COURT OF APPEALS DECISION DATED AND FILED

July 11, 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. 2006AP1626

Cir. Ct. No. 2004CV3088

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

THOMAS KINSEY AND MARGARET KINSEY,

PLAINTIFFS-APPELLANTS,

V.

TEMO INC.,

DEFENDANT-RESPONDENT,

THERMO TECH II LTD.,

DEFENDANT.

APPEAL from an order of the circuit court for Waukesha County: MARK GEMPELER, Judge. *Affirmed*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 ANDERSON, J. Thomas and Margaret Kinsey appeal from a summary judgment order dismissing their complaint against Temo, Inc. alleging breach of contract (warranty), breach of habitability and violations of the Wisconsin Department of Agriculture, Trade and Consumer Protection Code.[1] The Kinseys argue that the trial court erred in granting Temo's motion for summary judgment because material issues of fact exist as to whether there was a principal-agent relationship between Temo and Thermo Tech II, Ltd. Upon review, we conclude that there is no genuine issue as to any material fact. We therefore affirm the trial court's summary judgment order.

¶2 This case arose after Thermo Tech failed to satisfactorily complete the installation of a sunroom for the Kinseys. In early 2004, the Kinseys attended a home trade show in Milwaukee and left their contact information at a sunroom exhibit put up by Thermo Tech. Thereafter, a Thermo Tech salesperson contacted the Kinseys. On March 1, 2004, the Kinseys entered into a contract with Thermo Tech to purchase a sunroom. The Kinseys paid Thermo Tech approximately $29,000 for the installation of a sunroom. In his deposition, Thomas Kinsey acknowledged that at the time he and his wife signed the contract, they did not know who Temo was and he stated that "[i]t didn't matter."

¶3 Approximately six months after the contract was signed, work on the sunroom ceased before completion. After many unsuccessful attempts to contact

[1] From the motion hearing transcript and the appellate briefs it appears that the trial court and both parties deem all three claims as arising out of the contract agreement the Kinseys signed. We accept the validity of this treatment and we need not discuss the consumer protection claim in any detail since it rises and falls on the contract issue and since neither party argues it separately on appeal. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (If a decision on one point disposes of the appeal, we will not decide the other issues raised.).

Thermo Tech, the Kinseys learned that Thermo Tech was no longer operational. When the Kinseys realized they had a problem, Thomas Kinsey said that he and his wife started "digging." They noticed that a screen door from the sunroom materials had the Temo name on it. Thereafter, the Kinseys looked at brochures they had picked up from the home show and looked on the Internet to gather information about Temo. In doing so they discovered that Temo furnished materials for the sunroom installed by Thermo Tech. Thomas Kinsey stated that he then called a Temo representative "when it became apparent that Thermo in essence went out of—disappeared…. And I called him to see how they were going to finish the job."

¶4 The Temo representative's response was to tell the Kinseys that Temo could not help them because Temo is not a home improvement company; rather, it is in the business of manufacturing sunrooms.

¶5 The Kinseys sued both Thermo Tech and Temo for breach of contract (warranty), breach of habitability and violations of the Wisconsin Department of Agriculture, Trade and Consumer Protection Code. Thermo Tech did not appear or respond in this matter. Temo moved for summary judgment against the Kinseys. Temo argued that there was no privity of contract between it and the Kinseys and that each of the Kinseys' claims must fail as a matter of law. In response, the Kinseys argued that material issues of fact exist as to a principal-agent relationship between Temo, as principal, and Thermo Tech, as its agent. The trial court granted Temo's motion for summary judgment and dismissed the Kinseys' claims against Temo on the merits with prejudice.

