COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1392 **Cir. Ct. No. 2001CV780**

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

MARK FRANZEN AND JEANNE FRANZEN,

PLAINTIFFS-APPELLANTS,

V.

LEMEL HOMES, INC.,

DEFENDANT,

METROPOLITAN BUILDERS ASSOCIATION, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Mark and Jeanne Franzen appeal from a judgment dismissing on summary judgment their claims against the Metropolitan Builders Association of Greater Milwaukee, Inc. (the MBA) arising out of an arbitration relating to the faulty construction of their home by Lemel Homes, Inc. We conclude that the Franzens have not shown fraud in support of their intentional and negligent misrepresentation claims or that the arbitration award should be invalidated due to fraud. 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. Even if certain facts are in dispute, the factual dispute will not prevent the granting of summary judgment if the disputed facts are "not material to the legal issue on which summary judgment is sought." ***Tackes v. Milwaukee Carpenters Dis. Council Health Fund***, 164 Wis. 2d 707, 711, 476 N.W.2d 311 (Ct. App. 1991).

¶3 The dispute arises from the defective construction of the Franzens' home by Lemel. The parties ultimately resorted to arbitration before the MBA. The arbitration award required Lemel to make certain repairs to the home and pay the Franzens $2290. The Franzens accepted this payment. Thereafter, the Franzens contended that the repairs were inadequate, and the home was inspected again. The arbitrators then required Lemel to pay the Franzens an additional $1080, which the Franzens declined to accept. The Franzens then sought to vacate the arbitration award in the circuit court and pursued claims of intentional and

negligent misrepresentation against the MBA. The circuit court dismissed the Franzens' claims; the Franzens appeal.

¶4 The Franzens' intentional and negligent misrepresentation claims are based upon their allegation of fraud by the MBA. The Franzens allege that the arbitration award should be vacated because of misrepresentations made by the MBA.[1] We conclude that the summary judgment record does not reveal a genuine issue of material fact warranting further proceedings on the fraud-based claims.

¶5 Intentional misrepresentation has five elements:

> (1) the defendant made a factual representation; (2) which was untrue; (3) the defendant either made the representation knowing it was untrue or made it recklessly without caring whether it was true or false; (4) the defendant made the representation with intent to defraud and to induce another to act upon it; and (5) the plaintiff believed the statement to be true and relied on it to his/her detriment.

Kaloti Enters., Inc. v. Kellogg Sales Co., 2005 WI 111, ¶ 12, 283 Wis. 2d 555, 699 N.W.2d 205 (citations omitted). The critical element of any fraud claim is a knowingly false representation. *See* ***Lundin v. Shimanski***, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985).

¶6 The Franzens contend that an employee of the MBA fraudulently informed Jeanne that she was required to arbitrate before the MBA pursuant to her home construction contract. We disagree. The contract provided for arbitration and identified an arbitrator. However, by the time the conflict arose between the

[1] An arbitration agreement/award can be set aside where the award was procured by corruption, fraud or undue means. WIS. STAT. § 788.10(1) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Franzens and Lemel, the arbitrator previously selected under the contract was no longer offering arbitration services. The contract provided that if no arbitrator was selected, the arbitration would be before the MBA. Therefore, the MBA's employee's statement that the arbitration would take place before the MBA was consistent with the contract and was not a false statement made with intent to defraud. Summary judgment was appropriate on this claim.

¶7 The Franzens next contend that Jeanne was told by an employee of the MBA that she need not retain counsel to arbitrate. The employee denied making this statement. The Franzens argue that a question of material fact exists which should have precluded summary judgment. As the Franzens' reply brief highlights, Jeanne testified at an evidentiary hearing that she consulted with counsel to determine the cost of representation. Jeanne's inquiry of counsel indicates that she knew that she could employ counsel, and she chose not to retain counsel. The record does not reveal a disputed issue of material fact suggesting that Jeanne relied upon the alleged representation by the MBA employee that she did not need counsel for the arbitration. Summary judgment was appropriate on this claim.

¶8 The Franzens allege that the MBA falsely stated that it would enforce all existing agreements between the Franzens and Lemel. The MBA enforced all agreements reached in the arbitration, which was where the Franzen-Lemel dispute had to be resolved. Clearly, the Franzens and Lemel were unable to reach a comprehensive agreement regarding their dispute prior to arbitration.

