COURT OF APPEALS
DECISION
DATED AND RELEASED

June 24, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-0641

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

MILWAUKEE ECONOMIC DEVELOPMENT CORPORATION,

PLAINTIFF-RESPONDENT,

V.

JAMES EISOLD AND SANDRA EISOLD,

DEFENDANTS-THIRD PARTY PLAINTIFFS-APPELLANTS,

COLOR NETWORK, INC.,

THIRD PARTY PLAINTIFF-APPELLANT,

ORCHARD PARK AND GERALD R. KOSTNER,

THIRD PARTY DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. James and Sandra Eisold and Color Network, Inc., appeal from an order granting summary judgment in favor of the Milwaukee Economic Development Corporation and dismissing their third-party complaint against Gerald R. Kostner and Orchard Park (collectively, "Kostner"). They also appeal from a judgment which awarded $102,504.35 to MEDC. The appellants contend that the trial court erred in concluding: (1) that, on MEDC's breach of guaranty claim, their fraud-in-the-inducement defense was without merit; (2) that, on MEDC's intentional misrepresentation claim, no issues of material fact were in dispute; and (3) that the third-party defendants were not proper parties to the underlying action. We affirm.

I. BACKGROUND

MEDC loaned $125,000 to the Eisolds for their use in the development of a business, Color Network, Inc. The loan was to provide financing for Color Network's purchase of new equipment and leasehold improvements at the Orchard Park property, which was owned by Kostner.

The loan consisted of a Promissory Note, a Security Agreement, a Guaranty, and an Agreement Regarding Disbursing Procedures. Pursuant to the terms of the disbursing agreement, the MEDC loan proceeds could be used only to pay the cost of new equipment and the cost of leasehold improvement. The Eisolds also executed a Personal Guaranty under which they agreed to pay MEDC the outstanding principal balance of the note if Color Network failed to pay any part of the note when it came due.

On June 14, 1993, James Eisold, as president of Color Network, requested a disbursement of $30,167.24, representing to MEDC that the disbursement would be for Color Network's purchase of computer equipment from Aschenbrener Communications, Inc. Eisold's request was accompanied by an invoice specifying the equipment to be purchased from Aschenbrener. Based upon that request, MEDC issued a check, jointly payable to Color Network and Aschenbrener. Instead of using that money to purchase computer equipment, however, Eisold used it to pay the Color Network payroll.

Eisold never purchased the computer equipment. Nevertheless, on January 10, 1994, as president of Color Network, he executed a security agreement granting MEDC a security interest in the specific equipment that was to have been purchased.

On January 12, 1995, MEDC brought an action alleging: (1) breach of guaranty executed as collateral for a term loan; and (2) intentional misrepresentation made in connection with both the June 14, 1993 request for the funds and the January 10, 1994 security agreement. MEDC alleged that it relied on the misrepresentations in both disbursing the funds and "[i]n deciding to forebear from exercising its rights under the Note and the other documents evidencing the MEDC loan." In their Answer, the Eisolds asserted an affirmative defense claiming they had been fraudulently induced into signing the Note. They contended that Stephen Grebe, then the vice president of MEDC, had expressly stated that in the event of a default on the loan, MEDC would never enforce the personal guaranty, but would rely solely on the collateral pledged by Color Network.

The Eisolds and Color Network also filed a third-party action against Kostner and Orchard Park. Their complaint alleged that Kostner failed to make the leasehold improvements for which the Eisolds had obtained the MEDC loan. The third-party complaint also asserted that Kostner had retained funds received from the Eisolds; funds which were provided for the sole purpose of making the leasehold improvements. The Eisolds further claimed that as a result of Kostner's failure to make the leasehold improvements and wrongful retention of funds, they were unable to make their loan payments to MEDC. The Eisolds contended that as a result of Kostner's acts, MEDC sued them following their default on the loan and, therefore, that Kostner was liable for the money they owed MEDC.

On February 12, 1996, the trial court granted MEDC's motion for summary judgment on both the breach of guaranty claim and the intentional misrepresentation claim. The trial court also dismissed the third-party complaint.

II. ANALYSIS

Summary judgment is used to determine whether there are any disputed facts that require a trial, and, if not, whether a party is entitled to judgment as a matter of law. RULE 802.08(2), STATS.; ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis.2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). Our review of a trial court's grant of summary judgment is *de novo*. *See* ***Green Spring Farm v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We must first determine whether the complaint states a claim. ***Id.*** If the complaint states a claim, we must then determine whether "there is no genuine issue as to any material fact" so that a party "is entitled to a judgment as a matter of law." *See* RULE 802.08(2); ***Green Spring Farms***, 136 Wis.2d at 315, 401 N.W.2d at 820. A party moving for summary judgment must demonstrate a right to the

judgment beyond a reasonable doubt; any doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment. ***Green Spring Farms***, 136 Wis.2d at 315, 401 N.W.2d at 820.

