COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2268 **Cir. Ct. No. 99-CV-2399**

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

NICK LADOPOULOS,

PLAINTIFF-APPELLANT,

V.

PDQ FOOD STORES, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 DYKMAN, J. Nick Ladopoulos appeals from a summary judgment dismissing his claims for intentional misrepresentation, tortious interference with a prospective contract and breach of the covenant of good faith and fair dealing against PDQ Food Stores, Inc. In addition, Ladopoulos challenges the circuit court's decision limiting his damages on his breach of contract claim to $10,000,

and declining to award him attorney's fees, as provided by the contract. We agree with the circuit court that there are no genuine issues of material fact on any of Ladopoulos's claims, and therefore affirm.

BACKGROUND

¶2 The following facts are undisputed. Nick Ladopoulos bought a 5.8 acre parcel of land in Westport, Wisconsin, with the intent to develop part of the property for retail and residential space and to sell the remaining land for use as a convenience store selling gasoline. He obtained conditional use permits for this purpose, effective October 1998 and expiring one year later.

¶3 Ladopoulos and PDQ entered into a purchase agreement on October 15, 1998, under which PDQ agreed to pay Ladopoulos $230,000 for the part of the property to be used as a convenience store selling gasoline. Included in the agreement was a default provision. It provided in part that, if PDQ breached the agreement, it would pay Ladopoulos the deposit ($10,000) as liquidated damages and as "full and complete settlement of any and all claims **Seller** may have against **PDQ**." Subject to the satisfaction of several contingencies, the agreement required PDQ to close on the purchase by January 13, 1999. However, on February 8, 1999, Ladopoulos and PDQ amended the purchase agreement so that the contingency deadlines were extended to April 15, 1999, and the closing date was extended to June 3, 1999.

¶4 On June 22, 1999, shortly after Mobil Mart closed a sale on nearby property, PDQ informed Ladopoulos in a letter that it was rescinding the purchase agreement. PDQ's stated reason for doing so was that it had "received reports and estimates that indicate that it will cost in excess of $10,000 to correct adverse soil conditions on the Property." PDQ relied on section 5(E)(iii) of the agreement,

which permitted rescission if "the total anticipated cost to remediate all such soil conditions is more than" $10,000. In a response dated June 23, 1999, Ladopoulos wrote that the soil contingency had been satisfied "long ago" and that he was willing to pay for any soil remediation costs over $10,000.

¶5 PDQ did not purchase the property. Instead, it tendered a $10,000 check to Ladopoulos, stating: "Your endorsement of the check will confirm that … all disputes between you and PDQ are fully settled and compromised." Ladopoulos did not endorse the check and eventually sent it back to PDQ.

¶6 Ladopoulos filed a complaint against PDQ on October 7, 1999. In his second amended complaint, he asserted four causes of action: (1) intentional misrepresentation; (2) breach of contract; (3) breach of duty of good faith and fair dealing; and (4) tortious interference with a prospective contractual relationship. PDQ moved for summary judgment on May 22, 2000. After briefing and oral argument, the court granted PDQ's motion with respect to the intentional misrepresentation, breach of duty of good faith, and tortious interference claims. However, the court granted summary judgment in favor of Ladopoulos on the breach of contract claim. It concluded that under the terms of the agreement, the contingencies were deemed satisfied as of April 13, 2000, and therefore PDQ could not rescind the agreement based on the soil contingency. The court also concluded, however, that Ladopoulos's damages were limited to the $10,000 plus interest provided in the agreement.

¶7 The circuit court next considered the issue of attorney's fees. The parties' agreement states: "In connection with any litigation arising out of this **Agreement**, the prevailing party shall be entitled to recover all costs incurred, including reasonable attorney's fees." The court concluded that both PDQ and

Ladopoulos were prevailing parties because the court entered judgment for both parties on at least one claim. Although it concluded that PDQ was three-fourths successful and Ladopoulos was one-fourth successful, the court determined that "justice and fair play" would best be served if neither party received its attorney's fees. Ladopoulos appeals.

¶8 Further facts will be discussed throughout the decision as they become relevant.

