

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2005AP1748-FT

Cir. Ct. No. 2004CV002505

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DAVID DONISI,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

SHARON MCGANN,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. David Donisi appeals a summary judgment order dismissing his breach of contract claim against Sharon McGann arising from a failed real estate transaction. McGann cross-appeals the dismissal of her counterclaim for damages based on theories of common law misrepresentation and

false advertisement to the public under WIS. STAT. § 100.18 (2003-04).¹ We affirm the circuit court's dismissal of all claims.

BACKGROUND

¶2 On September 23, 2003, after an exchange of counteroffers, Donisi agreed to sell certain property to McGann for \$145,000. McGann refused to close on the property, however, after learning about some uncorrected building code violations and other alleged problems with the property that had not been disclosed in the Real Estate Condition Report provided by Donisi at some point during the negotiations. Donisi subsequently sold the property to another buyer for \$129,000 and demanded that McGann pay him the \$16,000 difference in price, alleging breach of contract.

¶3 McGann asserted as an affirmative defense that the contract was void or otherwise unenforceable based on Donisi's failure to disclose that he had received notices to repair or correct a condition of the property issued by a governmental agency, that there had been construction or remodeling on the property for which required governmental approval had not been obtained and that the main building on the property had sustained hail and water damage to its roof and had substantial structural defects from water seepage. In addition, McGann filed a counterclaim for damages, costs and attorney fees based on the same alleged misrepresentations of the condition of the property contained in the Real Estate Condition Report, under theories of both common law intentional misrepresentation and statutory false advertisement.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Donisi and McGann filed cross-motions for summary judgment. After reviewing the summary judgment materials, the circuit court dismissed all claims and awarded no damages or costs to either party.

DISCUSSION

¶5 This court reviews summary judgment decisions de novo, applying the same method employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994).

We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law.... [Next,] we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial.

Frost v. Whitbeck, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325 (citations omitted), *aff'd*, 2002 WI 129, 257 Wis. 2d 80, 654 N.W.2d 225.

Donisi's Breach of Contract Claim

¶6 We are satisfied that Donisi's complaint stated a claim for breach of contract and McGann's answer joined issue by alleging grounds to void that contract. We look to the summary judgment materials, then, to determine whether there were any material facts in dispute requiring trial on Donisi's claim.

¶7 If a party to a contract is induced to manifest his assent to the contract by means of a fraudulent or material misrepresentation by another party to the contract, the contract is voidable if the recipient justifiably relies on the misrepresentation. *First Nat'l Bank and Trust Co. of Racine v. Notte*, 97 Wis. 2d 207, 222, 293 N.W.2d 530 (1980).

¶8 Here, the real estate contract included a provision stating,

Seller represents to Buyer that as of the date of acceptance Seller has no notice or knowledge of conditions affecting the Property or transaction other than those identified in the Seller's Real Estate Condition Report dated [9/23/03], which was received by Buyer prior to signing this Offer [on 9/24/03] and which is made a part of this Offer by reference.

The real estate contract further defined a condition affecting the property to include a "government agency or court order requiring repair, alteration or correction of any existing condition."

¶9 In the Real Estate Condition Report, Donisi represented that he was not aware of any "federal, state or local regulations requiring repairs, alterations, or corrections of an existing condition. *This might include, but is not limited to, orders to correct building code violations.*" In her summary judgment materials, however, McGann provided copies of two orders from the safety and buildings division of the Department of Commerce ordering Donisi to correct a number of building code violations.

¶10 Donisi does not dispute that he received two orders to correct building code violations relating to greenhouses on the property, and that he did not mention them on the Real Estate Condition Report. He argues that the orders were immaterial, however, on the theory that the real estate contract also required the greenhouses to be removed from the property prior to closing. Donisi therefore reasons that the orders did not relate to a condition that would still be "existing" by the time of closing, and were not really "conditions affecting the Property." We reject these arguments.

¶11 The real estate contract represented that Donisi had no knowledge of conditions affecting the property “as of the date of acceptance” of the offer, not the date of closing. As we noted, Donisi does not dispute the existence of government orders directing him to remedy certain building code violations.

