COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1039 **Cir. Ct. No. 2005CV9568**

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

MILWAUKEE CITY POST #2874 VETERANS OF FOREIGN WARS OF THE UNITED STATES,

PLAINTIFF-APPELLANT,

V.

MAHARISHI VEDIC UNIVERSITY, INC., MARQUETTE UNIVERSITY AND TOWNE METROPOLITAN REALITY, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 VERGERONT, J. Milwaukee City Post #2874 Veterans of Foreign Wars of the United States (VFW) filed this action claiming breach of a lease agreement by successive owners of the leased property, which was condemned

and from which the VFW was evicted when the building was razed. The circuit court ordered dismissal of the complaint against Towne Metropolitan Realty, Inc., and Marquette University on the ground that it fails to state a claim for relief against them and granted summary judgment in favor of Maharishi Vedic University, Inc. The court also determined that sanctions under WIS. STAT. § 802.05[1] were appropriate because the action as commenced and continued is frivolous. For the reasons we explain below, we affirm

BACKGROUND

¶2 Because the sufficiency of the complaint is at issue on this appeal, we begin by relating the relevant allegations of the complaint in paragraphs 3-5.

¶3 In November 1962, the VFW entered into a lease with Towne Metropolitan Realty, Inc. for 5,250 square feet of space in a hotel building to be constructed by Towne at 2601 West Wisconsin Avenue. The lease term was ninety-nine years, with an option to extend the lease for an additional ninety-nine years and the annual rental was $1. The consideration for the lease was VFW's conveyance to Towne of the land on which the hotel was to be built. Towne was to pay taxes, insurance, and utilities and to provide leasehold improvements, which were to be refurbished every seven years. Towne sold the property to Marquette University in 1986, and in 1994 Marquette sold the property to Maharishi Vedic University, Inc.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 On February 28, 2001, the City of Milwaukee Redevelopment Authority acquired the hotel building pursuant to its authority under WIS. STAT. § 32.05, and the VFW was evicted by a raze order issued in April 2003. The redevelopment award of damages was $440,000, out of which VFW was paid $300,000 less delinquent property taxes, but the value of the leasehold premises to the VFW is $1,500,000. The VFW appealed the award to the Milwaukee County Condemnation Commission, which awarded $425,000—$15,000 less than previously awarded. The VFW appealed the adequacy of the condemnation commission's award to the Milwaukee County circuit court, and that case (the condemnation award case) was pending when the complaint in this action was filed. This court had ruled in the condemnation award case that the VFW could not file a separate claim for damages for the value of its leasehold premises, but could file a claim against the redevelopment authority only for the total value of the hotel on the day of taking. *See* ***Milwaukee Redevelopment Authority v. Veterans of Foreign Wars***, Nos. 2002AP1035 and 2002AP1880, unpublished slip op. (Wis. Ct. App. Sept. 30 2003). The circuit court subsequently ruled that this application of the "unit rule" does not violate Section 13 Article 1 of the Wisconsin Constitution.[2]

¶5 The complaint in this case alleges that Towne, Marquette, and Maharishi "breached the lease obligation to maintain the property in a condition so that it will have a value on February 28, 2001 of an amount sufficient to compensate the VFW for the value of its leasehold." The complaint seeks

[2] WISCONSIN CONST. art. I, § 13 provides:

> The property of no person shall be taken for public use without just compensation therefor.

$1,200,000 in damages plus compensation for the VFW's loss of use of the property.

¶6 Towne and Marquette both moved to dismiss on essentially the same grounds. They argued that the complaint fails to state a claim for relief because the lease contains no express covenant that upon condemnation the lessor ensures that the VFW will obtain full value for the leasehold interest, and WIS. STAT. § 706.10(6)[3] prohibits an implied covenant. Alternatively, they argued that the action against them is barred by the six-year statute of limitations for breach of contract actions. *See* WIS. STAT. § 893.43. Marquette's motion noted that the lease was not attached to the complaint as an exhibit, and it attached a copy of the lease to its motion.

