**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 8, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2007AP126** **Cir. Ct. No. 2002CV1927**

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

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**L.P. MOORADIAN COMPANY,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MEDNIKOW PROPERTIES, INC.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and orders of the circuit court for Brown County: JOHN D. McKAY, Judge. *Judgment and order affirmed in part; reversed in part; order affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Mednikow Properties, Inc. (Mednikow), appeals a judgment and an order of the circuit court holding that Isadore Mednikow (Isadore) was not unduly influenced by representatives of L.P. Mooradian

Company, that Mooradian was entitled to money damages for breach of contract, and that Mooradian should be permitted to purchase certain property for its assessed value. Mednikow also appeals both a partial summary judgment[1] determining Isadore was the primary shareholder of Mednikow as well as an order denying its motion for consideration.

¶2 We conclude the record supports the court's determination on the shareholder and undue influence questions. However, we conclude the court erred by awarding breach of contract damages: the court raised the question on its own, then granted Mooradian retroactive amendment of the pleadings after trial was complete. We affirm the trial court to the extent it held that Isadore was the primary shareholder and he was not influenced by Mooradian, thereby entitling Mooradian to purchase the property at issue here. We reverse the portions of the February 5, 2007 judgment and the October 23, 2006 order awarding Mooradian damages for breach of contract and permitting retroactive amendment of the complaint. We also affirm the order denying the motion for reconsideration.

## Background

¶3 In 1965, Ken Braun (Ken) purchased Mooradian. Following the purchase, Ken and Isadore negotiated a new lease, between Mooradian as tenant and Mednikow as landlord, for the property where Mooradian is located. This property is in the Green Bay area, approximately two blocks from Lambeau Field. That lease, and all subsequent leases, contained a right of first refusal permitting

[1] Partial summary judgments are not final documents and are not appealable as a matter of right, but properly come before this court by operation of WIS. STAT. RULE 809.10(4). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Mooradian the chance to purchase the lot if Mednikow ever chose to sell the property. In 1998, Ken sold Mooradian to his son and daughter, Daniel Braun and Jody Bruley.

¶4 Shortly after this purchase, an adjacent parcel became available and in 1999, Mooradian began leasing that from Mednikow as well. The new 1999 lease was signed by Isadore, as Mednikow's president, and by Braun and Bruley as officers of Mooradian. Isadore was eighty-eight years old at the time. The lease included an addendum, stating:

> It is mutually agreed by both Landlord [Mednikow] and Tenant [Mooradian] that said Tenant shall have right of first refusal to purchase the property … at the assessed value at the time of purchase, should the property be offered for sale or is [sic] a buyer is interested to purchase same or upon death of the principal shareholder of Mednikow Properties, Inc.

The lease and addendum were recorded with the register of deeds as a memorandum of lease in August 1999.

¶5 Isadore died on July 14, 2001. Mooradian contacted Mednikow to inform it that Mooradian wished to exercise the purchase right. In March 2002, Mooradian's attorney sent a letter to Isadore's estate's attorney, who responded that the estate was construing the addendum as a right of first refusal, and Mednikow would not be selling the property.

¶6 Mooradian filed suit, seeking a declaratory judgment. The trial court concluded, in part, that the addendum was a right of first refusal. Mooradian appealed and we reversed, holding the addendum was to be construed as an option to purchase the property upon the death of the principal shareholder. We

remanded with directions to consider other issues that had been raised.[2] *See* ***L.P. Mooradian Co. v. Mednikow Props., Inc.***, No. 2004AP1217, unpublished slip op. (WI App May 17, 2005).

¶7 The court issued a partial summary judgment on August 25, 2006, dismissing several of Mednikow's affirmative defenses. The court also held that because it was "undisputed that Isadore was the principal shareholder of Mednikow Properties at the time the contract was entered into, the option to purchase was triggered upon his death."

¶8 The case proceeded to trial on the issue of undue influence.[3] Mednikow's theory was that Bruley unduly pressured Mednikow into signing the 1999 lease and addendum. This influence was evidenced, Mednikow claimed, by extremely favorable lease and purchase terms, as well as by testimony about Isadore's declining health in the years preceding his death.