DECISION

A. Standard of Review

¶9 We review a circuit court's grant of summary judgment de novo, applying the same methodology as the circuit court. ***Yahnke v. Carson***, 2000 WI 74, ¶10, 236 Wis. 2d 257, 613 N.W.2d 102. Summary judgment is appropriate when the admissible evidence demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WIS. STAT. § 802.08 (1999-2000).[1] We draw all reasonable inferences in favor of the non-moving party. ***Hansen v. New Holland N. Amer.***, 215 Wis. 2d 655, 662-63, 574 N.W.2d 250 (Ct. App. 1997). A factual issue is genuine if the evidence is such that reasonable jurors could return a verdict in favor of the non-moving party. ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994). Ultimately, the party bearing the burden of proof on a claim at trial also has the burden "'to make a showing sufficient to establish the existence

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

of an element essential to that party's case.'" ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 292, 507 N.W.2d 136 (Ct. App. 1993) (quoting ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986)).

B. Breach of Contract and Liquidated Damages

¶10 The circuit court denied PDQ's summary judgment motion as it pertained to Ladopoulos's breach of contract claim and instead entered judgment for Ladopoulos, awarding him $10,000 under the contract's liquidated damages provision. PDQ has not appealed from this decision. Ladopoulos, however, contends that the liquidated damages provision is unenforceable. That clause provides in part:

> **DEFAULT**. If either party fails to perform that party's respective obligations hereunder (except as excused by the other party's default), the party claiming default shall make written demand for performance…. If **PDQ** fails to comply with such written demand within ten (10) days after receipt thereof, **Seller** shall be paid the **Deposit** and any accrued interest as liquidated damages as full and complete settlement of any and all claims **Seller** may have against **PDQ**, which **Seller** agrees shall be **Seller's** sole and exclusive remedy under this Agreement.

¶11 Ladopoulos argues the provision is unenforceable because $10,000 is "inadequate and grossly disproportionate" to his "foreseeable" damages. Specifically, he contends that although $10,000 may have been a reasonable amount of compensation for taking the property off the market for ninety days, as the parties originally agreed, it was not reasonable when the closing date was extended an additional 140 days.

¶12 The test for determining the validity of a liquidated damages provision is whether it is reasonable under the totality of the circumstances. ***Wassenaar v. Panos***, 111 Wis. 2d 518, 526, 331 N.W.2d 357 (1983).[2] The validity of a provision is a question of law. ***Id.*** at 524. However, where the circuit court has made factual findings in deciding the reasonableness of a provision, we review those findings under a clearly erroneous standard. ***Id.*** at 525. The circuit court concluded as a matter of law that the liquidated damages provision was reasonable. We therefore review its decision de novo.

¶13 Reasonableness is assessed by looking primarily at two factors: (1) the difficulty of estimating damages caused by a breach; and (2) how reasonable of an estimate the clause is of actual damages. ***Id***. at 529-30.[3] Applying this test, we conclude that the liquidated damages provision is

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[2] To date, Wisconsin courts have applied this test only in the context of deciding whether a liquidated damages provision is too *large*. STATE BAR OF WISCONSIN, CONTRACT LAW IN WISCONSIN §13.38, at 35 (2d ed. 2000). Wisconsin cases involving challenges of a liquidated damages provision by the non-breaching party have addressed only the issue of whether a particular provision is *ambiguous* in barring recovery of other damages. *See, e.g.,* ***Zimmerman v. Thompson***, 16 Wis. 2d 74, 114 N.W.2d 116 (1962); ***Yee v. Giuffre***, 176 Wis. 2d 189, 499 N.W.2d 926 (Ct. App. 1993). Ladopoulos does not argue that the provision is ambiguous, so we do not address that issue.

We see no reason, however, and the parties have not provided us with one, why the general requirement of reasonableness should not also apply when stipulated damages are alleged to be too small. The same public policies about uncertainty of damages, efficiency, and freedom of contract on one hand, and unequal bargaining power and permitting private encroachment into areas traditionally covered by public law on the other hand, would apply to both large and small liquidated damages provisions. *See* ***Wassenaar v. Panos***, 111 Wis. 2d 518, 528-29, 331 N.W.2d 357 (1983). We therefore conclude that ***Wassenaar***'s reasonableness test for the validity of liquidated damages clauses applies regardless whether a party is alleging the provision is too high or too low.