¶7 The VFW's position in opposition to the dismissal motion was that if, as the rulings in the condemnation award case thus far had held, the VFW cannot file a separate claim against the redevelopment authority and be fully compensated for its leasehold interest, then the VFW must have a claim against the current and prior lessors for a breach of the lease. The VFW acknowledged that the case law in Wisconsin holds that condemnation terminates the obligation

[3] WISCONSIN STAT. § 706.10(6) provides:

> **(6)** Except as provided in sub. (7) and except as otherwise provided by law, no warranty or covenant shall be implied in any conveyance, whether or not such conveyance contains special warranties or covenants. No mortgage shall be construed as implying a covenant for the payment of the sum thereby intended to be secured, and when there shall be no express covenant for such payment contained in the mortgage and no bond or other separate instrument to secure such payment shall have been given, the remedies of the mortgagee, shall be confined to the lands mentioned in the mortgage.

of a lessor to a lessee. However, the VFW asserted, none of the cases involve a negative lease—that is, a lease that obligates a lessor to provide leased premises at little or no cost to the lessee.

¶8 The circuit court granted both motions to dismiss. It concluded that the lease does not contain an express covenant that the lessor will ensure that the VFW will be fully compensated for the value of the leasehold interest in the event of condemnation and that WIS. STAT. § 706.10(6) prohibits implying such a covenant into the lease. The circuit court also concluded that, even if there were a breach of the lease, the six-year statute of limitations bars an action on that claim against Towne and Marquette because each sold the building more than six years ago and neither retained any obligations under the lease.

¶9 While the motions to dismiss were pending, Maharishi moved for summary judgment. In addition to making the arguments made by the other two defendants, Maharishi argued that under Wisconsin law the condemnation terminated the lease and therefore precluded this action for an alleged breach of the lease. In the VFW's opposition to this motion, it repeated its position that the case law holding that condemnation automatically terminates leases did not address negative leases such as this and that it had a right to recover adequate compensation for its loss from Maharishi if it could not be fully compensated in the condemnation award case.

¶10 The circuit court granted summary judgment in favor of Maharishi. It concluded that the complaint does not state a claim for relief against Maharishi for the same reason it does not state a claim for relief against the other two defendants. It also agreed with Maharishi that under established case law the rights of the lessee are extinguished by the condemnation and the lessee therefore

may not bring a breach of contract claim against the lessor when the property has been condemned.

¶11 Maharishi filed a motion asking the court to impose sanctions on the VFW and its counsel under WIS. STAT. § 802.05. The court granted the motion, concluding that the action as commenced and continued was frivolous and that sanctions were appropriate in the form of reasonable attorney fees and costs incurred by Maharishi in this litigation.[4]

DISCUSSION

I. Motions for Dismissal and Summary Judgment

¶12 On appeal, the VFW argues that the court erred in dismissing the complaint against Towne and Marquette and in granting summary judgment in favor of Maharishi. According to the VFW, the undisputed facts show that Maharishi breached the lease and the recent supreme court decision in ***Wisconsin Mall Properties, LLC v. Younkers, Inc.***, 2006 WI 95, 293 Wis. 2d 573, 717 N.W.2d 703, decided after the circuit court orders in this case, supports its position

[4] On November 22, 2006, the VFW filed in this court information regarding the status of appeals in the condemnation award case and another related case, ***City of Milwaukee Post 2874 v. The Redevelopment Authority of the City of Milwaukee***, case no. 2003CV9524, which seeks recovery of "losses under the relocation provisions of WIS. STAT. §§ 32.19 and 32.20." The VFW apparently views these materials as supplemental authority, since it cites WIS. STAT. § 809.19(10). Information about the status of these other cases is not relevant to the resolution of the issues raised on this appeal and we therefore do not address this submission.

On January 10, 2007, the VFW, again citing to WIS. STAT. § 809.19(10), provided us with the circuit court's December 28, 2006 decision and order in this case denying the VFW's motion for reconsideration of sanctions and determining the amount of the attorney fees to be paid to Maharishi. The general rule is that an appeal of a judgment or order does not include an order entered after that judgment or order. *See* ***Chicago & Nw. R.R. v. LIRC***, 91 Wis. 2d 462, 473, 283 N.W.2d 603 (Ct. App. 1979). We therefore do not address the circuit court's December 28, 2006 decision and order.

that it is entitled to recover from that defendant on its breach of contract claim to the extent it is not made whole in the condemnation award action. The VFW asserts that, even though Towne and Marquette each sold the property, each remains liable under the lease for Maharishi s breach of the lease.

