COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal No. 2016AP2245 **Cir. Ct. No. 2015CV003513**

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

ERIC L. KELLY,

PLAINTIFF-APPELLANT,

V.

PHILLIP COLE, JR. AND GLORIA COLE,

DEFENDANTS-RESPONDENTS,

BREWERY CREDIT UNION,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Eric L. Kelly appeals the trial court's order dismissing his unjust enrichment and promissory estoppel claims against Phillip Cole, Jr.[1] and Gloria Cole (collectively the "Coles"). Kelly and Phillip were co-workers and friends. The Coles owned a duplex with an outstanding note and mortgage, but no longer wanted to own the property. In contemplation of selling the duplex, the Coles refinanced the note and mortgage on the duplex in the amount of approximately $29,000, which included $6000 for necessary repairs.

¶2 Phillip and Kelly discussed Kelly buying the duplex for the outstanding balance on the note and mortgage. They agreed that if Kelly was able to assume the note and mortgage or obtain other financing to pay off the note and mortgage, the Coles would sell him the duplex.

¶3 Kelly began repairing the duplex using the $6000. He also applied for a loan with the Coles' lender, Brewery Credit Union ("Brewery").

¶4 After the repairs were completed, Brewery informed Kelly that his loan application was denied and that, based on the duplex's post-repair appraisal, additional monies would be required to purchase it. Kelly did not obtain other financing. Kelly was not able to purchase the Coles' duplex.

¶5 Kelly then filed this civil action against the Coles and Brewery claiming unjust enrichment and promissory estoppel, seeking damages of $20,000 as compensation for the value of the labor and materials used to repair the duplex.[2]

[1] For clarity, this court refers to Phillip Cole by his given name.

[2] Kelly's claims against Brewery were dismissed on summary judgment. Those claims are not material to this appeal and will not be discussed further.

The Coles filed a motion for summary judgment dismissing Kelly's claims. The trial court granted Coles' motion.

¶6 On appeal, Kelly maintains that there were "questions of [f]act that precluded summary judgment" and the case should be remanded to the trial court for a trial on the merits. Kelly has not identified any genuine issues of material fact. We affirm the trial court's order.

¶7 The following background facts are essential to understanding this case and are undisputed for the purposes of the summary judgment motion. In setting forth these facts, "'[w]e view the summary judgment materials in the light most favorable to the nonmoving party.'" *See* ***Rainbow Country Rentals and Retail, Inc. v. Ameritech Publ'g, Inc.***, 2005 WI 153, ¶13, 286 Wis. 2d 170, 706 N.W.2d 95. We refer to additional facts in our discussion as needed.

BACKGROUND

¶8 The Coles are longtime owners of a duplex in Milwaukee. Over the years, owning the duplex had become financially and physically burdensome. Although there were no code violations, the duplex was in poor condition, and the Coles were not renting the duplex. They also had a balloon payment coming due on the note and mortgage on the property.

¶9 In late 2014 or early 2015, Phillip, who was in his seventies, talked to Kelly about the Coles' desire to no longer own the property. Kelly was interested in buying the property and Phillip and Kelly came up with a plan to transfer ownership to Kelly. To avoid the balloon payment, the Coles changed lenders and refinanced the note and mortgage with a $29,000 loan from Brewery.

As a part of that refinancing, the Coles borrowed an additional $6000 which they intended for Kelly to use to repair the duplex.

¶10 Also in late January 2015, Phillip and Kelly went to Brewery and met with its employee, Rob Seton. Seton told Kelly that he understood that the Coles wanted to sell the duplex and that he understood that Kelly wanted to buy the property by assuming the loan. Seton explained to Kelly that there were steps that had to be taken before the duplex could be his, but Seton "was going to help [Kelly] get this done." Seton told Kelly that the note and mortgage balance was about $29,000; however, the duplex was worth about $39,000 for which Seton showed Kelly supporting documentation. Seton referred to the deal as a "cash cow." Seton said that, given Kelly's income level, after restoring the duplex to a livable condition, Kelly should have no problem qualifying for a loan.

¶11 Later, Kelly and his wife met with Seton and provided information for a credit application. Seton told Kelly that this information was "taken to see that [they] qualify to take over the mortgage."

