COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1359 **Cir. Ct. No. 2008CV301**

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

CHAD GEBHARDT,

PLAINTIFF-APPELLANT,

V.

BRUCE R. BOSBEN, BRIAN W. BAUMAN, AND MAIN FIRE PROTECTION, LLC,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 VERGERONT, J. This appeal arises out of the sale of a fire protection business by Chad Gebhardt to Bruce Bosben's company, now known as Main Fire Protection, LLC (Main). After Main sold the business to its current

owner, Dave Jones Fire Protection, LLC (Jones), Gebhardt filed this action against Bosben, Main, and Bosben's attorney, Brian Bauman. Bosben and Main filed counterclaims against Gebhardt. The circuit court granted summary judgment in favor of the defendants on all of Gebhardt's claims except on his claim of breach of the employment contract, which is to be tried. The circuit court did not address the counterclaims of Bosben and Main.

¶2 Gebhardt appeals. We conclude the circuit court properly granted summary judgment in favor of the defendants on Gebhardt's claims of fraud, promissory estoppel, breach of the duty of good faith and fair dealing, default on the promissory note, and liability under Bosben's personal guarantee. We also affirm the court's denial of summary judgment on Gebhardt's breach of the employment agreement. Finally, we conclude Gebhardt is not entitled to summary judgment on Bosben's and Main's counterclaims. Accordingly, we affirm.

BACKGROUND

¶3 In 2006 Gebhardt entered into a contract to sell his fire protection business to Bosben's company, Main. The asset purchase agreement required Main to pay Gebhardt the purchase price of $887,660 in quarterly installments, to be based upon a percentage of Main's gross sales, and provided that if the quarterly payments did not result in full payment of the purchase price by June 2008, then Main would issue a promissory note to pay Gebhardt the balance. The note similarly provided that the balance would be paid to Gebhardt in quarterly installments based on a percentage of gross sales, and it applied an interest rate of seven and one-half percent that would increase to nine percent after July 31, 2009. Finally, the note required that full payment of all amounts due under the 2006 asset purchase agreement, including interest, be made to Gebhardt no later than

July 31, 2010. Both the purchase agreement and the note were secured by the personal guarantee of Bosben.

¶4 As a condition for entering into the asset purchase agreement, Main required that Gebhardt be employed by Main. The employment agreement between Main and Gebhardt provided that Gebhardt was to serve as Main's president and general manager, for which he was paid a salary, to continue for up to three years or for as long as it took Main to pay him the full purchase price.

¶5 Gebhardt received his quarterly payments under the asset purchase agreement until mid-2007, when disputes arose over compensation for the extra hours he asserted he was working and the proper calculation of the monthly payments under the asset purchase agreement. By late 2007, Main began negotiations to sell the entire business to Jones, with Gebhardt assisting in those negotiations. The negotiations contemplated that Gebhardt would terminate his employment contract with Main and go to work for Jones.

¶6 The evening before the Jones closing, which was to take place on January 11, 2008, Gebhardt signed two documents: the draft of an agreement to terminate his employment with Main and pay him specified amounts under the Main employment agreement, and the draft of a payoff letter providing for payment of $446,038 to Gebhardt's company in full satisfaction of Main's payment obligation under the asset purchase agreement. Gebhardt expected that Bosben would execute those documents and return them to him that evening, but that did not occur. According to Bosben, he did not sign them because Gebhardt had made unilateral changes to each document that had the effect of making each null and void if payment to Gebhardt did not occur by a specified time the next day, and because he had learned that Jones had not reached an employment

agreement with Gebhardt but was planning to close the next day anyway. According to Gebhardt, the revisions simply reflected what had already been agreed to.

¶7 As it turned out, Gebhardt signed an employment contract with Jones the next morning and the closing took place that afternoon. Main did not pay Gebhardt after the closing. According to Bosben, this was because he learned just before and during the closing of significant potential open-ended liability for Main to Jones because of Gebhardt's actions. According to Gebhardt, the reason is that Bosben simply did not intend to pay him as he represented he would. When Gebhardt realized that Bosben was not going to sign the Main termination agreement, Gebhardt terminated his employment agreement with Jones.

¶8 Gebhardt filed suit against Bosben, Main, and Bauman, alleging nine claims related to the failure to pay him on the day of the closing of the sale to Jones or immediately thereafter. Bosben and Main responded with six counterclaims. (We will hereafter refer to "Bosben/Main" when we mean both of these defendants and there is no need to distinguish them.) Gebhardt moved for partial summary judgment on six of his claims and on all of Bosben/Main's counterclaims. Bosben/Main and Bauman moved for summary judgment on all of Gebhardt's claims.

