COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0669 **Cir. Ct. No. 99-CV-153**

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

ALBERT H. BEAVER AND BARBARA J. BEAVER,

PLAINTIFFS-APPELLANTS,

V.

NORBERT MUELLER AND J.D. ASKINS,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Albert and Barbara Beaver appeal a judgment dismissing their claims against Norbert Mueller. The Beavers argue the trial court erred by: (1) concluding that the evidence did not support their claims against Mueller; (2) "not going through the required exercise of making a subjective determination in deciding [their] motion for disqualification of judge"; and

(3) sanctioning the Beavers under WIS. STAT. § 814.025 for pursuing frivolous claims against Mueller. We reject these arguments and affirm the judgment. Further, because the trial court properly determined that the Beavers' claims as alleged against Mueller were frivolous, we award costs and reasonable attorney fees for a frivolous appeal and remand to the trial court to determine the award.

BACKGROUND

¶2 The Beavers own a resort known as "Chateau Hutter" in Door County. The trial court found that on August 4, 1999, Barbara told Mueller she had just written a substantial check for a jazz festival and was concerned about paying for the expenditure. In turn, Mueller informed Barbara that co-workers in his union were looking for housing and suggested that his co-workers could do some work for the Beavers at Chateau Hutter in exchange for housing there. On August 6, Mueller mentioned the possible deal to a co-worker, J.D. Askins, and showed Askins the Beavers' property. The following day, Askins and other workers, excluding Mueller, met with Barbara and entered into an oral agreement to exchange housing for labor. Askins helped the Beavers install an electrical breaker and moved onto the property that night.

¶3 On August 9, Askins informed Mueller about the deal he made with Barbara. Mueller was upset that Askins made arrangements without informing him, as Mueller wanted to supervise his co-workers at Chateau Hutter. The Beavers subsequently agreed that Mueller should supervise his co-workers because Mueller was familiar with the property and the Beavers' equipment. Although Mueller supervised some subsequent work, he was not paid for any work or supervising he did, nor did he receive a "finder's fee" for bringing the Beavers and Askins together. Further, Mueller never stayed at Chateau Hutter,

because his own home was nearby. Askins resided on the property for forty-eight days without fulfilling his end of the bargain with the Beavers.

¶4 In September 1999, the Beavers filed suit against Mueller and Askins seeking compensatory and punitive damages for breach of contract, fraud and unjust enrichment. In November 1999, Mueller filed his answer and counter-claim alleging that the Beavers' claims against him were frivolous. The Beavers ultimately obtained a default judgment against Askins in March 2000.

¶5 After a trial to the court on their claims against Mueller, the court concluded that the evidence did not support the Beavers' claims. The court also concluded that the Beavers' claims were frivolous pursuant to WIS. STAT. § 814.025(1) and (3). Their motions for reconsideration were denied and this appeal follows.

ANALYSIS

A. Breach of Contract

¶6 The Beavers contend the trial court erred by concluding there was no consideration to support a contract between Mueller and the Beavers. It is hornbook law that "offer," "acceptance" and "consideration" are elements of an enforceable contract. *See* 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §§11, 112 (1963). Consideration may consist of a benefit to the promisor or a detriment to the promisee. ***First Wis. Nat'l Bank v. Oby***, 52 Wis. 2d 1, 188 N.W.2d 454 (1971). For mutual promises to furnish consideration for each other and thus create a binding contract, they must impose some legal liability on the persons making them. ***Id.*** at 7. There is no consideration where performance is solely at the party's option or discretion, such as when the party is free to either

perform or withdraw from the contract at will. ***Id.*** Citing ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis. 2d 683, 133 N.W.2d 267 (1965), the Beavers emphasize that the acts of reliance by a promisee to his or her detriment provide a substitute for consideration. Specifically, the Beavers contend that "it is sufficient that [they] delivered possession of their property to Askins … at the inducement of Mueller."

¶7 Whether consideration supports a contract presents a question of fact. *See* ***Gertsch v. International Equity Research***, 158 Wis. 2d 559, 576, 463 N.W.2d 853 (Ct. App. 1990). We must uphold the trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Here, the Beavers' complaint alleged that "on or about August 7, 1999, plaintiff and defendants entered into an agreement whereby defendants would provide skilled labor to make certain improvements to (the land) in exchange for the privilege of defendant J.D. Askins being allowed to occupy one of the furnished units located on the property."

¶8 The trial court noted, however: "The most that can be claimed … based on the evidence, is that after the core agreement was struck between [the] Beavers and Askins on August 7th, they secured an ancillary promise from Mueller that he would supervise Askins and company's work." Trial testimony regarding Mueller's supervisory work established that Mueller was simply "helping out," consistent with his long-term friendship with the Beavers. The trial court found that "any supervisory work that Mueller performed or offered to perform was gratuitous, done as a favor, and not relied upon by [the] Beavers in entering into their deal with Askins." The court further concluded any claim that the Beavers relied on Mueller's alleged promise in entering the agreement with Askins is defeated by the fact that they struck their deal with Askins two days before Mueller knew the deal had been consummated. We conclude that the trial court's

findings of fact are not clearly erroneous and support its conclusion that there was no consideration to support a contract between Mueller and the Beavers.[1]

B. Unjust Enrichment

¶9 The Beavers suggest the trial court erred by denying their claim for unjust enrichment. The elements of an unjust enrichment claim are: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention by the defendant of the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value. ***Puttkammer v. Minth***, 83 Wis. 2d 686, 688-89, 266 N.W.2d 361 (1978). The Beavers claim Mueller gained the benefit of camaraderie among his co-workers and the enjoyment of Chateau Hutter as a guest at parties hosted there by Askins. However, any work or supervision Mueller performed at Chateau Hutter served to benefit the Beavers. We therefore agree with the trial court's conclusion that the evidence supports neither a benefit to Mueller nor "an unjustness in the present status quo between these parties."

