COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2493 **Cir. Ct. No. 2002CV143**

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

GREGORY JAUNICH AND JULIE JAUNICH,

PLAINTIFFS-APPELLANTS,

V.

DURPHEE LAKE CRANBERRY, LLC, QUALITY TITLE OF SAWYER COUNTY, INC. AND NICHOLAS STINCIC,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Sawyer County: JOHN P. ANDERSON, Judge. *Judgment modified and, as modified, affirmed in part and reversed in part; order affirmed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Gregory and Julie Jaunich appeal a judgment, entered on a jury's verdict, awarding Durphee Lake Cranberry, LLC ("DLC"), and

Nicholas Stincic the sum of $123,215.50. The Jaunichs had sued for the return of earnest money after cancelling a real estate contract; DLC and Stincic counterclaimed for breach of contract damages. The Jaunichs also appeal the order denying their motion to set aside the verdict. They assert: (1) Stincic lacked standing to counterclaim; (2) the court gave erroneous jury instructions and should have directed the verdict or, alternatively, they are entitled to a new trial in the interests of justice; (3) the court erroneously admitted evidence of the Jaunichs' wealth; and (4) DLC and Stincic were not entitled to damages under the contract. We conclude Stincic lacked standing; the Jaunichs failed to object to the jury instructions and are not entitled to a new trial; the court did not err in admitting wealth evidence; and damages should be reduced to the amount the Jaunichs concede. Accordingly, the judgment is modified and, as modified, affirmed in part and reversed in part; the order denying the motion to set aside the verdict is affirmed, and we remand for entry of a corrected judgment and a redetermination of costs.

Background

¶2 On July 31, 2001, the Jaunichs made an offer to purchase DLC's Sawyer County property for $870,000. Prior to DLC entering the contract, Stincic had transferred his entire interest in the company to his former father-in-law, Jon Gottschalk. Thus, Gottschalk signed the contract on DLC's behalf. Quality Title of Sawyer County, Inc., held the Jaunichs' $20,000 earnest money deposit.

¶3 The purchase offer contained multiple contingencies. One of these required DLC to ensure all hardware associated with its cranberry operation was removed prior to closing. The contract allowed the Jaunichs to terminate the

purchase offer if they were not satisfied with the completion of the contingencies on the date of closing.

¶4 Closing was originally scheduled for September 22, 2001, but was moved to October 1. According to the Jaunichs, they visited the property multiple times up to at least September 30 and it appeared the contingencies remained unfulfilled. The Jaunichs claim to have relayed their concerns to their attorney handling the transaction, Alf Sivertson, but these concerns were never relayed to DLC. The Jaunichs terminated the offer because they perceived the contingencies to be unfulfilled, but DLC refused to return the earnest money.

¶5 On November 7, 2001, Sivertson entered into a contract with DLC to purchase most of the property for $685,000. Stincic apparently purchased the remainder for $185,000. This resulted in DLC eventually obtaining $870,000 for the property, just as the Jaunichs had agreed in the purchase offer.[1]

¶6 On September 12, 2002, the Jaunichs sued DLC and Quality Title for a return of the earnest money. They also named Stincic as a defendant because he was claiming an interest in the earnest money. DLC and Stincic counterclaimed for compensatory and consequential damages from the Jaunichs' decision not to complete the sale.

¶7 The Jaunichs moved for summary judgment, arguing DLC had failed to comply with the contingencies and Stincic lacked standing to assert a

[1] Stincic disputes that he purchased the remainder of the property. He asserts the evidence merely shows that he acquired a bank loan for $185,000.

counterclaim. The court denied the motion. The parties then agreed to a return of the earnest money, leaving only the counterclaim for trial.[2]

¶8 At trial, there were jury instructions and a special verdict on substantial compliance. The jury found the Jaunichs breached the contract and awarded DLC and Stincic $63,000 for lost profits and $58,000 in consequential damages.[3] The Jaunichs moved to set aside the judgment. The motion was denied and the judgment entered. The Jaunichs appeal.

Discussion

I. Standing

¶9 The Jaunichs argue Stincic had no standing to assert a counterclaim against them. Whether a party has standing is a question of law we review de novo. ***Chenequa Land Conservancy, Inc. v. Village of Hartland***, 2004 WI App 144, ¶12, 275 Wis. 2d 533, 685 N.W.2d 573.

¶10 Generally, only a party to a contract has standing to recover under it.[4] ***Dorr v. Sacred Heart Hosp.***, 228 Wis. 2d 425, 449, 597 N.W.2d 462 (Ct.

