COURT OF APPEALS
DECISION
DATED AND FILED

September 2, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2741 **Cir. Ct. No. 2008CV375**

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

PATTI-MARSHALL, LLC,

PLAINTIFF-APPELLANT,

THOMAS AUSTIN, MELINA AUSTIN, GREG MEYERS, JENNIFER MEYERS, ERIK HAMRE, MICHELLE HAMRE, DONALD OSGOOD, BRAD BURBACH AND RHONDA BURBACH,

INVOLUNTARY-PLAINTIFFS,

V.

FOUR WINDS SUBDIVISION, LLC, DELIGHLA SEBASTIAN-BREHM, DONALD SEBASTIAN AND JUDY SEBASTIAN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dodge County: BRIAN PFITZINGER, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Patti-Marshall, LLC, appeals from a summary judgment order dismissing Delighla Sebastian-Brehm from this multi-claim lawsuit arising from a dispute among members of a homeowners' association.[1] Patti-Marshall contends there are material facts in dispute regarding whether Sebastian-Brehm engaged in a conspiracy to restrict trade[2] by: (1) serving on the association board when it voted to ban the publication of asking prices on "for sale" signs in the subdivision; and/or (2) verbally agreeing with her parents, who held the controlling votes in the homeowners' association, that the advertising prohibition was a good idea. Sebastian-Brehm asserts that the appeal is frivolous and seeks an award of costs, fees, and attorney fees pursuant to WIS. STAT. RULE 809.25(3)(c) (2007-08).[3] For the reasons discussed below, we affirm the order of the circuit court, but deny the motion for attorney fees.

BACKGROUND

¶2 During the time period relevant to this lawsuit, Patti-Marshall owned two lots in the Four Winds Subdivision. Sebastian-Brehm owned one lot. Sebastian-Brehm's parents, Donald and Judy Sebastian, who had developed the

[1] Patti-Marshall also seeks review of partial summary judgment orders involving Donald and Judy Sebastian, but those orders are not properly before us because the Sebastians are still involved in the ongoing litigation, and Patti-Marshall did not file timely petitions for leave to appeal the decisions involving the Sebastians. *See* WIS. STAT. RULES 809.10(4) (our jurisdiction over a notice of appeal is limited to final judgments or orders) and 809.50 (setting forth the procedure for seeking interlocutory appeal of non-final orders). We further note that, although the notice of appeal was also filed on behalf of William and Kimberly Meyers, the Meyers subsequently stipulated to dismiss their claims.

[2] The second amended complaint also raised a claim of breach of fiduciary duty against Sebastian-Brehm and her parents, but Patti-Marshall has not developed an argument on appeal for that claim relating to Sebastian-Brehm as distinct from her parents.

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

subdivision under the auspices of Four Winds, LLC, still owned 48 lots, which gave them a controlling interest in the homeowners' association. The Sebastians also served as president and vice-president of the homeowners' association, while Sebastian-Brehm served as secretary-treasurer.

¶3 Patti-Marshall sought to sell its two lots, and advertised its asking price on "for sale" signs posted on the property. The Sebastians' other daughter, Melina Austin, complained that the low asking price Patti-Marshall was advertising adversely affected the appraisal value of her lot and her ability to refinance a construction loan. In response, the Sebastians discussed prohibiting the display of prices on "for sale" signs in the subdivision. Sebastian-Brehm orally agreed with her parents that the proposed advertising ban would be a good idea. There is a factual dispute as to whether the board of the homeowners' association on which Sebastian-Brehm served ever actually voted on the ban, or whether the only official actions taken in furtherance of the ban were by the Sebastians, through the architectural control committee and the recording of an amendment to the subdivision declaration.

STANDARD OF REVIEW

¶4 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***, ¶24. We view the materials in the light most favorable to the party opposing the motion.

Id., ¶23. Our task, then, is to determine whether the facts set forth in the summary judgment materials—viewed most favorably to Patti-Marshall—would satisfy all the elements of its claimed cause of action.

DISCUSSION

¶5 The Wisconsin Antitrust Act[4] bars conspiracy in restraint of trade and authorizes civil suits for damages based upon violations of the Act. *See* WIS. STAT. §§ 133.03(1) and 133.18; ***Myers v. Bayer AG***, 2007 WI 99, ¶24, 303 Wis. 2d 295, 735 N.W.2d 448. The standard test for evaluating whether certain conduct constitutes an impermissible restraint of trade is a rule of reason. ***Independent Milk Producers Co-op v. Stoffel***, 102 Wis. 2d 1, 7, 298 N.W.2d 102 (Ct. App. 1980).

