

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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Appeal No. 2017AP1828

Cir. Ct. No. 2015PR113B

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE MATTER OF THE PETER F. BEMIS LIVING TRUST OF 2005 AND THE
SUSAN L. J. BEMIS MARITAL TRUST:**

SUSAN L. J. BEMIS,

APPELLANT,

v.

ROBERT MELZER,

RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County:
L. EDWARD STENGEL, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Susan L.J. Bemis appeals from an order denying her “Petition for Enforcement of Settlement Agreement and Remedy of Breach,” by which she sought specific performance of “Paragraph 14” of the settlement agreement between her and Robert Melzer, as well as her costs and attorneys’ fees incurred in seeking relief. The circuit court denied Susan’s request for specific performance, based on equitable considerations and on its finding that Melzer had not substantially breached his obligations or acted in bad faith and, consequently, concluded she was not entitled to attorneys’ fees or costs. We affirm.

¶2 In about 2003, Peter Bemis became president and CEO of Bemis Manufacturing Company (BMC), a closely held Bemis family business. Susan, a BMC employee since 1988, married Peter in 2008. Melzer was Peter’s long-time friend, estate-planning attorney, and, since 1987, a member of BMC’s board of directors. Melzer drafted the Peter F. Bemis Living Trust of 2005. Peter amended and restated the Trust in its entirety in 2011 and again in 2013, named Melzer successor trustee of the Trust, and nominated Melzer to act as personal representative of his estate. Peter died in 2013. Susan is the sole residuary beneficiary of the Trust and the sole lifetime beneficiary of the Susan L.J. Bemis Marital Trust created under the Trust.¹ Peter named Melzer and Susan co-trustees of the Marital Trust.

¶3 Class B nonvoting shares in BMC (“BMC shares”) are the principal asset of the Trust. The Marital Trust initially had no BMC shares. The Trust provided that upon Peter’s death, the trustee was to distribute one-third of the then

¹ We will refer to the Peter F. Bemis Living Trust of 2005, as amended and restated in 2013, as “the Trust” and to the Susan L.J. Bemis Marital Trust as “the Marital Trust.”

remaining BMC shares to the Marital Trust. Melzer did not immediately do so.² Susan complained that he also failed to provide her with information she believed he possessed regarding BMC's current financial status, how it was positioned for the future, and the value of BMC shares. Melzer contended that some information to which he had access as a board member might not be available to shareholders.

¶4 In 2015, Susan petitioned to remove Melzer as trustee and to appoint a successor. She alleged that he breached his fiduciary duties to her and that he had conflicts of interest due to his ongoing relationships with Peter's sons and their mother, Peter's former wife, and because Melzer served on the BMC board of directors, of which Peter's brother was chairman.³

¶5 After much negotiation, Susan and Melzer settled their dispute, memorialized in a twenty-two-page settlement agreement entitled "Resignation of Trustee, Release and Indemnification Agreement, Transfer of Trust Property, and Appointment of Successor Trustee." In it, Susan agreed to release her claims against Melzer, dismiss her removal petition, and pay Melzer's legal fees incurred in defending that action. In exchange, Melzer agreed to resign his trusteeship and, in Paragraph 14, to produce to Susan outstanding discovery requests ("the Discovery") within his possession or control as of June 29, 2016, following a good-faith search for them. The Discovery related to Melzer's administration of

² In April 2016, pursuant to a temporary restraining order, one BMC share was transferred to the Marital Trust, making Susan, as co-trustee, a shareholder eligible to attend shareholder meetings. The one-share transfer matter was settled by the Settlement Agreement. At the time of the hearings in this matter in January 2017, the Marital Trust had 761 BMC shares. BMC shares are the only asset of the Marital Trust.

³ Susan, whose relationship with Peter's children and former wife is strained, suggests that some family members do not have the same level of dedication to BMC's future and to maintaining its role in the community that Peter embraced.

the Trust and included any communications with BMC, its Board of Directors, or any other person regarding administration of the Trust. Paragraph 14 also provided that if Melzer did not produce the Discovery by July 15, 2016, he would assume all reasonable attorneys' fees and costs Susan incurred in obtaining relief.

