COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1760 **Cir. Ct. No. 2013CV3955**

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

EDWARD J. MENTELL,

PLAINTIFF-APPELLANT,

V.

ERHARD & PAYETTE, LLC AND WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: JUAN B. COLAS, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Edward Mentell appeals summary judgment dismissing his complaint for legal malpractice against Erhard & Payette, LLC and its malpractice insurer, Wisconsin Lawyers Mutual Insurance Company (collectively, Erhard & Payette). Erhard & Payette had represented Mentell in a negligence action against an appraiser hired to appraise a then-proposed condominium project for which Mentell was seeking financing. The circuit court granted summary judgment in favor of Erhard & Payette because Mentell failed to show that he suffered any damages from their representation of him. For the reasons discussed below, we affirm.

BACKGROUND

¶2 For purposes of summary judgment, the following facts are not in dispute. In June 2004, Mentell purchased land in Sun Prairie for the purpose of constructing a 12-unit condominium ("the condominium project"). Park Bank provided financing for the land purchase and financing for the condominium construction project. A condition for financing for the condominium project was that upon completion the project would have an appraised value of $2,650,000. In late July 2004, United Real Estate Corporation prepared an appraisal in which United determined that the condominium project had a projected fair market value of $2,625,000 upon completion. Although United's appraisal was below Park Bank's target value of $2,650,000 for financing, Park Bank provided the financing for the condominium project. We will refer to this financing as the construction loan.

¶3 Before United's appraisal was completed, Mentell entered into a construction contract with Alta Construction for the construction of the condominiums. The Alta contract provided for a guaranteed contract amount of

$1,496,800 with payments based on construction progress, and with a substantial completion date of February 2005. Ultimately, Alta did not complete the condominium project in a workmanlike manner and it was determined that an additional $700,000 would be required to complete the project and repair all defects. Mentell completed the project with another builder, but later surrendered the land and condominiums to Park Bank and ultimately declared bankruptcy.

¶4 Mentell, represented by Erhard & Payette, brought a negligence action against United based on United's July 2004 appraisal of the then-proposed condominium project. Mentell claimed that United's appraisal of the proposed condominium project overvalued the proposed condominium project.[1] United moved for summary judgment. Up until the hearing on the motion for summary judgment, Mentell had argued that he had suffered damages one of two ways as a result of United's appraisal, the specifics of which are not important for our purposes. At the summary judgment hearing, Attorney Michael Erhard abandoned those damages arguments and moved the circuit court for permission to assert a new argument on damages. The court denied that motion. The court then found that Mentell had abandoned his previously asserted damage arguments and granted summary judgment in favor of United on the ground that Mentell had failed to establish a genuine issue of fact as to whether he had been injured or damaged as a result of United's appraisal.

¶5 Mentell brought the present legal malpractice action against Erhard & Payette, alleging Erhard & Payette was negligent in Erhard & Payette's

[1] How and why United allegedly overvalued the proposed condominium project is not pertinent in this appeal and is therefore not discussed.

representation of Mentell in his lawsuit against United. Erhard & Payette moved the circuit court for summary judgment, arguing that Mentell was unable to prove he suffered any damages as the result of any negligence on their part.

¶6 The circuit court granted Erhard & Payette's motion for summary judgment. The court determined that the summary judgment submissions failed the test for legal malpractice in that the evidence, construed in the light most favorable to Mentell, did not establish that but for Erhard & Payette's negligence, Mentell would have won his lawsuit against United. Mentell appeals.

DISCUSSION

¶7 Mentell contends that the circuit court erred in granting summary judgment in favor of Erhard & Payette.

¶8 We review a circuit court's decision to grant or deny summary judgment de novo. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2015-16). We draw all reasonable inferences from the summary judgment materials in the light most favorable to the non-moving party. ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781. Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law. ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991).

¶9 On summary judgment, when the nonmoving party bears the burden of proof on an element and the moving party has submitted evidence showing that there is no triable issue of fact as to that element, then the nonmoving party must

establish that there is a genuine issue of fact by submitting evidence setting forth the specific facts as to that element. ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993). The nonmoving party cannot defeat summary judgment by merely alleging the existence of a factual dispute. ***North Highland Inc. v. Jefferson Machine & Tool Inc.***, 2017 WI 75, ¶22, 377 Wis. 2d 496, 898 N.W.2d 741. Nor can the nonmoving party rely upon unsubstantiated conclusory remarks, speculation, or testimony that is not based upon personal knowledge. ***Id.*** Applying these standards, we conclude for the reasons explained below that summary judgment in favor of Erhard & Payette is appropriate.