> An analysis of the reasonableness of a restraint includes an examination of the purpose of the restraint, market power and the anticompetitive effect of the restraint. A restraint to be found unreasonable must have a significant impact on competition in the marketplace. The relevant market, both product and geographic, must be identified, and the impact of the restraint of the relevant market is then determined. If the impact is not significant, the alleged conduct is allowed.

Id. at 8 (citations omitted). Factors relevant to this analysis may include the history of the restraint and the end it sought to accomplish; any reason for adopting the particular restraint as opposed to some other measure; the actual or probable effect of the restraint; and the condition of the business to which the constraint was applied before and after its imposition. ***Id.*** at 7-8.

[4] The language of the Wisconsin Antitrust Act is drawn largely from its federal counterpart, the Sherman Act. *See* 15 U.S.C. § 1 (1970).

¶6 Certain practices may be so blatantly anticompetitive as to be deemed per se unreasonable without an inquiry into their market impact or the reason for their use. ***Id.*** at 8. These include such things as price fixing, group boycotts, horizontal market allocation, resale price maintenance, and tying arrangements. ***Id.*** at 8-9. The historic trend, however, has been to apply the rule of reason in most instances and limit the types of recognized per se violations.

¶7 Here, Patti-Marshall claims that prohibiting the display of prices on "for sale" signs in the subdivision constituted an unreasonable restraint of trade. Its appellate brief focuses on whether Sebastian-Brehm satisfied the "conspiracy" element of the claim by agreeing that it was a good idea and/or being on the board that voted for the measure. She argues that the requirements of a conspiracy for antitrust purposes do not include an overt act, as a separate claim for civil conspiracy would. We note that agreeing something is a good idea is not the same as agreeing to take action to bring something about. Similarly, being on a board that approves a measure does not mean that a particular member voted affirmatively, although there may be a reasonable inference from Sebastian-Brehm's agreement that the ban was a good idea that, if there was a vote, it is likely that she voted in favor of it.

¶8 However, even if the materials would support a reasonable inference on the conspiracy element, Patti-Marshall has presented no argument to support its claim that prohibiting the display of prices on "for sale" signs constituted an impermissible restraint of trade. It has not identified the market at issue, much less pointed to any alleged facts in the summary judgment materials that would show a significant anticompetitive effect on that market. The signage ban did not dictate what the asking price should be, or in any way prevent interested buyers from learning the asking price through a realtor, which is plainly a standard

method in the real estate market. Nor has Patti-Marshall pointed to any authority holding that the type of conduct at issue here falls within one of the per se prohibitions.

¶9 In its trial court brief, Patti-Marshall argued that the ban constituted an impermissible restraint on trade because the formation of the conspiracy occurred within the state and it substantially affected the people of Wisconsin. That, however, is an additional test for determining whether Wisconsin's Antitrust Act may be applied to interstate commerce. *See* ***Olstad v. Microsoft Corp.***, 2005 WI 121, ¶85, 284 Wis. 2d 224, 700 N.W.2d 139. This is an intrastate commerce case to which the ***Olstad*** test does not apply. And even where ***Olstad*** does apply, it does not negate the need to also meet the criteria of the underlying restraint of trade claim. In sum, Patti-Marshall has failed to identify any facts in the summary judgment materials that would entitle her to trial on a restraint of trade claim.

¶10 We turn to Sebastian-Brehm's motion for costs and attorney fees. WISCONSIN STAT. § 809.25(3) authorizes the court to award costs and attorney fees upon determining that an appeal is frivolous, either because it was commenced in bad faith, or because the party or the party's attorney knew or should have known that the appeal lacked any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law. We award costs and attorney fees only when we conclude an appeal is frivolous in its entirety. ***State ex rel. Robinson v. Town of Bristol***, 2003 WI App 97, ¶54, 264 Wis. 2d 318, 667 N.W.2d 14.

¶11 Here, although we ultimately affirm the trial court's summary judgment decision, we are not persuaded that the conspiracy argument advanced by Patti-Marshall was wholly without basis in fact or law. Instead, we have

resolved the case based upon summary judgment methodology relating to other elements of the claim. Therefore, we will not deem the appeal frivolous in its entirety, and we decline to award attorney fees.

By the Court.—Order affirmed.

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