[3] The intent of the parties is also a factor. The supreme court has given little weight to intent because this has "little bearing on whether the clause is objectively reasonable." ***Wassenaar v. Panos***, 111 Wis. 2d 518, 530, 331 N.W.2d 357 (1983). Further, neither party discusses the intent of the parties factor in their briefs, so we do not focus on that factor.

enforceable. Ladopoulos does not argue that the damages for a failure to close the sale by PDQ would have been readily ascertainable in advance. Rather, he argues that the value of his site has "diminish[ed] very substantially" because another convenience store closed a sale on nearby property in June 1999. Beyond this allegation, however, he provides no evidence that his actual damages have greatly exceeded $10,000. Although Ladopoulos complains that his "impact analysis" was not completed when PDQ filed its motion for summary judgment, if Ladopoulos needed more time to oppose PDQ's motion, the proper response was a motion for additional discovery under WIS. STAT. § 802.08(4). *See* ***Kinnick v. Schierl, Inc.***, 197 Wis. 2d 855, 865, 541 N.W.2d 803 (1995); ***Park Bancorporation, Inc. v. Sletteland***, 182 Wis. 2d 131, 146, 513 N.W.2d 609 (Ct. App. 1994). He cannot complain now that PDQ's motion was filed before he had adequate time to oppose it. Further, as PDQ argues, Ladopoulos's difficulty in calculating his damages demonstrates the reasonableness of stipulating to damages in advance. We therefore agree with the circuit court that Ladopoulos has failed to create a genuine issue of fact regarding the validity of the liquidated damages provision.

C. Intentional Misrepresentation

¶14 Ladopoulos alleged in his complaint that PDQ falsely represented "its intent and desire to construct one of its retail locations" on his property and that his reliance on PDQ's misrepresentations cost him "no less than $500,000." The circuit court dismissed Ladopoulos's intentional misrepresentation claim because it concluded that the undisputed facts did not support several elements necessary to establish a prima facie claim. The elements of a claim for intentional misrepresentation are: (1) a false statement of fact, (2) made with intent to defraud and for the purpose of inducing the other party to rely on it, (3) that is

reasonably relied upon by the other party to his or her detriment. ***Kailin v. Armstrong***, 2002 WI App 70, ¶31.

¶15 The general rule regarding false representations of fact is that the statement must be a present or preexisting fact. *See* ***Chitwood v. A.O. Smith Harvestore Prod., Inc.***, 170 Wis. 2d 622, 631, 489 N.W.2d 697 (Ct. App. 1992). However, a promise may be actionable if there was no intent to perform it when the promise was made. ***Schurmann v. Neau***, 2001 WI App 4, ¶10, 240 Wis. 2d 719, 624 N.W.2d 157. Further, even where the parties have a contract, a victim of intentional misrepresentation may seek relief in tort when the false statement induced him or her to enter into the contract. ***Douglas-Hanson, Co. v. BF Goodrich Co.***, 229 Wis. 2d 132, 149-50, 598 N.W.2d 262 (Ct. App. 1999), *aff'd*, 2000 WI 22, 233 Wis.2d 276, 607 N.W.2d 621.[4]

¶16 Ladopoulos contends that PDQ intentionally misrepresented its commitment to build on his site both before entering into the purchase agreement in October 1998 and again in February 1999 when Ladopoulos agreed to extend the closing date. In arguing that he has sufficient evidence to create a genuine issue of material fact, Ladopoulos relies on the following allegations: (1) PDQ failed to tell him, either when he entered into the purchase agreement or when he agreed to extend the closing date, that it believed the area could not support two convenience stores selling gasoline; (2) PDQ failed to tell him that it believed his site was "premature" and was only desirable if certain conditions existed; (3) PDQ told him in December 1998 that it had, in the past, bought property without

[4] PDQ does not argue that Ladopoulos is barred from seeking relief in tort because he has already recovered for breach of contract. We therefore do not address that issue.

intending to build on it in order to "protect its territory"; (4) PDQ never asked its engineers to prepare final design drawings; (5) the minutes from an April 12, 1999 PDQ meeting reveal that PDQ was already planning its exit strategy; (6) in April 1999, PDQ overestimated the cost of soil remediation and never tried to secure bids to do the work but failed to tell Ladopoulos about the estimates until June 22, when it told Ladopoulos it would not close the sale; (7) PDQ began removing trees from the site in May 1999 so that Mobil Mart would believe the construction was proceeding; (8) PDQ made its decision not to close the sale by May 24, 1999, at the latest but did not inform Ladopoulos until June 22.