¶6 On June 29, Melzer produced several file boxes of documentation relating to the Trust. On July 21, the court dismissed the Removal Petition, approved the settlement agreement, and discharged Melzer as trustee.

¶7 Two weeks later, Susan asserted that Melzer failed to meet his Discovery production obligations. She specifically sought BMC shareholder books for 2014 and 2015, which historically were distributed at the annual shareholder meetings. Except dividend letters, the books contained all information made available to BMC shareholders to keep them apprised of the value of their investment. As a BMC shareholder and trustee of the Trust, Melzer would have had access to the books.

¶8 In fact, Susan already had a copy of the 2014 book but, believing Melzer was generally intentionally withholding documents, continued to request it from him. Melzer later testified he never had a copy. As to the 2015 book, hard copies were not distributed at the shareholder meeting. The information instead was made available to shareholders through an online portal. Due to the maintenance and licensing cost, the portal was disabled after 2015, so shareholders no longer had online access to the 2015 book. Melzer testified that he did not intend to withhold the 2015 book from Susan but, not being "a computer wizard," he only found it online shortly before day one of the hearing. BMC's corporate counsel was not sure if Melzer, despite being a director, even could have accessed the portal after 2015 due to his co-status as a shareholder.

¶9 Susan acknowledged that she could have asked BMC directly for the 2015 book but, again, wanted Melzer to produce it because, from her perspective, Melzer still was withholding Discovery. Dissatisfied with what she viewed as his spotty compliance, in September 2016 Susan filed an enforcement petition asserting an equitable claim for specific performance and seeking an award of her attorneys' fees. After a two-day hearing and additional written submissions, the court acknowledged the perhaps unintentional conflicts springing from Melzer's roles as trustee, director, shareholder, and fiduciary for Susan's benefit, but pointed out that the case was "not about whether or not there was a breach of a fiduciary responsibility," as that matter already had been settled by stipulation.

¶10 The court construed Paragraph 14 as obliging Melzer to furnish information available to him only as a BMC stockholder, not a director. It further concluded that, when Peter was alive, Susan enjoyed "a position far more privileged than either a stockholder or ... even a director," with access to "virtually unlimited information as to the workings of the corporation" and the path on which it was embarked. It acknowledged that, while Peter's death eliminated her access to such information, Melzer, too, "as her representative and stockholder" no longer would "be privy to that information that he could otherwise share with her." The court was satisfied that, while it did not think Melzer went "above and beyond his obligations," Susan failed to prove a substantial breach or that he did not exert a good-faith effort. Finally, noting Susan's admission that she possessed the 2014 book yet continued to demand it and that she had other means by which to access the 2015 information, the court found that she failed to mitigate her damages. It thus denied her requests for specific performance and damages, including attorneys' fees and costs.

¶11 On appeal, Susan alleges three grounds of error. She contends the circuit court erred when it (1) found that Melzer did not breach the Settlement Agreement; (2) held, contrary to the great weight of the evidence, that Melzer conducted a good-faith search; and (3) considered mitigation of damages despite not finding either that a breach occurred or that Paragraph 14’s stipulated damages provision was unenforceable.⁴ She asks that we reverse the circuit court’s decision and remand for the appointment of a special master to “undertake a robust and complete production of documents.”

¶12 At the outset, we disagree with Susan’s characterization that this is a “simple and straightforward contract action,” such that we should accord de novo review. Susan asked for specific performance. Our standard of review therefore is mixed. Whether a contracting party’s performance satisfies the test for substantial performance is a question of fact. *See Wm. G. Tannhaeuser Co. v. Holiday House, Inc.*, 1 Wis. 2d 370, 373-74, 83 N.W.2d 880 (1957). The test for substantial performance is whether the performance met the contract’s essential purpose. *See Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 516, 434 N.W.2d 97 (Ct. App. 1988). A circuit court’s factual findings must be upheld unless clearly erroneous. *See* WIS. STAT. § 805.17(2) (2015-16).⁵ Whether Susan met her burden of proof is a question of law we review de novo. *See Lenhardt v. Lenhardt*, 2000 WI App 201, ¶6, 238 Wis. 2d 535, 618 N.W.2d 218.

⁴ Paragraph 14 contains a fee-shifting provision for the prevailing party’s attorneys’ fees, not a stipulated damages provision.

