COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP797 **Cir. Ct. No. 2002CV126**

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

DISPLAY PROMOTIONS, INC.,

PLAINTIFF-APPELLANT,

V.

DOVEBID VALUATION SERVICES, INC., JOHN A. LIMA, EVANSTON INSURANCE COMPANY, AND TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Display Promotions, Inc. appeals from the dismissal of its claims on summary judgment against DoveBid Valuation Services,

Inc. and John A. Lima, and from an order denying its motion for reconsideration of the dismissal. We agree with the circuit court that Display did not fall within the ambit of the foreseeable harm caused by DoveBid's allegedly negligent valuation of assets being purchased by Display. Therefore, we affirm.

¶2 We review decisions on summary judgment by applying the same methodology as the circuit court. ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** at 496-97.

¶3 Display, a lithography, printing and advertising concern, desired to purchase the assets of Wirth Press, another printing company. Display and Wirth negotiated the price for Wirth's assets based on information provided by Wirth. In a draft Letter of Intent, Wirth and Display agreed that Wirth's personal property had a value of $2,250,000. Thereafter, the parties entered into a further Letter of Intent (the May 8, 1998 Letter, "the Letter") which specified $4,150,000 as the total purchase price, $2,250,000 of which was assigned to Wirth's personal property. The Letter permitted Display to obtain an appraisal of Wirth's assets, but the Letter did not contain a financing contingency. The Letter further stated that it was intended to be "a letter of proposal and not a binding agreement," and the parties contemplated execution of further, final agreements memorializing the transaction. In the end, no formal sale documents were executed before the transaction closed.

¶4 Display sought financing for the Wirth acquisition from M&I Bank. As a condition of financing, M&I required an appraisal of Wirth's personal

property. M&I retained DoveBid,[1] whose vice president, John Lima, inspected Wirth's personal property and estimated that it had a fair market value of $2,023,325, which was less than the amount to which Display and Wirth had agreed.[2] Because the appraised value of Wirth's personal property was too low for the financing Display requested, M&I required additional collateral from Display. Display's principals satisfied this request, and M&I approved the financing.

¶5 The Wirth-Display transaction closed in June 1998. In closing the transaction, Display's principal, Peter Lanigan, claims that he relied upon the fact that the appraisal was satisfactory to M&I. The appraisal and approved financing were factors in Lanigan's decision to purchase Wirth's property at the price specified in the Letter. However, Lanigan did not see DoveBid's appraisal before the transaction closed.

¶6 In 2001, Display sought refinancing, and Lima prepared a new appraisal of the property purchased from Wirth. Lima valued the property at $1,244,450, almost $779,000 less than the appraised value in 1998. Display was unable to obtain further financing in light of the reduced value of the property, and it ultimately entered into a WIS. STAT. ch. 128 receivership.

¶7 In 2002, Display sued DoveBid and Lima for negligently appraising Wirth's property in 1998. Display alleged that it had relied upon the appraisal and overpaid for Wirth's property. Display further alleged that it sustained damages

[1] At the time the appraisal was conducted, the appraisal company's name was AccuVal Associates, Inc. AccuVal merged into DoveBid in 2000. We will refer to the appraiser as DoveBid.

[2] The agreement between M&I and DoveBid barred M&I from disclosing the appraisal to any other parties.

when its business collapsed because it could not refinance based on the reduced value of the former Wirth property.

¶8 DoveBid and Lima sought summary judgment. They claimed that Display could not have relied upon the 1998 appraisal because Display did not see the appraisal before its transaction with Wirth closed, the Letter was not contingent upon obtaining financing, and the 1998 appraisal was not the proximate cause of Display's losses. The parties agreed in the circuit court that there were no material factual issues in dispute.

¶9 Based on the material undisputed facts, the circuit court concluded that Display proceeded with the purchase of Wirth's assets as outlined in the Letter and did not rely upon the DoveBid appraisal procured by M&I. The Letter did not contain a financing contingency which would have permitted Display to withdraw from the transaction if, in the circuit court's words, "there had been a connection between the appraisal and the willingness on the part of the lender to complete the loan transaction." The court concluded that the sole purpose of the appraisal was to assist M&I in its financing decision and not to advise Display whether to conclude the transaction.

¶10 On reconsideration, the court concluded that the facts of this case do not fall under ***Costa v. Neimon***, 123 Wis. 2d 410, 366 N.W.2d 896 (Ct. App. 1985).

¶11 On appeal, Display argues that this case falls under ***Costa***. In ***Costa***, the court held that a real estate appraiser hired by the mortgage lender can be liable to the real estate purchasers for a negligent appraisal even if the purchasers and the appraiser were not in privity of contract. ***Id.*** at 414.

> It is beyond serious dispute that an appraiser's negligently performed calculation of the value of property is an act or omission which would foreseeably cause some harm to someone. The most obvious "someone" is the party who hired the appraiser—in this case, the lender. Thus, an appraiser's failure to use due care in performing an appraisal is negligence because it is an act or omission in the face of foreseeable harm.
>
> It is not necessary that the appraiser have foreseen the harm to the particular plaintiff, although here, as in ***A.E. Investment*** [***Corp. v. Link Builders, Inc.***, 62 Wis. 2d 479, 214 N.W.2d 764 (1974)], harm to the plaintiff was foreseeable. [The appraiser] should have foreseen that a prospective buyer of the property being appraised was "within the ambit" of harm which would result from a carelessly done appraisal.
>
> Thus, under well-settled principles of Wisconsin negligence law, an appraiser may be held liable to a third party for negligence in performing an appraisal. We reject [the appraiser's] argument that he owed no duty of care to the [purchasers].

Costa, 123 Wis. 2d at 414 (citation omitted).

¶12 Display argues that it shares the characteristics of the real estate purchasers in ***Costa***: the purchasers knew that the lender had obtained an appraisal and the purchasers understood that financing would not have been approved in the absence of a satisfactory appraisal.

¶13 We agree with the circuit court that ***Costa*** does not apply. The purchasers in ***Costa*** knew that an appraisal would be performed and that the appraisal was a condition of financing. ***Id.*** at 412. Here, Display did not make its purchase of Wirth contingent upon financing or upon an appraisal of Wirth's assets; the parties settled on a valuation for the assets before Display sought financing. More importantly, it is undisputed that after M&I received DoveBid's appraisal, M&I required DoveBid's principals to provide additional collateral in order to obtain the requested financing. It was not foreseeable that DoveBid's

appraisal would harm Display, which did not rely upon the values set forth in the appraisal to either satisfy M&I's demand for additional collateral or set a purchase price for Wirth's assets.[3] The undisputed facts in this case do not place Display within the ambit of harm of DoveBid's allegedly negligent appraisal. These significant factual distinctions take this case out of the bounds of ***Costa***.[4]

By the Court.—Judgment and order affirmed.

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

[3] Even though the Letter was not the final agreement between the parties, the absence of a subject-to-financing and/or appraisal clause indicated Display's intention to proceed based on the negotiated price.

[4] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").