**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 28, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP2036** **Cir. Ct. No. 2004CV955**

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

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**BUENA VISTA SHORES MARINA, LLC, GARY DUCE AND NICOLE BERARD,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**MICHAEL B. POSTON, TM DELAFIELD, LLC, D/B/A THE GOLDEN ANCHOR RESTAURANT, TGA, LLC, TRI CITY NATIONAL BANK AND STEVEN WOSINSKI,**

**DEFENDANTS,**

**BRADLEY J. DAGEN AND HURTADO, S.C.,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Reversed and cause remanded.*

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

¶1 SNYDER, P.J. Buena Vista Shores Marina, LLC, Gary Duce, and Nicole Berard (together, Duce) appeal from an order for summary judgment in favor of Bradley J. Dagen and Hurtado, S.C.[1] Duce contends that a genuine issue of material fact precludes summary judgment. Specifically, Duce argues that the circuit court erred in determining that no escrow agreement between Duce, Dagen, and Michael B. Poston ever existed. We conclude that a genuine issue of material fact has been raised and that summary judgment was therefore inappropriate. We remand the matter to the circuit court for further proceedings in accordance with this opinion.

## FACTS AND PROCEDURAL BACKGROUND

¶2 Duce organized Buena Vista Shores, LLC, to develop a marina on the west side of Pewaukee Lake, next to The Golden Anchor restaurant. The Golden Anchor is on property owned by TGA, LLC, a company owned by Poston and his business partner, Todd Heppe. At the time, Poston and Heppe each owned a fifty percent interest in the business.

¶3 Duce approached Poston with the hopes of acquiring an interest in The Golden Anchor as well as in lake frontage owned by TGA, LLC. Poston's lake frontage would advance Duce's plans for the marina by adding to adjacent

[1] Michael B. Poston, TM Delafield, LLC d/b/a The Golden Anchor Restaurant, and TGA, LLC (together, Poston) also moved for summary judgment. The circuit court denied Poston's motion, and no appeal is taken from that portion of the court's order. At the time of the events giving rise to this lawsuit, Dagen was with the law firm of Hurtado & Dagen, S.C. Dagen subsequently left for employment elsewhere and his former firm is now known as Hurtado, S.C. References in this opinion to the Hurtado firm should be understood to mean Hurtado & Dagen as it existed at the time the events occurred.

lake frontage already owned by Duce. On April 11, 2002, Duce entered into a purchase agreement with Poston, the terms of which are subject to ongoing litigation.

¶4 The purchase agreement stated in relevant part:

> Be it known, for good consideration, a purchase by Buena Vista Shores Marina LLC/Gary Duce/Nicole Berard, for the sum of eighty thousand dollars (80,000.00), the receipt and sufficiency of which is acknowledged, the undersigned Michael Poston … hereby agrees to sell 40% of his interests in the business which at this time is 50% ownership in the business assets, and property of (TGA LLC/TM Delafield/DBA The Golden Anchor Restaurant) to (Buena Vista Shores Marina LLC/Gary Duce/Nicole Berard).

Within twenty-four hours of signing, the agreement required Poston to use the $80,000 to purchase the remaining business interests from his partner, Heppe:

> At which time (within twenty four hours (24hrs), of signed agreement, the use of the purchase funds (eighty thousand dollars ($80,000.00), will be used for the sole purpose of purchasing the entire business assets and property of (TGA LLC/TM Delafield) from (Todd Heppe …), of whom is the current partner of (Michael Poston) ….

Thirty days after acquiring Heppe's interest, Poston was to sell twenty-five feet of The Golden Anchor's lake frontage to Duce:

> Within thirty days (30 days) of said acquisition, of Michael Poston buying the equity and business assets from (Todd Heppe) of said businesses, (TGA LLC/TM Delafield/DBA The Golden Anchor Restaurant), (Michael Poston) agrees to sell to … ([Duce]) twenty five feet (25') of … lake frontage …. This will be legally surveyed, deeded, released of any and all encumbrances and recorded as public record to … ([Duce]).

