

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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**Appeal No. 2011AP1954
STATE OF WISCONSIN**

Cir. Ct. No. 2010CV1353

**IN COURT OF APPEALS
DISTRICT II**

HALMARC LLC,

PLAINTIFF-APPELLANT,

V.

**FORD LEASING DEVELOPMENT COMPANY, FORD MOTOR COMPANY AND
TOWNE FORD, INC., D/B/A PORCARO FORD,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Racine County:
CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Halmarc LLC appeals from a judgment granting summary judgment in favor of Ford Leasing Development Company (FLDC), Towne Ford, Inc., d/b/a Porcaro Ford (Towne Ford), and Ford Motor Company (Ford), and denying its motion for leave to amend its complaint. We conclude that

the circuit court properly granted summary judgment. We further conclude that the court properly exercised its discretion in denying Halmarc's motion for leave to amend its complaint. Accordingly, we affirm the judgment.

¶2 This case arises out of a real estate lease agreement between Halmarc, as landlord, and FLDC, as tenant, and a sublease agreement on the same property between FLDC, as sublandlord, and Towne Ford, as subtenant.

¶3 In 1997, Halmarc and FLDC entered into a written lease agreement (the Main Lease) involving a property located in Racine. The Main Lease was for a term of thirty years with provisions that allowed for early termination under certain conditions. The property was to be utilized as a Ford Dealership.¹

¶4 On or about the same time, FLDC entered into a written dealership sublease (the Sublease) with Towne Ford under which FLDC subleased the property to Towne Ford for a term of five years, with an option to extend for four additional terms of five years each.²

¶5 Under the Main Lease, FLDC had the absolute right to terminate the agreement if the Sublease either expired or was terminated for any reason. Article 1.03 of the Main Lease provides:

If the Sublease executed and delivered simultaneously with the execution and delivery of this Lease expires or is terminated for any reason during the Lease Term, Tenant at its option may terminate this Lease and all of Tenant's obligations hereunder at any time thereafter upon giving to

¹ FLDC is a subsidiary of Ford Holdings, LLC, which is a wholly owned subsidiary of Ford. It entered into the agreements at issue to provide site control for Ford.

² At the time of these initial agreements, the principals of Halmarc and Towne Ford were the same.

Landlord not less than 30 days' prior written notice of such termination. Subsequent subletting of the Premises shall not constitute a waiver of Tenant's absolute right to terminate this Lease at any time after termination of the Sublease.

¶6 FLDC also had the option to sublease the property but was not obligated to do so. Article 8.01 of the Main Lease provides, "During the Lease Term, Tenant [FLDC], without the consent of Landlord, may assign this Lease or any interest herein or sublease all or part of the Premises."

¶7 Meanwhile, under the Sublease, either FLDC or Towne Ford could terminate the agreement without the consent of the other party if Towne Ford ceased to be an authorized Ford dealer. Article 17.02 of the Sublease provides, in part:

If on the Commencement Date, Tenant is not the holder of a valid and subsisting Sales Agreement, or if any Sales Agreement held by Tenant shall expire or terminate during the Lease Term and shall not be renewed or replaced, either Landlord or Tenant by notice to the other may designate a date on which this Lease shall terminate.

¶8 FLDC and Towne Ford could also terminate the Sublease by written agreement. Article 18.02 of the Sublease provides, in part:

Neither this Lease nor any provision hereof may be changed, waived, discharged or terminated orally. Only an instrument in writing signed by the party against which enforcement of the change, waiver, discharge or termination is sought shall be binding on the party.

¶9 In 2007, the owners of Towne Ford decided to sell their stock to Mark Porcaro. As part of the stock transaction, Porcaro received a Real Estate Option Agreement from Halmarc, which gave him a qualified two-year option to purchase the property, as well as a right of first refusal to purchase the property after the option period expired. In return, Porcaro agreed to extend the Sublease

for five years through July 28, 2012. Towne Ford and FLDC subsequently amended the Sublease to reflect that extension.

¶10 In connection with the change of ownership of Towne Ford, Ford agreed to allow Porcaro to be a Ford dealer for a two-year term. However, Ford mandated that Porcaro make certain improvements to the property subject to the Sublease and complete those before July 2009.

¶11 Porcaro did not make the improvements to the property as required by the letter of understanding. Rather than terminate Porcaro's right to operate a Ford dealership,³ Ford extended the agreement for one more year. The extension required Porcaro to either improve the property subject to the Sublease, or in the alternative, to find a new appropriate facility from which to operate his business.

