COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3399

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

MARGARET T. KANE,

PLAINTIFF-APPELLANT,

V.

TIMOTHY BERKEN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: VIVI L. DILWEG, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

HOOVER, J. This appeal involves an alleged forty-year-old oral agreement to share Green Bay Packers tickets among friends. The arrangement dissolved in 1997, resulting in Margaret Kane initiating this litigation. Kane asserts a right to and interest in the tickets now registered in the name of Timothy

Berken, the son of Raymond Berken, one of the original parties to the agreement. On summary judgment, the circuit court dismissed Kane's action, concluding that the ticket agreement was a year-to-year contract that expired at the end of the year if not renewed. Kane contends the circuit court erred by reaching this determination because she had alternatively pled an underlying agreement for continuous ongoing common ownership upon which various causes of action depend. Thus, Kane argues, factual issues remain as to the existence and nature of her right to and interest in the tickets, and summary judgment was inappropriate.

We agree with Kane that her complaint can be construed to allege an executed agreement for common ownership of the tickets. The circuit court, however, correctly dismissed Kane's breach of contract claim because it pleads only an annually-renewed agreement. We conclude that her complaint's remaining claims are viable and the record reflects factual disputes with respect to those claims. Accordingly, we reverse the summary judgment on all causes of action except Kane's breach of contract action and remand for further proceedings.

Kane's complaint alleges that beginning in 1957, Kane, her now deceased husband, and several other couples, including Raymond Berken and his wife, orally agreed to jointly purchase Green Bay Packers tickets for the purpose of furthering the social relationship and interaction of the parties. The couples pooled their equal contributions and paid in advance for the tickets. Raymond Berken assumed the responsibility of handling the initial registration and purchase on the group's behalf.

In 1989, Raymond gave his interest in the tickets to his son, Timothy Berken, and changed the Green Bay Packers ticket office registration as well. Tim continued the arrangement with Kane without change from 1989 until 1996. In

the fall of 1996, Berken notified Kane he would not give her any playoff tickets that year nor any tickets for the subsequent year. He refused her payment the following year. Kane did not consent to these decisions. She alleges that at age seventy-two, she has no reasonable expectation of procuring season tickets during her lifetime because the waiting list exceeds thirty years.

Kane pled five separate causes of action against Berken: (1) breach of an oral contract "renewed on a yearly basis by consent"; (2) intentional misrepresentation by Tim from his 1989 representation that he would succeed to the interest of his father, accept Kane's contribution and tender Kane her share of the tickets; (3) wrongful conversion of Kane's equitable interest in the tickets; (4) promissory estoppel; and (5) constructive trust.[1]

Berken's answer denied any agreement among the parties to share tickets and denied that Kane had any interest in the tickets. He subsequently moved for summary judgment and to dismiss for failure to state a claim. In support of his motion, Berken filed a single affidavit, from a Packer official, indicating that as far as the Packers are concerned Berken is the sole owner of the tickets.

The circuit court granted Berken summary judgment on all causes under consideration.[2] The court determined that the relevant facts were not in

[1] Kane's complaint also alleged a sixth cause of action: that she is entitled to a declaration recognizing her interest in the tickets and "quieting title to two such tickets in her name and on behalf of her heirs, successors, and assigns." At some point in the proceedings, she apparently dropped that claim and has not made any argument concerning it on appeal. We therefore deem it abandoned. *See* ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues not briefed are deemed abandoned).

[2] One issue remained after the circuit court's ruling: whether Berken breached the yearly agreement in 1996 when he refused to sell the play-off tickets to Kane. Kane did not pursue the issue.

dispute and that the statute of frauds[3] barred any claim that the "agreement" to purchase tickets for the group was a continuing contract, leaving only a year-to-year contract that either party could refuse to renew. It determined that there was no dispute that the agreement was merely "a courtesy agreement," and that Kane knew the agreement was merely a year-to-year contract.

The court concluded that because the agreement was year to year, Kane could have no equitable interest in or right to the tickets because the agreement could simply be nonrenewed.[4] Nor could Tim misrepresent the contract's nature because, again, the court found Kane knew it was an annually-renewed agreement. Because the court found the agreement subject to annual renewal, it determined that no cause of action survived. This appeal ensued.

Under § 802.06(2), STATS., a motion to dismiss for failure to state a claim shall be treated as a motion for summary judgment under § 802.08, STATS., if matters outside the pleadings are presented to the court. ***M & I Marshall &***

[3] The circuit court did not specifically identify which statute it relied upon, but we determine it to be § 241.02, STATS., which provides, in pertinent part:

> Agreements, what must be written.
>
> (1) In the following case every agreement shall be void unless such agreement or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged therewith:
>
> (a) Every agreement that by its terms is not to be performed within one year from the making thereof.

[4] The circuit court rejected the promissory estoppel claim on the grounds that there was no promise and no injustice because "[t]hey knew this was a year-to-year commitment …." It dismissed the constructive trust claim, citing "[t]here wasn't an agreement here that this would continue year after year after year." The court determined the conversion claim was not viable because Kane never had an ownership interest, that "[e]very year they asked if they could have the tickets …."