A. Breach of Guaranty Claim

Asserting an affirmative defense to MEDC's breach of guaranty claim, the Eisolds maintained that MEDC fraudulently induced them into the loan when Grebe told them that MEDC would not enforce the personal guaranty, but instead would rely exclusively on the collateral pledged by Color Network to satisfy the loan in the event of default. MEDC denied that Grebe made any such representation. The Eisolds claim that this dispute raises a genuine issue of material fact and, therefore, precludes summary judgment. We disagree.

A party alleging false representation as an affirmative defense must have relied upon the false representation, and the party's reliance must have been reasonable or justified. *See* ***Williams v. Rank & Son Buick, Inc.***, 44 Wis.2d 239, 245-46, 170 N.W.2d 807, 810-11 (1969). In other words, the party must show that it had a right to rely on the alleged misrepresentation, not merely that it did so. *See* ***Ritchie v. Clappier***, 109 Wis.2d 399, 404, 326 N.W.2d 131, 134 (Ct. App. 1982) (reliance on a representation must be justified; negligent reliance is not justifiable).

A party cannot reasonably rely on allegedly fraudulent statements directly contradicted by the terms of a subsequently executed contract. *See* ***Amplicon Inc. v. Marshfield Clinic***, 786 F. Supp. 1469, 1478 (W.D. Wis. 1992). The Eisolds contend, however, that their pleadings and affidavits establish a genuine issue relating to the reasonableness of their reliance on the alleged misrepresentation, thus bringing them within a recognized exception to this

general rule. They rely on ***Caulfield v. Caulfield***, 183 Wis.2d 83, 515 N.W.2d 278 (Ct. App. 1994), and ***Bank of Sun Prairie v. Esser***, 155 Wis.2d 724, 456 N.W.2d 585 (1990). ***Caulfield*** and ***Esser***, however, are significantly distinguishable.

In ***Caulfield***, the defendant claimed he was fraudulently induced to sign a note in favor of his wife at the request of his wife and her attorney. ***Caulfield***, 183 Wis.2d at 91-92, 515 N.W.2d at 282. Recognizing that the spousal relationship might have affected the defendant's decision to enter into the note, this court concluded that the defendant had raised a question of material fact relating to the reasonableness of his reliance on the alleged misrepresentation. ***Id.*** at 94, 515 N.W.2d at 283. This court also noted, however, that in the absence of a long-term personal relationship that could justify reliance on oral representations expressly contradicted in a subsequently executed contract, a person cannot justifiably rely on such representations. ***Id.*** In the instant case, the Eisolds have not claimed any such basis for their reliance. They have failed to present any evidence of a personal relationship that could justify their reliance on the alleged representations—representations contradicted by the express terms of their personal guaranty.

In ***Esser***, the defendant signed a guaranty on a note without first reading the guaranty. She later claimed she had done so only after the bank had misrepresented the terms of the guaranty. ***Esser***, 155 Wis.2d at 728, 456 N.W.2d at 587. Denying any misrepresentation, the bank contended that the defendant was negligent as a matter of law by failing to read the contract before signing it and, thus, was barred from proceeding on her claim that the bank fraudulently induced her to sign the note. ***Id.*** at 732, 456 N.W.2d at 589. The supreme court rejected the bank's contention and held that the failure to read a guaranty would not bar a

person executing a guaranty from claiming that the party seeking to enforce the guaranty had misrepresented its contents. ***Id.*** The Eisolds contend that ***Esser*** supports their claim that they justifiably relied on Grebe's statements. In ***Esser***, however, the defendant alleged a misrepresentation of the terms of the note; in the instant case, by contrast, the Eisolds did not allege any misrepresentation of the terms of their guaranty. Further, they never claimed that they failed to read the note or that the agent denied them the opportunity to read it.

The Eisolds' guaranty is clear. It states, in part:

> The obligations of the Undersigned hereunder shall not be released, discharged or in any way affected, nor shall the Undersigned have any rights or recourse against Lender, by reason of any action Lender may take or omit to take under the foregoing powers.
>
> In case the Debtor shall fail to pay all or any part of the Liabilities when due, whether by acceleration or otherwise according to the terms of said note, the Undersigned, immediately upon the written demand of Lender, will pay to Lender the amount due and unpaid by the Debtor as aforesaid, in like manner as if such amount constituted the direct and primary obligation of the Undersigned....
>
> ....
>
> If this instrument is executed by more than one person or other entity, each shall be jointly and severally liable hereunder.