¶9 The court ultimately concluded that Isadore had not been unduly influenced to sign the addendum and lease memorandum. Although not raised by the parties, the court further concluded Mednikow had breached the addendum by failing to timely sell, causing Mooradian damages for rent paid in the interim.

¶10 Mednikow filed a motion for reconsideration. The court denied Mednikow's motion but orally granted Mooradian's request to retroactively

[2] Only two of these issues, the identity of the principal shareholder and the question of undue influence, are raised on appeal. There were five other issues, none of which are before us now.

[3] There was also a question whether Isadore had the capacity to make the transactions he did. However, that is not before us on appeal.

amend the complaint to conform to the evidence on contract damages. The court then entered judgment against Mednikow, stating Mooradian was entitled to purchase the property in question for its assessed value minus an offset for rental damages and granting in writing Mooradian's motion to retroactively amend the complaint. Mednikow appeals, raising three issues: first, whether Isadore was its primary shareholder; second, whether Isadore was unduly influenced to sign the 1999 addendum; and third, whether the court appropriately permitted amendment of the pleadings and appropriately awarded damages.

## Discussion

### I. Whether Isadore was Mednikow's Primary Shareholder

¶11 Mednikow contends the trial court erred as a matter of law when it concluded Isadore was the company's principal shareholder at the time of his death. It asserts the "ruling was incorrect when made, and the premise on which it was based was fully disproved at trial."

¶12 However, the primary shareholder question was decided on a motion for summary judgment: the only issues at trial were undue influence and capacity. Mednikow has not shown why we should, or how we can, consider subsequent trial testimony about the primary shareholder. If we were to consider evidence submitted at trial and make a factual determination based upon it, we would exceed our judicial role and turn this court into the trier of fact. Instead, we are confined to the summary judgment record, and we review summary judgments de novo, using the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). We review the summary judgment materials in the light most favorable to the non-moving party. ***Avery v. Diedrich***, 2007 WI 80, ¶18, 301 Wis. 2d 693, 734 N.W.2d 159.

Here, Mednikow sought summary judgment based on its contention that Isadore's death did not trigger the addendum's purchase option.

¶13 At the time of summary judgment, the court had before it Mednikow's tax returns. These returns indicated Isadore owned 78.16% of Mednikow at the end of 1999 and 2000. Although a 2001 return, prepared in November 2001, indicated Mednikow's, Inc.—a different company from appellant Mednikow—owned 100% of Mednikow, the court noted this only indicated the transfer of ownership was completed by November 2001, four months after Isadore's death. The 2001 return does not demonstrate Isadore was no longer the primary shareholder upon his death.

¶14 Mednikow also complains the court ignored its submissions from Leland Rogers, Isadore's nephew and the estate's personal representative. But Rogers merely averred he learned that "Mednikow Properties Inc. is wholly owned by Mednikow's Inc." The only date in his affidavit is the date he signed it. Rogers makes no reference to when Mednikow's, Inc., acquired ownership of Mednikow. The affidavit is therefore not illuminating on the shareholder question.

¶15 Accordingly, there was no genuine issue of material fact at the time the court rendered its decision. The summary judgment submissions included two sets of tax returns indicating Isadore owned more than three-quarters of Mednikow, and Mednikow offered no countervailing evidence on that point

during summary judgment proceedings. Thus, the court properly determined Isadore was the primary shareholder referred to in the addendum.[4]

## II. Undue Influence

¶16 The terms of the 1999 lease allowed Mooradian to lease its buildings for $1.52 per square foot, compared to an average market rate of $4 to $20 per square foot depending on building type. Further, the agreement provided Mooradian an opportunity to purchase the property for its assessed value of $268,700. Isadore, however, had previously declined a $1.5 million offer for the block,[5] considering it too low. Moreover, Isadore's long-time secretary and personal assistant, Cleo Gillis, testified that not only had Isadore complained about feeling pressured by Bruley into signing the lease, but also that the circumstances surrounding the signing differed from Isadore's usual business practices. There was also testimony regarding Isadore's declining health. Given all of this, Mednikow asserts Isadore was unduly influenced by Braun and Bruley.