¶12 In February 2015, the Coles advanced $6000 to Kelly to use for repairs to the duplex. Kelly and Phillip signed a receipt dated February 9, 2015, which states: "[r]eceived from [Phillip] $3000.00 on 2-6-15[,] $3000.00 on 2-9-15[.] Monies for re-hab on [the duplex] @ 3757A N[.] 26th given to [Kelly] *with intent for him to buy when loan approved*[.]" (Emphasis added; some capitalization omitted.)

¶13 The Coles never told Kelly what to fix inside the duplex. Kelly knew that the Coles "weren't going to give [him] any more money" to fix up the duplex. He also knew that "rehabbing" the duplex was going to cost more than

$6000 and that he had to assume the note and mortgage or obtain other financing in order to buy the duplex.

¶14 Kelly applied for a loan with Brewery to purchase the duplex. While the loan application was pending, Kelly did repair work on both the upper and lower units. According to Kelly, he worked ten-hour days over three months, Phillip visited the duplex daily, complimented the progress, and appeared excited about the repairs.

¶15 After the repairs were completed, a March or an April 2015 appraisal valued the duplex at $26,000. Seton told Kelly that, although he sympathized with him, Kelly needed to come up with an additional $9000 in order to obtain a loan from Brewery. Kelly also spoke to Brewery's president who confirmed what Seton told Kelly. Kelly did not try to get financing elsewhere and he did not obtain the necessary financing. The Coles still own the duplex and they have been able to rent the upper and lower units.

¶16 Kelly filed this action. The Coles counterclaimed against Kelly for unjust enrichment and property damage. They alleged that, while Kelly was repairing the duplex, he had lived there without paying rent. They also alleged that, when Kelly moved out, he vandalized the property.

¶17 At Kelly's January 2016 deposition he testified, regarding his agreement with Phillip, as follows:

> if [he] could assume the loan with Brewery … that [Phillip] would agree to [transfer the property to him], and [the Coles] took out a $6,000 advance that they were willing to put with the loan purchase.

Kelly also testified that they never talked about what would happen if he could not assume the loan. He knew he had to assume the loan or obtain other financing. Kelly understood that the Coles were ready and willing to sell him the property, if he could either assume their loan or get other financing to buy the duplex.

¶18 The trial court conducted a hearing on the Coles' summary judgment motion. Upon completion of the parties' arguments, in an oral decision, the trial court granted the motion and dismissed Kelly's claims.

¶19 With respect to the unjust enrichment claim, the trial court stated that it assumed that Kelly had satisfied the first two elements. However, it concluded Kelly had not satisfied the third element of unjust enrichment—that the Coles accepted or retained the benefit under circumstances making it inequitable for the Coles to retain the benefit without payment of its value. The trial court explained that it could not conclude that the benefits were conferred upon the Coles in any way other than "an officious way such that [the trial court] cannot find that allowing the Coles to retain the benefits would unjustly … enrich them." The trial court expressly stated that "there [was] no disputed fact in this record that the [c]ourt [could] find that contradicts the Cole[]s[']' assertion that … Kelly thrust these benefits upon them."

¶20 Addressing the promissory estoppel claim, the trial court further stated that the first element was satisfied because the Coles made a promise, which they could reasonably expect to induce Kelly to perform. However, it found the second element—that the promise did induce such action—was not satisfied. The court explained that although Kelly "performed at some level by making improvements to the [duplex], he did not perform by being able to qualify for a [loan]." Therefore, the trial court also granted summary judgment in favor of the

Coles on this claim. A brief written order memorialized the trial court's determination.

¶21 Subsequently, the Coles and Kelly stipulated to the dismissal of the Coles' counterclaims without prejudice, with leave to reopen the action and amend the counterclaims if Kelly prevailed on appeal. The trial court approved the stipulation. This appeal followed.

DISCUSSION

¶22 In addressing Kelly's challenges to the trial court's summary judgment decision dismissing his unjust enrichment and promissory estoppel claims, we apply the following standard of review.

Standard of Review

¶23 We review a summary judgment determination *de novo*, using the same methodology as the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2)(2015-16).[3] "In order to survive summary judgment, however, the party with the burden of proof on an element in the case must establish that there is at least a genuine issue of fact on that element by submitting evidentiary material 'set[ting] forth specific facts,'… material to that element."