¶5 Dagen had served as Poston's attorney several times in the past, though he was not involved in drafting the purchase agreement between Duce and

Poston. Poston, however, told Dagen about the purchase agreement and advised him to expect Duce's deposit of funds, which should then be distributed to Heppe. On April 16, Duce arrived at Dagen's office with $80,000. Dagen prepared a receipt for the funds and, as directed by both Duce and Poston, released the money to Heppe.

¶6 Duce expected that in exchange for the $80,000, Dagen would "get me the stock from Todd Heppe and from Mike Poston." Duce attempted to contact Dagen several times after the funds were transferred to "find out when the stock transfer would take place." About one month later, Poston informed Duce that the closing had already taken place. Eventually, Poston informed Duce that he would not be transferring any stock or lake frontage to Duce.

¶7 Duce hired an attorney and attempted to get his $80,000 payment back. This lawsuit followed. Duce presented three causes of action, including breach of contract and fraud against Poston and a claim for breach of an escrow agreement by Dagen and Hurtado. Two motions for summary judgment came before the circuit court.[2] The court denied summary judgment to Poston and his limited liability companies, but granted summary judgment on the breach-of-escrow contract claim against Dagen and Hurtado, S.C. Duce appeals from that portion of the order granting summary judgment.

[2] Tri-City National Bank and Steven Wosinski were joined as necessary parties because they hold mortgages against Poston's property. Neither Tri-City nor Wosinski joined in the motions for summary judgment.

## DISCUSSION

¶8 We review summary judgment de novo, applying the same methodology as the trial court. ***Grams v. Milk Prods., Inc.***, 2005 WI 112, ¶12, 283 Wis. 2d 511, 699 N.W.2d 167. This methodology, though oft repeated, bears reiteration here. "If the complaint states a claim and the pleadings show the existence of factual issues, the court examines the moving party's … affidavits or other proof to determine whether the moving party has made a prima facie case for summary judgment under [WIS. STAT. § 802.08(2) (2003-04)]." To make a prima facie case, the moving defendant must show a defense that would defeat the plaintiff. ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980) (emphasis omitted). If the defendant does so, the court must then examine the affidavits and other proof of the opposing party to determine whether there are disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to trial. ***Id.***

¶9 The burden is on the moving party to prove that there are no genuine issues of material fact. ***Strasser v. Transtech Mobil Fleet Serv., Inc.***, 2000 WI 87, ¶31, 236 Wis. 2d 435, 613 N.W.2d 142. An issue of fact is genuine if a reasonable jury could find for the nonmoving party. ***Id.***, ¶32. A material fact is such that would influence the outcome of the controversy. ***Id.*** We will reverse a summary judgment if the trial court incorrectly decided a legal issue or if material facts were in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

¶10 "An escrow relationship is essentially a three-party contract which arises in the first instance by an agreement between two parties concerning the delivery of an instrument upon the occurrence of a specified future condition." 28

AM. JUR. 2d *Escrow* § 10 (2000). Furthermore, it has been held that though the parties to an agreement do not employ the term "escrow," this does not preclude the finder of fact from concluding that was their intent. *See, e.g.*, ***McCormack v. Kirtley***, 563 P.2d 280, 283 (1977) (where funds were deposited and distribution conditioned upon the transfer of the liquor license, court held that the agreement was an escrow); ***Kunick v. Trout***, 85 N.W.2d 438, 445 (N.D. 1957) (whether a grant is an escrow depends upon the intent of the parties as discernible from their expressed words and purposes).

¶11 With this in mind, we turn to the pleadings. Duce alleged that he entrusted Dagen with his $80,000 believing that Dagen would secure the benefit (the transfer of the stock to Duce, which would then lead to the conveyance of the lake frontage) that Duce and Poston contemplated when entering the April 11, 2002 purchase agreement. Attached as Exhibit B to Duce's complaint is copy of the written receipt from Dagen, which states:

> RECEIPT OF MONIES
>
> This is to acknowledge receipt from Gary Duce (Buena Vista Marina, LLC) the sum of fifty-nine thousand, nine hundred ($59,900.00) dollars (cash) and Educators Credit Union Cashier's check in the amount of twenty thousand, one hundred ($20,100.00) dollars to be placed in Hurtado & Dagen, S.C. Client Trust Account for the purchase/ exchange of Todd Heppe's interest in the Golden Anchor.
>
> Dated this 16th day of April, 2002.