[2] With the return of the earnest money, it would appear that Quality Title's interest in this litigation was finished and, indeed, there is no further mention of that company in the appeal.

[3] The total sum of $123,215.50 includes $2,215.50 for costs.

[4] Stincic would have us apply the general rule of standing, which requires us to "determine whether the petitioner was injured in fact, and whether the interest allegedly injured is arguably within the zone of interests to be protected or regulated …." ***Mogilka v. Jeka***, 131 Wis. 2d 459, 467, 389 N.W.2d 359 (Ct. App. 1986). However, the remaining portion of that sentence, which Stincic omits from his brief, refers to interests protected or regulated "by the statute or constitutional guarantee in question." ***Id.*** We are dealing with neither a statute nor a constitutional provision.

App. 1999). The only parties to the contract here are the Jaunichs and DLC, by Gottschalk.

¶11 However, if a contract is specifically made for the benefit of a third party, that party also has standing to seek recovery. ***Goossen v. Estate of Standaert***, 189 Wis. 2d 237, 249, 525 N.W.2d 314 (Ct. App. 1994). The claimed third party must show the parties to the contract entered it directly and primarily for the third party's benefit. ***Id.*** An indirect benefit incidental to the contract is insufficient. ***Id.***

¶12 Stincic asserts he was a third-party beneficiary "due to the fact that the direct consequences of the sale and benefits would accrue to him." However, the "contract must indicate that the third-party either was specifically intended by the contracting parties to benefit from the contract, or is a member of a class the contracting parties intended to benefit." ***Dorr***, 228 Wis. 2d at 450 (citing ***Goossen***, 189 Wis. 2d at 249).

¶13 Stincic "acknowledged that the contract … on its face does not indicate that Stincic was an intended beneficiary." There is no evidence the Jaunichs intended Stincic benefit from the contract they made with DLC, and they deny any such intent. While Stincic claims he had a side agreement with the Gottschalks for the proceeds of the sale to come to him, there is no evidence the Jaunichs, as parties to the contract, knew about it at the time the contract was signed. Accordingly, we decline to conclude Stincic was a third-party beneficiary of the contract.

¶14 Stincic also claims he has standing as the real party in interest and as a successor in interest to DLC. Stincic's arguments on these points are not entirely clear. He asserts, for example, that he was a successor in interest because

it is "clear from the testimony given at trial that Mr. Stincic was the real party in interest." In any event, we reject both notions.

¶15 One argument Stincic relies upon for claiming to be the real party in interest is that he negotiated the terms of the sale prior to DLC signing the contract. The act of negotiating is not conclusive. The Jaunichs negotiated through their attorney, Sivertson, but this does not make the contract one between Sivertson and Stincic. Stincic also claims "everyone was aware of the fact that Nick Stincic was the real party in interest …. It was also clear that he had a financial problem that was being addressed by the sale of this property …." That "everyone was aware" is neither a legal argument nor a legal principle.[5] We thus reject the notion that Stincic is the real party in interest.

¶16 We also reject Stincic's claim that he is a successor in interest to DLC. The basis for this claim is evidently the side agreement with Gottschalk allowing Stincic to reclaim ownership of DLC. However, this makes him a successor to Gottschalk, not DLC. Assuming Stincic regained control of DLC, he may be the successor who would collect damages on DLC's behalf, as a personification of the company, but he cites no authority that he is therefore entitled to seek damages in his individual capacity.

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[5] Indeed, DLC and Stincic's argument regarding Stincic's claim as the successor and real party is completely devoid of any citation to legal authority. This is contrary to WIS. STAT. RULE 809.19(1)(e). We may also decline to address issues unsupported by reference to legal authorities. ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286.

For a similar reason, we disregard Stincic's assertion that he has standing because he had to counterclaim to avoid claim and issue preclusion. Not only is the argument unsupported but it is conclusory, occupying all of two sentences. Stincic never delineates the doctrines nor analyzes how he thinks they could have been applied to his detriment in the absence of a counterclaim. We will not consider an underdeveloped argument, nor will we take it upon ourselves to develop the argument. ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶17 Stincic has no standing to assert a counterclaim. Accordingly, the portion of the judgment awarding Stincic damages in his individual capacity is reversed.

