COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2005AP2680
2006AP1410

Cir. Ct. No. 2005CV4538

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

DANIEL ONISCHUK,

PLAINTIFF-APPELLANT,

V.

JOHNSON CONTROLS, INC., DAVID LAPLANT AND DONALD PFIEFFER,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Wedemeyer, Fine and Snyder, JJ.

¶1 FINE, J. In this consolidated appeal, Daniel Onischuk appeals, *pro se*, an order dismissing his claims against his former employer, Johnson Controls, Inc., and his supervisors at Johnson Controls, David LaPlant, and

Donald Pfieffer. Onischuk also appeals an order dismissing what is essentially a motion for reconsideration. Although he asserts many claims on appeal, the dispositive issue is whether a Settlement Agreement Onischuck signed "releas[ing] and forever discharg[ing]" "any and all claims" against Johnson Controls is valid. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed). We conclude that it is and affirm.

I.

¶2 In 1999 and 2000, Onischuk filed multiple complaints with the Equal Rights Division of the Wisconsin Department of Workforce Development, alleging that his former employer, Johnson Controls: (1) discriminated against him on the basis of "Race &/or National Origin[;] Canadian of Slavic Ancestry" (some uppercasing omitted), in violation of the Wisconsin Fair Employment Act, *see* WIS. STAT. §§ 111.31–111.395, and (2) retaliated against him for not working overtime, in violation of WIS. STAT. §§ 103.01–103.03, 103.96, and 111.322(2m).

¶3 On October 8, 2001, Johnson Controls and Onischuk negotiated and signed a "Complete and Permanent Release and Settlement Agreement." (Some uppercasing omitted.) According to the Settlement Agreement, in exchange for $1,000, Onischuk agreed that he would "not file any further complaints, cases or charges asserting any claim released in paragraph 4 below." Paragraph four provided:

> [Onischuk] hereby releases and forever discharges [Johnson Controls], its parent, subsidiary, related and affiliated companies, and its and their past and present employees, directors, officers, agents, shareholders, insurers, attorneys, executors, assigns and other representatives of any other kind (referred to in this Agreement as "Released Parties") from any and all claims,

> demands, rights, liabilities and causes of action of any kind or nature, known or unknown, arising prior to or through the date [Onischuk] executes this Agreement, including but not limited to any claims, demands, rights, liabilities and causes of action arising or having arisen out of or in connection with [Onischuk's] employment or termination of employment with [Johnson Controls]. Complainant also releases and waives any claim or right to further compensation, benefits, damages, penalties, attorneys' fees, costs or expenses of any kind from [Johnson Controls] or any of the other Released Parties.

¶4 On October 11 and October 16, 2001, among other dates, Onischuk sent letters to Johnson Controls purporting to rescind the Settlement Agreement. In the letters, he claimed that he thought he was waiving only his right to "pursue the equal rights complaint," but that Johnson Controls "completely misrepresented the verbal negotiations" causing him to waive any additional claims. (Some uppercasing omitted.)

¶5 Johnson Controls told Onischuk that he could not unilaterally rescind the Settlement Agreement, and, in a written order, an Equal Rights Division administrative law judge dismissed Onischuk's complaint, "conclud[ing] that the circumstances did not warrant voiding the Request to Withdraw Complaint form signed by [Onischuk]."

¶6 On May 13, 2005, Onischuk, *pro se*, sued Johnson Controls in the Milwaukee County Circuit Court, asserting many employment-related claims, including retaliation, discrimination, harassment, wrongful dismissal, and defamation. Johnson Controls moved for dismissal or, in the alternative, summary judgment, claiming, as relevant, that Onischuk waived and released all claims against Johnson Controls in the October of 2001 Settlement Agreement. *See* WIS. STAT. RULES 802.06(2)(a)(6), 802.08(2). Onischuk argued that the Settlement

Agreement was void because, as material, Johnson Controls intentionally misrepresented its terms.

¶7 Onischuk appeared by telephone at an August of 2005 hearing on Johnson Controls's motion. During the hearing, Onischuk told the circuit court that he did not read the Settlement Agreement before he signed it:

> THE COURT: Did you read the document before you signed it?
>
> MR. ONISCHUK: No, Your Honor. I was relying on the fact that they had a duty to reveal and to disclose and to inform me of that …. And nobody, prior to my signing, ever made me aware of the substantial changes that were reflected in the written document, and they were totally never, ever mentioned to me and never discussed.

