COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1129-FT **Cir. Ct. No. 2007CV164**

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

ROY A. ATKINS,

PLAINTIFF-APPELLANT,

V.

MICHAEL P. HAGEN D/B/A PRIDE OF AMERICA CAMPING RESORT AND PRIDE OF AMERICA, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Columbia County: DANIEL GEORGE, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Roy A. Atkins appeals from the order granting summary judgment to Michael P. Hagen d/b/a Pride of America Camping Resort and Pride of America, Inc. (hereafter "Hagen"). Pursuant to this court's order of

May 29, 2009, the case was placed on the expedited appeals calendar and the parties have submitted memo briefs. *See* WIS. STAT. RULE 809.17 (2007-08).[1] We reverse the judgment of the circuit court and remand the matter to that court for proceedings consistent with this decision.

¶2 This is a dispute between a renter of a campsite and the campsite owner about whether the owner made an enforceable promise to the renter that he could sell the structure on the campsite he rented and the purchaser would then be allowed to continue to rent the campsite.

¶3 Hagen manages and owns the Pride of America Camping Resort, and in 2001, he sold a structure owned by the resort to Atkins and his former wife. The structure, which consisted of a trailer and a permanent add-a-room, was located on campsite 45, which Atkins rented. Atkins alleges that at the time he agreed to purchase the trailer and structure from Hagen, Hagen intentionally misrepresented to Atkins that Atkins could later sell the structure on the campsite Atkins leased, and that the purchaser would be able to continue to lease the campsite on a year-to-year basis as he had. Hagen disputes this. Hagen denies that any such representation was made to Atkins. According to Atkins, Hagen wants to convert campsite 45 to an overnight site and that is why he is denying the promises were made.

¶4 Hagen eventually brought an eviction action against Atkins, and Atkins brought a separate action alleging intentional misrepresentation. Hagen moved for summary judgment on the intentional misrepresentation claim. The

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

circuit court determined that the affidavit Atkins submitted in opposition to the motion was inconsistent with his deposition testimony. The court refused to accept Atkins' affidavit on the basis of the sham affidavit rule and granted the motion.

¶5 Our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995).

> We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins an issue of material fact or law. If we determine that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. If the movant has carried his [or her] initial burden, we then look to the opposing party's affidavits to determine whether any material facts are in dispute that entitle the opposing party to a trial.

Schurmann v. Neau, 2001 WI App 4, ¶6, 240 Wis. 2d 719, 624 N.W.2d 157 (citations omitted).

¶6 We conclude first that the circuit court erred when it refused to accept Atkins' affidavit under the sham affidavit rule. Under this rule, "an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained." ***Yahnke v. Carson***, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102.

¶7 During his deposition, Atkins was asked: "what was your understanding as to the terms of your purchase of the add-a-room and the Hornet trailer?" Atkins responded:

> That would be like backing up saying that I was going to purchase the improvements with the Hornet because Mike Hagen said they purchased the Hornet to go underneath there and they had no use for it if it didn't go underneath there. So I had to take it as a package, I said fine. The terms were mentioned on the price, how my wage or hourly wage was going to go toward the purchase price of that and where the lot lines were going to be and that it could be resold to another customer any time with no restrictions just like it has been going on for 30 years I was told.

And:

> A. [Paul Hagen] gave me his word when I bought [the structure that] it could be sold at any time under the same circumstances that I rented the site. That had been going on for 30 some years they said.
>
> Q. So one of the Hagens used the exact words under the same circumstances?
>
> A. Yes, Mr. Paul Hagen did. My neighbor at the time was there already for 30 years, you know, and that was the example. Why would you have to worry; look at Dory Gallagher, she's been here 30 years and, you know, nothing's changed with her rules or contract.

¶8 In his affidavit in opposition to summary judgment, Atkins stated:

> Defendant Michael P. Hagen and his father Paul Hagen … told Roy Atkins that he could sell the cabin structure on site No. 45 to anybody and that Michael P. Hagen d/b/a Pride of America Camping Resort would honor the right of the purchaser of the cabin structure on site No. 45 to continue to rent site No. 45 with the cabin structure on [it].

¶9 The circuit court stated that Atkins had many opportunities during his deposition to explain the terms of the agreement he believed he had reached with Hagen. The court further stated that Atkins made vague statements during the deposition, but that "never does the plaintiff represent that there were statements made by the defendants that he would forever be able to ensure a subsequent buyer would have the right to remain on Lot Number 45." Rather, the

court stated, Atkins waited to submit an affidavit in response to the summary judgment motion that contained the specifics of his claim.

¶10 We do not agree there is a conflict between the deposition testimony and the affidavit. Atkins' position is not that he was told that he would be forever able to ensure that a subsequent buyer would have the right to remain on Lot 45. Nor is he arguing, as Hagen asserts, that he had been told he could sell the structure to anyone without Hagen's approval, in violation of the terms of the lease agreement. Rather, Atkins' position is that he was told that if he found a buyer for his structure and Hagen approved the buyer, then that buyer would be able to continue to rent, as Atkins was doing, on a year-to-year basis.

¶11 Hagen argues that summary judgment was appropriate because Atkins cannot establish the elements of a claim for intentional misrepresentation. The elements of such a claim are: "a statement of fact that is untrue, made with the intent to defraud, and for the purpose of inducing the other party to act on it, which the other party relies on to his or her detriment, where the reliance is reasonable." ***Kailin v. Armstrong***, 2002 WI App 70, ¶31, 252 Wis. 2d 676, 643 N.W.2d 132 (citation omitted). Hagen argues that Atkins cannot establish that there was a present intent to deceive. We conclude, however, that both parties have provided factual submissions to support their positions. Because there is a disputed issue of fact, Atkins is entitled to a trial.

¶12 Hagen further argues that Atkins cannot establish that he reasonably relied on the statements he alleges the Hagens made because there is a provision in the Seasonal Campsite Agreement, which Atkins signed each year, that provides: "Resort has made no representations or warranties, written or oral, express or implied, concerning said campsite." We do not agree that this language plainly

prevents consideration of the statements Atkins attributes to the Hagens. This language is contained in a paragraph that concerns the condition of the campsite. The paragraph in its entirety reads:

> Camper has had an opportunity to inspect said campsite. Camper has determined that said site is suitable for Camper's unit and accepts the same. Resort has made no representations or warranties, written or oral, express or implied, concerning said campsite.

¶13 We conclude that it is, at the least, ambiguous whether the "no representations" language applies only to the condition of the campsite or applies to any representation related to the agreement. Atkins has averred that representations were made and that he relied on them. Based on these submissions, a reasonable jury could conclude that this language applied only to the condition of the campsite and that Atkins reasonably relied on the statements made by the Hagens that, if he sold the structure, the purchaser would be able to stay on the campsite. The issue, therefore, was not appropriate for summary judgment.

¶14 Hagen also argues that by signing the lease agreement, Atkins waived his right to rely on the oral representations that were contrary to the terms of the agreement. However, as we concluded above, the language that Hagen points to in support of this argument can, at the least, reasonably be read to refer only to the condition of the campsite and not to oral representations generally. Hagen does not identify anything else that supports his argument that the oral representations Atkins asserts Hagen made are not enforceable.

¶15 We conclude that, because there are genuine issues of material fact in dispute, summary judgment was not appropriate. We therefore remand the matter to the circuit court for a trial on the intentional misrepresentation claim.

By the Court.—Judgment reversed and cause remanded with directions.

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