¶17 In Wisconsin, undue influence in the execution of an inter vivos conveyance is proven in one of two ways. ***Onderdonk v. Keepman***, 81 Wis. 2d 687, 699, 260 N.W.2d 803 (1978). The parties agree we need only address the method requiring proof of four elements: susceptibility, opportunity to influence,

[4] Although we need not reach the merits, we note that only by considering Isadore the primary shareholder can we give effect to the meaning of the addendum. If Mednikow's, Inc., is the primary shareholder, then the addendum is contingent upon the death of an entity that cannot die. This would render the addendum meaningless, and we generally avoid such a contractual interpretation. *See* ***Isermann v. MBL Life Assur. Corp.***, 231 Wis. 2d 136, 153, 605 N.W.2d 210 (Ct. App. 1999).

[5] The block apparently refers to the two parcels Mooradian currently rents from Mednikow as well as a third adjacent parcel.

disposition to influence, and coveted result. ***Id.*** The objector has the burden to prove these elements by clear, satisfactory, and convincing evidence. ***Miller v. Vorel***, 105 Wis. 2d 112, 116, 312 N.W.2d 850 (Ct. App. 1981). However, only three of the elements must be so proven; if they are, "there need be only slight proof of the fourth." ***Id.***

¶18 We examine the record for evidence to support the trial court's actual findings, not findings the court could have made but did not. ***Odegard v. Birkeland***, 85 Wis. 2d 126, 134, 270 N.W.2d 386 (1978). We reverse only if the evidence in support of the contrary finding constitutes the great weight and clear preponderance of the evidence. ***Id.*** at 135. The trial court is the ultimate arbiter of witness credibility, and in the event of conflicting inferences from the testimony, we assume the court drew the inferences necessary to support its findings. ***Id.***; ***Miller***, 105 Wis. 2d at 116.

**A. Susceptibility**

¶19 The first element of undue influence is susceptibility. Factors to consider in an assessment of susceptibility include "the person's age, personality, physical and mental health and ability to handle business affairs." ***In re Dejmal***, 95 Wis. 2d 141, 156, 289 N.W.2d 813 (1980). If consideration of these factors demonstrates the grantor was "unusually receptive" to suggestions of others and consistently deferred to them on matters of utmost personal importance, the first element of undue influence is established. ***Id.*** at 156-57.

¶20 Isadore was eighty-eight years old when he signed the addendum. Mednikow claims his physical health was in decline. Isadore evidently had poor vision, requiring him to use a magnifying glass to read documents; vascular disease; and cancer. Mednikow also asserts he had a short attention span and

frequently fell asleep midsentence. Mednikow argues Isadore's mental health and, accordingly, his ability to handle business affairs, was also deteriorating. It points to testimony from one of Isadore's attorneys and from Gillis, both of whom testified Isadore did not seem to trust himself. The court rejected this argument, noting that Isadore's deterioration as presented by Mednikow occurred after he executed the 1999 lease. Specifically, most of the deterioration appears to have come in the months preceding Isadore's 2001 death.

¶21 Beyond what the court specifically noted, there is sufficient additional evidence in the record supporting a finding that Isadore was not susceptible to influence. Rogers, who also held Isadore's health care power of attorney, testified Isadore never suffered a mental decline necessitating Rogers' takeover of his affairs. Todd DeVillers, a commercial real estate broker, testified that Isadore appeared competent in the spring of 2000, when Isadore handled a sale of a property to the Lac du Flambeau tribe. Harry Merriman, Isadore's longtime accountant, testified that in 1999, Isadore was still handling his own business affairs. Thomas Olejniczak, a long time acquaintance of Isadore, testified that Isadore always seemed "pretty sharp." And even Gillis testified that he did not seem to "slow up" until 2000 or 2001. The finding that Isadore was not susceptible to influence is therefore not clearly erroneous.

### B. Opportunity to Influence

¶22 The second element of undue influence is the self-explanatory opportunity to influence. Mednikow takes issue with the "secrecy and cloistering" of Isadore by Braun and Bruley. It contends opportunity is obvious because the addendum and lease were signed at Mooradian's store, rather than Isadore's usual place of business. Further, Gillis's affidavit indicated Isadore told her that he felt

Mooradian was "pushing" him into signing the addendum. And Mednikow contends it was Isadore's business practice to always have Gillis or attorney Cecile Faller present when he signed a business document.

