COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0669

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

DOMANIK SALES CO., INC.,

PLAINTIFF-APPELLANT,

V.

PAULANER-NORTH AMERICA CORPORATION,
AN ILLINOIS CORPORATION,
D/B/A HACKER-PSCHORR USA,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

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

¶1 PER CURIAM. Domanik Sales Co., Inc. appeals from a judgment dismissing its action alleging that Paulaner-North America Corporation wrongfully terminated a beer distributorship agreement. Domanik claims that

Paulaner's notice of default and cure demand did not comply with the contract, that mailing payment within the time was sufficient, that the jury should have been instructed regarding substantial performance, that Paulaner breached an implied covenant of good faith and fair dealing as well as the Wisconsin Fair Dealership Law (WFDL),[1] and that its claim for tortious contractual interference and punitive damages should have been submitted to the jury. We reject these claims and affirm the judgment.

¶2 Paulaner imports German beer. Domanik had been a distributor of Paulaner imports for more than twenty years. The distributorship agreement provided that Paulaner could terminate the agreement if a default in payment remained uncured five days after Domanik received a written demand for payment. The agreement also permitted Paulaner, "from time to time in its sole discretion," to establish the terms of payment. By a letter dated February 26, 1998, Paulaner gave Domanik notice of its intent to terminate the agreement effective April 27, 1998, because Domanik failed to meet minimum depletion requirements. The letter indicated that Domanik would no longer be afforded credit and that all further delivery of product "will be on a C.O.D basis only."

¶3 On March 10, 1998, Paulaner delivered a shipment of beer to Domanik but did not include an invoice with the shipment or receive payment upon delivery. On March 18, 1998, Paulaner notified Domanik that the payment for the March 10 shipment was past due, that the amount due was $23,842.54, that payment was to be received no later than March 25, 1998, and that the agreement would be terminated if payment was not received by that date. Paulaner's

[1] *See* WIS. STAT. ch. 135 (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

March 18, 1998 letter was sent by facsimile transmission and certified mail to Domanik. The invoice for the March 10 delivery was sent by facsimile transmission to Domanik on March 18, arriving after receipt of the default notice.

¶4 Domanik wrote a check for the full amount due on Friday, March 20, 1998, and placed the payment in the mail. The envelope was postmarked Monday, March 23, 1998. Payment was not received by Paulaner in its Colorado offices until March 26, 1998. The distributorship agreement was terminated by Paulaner that same day since payment had not been received as required by the default notice.

¶5 Domanik commenced this action asserting five claims: breach of the distributorship agreement, breach of the duty of good faith and fair dealing, violation of the WFDL, tortious interference with business relationships, and punitive damages. Only the breach of contract claim was tried to the jury since the circuit court dismissed all the other claims prior to trial. At the conclusion of the trial, the circuit court denied Domanik's motion for summary judgment. The motion argued that under the terms of the agreement and the "mailbox rule," the payment was not late. Domanik's postverdict motion was denied and the judgment of dismissal entered on the jury's finding that Paulaner had not breached the agreement.

¶6 Domanik first argues that because it had not received an invoice with the March 10 delivery, it was not in default with respect to payment. Thus, Domanik seeks a ruling that as a matter of law the March 18 default notice was invalid. The application of the terms of a written contract is generally a question of law which we independently review on appeal. *See* ***Journal/Sentinel, Inc. v. Pleva***, 151 Wis. 2d 608, 614, 445 N.W.2d 689 (Ct. App. 1989).

¶7 We conclude that Domanik's claim ignores the provision in the agreement allowing Paulaner to set the terms of payment within its sole discretion. Domanik received the invoice by facsimile transmission, thus relieving it of the obligation to pay C.O.D. However, implicit in Paulaner's March 18 letter is that the terms of payment were changed to due upon receipt of invoice. Paulaner provided more than the required five-day cure time. It was within its right to demand payment by a date certain and terminate the agreement when payment was not received.[2]

¶8 Domanik next contends that placing the payment in the mail constituted payment under the "mailbox rule." *See* ***Mansfield v. Smith***, 88 Wis. 2d 575, 588, 277 N.W.2d 740 (1979) ("offer is binding from the moment an offeree deposits a properly addressed letter of acceptance in the mailbox"). While the "mailbox rule" enjoys a common law origin, it applies only to situations where "there is an express or implied authorization that the mails are to be used." ***Id.*** The distributorship agreement made no explicit statement that mailing is equated with payment. Indeed, Paulaner had sole discretion to set the terms of payment. Paulaner's letter specifically stated that payment had to be "received," not merely "mailed," by a certain date. That directive, as well as the previous placement of Domanik deliveries on C.O.D. status, overrode any previous course of dealing between the parties. The "mailbox rule" does not operate here to make Domanik's payment timely.

[2] Paulaner argues that Domanik's failure to meet the minimum depletion requirements constitutes an alternative ground for affirming the judgment of dismissal. We need not address the claim that the jury should have heard evidence of Domanik's failure to meet the requirements.

¶9 Domanik claims that it substantially complied with the distributorship agreement by making payment by mail prior to the deadline and that the jury should have been instructed regarding substantial performance under the contract. The circuit court exercises broad discretion to instruct the jury in a manner that fully and fairly informs the jury of the rules and principles of law applicable to the particular case. *See* ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996). "The relevant question in determining whether a jury instruction is appropriate is whether it is a correct statement of the law." *See* ***Brown v. Dibbell***, 220 Wis. 2d 200, 211, 582 N.W.2d 134 (Ct. App. 1998). Thus, we consider whether the rule of substantial performance applies to the distributorship agreement. We conclude it does not.