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Horak v. Building Servs. Indus. Sales Co., 2008 WI App 56, ¶8, 309 Wis. 2d 188, 750 N.W.2d 512 (citation and one set of quotation marks omitted).[4]

The Trial Court Properly Exercised its Discretion in Dismissing Kelly's Unjust Enrichment Claim on Equitable Grounds

¶24 To establish a claim for unjust enrichment, a plaintiff must prove three elements: (1) the plaintiff conferred a benefit upon the defendant; (2) the defendant had an appreciation or knowledge of the benefit; and (3) the defendant accepted or retained the benefit under circumstances making it "'inequitable for the defendant to retain the benefit without payment of its value.'" ***S & M Rotogravure Serv., Inc. v. Baer***, 77 Wis. 2d 454, 460, 252 N.W.2d 913 (1977) (citation omitted). In an action for unjust enrichment, the trial court exercises discretion in determining whether to grant or deny equitable relief. *See* ***Ulrich v. Zemke***, 2002 WI App 246, ¶8, 258 Wis. 2d 180, 654 N.W.2d 458. "Discretionary decisions are sustained if the [trial] court examined the relevant facts, applied a proper standard of law, and using a rational process, reached a conclusion that a reasonable judge could reach." ***Id.***

¶25 The trial court found that, under the circumstances, it was not inequitable for the Coles to retain the benefits, if any, of Kelly's work without paying for it. As such, we need not address the parties' arguments regarding the second element, since the trial court assumed that Kelly had established the first and second element and the unjust enrichment claim has been resolved based on

[4] The Coles cite ***Yahnke v. Carson***, 2000 WI 74, ¶11, 236 Wis. 2d 257, 613 N.W.2d 102, and state that a party may not manufacture a factual dispute when none exists by submitting an affidavit which directly contradicts prior deposition testimony. However, they do not discuss the application of the rule, often referred to as the "sham" affidavit rule, to the facts of this case.

the absence of the third element. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed). ¶26 In challenging the dismissal of this claim, Kelly asserts that "[w]hen a person confers a benefit upon another with the reasonable expectation of compensation, he has not officiously conferred a benefit," citing ***Cosgrove v. Bartolotta***, 150 F.3d 729, 734 (7th Cir. 1998). Kelly states that he reasonably expected to obtain the duplex as his compensation and that, because Phillip pointed out some of the work that his duplex needed and communicated his approval of Kelly's work, Phillip cannot call himself a passive beneficiary.

¶26 The Coles contend that the benefit of the improvements to the duplex was thrust upon them when Kelly failed to obtain financing to purchase the home. In essence, the Coles state that the sole benefit they and Kelly expected would be conferred upon the Coles was that Kelly would obtain financing from Brewery and become the owner of the duplex and they would be relieved of the ownership and its responsibilities. And, such benefit was never conferred. Additionally, the Coles state that they have not accepted or retained any benefit from Kelly because they remain ready to transfer the duplex to Kelly if he pays off their note and mortgage on it.

¶27 In ***Ludyjan v. Continental Casualty Co.***, our Supreme Court explained the reasoning underlying the policy of not awarding restitution to one who has officiously conferred a benefit upon another, in part, as follows:

> [W]here a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. The rule denying restitution to officious persons has the effect of penalizing those who thrust benefits upon others and protecting persons who have had benefits thrust upon them.

Id., 2008 WI App 41, ¶12, 308 Wis. 2d 398, 747 N.W.2d 745 (quoting RESTATEMENT OF RESTITUTION § 2 cmt. a (AM. LAW INST. 1937)).

¶28 Here, the record establishes that when Kelly made repairs to the duplex, he also knew that he had to obtain a loan if he was to become the owner. Kelly's awareness of that condition is shown by the February 2015 receipt which he signed that states, "[m]onies for re-hab on [the duplex] @ 3757A N[.] 26th given to [Kelly] *with intent for him to buy when loan approved*[.]" (Emphasis added.)