Thus, the Eisolds personally guaranteed the punctual payment of the principal and interest on the note. The guaranty explicitly contradicts that which the Eisolds claim the MEDC agent represented to them. Therefore, even if an MEDC agent had represented that MEDC would not enforce the guaranty, it would have been unreasonable for the Eisolds to have relied on that statement given that the guaranty clearly contradicted any such representation. Accordingly, the trial court

correctly concluded that the Eisolds' fraudulent inducement defense was without merit as a matter of law and correctly ordered summary judgment for MEDC on its breach of guaranty claim.

B. Intentional Misrepresentation Claim

Arguing that the trial court erred in granting summary judgment to MEDC on its intentional misrepresentation claim, the Eisolds dispute that James knew, at the time he requested the $30,167.24 disbursement, that he was going to use the funds not for computer equipment but for payroll. Thus, the Eisolds maintain, the state of mind required for fraud was not established by the summary judgment submissions and, therefore, a genuine issue of material fact remained in dispute. Restricting the analysis to the June 14, 1993 request, the Eisolds offer a persuasive argument. Expanding the analysis to consider all the summary judgment submissions, including those encompassing the January 10, 1994 security agreement, we reject their challenge.

The elements of intentional misrepresentation are: "(1) a false representation of fact; (2) made with intent to defraud and for the purpose of inducing another to act upon it; and (3) upon which another did in fact rely and was induced to act, resulting in injury or damage." ***D'Huyvetter v. A.O. Smith Harvestore***, 164 Wis.2d 306, 320, 475 N.W.2d 587, 592 (Ct. App. 1991). Of particular significance to the Eisolds' argument in the instant case, "[g]enerally, the false representation must relate to present or pre-existing facts and cannot be merely unfulfilled promises or statements of future events." ***Id.***

MEDC's affidavit, submitted by Grebe, asserts without contradiction that the disbursement to James Eisold was made in reliance upon his representation regarding his intent to use the funds to purchase computer

equipment. The affidavit also asserts that shortly after issuing the check to Eisold, MEDC learned that Eisold had not purchased the equipment, but rather, had used the funds to meet Color Network's payroll. In his affidavit opposing MEDC's motion for summary judgment, however, James Eisold claims he never intended to misappropriate the funds. He avers that, at the time he made the request for the disbursement, he did intend to purchase the equipment. In his affidavit Eisold stated:

> 16. I received a check from MEDC for the purchase of computer equipment. It was made out to both Color Network, Inc. and Aschenbrener Communications, Inc. I gave the check to Jim Jensen of Aschenbrener Communications, Inc.
>
> 17. Subsequently my book keeper informed me that Color Network had insufficient funds to meet payroll. I contacted Jim Jensen of Aschenbrener … and asked if I could postpone for two weeks the purchase of the computer equipment, because Color Network, Inc. would be receiving approximately $50,000.00 in receivables. Jim Jensen agreed to this and returned the MEDC check to me. I fully intended to purchase the computer equipment, and never intended to defraud MEDC in any way.
>
> ….
>
> 20. The receivables did not come in as anticipated, so Color Network, Inc. did not have money to purchase the computer equipment.
>
> ….

Although James Eisold's use of the money for his company's payroll and his failure to purchase the computer equipment ultimately could lead a jury to infer that Eisold misrepresented facts with an intent to defraud MEDC, that is not the only reasonable inference. A jury also could believe James Eisold. Thus, limiting the view to the June 1993 transaction, and viewing the facts in the

affidavits submitted by MEDC and James Eisold in the light most favorable to the Eisolds, a reasonable inference could be drawn that James Eisold did not intend to misuse the MEDC funds at the time he made his request. *See* ***Harman v. La Crosse Tribune***, 117 Wis.2d 448, 457, 344 N.W.2d 536, 541 (1947) (a person's intent cannot be readily determined on a motion for summary judgment).

MEDC's claim of false misrepresentation, however, was not limited to James Eisold's June 1993 actions in obtaining the disbursement. MEDC also alleged that Eisold's fraud included the January 1994 security agreement representation that the equipment indeed had been purchased and thus could serve as collateral. Further, MEDC's pleadings did not segment the fraud into two separate claims corresponding to the two transactions. Instead, MEDC alleged in a single claim that Eisold's conduct in June 1993 and January 1994 caused it to disburse funds and "forebear from exercising its rights under the Note," based on the misrepresentations that the equipment would be purchased and, in fact, was purchased. In their Answer, the Eisolds offer a general denial but acknowledge the documents that unequivocally establish the misrepresentations of January 1994, and MEDC's reliance on them. Accordingly, we conclude that summary judgment was proper.