¶17 Even assuming all of these allegations are based on admissible evidence, we conclude that they do not create a genuine issue of material fact on Ladopoulos's misrepresentation claim. Most of the allegations indicate only that PDQ did not want to compete with another store and may have decided to pull out when it realized that Mobil Mart would also have a store in the same area. To succeed on an intentional misrepresentation claim, however, Ladopoulos must prove that PDQ had no intent to perform its promise *when it made the promise*. Evidence that PDQ got cold feet at some point after the closing date was extended in February is insufficient to show this.

¶18 The only allegation that has any relation to a present intent not to perform is that PDQ admitted in December 1998 that it had tied up property in the past to prevent competitors from building there. Although we must draw all reasonable inferences in favor of Ladopoulos, when there is only one reasonable inference to be drawn, we may decide this as a question of law. ***Groom v. Professionals Ins. Co.***, 179 Wis. 2d 241, 249, 507 N.W.2d 121 (Ct. App. 1993). We conclude that it is unreasonable to infer that PDQ had no present intent to close the sale on February 8, 1999, based on a statement that it had bought

property in the past in order to prevent competitors from doing so. Although PDQ may have bought property near its existing stores to "protect its territory" from competition, it does not follow that it would randomly seek to prevent its competitors from building on sites in areas where it had nothing to protect. There is also no evidence that PDQ bore any malice toward Ladopoulos or that it sought to prevent him from selling the land out of spite.

¶19 Moreover, to the extent that PDQ's alleged statement communicated an intent not to close the sale, it would make any reliance on PDQ's representation unreasonable. Ladopoulos alleges that PDQ informed him of its past practices in December 1998, two months *before* Ladopoulos agreed to extend the closing date. Ladopoulos therefore knew about PDQ's past behavior when he was considering the extension, but agreed to it anyway. A plaintiff making a misrepresentation claim must show that he or she "justifiably relied" on the defendant's misrepresentations. ***Hennig v. Ahearn***, 230 Wis. 2d 149, 164, 601 N.W.2d 14 (Ct. App. 1999). It is not reasonable to rely on a representation when one knows facts that are inconsistent with it. *See* ***All-Tech Telecom, Inc. v. Amway Corp.***, 174 F.3d 862, 867 (7th Cir. 1999); ***Foss v. Madison Twentieth Century Theaters, Inc.***, 203 Wis. 2d 210, 218-19, 551 N.W.2d 862 (Ct. App. 1996).

¶20 Because Ladopoulos failed to create a genuine issue of material fact, the circuit court was correct in granting PDQ's summary judgment motion with respect Ladopoulos's intentional misrepresentation claim.

D. Tortious Interference with a Prospective Contract

¶21 Ladopoulos also challenges the circuit court's dismissal of his tortious interference claim. He contends that by tying up his property but failing to close the sale, PDQ prevented him from entering into a contractual relationship

with Kwik Trip or Mobil Mart, which, Ladopoulos alleges, had both expressed interest in purchasing the property. Even if true, the allegation does not state a claim for tortious interference with a prospective contract. To establish such a claim, Ladopoulos would have to allege that PDQ interfered with the prospective relationship by: "(a) inducing or otherwise causing *a third person* not to enter into or continue a prospective relation or (b) preventing *the other* from acquiring or continuing a prospective relation." ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 788, 541 N.W.2d 203 (Ct. App. 1995) (emphasis added) (quoting ***Cudd v. Crownhart***, 122 Wis. 2d 656, 659-60, 364 N.W.2d 158 (Ct. App. 1985)).

¶22 Ladopoulos does not allege that PDQ had *any* contact with Kwik Trip, Mobile Mart or any other prospective buyer, much less that PDQ attempted to induce them not to contract with Ladopoulos. Therefore, the circuit court correctly dismissed Ladopoulos's tortious interference claim.

E. Breach of Covenant of Good Faith and Fair Dealing

¶23 The circuit court granted PDQ's motion for summary judgment with respect to Ladopoulos's good faith and fair dealing claim. Ladopoulos makes his argument that the circuit court's decision on this issue is erroneous in one sentence: "[T]he trial court failed to consider the admissible evidence of record summarized in the annotated statement of facts and argued in the sections of this brief that discuss the factual basis for the claims on intentional misrepresentation and tortious interference with prospective contractual relationships."