¶13 Because the VFW's argument on the liability of Towne and Marquette depends upon Maharishi being liable for breach of the lease, we begin by addressing the VFW's claim against Maharishi. We review de novo the grant of summary judgment in favor of the Maharishi, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). The first step in the methodology is to examine the complaint to determine whether it states a claim for relief. ***Green Spring Farms***, 136 Wis. 2d at 317. In testing the sufficiency of the complaint we take all factual allegations and all reasonable inferences from them as true, construing them liberally in favor of the plaintiff. *See* ***id.*** If the complaint states a claim for relief, we examine the answer to determine if it presents a material issue of fact. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). If it does, we look to the moving party's affidavits to determine if they establish a prima facie case for summary judgment. ***Id.*** If they do, we then look to the opposing party's affidavits to determine whether there are any material facts in dispute which entitle the opposing party to a trial. ***Id.*** at 372-73.

¶14 Turning first to the complaint, we observe that, although the complaint refers to the lease, it is not attached as an exhibit. Marquette supplied a copy of the lease with its motion to dismiss and the VFW's brief in opposition to that motion shows that it implicitly viewed the lease to be properly before the

court as part of the court's analysis of the complaint. Presumably for that reason, Maharishi did not submit a copy of the lease accompanied by an affidavit when it filed its summary judgment motion, but instead referred to the lease as if it were already before the court. The VFW did not object and also referred to the lease as though it were already before the court. We will therefore consider the lease as being properly part of the complaint for purposes of analyzing whether the complaint states a claim for relief. *See* ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶9, 274 Wis. 2d 719, 685 N.W.2d 154 (when both parties rely in the circuit court on language from a lease in arguing a motion to dismiss, the party who did not submit the lease is estopped from arguing that a different procedure should have been employed).[5]

¶15 The only express allegation in the complaint regarding what provision of the lease the defendants breached is that they "breached the lease obligation to maintain that property in a condition so that it will have a value on February 28, 2001 of an amount sufficient to compensate the VFW for the value of its leasehold." However, a review of the lease discloses no provision that could reasonably be construed to state this. On appeal, the VFW does not contend otherwise and does not dispute the circuit court's ruling that under WIS. STAT. § 706.10(6) such a provision, or covenant, may not be implied in the lease.

[5] The proper procedure when the court considers documents outside the complaint on a motion to dismiss is to treat the motion as one for summary judgment. *See* WIS. STAT. § 802.06(2)(b). That did not happen with respect to Marquette's motion to dismiss, apparently because none of the parties to the motions to dismiss brought this to the court's attention. In order to correct an apparent misunderstanding by Marquette, we emphasize that the basis for our ruling in ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶9, 274 Wis. 2d 719, 685 N.W.2d 154, was the implicit agreement by the opposing party to the procedure below, which, we concluded, estopped that party from taking a contrary position on appeal. We expressly did *not* adopt the federal approach under which a court may regularly consider on a motion to dismiss a document referred to in the complaint that is central to the plaintiff's claim. ***Id.***, ¶9 n.6.

¶16 Instead, on appeal the VFW argues that the express provisions in the lease that Maharishi violated are:

> (1) The Post premises shall consist of a minimum of 5250 square feet;
>
> (2) The Post premises shall have an entrance lobby on Wisconsin Avenue which will conform and blend with other portions of the building fronting or abutting on Wisconsin Avenue; this area shall be in addition to the 5250 square feet heretofore mentioned;
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> (3) There shall be installed a properly discernable pole for our National Flag, a suitable, attractive VFW plaque at the Wisconsin Avenue entrance, a suitable Post name sign and appropriate markings on Wisconsin Avenue and 26th Street, to provide clear public identification of the Post premises;
>
> (4) The building shall comply with all local and State laws, regulations and codes;
>
> (5) A minimum of 3000 square feet of the Post premises will be provided as meeting hall space, with such space to be so constructed that it can be divided into two (2) separate meeting halls, properly lighted. Such meeting hall space shall have a free-spanned acoustical ceiling and the movable partition between the two halls shall be of soundproof construction and material.

