

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 5, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2012

Cir. Ct. No. 2005CV9531

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**GERALD R. LOEBEL, D/B/A CUSTOM MARBLE PRODUCTS, INC. AND
GERALD R. LOEBEL, D/B/A HEALTH PLUS, LLC,**

PLAINTIFFS-APPELLANTS,

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Gerald R. Loebel, doing business as Custom Marble Products, Inc., and as Health Plus, LLC, appeals the trial court's grant of summary

judgment dismissing his breach-of-contract and relocation-assistance claims against the Redevelopment Authority of the City of Milwaukee.¹ *See* WIS. STAT. § 32.19 (relocation assistance). Loebel contends that the trial court erred because genuine issues of material fact preclude summary judgment. We affirm.

I.

¶2 Loebel owned Custom Marble Products and Health Plus, located at 4923 West Lisbon Avenue in Milwaukee. Loebel used the first floor of the building as a manufacturing plant for Custom Marble Products and stored health club equipment for Health Plus in the basement. The Redevelopment Authority took the property in 1998 through eminent domain.

¶3 Loebel and the Redevelopment Authority resolved their disputes in connection with the taking by executing a “Relocation Benefits Compensation and Settlement Agreement” on November 12, 1999. (Some uppercasing omitted.) Under the Settlement Agreement, the Redevelopment Authority agreed to pay Loebel \$200,000, and, as set out in Exhibit A to the Settlement Agreement, also agreed to move or replace certain “[f]eatures” of the condemned property, including: “Loading dock purchase and construction cost or lift required for loading and/or unloading product.” In exchange, Loebel waived all relocation benefits except moving expenses.

¶4 Loebel and the Redevelopment Authority were not satisfied with the November 1999 Settlement Agreement, and ultimately agreed to a “Relocation

¹ Compensation for the taking of Loebel’s property is not at issue on this appeal. *See* WIS. STAT. § 32.09 (just compensation).

Settlement and Release,” which was executed by Loebel and the Redevelopment Authority in February of 2000. (Some uppercasing omitted.) Under this Settlement and Release, the Redevelopment Authority agreed to pay Loebel an additional \$475,000 “as settlement of all his claims for relocation costs.” Loebel agreed to assume the burden for improvements to the relocation property:

Loebel agrees to contract directly for all improvements to the Replacement Facility and for the move of all personal property from the Subject Property and to pay the cost thereof. The improvements to be made to the Subject Property are those deemed necessary to obtain an occupancy permit and those improvements listed on Exhibit A to the Relocation Benefits Compensation and Settlement Agreement dated November 12, 1999.

Loebel also released all claims “of any kind or nature whatsoever” against the Redevelopment Authority:

Loebel agrees that upon payment of the consideration ... [Loebel] does for himself, his heirs and assigns, forever release and discharge the Authority, its successors, assigns, officers, agents and employees, of and from any and all claims, demands, actions and causes of action for damages of any kind or nature whatsoever and all liability whatsoever in the Subject Property including, without limitation, attorney’s fees and costs, if any, in any way arising out of or relating to the relocation of Loebel from the Subject Property.

¶5 Loebel subsequently sued the Redevelopment Authority, claiming in his amended complaint that: (1) the Redevelopment Authority breached its contract when it did not “provide compensation for a loading dock at the replacement property ... as was agreed upon in Contract 1 and the subsequent communications,” and (2) the Redevelopment Authority owed relocation benefits to Loebel and Health Plus.

¶6 As material to this appeal, the dispute revolves around Loebel's contention that his February of 2000 agreement to accept the \$475,000 in full settlement was later modified by what he claims were "ongoing discussions, negotiations" between him and the Redevelopment Authority and that this "created an ambiguity ... [and] demonstrate[d] a willingness to continue negotiations relating to the obligation to provide a loading dock and the relocation benefits for Health Plus." In support of his position, Loebel proffered letters, memoranda, and e-mails purporting to show that the parties agreed to modify the February of 2000, "Relocation Settlement and Release."

¶7 In granting summary judgment to the Redevelopment Authority, the trial court concluded that the February of 2000 "Relocation Settlement and Release" was clear and that it would not look at parole evidence. *See Huml v. Vlazny*, 2006 WI 87, ¶52, 293 Wis. 2d 169, 197, 716 N.W.2d 807, 820 (unambiguous contract interpreted without resort to extrinsic evidence). It then determined that under the February of 2000, "Relocation Settlement and Release," Loebel had unambiguously waived his rights to a loading dock and relocation benefits for Health Plus. The trial court also concluded that the February of 2000 "Relocation Settlement and Release" was not modified because there was "no meeting of the minds": "There is a release. There is a signing of the checks, cashing the checks. Anything else subsequent to that, that the parties talked about or try to exclude from that contract, appears to be no meeting of the minds on those issues, no new contract."

