COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-0420

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

MANITOWOC WESTERN COMPANY, INC.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

ALLAN MONTONEN,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

MANITEX, INC., THE MANITOWOC COMPANY, INC., FRED BUTLER, ROBERT R. FRIEDL, AND DOES 1 THROUGH 20, INCLUSIVE,

THIRD-PARTY DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Allan Montonen appeals from a judgment granting summary judgment to Manitowoc Western Company, Inc. (MWC) and others. MWC cross-appeals from the circuit court's denial of its motion for sanctions against Montonen and his counsel for frivolous claims. We affirm the circuit court.

¶2 In 1994, Montonen was the general manager of MWC's subsidiary, Benicia Boom Truck Dealership, in Benicia, California. MWC, a Wisconsin corporation, is a wholly-owned subsidiary of The Manitowoc Company, Inc. (Manitowoc).[1] This dispute arises out of Montonen's option to purchase the Benicia facility. The option was set forth in an October 1994 letter captioned "Option to Purchase Benicia Boom Truck Crane Dealership" (the option letter). Third-party defendant Robert R. Friedl, chief financial officer of Manitowoc and a director of MWC and Manitex, Inc., negotiated the option letter with Montonen and the parties' respective counsel. On behalf of MWC, the option letter was signed by another third-party defendant, Fred Butler, who was president of MWC. Disputes arose and litigation ensued relating to the option letter.

¶3 In April 1996, MWC sued Montonen to obtain a declaration that the option letter was a nonbinding and unenforceable general expression of intent and, even if the option letter were binding, MWC had no obligation to perform under the option letter. MWC also sought a declaration that it had the right to terminate Montonen's employment without further liability. The circuit court decided all

[1] MWC is also a distributor for Manitex, Inc., another wholly-owned subsidiary of Manitowoc.

issues against Montonen on summary judgment but denied the motion of MWC and the third-party defendants for sanctions against Montonen for a frivolous proceeding. Montonen appeals the dismissal of his claims, and MWC cross-appeals the denial of sanctions. We will address the facts as they relate to the appellate issues.

PERSONAL JURISDICTION

¶4 Montonen argues that the circuit court improperly exercised personal jurisdiction over him because he was served with MWC's summons and complaint while he was in Wisconsin trying to resolve the option letter dispute.

¶5 After Montonen exercised his option to purchase the Benicia facility, the parties were unable to agree on all of the terms of the purchase agreement. In April 1996, one of Montonen's attorneys requested a meeting with Fred Butler in Manitowoc, Wisconsin. Montonen, Butler and their attorneys met in Manitowoc on April 30. During the meeting, Montonen was served with MWC's summons and complaint.

¶6 Montonen, a California resident, moved to dismiss on the grounds that the court lacked personal jurisdiction because he was tricked into coming to Wisconsin so that he could be served with a summons and complaint. While it is true that an individual will not be subject to a Wisconsin court's personal jurisdiction when he or she was induced to come into the jurisdiction by false representations, ***Townsend v. Smith***, 47 Wis. 623, 626, 3 N.W. 439 (1879), the court found that Montonen's counsel requested a face-to-face meeting, the meeting was held in Wisconsin, and Montonen was not tricked or induced by fraud or deceit to come to Wisconsin for the meeting. Therefore, Montonen did not establish that he was induced to come to Wisconsin for purposes of obtaining

jurisdiction over him for service of process. The record supports the circuit court's findings regarding the circumstances under which Montonen came to be in Wisconsin on the day he was served with MWC's suit seeking a declaration relating to the option letter.

¶7 Montonen also asks us to abolish the law of "transient jurisdiction" which provides that a court may obtain personal jurisdiction over an individual if service is accomplished on the defendant when the defendant "[i]s a natural person present within this state when served." WIS. STAT. § 801.05(1)(a) (1995-96).[2] He also argues that he did not have sufficient contacts with Wisconsin to confer personal jurisdiction. Neither argument was made in the circuit court. Therefore, we do not address them. ***Meas v. Young***, 138 Wis. 2d 89, 94 n.3, 405 N.W.2d 697 (Ct. App. 1987).[3]

¶8 In the alternative, Montonen argues that we should adopt a rule which forbids service of process on a person who comes to Wisconsin for settlement discussions. While a few jurisdictions have adopted this approach, *see, e.g.,* ***E/M Lubricants, Inc. v. Microfral, S.A.R.L.***, 91 F.R.D. 235 (N.D. Ill. 1981), Wisconsin has not. We are an error-correcting court, ***Hillman v. Columbia County***, 164 Wis. 2d 376, 396, 474 N.W.2d 913 (Ct. App. 1991), and it is not our role to make such a wholesale change in the law of personal jurisdiction. That role is reserved to our supreme court using its law-developing or law-declaring powers. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 405, 424 N.W.2d 672 (1988).