¶23 The court rejected Mednikow's inference of opportunity. It found that it was not always true that Gillis or Faller had to be present. Specifically, it noted that Gillis had no specific recollection of being at any document signing, and she had noted that she would only have been at a signing if her name were on a document as a witness. The court decided there was no evidence that Faller was ever present at a signing. Further, Isadore had been given a copy of the addendum on April 23, but did not sign it until June 15, and did not sign the "memorandum" that was filed with the county until July 30. The court noted there was no evidence that Bruley and Braun told Isadore not to discuss the addendum with others, or forced him to otherwise keep it secret. Thus, the court could properly conclude there was no evidence of opportunity to influence.[6]

### C. Disposition to Influence

¶24 The third element is disposition to influence. Disposition to influence "involves more than just a desire to obtain a share of the grantor's [property]. It implies a willingness to do something wrong or unfair." ***Onderdonk***, 81 Wis. 2d at 700. Mednikow contends disposition is a "desire to obtain a benefit that would not naturally flow to the influencer." This assertion is made without citation to authority and, indeed, appears to directly contradict

[6] We could end our discussion here, as Mednikow has to prove at least three of the four elements of undue influence by clear and convincing evidence and it has already failed on two elements. We discuss all four elements for the sake of completeness.

***Onderdonk***. Nevertheless, Mednikow suggests Bruley purposely drafted the document to be misleading and confusing. It bases this assertion on Bruley's admission that she had slightly reworded the right of first refusal included in the pre-1999 leases. Mednikow asserts that there is no evidence Isadore knew the 1999 addendum contained anything other than his standard form language.[7]

¶25 The court concluded there was no evidence that Mooradian had disposition to influence Isadore. It noted Isadore's long-standing friendship with Ken Braun, concluding Isadore would not have tolerated deception from Ken or anyone else associated with Mooradian. Mednikow has not shown that this finding is clearly erroneous.

### D. Coveted Result

¶26 The final element of undue influence is coveted result. Coveted result "has been said to signify more than simply a result favorable to the person who is alleged to have exerted undue influence." ***Estate of Dejmal***, 95 Wis. 2d at 159. "This element goes to the naturalness or expectedness of the conveyance." ***Onderdonk***, 81 Wis. 2d at 700. "Even a conveyance which evidences a drastic change in attitude can be sustained if logical reasons are shown for that change." ***Odegard***, 85 Wis. 2d at 138.

¶27 Mednikow relies heavily on Isadore's rejection of a $1.5 million purchase offer made around the time of the 1999 lease. But the trial court found that Isadore and Ken Braun had intended for years for Mooradian to eventually

[7] This latter assertion ignores the burden of proof. Mooradian does not have to prove Isadore was in control of his faculties; Mednikow has to prove Isadore was unduly influenced.

own the property, with Isadore telling Ken that Isadore would make sure Braun and Bruley would get the property after he died so they would not have to move the business.[8] This is consistent with Gillis's testimony that it was not unusual for Isadore to want to protect long-term tenants like Mooradian. In addition, there was evidence that, in 1999, the prospect for the property's development was much different, much lower, than at the time of trial. With this evidence, it does not seem inherently incredible to agree to sell property for its assessed, rather than market, value.

## III. Amendment of the Complaint/Damages Award

¶28 Mednikow contends it was error for the trial court to award Mooradian damages for breach of contract. We agree.

¶29 In its complaint, Mooradian had sought only a declaratory judgment that the 1999 addendum created a purchase option. But in its decision whether Isadore had been unduly influenced, the court raised and decided, on its own motion, the question of whether Mednikow breached the addendum by failing to timely sell the property, causing Mooradian $86,887 in damages for rent paid in the interim. When Mednikow filed its motion for reconsideration, Mooradian orally asked the court to grant leave to amend the pleadings to conform to the evidence. The court granted Mooradian's oral request and denied Mednikow's motion for reconsideration.