The receipt is signed by both Duce and Dagen. Duce further alleged that Dagen distributed the funds without securing the expected consideration.

¶12 In his answer, Dagen denied the allegations and affirmatively averred that there was no escrow agreement, oral or written, with regard to the

$80,000 and that there were no contractual or other duties owed to Duce by Dagen or his firm. Absent an escrow agreement, Duce's claim against Dagen for breach will fail.

¶13 Accordingly, we turn to the affidavits and other proofs to determine whether there are disputed facts, or competing inferences from undisputed facts, that would allow a fact finder to conclude that an escrow relationship arose between Duce, Poston, and Dagen. Whether there was an intent to enter into an agreement is a question of fact. ***Ginsu Prods., Inc. v. Dart Indus., Inc.***, 786 F.2d 260, 262 (7th Cir. 1986). In a proper case, the legal effect to be given an agreement may be determined on a motion for summary judgment; however, where there is a dispute as to the intent of the parties to the agreement, an issue of fact is presented and summary judgment should not be granted. ***Younger v. Rosenow Paper & Supply Co.***, 51 Wis. 2d 619, 629-30, 188 N.W.2d 507 (1971).

¶14 For indications of intent, we turn to Duce's affidavit and quote from it at length:

> When we made the [purchase] agreement I understood that Mike Poston owned 50% of the stock of TM Delafield, LLC and TGA LLC and that Todd Heppe owned the other 50%. I wanted to acquire 25 feet of lake frontage and have the exclusive right to use … the remaining frontage owned by these companies. Mike Poston told me that he was willing to enter into such an agreement, but that his partner, Todd Heppe, objected. Mike Poston also told me that Todd Heppe was willing to sell his interest in the companies, and this would permit such an agreement to go forward.
>
> Mike Poston and I then drafted the "Purchase Agreement" addressed in this lawsuit. Under this agreement I was supposed [to] pay $80,000 and in turn get 40% of the stock in the two LLC's from Mike Poston and 50% from Todd Heppe, giving me a total of 90%. Holding the stock of the companies was my assurance that I would then get the real estate and property rights I wanted to purchase.

….

After Mike Poston and I came to an agreement, I took $80,000 to Attorney Bradley Dagen's office. I did this because I did not want to give Mike Poston the money without making certain that I had the stock of the two companies in exchange….

When I met with Attorney Bradley Dagen on April 16, 2002, we spoke about the agreement as I described it above, and he knew what the terms of the deal were. He agreed to transfer my $80,000 to Todd Heppe and to get me the stock from Todd Heppe and from Mike Poston.

Over the next few weeks after April 16, 2002, I called Mr. Dagen's office a number of times trying to talk to him and find out when the stock transfer would take place. He never came on the phone or returned my calls.

….

After about a month, Mike Poston told me that the closing had taken place, and I shouldn't worry about it….

….

Not long afterward, when I tried to talk to Mike Poston about this again, he told me that the Golden Anchor Restaurant was on a nonconforming piece of real estate and that he could not transfer any property to me without jeopardizing the restaurant's ability to continue to do business. I asked him how long he had known about this, and he said he had always known, even before he made the deal with me, that the property was nonconforming. He also said that he had what he wanted now, which was Todd Heppe out of the business and himself in total control.

I told Mike Poston that I wanted my money back. I did not think that this would be a fair result, but would have settled the matter at the time. Mike Poston laughed at me and said I'd have to sue him, then maybe I'd get the money back. He also said he'd talked it over with Attorney Dagen, who had told him that the way the [purchase] agreement read, it sounded like I was only supposed to end up with 20% of the stock, and at best I'd get my money back and a small amount of interest. He said words to the effect that he had a nice low-interest loan out of me.