C. Third-Party Complaint

The Eisolds next argue that the trial court erred in dismissing their third-party complaint. Under theories of breach of contract, unjust enrichment, promissory estoppel, and intentional misrepresentation, the Eisolds impleaded Kostner and Orchard Park. In essence, the Eisolds claimed that their financial difficulties flowed from their landlord’s failure to fulfill his obligations under his contract with them and Color Network. The trial court determined that the

Eisolds' liability to MEDC did not legally flow from whatever Kostner may or may not have done. The trial court concluded, therefore, that Kostner and Orchard Park were not proper parties to the action and dismissed the third-party complaint without prejudice. The trial court was correct.

A trial court's decision to dismiss an action is discretionary and will not be disturbed absent an erroneous exercise of discretion. ***Johnson v. Allis-Chalmers Corp.***, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). We will sustain a discretionary act if the trial court examined the relevant facts, applied the proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

The Eisolds argue that the trial court's reasoning is flawed because privity of contract is not required for a third-party action. Citing § 803.05, STATS., the Eisolds claim that their third-party action was proper because a defendant may bring a third-party action against someone who may be liable to the defendant "for all or part of the plaintiff's claim against the defending party." Section 803.05(1), STATS.

Under § 803.05(1), STATS.,[1] a defending party may implead a third-party if the third-party's liability is dependent upon the outcome of the main claim.

[1] Section 803.05, STATS., provides in part:

> **Third-party practice.** **(1)** At any time after commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the defending party for all or part of the plaintiff's claim against the defending party, or who is a necessary party under s. 803.03....

If the claim is separate or independent from the main action, however, impleader is improper. *See* JAY E. GRENIG & WALTER L. HARVEY, CIVIL PROCEDURE § 305.2 at 395 (West Wisconsin Practice Series, Vol. 3, 1994).

Applying the statute, the trial court concluded that Kostner and Orchard Park were not possibly "liable to the defending party for all or part of the plaintiff's claim against the defending party." Section 803.05(1), STATS. MEDC brought an action against the Eisolds for breach of guaranty and intentional misrepresentation. Kostner and Orchard Park were not parties to that contract and, therefore, were not in the lawsuit. The Eisolds have alleged numerous causes of action against Kostner and Orchard Park, none of which is connected to MEDC's claims. To bring Kostner and Orchard Park into the action would have resulted in the trial of issues not involved in the litigation between the original parties. The trial court correctly concluded that impleader was improper.

The Eisolds also claim that Kostner and Orchard Park should have been parties to the action under § 803.03, STATS. Section 803.05, STATS., provides that impleader is proper if the impleaded party is a necessary party pursuant to § 803.03, STATS.[2] Because Kostner was not involved in the underlying

[2] Section 803.03, STATS., provides:

> **Joinder of persons needed for just and complete adjudication. (1)** PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process shall be joined as a party in the action if:
>
> (a) In the person's absence complete relief cannot be accorded among those already parties; or
>
> (b) The person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may:

(continued)

dispute between MEDC and the Eisolds, the adjudication of that dispute did not require Kostner's and Orchard Park's participation. Thus, neither Kostner nor Orchard Park was a necessary party. Further, because the claims asserted by the Eisolds against Kostner and Orchard Park are so distinct from those of the underlying action, no overlapping issues or defenses are present. Therefore, separate litigation will not "subject" the Eisolds "to a substantial risk" under the statute. Section 803.03(1)(b)2.

Accordingly, we conclude that the trial court reasonably exercised discretion in dismissing the third-party complaint without prejudice.[3]

By the Court.–Judgment and order affirmed.

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

> 1. As a practical matter impair or impede the person's ability to protect that interest; or
>
> 2. Leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his or her claimed interest.

[3] The Eisolds further claim that Kostner and Orchard Park should have been impleaded in this action under the equitable principles of either contribution or indemnification. Kostner responds that the doctrine of contribution is inapplicable because no common liability exists, and that indemnification does not apply because there was no contractual right among the parties. We agree. Kostner was not a party to the MEDC loan to the Eisolds, was not a signator on the loan, and was not a guarantor. *See generally* ***Vulcan Materials Co. v. Quality Limestone Products, Inc.***, 41 Wis.2d 705, 165 N.W.2d 204 (1969).