(Underline in appellant's brief.) The VFW also adds:

> Aside from this express covenant, the Maharishi had a clear obligation to maintain the hotel building in a condition to permit it to meet its obligations to the VFW under the terms of the lease. Instead, the Maharishi permitted the hotel building to deteriorate to the point where [the development authority] had the right to acquire it under the blighted area statute, Wis. Stat. § 66.1331 and Wis. Stat. § 66.1333. The reason the hotel building was condemned was because of the failure of the Maharishi to maintain it.

¶17 The arguments that the VFW makes on appeal are not based on the allegations of the complaint. The complaint does not refer to any provision in the lease that obligates the lessor to maintain the hotel building and does not allege that the breach of any such provision caused the condemnation; nor are there reasonable inferences from the facts alleged in the complaint that suggest this, even under a liberal construction.

¶18 In addition, the VFW did not identify the lease provisions it now relies on in its circuit court brief in opposition to the summary judgment motion. Rather, its brief asserted that "the action is based on an explicit covenant in the lease between the VFW and Towne …" and then referred only to the obligation "to provide the VFW with 5,250 square feet in the ground level of a new hotel at 2601 West Wisconsin Avenue with a 99-year term at an annual cost to the VFW of $1.00." That brief identified "the underlying theory of the action … [as] based on the explicit covenant in its lease with Towne, and its constitutional right to be compensated by someone for its losses." Thus, even if we were to ignore the first step of summary judgment methodology, we would conclude that the legal theory the VFW advances on appeal—that Maharishi breached obligations under the lease to maintain the hotel building and that breach caused the condemnation—was not adequately developed in the circuit court.

¶19 We generally do not address arguments on appeal that are not adequately developed in the circuit court; this is particularly true where the appellant seeks reversal based on a theory that was not adequately articulated to the circuit court. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). In addition, we do not address an argument presented for the first time on appeal where, had it been raised below, the opposing party might well have presented additional factual submissions for the court's consideration on

summary judgment. ***Gruber v. Village of North Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692.

¶20 In this case, Maharishi argued in the circuit court, based on its submissions in support of its summary judgment motion, that the VFW, through counsel, had stated in a brief filed in the condemnation award case that "the Maharishi Vedic University never occupied the building after its acquisition, but complied, at least substantially, with the terms of the Lease with the VFW." If the VFW meant in its brief in opposition in the circuit court to make a distinction between the lessor's obligation to provide and maintain the space for the VFW and another obligation to maintain the hotel building—as it now argues in its reply brief on appeal—we conclude it did not do so in a way that would reasonably give Maharishi a fair chance to respond to this argument with factual submissions if it chose.[6]

[6] Along with its brief in the circuit court, the VFW submitted two affidavits of the VFW quartermaster. One avers that, in the period between 1999 and the acquisition of the property by the redevelopment authority, he observed a lack of security in the hotel building and a lack of maintenance and repair both in the exterior and the interior of the building. He avers that "eventually on February 28, 2001 the Redevelopment Authority of the City of Milwaukee exercised its power of eminent domain and acquired the property from the Maharishi…." We observe that the VFW quartermaster does not aver that the lack of maintenance of the hotel caused the condemnation, although he does aver that the "[l]ack of maintenance by the Maharishi … and the commencement of the asbestos removal [by the redevelopment authority] and demolition by [the redevelopment authority] prompted the Department of Neighborhood Services to issue a Raze Order directing removal of the VFW from the premises." In any event there is no way to tell from this affidavit which, if any, lease provisions were breached by the lack of maintenance of the hotel building and the accompanying brief does not identify any. As noted above, the accompanying brief asserts that the action is based on the "explicit covenant in the lease" to provide the prescribed space for a ninety-nine year term.

In the other affidavit the VFW quartermaster avers that all "the facts set out" in the complaint and in the brief "have been thoroughly investigated and undisputed in prior litigation between the VFW and the Redevelopment Authority of the City of Milwaukee" and "are true and correct to the best of [his] knowledge."

