COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1361 **Cir. Ct. No. 2007CV1073**

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

KENNETH L. MCCOY,

PLAINTIFF-APPELLANT,

V.

MAUREEN C. OCCHINO,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kenneth McCoy appeals a judgment dismissing his claims for breach of contract, promissory estoppel, and unjust enrichment against Maureen Occhino. McCoy argues the circuit court erred by concluding there was insufficient evidence to support his claims. We disagree and affirm.

BACKGROUND

¶2 McCoy and Occhino began a romantic relationship in the early 1990s and had three children together. In 1993, Occhino moved into McCoy's residence; however, she maintained ownership of her own house until 1995. After Occhino sold her residence, McCoy advised her she could defer capital gains taxes on the sale if she purchased another house. She agreed to purchase a cottage from McCoy for $150,000 in 1997, which she financed with a mortgage for the full purchase price. Occhino gave McCoy the $150,000 and he deeded the cottage to her.

¶3 In 2002, Occhino informed McCoy that she was moving out and taking their children with her. She located a house, but was unable to obtain financing because she still owed $144,425 on the cottage. She explained her predicament to McCoy and he paid off the mortgage. Occhino did not deed the cottage back to McCoy.

¶4 After Occhino moved out, the parties intermittently maintained an intimate relationship. Occhino continued to pay the real estate taxes on the cottage and use the property with the children. McCoy occasionally mowed the lawn and plowed snow at the cottage, but did not use it or expend any money to maintain it.

¶5 In May 2007, McCoy sued, claiming he paid off the mortgage because the parties had agreed Occhino would deed the cottage back to him. Occhino responded that there had never been such a deal, and that McCoy voluntarily paid off the mortgage to keep the children happy and enable her and the children to have a place to live.

¶6 Following a bench trial, the circuit court concluded Occhino's testimony was more credible than McCoy's. It found the parties did not have a contract to sell McCoy the cottage, and rejected McCoy's promissory estoppel and unjust enrichment claims.

DISCUSSION

¶7 McCoy's contract and promissory estoppel arguments challenge the sufficiency of the evidence to support the circuit court's conclusions. Whether a contract existed between McCoy and Occhino depends on the court's factual findings. *See* ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 837-39, 520 N.W.2d 93 (Ct. App. 1994). Likewise, the court's finding that there was insufficient evidence that Occhino promised to deed the cottage to McCoy is a finding of fact. *See* ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965). We will not set aside the court's findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2).[1]

Breach of Contract

¶8 The circuit court first explained that its reluctance to find a contract between the parties to convey the property was highly influenced by the parties' failure to conform to the requirements of WIS. STAT. § 706.02—the statute of frauds. This statute requires transactions for the conveyance of real property to be in a document signed by the parties, and identify the land, the interest conveyed, and any material terms and conditions. The court observed that the purpose of the

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

statute is to "avoid what we have been doing here all day today, which is six years post trying to figure out what somebody's intent was."

¶9 The court also rejected McCoy's argument that the statute of frauds is not a bar to the enforcement of an oral agreement when one party has benefited from the other party's part performance of a contract. McCoy contended his payment of the mortgage constituted part performance, and that the court should therefore find and enforce an oral agreement. The court correctly pointed out that in the case McCoy relied on at trial for this proposition, ***Bunbury v. Krauss***, 41 Wis. 2d 522, 164 N.W.2d 473 (1969), the question was the oral modification, not the existence, of a contract. Further, the ***Bunbury*** holding was based in part on WIS. STAT. § 240.09 (1969),[2] which has since been repealed. On appeal, McCoy turns to ***Pick Foundry, Inc. v. General Door Manufacturing Company***, 262 Wis. 311, 55 N.W.2d 407 (1952). This case is off point as well, because it dealt with modifications to a written, signed contract. Here, there was never any document in writing. McCoy cites no authority to support his argument that a court should find a contract simply on the basis of one party's unilateral actions.

¶10 The trial court correctly emphasized that a contract must contain the essential terms of an agreement. The court placed particular emphasis on McCoy's testimony that he "perceived … [and] assumed [Occhino would deed the cottage back to him]." As the court observed:

> That doesn't get you to a contract. … A contract requires a meeting of the minds. And on all the essential terms. I can't think of anything more essential to this agreement as

[2] WISCONSIN STAT. § 240.09 (1969) provided: "Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance of such agreements."

> to whether she had to pay the money back or whether he could at some point say give me the property back.

