

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

No. 98-0328

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

TAXMAN INVESTMENT COMPANY,

PLAINTIFF-RESPONDENT,

v.

ANDREW J. SHAW,

DEFENDANT-APPELLANT,

NITRO, INC. AND YOUNG YUN,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Andrew J. Shaw appeals from a grant of summary judgment dismissing his counterclaims alleging negligent misrepresentation and

forfeiture against Taxman Investment Company.¹ Shaw contends that material issues of fact exist as to both counterclaims, rendering the trial court's summary judgment ruling erroneous. Because Shaw failed to present sufficient evidence demonstrating the existence of a material fact, the trial court did not err when it granted summary judgment on the counterclaims.

I. BACKGROUND

¶2 In September 1995, Shaw and an associate purchased the stock of an existing nightclub, Nitro, which was leasing space in a building located at 500 North Water Street. The landlord was Taxman and, in order to effect the assignment of the existing lease, Taxman required Shaw to execute a personal guarantee. The guarantee stated that Shaw would assume responsibility for up to six months rent if Nitro failed to pay the rent. In March 1996, Nitro failed to pay the rent. Taxman initiated eviction actions and sued Shaw under the guarantee provision. Shaw counterclaimed against Taxman, alleging that Taxman negligently misrepresented facts relating to obtaining a liquor license and illegally retained all of Nitro's property, which was subsequently auctioned off with Taxman retaining the proceeds.

¶3 Taxman filed a motion seeking summary judgment on the counterclaims. On the negligent misrepresentation claim, Shaw argued that

¹ Shaw's appeal also raised claims challenging the trial court's rulings on issues relating to a judgment following a jury verdict entered in favor of Taxman for \$99,873.90. Shaw was ordered to pay that amount pursuant to a guarantee he signed as owner of a nightclub, Nitro, after the nightclub breached its lease agreement with Taxman by failing to pay rent. However, during the pendency of the appeal, Shaw filed for bankruptcy and the judgment entered on the jury's verdict was discharged. Accordingly, we concluded by order dated September 3, 1999, that issues relating to the judgment are moot. We permitted the appeal to continue, but limited the remaining issue to a review of the trial court's ruling on the dismissal of Shaw's counterclaims.

Taxman led him to believe there would be no problem in obtaining a liquor license, and this representation convinced Shaw to sign the personal guarantee. In fact, Shaw states his application for a liquor license was denied. The trial court granted the motion dismissing the counterclaim, ruling that Shaw failed to satisfy his burden of proof, failed to show that Taxman had an obligation to “speak or tell something,” and that Taxman answered all of Shaw’s questions truthfully. On the forfeiture claim, the trial court ruled that there were no facts in dispute and no authority cited. Shaw now appeals.

II. DISCUSSION

¶4 This case arises from a grant of summary judgment. The standards governing our review of summary judgments are well known, *see, e.g., Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), and need not be repeated here. Our review is *de novo*. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). Shaw contends that both his negligent misrepresentation and forfeiture counterclaims should not have been dismissed. We reject each counterclaim in turn.

A. *Negligent Misrepresentation.*

¶5 Shaw’s negligent misrepresentation claim stems from a statement Taxman made during the negotiations for the lease assignment. Shaw alleges that Taxman was pressuring him to sign the personal guarantee as a sign of his “good faith.” When Shaw inquired about the previous owners’ ability to obtain a liquor license for Nitro, Taxman responded that there was never a problem. Shaw contends Taxman led him to believe that securing a liquor license would not be a problem. Shaw suggests that the statements Taxman made regarding the liquor

license constitute negligent misrepresentation or, at a minimum, raise a material issue of fact for a jury. We do not agree.

¶6 In order to prove a claim for negligent misrepresentation, Shaw must prove that: (1) a representation of fact was made by Taxman; (2) the representation of fact was untrue; (3) Taxman was negligent in making the representation of fact; and (4) Shaw believed that the representation was true and relied on it to his detriment. *See* WIS JI—CIVIL 2403. The specific elements of a cause of action in negligence are: (1) a duty of care or a voluntary assumption of a duty on the part of the defendant; (2) a breach of the duty (which involves a failure to exercise ordinary care in making a representation or in ascertaining the facts); (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. *See, e.g., Green Spring Farms*, 136 Wis. 2d at 319.