¶10 In a legal malpractice action, the plaintiff has the burden of proving the following four elements: (1) existence of an attorney-client relationship; (2) "'acts constituting the alleged negligence'"; (3) "'that the negligence was the proximate cause of the injury'"; and (4) damages. ***Lewandowski v. Continental Cas. Co.***, 88 Wis. 2d 271, 277, 276 N.W.2d 84 (1979) (quoted source omitted).

¶11 The parties focus on the third and fourth elements, causation and damages, which are closely linked in this context. In legal malpractice actions, proof of these two elements "entails establishing that, 'but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action.'" ***Glamann v. St. Paul Fire and Marine Ins. Co.***, 144 Wis. 2d 865, 870, 424 N.W.2d 924 (1988) (quoting ***Lewandowski***, 88 Wis. 2d at 277). This means that to defeat summary judgment, Mentell has the burden of setting forth specific facts showing that but for Erhard & Payette's negligent representation, he would have prevailed in his negligence action against United. *See* ***Transportation Ins. Co.***, 179 Wis. 2d at 290.

¶12 To prevail in his negligence action against United, Mentell bore the burden of proving each of the following four elements: "'(1) A duty on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.'" ***Avery v. Diedrich***, 2007 WI 80, ¶20, 301 Wis. 2d 693, 734 N.W.2d 159 (quoted source omitted). Accordingly, to overcome Erhard & Payette's motion for summary judgment, Mentell must point this court to evidence in the summary judgment submissions showing that United owed him a duty, United breached that duty, and United's breach of duty caused Mentell an actual loss or damages. *See* ***Transportation Ins. Co.***, 179 Wis. 2d at 290.

¶13 Erhard & Payette assert that summary judgment in its favor is appropriate because Mentell fails to point to any credible, non-speculative evidence showing that United's appraisal caused him an actual loss or damages. We agree.

¶14 Mentell argues that because United's appraisal did not properly value the proposed condominium project, he suffered financial losses that he would not have suffered had United's appraisal been accurate. Mentell asserts that had United's appraisal properly valued the condominium project, Park Bank would not have provided financing for construction of the condominiums because the appraisal amount would have been substantially below Park Bank's target value for approving the construction loan. Mentell asserts that without Park Bank's financing, "construction would not have occurred" and he would not have "continu[ed] to pay Alta." Mentell further asserts that he would have sold the land

he had purchased for construction of the condominiums, further mitigating his financial losses.[2]

¶15 In support of these assertions, Mentell points to the following evidence. First, he points to a portion of his affidavit for the proposition that he did not become aware that United's appraisal overvalued the proposed project until he was in arbitration with Alta, "years after the appraisal." In his affidavit, Mentell averred in pertinent part that United's appraisal was "completed late in the month of July[] 2004," that "[d]uring the course of arbitration against ALTA [he] learned information which caused [him] to question whether [] United['s] appraisal was correctly done," and he "eventually came to learn that indeed [United's appraisal] had not been done correctly, which caused its value to be incorrectly overstated by approximately $475,000 or roughly 20% less than the project['s] hoped for value to make it viable."

¶16 Second, Mentell points to an email from himself to Jeff Olson, the vice president of business banking at Park Bank, for the factual assertion that Park Bank would not have provided financing for Mentell's construction loan if United's appraisal had been accurate. In the email, Mentell states as follows:

> Hey Jeff,
>
> I got the 10 page fax last night, didn't see a place to sign. Was there anything in particular that I should pay attention to? As for the release prices, its hard for me to say, without seeing the appraisal. When can I get a copy of that? Cause I am obviously relying on that to help determine the sales price of these units. When are we looking at closing?

[2] Erhard & Payette argue that Mentell's arguments that he could have mitigated his financial losses from the condominium project have been forfeited by Mentell because he did not raise these arguments before the circuit court. Because our review on summary judgment is de novo, we address those arguments.

[T]hanks!

¶17 Third, Mentell points to seven pages of the construction contract between him and Alta Construction. Those pages contain provisions specifying: that the start date of the contract was July 1, 2004; a contract amount of $1,496,800.00 to be paid by progress payments throughout construction; that Mentell may terminate the contract at any time without cause; and that in the event that Mentell terminates the contract, Alta is to be paid for work executed, costs incurred by the contract termination, and "reasonable overhead and profit on the Work not executed."

¶18 Fourth, Mentell points to the following averment in his affidavit: "If [] United['s] appraisal had been properly done, I would not have gone ahead with the project and I would have either sold the lots to Brian Cason [owner of Alta Construction] as we had previously discussed, or put the lots back on the market."