II. Jury Instructions and the Verdict

¶18 The Jaunichs assert the court erroneously instructed the jury. The court gave an instruction on substantial compliance regarding the contractual contingencies. The Jaunichs contend the court should have given a strict compliance instruction instead because the contract contained a "time is of the essence" clause.

¶19 Without deciding whether the clause was sufficient to require a strict compliance instruction, we note that the Jaunichs concede they did not object to the substantial compliance instruction. Failure to object to a jury instruction constitutes waiver. WIS. STAT. § 805.13(3). Nevertheless, the Jaunichs urge us to grant a new trial in the interests of justice, arguing the real controversy—which, according to them, is complete compliance—was not fully tried.

¶20 We have the discretionary authority to grant a new trial in the interests of justice "if it appears from the record that the real controversy has not been fully tried." WIS. STAT. § 752.35. We use this power sparingly, granting a new trial "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶21 To establish the real controversy has not been fully tried, the Jaunichs must convince us either that the jury was precluded from considering important testimony bearing on an important issue, or that certain evidence was

improperly admitted and clouded a crucial issue in the case. *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998).

¶22 We are not persuaded to use our discretionary powers on the substantial-versus-complete compliance distinction.[6] The parties tried the case on the theory of substantial compliance. Once the jury decided DLC fulfilled its contractual obligations, it could conclude the Jaunichs were the ones responsible for the breach. The argument now is simply an attempt to interject a new legal theory where a previous theory was unsuccessful. We are not compelled to hold the real controversy was not fully tried because we are not convinced that complete compliance was required as a matter of law.[7]

¶23 The Jaunichs also complain the court erred in allowing the jury to hear evidence of their wealth. They contend such evidence is irrelevant and prejudicial. Although they do not specifically assert this as justification for us to grant a new trial, their argument implies this evidence "was improperly received" and "clouded a crucial issue." ***Id.*** We therefore discuss it here.

[6] Indeed, we are not convinced that mere inclusion of the "time is of the essence" clause necessarily requires an instruction on strict compliance. The actions of the parties may reveal how they interpret such a clause. *See* ***Employers Ins. of Wausau v. Jackson***, 190 Wis. 2d 597, 616-17, 527 N.W.2d 681 (1995). Here, the Jaunichs agreed to extend the closing date, which suggests timing may not have been particularly essential, negating the clause's impact.

[7] Even if the jury had been instructed on complete compliance, we are not convinced there would be a different result at trial. *See* ***State v. Caban***, 210 Wis. 2d 597, 610-11, 563 N.W.2d 501 (1997). The most the Jaunichs have shown on appeal is that the day before closing, the contingencies appeared unfulfilled. The contract, however, only required they be completed the day of closing, not before. The Jaunichs offered no evidence of the condition on the closing date. However, there was testimony Stincic labored near and until the closing date to satisfy the contingencies and succeeded in doing so.

¶24 The decision to admit or exclude evidence is a discretionary one. ***State v. Kimberly B.***, 2005 WI App 115, ¶38, 283 Wis. 2d 731, 699 N.W.2d 641. The test is not whether this court would have admitted the evidence in question. ***Id.*** If the trial court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach," we will affirm the decision. ***State v. Veach***, 2002 WI 110, ¶55, 255 Wis. 2d 390, 648 N.W.2d 447.

¶25 The evidence of the Jaunichs' wealth goes to impeachment. Gregory testified he owned a small business. On cross-examination, it was established that his stock ownership totaled about five million dollars. DLC asserts Gregory was seeking sympathy from the jury as a small business owner. To the extent that is true, the wealth evidence had impeachment value. We cannot conclude the court erroneously exercised its discretion and, again, we are not compelled to exercise our discretionary reversal power.

¶26 The Jaunichs had also moved to set aside the verdict, arguing the court should have directed the verdict to hold DLC had not satisfied the contingencies. However, the court declined to do so because there was evidence from which a reasonable jury could have concluded the contingencies were met.

¶27 The specific contingency the parties are concerned with is the removal of the cranberry operation equipment. Julie testified that she was at the property two days before closing and the equipment was still on the property. Gregory testified that on September 30, he saw pipes on part of what he believed to be the property for sale. Stincic testified that he removed all of the equipment and that anything Gregory saw was on a parcel not included in the sale. Sivertson testified the contingencies appeared fulfilled and that he had not heard from the

Jaunichs. Although the Jaunichs question whether the equipment could have been timely removed, they presented no evidence of the property's condition on the day of closing, the relevant date under the contract. Thus, the jury, as fact-finder, could accept Stincic's and Sivertson's testimony while rejecting the Jaunichs'. We discern no error.

