COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2522

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

HARRY J. WESOLOWSKI,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AMERICAN FAMILY LIFE INSURANCE COMPANY AND AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

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

¶1 NETTESHEIM, J. Harry J. Wesolowski, an American Family insurance agent, appeals from an order and judgment granting American Family's[1] motion to dismiss his amended complaint.[2] The dispute stems from American Family's unilateral amendment to the compensation schedules of American Family insurance agents as set out in the contracts between the agents and American Family. By the modification, American Family lowered commission rates paid to all of its agents, including Wesolowski. On appeal, Wesolowski argues that the circuit court erred in concluding that American Family could exercise its contractual right to unilaterally amend the compensation schedules without rendering the contract illusory. Alternatively, Wesolowski argues that even if the contract was not illusory, he had a vested right to renewal commissions on existing policies.

¶2 Because the agreement expressly permitted American Family to unilaterally amend the compensation schedules and because the agreement recites other consideration received by Wesolowski, we hold that the contract is not illusory. We also hold that Wesolowski did not possess a vested right to renewal commissions on existing policies. We affirm the circuit court's judgment.

[1] Our reference to "American Family" encompasses American Family Mutual Insurance Company, American Family Life Insurance Company and American Standard Insurance Company of Wisconsin. For ease of reference we will refer to the collective defendants as "American Family."

[2] Wesolowski also appeals from the provision of the judgment that denied his motion for summary judgment. Since we conclude that the circuit court properly dismissed Wesolowski's complaint for failure to state a claim, we need not address the court's further ruling rejecting Wesolowski's motion for summary judgment.

FACTS

¶3 Because the issue turns on the sufficiency of Wesolowski's amended complaint, we take the facts from that pleading. Wesolowski began working as an independent agent on behalf of American Family in October 1981. The relationship began with Wesolowski signing an American Family standard career agent's agreement. The agreement included a compensation and bonus schedule. On January 1, 1993, Wesolowski and American Family executed a new contract which did not alter the compensation and bonus schedule recited in the earlier agreement. However, the 1993 agreement contained the following provision which lies at the heart of the present dispute:

> [American Family] retains the right to change, alter, amend or terminate any compensation or bonus schedule attached hereto without notice [to] or consent [of the agent] on the date specified by [American Family].

¶4 Relying on this provision, American Family sent notice in September 1995 to all of its agents advising of a unilateral change to the compensation schedules effective January 1, 1996. The change reduced commissions on new business written by agents after the effective date of the change and also reduced commissions on renewal business with respect to policies written both prior to and after the effective date of the change.

¶5 Wesolowski brought suit against American Family challenging the modifications to the compensation schedules.[3] Among other claims, Wesolowski sought a declaration that the modification clause was unenforceable because it rendered the contract illusory. Relying on a severability clause, Wesolowski sought enforcement of the balance of the agreement, including the compensation

[3] Wesolowski's action was commenced as a class action on his behalf and other American Family agents similarly situated.

schedules. Alternatively, Wesolowski sought a declaration that American Family was at least obligated to pay higher renewal commissions under the prior compensation schedules because he had acquired a vested interest in such payments.

¶6 American Family moved to dismiss the complaint for failure to state a claim. Following a hearing, the circuit court held that the contract between the parties unambiguously permitted American Family to unilaterally change the compensation schedules and that this provision did not render the contract illusory. The court also rejected Wesolowski's alternative claim that American Family was responsible for payment of renewal commissions under the 1993 agreement. Wesolowski appeals.

DISCUSSION

¶7 Wesolowski makes two arguments on appeal. First, he challenges the circuit court's holding that the contract was not illusory. Second, he contends that even if the contract was not illusory, he had a vested right in the higher renewal commission rates on policies that were in effect before the 1996 changes to the compensation schedules took effect.

¶8 In examining the sufficiency of a complaint, we accept as true all facts pleaded by the plaintiff, as well as all inferences reasonably derived from those facts. *See* ***Gritzner v. Michael R***., 228 Wis. 2d 541, 547, 598 N.W.2d 282 (Ct. App. 1999). Further, "[a] motion to dismiss tests whether the complaint is legally sufficient to state a claim upon which relief may be granted." ***Id***. at 547-48. Such an inquiry presents a question of law that we review de novo. *See* ***id***. at 548. Nevertheless, we value the lower court's decision on questions of law. *See* ***id***.