¶9 We do not see how the Franzens' allegations that the MBA claimed it would not show preference to the builder and that it would enforce its rules and procedures equally against both parties constitute untrue statements made with intent

to defraud. The essence of this claim is that the Franzens were not satisfied after the arbitration. This is not enough to sustain a fraud claim.

¶10 The Franzens contend that the MBA represented that it would conduct a thorough and fair inspection to determine Lemel's compliance with codes and standards. Again, we fail to see how this allegation is an untrue statement made with intent to defraud. As part of the arbitration process, the Franzens' home was inspected on more than one occasion.

¶11 We also conclude that there are no genuine issues of disputed fact relating to the Franzens' negligent misrepresentation claim. The negligent misrepresentation claim is also premised on allegedly false statements made by the MBA. We have already addressed those allegedly false statements.[2]

¶12 The Franzens next claim that the arbitration award should be vacated because the arbitration proceeding was not fair and was the result of fraud. We have already addressed the fraud allegations. We turn to the arbitration proceeding itself.

¶13 Arbitration awards are due deference, and we do not substitute our judgment for that of the arbitrator. ***City of Madison v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d 576, 585-86, 427 N.W.2d 8 (1988). We "will not overturn the arbitrator's decision for mere errors of law or fact, but only when 'perverse misconstruction or positive misconduct [is] plainly established, or if

[2] Because we so hold, we do not address the circuit court's application of the economic loss doctrine to the Franzens' negligent misrepresentation claim.

there is a manifest disregard of the law, or if the award itself is illegal or violates strong public policy.'" ***Id.*** at 586 (citations omitted).

¶14 The Franzens argue that the arbitration award should be invalidated because they were induced into entering into the MBA arbitration agreement. This claim is premised upon the previously rejected claims of fraud and false statements by the MBA.

¶15 The Franzens seek to have the arbitration award invalidated because Mark was not a party to the arbitration agreement. However, the circuit court determined and the summary judgment record bears out that Mark participated in the arbitration proceeding.

¶16 The Franzens claim that the arbitration panel did not consider all of their claims of faulty workmanship and inadequate repair and that Lemel was not required to respond to each defect the Franzens alleged.[3] The MBA rules and procedures require the issues to be submitted in writing and require the responding party to submit a reply in writing. The rules do not specify how extensive the response must be or how subsequent issues are to be raised and responded to.

¶17 It is clear from the arbitration award that the MBA considered all issues raised by the Franzens which were within the scope of the arbitration. For example, the Franzens contend that the MBA did not make a decision relating to

[3] The Franzens argue that the arbitration panel did not address Jeanne's claim that Lemel terminated her employment as a selections coordinator in retaliation for her complaints about the condition of the home Lemel constructed. This argument lacks merit. The MBA arbitration agreement addressed matters involving the construction of the home; Jeanne Franzen's employment claims were outside the scope of the MBA arbitration. Also outside the scope of the arbitration were the Franzens' claims for personal injury arising from exposure to the foam insulation.

foam insulation which was applied to the windows to stem drafts and air leaks, but which caused health problems for the Franzens and created further problems with the windows. However, the September 27, 2005 MBA arbitration award discusses the foam insulation issue and requires Lemel to repair the windows and to determine how the foam insulation may be sealed to protect the home's occupants from it.

¶18 The Franzens complain that they did not receive a copy of the inspection report prepared by the MBA. It is undisputed that Lemel also did not receive a copy. The MBA rules state that "[t]he Inspection Team's report is never released to the parties." This issue lacks merit.

¶19 We are also unmoved by the Franzens' contention that the MBA did not apply its standards in evaluating the condition of their home. The MBA responded to the Franzens' complaints in its arbitration award. The MBA found that Lemel did not complete repairs or completed repairs not to industry standards and awarded the Franzens $1080, which the Franzens declined to accept.

¶20 The summary judgment record relating to the arbitration does not establish misconstruction, misconduct, a manifest disregard of the law or a violation of public policy. The summary judgment record does not establish material factual issues relating to the Franzens' intentional and negligent misrepresentation claims. The circuit court did not err in granting summary judgment.

By the Court.—Judgment affirmed.

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