(continued)

¶21 We conclude the circuit court correctly ruled that the complaint, including the lease, does not state a claim for relief for breach of "the lease obligation to maintain that property in a condition so that it will have a value on February 28, 2001 of an amount sufficient to compensate the VFW for the value of its leasehold." We also conclude that the complaint, including the lease, does not state a claim for relief on the theory the VFW argues on appeal: that the lessor had an obligation under the lease to maintain the hotel building and Maharishi breached this obligation, causing the condemnation. Therefore, the circuit court properly granted summary judgment in favor of Maharishi.

¶22 In view of our conclusion that summary judgment in favor of Maharishi is proper because the complaint, including the lease, does not state a claim for breach of contract, it is not necessary for us to decide whether the VFW's reading of ***Wisconsin Mall Properties***, 293 Wis. 2d 573, is correct. The VFW argues that ***Wisconsin Mall Properties*** permits it to bring a contract action for failure to maintain the property, thus causing condemnation, notwithstanding the condemnation.[7] This argument presumes that the VFW's complaint states a claim for breach of contract on this ground, but we have concluded it does not.

Maharishi's reply brief in the circuit court indicates it did not view either of these two affidavits as meeting the requirements of WIS. STAT. § 802.08(3) for proper submissions on summary judgment, but that issue was never addressed by the circuit court. There is no need for us to address it on appeal.

[7] In ***Wisconsin Mall Properties, LLC v. Younkers, Inc.***, 2006 WI 95, ¶¶3-5, 293 Wis. 2d 573, 717 N.W.2d 703, the supreme court held that the circuit court erred in granting summary judgment against the lessor on the theory that the existence of condemnation proceedings regarding the property precluded the lessor from seeking contract remedies against the lessee. The breach of contract claim alleged that the lessee, who had entered into an agreement with the city for the condemnation of the property, had thereby breached the provisions of the lease that required the lessee to refrain from taking any action to terminate or avoid the lease and provided that the lessee's obligations under the lease would not be affected by condemnation. ***Id.***, ¶¶10-12. The lessor asserted that the award it received in the condemnation proceeding was significantly (continued)

¶23 Our conclusion with respect to Maharishi resolves the VFW's arguments concerning Towne and Marquette against the VFW. As we have explained, the VFW's only argument on appeal concerning those two defendants is that they are liable under the lease for the breach by Maharishi.

II. Attorney Fees under WIS. STAT. § 802.05

¶24 Maharishi moved for sanctions under WIS. STAT. § 802.05(2) for these reasons: (1) there is no authority in the law for an implied covenant that the lessor will ensure that the value on the date of condemnation is sufficient to

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less than it was entitled to under the liquidated damage clause for a default under the lease. ***Id.***, ¶16.

The supreme court's analysis in ***Wisconsin Mall Properties*** recognized the general rule that complete condemnation of a property terminates a lease attached to the property and the general rule that "parties to a lease may contract for their rights and obligations in the event of a condemnation." ***Id.***, ¶¶27-28. In light of those general rules, the court made these observations: the condemnation of the property terminated the lease "except to the extent that the parties agreed otherwise with respect to their rights and obligations in the event of a condemnation"; and it is incorrect to assume that the lessor is "necessarily precluded from enforcing against [the lessee] any right that arose under the lease." ***Id.***, ¶31. The court also observed that the primary breach the lessor was alleging (the collusion with the city to effectuate a condemnation to allow the lessee to escape its obligations under the lease) occurred before the condemnation, ***id.***, ¶33; the lease contained provisions referring to the parties' rights and obligations in the event of a condemnation, ¶¶35-36; and there were potential differences between the remedies available to the lessor on a contract claim and in a condemnation proceeding, ¶¶37-44. The court concluded:

> [I]n light of the two general rules we previously discussed and the terms of the lease, we remain convinced that whether [the lessor] may seek a remedy against [the lessee] for breach of the lease depends on the terms of the lease as interpreted and applied to the facts of this case.

Id., ¶44.