Ilsley Bank v. Town of Somers, 141 Wis.2d 271, 285 n.9, 414 N.W.2d 824, 829 n.9 (1987).[5] A motion for summary judgment must be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Section 802.08(2), STATS.; ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477 (1980). We review summary judgment rulings independently of the circuit court. *See* ***Grams***, 97 Wis.2d at 338-39, 294 N.W.2d at 477. Numerous cases set forth the procedure to be used in reviewing a trial court's grant of summary judgment, therefore we need not repeat it here.

ANALYSIS

The critical issue initially is the nature of the Kane/Berken agreement pled by Kane: was it a yearly agreement to share tickets or was it to form an association to own tickets over multiple years? If the agreement is merely year to year, this action fails because Berken could elect to not renew the agreement at any time, and Kane would have no continuing interest in the tickets, regardless of her legal theory. Alternatively, if the agreement was to form an association to purchase tickets over multiple years, Kane would have an interest in the tickets that could support her claims.

Berken contends that because Kane's complaint specifically alleges a year-to-year agreement, all of her causes of action fail. He relies on Kane's allegation in her breach of contract claim that the agreement was renewed annually. Kane contends that she alternatively alleges an association for the

[5] In this case, because Berken did not specify which claims were subject to the motion to dismiss or summary judgment motion and because he submitted an affidavit, the circuit court considered the motion to dismiss as one for summary judgment. *See* ***Radlein v. Industrial Fire & Cas. Ins. Co.***, 117 Wis.2d 605, 608-09, 345 N.W.2d 874, 876-77 (1984). Both parties treat this case as an appeal from a summary judgment, so we do as well.

ownership of the tickets with Berken as the association's agent. As such, she contends that all her claims are viable. We conclude that under a liberal reading, Kane's complaint alternatively alleges a co-ownership agreement of indefinite duration, and therefore alleges a continuing interest in the tickets.

We look initially to Kane's complaint to determine its allegations regarding the ticket agreement's nature. *See* ***Grams***, 97 Wis.2d at 338, 294 N.W.2d at 477. In doing so, we liberally construe Kane's allegations to determine if there are any circumstances under which she may recover, and to this end, we draw inferences in her favor. *See* ***Evans v. Cameron***, 121 Wis.2d 421, 426, 360 N.W.2d 25, 28 (1985).

Kane's complaint pled that in 1957, she and others agreed to jointly purchase season tickets for the use and enjoyment of five couples. They pooled their money, and Raymond Berken assumed the task of handling the initial registration and purchase because it was convenient for him. She further alleges that in 1989, when Raymond Berken transferred the ownership and registration to his son, Tim, Tim took it subject to the rights and obligations of the association. Under a liberal construction of Kane's complaint, she alleges the agreement's nature in the alternative. Only in her breach of contract claim did she allege the agreement was "renewed on a yearly basis …." Elsewhere, she alleges the agreement was to form an association to own the tickets jointly and indefinitely, with Berken acting merely as the association's agent. Once the tickets were purchased on behalf of the association and its agent thereby registered with the Packers, the agreement was fully executed. We construe the complaint to plead an alternative to a yearly-renewable ticket agreement.

Berken would have us ignore these alternative allegations. He asserts that summary judgment methodology requires that the court accept the complaint as true and that he may utilize Kane's pleadings as an admission against her. He contends that because her complaint alleges that the agreement was year-to-year, he is entitled to summary judgment.[6]

Although we agree with Berken that Kane's pleadings may be used as "admissions" for purposes of summary judgment, ***Gouger v. Hardtke***, 167 Wis.2d 504, 518, 482 N.W.2d 84, 91 (1992), that does not address alternative allegations. We are required to consider all facts alleged in Kane's complaint. *See* ***Strid v. Converse***, 111 Wis.2d 418, 423, 331 N.W.2d 350, 353 (1983). The annually renewed contract allegation is specific to the breach of contract claim. Other claims contain alternative allegations contrary to and inconsistent with a year-to-year agreement. We will not read the annually-renewed agreement into those claims.

We conclude that Kane's complaint pleads an ongoing common ownership ticket agreement and, alternatively, an annually-renewed ticket agreement. By its own terms, the annually renewed agreement expires at each

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[6] Kane's response, that her affidavit's allegations supplant her complaint's conflicting allegations was rejected in ***Gouger v. Hardtke***, 167 Wis.2d 504, 520, 482 N.W.2d 84, 91 (1992):

> ***Leszczynski*** [***v. Surges***, 30 Wis.2d 534, 141 N.W.2d 261 (1966)], however, held only that the moving party's affidavit takes precedence over the opposing party's pleadings, thereby requiring the opposing party to support its own pleadings with evidentiary facts. The moving party's own inconsistent pleadings, admissible during trial as an admission, constitute "other proof" which the opposing party may use to raise an issue of material fact.