¶10 "The doctrine of substantial performance is an equitable doctrine and constitutes an exception in building contracts to the general rule requiring complete performance of the contract." ***Kreyer v. Driscoll***, 39 Wis. 2d 540, 544, 159 N.W.2d 680 (1968). The precedents explaining the application of the doctrine involve personal service or construction contracts and the aim to cure minor imperfections that are inevitable in such situations. This is not a situation involving personal service or construction inherently subject to imprecise performance. Rather, this is a commercial contract. The Uniform Commercial Code permits the parties to specify the terms of performance and expect perfect tender of performance. *See* WIS. STAT. § 402.601. The distributorship agreement and Paulaner's letter set forth the terms of performance. There can be no variation in whether timely payment has been made. The substantial performance doctrine does not operate to relieve Domanik of its contractual obligation to perform and the circuit court did not err in refusing to instruct the jury on the doctrine.

¶11 It is correct, as Domanik asserts, that every contract implies good faith and fair dealing between the parties. *See* ***Chayka v. Santini***, 47 Wis. 2d 102, 107, 176 N.W.2d 561 (1970). Where, as here, one party is entitled to expect performance to certain terms and the contract authorizes certain remedies in the face of nonperformance, the party has not breached the implied obligation of good faith. *See* ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988). The absence of a late payment in the twenty-year history of the parties does not negate the fact that Paulaner acted as authorized by the agreement. Moreover, the twenty-year history was leveled when Paulaner put Domanik on C.O.D. status. We acknowledge Domanik's contentions that the termination was pretextual and that Paulaner unfairly lulled it into a false sense of security.[3] However, the duty of good faith is not breached if a course of action available to one party could have avoided the harm and that course of action was not followed. *See* WIS JI—CIVIL 3044; ***Schaller v. Marine Nat'l Bank of Neenah***, 131 Wis. 2d 389, 403, 388 N.W.2d 645 (Ct. App. 1986). There is no dispute that Domanik knew Paulaner was looking to terminate the distributorship agreement. Domanik could have utilized a method of payment which would have assured its timely receipt. Domanik failed to utilize the preventive course of action. The circuit court properly dismissed the claim that Paulaner breached the implied duty of good faith.

¶12 Concluding that the WFDL did not apply to the parties' relationship, the circuit court dismissed Domanik's WFDL claim. At issue here is whether

[3] On March 19, 1998, the day after receiving the invoice, Domanik's controller spoke with Paulaner's accounts receivable coordinator and indicated that Domanik would issue a check for the full amount due on Friday, March 20, 1998. Paulaner's accounts receivable coordinator remained silent, neither approving or objecting to Domanik's proposed course of action.

there was a "community of interest" between the parties so that the "dealership" is covered by the WFDL. *See* WIS. STAT. § 135.02(3). When the facts are undisputed, whether the community of interest requirement has been met is a question of law. *See* ***Guderjohn v. Loewen-Am., Inc.***, 179 Wis. 2d 201, 205, 507 N.W.2d 115 (Ct. App. 1993). Financial interest and interdependence are the two guideposts for determining community interest. *See* ***id.*** There should be a demonstrated stake in the relationship "large enough to make the grantor's power to terminate, cancel or not renew a threat to the economic health of the person (thus giving the grantor inherently superior bargaining power)." ***Ziegler Co. v. Rexnord, Inc.***, 139 Wis. 2d 593, 605, 407 N.W.2d 873 (1987).

¶13 Domanik cites to its long history of marketing Paulaner's beer products and the brand-specific marketing and promotional expenditures it made. Yet Domanik did not demonstrate any investment in the promotion or storage of Paulaner products unique from that utilized for other products. The minimal financial investment, other than in inventory, is a strong indicator that only a vendee/vendor relationship exists. *See* ***Guderjohn***, 179 Wis. 2d at 211. Domanik dealt with at least eleven other suppliers while working with Paulaner. Paulaner products represented less than 4% of Domanik's average annual sales. This low percentage of annual sales is strong evidence that there is no continuing financial interest between the parties. *See* ***Ziegler***, 139 Wis. 2d at 607. There was no evidence of intertwining financing arrangements. Domanik's stake in its distributorship agreement is primarily in future profits, and that is not enough to establish a community of interest. *See* ***Guderjohn***, 179 Wis. 2d at 213. The WFDL does not apply.

¶14 Finally, Domanik argues that the circuit court should have submitted to the jury its claim for tortious interference with the prospective contracts

between Domanik and its customers and for punitive damages. The argument is not sufficiently developed. *See* ***Estrada v. State***, 228 Wis. 2d 459, 465 n.2, 596 N.W.2d 496 (Ct. App. 1999) (this court need not consider issues which the appellant does not develop). Our conclusion that Paulaner acted as authorized by the distributorship agreement precludes the notion that outrageous conduct supporting an award of punitive damages occurred. Further, the proper termination of the agreement was not aimed at Domanik's contracts with its customers, and the effect on those contracts is at best collateral. A cause of action for tortious interference does not lie unless the interference is intentional and improper. *See* ***Dorr v. Sacred Heart Hosp.***, 228 Wis. 2d 425, 456, 597 N.W.2d 462 (1999).

By the Court.—Judgment affirmed.

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