COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1810-FT **Cir. Ct. No. 2005CV69**

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

JAMES P. SWEO CHILDREN'S TRUST
C/O TRACY RIEHLE, TRUSTEE,

PLAINTIFF-APPELLANT,

V.

RICHARD BRANDT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Iron County: PATRICK J. MADDEN, Judge. *Reversed and cause remanded for further proceedings.*

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

¶1 PER CURIAM.[1] The James P. Sweo Children's Trust, by its trustee Tracy Riehle,[2] appeals an order dismissing its breach of contract claim against Richard Brandt. The court granted Brandt's motion to dismiss for failure to state a claim after concluding the underlying contract was null and void. Riehle asserts her complaint was sufficient. She further asserts the court considered matters outside the pleadings in deciding the motion to dismiss and, therefore, it should have converted the motion into one for summary judgment and set a corresponding briefing schedule. Because Brandt's complaint sufficiently states a claim, we reverse and remand for further proceedings.

Background

¶2 Riehle made an offer to purchase land owned by Brandt, which he accepted. The offer required the property be conveyed free and clear of all liens and encumbrances and required evidence of title in the form of an owner's policy of title insurance. The evidence Brandt provided revealed the property was encumbered by a road easement and mineral rights exclusions.

¶3 Riehle considered this unacceptable and, pursuant to the purchase offer, notified Brandt of her objections. Under the purchase offer, this gave Brandt no more than fifteen days to remove the objections. The offer further stated:

> In the event that Seller [Brandt] is unable to remove said objections, Buyer [Riehle] shall have 5 days from receipt of notice thereof, to deliver written notice waiving the

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] We will refer to the Trust as "Riehle" for brevity's sake.

> objections, and the time for closing shall be extended accordingly. If Buyer does not waive the objections, this Offer shall be null and void.

When Brandt failed to clear the encumbrances, Riehle brought suit, seeking specific performance and monetary damages.

¶4 Brandt alleged, as affirmative defenses, that he had removed the road easement and was unable to remove the mineral rights, making the contract null and void. He also filed a motion to dismiss for failure to state a claim and included with his brief an affidavit from his attorney, John Houlihan. The affidavit indicated that the mineral rights had not been removed because Houlihan had been unable to contact the rights holders. A motion hearing was set.

¶5 Because Brandt included the affidavit in his filing, Riehle informed him that the motion had to be treated as a motion for summary judgment and asked Brandt to agree to rescheduling in order to accommodate the statutory response times. Brandt refused. Riehle filed a response opposing the motion to dismiss, arguing to the court that the motion should be treated as one for summary judgment and that an appropriate briefing schedule should be set. At the motion hearing, Brandt argued his motion fit within the four corners of the contract itself and, therefore, was within the pleadings.

¶6 The court granted the motion to dismiss, concluding the contract was null and void because of Brandt's "inability to remove the mineral rights" and Riehle's refusal to waive the objections. Thus, the court concluded, Riehle had failed to state a claim on which relief could be granted. Riehle now appeals.

Discussion

Failure to State a Claim

¶7 Whether a complaint states a claim is a question of law we review de novo. ***Beloit Liquidating Trust v. Grade***, 2004 WI 39, ¶17, 270 Wis. 2d 356, 677 N.W.2d 298. A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. ***Torres v. Dean Health Plan, Inc.***, 2005 WI App 89, ¶6, 282 Wis. 2d 725, 698 N.W.2d 107 (citation omitted). All facts pleaded and reasonable inferences that may be drawn therefrom are accepted as true for the purposes of testing the sufficiency. ***Id.*** Legal inferences and unreasonable inferences, however, need not be accepted as true. ***Id.*** "A complaint should not be dismissed as legally insufficient unless it appears certain that a plaintiff cannot recover under any circumstances." ***Beloit Liquidating***, 270 Wis. 2d 356, ¶17.

¶8 In the complaint, Riehle alleged (1) there was a contract which required clear title but (2) Brandt did not produce a clear title; therefore, (3) he breached the contract and (4) Riehle suffered damages as a result. This is the very essence of a breach of contract claim.

¶9 Brandt claims the complaint is insufficient because Riehle incorporated the "unable to remove said objections" language by attaching a copy of the contract to the complaint. He contends Riehle pled herself out of court because she did not correspondingly plead Brandt was able to remove encumbrances and he further asserts that he was as a matter of law unable to remove the mineral rights owned by others. We disagree with Brandt's analysis.

¶10 The flaw in Brandt's logic is that it does not inevitably follow that because others own the mineral rights, he would therefore be unable to remove

them. While he asserts he cannot legally compel the rights owners to surrender those rights, this does not mean that he is precluded from attempting to negotiate the rights' return.

¶11 The contract required, first and foremost, that Brandt deliver clear title to Riehle. The language about Brandt being unable to remove objections appears to function as a "contingency plan." In the event Brandt cannot clear the title, Riehle may either waive any objection and proceed with the sale or terminate the contract. But from Brandt's standpoint, inability to clear title ultimately serves as an affirmative defense. Brandt recognized this and filed his answer accordingly. However, the clause does not mean Riehle had to anticipate that defense and preemptively plead its opposite. In her complaint, Riehle alleged there was a contract, a breach of the contract, and damages—the fundamentals of a contract claim. Because it is not readily apparent that Riehle "cannot recover under any circumstances," the complaint is sufficient. *See* ***Beloit Liquidating***, 270 Wis. 2d 356, ¶17.