¶12 We conclude Donisi’s assertion in the real estate contract that he was unaware of any orders to correct building code violations on the property was a material representation upon which McGann reasonably relied in deciding to purchase the property at the final agreed upon price, rendering the real estate contract voidable. Because the contract was voidable, McGann was entitled to walk away from it upon discovering the misrepresentation. Therefore, the circuit court properly dismissed Donisi’s breach of contract claim on summary judgment. In light of our conclusion regarding the building code violations, we need not address the other misrepresentations in the Real Estate Condition Report which McGann claimed rendered the contract unenforceable.

McGann’s False Advertisement Counterclaim

¶13 Wisconsin’s Deceptive Trade Practices Act “generally prohibits false, deceptive, or misleading representations or statements of fact in public advertisements or sales announcements.” *Tietzworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶38, 270 Wis. 2d 146, 677 N.W.2d 233. The statute provides in relevant part:

No person ... with intent to sell ... any real estate ... or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate ... shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or

television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such ... sale ... of such real estate ..., which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

WIS. STAT. § 100.18(1). In short, the statute requires a plaintiff to allege that a defendant

has, with the specified intent, made an ‘advertisement, announcement, statement or representation ... to the public,’ which contains an ‘assertion, representation or statement of fact’ that is ‘untrue, deceptive or misleading,’ and that the plaintiff has sustained a pecuniary loss as a result of the ‘assertion, representation or statement of fact.’

Tietsworth, 270 Wis. 2d 146, ¶39 (citing § 100.18(1)).

¶14 We conclude that McGann’s allegations are insufficient to state a claim under the Deceptive Trade Practices Act because Donisi’s alleged misrepresentations in the Real Estate Condition Report were not made to the public. “[T]he important factor in defining ‘the public’ is ‘whether there is some particular relationship between the parties.’” *Kailin v. Armstrong*, 2002 WI App 70, ¶44, 252 Wis. 2d 676, 643 N.W.2d 132 (citation omitted) (concluding a party to a contract was not a member of the public). McGann contends she did not have a particular relationship with Donisi until he accepted her counteroffer. We disagree. Donisi’s representations were not made “in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing.” Rather, McGann had already made an initial purchase offer on the property before Donisi provided her with the Real Estate Condition Report. Therefore, at the time the alleged

misrepresentations were made, McGann and Donisi had already established the particular relationship of negotiating parties. The circuit court properly dismissed McGann's WIS. STAT. § 100.18 counterclaim.

McGann's Intentional Misrepresentation Counterclaim

¶15 McGann contends the circuit court erred in dismissing her common law intentional misrepresentation claim because her cross-motion for summary judgment only referenced her statutory misrepresentation claim. However, the record shows that Donisi moved for summary judgment on both of McGann's counterclaims, as well as his own breach of contract claim. Therefore, the circuit court properly considered whether a trial was required on the common law misrepresentation counterclaim, even though McGann had only argued the statutory counterclaim in her own motion.

¶16 McGann averred in her affidavit that she had incurred \$155.30 in out-of-pocket expenses related to Donisi's misrepresentations: \$60 in lost interest on her earnest money and \$95.30 in travel expenses for trips made solely or primarily because of the contract. To the extent that McGann's claimed damages arose from the contract itself, we note that once the grounds for avoidance of a contract have been met, the aggrieved party has the election of either rescission or affirming the contract in seeking damages. *First Nat'l Bank and Trust Co. of Racine*, 97 Wis. 2d at 225. Here, it was undisputed in the pleadings that McGann relied upon the misrepresentations by Donisi to walk away from the contract, barring her from also seeking contract damages.

¶17 To the extent that McGann was attempting to claim that her damages were the result of a separate tort, we note she did not present the circuit court with any argument or legal authority showing that the economic loss doctrine would not

apply or otherwise explaining the basis for her position. When Donisi moved for summary judgment on both of McGann's counterclaims, and McGann responded with a cross-motion and argument supporting only one of her two claims, the circuit court could reasonably have considered her other claim abandoned. We therefore deem any objection to the dismissal of her intentional misrepresentation claim to be waived. *Schwittay v. Sheboygan Falls Mut. Ins. Co.*, 2001 WI App 140, ¶16 n.3, 246 Wis. 2d 385, 630 N.W.2d 772 ("A party must raise an issue with sufficient prominence such that the circuit court understands that it is called upon to make a ruling.").

By the Court.—Order affirmed.

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