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[2] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

[3] Even if we were to reach this argument, we would note that the United States Supreme Court has upheld the constitutionality of the transient jurisdiction rule. *See* ***Burnham v. Superior Court of Cal.***, 495 U.S. 604 (1990).

THE OPTION LETTER

¶9 Montonen argues that the option letter is a binding and enforceable contractual obligation which MWC breached. He argues that the option letter should be interpreted under California law. MWC disagrees on both counts and urges us to apply Wisconsin law in interpreting the letter. The circuit court concluded on summary judgment that the option letter was merely an agreement to agree and not an enforceable contract. We agree with the circuit court.

¶10 An appeal from a grant of summary judgment raises an issue of law which we review by applying the same standards employed by the trial court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. ***Streff v. Town of Delafield***, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

¶11 On summary judgment, the circuit court discerned no conflict between Wisconsin and California law on the question of agreements to agree. Therefore, the court applied Wisconsin law in interpreting the option letter. The court determined the parties' intent from the provisions of the letter. Paragraph seven of the option letter contemplates a closing of the transaction involving Benicia's assets "subject to and *contingent* upon the negotiation, execution and delivery by MWC and [Montonen] of a definitive purchase agreement containing [terms acceptable to MWC and Montonen] and such other definitive agreements as may be necessary to consummate the Closing, all containing terms and provisions acceptable to both MWC and [Montonen]." (Emphasis added.) The court concluded that "the closing and purchase are subject to and contingent upon further negotiation and the execution of a definitive purchase agreement." The use of the word "contingent,"

which generally means "possible, but not assured," in the option letter supported MWC's contention that the option letter was an agreement to agree.

¶12 The circuit court rejected Montonen's argument that paragraph nine of the letter evidenced the parties' intent to be bound by the option letter. While that paragraph states that the parties' obligations are binding on them, the circuit court rightly noted that the paragraph provides that the proposal outlined in the option letter was contingent upon the conditions set forth in the letter "including the achievement of satisfactory performance and the negotiation, execution and delivery of a definitive purchase agreement acceptable to both MWC and [Montonen]."

¶13 The court concluded that the parties' objective intent in entering into the option letter was an agreement to agree. In the absence of a genuine issue of material fact on this question, the court granted summary judgment to MWC.

¶14 While Montonen argues on appeal for the application of California law to the option letter, he concedes in his appellant's brief that under the law of California and Wisconsin, "agreements to agree to do not create binding obligations" and the parties' intent to be bound must be ascertained from the language employed in the option letter. We accept this concession and apply Wisconsin law to the option letter.

¶15 Agreements to agree are not enforceable. *See* ***Dunlop v. Laitsch***, 16 Wis. 2d 36, 42, 113 N.W.2d 551 (1962). Whether an agreement will be binding depends on the parties' intent. ***Peninsular Carpets, Inc. v. Bradley Homes, Inc.***, 58 Wis. 2d 405, 413-16, 206 N.W.2d 408 (1973). The parties' intent is discerned from their "words, written and oral, and their actions." ***Household Utils., Inc. v. Andrews Co.***, 71 Wis. 2d 17, 29, 236 N.W.2d 663 (1976). An agreement which refers to subsequent "formal agreements" is generally not binding precisely because

it contemplates further dealings. ***Skycom Corp. v. Telstar Corp.***, 813 F.2d 810, 815 (7th Cir. 1987). The ***Skycom*** court noted that where parties have identified areas of uncertainty in their transaction which must be addressed and resolved prior to the conclusion of the transaction, the parties may be said to have reached an agreement to agree and it would be unfair and commercially disadvantageous to deem such agreements binding contracts. *See* ***id.***

¶16 It is clear from the language of the option letter that the parties in this case contemplated further negotiations in reaching a disposition of the Benicia dealership. In the course of attempting to create a document embodying their plans for the Benicia dealership, Montonen's counsel asked MWC "to prepare a [first] draft of a definitive purchase agreement in accordance with paragraph 7" of the option letter. After receiving a draft from MWC, Montonen noted the complexity of the agreement and that it varied significantly from the provisions of the option letter. The parties could not agree about the area within which Montonen could operate and whether that could exceed the area covered under the existing distributorship agreement between Manitowoc and Manitex, the current owner of the Benicia dealership. This evidence, which was uncontroverted on summary judgment, supports a conclusion that the option letter was merely an agreement to agree, not a binding agreement.