The VFW reads ***Wisconsin Mall Properties*** as establishing certain principles that permit actions for breach of lease agreements even if there are no lease provisions specifically addressing condemnation, while Maharishi contends such lease provisions are a necessary factual predicate to the court's holding. As noted above, we do not need to resolve this issue.

compensate, in a condemnation proceeding, the lessee for the value of the leasehold interest; (2) the VFW previously stated in filings in the condemnation award case that Maharishi had not breached the lease and those statements are inconsistent with the allegations of the complaint that it had breached the lease; and (3) the VFW knew that under Wisconsin case law the condemnation terminated the lease.[8]

¶25 The VFW filed a brief in opposition to the sanction motion along with the affidavit of its counsel. The VFW explained that, while it understood that the established law in Wisconsin was that condemnation terminated a lease and freed the lessee from the obligation to pay rent, it intended to raise the issue whether a lessee could sue the lessor for a breach of the lease that occurred prior to the condemnation. More specifically, the VFW stated, the issue in this action is whether a lessee with a negative lease—meaning that the lessor has an obligation to lease premises at no cost—could maintain such a suit. The VFW asserted that no case had resolved this issue, and it viewed the supreme court's acceptance of the petition for review of our decision in ***Wisconsin Mall Properties LLC v. Younkers, Inc.***, 2005 WI App 261, 288 Wis. 2d 463, 707 N.W.2d 886, as confirmation that it was not frivolous to argue that the lessee in such a situation

[8] Maharishi also argued in its brief in support of sanctions that the VFW had acknowledged in previous filings in the condemnation award case that the established law is that condemnation terminated the lease and therefore the VFW was judicially estopped from taking a contrary position in this action. Maharishi repeats this argument on appeal. The circuit court did not expressly rule on this point. However, the circuit court implicitly ruled that the VFW's prior acknowledgment that this is the established law is not necessarily inconsistent with making a nonfrivolous argument for a change or modification in the existing law. We agree with this implicit ruling and do not further discuss this argument of Maharishi.

should be able to maintain a breach of contract action against the lessor.[9] That is, the VFW asserted, although the lower courts had rejected the argument that the lessor in that case could bring an action against the lessee for a breach of the lease that occurred before condemnation, the supreme court's acceptance of the petition for review meant there was merit to the lessor's argument in that case. Acknowledging that the lessee, not the lessor, is the plaintiff in this case, the VFW viewed that distinction as not undermining the relevance of the issue in ***Wisconsin Mall Properties*** to this case.

¶26 After a hearing at which the VFW's counsel expanded on its brief and also answered a number of questions posed by the court, the court decided that sanctions were warranted. The court concluded that the VFW's legal theories were not warranted by existing law or a nonfrivolous basis for a modification of the law for the following reasons: (1) the obligations that the VFW attempted to attribute to the lessor were not expressly stated in the lease; (2) the VFW conceded that under Wisconsin law it did not have a claim against Maharishi for implied covenants, but in fact the obligations the VFW relied upon were implied covenants; (3) the VFW could provide no case law authority for the concept of a "negative lease" or for its relevance to the VFW's claim; and (4) VFW's monetary loss because of the inadequate condemnation award, assuming that were true, did not provide a reasonable basis in the law for this action.

¶27 In addition, the court stated, the existing law as established in ***Maxey v. Redevelopment Authority of Racine***, 94 Wis. 2d 375, 405, 288 N.W.2d 794

[9] After the complaint was filed in this case, this court affirmed the circuit court's decision in ***Wisconsin Mall Properties LLC v. Younkers, Inc.***, 2005 WI App 261, 288 Wis. 2d 463, 707 N.W.2d 886.

(1980), is that the lease terminates when property is condemned. The court rejected the VFW's argument that the supreme court's then-recent acceptance of the petition for review of ***Wisconsin Mall Properties, LLC***, 288 Wis. 2d 463, provided a nonfrivolous basis for a modification of that rule in this case. The court noted that the lease in that case expressly provided for obligations of the parties in the event of condemnation. *See supra* note 7. The court also noted that the VFW could not have relied in filing this action on the supreme court's acceptance of the petition for review of ***Wisconsin Mall Properties***, 288 Wis. 2d 463, because that occurred after this case was filed.