¶19 Fifth, Mentell points to the deposition testimony of United's expert, Thomas Spitz, who Mentell asserts "explicitly recognized … that Sun Prairie's real estate market was performing extremely well during the relevant time period." In that portion of Spitz's deposition cited to this court by Mentell, Spitz testified as follows:

> [Question] Do you have any reason to dispute that 2005 was the best year in the last 15 years for condo sales in Dane County?
>
> [Spitz] I would have no reason to dispute it. I would have no reason to confirm it.
>
> [Question] Do you generally remember 2004, 2005, 2006 as good years for condo sales in that general area we've been discussing?
>
> [Spitz] I certainly know it to have been very strong economic growth years. I just can't speak specifically to the condo sales or certainly in a given area.

> [Question] What about home sales in Dane County?
>
> [Spitz] I believe it to have been very robust at that time, yes.
>
> [Question] The 2004, 2005, 2006 time frame?
>
> [Spitz] Correct.
>
> [Question] Subsequent years weren't so good.
>
> [Spitz] Correct.

¶20 The evidence pointed to by Mentell cannot support a jury finding that United's appraisal caused him an actual loss because of the lack of specificity. For example, Mentell asserts that the construction loan from Park Bank would not have closed if United had prepared an accurate appraisal. However, the only evidence we are directed to that concerns the construction loan is the email from Mentell to Olson, which is set forth in ¶16 above. That email was a straightforward inquiry for information by Mentell regarding several issues that did not include an appraised value cut-off at which Park Bank would be unwilling to provide Mentell a loan. Specifically, nothing in the contents of that email could lead a reasonable jury to infer that Park Bank would not go forward with the construction loan if United's appraisal value was $475,000 less. The factual proposition may be true, but Mentell does not point to evidence supporting the proposition.

¶21 Mentell asserts that his financial losses would have been mitigated but for United's appraisal because, had he known that the value was $475,000 less than anticipated, he would have cancelled his contract with Alta and not gone forward with construction of the condominiums. However, from the evidence Mentell directs us to, that evidence being only the language in Mentell's contract with Alta that permitted cancellation of the contract, a reasonable juror could at

best infer that Mentell would have been able to cancel his contract with Alta. The evidence does not indicate how much, if any, Mentell would have been able to mitigate his losses by doing so.

¶22 Finally, Mentell merely asserts that he would have sold the two lots he purchased for construction of the condominiums. This is too vague. Moreover, Mentell's expert, Spitz, declined to opine on the strength of the condo market. For that matter, in the portion of Spitz's deposition cited to this court, Spitz does not testify as to what sales were like for undeveloped or partially developed land like the lots at issue here. We acknowledge that Mentell cites to his averment that he would have sold the lots to Alta, but this averment does not contain personal knowledge as to Alta's willingness or ability to purchase the lots.

¶23 In summary, Mentell points to no evidence that the financial losses he suffered from the condominium project would have been less but for United's appraisal. Accordingly, we conclude that summary judgment in favor of Erhard & Payette was appropriate.

¶24 Mentell argues that if we determine that he failed to show that he would have prevailed in his lawsuit against United but for the negligence of Erhard & Payette, we should determine that a claim for damages against Erhard & Payette for the fees and litigation costs he expended during that litigation "must survive." We disagree.

¶25 Mentell argued before the circuit court had he is entitled to fees and litigation costs arising from the litigation against United because Erhard & Payette "should have told [him he] had no viable case." In the circuit court's decision on summary judgment, the court rejected this argument, explaining:

> There are no factual allegations [] relating to [Erhard & Fayette's] conduct, only the conclusory legal statement that they were negligent…. Because no factual allegations in the complaint or in evidentiary submissions support the claim that [Erhard & Fayette] failed to properly analyze the case ..., that claim cannot be a bar to summary judgment of dismissal.

Mentell argues that the court's rationale is erroneous because "if the evidence shows that the case [against United] was actually doomed from the start, one could infer that the attorneys who pursued that claim did so in a manner that falls below the duty of care owed to Mentell." We disagree.

¶26 Mentell misinterprets the legal standards on summary judgment. In concluding that Mentell has not shown that he would have prevailed against United but for Erhard & Payette's negligence in that matter, we are *not* concluding, as Mentell puts it, that "the evidence shows that [the litigation against United] was … doomed from the start." Rather, we are concluding that *Mentell* has failed to point this court to any evidence that he would have prevailed in that action but for his attorneys' negligence. In addition, we are not presented with any persuasive arguments that a reasonable attorney in Erhard & Payette's position would have known from the start that litigation against United was fruitless. Accordingly, we reject this argument.

CONCLUSION

¶27 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).