MONTONEN'S FRAUD CLAIM

¶17 Montonen challenges the circuit court's dismissal on summary judgment of his fraud counterclaim against MWC. Montonen alleged that before he signed the option letter, Friedl assured him that it was MWC's intent that the option letter would be binding and fully enforceable by the parties and that MWC would act in good faith. Despite the foregoing representations, MWC did not intend the option letter to be enforceable even if Montonen performed fully under it.

¶18 To the extent Montonen's argument is premised on a contention that the option letter was an enforceable agreement, we have already held that the option letter did not constitute an enforceable agreement. Therefore, Montonen cannot rest on the fact that while MWC initially indicated that it would perform under the option letter, it later withdrew from unsuccessful negotiations. Rather, in order to establish fraud, Montonen must show that MWC did not intend to perform under any circumstances at the time it entered into the option letter,[4] i.e., the ***Alropa*** exception.

> To amount to a fraud upon the purchaser the representations must relate to present or pre-existing facts, and it cannot ordinarily be predicated on unfulfilled promises or statements made as to future events. One of the exceptions to this rule is that when promises are made upon which the purchaser has a right to rely, and at the time of making them the promisor has a present intent not to perform them, the promises may amount to fraudulent representations and liability result.

Hartwig v. Bitter, 29 Wis. 2d 653, 657, 139 N.W.2d 644 (1966) (citation and footnote omitted) (quoting ***Alropa Corp. v. Flatley***, 226 Wis. 561, 565-66, 277 N.W.2d 108 (1938)).

¶19 The circuit court concluded that Montonen did not present any evidence that MWC's representations and promises were other than the types of representations and promises made in the option letter, all of which were subject to the contingencies and conditions set forth in the option letter.

¶20 The summary judgment record substantiates that MWC engaged Montonen in substantial and lengthy negotiations but the parties were unable to come to an agreement for the disposition of the Benicia facility. Among the

[4] California law is in accord on this point. *See* ***Magpali v. Farmers Group, Inc.***, 55 Cal. Rptr. 2d 225, 231 (1996).

unresolved issues was the scope of Montonen's sales area. The circuit court observed that MWC's promises were qualified by other provisions in the option letter which expressly noted that other significant matters had yet to be negotiated. And, it was in these areas that negotiations broke down. Because Montonen cannot establish that MWC did not intend to honor the option letter when it entered into the letter, we need not address Montonen's arguments relating to other aspects of his fraud claim.

MONTONEN'S CONSPIRACY CLAIMS

¶21 The circuit court dismissed Montonen's conspiracy claims against MWC and certain of its subsidiaries and agents for failure to state a claim. Montonen alleged in his counterclaim that "MWC, Manitowoc, Manitex, Friedl, and Butler, in taking the actions set forth [in the fraud counterclaim] entered into a common plan, scheme, agreement and conspiracy to interfere with Montonen's rights and to injure Montonen as set forth [in the fraud counterclaim]."[5] Montonen also alleged that Friedl and Butler profited from the sale of the Benicia dealership to another after the negotiations with Montonen failed to yield an agreement.

¶22 Applying Wisconsin law, the circuit court dismissed Montonen's conspiracy claims against all parties because a corporation and its wholly owned subsidiary cannot conspire as a matter of law. The court further found that Montonen did not allege acts of the agents which were wholly unrelated to promoting the principal corporations' welfare, which would be required to bring a separate claim against the agents.

[5] Montonen made similar allegations in his third-party complaint against Manitex, Manitowoc, Butler and Friedl.