¶28 The court also concluded there was no factual basis for a claim against Maharishi. Because the VFW had stated in several submissions in related cases that Maharishi had complied or substantially complied with the terms of the lease, the court concluded that the VFW must have been aware that its claim of breach of the lease had no basis in fact.

¶29 WISCONSIN STAT. § 802.05(2) provides:

> **(2)** REPRESENTATIONS TO COURT. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:
>
> (a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
>
> (c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so

> identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

If a court determines that subsec. (2) has been violated, "the court may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated sub. (2) or are responsible for the violation" in accordance the provisions of the statute. Section 802.05(3).[10]

¶30 When we review the grant or denial of attorney fees under WIS. STAT. § 802.05, our standard of review varies depending on the issue presented. ***Wisconsin Chiropractic Ass'n v. State of Wisconsin Chiropractic Examining Bd.***, 2004 WI App 30, 269 Wis. 2d 837, ¶16, 676 N.W.2d 580. The court's decision to impose a sanction here implicates § 802.05(2)(b) and (c). With respect to subsec. (b), whether a claim or legal theory is warranted by existing law or a nonfrivolous argument for a change in the law presents a question of law, and our review on this issue is therefore de novo. *See* ***id.***

¶31 Whether there was a violation of the representation in WIS. STAT. § 802.05(2)(c) typically involves factual findings on what pre-filing investigation was done and a discretionary decision on what investigation should have been done. *See* ***id.*** We affirm the circuit court's factual findings unless they are clearly erroneous and affirm its discretionary decision if the court examined the relevant

[10] WISCONSIN STAT. § 802.05(3)(a) describes how a party must initiate a motion for sanctions. The VFW does not mention § 802.05(3)(a) and does not contend Maharishi did not comply with it. Therefore we do not address this subsection.

facts, applied the correct legal standard, and, using a demonstrated process, reached a conclusion that a reasonable judge could reach. *See* ***id.***

¶32 In deciding whether an attorney signing a pleading made a reasonable inquiry into the facts and law of a case, courts are to use an objective standard, asking what a reasonable attorney should have done at the time of the challenged filing. ***Id.***, ¶14.

¶33 We agree with the circuit court that the VFW failed to identify the express obligations in the lease that Maharishi breached and for which it sought recovery. As we have already explained, neither the complaint nor the VFW's circuit court briefs identified the express provisions in the lease that were breached and which caused the VFW the damages it seeks. The complaint and briefs mention the express obligation to provide the prescribed space to the VFW, but the VFW explains in their brief in opposition to sanctions that its legal theory is that the lease was breached *prior* to the condemnation. Thus, the VFW is not relying on the failure to provide the space after the condemnation.

¶34 We agree with the circuit court's conclusion that the VFW appeared to be arguing in the circuit court that the express obligation to provide the space in the hotel created an implied obligation to maintain the hotel so that it would not be condemned. Like the circuit court, we conclude the VFW never provided a legal theory, either based on existing law or a nonfrivolous argument for a change in the law, that would permit such an implied obligation given the proscription against implied covenants in WIS. STAT. § 710.06. Also like the circuit court, we conclude that, given the proscription in § 710.06, neither inadequate compensation in the condemnation proceeding nor the fact that the VFW had what it describes as a "negative lease" provides a reasonable basis for implying such a covenant. The

VFW's appellate brief appears to rely to some extent on an implied obligation to keep the hotel building from deteriorating so that it would not be condemned, but still does not present a legal theory that takes the proscription in § 710.06 into account.