Onischuk also told the circuit court that he did not read the Settlement Agreement because he "had a lot of emotional turmoil … going on with [the death of] my mother and close friend[]; the abuse and discrimination that I had experienced at Johnson Controls, and also I was very upset by the present turn of events in the Equal Rights case, and I just wanted to get out of there."

¶8 The circuit court granted Johnson Controls's motion, finding, as material, that: (1) Onischuk "admitted to signing the Settlement Agreement and Release of Claims"; (2) Onischuk "admitted that he elected not to read the Release prior to signing it"; and (3) "the Release was not signed under any circumstances that would render it unenforceable." Based on these findings, the circuit court concluded that the "Release was a valid and enforceable contract that released and waived [Onischuk's] claims up to and through the time he executed the Release."

¶9 Onischuk then filed many *pro se* motions with the circuit court, including a "Motion[] to Reconsider," "Motion for Relief of Judgment & Order,"

and "Motion for New Trial," claiming, as material, that he had validly rescinded the Settlement Agreement under the Age Discrimination in Employment Act of 1967. *See* 29 U.S.C. § 626(f)(1)(G) (individual has seven days to revoke agreement waiving claim under Age Discrimination in Employment Act).

¶10 The circuit court denied Onischuk's claims in a written order, concluding that Onischuk had not submitted newly discovered evidence or established a manifest error of law or fact. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 416, 685 N.W.2d 853, 862 ("To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact.").

II.

¶11 In deciding Johnson Controls's motion to dismiss or, in the alternative, motion for summary judgment, the circuit court had before it many exhibits, affidavits, and Onischuk's statements at the hearing. Accordingly, we will consider the motion as one for summary judgment. *See* WIS. STAT. RULE 802.06(2)(b) ("If … matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment.").[1] We review *de novo* a circuit court's grant of summary judgment. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816,

[1] Generally, a circuit court is required to notify the parties when it intends to convert a motion to dismiss for failure to state a claim to a motion for summary judgment. ***CTI of Northeast Wisconsin, LLC v. Herrell***, 2003 WI App 19, ¶5, 259 Wis. 2d 756, 760, 656 N.W.2d 794, 797. The parties are precluded from arguing a lack of notice or opportunity to reply, however, when they assert their right to respond. ***Id.***, 2003 WI App 19, ¶10, 259 Wis. 2d at 762–763, 656 N.W.2d at 798. Here, both parties had an adequate opportunity to and did respond.

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).

¶12 The dispositive issue on this appeal is whether Onischuk's claims are barred under the Settlement Agreement. As we have seen, the Settlement Agreement "releas[ed] and forever discharg[ed]" Johnson Controls "from any and all claims, demands, rights, liabilities and causes of action of any kind or nature, known or unknown … arising or having arisen out of or in connection with [Onischuk's] employment or termination of employment with [Johnson Controls]." Onischuk does not dispute that this language is clear. *See* ***Cernohorsky v. Northern Liquid Gas Co.***, 268 Wis. 586, 593, 68 N.W.2d 429, 433 (1955) (Unambiguous language in a contract must be enforced as it is written.). Rather, he argues that the Settlement Agreement is not enforceable because, he contends that: (1) Johnson Controls misrepresented its terms during negotiations, and (2) he validly revoked it under the Age Discrimination in Employment Act. We address each claim in turn.[2]

¶13 Onischuk appears to raise a claim of intentional misrepresentation. The elements of intentional misrepresentation are: (1) the defendant made a representation of fact; (2) the representation of fact was untrue; (3) the defendant made the representation either knowing that it was untrue, or recklessly not caring

[2] Onischuk also claims that he is due worker's compensation from Johnson Controls because was "injur[ed] after employment and outside the terms of the settlement." This claim is barred by Onischuk's failure to exhaust his administrative remedies. *See* ***German v. Wisconsin Dep't of Transp.***, 223 Wis. 2d 525, 543, 589 N.W.2d 651, 659 (Ct. App. 1998) ("Worker's compensation claims have to be pursued through the worker's compensation system in [WIS. STAT.] ch. 102, and judicial review is available only as provided in [WIS. STAT.] § 102.23(1)(a).").

whether it was true or false; (4) the defendant made the representation with the intent to deceive the plaintiff in order to induce the plaintiff to act on it to plaintiff's pecuniary damage; and (5) the plaintiff believed that the representation was true and relied on it. ***Ramsden v. Farm Credit Servs. of N. Cent. Wisconsin ACA***, 223 Wis. 2d 704, 718–719, 590 N.W.2d 1, 7 (Ct. App. 1998).