….

> Based on what happened, I believe that Mike Poston, from the beginning, planned to defraud me out of $80,000 and that he never had any intention of giving me anything of value for the money I handed over to his attorney, Brad Dagen. I also believe that Brad Dagen allowed this to happen by turning over my $80,000 to Mike Poston without my receiving the stock of [the limited liability companies].

¶15 At his deposition, Duce testified that he gave the $80,000 to Dagen expecting Dagen to hold it "in escrow so that he could purchase or do whatever transaction he needed to buy out Todd Heppe's stock for me." Dagen offers a different interpretation of the agreement, stating that he only agreed to accept the deposit and "release those funds to Mr. Heppe," which he did. He further argues that nothing in their encounter initiated an attorney-client relationship or any duty of care owed to nonclients.[3]

¶16 At the motion hearing, the circuit court followed Dagen's rendition and interpretation of the facts to hold that no escrow existed.[4] The court concluded:

> The court believes that the reasonable inferences drawn from the facts in this case are that there was no contrary instruction given to Attorney Dagen by either Poston or Duce and that there is no evidence to establish that the

[3] We take this opportunity to observe that Dagen's role as occasional legal counsel to Poston did not necessarily preempt him from serving as an escrow agent for Poston and Duce. An attorney may act as an escrow agent. This is true even where the attorney also serves as legal counsel for one of the parties to the escrow. *See, e.g.*, ***Andrews v. Carmody***, 761 N.E.2d 1076, 1081 (Ohio App. 2001) (in real estate transactions, an attorney may act as the attorney for one of the parties and escrow agent for both); *cf.* ***Jones v. Kootenai County Title Ins. Co.***, 873 P.2d 861, 866 (Idaho 1994) (attorney's status as legal counsel for one party does not entitle law firm to summary judgment where genuine issue of material fact exists as to whether attorney voluntarily assumed a separate duty to a nonclient).

[4] We note that, in its oral ruling, the circuit court twice acknowledged the facts underlying its decision were disputed by Duce. We cannot tell from the transcript, however, why the court disregarded Duce's affidavit and deposition testimony, or the competing inferences they raised.

> $80,000 released by Dagen to Heppe was contrary to the intent of the parties or that the money was used for anything other than the purpose intended by the agreement.

¶17 On summary judgment it is not the role of the circuit court, or of this court, to weigh the evidence or decide issues of fact. *See* ***Grams***, 97 Wis. 2d at 338. Rather, it was Dagen's burden to demonstrate a right to judgment with "such clarity as to leave no room for controversy," and the circuit court's duty to resolve any doubts in favor of Duce. *See* ***id.*** at 338-39.

¶18 Duce's affidavit and deposition testimony demonstrate competing inferences regarding the intent of the parties, the meaning of the language on the receipt, the oral instructions to Dagen, and the purpose for the deposit of $80,000, all of which go directly to the outcome of this controversy. Because these material facts cannot be determined conclusively from pleadings and supporting proofs, a trial is necessary to resolve whether an escrow agreement existed, and if so, whether it was breached. Because the issue here involved the intent of the parties at the time that Duce deposited $80,000 into Dagen's trust account, it raised a clearly defined issue of material fact. Summary judgment was therefore inappropriate. *See* ***Younger***, 51 Wis. 2d at 629-30; ***Strasser***, 236 Wis. 2d 435, ¶¶31-32.

## CONCLUSION

¶19 Summary judgment is an exacting standard that is not lightly satisfied. ***Central Corp. v. Research Prods. Corp.***, 2004 WI 76, ¶36, 272 Wis. 2d 561, 681 N.W.2d 178. We conclude that the affidavits and other proofs, liberally construed in favor of Duce, the nonmoving party, raise a genuine issue of material fact regarding the existence of an escrow agreement. Accordingly, we reverse the

summary judgment in favor of Dagen and Hurtado and reinstate Duce's claim for breach of escrow agreement.

*By the Court.*—Order reversed and cause remanded.

Not recommended for publication in the official reports.