rests her claim for relief.

Watts v. Watts, 137 Wis.2d 506, 512, 405 N.W.2d 303, 306 (1987) (citations omitted).

On appeal, Thekan argues that by pleading unjust enrichment and breach of contract in the alternative, he stated a claim upon which relief can be granted. We disagree. The law is clear that if a contract covers the subject of a claim, an unjust enrichment claim will not also be present. *See* ***Continental Cas. Co. v. Wisconsin Patients Compensation Fund,*** 164 Wis.2d 110, 118, 473 N.W.2d 584, 587 (Ct. App. 1991).

Thekan attempts to distinguish ***Continental*** and the case upon which it relies for this proposition, ***Watts***. However, subsequent decisions of this court have cited ***Continental*** for the proposition challenged by Thekan. *See* ***Greenlee v. Rainbow Auction/Realty Co.,*** 202 Wis.2d 653, 671, 553 N.W.2d 257, 265 (Ct. App. 1996). In ***Greenlee,*** the plaintiff alleged an unjust enrichment claim as well as a breach of contract claim. *See* ***id.*** The ***Greenlee*** court relied on ***Continental*** in holding that "[t]he doctrine of unjust enrichment does not apply where the parties have entered into a contract." ***Greenlee,*** 202 Wis.2d at 671, 553 N.W.2d at 265. The law in this area is clear.

Thekan challenges the trial court's finding that the parties conceded that written change orders were not employed, pointing to that portion of the record which he contends substantiates that the Revanes made written requests for deviations from the contract. Thekan's argument ignores that this case was before the trial court on the Revanes' motion to dismiss the amended complaint. The amended complaint itself alleges that the extras were provided without employing written change orders as required by the parties' contract. While a complaint must be liberally construed, we cannot read into it what the plaintiff has failed to plead or ignore what the plaintiff has pled.

We acknowledge that Thekan's amended complaint alleges that the absence of written change orders "constitut[ed] a waiver of the written requirement contained in the original contract." However, Thekan's appellant's brief does not argue the significance of this allegation for the Revanes' motion to dismiss. Rather, Thekan argues that the record reveals he performed work outside of the contract, not that the parties modified the contract's written change order requirement by their conduct.

By the Court.—Order affirmed.

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