⁵ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶13 “[A]s an equitable remedy, an award of specific performance is discretionary.” *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2010 WI 44, ¶38, 324 Wis. 2d 703, 783 N.W.2d 294. To obtain it, specific performance first must be “available as a remedy.” *Beidel v. Sideline Software, Inc.*, 2013 WI 56, ¶11, 348 Wis. 2d 360, 842 N.W.2d 240. The parties agreed in advance that it would be.

¶14 Second, there must have been “a substantial enough breach to warrant specific performance,” which the court determines by considering the covenant of good faith and fair dealing. *Id.*, ¶¶11, 27. Whether a material breach occurred is a question of fact. *State v. Jorgenson*, 137 Wis. 2d 163, 169, 404 N.W.2d 66 (Ct. App. 1987).

¶15 Susan makes much of Melzer’s late production of some shareholder meeting agendas and his nonproduction of 2000 emails. The court implicitly found that the agendas initially were overlooked due to honest error and that Susan made no showing why she believed the emails were in any way relevant.

¶16 The testimony showed, as noted, that Melzer delivered boxes of documents to his counsel’s office for production to Susan by the first deadline. He waived his attorney-client privilege with two law firms so they could produce files regarding their representation of him in his capacity as trustee of the Trust—the documents from just one of the firms comprised 1200 pages. He waived the privilege to allow file production from a third law firm that represented him in his capacity as trustee in regard to claims made by Peter’s former wife. He produced communications from accounting firms and professionals relating to the administration of the Trust. He worked with an IT professional to collect and review, for over fifteen hours, emails and texts, and produced 1000 of the 3000 total. While conceding that some Discovery was produced after the second

deadline, Melzer and the court acknowledged that the materials represented what Melzer had located and believed in good faith to be both responsive to Paragraph 14 and permissible for him to provide.

¶17 The court did not explain at length its findings that Melzer met, at least minimally, his obligations of production and good faith under the contract. It stated, however, that it reviewed the testimony, which was extensive. We can infer from the court’s ultimate conclusion and the facts of record that Susan did not meet her burden of demonstrating otherwise. See *Town of Avon v. Oliver*, 2002 WI App 97, ¶23, 253 Wis. 2d 647, 644 N.W.2d 260 (when court sitting as fact finder does not make express finding necessary to its decision, we accept implicit finding if supported by record). The court’s findings here, implicit and explicit, find record support and are not clearly erroneous.

¶18 The third consideration in obtaining specific performance goes to “the heart of the matter”—a “balancing of the equities.” *Beidel*, 348 Wis. 2d 360, ¶30. The court must consider the facts and circumstances of the individual case, and whether the equities “lie on [the plaintiff’s] side” and whether “nothing would make an order of specific performance unfair, unreasonable or impossible.” *Id.*, ¶¶11, 30 (citation omitted).

¶19 The court implicitly found that the equities do not lie with Susan. She demanded the 2014 book from Melzer for two years *after* acquiring it herself and filed the enforcement petition partly based on her claim that she needed it. Despite testifying that she needed the 2014 and 2015 book information, she later conceded that she already had the 2014 book, knew she could have asked BMC for the 2015 book, and intentionally withheld this knowledge from Melzer.

¶20 In addition, the court found that the parties’ mutual failure to “put aside petty issues and look to the bigger picture” led to “wast[ing] hundreds of thousands of dollars of attorneys’ fees” in a manner that would “shock even the conscience” of Peter. This plays into Susan’s complaint that the court focused too heavily on her failure to mitigate her damages. We see the court’s point as no more than an equitable observation that she already had, or could have had, documents she continued to demand.

¶21 If the court had concluded that Melzer substantially breached the agreement and acted in bad faith, Susan would not inevitably prevail. “[E]ven if a party meets the burden to establish that the elements exist for the equitable relief sought, a court of equity still retains the discretion to grant or deny relief.” *Richards v. Land Star Group, Inc.*, 224 Wis. 2d 829, 848, 593 N.W.2d 103 (Ct. App. 1999). We affirm the circuit court’s decision not to order specific performance or award attorneys’ fees, as it “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Since she did not prevail, Susan is not entitled to attorneys’ fees or costs.

By the Court.—Order affirmed.

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