¶24 Regardless of the sufficiency of Ladopoulos's argument, his covenant of good faith claim must fail. As noted, the circuit court entered judgment in favor of Ladopoulos on his breach of contract claim. PDQ has not appealed that issue. Ladopoulos cannot recover for both breach of contract and

breach of the implied covenant of good faith and fair dealing. Injured parties to a contract may recover under an implied covenant of good faith theory when, even though the express terms of the contract have been fulfilled, one of the parties "accomplish[es] exactly what the agreement of the parties sought to prevent." ***Foseid***, 197 Wis. 2d at 796 (quoting ***Estate of Chayka***, 47 Wis. 2d 102, 107, 176 N.W.2d 561 (1970)). The circuit court has already concluded that PDQ did not uphold the agreement, and the court awarded Ladopoulos damages accordingly. Because damages for breach of the implied covenant of good faith and fair dealing are generally the same, recovery for both would be duplicative. *See, e.g.,* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 442, 405 N.W.2d 354 (1987).

F. Attorney's Fees

¶25 In Wisconsin, attorney's fees are generally not recoverable unless they are provided for by contract or statute. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 426, 456 N.W.2d 653 (Ct. App. 1990). Section 8(E) of the purchase agreement provides: "In connection with any litigation arising out of this **Agreement**, the prevailing party shall be entitled to recover all costs incurred, including reasonable attorney's fees." The circuit court determined that Ladopoulos was one-fourth successful and PDQ was three-fourths successful. Despite this conclusion, the court decided not to impose PDQ's attorney's fees on Ladopoulos "in view of PDQ's decision to contest the breach of contract claim." The interpretation of a contract is a question of law, which we review de novo. ***Borchardt***, 156 Wis. 2d at 427.

¶26 PDQ has not appealed from the circuit court's decision, but Ladopoulos argues that the circuit court erred in concluding that he was only one-fourth successful. He contends that the only claim "arising out of this

Agreement" was the breach of contract claim, and because the court entered judgment in favor of him on this claim, he was the sole prevailing party within the meaning of the agreement.

¶27 There is a preliminary issue, however, which is whether Ladopoulos was the "prevailing party" on the breach of contract claim. The purchase agreement does not define the phrase "prevailing party." When a contract does not define a term, we give the words their ordinary meaning. ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 507, 577 N.W.2d 617. The dictionary defines "prevail" as "to be or become effective or effectual: be successful." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993).

¶28 In the case before us, it is undisputed that PDQ tendered $10,000 to Ladopoulos after it failed to close the sale. Ladopoulos never cashed the check, and after filing this action, eventually returned it to PDQ. The circuit court awarded Ladopoulos $10,000 for his breach of contract claim, which we have affirmed. The court entered judgment in favor of PDQ on Ladopoulos's remaining claims. Ladopoulos therefore did not achieve anything by bringing this action. The only relief he obtained, the $10,000 damages award, was the same amount that PDQ tendered to him immediately after the breach. A party is not successful on a claim when he is awarded the same relief that he rejected before bringing the action. Presumably, Ladopoulos's purpose in filing a lawsuit against PDQ was to obtain either greater damages or specific performance. But he failed in obtaining either.

¶29 We are to give contracts a construction that will make them rational business instruments and will effectuate what appears to have been the intention of the parties. ***Borchardt***, 156 Wis. 2d at 427. Liquidated damages provisions are

included in contracts in part to avoid litigation by agreeing to damages in advance. It would not be rational, then, to include a liquidated damages provision in a contract and then to intend the interpretation of "prevailing party" to include a plaintiff that recovers through litigation no more than what could have been recovered without incurring any attorney's fees.

¶30 Because PDQ offered immediately after the breach the same relief that Ladopoulos obtained through litigation, we conclude that Ladopoulos was not the "prevailing party" within the meaning of the contract on the breach of contract claim. We therefore need not decide whether Ladopoulos's other claims arose out of the agreement. Further, because PDQ has not appealed from the circuit court's decision to award neither party attorney's fees, no remand to award costs and fees to PDQ is necessary.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.