II.

¶8 We review *de novo* a trial court's grant of summary judgment. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816,

820–821 (1987). Summary judgment must be granted when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. WIS. STAT. RULE 802.08(2). Additionally, the interpretation of a contract is a question of law that we also review *de novo*. *Teacher Ret. Sys. of Tex. v. Badger XVI Ltd. P’ship*, 205 Wis. 2d 532, 555, 556 N.W.2d 415, 424 (Ct. App. 1996).

The lodestar of contract interpretation is the intent of the parties. In ascertaining the intent of the parties, contract terms should be given their plain or ordinary meaning. If the contract is unambiguous, our attempt to determine the parties’ intent ends with the four corners of the contract, without consideration of extrinsic evidence.

Huml, 2006 WI 87, ¶52, 293 Wis. 2d at 196–197, 716 N.W.2d at 820 (citations omitted).

¶9 On appeal, Loebel does not claim that the terms of the February of 2000 “Relocation Settlement and Release” are ambiguous, although he made this argument before the trial court. Rather, he contends that there are genuine issues of material fact whether: (1) the parties agreed to the February of 2000 “Relocation Settlement and Release,” because of a mutual mistake of fact, and, as we have seen, (2) the parties modified the contract by subsequent conduct or actions. We address each contention in turn.

A. *Mutual Mistake.*

¶10 Loebel claims on appeal that there are issues of fact whether the parties by mutual mistake omitted from the February of 2000 “Relocation Settlement and Release”: (1) a provision that the Redevelopment Authority would be responsible for providing the loading dock, and (2) a provision that Loebel could seek “relocation and miscellaneous expense claims” for Health Plus. Loebel did not, however, raise these claims before the trial court during the summary

judgment proceedings. Accordingly, we will not address them. See *Wirth v. Ehly*, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (generally, appellate court will not review issue raised for first time on appeal); cf. *Goebel v. National Exchangors, Inc.*, 88 Wis. 2d 596, 614, 277 N.W.2d 755, 764 (1979) (modification of contract must be pled by party making claim).

B. *Modification.*

¶11 Loebel contends that there are issues of material fact whether the parties modified the terms of the February of 2000 “Relocation Settlement and Release” to include provisions for the loading dock and Health Plus’s relocation claims. In support of this contention, he points to documents attached to his brief in opposition to summary judgment and claims that they create an issue of material fact. We disagree.

¶12 The existence of an agreement to modify a contract is “established in the same way as any other contract.” *Kohlenberg v. American Plumbing Supply Co.*, 82 Wis. 2d 384, 393, 263 N.W.2d 496, 500 (1978). “Modification must be made by the contracting parties or someone duly authorized to modify, and one party to a contract cannot alter its terms without the assent of the other parties; the minds of the parties must meet as to the proposed modification.” *Nelsen v. Farmers Mut. Auto. Ins. Co.*, 4 Wis. 2d 36, 55, 90 N.W.2d 123, 133 (1958) (quoted source omitted).

“While the parties to a contract may modify it by a subsequent contract which is shown by their acts, the acts which are relied upon to modify a prior contract must be unequivocal in their character. Acts which are ambiguous in their character, and which are consistent either with the continued existence of the original contract, or with a modification thereof, are not sufficient to establish a modification.”

Id., 4 Wis. 2d at 56, 90 N.W.2d at 134 (quoted source omitted); *see also Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 178, 557 N.W.2d 67, 75 (1996) (“Vagueness or indefiniteness as to an essential term of the agreement prevents the creation of an enforceable contract.”) (bolding omitted).

