

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2008AP2481

Cir. Ct. No. 2006CV4313

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KURT S. KUEHN,

PLAINTIFF-APPELLANT,

V.

APEX PROPERTY MANAGEMENT, INC.,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,**

V.

123 EAST JOHNSON STREET, LLC AND WISCONN INVESTMENTS, LLC,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
MARYANN SUMI, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Kurt Kuehn appeals an order dismissing his complaint regarding a residential tenancy. We affirm.

¶2 Kuehn's complaint alleged several theories against his former residential landlords, including three forms of misrepresentation, breach of contract, breach of warranty, and violations of ordinance and administrative rule. The circuit court dismissed the complaint on summary judgment.

¶3 Kuehn first argues that the circuit court erred by dismissing his three misrepresentation claims. The court's decision was based on the economic loss doctrine. *See Below v. Norton*, 2008 WI 77, ¶4, 310 Wis. 2d 713, 751 N.W.2d 351 (economic loss doctrine bars misrepresentation claims in residential real estate transaction). Kuehn argues that the doctrine does not apply to his claims because they are based solely on tortious conduct by the defendants that occurred *after* the formation of the contract. He argues that these claims are based only on his allegation that the defendants later refused to provide him with a copy of a lease addendum that he signed, which stated that he would not have to pay rent during the period that renovations to the apartment were not yet complete.

¶4 We first note that this is a change from Kuehn's position in circuit court. There, he argued that the misrepresentation claims were based on statements made by defendants *before* the contract was formed, and were made for the purpose of inducing the contract. However, for purposes of this appeal, we will accept Kuehn's limitation of his claims to solely the alleged failure to provide a copy of the lease addendum.

¶5 If this is the basis for the claims, they have a weakness more fundamental than the economic loss doctrine. The first step in summary judgment analysis is to determine whether the complaint states a claim. *See Burbank*

Grease Servs., LLC v. Sokolowski, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781. We are unable to see how this alleged failure to provide a copy of the lease satisfies the elements of misrepresentation.

¶6 As described by Kuehn, the defendants tortiously misrepresented that the lease addendum did not exist, which he refers to as “tortious contract dodging.” His brief does not include any description of the legal theory of the tort of “contract dodging.” However, in his brief to the circuit court, he described all three misrepresentation theories as including the element that the plaintiff believed the misrepresentation and relied on it. But in the facts alleged by Kuehn, he did *not* believe the defendants’ representation of the non-existence of the lease addendum, and accordingly he did not rely on it. Furthermore, it is not clear what monetary damages Kuehn could prove for this alleged tort. Therefore, we conclude that the three misrepresentation claims, as limited by Kuehn on appeal, are properly dismissed for failure to state a claim.

¶7 Kuehn next argues that the court erroneously dismissed his claims for breach of the lease and of the warranty of fitness for use and occupation. Kuehn alleges that defendants committed these breaches by not completing certain renovations before his occupancy commenced. In its summary judgment decision, the circuit court concluded that Kuehn had not sufficiently shown damages. On appeal, Kuehn remains vague about this point. He appears to argue that he can prove his damages by showing the difference in value between the apartment as promised and the apartment he actually received and occupied. He argues that experts such as real estate agents and property managers “can accompany Mr. Kuehn’s testimony.” However, Kuehn does not cite to the presence of any such opinion evidence in the summary judgment record. It is not sufficient for him to simply speculate about what evidence he might introduce at trial, if one were held.

¶8 Kuehn also argues for a different measure of damages. He argues that if the renovations were not completed, then, under the lease addendum we described above, he was not required to have paid rent for a certain period of time. The defendants, of course, dispute the existence of such an addendum. Kuehn argues that there is a dispute of material fact on this point that requires a trial. We disagree. During oral argument in the circuit court, the court asked counsel for Kuehn whether Kuehn had any evidence that the defendants signed the alleged lease addendum. Counsel replied, in essence, that he did not know. Without evidence that the defendants signed the alleged addendum, Kuehn cannot establish that the addendum was binding.

¶9 Kuehn next argues that the court erred by dismissing his claims under certain administrative rules. One of the claims was under WIS. ADMIN. CODE § ATCP 134.09(9)(a) (February 1980) for the defendants' misrepresentations about the condition of the apartment. However, this claim also fails because of Kuehn's inadequate showing as to damages. The other rule allegedly violated was WIS. ADMIN. CODE § ATCP 134.03(1) (February 1980), which requires the landlord to give the tenant a copy of the lease. Kuehn argues that defendants violated this rule by not giving him a copy of the lease addendum. However, he does not explain what monetary damages he suffered from this alleged violation.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2007-08).