¶29 Kelly's testimony at his 2016 deposition provides additional evidence of his understanding that he had to get a loan if he was to become the duplex's owner. Upon questioning, Kelly testified:

> [Attorney] What was your understanding of "get rid of it[?]"
>
> [Kelly] Getting rid of the [duplex], meaning to sell or [have] somebody else take over the mortgage on it. [Phillip] just wanted off of it. Both of them did. They said their kid was living in the [duplex] for the last ten years, and they haven't received any money for it.
>
> [Attorney] Did he ever talk to you about just letting it go into foreclosure?
>
> [Kelly] No. He never told me anything about foreclosure. I don't think he would have done that, because he said he had nice credit, and he had already been through four bankruptcies.
>
> [Attorney] Sometime in late December you were having a discussion about the [duplex]. What was his proposal, exactly?
>
> [Kelly] That if I could assume the loan with [Brewery], that he would agree to do it, and him and his wife took out a $6000 advance

> that they were willing to put with the loan purchase.
>
> ….
>
> [Attorney] And you knew that you had to assume the loan in order to buy the [duplex], correct?
>
> [Kelly] Yes, ma'am.
>
> [Attorney] And, if you would have been able to assume the loan, the Coles would have sold you the [duplex]?
>
> [Kelly] That was the plan, until the appraisal came in.
>
> ….
>
> [Attorney] Is it your understanding that the Coles were ready and willing to sell you the [duplex] if you could either assume their loan or get other financing to buy it?
>
> [Kelly] Yes, ma'am.

¶30 Contrary to Kelly's assertion that he is entitled to restitution, this case does not present "circumstances in which the benefactor [Kelly] reasonably believes that he will be paid—that is, when the benefit is not rendered gratuitously, as by an officious intermeddler, or donatively, as by an altruist or friend or relative." *See* ***Cosgrove***, 150 F.3d at 734 (applying Wisconsin law). Rather, when Kelly made the repairs to the duplex, he knew that he had to obtain financing so he could assume or pay off the Coles' note and mortgage and become the owner of the duplex.

¶31 In addition, when Kelly entered into the plan to buy the duplex, Kelly knew that becoming the duplex's owner was conditioned on his ability to obtain financing. He also knew that the Coles had a $6000 limit on repair funds. After he failed to obtain financing, Kelly could not "reasonably believe" that he

would be paid for the repairs he did. Moreover, the Coles are not responsible for Kelly's inability to obtain the loan from Brewery. Nor are they responsible for Kelly's decision to make repairs that cost more than the $6000 that the Coles advanced.

¶32 Kelly also relies on portions of the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10 and cmt. a (AM. LAW INST. 2011), which relate to mistaken improvements.[5] However, despite considering the facts and the reasonable inferences from those facts in the light most favorable to Kelly, no reasonable jury could find that Kelly mistakenly made improvements believing that he would become the owner of the duplex without assuming the Coles' note and mortgage or qualifying for a loan to satisfy that mortgage.

¶33 Instead, the evidence unequivocally establishes that when Kelly began the duplex repairs he knew that (1) he would need to get a loan so he could assume the Coles' note and mortgage or satisfy it, and that (2) becoming the duplex's owner was contingent on him doing so. In the parlance of the

[5] Kelly quotes the following portions of the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10 and cmt. a (AM. LAW INST. 2011):

> A person who improves the real or personal property of another, acting by mistake, has a claim in restitution as necessary to prevent unjust enrichment.
>
> . . . .
>
> Modern decisions allow restitution for mistaken improvements more liberally than in the past because the tendency of the modern law is to judge the equities between the parties on a case-by-case basis. Instead of applying a blanket rule denying restitution for this particular class of benefits, courts can protect the legitimate interests of the owner by appropriate limitations on the remedy afforded the improver.

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5(3) (AM. LAW INST. 2011),[6] Kelly bore the risk of the mistake and, therefore, he has not established an invalidating mistake that would allow him to claim that he made "mistaken improvements" under RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10 (AM. LAW INST. 2011).

¶34 Thus, we conclude that the trial court properly exercised its discretion in dismissing Kelly's unjust enrichment claim.