¶7 Shaw's submissions in opposition to Taxman's motion seeking summary judgment on the negligent misrepresentation claim, fail to show that Taxman falsely represented any fact or had any duty to disclose whether Shaw would have problems obtaining a liquor license. The submissions allege that Taxman stated that previous owners of the premises never had a problem obtaining a liquor license. It is undisputed that that statement is true. Since 1973, the premises has been operating as a nightclub, requiring a liquor license. Further, Shaw attempts to convince us that Taxman had some duty to disclose that fights requiring police involvement, which had occurred at Nitro, might prevent Shaw from obtaining a liquor license. However, there is no evidence in the record to show that Taxman knew about the incidents referred to. Taxman did not operate the nightclub; rather, he was the landlord. Further, there is evidence in the record indicating that Shaw had knowledge of the fighting incidents that occurred at

Nitro. During his deposition, Shaw admitted that he was aware of such incidents before he purchased the stock from the previous owners. We agree with the trial court's reasoning regarding Taxman's duty to disclose information to Shaw:

[T]here is no evidence on this record that there was specific information asked for and not provided by [Taxman].

There is no evidence of a special relationship. [Taxman] was not an operator of the business, and there is no evidence that he had knowledge of these police problems that are referred to in the documents. In fact, to the contrary; there is evidence that it was known to [Shaw].

So therefore, that doesn't raise a duty to speak.

... This was an arms-length transaction between businessmen.

Therefore, we conclude that Shaw failed to demonstrate there was any material issue of fact in dispute regarding the misrepresentation claim. Summary judgment was properly granted because the record conclusively demonstrated that the representation made by Taxman as to previous owners not having any problem obtaining a liquor license was true, not false.

B. Forfeiture.

¶8 Shaw's second counterclaim alleged that Taxman engaged in an unlawful forfeiture. Shaw alleges that this claim arises because Taxman failed to follow the required notice provision of WIS. STAT. § 704.17(3) (1997-98), which permits a landlord to terminate a tenancy for failure to pay rent after giving the tenant thirty days to do so.² Shaw also asserts that Taxman failed to follow the default provision of the lease, which provided:

² WISCONSIN STAT. § 704.17(3)(a) provides in pertinent part:

(continued)

1. If (a) Tenant shall fail to pay the rental due hereunder within five (5) days after the same shall be due ... Landlord, may, upon notice to Tenant, recover possession of and re-enter the Leased Premises without affecting Tenant's liability for past rent and other charges due or future rent and other charges to accrue hereunder.

In essence, Shaw argues that Taxman took possession of the premises without giving proper notice, either thirty days under the statute or, five days under the lease. Shaw contends that Taxman took possession of the premises by immediately changing the locks and then auctioning off all of the equipment and personal property located within the nightclub. Shaw argues this action constitutes an unlawful forfeiture and that material issues of fact exist on this claim. We cannot agree.

¶9 The default provision of the lease permits Taxman to take possession of the premises when rent is five days past due. There is a security provision in the lease, which provided Taxman with authority to take possession of the property within the premises upon breach of the lease. That provision provides:

As security for the faithful performance by Tenant of all the terms, conditions and provisions contained in this Lease on Tenant's part to be performed, Tenant hereby creates and grants to Landlord a first lien upon and security interest in all leasehold improvements installed in the Leased Premises and all furniture, furnishings, fixtures and equipment and other personal property now or hereafter in or to be placed in the Leased Premises, together with all proceeds therefrom and all accessions thereto (the "Collateral"), and the provisions of this paragraph are acknowledged by Tenant to constitute a chattel mortgage or chattel security agreement creating and granting a security interest in favor of Landlord in all of the Collateral.

If a tenant under a lease for more than one year fails to pay rent when due ... the tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay the rent ... on or before a date at least 30 days after the giving of the notice, and if the tenant fails to comply with the notice.

Therefore, the lease provides the authority for the landlord to secure the collateral if a breach occurs, and provides the landlord with the right to take possession of the premises. Shaw's reliance on the aforementioned statute is misplaced. The statute cited provides notice requirements for termination of the tenancy. Therefore, it is not properly relied on in support of repossession of the premises. The lease agreement permitted the landlord to "recover possession of and re-enter the Leased Premises without affecting Tenant's liability" if rent was five days past due. This occurred in March 1996, when Nitro failed to pay rent on the premises for March. The tenancy was not terminated until several months later. Taxman did not sell the collateral until April 1997. At no time in between was rent for March or any other month paid.

¶10 Based on the foregoing, we conclude that Shaw's claim alleging forfeiture did not raise any issues of material fact; rather, the trial court was correct to dismiss the claim and grant summary judgment in favor of Taxman.

By the Court.—Judgment affirmed.

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