C. Disqualification of Judge

¶10 The Beavers claim the trial court erred by "not going through the required exercise of making a subjective determination in deciding [their] motion for disqualification of judge." WISCONSIN STAT. § 757.19(2)(g) requires a judge to disqualify himself if he determines he cannot, or it appears he cannot, act in an

[1] On appeal, the Beavers have failed to brief any issues regarding their fraud claim against Mueller. We have no duty to consider any issues other than those presented to us, ***Waushara County v. Graf***, 166 Wis. 2d 442, 480 N.W.2d 16 (1992), and issues not briefed are deemed abandoned. ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

impartial manner. Our supreme court has held that this determination is subjective. ***State v. Harrell***, 199 Wis. 2d 654, 664, 546 N.W.2d 115 (1996). Appellate review is limited to determining whether the judge made a subjective determination. ***Id.*** at 663-64.

¶11 Here, the Beavers raised an allegation of judicial bias and prejudice for the first time in their "renewed motion for reconsideration and motion for a new trial." The trial judge, noting that this allegation likely stemmed from the Beavers' dissatisfaction with the court's ruling, determined that "[n]o bias or prejudice existed or exists toward [the Beavers]." Because the trial judge made a subjective determination of his impartiality, he satisfied the requirements of WIS. STAT. § 757.19(2)(g).

D. Frivolous Claims and Appeal

¶12 The Beavers argue that the trial court erred by sanctioning them for pursuing frivolous claims under WIS. STAT. § 814.025(1) and (3), which provides:

> (1) If an action or special proceeding commenced or continued by a plaintiff … is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
>
> ...
>
> (3) In an order to find an action … frivolous under sub. (1), the court must find one or more of the following:
>
> (a) The action … was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action … was without any reasonable basis in law or equity and could not be supported by a good

> faith argument for an extension, modification or reversal of existing law.

¶13 In reviewing a circuit court's decision regarding frivolousness, our standard involves a mixed question of fact and law. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 236, 517 N.W.2d 658 (1994). "The findings by the circuit court of what was said, what was done, what was thought, and reasonable inferences drawn therefrom, are questions of fact" that will not be overturned unless clearly erroneous. ***Id.*** The ultimate conclusion whether the facts cited fulfill the legal standard of frivolousness is a question of law we review independently. ***Id.***

¶14 Here, the court emphasized that Albert Beaver is an attorney and noted that the November 1999 filing of Mueller's counterclaim put the Beavers on notice that their claims would be scrutinized under WIS. STAT. § 814.025(1) and (3). The court, noting that the Beavers undertook no discovery during the fifteen months between the filing of their complaint and the trial, concluded that because the Beavers did not call any witnesses other than themselves, they knew what their testimony would be. The trial court thus concluded that the July 12, 2000, depositions of the Beavers should have served to focus the Beavers' attention on the elements they would be required to prove in order to sustain their claims.[2]

[2] The Beavers challenge the trial court's reference to their July 2000 depositions, arguing that transcripts of the depositions were never offered into evidence. The trial court, however, did not address what was said in the depositions but, rather, acknowledged the existence of the depositions as instruments to focus the Beavers on the elements necessary to prove their claims against Mueller. Regardless of the depositions' contents, the court focused on the fact that once discovery ended, the Beavers knew or should have known that their action was "without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." WIS. STAT. § 814.025(3)(b).

¶15 The court noted that with respect to their fraud claim, the Beavers' "own testimony defeated any support of the claim." The court concluded that the evidence failed to establish any existing contract between Mueller and the Beavers. Likewise with respect to the unjust enrichment claim, the court determined that the Beavers failed to establish "any benefit conferred upon Mueller that would be unjust for him to retain." Because there was no factual or legal basis for the Beavers' claims against Mueller, we conclude that the trial court properly awarded attorney fees and costs pursuant to WIS. STAT. § 814.025.

¶16 Mueller also requests fees and costs for a frivolous appeal. Our conclusion that the trial court correctly adjudged the matter frivolous renders the appeal frivolous per se. ***Belich v. Szymaszek***, 224 Wis. 2d 419, 435, 592 N.W.2d 254 (Ct. App. 1999). Consequently, Mueller is also entitled to a further award on appeal without a finding that the appeal itself is frivolous under WIS. STAT. RULE 809.25(3). We therefore grant the motion for costs and reasonable attorney fees and remand to the trial court to determine the proper amount. *See* ***Lessor v. Wangelin***, 221 Wis. 2d 659, 669, 586 N.W.2d 1 (Ct. App. 1998).

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

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