¶9 The resolution of this case turns on our reading of a couple of key provisions from the 1993 agents' agreement. American Family's basic obligation to pay agents is recited in section 5a of the agreement: "The company agrees … [t]o pay you pursuant to the provisions of the applicable compensation schedules attached hereto and made a part hereof, such compensation to be in full payment for all services rendered by you and to be made as soon as practicable." The applicable commission rates payable for policies sold or renewed by agents on behalf of each of the underwriting companies were laid out in various schedules attached to the agreement. However, section 6d of the same agreement, entitled "Changes in Compensation Schedules," provided that American Family "retains the right to change, alter, amend or terminate any compensation or bonus schedule attached hereto without notice or your consent on the date specified by the Company."

¶10 Wesolowski contends that section 6d renders the contract illusory. As such, he contends that this provision is unenforceable but the balance of the contract is enforceable under the contract's severability clause. Wesolowski begins his argument by citing to Corbin on Contracts, which states that if "what appears to be a promise is an illusion, there is no promise." 2 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 5.28, at 142 (Joseph M. Perillo and Helen Hadjiyannakis Bender, revised ed. 1995). Wesolowski further cites the following from Corbin: an "illusory promise" is "words in promissory form that promise nothing" and "do not purport to put any limitation on the freedom of the alleged promisor." ***Id***. Wesolowski believes that Corbin's example of an illusory promise where "A's words leave A's future action subject to A's own future whim, just as it would have been had A said nothing at all" describes the situation present before us. ***Id***.

¶11 Wesolowski also contends that ***Nelsen v. Farmers Mutual Auto Insurance Co***., 4 Wis. 2d 36, 90 N.W.2d 123 (1958), and ***Gerruth Realty Co. v. Pire***, 17 Wis. 2d 89, 115 N.W.2d 557 (1962), support his cause. In ***Nelsen***, the plaintiff was a district supervisor and agent of the defendant insurance company. Initially, Nelsen worked under an oral agreement. *See* ***Nelsen***, 4 Wis. 2d at 40-41. After several years of working for the defendant in that capacity, Nelsen was sent a letter that laid out the terms of his employment. *See* ***id***. at 45. Among the terms was that Nelsen was to be paid commissions of 10% on new business and 4% on renewal business. *See* ***id***. Three years later, the defendant unilaterally changed the terms by issuing a new agreement letter whereby Nelsen would only be paid a 2% commission on renewal business. *See* ***id***. at 56. Nelsen protested the change, but continued working for the defendant under the belief that he and other "old-timers" could continue to work under the old agreements. *See* ***id***. at 46-47. Our supreme court ultimately upheld the jury's finding that Nelsen did not accept the modified terms contained in the defendant's later agreement letters purporting to change the terms of the relationship between the parties. *See* ***id***. at 57. In doing so, the court recognized the rule that "one party to a contract cannot alter its terms without the assent of the other parties; the minds of the parties must meet as to the proposed modification." ***Id***. at 55 (citing 17 C.J.S. *Contracts* § 375 (1939)).

¶12 In ***Gerruth***, the defendants signed an offer to purchase property belonging to the plaintiff. *See* ***Gerruth***, 17 Wis. 2d at 89-90. The offer was made subject to "the purchaser obtaining the proper amount of financing." ***Id***. at 90. The dispute arose after the defendants attempted to back out of the deal citing an inability to secure satisfactory financing—even after the plaintiff and another seller offered to personally finance a large portion of the purchase price. *See* ***id***. at 90-91. After recognizing that an uncertain contract could be made certain by

looking to the surrounding circumstances, *see* ***id***. at 91-92, our supreme court found that it could not do so in that case without making the contract for the parties, and, ultimately, held the contract void for indefiniteness. *See* ***id***. at 95. Wesolowski, however, seizes upon language where the court said that adopting the defendants' interpretation of the contract in ***Gerruth***—that they had the exclusive right to determine what the proper amount of financing was—would render the contract illusory. *See* ***id***. Wesolowski argues that the same principle is at play in our case.

¶13 We view ***Nelsen*** and ***Gerruth*** as readily distinguishable. This case differs factually from ***Nelsen*** in that here we have a contractual clause—section 6d—which expressly authorized American Family to amend the compensation schedules, while no such contractual language existed in ***Nelsen***. Similarly, this case differs factually from ***Gerruth*** in that here American Family did not have the unfettered discretion to void the entire contract with Wesolowski. Instead, section 6d permitted American Family to unilaterally modify or cancel only one provision in the contract, with the remainder of the contract remaining in full force.