The Trial Court's Determinations regarding the Promissory Estoppel Claim are supported by the Record and Equitable Principles

¶35 Promissory estoppel has three elements: (1) the promise was one for which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) the promise did induce such action or forbearance; and (3) injustice can be avoided only by enforcement of the promise. ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965). The third requirement involves a policy decision which "necessarily embraces an element of discretion." ***Id.***

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[6] The RESTATEMENT explains the following regarding invalidating mistakes:

> (3) A claimant bears the risk of a mistake when
>
> (a) the risk is allocated to the claimant by agreement of the parties;
>
> (b) the claimant has consciously assumed the risk by deciding to act in the face of a recognized uncertainty; or
>
> (c) allocation to the claimant of the risk in question accords with the common understanding of the transaction concerned.

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 (AM. LAW INST. 2011).

¶36 Kelly asserts that his promissory estoppel claim should be reinstated. Citing ***Cosgrove***, 150 F.3d at 733, Kelly states promissory estoppel does not require an enforceable contract. In his initial brief, Kelly states that although the phrase "when loan approved," in the receipt for the $6000, made the [Coles'] promise somewhat conditional, that is no defense to promissory estoppel.[7]

¶37 Kelly's assertion that a somewhat conditional promise is not a defense to promissory estoppel is not accompanied by any citation to legal authority and could be denied on that ground alone. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). However, addressing the merits of that assertion, decisions of the Wisconsin Supreme Court hold to the contrary.

¶38 Rather, when a promise is conditioned upon the occurrence of some other event that has not occurred, it is not an unfulfilled promise that provides a basis for recovery under promissory estoppel. *See* ***Silberman v. Roethe***, 64 Wis. 2d 131, 154, 218 N.W.2d 723 (1974) (concluding that the promises at issue were not promises that the plaintiff should have reasonably expected to induce action or forbearance of a definite and substantial character on the part of the promisee); ***Lakeshore Commercial Fin. Corp. v. Bradford Arms Corp.***, 45 Wis. 2d 313, 322, 173 N.W.2d 165 (1970) (stating that because the promise to release

[7] In his reply brief, Kelly states that "the understanding between Kelly and [the] Coles was not that [the] Coles['] obligation to transfer the [duplex to] Kelly was enforceable only in the event that Kelly obtained financing. This was not discussed and not a condition of the agreement. Kelly's understanding was that if he repaired the property, that it would be transferred to him."

Kelly's brief does not cite the record in making this assertion. Kelly does not address this stark change from his position in his opening brief which acknowledges that he needed to get a loan for the duplex. We will not speculate why Kelly takes contradictory positions in his briefs. Regardless, statements in briefs are not evidence. *See* ***Holbrook v. Holbrook***, 103 Wis. 2d 327, 340, 309 N.W.2d 343 (Ct. App. 1981).

the plaintiff's mortgage was conditioned on receipt of substitute collateral which was not received, there was "no issue about [mortgage holder] failing to keep its promise"); ***Winnebago Homes, Inc. v. Sheldon***, 29 Wis. 2d 692, 701, 139 N.W.2d 606 (1966) (stating that promissory estoppel claim would fail on its merits because the "so-called promise on the part of the lender may not fairly be construed to constitute an unqualified promise to pay upon completion" of the home; it was clear that payment was conditioned upon the homeowners' approval and the lender obtaining insurance from the federal housing administration).

¶39 ***Cosgrove***, cited by Kelly, also states that

> [a] promise that is vague and hedged about with conditions may nevertheless have a sufficient expected value to induce a reasonable person to invest time and effort in trying to maximize the likelihood that the promise will be carried out. *But if he does so knowing that he is investing for a chance, rather than relying on a firm promise that a reasonable person would expect to be carried out, he cannot plead promissory estoppel*.

See ***id.***, 150 F.3d at 733 (emphasis added; applying Wisconsin law). Here, Kelly knew he was "investing for a chance" (that by doing the repairs he would qualify for a loan sufficient to pay off the note and mortgage), "rather than relying on a firm promise that a reasonable person would expect to be carried out" (there was no promise about what would happen if Kelly did not qualify for a sufficient loan—he merely assumed he would qualify); thus, he cannot establish a claim for promissory estoppel. *See* ***id.*** Contrary to Kelly's assertion, Wisconsin state court decisions and ***Cosgrove*** hold that the conditional nature of a promise can be a defense to promissory estoppel.