¶35 On appeal, as we have already mentioned, the VFW is referring for the first time to several express lease provisions that, it asserts, obligates Maharishi to maintain the hotel building. *See* paragraph 16 above. This belated argument does not persuade us that the court erred in deciding that the VFW did not identify a legal basis for its breach of contract claim. First, the VFW had ample opportunity to advise the circuit court of the express lease provisions on which it was relying and failed to do so. Second, the provisions numbered 1, 2, 3, and 5 in paragraph 16 above do not appear to relate to maintenance of the hotel building at all, but to characteristics of the premises the lessor is to provide the VFW.[11] It appears the VFW is relying primarily on the provision that "the building shall comply with all local and State laws, regulations and codes," because the VFW has underlined that phrase and tells us that it has a nonfrivolous claim that Maharishi breached an express duty to maintain the building in a code-compliant condition. However, even at this late point in time, after having failed to include such allegations in the complaint, or in an amended complaint, or in

[11] It appears that the VFW may also be arguing on appeal that it has a nonfrivolous claim for a breach of the express obligation to provide the specified space for the lease term. However, in the circuit court, as we have already discussed *supra* in paragraph 25, the VFW stated its theory was that Maharishi breached the lease *prior* to the condemnation. We therefore do not discuss this contention further. Nonetheless, we observe that however broadly or narrowly one reads ***Wisconsin Mall Properties***, 293 Wis. 2d 573, the case does not support the position that a lessee may pursue a breach of contract claim against a lessor, after the property has been condemned, *solely* on the ground that the lessor is not providing the leased premises after the condemnation. Such a position would entirely vitiate the general rule that complete condemnation of the property terminates a lease attached to the property. *See* ***id.***, ¶27.

argument to the circuit court opposing sanctions, the VFW does not explain what the code violations are.[12]

¶36 We now turn to the circuit court's determination on the lack of a factual basis for the claim. The VFW had the opportunity to explain in the circuit court how its prior statements on Maharishi's compliance with the lease could be reconciled with having a factual basis for a claim for breach of contract under any legal theory in this case. However, it did not do so. If the VFW had discovered new evidence since it made those statements or had developed a different legal theory under which different facts were significant, it was incumbent on the VFW to explain that to the circuit court.

¶37 On appeal, the VFW asserts in its reply brief that it meant by the prior statements that Maharishi substantially complied with its obligations under the lease to maintain the VFW space and now it is contending that Maharishi breached its obligation to maintain the hotel building "code compliant." However, as we have already noted, even now there is no specificity, let alone evidentiary support, for this new contention.[13] In view of the prior statements that are

[12] We note that in its responsive brief on appeal, Maharishi argues that the lease's reference to the building's compliance with law, regulation, and code, *see supra* paragraph 16, relates to the construction of the building, not an ongoing maintenance obligation. We need not address this dispute.

[13] We also observe that on appeal the VFW is presenting yet another new legal theory that depends on yet another factual predicate that is wholly absent from the complaint and from its briefs in the circuit court: that Maharishi "willfully or negligently abandon[ed] [the] building," causing its value on the date of condemnation to be insufficient to compensate the VFW for the value of its leasehold. The VFW states:

(continued)

inconsistent with the factual predicate for a breach of contract claim, the lack of an explanation to the circuit court for the inconsistency, and the lack of an explanation of what evidentiary support the VFW had for specific factual allegations on the conduct of Maharishi that constituted a breach under the legal theory the VFW was advocating, we conclude the circuit court did not erroneously exercise its discretion in determining that the VFW did not have a factual basis for its claim.

¶38 As we have already explained, the reach of ***Wisconsin Mall Properties***, 293 Wis. 2d 573, becomes relevant in this case only if the VFW has a claim for breach of the lease agreement against Maharishi. *See supra* ¶22 and footnote 7. Because we conclude the circuit court correctly decided that the VFW's claim for a breach of contract against Maharishi did not have a nonfrivolous basis in the law and reasonably decided there was no factual basis for the claim, it is not necessary to decide if the VFW's argument that ***Wisconsin Mall Properties*** permits it to proceed with the breach of contract claim is nonfrivolous. Accordingly, we affirm the circuit court's decision that sanctions are appropriate without reaching this issue.

> When this matter is returned for trial, the Maharishi will have an opportunity to explain why it did not occupy this building between 1994 and 2001, and allowed it to deteriorate and be vandalized. It is possible that the evidence produced at trial will establish that the Maharishi deliberately abandoned the hotel *knowing that it would be eventually condemned, and that if the hotel were to be condemned, the Maharishi would then be automatically relieved of its duties under the lease* to maintain the VFW in occupancy for the 61 years remaining on the initial term, plus the option period.

(Emphasis in original.)

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.