The undisputed evidence shows the parties did not execute a conveyance as required by WIS. STAT. § 706.02, or discuss any material terms of an agreement. This supports the court's conclusion that there was no enforceable contract to transfer the property back to McCoy.

Promissory Estoppel

¶11 We also conclude the court's rejection of McCoy's promissory estoppel claim is supported by sufficient evidence. A successful promissory estoppel claim must establish three elements: (1) there was a promise, "which the promisor should reasonably expect [would] induce action or forbearance of a definite and substantial character on the part of the promisee"; (2) the promise induced such action or forbearance; and (3) injustice can only be avoided by enforcement of the promise. ***Hoffman***, 26 Wis. 2d at 698.

¶12 Although the circuit court did not explicitly refer to the promissory estoppel claim in its ruling, it did find McCoy failed to establish any promise. The court pointed to McCoy's failure to finalize any agreement and his lack of use of the property as indications he had not received a promise Occhino would deed the property back to him. It likewise noted Occhino's payment of the real estate taxes and her continued use of the cottage indicated she had made no such promises. Finally, it found it highly unlikely Occhino would have agreed to sell a property for approximately $5,500 less than she paid for it, particularly because it is likely the property would have appreciated in value from 1997 to 2002. These findings amply support the court's conclusion that Occhino did not promise McCoy she would deed the cottage to him.

Unjust Enrichment

¶13 Whether to grant judgment for unjust enrichment is within the circuit court's discretion. ***Ulrich v. Zemke***, 2002 WI App 246, ¶8, 258 Wis. 2d 180, 654 N.W.2d 458. We sustain discretionary decisions "if the circuit court examined the relevant facts, applied a proper standard of law, and using a rational process, reached a conclusion that a reasonable judge could reach." ***Id.***

¶14 A court may grant judgment for unjust enrichment when three elements are present:

> (1) [A] benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

S & M Rotogravure Serv., Inc. v. Baer, 77 Wis. 2d 454, 460, 252 N.W.2d 913 (1977) (citation omitted). Here, the court found Occhino had a benefit conferred upon her and knew of the benefit. However, it declined to conclude it would be inequitable for Occhino to retain that benefit without payment of its value.

¶15 The court noted that because Occhino was the primary caretaker and McCoy wanted to maintain contact with his children, there was evidence McCoy's actions benefited both parties. Further, the court concluded McCoy did not present enough information for the court to find the benefit Occhino received from the arrangement was inequitable. The court stated:

> It has to be unjust and unconscionable for her to retain it without paying the reasonable value thereof. I … can't reach that conclusion. I don't have enough facts … to reach that conclusion. The ones that I have tell me it might or it might not be. … That money may exceed the value of having the kids able to use [the cottage], in maintaining a

> sort of relationship, and it may not. And if I have to guess, then somebody hasn't met their burden of proof.

¶16 The circuit court opined that Occhino did not need to prove the payoff was a gift to defeat McCoy's unjust enrichment claim. It nonetheless determined that "there is much more evidence that it was a gift." On appeal, McCoy contests this finding. Although it is not inequitable for a defendant to retain a benefit if the benefit was a gift, *see* ***Lawlis v. Thompson***, 137 Wis. 2d 490, 496, 405 N.W.2d 317 (1987), it does not follow that all unjust enrichment claims require the court to determine whether there was a gift. All the doctrine requires is that the court decide whether it would be inequitable for the defendant to retain the benefit without paying for it. Therefore, we need not further address this argument.

¶17 Nevertheless, the only issue regarding a gift would be whether McCoy intended to make a gift, which is a question of fact. *See* ***Derr v. Derr***, 2005 WI App 63, ¶27, 280 Wis. 2d 681, 696 N.W.2d 170. The court noted that although initially it appeared McCoy was going to draw up documents to transfer the property, he ultimately paid off the property without the documents and told his lawyer to put it on hold, which he continued to do year after year. It further observed McCoy did not demand his money back even though Occhino continued to pay the property taxes and do the maintenance. Thus, the court's determination that the loan payoff was a gift was not clearly erroneous.

¶18 We conclude the circuit court "examined the relevant facts, applied a proper standard of law, and using a rational process, reached a conclusion that a reasonable judge could reach." ***Ulrich***, 258 Wis. 2d 180, ¶8. Therefore, we will not disturb its determination that it was not inequitable for Occhino to retain the benefit of the loan payoff.

By the Court.—Judgment affirmed.

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