¶14 Furthermore, we agree with American Family that the portions of Corbin cited by Wesolowski do not offer a complete account of the law concerning illusory promises. American Family aptly cites in its brief to the further commentary by Corbin on this topic: "Such an illusory promise is neither enforceable against the one making it, nor is it operative as a consideration for a return promise. Thus, *if there is no other consideration for a return promise*, the result is that no contract is created." CORBIN § 5.28, at 142-43 (footnote omitted; emphasis added). American Family points to the other nonmodifiable considerations recited in the contract, most notably an extended earnings plan that operated like a pension.

¶15 Wesolowski responds by noting that agents are not eligible for extended earnings benefits until they have completed ten years of service for the company. Thus, he concludes that this benefit does not constitute adequate consideration to agents with less than ten years' service. We disagree. While this is a contingent future right, it presumably would be an important motivating factor to an agent when choosing to sign on with American Family as an agent. As such, it constitutes an important component of the consideration, and thus prevents this contract from falling within Corbin's definition of an illusory contract.

¶16 Even if the contract is not illusory, Wesolowski argues that he had acquired a vested right to the higher renewal commissions for policies that were in effect prior to the 1996 amendment to the compensation schedules. In support, he cites to two decisions from the United States Supreme Court: ***Nolde Bros., Inc. v. Bakery Workers***, 430 U.S. 243 (1977), and ***Litton Financial Printing Division, Inc. v. NLRB***, 501 U.S. 190 (1991).

¶17 We fail to see how ***Nolde Bros.*** and ***Litton*** support Wesolowski's argument. The dispute in ***Nolde Bros.*** centered on whether severance pay mandated by a collective bargaining agreement was owed to union employees who were terminated after the collective bargaining agreement had expired. The collective bargaining agreement called for such disputes to be arbitrated, but the employer refused to honor that obligation because the agreement had expired. Although the Supreme Court ruled in favor of the union employees, the issue in the case was limited to the question of whether the employer was obligated to arbitrate the issue. "Only the issue of arbitrability is before us." ***Nolde Bros.***, 430 U.S. at 244.

¶18 Similarly, ***Litton*** focused on the arbitrability of a dispute in light of the Court's earlier holding in ***Nolde Bros***. In ***Litton***, the issue was whether layoffs by the employer after the expiration of a collective bargaining agreement were governed by the arbitration provision in the agreement. *See* ***Litton***, 501 U.S. at 193. Wesolowski seizes on the following language from ***Litton***: "[C]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.… Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement." ***Id***. at 207. However, the Supreme Court also noted that such exceptions are determined by interpretation of the underlying contract. *See* ***id***. As we have already held, the 1993 contract envisioned unilateral amendments to the compensation schedules like the one implemented by American Family in 1996. Wesolowski cannot be heard to assert a vested right to the previously higher renewal commissions where he has expressly agreed that American Family had a right to alter those payments.

¶19 On a related theme, Wesolowski also argues that the American Family modification represented an invalid retroactive amendment to the parties' agreement. But the modification was not retroactive. It did not require Wesolowski to disgorge compensation already paid under the 1993 agreement. Instead, American Family implemented a prospective change that reduced the commission rates set out in the prior schedules. As noted, this action was expressly contemplated and permitted by the 1993 agreement.

¶20 What Wesolowski would have us do is find ambiguity in the agents' agreement he signed when there is none. "If the terms of a contract are plain and unambiguous, we will construe the contract as it stands, even though the parties may have placed a different construction on it." ***Kreinz v. NDII Sec. Corp***., 138 Wis. 2d 204, 216, 406 N.W.2d 164 (Ct. App. 1987). The agreement expressly

authorized American Family to make changes to the compensation schedules. By agreeing to that provision, Wesolowski cannot be heard to argue that he had acquired a vested interest to higher commission payments under that schedule.

CONCLUSION

¶21 We hold that the contractual provision authorizing American Family to make modifications to the compensation schedules did not render the contract illusory. We further hold that the contract did not establish a vested right in Wesolowski to the higher commission rates on policies sold before the effective date of the amendment.

By the Court.—Judgment affirmed.

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