Conversion of the Motion to Dismiss

¶12 WISCONSIN STAT. § 802.06(2)(b) states that if a party brings a motion to dismiss for failure to state a claim and the court is offered and does not exclude matters outside the pleading, the motion "shall be treated as one for summary judgment and disposed of as provided in [Wis. Stats.] *s. 802.08,* and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion…." Here, Riehle argues the court considered extraneous information by considering Houlihan's affidavit and, therefore, should have or effectively did convert the motion to summary judgment, but never allowed Riehle an opportunity to present pertinent material. *See* ***CTI v. Herrell***, 2003 WI App 19,

¶8, 259 Wis. 2d 756, 656 N.W.2d 794. Brandt responds that the court confined itself to reviewing the parties' briefs.

¶13 We conclude that whether the trial court relied on Houlihan's affidavit, the court nevertheless went beyond the four corners of the complaint. In analyzing whether Riehle's complaint properly stated a claim, the court ruled on the validity of Brandt's defense by effectively taking judicial notice of the status of mineral rights in Iron County. This amounted to the court treating the motion as one for summary judgment even though it did not follow statutory procedure.[3]

¶14 In deciding the motion, the court stated:

> The Court having reviewed both the plaintiff's memorandum … and the original brief [from Brandt] in support of the motion to dismiss, the Court finds that it's Lines 207 to 212 of the contract that are controlling, in that there is no contract for the reason that there is no relief which can be granted because there is no reasonable basis in law or in fact to have those mineral rights removed, and I will indicate that the Court's own knowledge, that this being Iron County, and the Court's own property where my house rests the mineral rights are owned by someone else, and I don't know of any property in Iron County where the mineral rights belong to the people who have the house on top of them. That's just a simple fact of the nature of Northern Wisconsin, and I think that your motion recognizes that fact. The contract contemplates this kind of result if you can't overcome what no one else in Iron County can overcome, and, therefore, your motion is granted.

[3] We note that, contrary to Brandt's argument, the court does not have to make a declaration that it is converting a motion to dismiss for failure to state a claim into a summary judgment motion. *If* a motion to dismiss is presented and *if* the court is presented with extraneous information that it does not exclude, then the court *shall* treat the motion as one for summary judgment, whether or not it explicitly declares it is doing so.

¶15 Brandt asserts the court properly took judicial notice of the status of mineral rights in the county. However, this is not a properly noticed "fact." WISCONSIN STAT. § 902.01(2) allows the court to take judicial notice of a fact "not subject to reasonable dispute." A fact is not subject to reasonable dispute if it is a "fact generally known within the territorial jurisdiction of the trial court" or if it is a "fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." WIS. STAT. §§ 902.01(2)(a)-(b).

¶16 The problem here is two-fold. First, assuming the court should even have reached the merits of Brandt's defense, the question surrounding the status of the mineral rights was not the general status of mineral rights in Iron County but, rather, Brandt's ability to remove the rights from the particular property at issue in this sale. Second, it may or may not be difficult to remove mineral rights owned by others; the record is silent on this matter. Brandt evidently did not believe it was a totally futile endeavor as his attorney attempted to contact the mineral rights owners, possibly to try negotiating a rights release. Thus, we conclude the court could not properly take judicial notice of the "fact" that no one in Iron County whose property is encumbered by mineral rights exclusions can ever clear title.

¶17 As to the perceived "conversion" of the dismissal motion into a summary judgment motion, Brandt also argues that, under federal case law relating to an analogous federal rule of procedure, Riehle has failed to show that "notice and an opportunity to respond would have mattered." ***Alioto v. Marshall Field's & Co.***, 717 F.3d 934, 936 (7th Cir. 1996). Riehle does not specifically address the case Brandt cited, but she did argue that he could not prevail on summary judgment, which accomplishes the same goal.

¶18 Brandt had characterized the contract as saying "if we cannot clear title, that the offer is null and void … if the buyer is not willing to waive the objection…." Because Riehle would not waive the objection, Brandt claims the contract is void in any event. Riehle asserts that "mere failure to cure is not the same thing as inability to cure." We agree with Riehle.

¶19 It is arguable that the contractual language means Brandt has to demonstrate he was unable to remove the encumbrances after some affirmative attempts to do so, not that it is generally acknowledged that mineral rights are hard to remove or that he expects to be unable to remove them because they are owned by someone else. In other words, Brandt's failure to clear title might arise from lack of due diligence or bad faith; it is not necessarily synonymous with or prima facie proof of an inability to clear title. Houlihan's affidavit only shows some undated attempt to contact the mineral rights holders. It does not demonstrate any effort during the fifteen-day cure period to clear Riehle's objections. One could thus infer that Brandt was or would have been able to remove those mineral rights with due diligence, or one could infer that Brandt simply decided to make no effort. These inferences create a sufficient factual dispute for Riehle to defeat a summary judgment motion.

Conclusion

¶20 Although the court appeared to be mindful of the proper statutory approach of WIS. STAT. § 802.06(2)(b), it considered matters beyond the pleadings and effectively treated the motion to dismiss as one for summary judgment. Such a conversion required Riehle be given an opportunity to respond. She was not provided that chance. Nevertheless, the complaint properly stated a claim. Dismissal was improper.

By the Court.—Order reversed and cause remanded.

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