¶6 On appeal the Kinseys argue that summary judgment was improper because material issues of fact exist as to a principal-agent relationship between

Temo and Thermo Tech. They assert that Temo exercised and maintained authority and final approval over Thermo Tech's actions in the areas of marketing, sale, design and installation of the Temo sunroom. In support of this assertion, they note that Temo provided a design layout for the Kinsey sunroom to Thermo Tech. They also point to the dealership agreement between Temo and Thermo Tech and claim it illustrates the right of Temo to control Thermo Tech in the day-to-day operations of marketing, installing and servicing Temo sunrooms. They rely mostly on sec. 1.2 of the agreement which provides:

> **Dealer** shall sell, install, and service **Temo** sunrooms solely from the retail location listed on Exhibit A and within the assigned territory also described on Exhibit A, or at consumer events such as state fairs or home shows as **Temo** may authorize, or choose to deny, in writing from time to time.

They also look to sec. 8.3 of the agreement for support. This section provides:

> This Agreement is not a contract of employment, partnership, joint venture or franchise. Nothing herein shall be construed to give either party the power to direct or control the day-to-day activities of the other or to constitute the parties as partners, joint ventures, co-owners or otherwise as participants in a joint or common enterprise or franchise agreement. **Dealer**, its agents and employees are not the employees of **Temo**, nor shall it or they represent **Temo** for any purpose except as expressly set forth in this Agreement, nor shall **Dealer** have any power or authority as agent, except as expressly set forth herein, to represent, act for, bind or otherwise create or assume any obligation on behalf of **Temo**.

The Kinseys argue that the language "except as expressly set forth in this Agreement" provides for exceptions where Thermo Tech can act as an agent for Temo and that therefore this provision cannot be relied upon to deny the possibility of or reasonable inference of a principal-agent relationship between Temo and Thermo Tech.

¶7 Finally, the Kinseys argue that their assertion of an agency relationship and Temo's denial of such, in itself, bars summary judgment under ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983), which holds that the determination of whether a principal-agent relationship exists is a question of fact for the trier of fact.

¶8 We review a motion for summary judgment de novo, using the same methodology as the trial court. ***Old Tuckaway Assocs. Ltd. P'ship v. City of Greenfield***, 180 Wis. 2d 254, 278, 509 N.W.2d 323 (Ct. App. 1993). Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2005-06). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (quoting ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-48 (1986)). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Baxter***, 165 Wis. 2d at 312 (citation omitted).

¶9 Privity of contract is essential in a cause of action based on breach of contract. *See* WIS JI—CIVIL 3200; *see also* ***Antwaun A. v. Heritage Mut. Ins. Co.***, 228 Wis. 2d 44, 72-73, 596 N.W.2d 456 (1999). The term "privity," used with respect to contract, implies a connection, mutuality of will, and interaction of parties. ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 397 n.1, 573 N.W.2d 842 (1998) (citation omitted). It is that connection or relationship which exists between two or more contracting parties. *See* ***id.*** (citation omitted).

¶10 The elements necessary to establish a principal-agent relationship are: (1) "the express or implied manifestation of one party that the other party shall act for him [or her];" (2) "[the principal] has retained the right to control the details of the work;" and (3) "whether the party agreeing to perform the service is engaged in a distinct occupation or business apart from that of the person who engages the services." ***Peabody Seating Co. v. Jim Cullen, Inc***., 56 Wis. 2d 119, 123, 201 N.W.2d 546 (1972) (citation omitted). The most important single indicium in determining if a party is an agent or an independent contractor is the determination of who has retained the right to control the details of the work. ***Bond v. Harrel***, 13 Wis. 2d 369, 374, 108 N.W.2d 552 (1961); *see* ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 295, 531 N.W.2d 357 (Ct. App. 1995). The determination of whether a principal-agent relationship exists is a question of fact for the trier of fact. ***Noll***, 115 Wis. 2d at 643.

¶11 This court appreciates the Kinseys' unfortunate situation but there are no material issues of fact that would support reversal. Therefore, Temo's motion for summary judgment was properly granted by the trial court.

