COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1678 **Cir. Ct. No. 02CV000505**

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

LOIS E. OLSON,

PLAINTIFF-RESPONDENT,

V.

CLARENCE J. BOERBOOM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Clarence Boerboom appeals a judgment awarding certain property items and cash to Lois Olson. He contends the trial court based the cash award on errors of fact and law. We disagree and therefore affirm.

¶2 Boerboom and Olson began a relationship and Olson moved to Boerboom's farm in 1999. Olson brought with her several animals and $22,000 from the sale of her own farm. Olson subsequently transferred the $22,000 to Boerboom.

¶3 In August 2002, the parties ended their relationship and Olson moved from the farm. She sued Boerboom seeking return of property he kept when she left and return of the $22,000 she gave him.

¶4 At the bench trial, Boerboom testified that the $22,000 served as rent payments for the term of Olson's stay on the farm, or a substantial portion of it. Olson testified she loaned the $22,000 to Boerboom. However, neither party provided any written evidence of either a loan or rent transaction.

¶5 In its decision, the trial court found insufficient evidence that the $22,000 was intended either as rent or as a loan. Instead, the trial court described the money as Olson's investment in what she expected to be a long-term relationship. Because the relationship turned out to be short-term, the trial court concluded that Olson should receive most of her "investment" back. The result, with offsets, was an award of $19,681.06 plus costs and disbursements.

¶6 The statute of frauds, WIS. STAT. § 241.02(1) (2003-04),[1] bars enforcement of certain agreements unless they are in writing, including every agreement that by its terms is not to be performed within one year. Boerboom first contends this provision bars Olson's award in the absence of a written loan

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

agreement. That would be true if the trial court had found that Olson had provided a long-term loan to Boerboom. However, the trial court expressly found the $22,000 was not a loan. Instead, the court based recovery on an unjust enrichment theory. Thus, WIS. STAT. § 241.02(1) was inapplicable. *See* ***Felland v. Sauey***, 2001 WI App 257, ¶16 n.3, 248 Wis. 2d 963, 637 N.W.2d 403 (Plaintiffs who do not to comply with the statute of frauds requirements may still claim unjust enrichment.).

¶7 Boerboom effectively concedes the point by next arguing the trial court erred by applying an unjust enrichment analysis. Unmarried cohabitants may pursue an unjust enrichment claim following termination of their relationship. ***Watts v. Watts***, 137 Wis. 2d 506, 532-33, 405 N.W.2d 303 (1987). An action for unjust enrichment is based on proof of three elements: (1) a benefit conferred on one party by the other; (2) knowledge or appreciation of the benefit by the recipient; and (3) retention of the benefit under inequitable circumstances. ***Id.*** at 531. A circuit court's decision to grant equitable relief on an unjust enrichment claim is discretionary. *See* ***Ulrich v. Zemke***, 2002 WI App 246, ¶8, 258 Wis. 2d 180, 654 N.W.2d 458. Here, in awarding Olson most of her $22,000 claim, the trial court considered Boerboom's use of the money for the farm and Olson's other contributions to the farm operation. The court also considered Olson's money contribution to the relationship as comparable to Boerboom's contribution of the farm for their joint use. These were proper factors to consider in equity, and the resulting decision was reasonable. As the court noted, each party received back what each brought to the relationship.

¶8 In his reply brief Boerboom contends the court improperly used the theory of unjust enrichment because Olson did not assert that theory in her pleadings. "However, a complaint need not expressly identify a legal theory, but

only the facts necessary to recover under that legal theory." ***Murray v. City of Milwaukee***, 2002 WI App 62, ¶12 n.6, 252 Wis. 2d 613, 642 N.W.2d 541. The issue of Olson's claim to the $22,000 was fully and fairly tried and Boerboom fails to show any prejudice from Olson's failure to articulate the unjust enrichment theory in her complaint.

By the Court.—Judgment affirmed.

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