¶23 We review de novo a motion to dismiss for failure to state a claim, accepting all the alleged facts and reasonable inferences as true. ***Town of Eagle v. Christensen***, 191 Wis. 2d 301, 311-12, 529 N.W.2d 245 (Ct. App. 1995). A motion to dismiss tests the legal sufficiency of the complaint. ***Id.*** at 311. Because pleadings are to be liberally construed, a claim will be dismissed only if it is clear that under no conditions can the plaintiff recover. ***Id.***

¶24 The dispositive point is the fact that a company cannot conspire with its agents, which is what Montonen alleges occurred here. For the reasons set forth in ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 426-31, 405 N.W.2d 354 (Ct. App. 1987), these allegations have no basis in law.[6]

¶25 Montonen argues that California law does not preclude his conspiracy claims. We disagree. While California courts have not specifically adopted the United States Supreme Court case upon which Wisconsin bases its bar to conspiracy claims between a corporate principal and its agents, ***Copperweld Corp. v. Independence Tube Corp.***, 467 U.S. 752 (1984),[7] California has an "agent's immunity" doctrine which is conceptually in accord with ***Copperweld***. "[A]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage." ***Black v. Bank of Am. N.T. & S.A.***, 35 Cal. Rptr. 2d 725, 727 (1994) (quoted source omitted). Montonen alleges in his counterclaim that Butler and Friedl were agents of MWC, Manitex and

[6] Montonen even concedes that the circuit court may have properly dismissed his conspiracy claims under Wisconsin law.

[7] In ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 426-31, 405 N.W.2d 354 (Ct. App. 1987), the court expressed its agreement with ***Copperweld Corp. v. Independence Tube Corp.***, 467 U.S. 752 (1984).

Manitowoc. These allegations bring the claim under California's agent's immunity doctrine.

MONTONEN'S UNJUST ENRICHMENT CLAIM

¶26 Montonen also appeals the dismissal of his unjust enrichment counterclaim. Montonen alleged that he was improperly induced to continue performing services for the benefit of MWC, Manitowoc, Manitex, Friedl and Butler and that these entities benefited from his services.

¶27 The circuit court, applying Wisconsin law, dismissed this claim because Montonen conceded that he had an employment contract. Where, as here, the parties are in a contractual relationship, the doctrine of unjust enrichment does not apply. ***Cont'l Cas. Co. v. Wis. Patients Comp. Fund***, 164 Wis. 2d 110, 118, 473 N.W.2d 584 (Ct. App. 1991).[8] The circuit court correctly concluded that Montonen could not claim that the defendants were unjustly enriched by services which he was contractually bound to provide and for which he was compensated pursuant to his contract.

MWC'S CROSS-APPEAL

¶28 MWC cross-appeals from the circuit court's refusal to hold that Montonen's defenses, counterclaims and third-party complaint were frivolous under WIS. STAT. §§ 802.05 and 814.025(3).[9] Montonen made claims against the MWC entities and two corporate officers, Butler and Friedl, in their individual capacities.

[8] California law is in accord on this point. ***Lance Camper Mfg. Corp. v. Republic Indem. Co. of Am.***, 51 Cal. Rptr. 2d 622, 628 (1996).

[9] The parties disagree over which statute applies. We need not resolve this dispute because MWC does not prevail under either statute.

¶29 WISCONSIN STAT. § 802.05(1)(a) states that a signature on a pleading certifies that the pleading is well-grounded in fact and existing law or a modification of existing law. The sanction under § 802.05 "may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the filing ... including reasonable attorney's fees." The frivolous claims statute, WIS. STAT. § 814.025, provides that reasonable attorney's fees shall be awarded to the victim of a frivolous claim, e.g., a claim which is brought to harass or a claim that lacks "any reasonable basis in law or equity" or a good faith argument for a modification of existing law.

¶30 We first address Montonen's claims against the MWC entities. In its ruling on MWC's motion for sanctions, the circuit court found that Montonen's arguments about MWC's intent to honor the option letter were "thin," but not so lacking in foundation as to be harassment or without a reasonable basis in law or equity. The court found that while Montonen stated a claim relating to MWC's intent at the time the option letter was executed, Montonen did not have sufficient proof. The court found that the signer of Montonen's pleadings had information formed after a reasonable inquiry and that the pleadings were fairly well-grounded in fact.[10]

¶31 As the circuit court acknowledged, Montonen's claim of lack of intent to perform at the execution of the option letter was subject to proof, which was not forthcoming. However, Montonen stated a claim and was entitled to avail

[10] MWC argues that the circuit court did not consider the standards under WIS. STAT. § 802.05. However, it is clear from this statement that the court, without identifying the statute, did consider the § 802.05 standards.

himself of the discovery process. We cannot say that Montonen's claims were brought solely to harass the defending corporate entities.

¶32 We also conclude that Montonen's conspiracy claims against the corporate entities were not frivolous. Montonen claimed that California law did not preclude his conspiracy claims. While we have held against Montonen on this point, he did have an arguable basis for relying on California law since California law does not precisely echo Wisconsin's law in this area.