¶12 First, privity of contract did not exist between the Kinseys and Temo. The Kinseys' contract was with Thermo Tech. At the time the Kinseys contracted with Thermo Tech for the sunroom, they did not know of the existence of Temo. The Kinseys first learned of Temo months after signing the contract with Thermo Tech and, only after a problem arose, did the Kinseys start "digging" and discover Temo and its relationship to Thermo Tech. The Kinseys did not rely on any information provided by Temo when they signed the contract. The Kinseys paid Thermo Tech approximately $29,000 and they do not claim or make a showing that Temo received any of this money. Thus, privity between Temo and the Kinseys did not exist because the record shows no connection, mutuality

of will, or interaction of parties at the time of contract. *See* ***Daanen & Janssen, Inc.***, 216 Wis. 2d at 397 n.1.

¶13 Second, the evidence does not require that the issue of agency be tried. The Kinseys contend that summary judgment was improper because there are material issues of fact as to whether a principal-agent relationship existed between Temo and Thermo Tech. They argue that their assertion of a principal-agent relationship and Temo's denial of such, in itself, bars summary judgment under ***Noll***.

¶14 We cannot agree. There is no material issue of fact in dispute. Furthermore, there is no undisputed material issue of fact sufficient to allow for reasonable alternative inferences. *See* ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶12, 277 Wis. 2d 21, 690 N.W.2d 1. In order for the Kinseys to rely on the ***Noll*** rule, they must raise a justiciable issue that a trier of fact could decide. *See* ***Baumeister***, 277 Wis. 2d 21, ¶12. They have not.

¶15 Nothing in the record gives rise to a material issue of fact supporting a claim that a principal-agent relationship existed. No employee or representative of Temo was ever involved with the installation of the sunroom or the day-to-day operations of Thermo Tech. There is no evidence showing that Temo controlled, or had the right to control, any work that Thermo Tech performed with regard to the installation of a Temo sunroom. *See* ***Envirologix Corp.***, 192 Wis. 2d at 295. Additionally, the Kinseys are not helped by their reliance on sec. 1.2 of the dealership agreement to prove a principal-agent relationship. Section 1.2 does not vest Temo with control over the dealer's day-to-day operations. It merely requires that a Temo dealer conduct its business from certain prescribed locations.

¶16 The Kinseys also unsuccessfully assert that sec. 8.3 of the dealership agreement supports the possibility of a principal-agent relationship. They argue that the language "except as expressly set forth in this Agreement" provides for exceptions where Thermo Tech can act as an agent for Temo. The problem with this argument is that the Kinseys do not point to a provision in the agreement in which the exception is satisfied. In short, the agreement never sets forth any other provisions which confer agent status on a dealer or which confer power or authority on Temo over a dealer such that an agency might otherwise be created.

¶17 Section 8.3 of the dealership agreement, in fact, expressly bars a principal-agent relationship and there is no undisputed material issue of fact sufficient to allow for reasonable alternative inferences. *See* ***Baumeister***, 277 Wis. 2d 21, ¶12.

¶18 The evidence presented by the Kinseys, at most, establishes that Temo provided the materials and plans for its sunrooms to its dealers such as Thermo Tech. The mere authority to act for another does not, without more, establish agency as a matter of law. ***Envirologix Corp.***, 192 Wis. 2d at 295. We conclude that there are no material issues of fact in support of the Kinseys' claim of an agency relationship between Temo as the alleged principal and Thermo Tech as the alleged agent. Most compelling is the lack of any persuasive evidence showing that Temo controlled or had the right to control any work that Thermo Tech performed with regard to the installation of a Temo sunroom. Here, there can be no liability without fault and, since Temo did not control or have the right to control the day-to-day operations of Thermo Tech, any other ruling would be difficult to justify on fairness grounds. *See* ***Kerl v. Dennis Rasmussen, Inc.***, 2004 WI 86, ¶27, 273 Wis. 2d 106, 682 N.W.2d 328.

By the Court.—Order affirmed.

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