¶40 In this case, the record clearly establishes that the Coles' promise to transfer the duplex to Kelly was conditioned upon him obtaining financing. Kelly

also understood that he could have gone someplace other than Brewery to obtain a loan to buy the duplex. Thus, the conditional nature of the Coles' promise means that it does not provide a basis for recovery for promissory estoppel. *See, e.g.*, ***Winnebago Homes***, 29 Wis. 2d at 701. This is particularly applicable here because the Coles had no role in or control over the loan approval process and/or Brewery's ultimate decision regarding Kelly's loan application. *See* ***id.***

¶41 Kelly also states that there was no doubt in anyone's mind that his loan would be approved, and stresses Brewery's assurances that, given his income level, he should have no problem getting a loan once the duplex was made livable. Kelly cites no facts in the record to support the assertion that there was no doubt in anyone's mind that his loan would be approved. As we have oft stated, it is not the role of this court to scour the record for those facts. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990). Moreover, even if true, the record does not include any evidence, much less evidence supporting any inference, that the Coles had any role with respect to those representations. The trial court's dismissal of the promissory estoppel claim is supported by the record.

¶42 Based on our review of the record, dismissal of the promissory estoppel claim is also proper based on the third promissory estoppel prong; that is, the record does not provide a basis for awarding relief to Kelly to avoid injustice. *See* ***Doe v. General Motors Acceptance Corp.***, 2001 WI App 199, ¶7, 247 Wis. 2d 564, 635 N.W.2d 7 (stating that the reviewing court can affirm a summary judgment on different grounds than those relied on by the trial court); *see also* ***Silberman***, 64 Wis. 2d at 143, 147 (stating that the court was making an independent determination on appeal regarding whether injustice could be avoided only by enforcement of the promise—the third element of a promissory estoppel claim).

¶43 In ***Silberman***, the court relied upon the following factors in assessing the injustice:

> The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

Id., 64 Wis. 2d at 146 (citing RESTATEMENT OF CONTRACTS SECOND § 90(1) (AM. LAW INST., Tentative Draft No. 2, 1965); quotation marks omitted).

¶44 In this case, the circumstances under which the promise was made were rather informal. *See* ***Silberman***, 64 Wis. 2d at 146. And, as previously stated, the promise which Kelly seeks to enforce was conditioned on Kelly assuming the Coles' note and mortgage with Brewery or obtaining other financing. The Coles took on an additional $6000 of debt and allowed Kelly to use that money for repairs before he had applied for the loan to purchase the duplex. We also take into consideration the fact that the parties were friends and the transaction does not involve an individual taken advantage of by a corporation or individual with superior knowledge of legal and business practices. *See* ***id.***

¶45 Additionally, Kelly thought he was making a very good investment. He stated that Seton told him that the amount of the note and mortgage on the duplex was about $29,000, but that without any improvements the duplex was worth $39,000. Kelly also relied on Seton's description of the duplex as a cash cow for which, according to Kelly, Seton provided documentation. Moreover, the $29,000 included the $6000 that the Coles gave to Kelly to use for repairs to the

duplex. This was not a situation where Kelly was merely trying to help a friend. Had it worked out as Kelly envisioned, he would have obtained property worth in excess of $39,000 for $29,000. Moreover, the Coles stand ready and willing to sell the duplex to Kelly for the amount of the outstanding note and mortgage—about $29,000.

¶46 Further, we note that the record clearly establishes Kelly knew that he needed to assume the note and mortgage or obtain other financing in order to become the owner of the duplex. The Coles did not tell Kelly what projects to work on, how many projects he should do, or how many hours he should spend doing repair work. Indeed, the Coles expressly told Kelly that $6000 was all they would advance for repairs and that they had no more money to advance for that purpose.

¶47 Kelly performed repair work and did not become the duplex's owner. However, he, alone, was responsible for the extent of the repair work and for spending more than $6000 on repairs. Kelly apparently hedged his bets on getting the loan, believing that he would ultimately benefit from all the work that he did. The Coles are not responsible for Kelly's failure to obtain financing. We conclude here to "let the losses lie where they have fallen because it is not clear that injustice would result from the nonenforcement of the alleged promises of the defendant." *See* ***id.*** at 147.

CONCLUSION

¶48 Having independently considered the record, we conclude that the trial court properly dismissed Kelly's unjust enrichment and promissory estoppel claims. Therefore, we affirm the trial court's order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.