[8] Mednikow argues there was a violation of the Dead Man's Statute, WIS. STAT. § 855.15, when the court permitted Ken to testify about conversations with Isadore. This argument is raised for the first time on appeal and is therefore waived. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

¶30 WISCONSIN STAT. § 802.09(1) permits an amendment to pleadings once "as a matter of course" within the first six months after a summons and complaint are filed. "Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party…." ***Id.*** "If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." WIS. STAT. § 802.09(2). "[A]mendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment[.]" ***Id.*** Mednikow urges us to apply § 802.09(1); Mooradian argues § 802.09(2) is more appropriate.

¶31 The decision to grant leave to amend a complaint is committed to the trial court's discretion. ***Read v. Read***, 205 Wis. 2d 558, 573, 556 N.W.2d 768 (Ct. App. 1996). Application of an erroneous legal standard is an erroneous exercise of discretion. ***Hess v. Fernandez***, 2005 WI 19, ¶12, 278 Wis. 2d 283, 692 N.W.2d 655.

¶32 When WIS. STAT. § 802.09(2) is invoked, the court must determine whether the issues have been tried by express or implied consent of the parties. ***Hess***, 278 Wis. 2d 283, ¶14. If the court determines there was consent, it must amend the pleadings. ***Id.*** If there is no consent, the court must apply a balancing test and make an interests of justice determination. ***Id.***

¶33 Here, it is evident the court made neither consideration. In granting the motion to amend the pleadings, the court stated:

> Honestly and intentionally I addressed that latter issue and addressed it from my own perspective. Certainly it was not the perspective that either party had presented it. I was merely attempting to in the interest of judicial economy and the potential for expense in litigating things that I think

> didn't have to be litigated any further put a bottom line on the case.

Failure to apply the correct standard was an erroneous exercise of discretion. However, we decline to remand for the court's reconsideration, because we hold there was no consent as a matter of law. *See* ***id.***, ¶21.

¶34 To find implied consent, the court must use the test of actual notice. ***Id.***, ¶14. That is, implied consent exists "where there is no objection to the introduction of evidence on the [unpled] issue and where the party not objecting is aware that the evidence goes to the [unpled] issue." ***Id.***, ¶21.

¶35 Mooradian argues Mednikow had notice because it did object to certain evidence regarding breach.[9] However, the evidence Mooradian cites is more appropriately characterized as evidence regarding Mooradian's attempt to exercise its contested purchase rights. The mere fact that the evidence shares elements with a breach of contract claim does not automatically put Mednikow on actual notice that an implied, unpled claim is being litigated. *See* ***id.***, ¶22.

¶36 Without actual notice, there is no implied consent. Without consent to try the issue, it is improper to amend the pleadings without conducting an interests of justice analysis. WIS. STAT. § 802.09(2); ***Hess***, 278 Wis. 2d 283, ¶14. We need not remand for this determination either, as the interests of justice question presents a question of law. ***Hess***, 278 Wis. 2d 283, ¶24.

[9] This argument is about implied consent only. Mooradian does not argue, nor do we think it could show, that Mednikow expressly consented to trying the breach issue.

¶37 There are a variety of factors to consider in determining the interests of justice in a motion to amend pleadings. These include prejudice, undue delay, and motive of the moving party. ***Id.***, ¶23.

¶38 We have no difficulty concluding the interests of justice weigh against amendment here. There was no notice the contract claim was being tried; it certainly was not pled. The court raised the issue on its own, *see* ***id.***, ¶28, then granted the motion not only well after trial but essentially as an afterthought at the end of the reconsideration hearing. As a result, Mednikow had virtually no opportunity to respond to the breach allegation and had no chance to mount a defense. This is prejudicial. Moreover, but for the court's initiative, it does not appear that Mooradian had thought to seek breach of contract damages. Indeed, the motion to amend the pleadings to add the breach of contract claim came approximately four years after the initial summons and complaint were filed. We cannot consider this a reasonable delay in seeking amendment.

¶39 The portions of the February 5, 2007 judgment and October 23, 2006 order that award Mooradian damages for breach of contract and grant its motion to retroactively amend the pleadings are reversed. The remainder of that judgment and order, as well as the partial summary judgment concluding Isadore was Mednikow's primary shareholder and the January 19, 2007 order denying the motion for reconsideration, are affirmed.

*By the Court.*—Judgment and order affirmed in part; reversed in part; order affirmed.

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