¶28 Because we are not persuaded to grant a new trial or to change the verdict, we affirm the part of the judgment in favor of DLC and we affirm the order denying the motion to set aside the verdict. However, because we reverse the portion of judgment pertaining to Stincic, we must revise the amount of the damage award.

III. Damages

¶29 The elementary rule of contract damages is to restore a party to the position it would have been in but for the breach. ***Wolnak v. Cardiovascular & Thoracic Surgeons***, 2005 WI App 217, ¶52, 287 Wis. 2d 560, 706 N.W.2d 667. Here, DLC was essentially restored when Sivertson and Stincic purchased the property for the same total the Jaunichs agreed to pay. While Stincic maintains he did not purchase part of the property, the special verdict did not seek, and the jury did not award, the $185,000 deficit.

¶30 However, a party may also seek consequential damages under a contract. ***Magestro v. North Star Envtl. Const.***, 2002 WI App 182, ¶10, 256 Wis. 2d 744, 649 N.W.2d 722. Contract damages should compensate the wronged party for damages arising naturally from the breach. ***Id.*** However, these damages, both compensatory and consequential, must be foreseeable. ***Id.***

¶31 At trial, DLC and Stincic offered evidence of consequential damages that the Jaunichs have grouped into ten categories:

> (1) additional mortgage interest paid by DLC, (2) $32,560 in capital gains tax paid by Stincic, (3) additional real estate taxes paid by DLC, (4) closing costs paid by Stincic on his November 7, 2001 purchase of part of the DLC property, (5) additional real estate taxes paid by Stincic, (6) additional landscaping costs to prepare the DLC property for the Sivertson purchase, (7) additional survey costs, (8) los[s] of profits by Stincic, (9) mortgage interest paid by Stincic, and (10) attorneys fees.

The consequential damages award was $58,000. However, DLC did not suffer all of the damages.

¶32 The capital gains tax that Stincic paid cannot be awarded for two reasons. First, to the extent that he paid the tax in his personal capacity, he lacked standing to assert a claim for personal damages. Second, the tax is not a consequence of the breach; it is a consequence of the sale and would have had to be paid even if the Jaunichs had completed the transaction.

¶33 The closing costs, real estate taxes, purported lost profits in this portion of the award, and mortgage interest Stincic paid are also not recoverable because Stincic incurred them as an individual. The same is true of the attorney fees—the fees were paid to Stincic's personal attorney, and there is no evidence the attorney did any work for DLC or that DLC paid any of the fees. None of these elements was reasonably foreseeable or a natural consequence of the breach because the damages arise from actions of a third party.

¶34 This leaves, as potential damages, the additional mortgage interest and real estate taxes that DLC paid, plus landscaping and survey costs Stincic paid to prepare the property to sell to Sivertson. The Jaunichs admit that the

preparatory work on the property might reasonably stem from a breach. However, they point out that these were further costs Stincic incurred personally; they were not damages suffered by DLC. Because of Stincic's lack of standing, those damages must also be eliminated.

¶35 The Jaunichs concede that if DLC is entitled to anything, it is entitled to the mortgage interest and real estate taxes incurred between the scheduled and eventual closings. They agree to $4,248.40 for mortgage interest and $319.58 taxes, calculated by DLC's expert. Because we affirm the verdict on the breach, the Jaunichs are liable for the sum of $4,567.98.

¶36 The jury also awarded $63,000 in lost profits. Although this award was purportedly granted to DLC, it is undisputed that the lost profits in question are those of Stincic's intended business. The Jaunichs explain that Stincic failed to support his claim for profits with appropriate evidence, but we need not reach a sufficiency of the evidence question. Stincic's lack of standing invalidates the entire award.

¶37 Accordingly, we modify the amount of damages to which DLC is entitled. On remand, the clerk of court will modify the judgment to reflect a damage award of $4,567.98 to DLC only. Further, the trial court must determine which portion of its $2,215.50 award of costs is attributable to work done solely on DLC's behalf. Any costs incurred for Stincic's individual benefit on the counterclaim must be disallowed. The trial court may make that determination from the record, it may ask counsel to submit a bill of costs, or it may hold a fact-finding hearing, whichever the court considers most feasible.

By the Court.—Judgment modified and, as modified, affirmed in part and reversed in part; order affirmed and cause remanded with directions. No costs on appeal.

Not recommended for publication in the official reports.