¶12 Ultimately, Porcaro elected to move his business to a nearby location. Accordingly, he and FLDC terminated the Sublease by written agreement effective February 28, 2010. Because there was no longer a dealership operating on the property subject to the Sublease, the Main Lease between Halmarc and FLDC was also terminated.

¶13 In February 2010, Halmarc filed this action accusing FLDC of breaching its implied duty of good faith under the Main Lease, accusing Towne Ford of breaching the Sublease (alleging that Halmarc was a third-party beneficiary of the Sublease), and accusing Ford of intentionally interfering with

³ Had Ford terminated Porcaro's right to operate a Ford dealership, either FLDC or Towne Ford could have terminated the Sublease without consent of the other party under Article 17.02. As noted by the circuit court, this would have left Halmarc in almost the same position as it is in now.

the Sublease by pressuring Porcaro to abandon the leased property. FLDC, Towne Ford, and Ford responded by filing a motion for summary judgment. Halmarc then moved to amend its complaint to allege additional claims stemming from the Real Estate Option Agreement. By then, over one year had passed since the original complaint was filed.

¶14 Following a hearing and briefing on the matter, the circuit court granted the motion for summary judgment in favor of FLDC, Towne Ford, and Ford, and denied Halmarc's motion for leave to amend its complaint. This appeal follows.

¶15 We review a grant of summary judgment de novo, using the same methodology as the circuit court. *Estate of Sheppard ex rel. McMorrow v. Schleis*, 2010 WI 32, ¶15, 324 Wis. 2d 41, 782 N.W.2d 85. Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See id.*; WIS. STAT. § 802.08(2) (2009-10).⁴ We also review the interpretation of a contract de novo. *See Columbia Propane, L.P. v. Wisconsin Gas Co.*, 2003 WI 38, ¶12, 261 Wis. 2d 70, 661 N.W.2d 776. Finally, whether to permit an amendment to a complaint later than six months after it has been filed is committed to the sound discretion of the circuit court. *Id.*, ¶13. We will affirm a discretionary decision so long as the circuit court did not erroneously exercise its discretion. *Id.*

¶16 Halmarc first contends that the circuit court erred in dismissing on summary judgment its claim against FLDC for breach of the contractual duty of

⁴ All references to the Wisconsin Statutes are to the 2009-10 version.

good faith. Specifically, Halmarc asserts that a reasonable jury could have found that it had a reasonable expectation under the Main Lease that FLDC would not enter into an agreement with Towne Ford to terminate the Sublease prior to its July 28, 2012 expiration date in order to allow Towne Ford to abandon the property and FLDC to terminate the Main Lease.

¶17 Wisconsin law does recognize that in every contract there is an implied duty of good faith and fair dealing. *LDC-728 Milwaukee, LLC v. Raettig*, 2006 WI App 258, ¶11, 297 Wis. 2d 794, 727 N.W.2d 82. However, that duty is not a basis to circumvent express terms of a contract. As this court has previously explained:

But where ... a contracting party complains of acts of the other party which are specifically authorized in their agreement, we do not see how there can be any breach of the covenant of good faith. Indeed, it would be a contradiction in terms to characterize an act contemplated by the plain language of the parties' contract as a "bad faith" breach of that contract.

Super Valu Stores, Inc. v. D-Mart Food Stores, Inc., 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988).

¶18 Here, FLDC and Towne Ford terminated the Sublease by written agreement, thus giving FLDC the absolute right to terminate the Main Lease under Article 1.03. Although Halmarc maintains that it had a reasonable expectation that FLDC would not enter into such an agreement prior to July 28, 2012, this

expectation is not supported by the plain language of the Main Lease.⁵ Indeed, nothing in the Main Lease limited FLDC's ability to terminate its Sublease with Towne Ford or otherwise limited the application of Article 1.03 to particular types of terminations. Because the implied duty of good faith and fair dealing cannot be used to circumvent express terms of the Main Lease, we reject Halmarc's first claim.

¶19 Halmarc next contends that the circuit court erred in dismissing on summary judgment its claim against Towne Ford for breach of contract. According to Halmarc, a reasonable jury could have found that it was a third-party beneficiary to the Sublease between FLDC and Towne Ford. Therefore, Halmarc asserts that it is entitled to recover against Towne Ford the damages caused by Towne Ford's abandonment of the property without Halmarc's consent.