Nor does Kane explain why, under summary judgment methodology, we would examine her affidavit when determining whether her *complaint* states a claim.

year's end unless renewed. Thus, Kane's enforcement rights would expire with the contract. Because the annually renewed agreement is contained in the breach of contract cause of action, summary judgment was properly granted on that claim. The remainder of the claims pled the association members owned the tickets and Berken was its agent. If such an agreement is proven, Kane's other claims may be viable because she had a continuing interest in the tickets. Summary judgment is therefore inappropriate on the basis of the alternative allegations in Kane's complaint.

We next examine Berken's answer and affidavit to determine whether his allegations dispute the material facts set forth in Kane's complaint. His answer denies the existence of a ticket agreement, putting the existence and nature of the agreement into issue. His affidavit does not address the agreement or whether Kane has any right to the tickets vis-à-vis Berken. For our purposes, the affidavit does not address Kane's allegations. We are therefore left with conflicting pleadings regarding the existence and nature of the agreement. On remand, the court will need to determine whether an agreement exists and, if so, the nature and extent of Kane's interest in the tickets. Those determinations cannot be resolved on summary judgment.

Because Kane's complaint pleads a continuing interest and right to the tickets, her other claims are viable. She alleges Tim misrepresented that he would continue to honor her interest in the tickets when his father gave him the tickets.[7] Similarly, his 1989 promise to honor her interest reasonably induced her

[7] For the elements of an intentional misrepresentation, *see* ***D'Huyvetter v. A.O. Smith Harvestore Products***, 164 Wis.2d 306, 320, 475 N.W.2d 587, 592 (Ct. App. 1991).

to forego obtaining her own tickets.[8] Further, she alleges Tim converted her interest in the tickets[9] and that as the association's agent, he was unjustly enriched when he abused his position as agent and failed to provide her the tickets.[10]

Finally, we examine Berken's alternative grounds for dismissing the conversion and intentional misrepresentation claims. He contends that the conversion claim is barred by the six-year statute of limitations, § 893.51(1), STATS.,[11] and that the intentional misrepresentation claim cannot be sustained because it involves a promise of future action. We reject his contentions.

Berken's argument regarding conversion asserts that the conversion took place in 1957 when his father registered the tickets in his own name. This misses the mark. Kane's conversion claim alleges that Tim, not his father, converted her equitable interest in the tickets. Although she does not allege when this happened, the reasonable inference is that Tim converted her interest in the tickets in 1997 when he refused to accept her payment or send her season tickets. A six-year statute of limitations does not bar this claim.

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[8] For the elements of promissory estoppel, *see* ***Grams v. Melrose-Mindoro Jt. Sch. Dist. No. 1***, 78 Wis.2d 569, 578-79, 254 N.W.2d 730, 735 (1977).

[9] For the elements of conversion, *see* ***Production Credit Ass'n v. Nowatzski***, 90 Wis.2d 344, 353-54, 280 N.W.2d 118, 123 (1979).

[10] For the elements of a constructive trust, *see* ***Wilharms v. Wilharms***, 93 Wis.2d 671, 678, 287 N.W.2d 779, 783 (1980).

[11] The statute of limitations for conversion is contained in § 893.51(1), STATS., which provides:

> (1) Except as provided in sub. (2), an action to recover damages for the wrongful taking, conversion or detention of personal property shall be commenced within 6 years after the cause of action accrues or be barred. The cause of action accrues at the time the wrongful taking or conversion occurs, or the wrongful detention begins.

Berken contends that Kane alleges a misrepresentation concerning what Berken agreed to do with the tickets in the future. Berken asserts that there can be no intentional misrepresentation as to an unfulfilled promise or a statement about future events. Generally, an actionable false representation must relate to present or pre-existing facts and cannot be merely unfulfilled promises or statements of future events. ***D'Huyvetter v. A.O. Smith Harvestore Products***, 164 Wis.2d 306, 320, 475 N.W.2d 587, 592 (Ct. App. 1991). "An exception to the 'pre-existing fact' rule exists, however, where the promisor, at the time the promise was made, had a present intention not to perform." ***U.S. Oil v. Midwest Auto Care Services***, 150 Wis.2d 80, 87, 440 N.W.2d at 826. "The promise itself is an implied representation of a present intent to perform, and the misstatement of present intention is a misrepresentation of material fact." ***Id***.

We conclude that Kane pled an actionable misrepresentation. She alleged Berken represented in 1989 that he would succeed to his father's interest, that the representation was false, known to be false and made with the intent that she rely on it. Our reading of her allegations is that Berken knew the representation was false at the time it was made. As such, it falls within the exception to the "pre-existing fact" rule.

In summary, because Kane's complaint and Berken's pleadings and proof show a dispute over the ticket agreement's existence and nature, summary judgment was inappropriate to determine dismissal of Kane's claims, with the exception of the breach of contract claim. Berken's alternative grounds for dismissal of the other claims do not withstand scrutiny under summary judgment methodology. Accordingly, the summary judgment is reversed as to all of Kane's claims at issue on this appeal except the breach of contract claim. On remand, the

court will need to determine whether an agreement exists and, if so, the nature and extent of Kane's interest in the Packers tickets.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded. No costs on appeal.

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