¶14 An intentional misrepresentation claim may arise either from a "failure to disclose a material fact" or from a "statement of a material fact which is untrue." ***Id.***, 223 Wis. 2d at 713, 590 N.W.2d at 5. Here, Onischuk contends that Johnson Controls failed to "warn" him that the Settlement Agreement waived all of his employment-related claims against Johnson Controls, not just the claims in his complaint alleging national origin discrimination and retaliation. Onischuk's misrepresentation claim fails on the fifth element—reliance. *See* ***Hennig v. Ahearn***, 230 Wis. 2d 149, 170, 601 N.W.2d 14, 24 (Ct. App. 1999) (whether reliance is justifiable may be decided as matter of law where facts are undisputed).

¶15 The key here is that a party cannot reasonably rely on allegedly fraudulent statements directly contradicted by the terms of a subsequently executed contract. *See* ***Amplicon, Inc. v. Marshfield Clinic***, 786 F. Supp. 1469, 1478 (W.D. Wis. 1992). As we have seen, Onischuk does not dispute that he signed the Settlement Agreement, albeit claiming that he did not read it. The "[f]ailure to read a contract … is not an excuse that relieves a person from the obligations of the contract." ***Deminsky v. Arlington Plastics Mach.***, 2003 WI 15, ¶30, 259 Wis. 2d 587, 610, 657 N.W.2d 411, 423; *see also* ***Kanack v. Kremski***, 96 Wis. 2d 426, 432, 291 N.W.2d 864, 867 (1980) ("'The law requires men in their dealing with each other, to exercise proper vigilance and apply their attention to those particulars which may be supposed to be within the reach of their

observation and judgment, and not close their eyes to the means of information accessible to them.'") (quoted source omitted).

¶16 Onischuk contends, however, that he did not read the Settlement Agreement because he was under duress due to his "illness of severe depression, stress and anxiety." Duress involves "wrongful acts … that compel a person to manifest apparent assent to a transaction without his volition or cause such fear as to preclude him from exercising free will and judgment in entering into a transaction." ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 109–110, 293 N.W.2d 155, 160 (1980) (quoted sources and internal quotation marks omitted).

¶17 Onischuk's claims of alleged duress do not point to anything that Johnson Controls did that amounts to "duress." Other than an unsubstantiated claim that he feared legal action regarding an alleged bomb threat at Johnson Controls, Onischuk does not allege that Johnson Controls threatened him or otherwise interfered with his free will to sign or reject the Settlement Agreement. While Onischuk may have felt stress during the negotiations, this factor alone is insufficient to satisfy the legal requirements for duress. *See* ***Selmer Co. v. Blakeslee-Midwest Co.***, 704 F.2d 924, 928 (7th Cir. 1983) (stress of business conditions alone not duress). Onischuk does not allege that he told Johnson Controls on October 8, 2001, he was unable to negotiate because of his illness or dispute that the administrative law judge took, as quoted in his brief in chief, "'hours to explain'" the Settlement Agreement to him. (Underlining by Onischuk.)

¶18 Finally, Onischuk claims that he revoked the Settlement Agreement, as permitted by the Age Discrimination in Employment Act. The Age Discrimination in Employment Act provides that the waiver of a claim under the

Act will not be considered knowing and voluntary unless "the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired." 29 U.S.C. § 626(f)(1)(G).[3]

¶19 Onischuk contends that he revoked the Settlement Agreement under this provision when, more than once and within seven days of its signing, he sent letters to Johnson Controls purporting to revoke the Settlement Agreement. Onischuk, however, never asserted an age discrimination claim in his complaint to the Equal Rights Division, conceding in his main brief on appeal that he "filed [his] complaints … only for Overtime Pay and National Origin Discrimination." (Underlining by Onischuk.) Thus, he cannot invoke the provisions of the Age Discrimination in Employment Act to void the Settlement Agreement. We agree with the circuit court that Onischik did not submit newly discovered evidence or

[3] 29 U.S.C. § 626(f)(1)(G) provides:

> **(f) Waiver**
>
> **(1)** An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—
>
> ….
>
> **(G)** the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

See also ***Cole v. Gaming Entm't, LLC***, 199 F. Supp. 2d 208, 212 (D. Del. 2002) ("The standards for voluntariness under Title VII [of the Civil Rights Act of 1964] have not yet been codified.").

raise a manifest error of law or fact in his motion for reconsideration. Accordingly, we affirm the circuit court's ruling that Onischuk's claims are barred by the Settlement Agreement.

By the Court.—Orders affirmed.

Publication in the official reports is not recommended.