¶20 "A third-party beneficiary is one who the contracting parties intended to 'directly and primarily' benefit." *Becker v. Crispell-Snyder, Inc.*, 2009 WI App 24, ¶11, 316 Wis. 2d 359, 763 N.W.2d 192 (quoting *Winnebago Homes, Inc. v. Sheldon*, 29 Wis. 2d 692, 699, 139 N.W.2d 606 (1966)). "A party proves its third-party beneficiary status by pointing to specific language in the contract establishing intent ... [t]he benefit proven must be direct; an indirect

⁵ In support of its reasonable expectation argument, Halmarc cites (1) a recital at the beginning of the Main Lease indicating that FLDC would sublease the property in accordance with the terms of the Sublease and (2) Porcaro's agreement to extend the Sublease through July 28, 2012. Halmarc's reliance on these items is misplaced for at least two reasons. First, the fact that FLDC had agreed to sublease the property pursuant to the terms of the Sublease does not create an affirmative obligation to sublease or prohibit early termination of the Sublease, particularly in light of Article 8.01, which makes subleasing optional. Second, Porcaro's agreement in a separate stock transaction to extend the Sublease cannot be used to alter the plain language of the Main Lease.

benefit incidental to the primary contractual purpose is insufficient.” *Becker*, 316 Wis. 2d 359, ¶11.

¶21 Reviewing the contracts at issue, we conclude that FLDC and Towne Ford did not intend Halmarc to be a third-party beneficiary of its Sublease. To begin, there is no language in the Sublease (or in any subsequent amendment to the Sublease) which expressly identifies Halmarc as a direct or primary beneficiary.⁶ Moreover, under the Main Lease, FLDC was not obligated to sublease the property to anyone. It could elect to lease the property for its own use, or sublease all or part of it. Therefore, any subleasing by FLDC would have been for the primary benefit of FLDC and its subtenant, not Halmarc. For these reasons, we reject Halmarc’s second claim.

¶22 Halmarc next contends that the circuit court erred in dismissing on summary judgment its claim against Ford for intentionally interfering with the Sublease by pressuring and encouraging Towne Ford to abandon the property. Halmarc submits that a reasonable jury could find that such interference was neither justified nor privileged.

¶23 Halmarc’s third argument is a nonstarter. The elements of tortious interference require that Halmarc “had a contract or a prospective contractual

⁶ Halmarc notes that Article 1.01 of the Sublease makes that contract subject to the Main Lease and that Article 1.03(a) requires Towne Ford, as Tenant, to “perform and observe all the duties and obligations of [FLDC]” to Halmarc under the Main Lease. Contrary to Halmarc’s assertions, these provisions do not establish the parties’ intent to make it a third-party beneficiary. As noted by Ford, making the Sublease subject to the Main Lease is logical given that if the Main Lease was terminated, FLDC would have nothing to sublease. Furthermore, requiring Towne Ford to “perform and observe all duties and obligations of [FLDC]” was simply a way to prevent Towne Ford, as the subtenant, from engaging in conduct that would cause FLDC to be in breach of the Main Lease. As such, this provision was for the primary benefit of FLDC, not Halmarc.

relationship with” Towne Ford. *Briesemeister v. Lehner*, 2006 WI App 140, ¶48, 295 Wis. 2d 429, 720 N.W.2d 531. Here, Halmarc was neither a party nor a third-party beneficiary of FLDC’s Sublease with Towne Ford. Consequently, we reject Halmarc’s third claim for lack of standing.

¶24 Finally, Halmarc contends that the circuit court erroneously exercised its discretion in denying its motion for leave to amend its complaint. Halmarc had sought to amend its complaint to allege (1) a cause of action against Towne Ford and Porcaro for breach of the Real Estate Option Agreement and (2) a cause of action against Ford and FLDC for intentionally interfering with the Real Estate Option Agreement. Again, Halmarc’s claims are grounded in Towne Ford’s action of abandoning the property prior to July 28, 2012.

¶25 In granting summary judgment in favor of FLDC, Towne Ford, and Ford, the circuit court concluded, among other things, that none of the parties breached any of the agreements, that there was no evidence of bad faith, and that there was no merit to the theory that Ford tortiously interfered with Halmarc’s interests. Given these conclusions, which were based on a thorough understanding of the facts and conduct of the parties, the circuit court reasonably determined that the amendments proposed by Halmarc would not result in a viable cause of action. As a result, we are satisfied that the court did not erroneously exercise its discretion in denying Halmarc’s motion for leave to amend its complaint.

¶26 For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