¶33 We turn to Montonen's claims against the corporate officers in their individual capacities. On a motion to dismiss, the circuit court found that Montonen stated a claim of conspiracy based on fraud and deceit against the corporate officers.

¶34 We disagree with the circuit court and conclude that Montonen knew or should have known that he could not pursue claims against the corporate officers as individuals. Montonen's pleadings identify Butler and Friedl as agents of the MWC entities. Montonen concedes in this court that he sued Butler and Friedl as individuals as a hedge against a possible claim by the MWC entities that Butler and Friedl were acting outside the scope of their employment.

¶35 We reject this purely speculative basis for bringing a party into litigation. Montonen has not pointed us to any evidence in the record that at the time he pled against Butler and Friedl, the MWC entities were claiming that Butler and Friedl had acted outside the scope of their employment. The claims against Butler and Friedl were without foundation in fact and law and were frivolous.

¶36 Even though we disagree with the circuit court and hold that the claims were frivolous, we nevertheless affirm the court's order denying attorney's

fees and costs because there is no showing that the attorney's fees and costs expended in this litigation would have varied in quality and quantity had Montonen not sued Butler and Friedl in their individual capacities. We may affirm the circuit court on grounds other than that relied upon by the lower court. ***Bence v. Spinato***, 196 Wis. 2d 398, 417, 538 N.W.2d 614 (Ct. App. 1995).

¶37 In ***Sommer v. Carr***, 99 Wis. 2d 789, 793, 299 N.W.2d 856 (1981), the court stated that before WIS. STAT. § 814.025 was adopted, "there was no way an innocent party could recoup legal expenses without starting a separate action ...." In ***Lenhardt v. Lenhardt***, 2000 WI App 201, ¶14, 238 Wis. 2d 535, 618 N.W.2d 218, *review denied*, 239 Wis. 2d 310, 619 N.W.2d 93 (Wis. Oct. 17, 2000) (No. 99-2022), the court noted that attorney's fees may be recovered under § 814.025 even if they were incurred prior to the commencement of the litigation as long as the fees were sufficiently related to the subject matter of the later-filed frivolous case. We conclude that the remedy under WIS. STAT. §§ 802.05 and 814.025(3) is an award of attorney's fees and costs expended in responding to a frivolous claim.

¶38 There is no evidence that any additional attorney's fees and costs were incurred in responding to the individual claims against Butler and Friedl. As corporate officers, they were subject to discovery relating to Montonen's claims against the corporate entities. Montonen directed interrogatories and document production requests to Butler and Friedl, and both were deposed. The January 1998 interrogatories, document production and requests for admission Montonen sent to Butler relate to the substance of Montonen's claims and ask for nothing personal about Butler. An excerpt of Friedl's deposition focuses on the disputed option letter transaction. The answer to the third-party complaint was filed by one attorney for all corporate and individual defendants.

¶39 The record does not reveal that the scope of Butler's and Friedl's involvement in the litigation was expanded by virtue of the individual claims asserted against them, even if those individual claims had no basis in law. The record also does not indicate that additional attorney's fees were incurred in disposing of the individual claims against Butler and Friedl. The individual claims were inextricably linked with the claims brought against the corporate entities for which Butler and Friedl served as officers. Manitowoc's motions to dismiss were made against all claims brought by Montonen, not just those claims brought against Butler and Friedl in their individual capacities.

¶40 Even though MWC intended to prove its reasonable attorney's fees once it received a threshold determination that Montonen's claims were frivolous, its prima facie case under WIS. STAT. §§ 802.05 and 814.025 needed to include a showing that such fees were incurred in the course of responding to the frivolous claims.[11] Because that threshold showing was not made, MWC's sanctions motion and proof are lacking. We therefore affirm the circuit court's refusal to award sanctions but on different grounds.

¶41 Finally, MWC complains that Butler and Friedl will forever bear the stigma of having been sued by Montonen and may have to reveal such in future business dealings and litigation. To the extent that Butler and Friedl were harmed, the harm cannot be addressed under WIS. STAT. §§ 802.05 or 814.025, which requires a party to incur attorney's fees in the first place.

[11] We are aware that case law discusses the deterrent effect of the frivolous claims statutes. However, because MWC invoked these statutes in its sanction motion and the remedy under these statutes is attorney's fees, we do not deem our holding inconsistent with the cases discussing deterrence.

¶42 No costs to any party.

By the Court.—Judgment affirmed.[12]

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

[12] 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.").