¶13 Loebel submitted to the trial court in opposition to the Redevelopment Authority’s motion for summary judgment the following:

- A January 24, 2000, letter from Loebel to the Redevelopment Authority “claim[ing relocation benefits] for the business of Health Plus in the amount of \$98,700.” This letter, of course, precedes the February of 2000 “Relocation Settlement and Release.”
- A February 14, 2000, letter from one of Loebel’s lawyers to the Redevelopment Authority “confirm[ing] and reiterat[ing] what we discussed this morning, regarding the ... Relocation Settlement and Release,” including the “conditions” that the Redevelopment Authority: (1) “obtain and provide a complete bid by a reputable contractor to install and integrate a scissors-type loading dock,” and (2) “participate in a mediation process with [Loebel], the purpose of which is to achieve a mutually satisfactory conclusion” to Health Plus’s claim for relocation benefits. Loebel appears to have executed the February of 2000 “Relocation Settlement and Release” on February 12, 2000. The Redevelopment Authority executed it on February 16, 2000.
- A February 15, 2000, letter from the Redevelopment Authority to one of Loebel’s lawyers asserting that the February 14th letter “incorporated new

and unacceptable additional terms for the Loebel Relocation Settlement and Release”:

We have previously denied any business relocation claim for Health Plus. We have included the cost of moving all of the athletic equipment that was stored at Custom Marble. In order to resolve this matter, we had suggested asking the State Department of Commerce for their opinion as to eligibility for any other relocation benefits. We remain prepared to do that, and to pay any additional claims they may deem legally required. We will not negotiate a settlement of any other kind.

....

Your requirements for the loading dock are not at issue.

- A February 15, 2000, letter from one of Loebel’s lawyers “in response” to the Redevelopment Authority’s letter claiming that, “[a]s I read it, ... the loading dock approach specified in my February 14 letter has been accepted,” and “agree[ing] to separate” the Health Plus “matter completely.”
- A February 24, 2000, letter from one of Loebel’s lawyers to the Redevelopment Authority “summariz[ing] the status of the relocation,” “[e]nclos[ing] the latest version of Exhibit A,” and stating that “Mr. Loebel is also working on the bid for the loading dock.”
- An August 10, 2000, internal office memorandum from one Redevelopment Authority employee to another stating that “[p]ursuant to its Relocation Benefits Compensation and Settlement Agreement dated November 12, 1999, between the [Redevelopment Authority] and [Loebel], I have obtained four bids for the construction of a loading facility. ... Therefor [*sic*], I recommend issuing a letter of authorization

to Custom Marble Products to proceed with construction of the facility up to the amount of the low bid of \$68,800.00.”

- An October 3, 2000, letter from one of Loebel’s lawyers to the Redevelopment Authority notifying it that “we believe” the Redevelopment Authority is “in default under the Relocation Benefits Compensation and Settlement Agreement ... dated November 12, 1999 [and] is obligated to provide [Custom Marble Products] with a loading dock.”
- An October 26, 2000, letter from the Redevelopment Authority to Loebel telling Loebel that the Redevelopment Authority had gotten “four bids ... for a loading facility,” and “authoriz[ing Loebel] to implement construction of a loading facility at a cost not to exceed \$68,800.00.”
- A November 6, 2000, letter from Loebel to the Redevelopment Authority requesting that the Redevelopment Authority “re-bid” the loading dock project.
- Several documents dated April 3, 2001, to May 7, 2001, showing that Loebel got re-bids for the loading dock and submitted them to one of his lawyers.
- A November 5, 2001, letter from the Redevelopment Authority to one of Loebel’s lawyers “approv[ing] Mr. Loebel’s construction bid ... in the amount of \$74,000.00” for the loading dock, and “determin[ing] Health Plus does not qualify as a displaced party for relocation benefits. ... We will not honor any claim for a business relocation payment nor will we engage in any settlement discussions.”

- A November 4, 2002, “Release of Claims” between Loebel and the City of Milwaukee in a related, but separate case, “exclud[ing] any claims for relocation payments for a loading dock and relocation or miscellaneous expense claims for Health Plus.” (Some capitalization omitted.)
- A February 4, 2003, internal office memorandum from one Redevelopment Authority employee to another stating that “we have agreed to pay for a loading dock and Loebel agreed to do the contracting directly.”
- Several February of 2005 internal office e-mail messages from one Redevelopment Authority employee to another asking how to secure payment for a loading dock at Custom Marble Products.

As the trial court correctly ruled, this evidence of cross assertions and assumptions does not satisfy Loebel’s burden to show a genuine issue of material fact as to whether there was a meeting of the minds to rescind the broad release he gave in the February of 2000 “Relocation Settlement and Release.” See *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 290, 507 N.W.2d 136, 139 (Ct. App. 1993) (The party resisting summary judgment has the burden to set forth specific facts to establish the elements on which they have the burden of proof at trial.); *Nelsen*, 4 Wis. 2d at 56, 90 N.W.2d at 134 (“the acts which are relied upon to modify a prior contract must be unequivocal”) (quoted source omitted). We affirm.

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.