¶9 The circuit court granted summary judgment in favor of the three defendants on all claims against them except the claim for breach of the employment contract against Bosben/Main. As to this claim, the court concluded that both parties' arguments were too undeveloped to warrant summary judgment. The court postponed decision on the counterclaims because, the court stated, they were not properly before the court on summary judgment.

DISCUSSION

¶10 On appeal, Gebhardt contends the circuit court erred in granting summary judgment in favor of Bauman and Bosben on his fraud claim because, he asserts, there are disputed issues of fact on that claim that entitle him to a trial.[1] On his claims for promissory estoppel, breach of the duty of good faith and fair dealing, default on the promissory note, and liability under Bosben's personal guarantee, Gebhardt asserts that summary judgment in favor of the defendants was error, although it is not clear on which of these claims he believes he is entitled to summary judgment and on which he believes there are factual disputes that need to be tried. Gebhardt also contends the court erred in concluding his claim for breach of the employment agreement should be tried instead of granting his motion for summary judgment on that claim. Finally, Gebhardt contends the circuit court erred in ruling that Bosben/Main's counterclaims were not properly before the court.[2]

¶11 We review de novo the grant or denial of summary judgment, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled to summary judgment when there are no genuine issues of material fact and that

[1] Although the court's order was final only as to Bauman, we granted Gebhardt's petition for leave to appeal issues concerning Main and Bosben as well.

[2] We do not address Gebhardt's claim for tortious interference of contract because in his main brief he refers to this in only two sentences in a footnote. His reply brief contains a short discussion on this claim, but does not contain a developed argument explaining the elements of the claim and applying those elements to the evidence that he views to be undisputed. We generally do not address arguments raised for the first time in the reply brief, *see* ***A.O. Smith Corp. v. Allstate Ins. Co.***, 222 Wis. 2d 475, 492-93, 588 N.W.2d 285 (Ct. App. 1998), nor do we address undeveloped arguments. *See* ***Libertarian Party of Wisconsin v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996).

party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2007-08).[3]

¶12 When deciding a summary judgment motion, we first examine the submissions of the moving party to determine if they make a prima facie showing that the party is entitled to the relief the party seeks. ***Hoida, Inc. v. M&I Midstate Bank***, 2006 WI 69, ¶16, 291 Wis. 2d 283, 717 N.W.2d 17. When the moving party is a defendant, a prima facie defense for summary judgment means a showing of a defense that would defeat the claim. ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If the moving party makes this initial showing, then, to avoid summary judgment, the non-moving party must produce evidentiary material showing a genuine issue of material fact. ***Transportation Ins. Co. v. Hunzinger Const. Co.***, 179 Wis. 2d 281, 290-91, 507 N.W.2d 136 (Ct. App. 1993). In deciding if there is a genuine issue of material fact, we view the evidence most favorably to the nonmoving party and draw all reasonable inferences in favor of that party. ***Metropolitan Ventures, LLC v. GEA Assoc.***, 2006 WI 71, ¶20, 291 Wis. 2d 393, 717 N.W.2d 58.

I. Gebhardt's Claims

A. Fraud

¶13 Gebhardt contends there are disputed issues of fact that preclude summary judgment on his fraud claim against Bosben and Bauman. He asserts there is evidence that, in order to close the sale to Jones, Bosben and Bauman

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

fraudulently induced him to sign the termination agreement and payoff letter with Main and the employment agreement with Jones. The fraudulent inducement, according to Gebhardt, was the false promise that Main would pay Gebhardt immediately after the closing with Jones all money due him under the 2006 asset purchase and employment agreements.

¶14 The essential elements of a fraud claim, also known as intentional misrepresentation, are that: (1) a representation of fact was made; (2) the representation was false; (3) the defendant made the representation knowing it was untrue, or recklessly, without caring whether it was true or false, or the defendant failed to exercise ordinary care in making the representation and in ascertaining the facts; and (4) the plaintiff believed such representation to be true and relied on it to its detriment. ***Ollerman v. O'Rourke Co.***, 94 Wis. 2d 17, 25, 288 N.W.2d 95 (1980). "[P]romises or representations of things to be done in the future are not statements of fact. Statements of fact must relate to present or preexisting facts, not something to occur in the future." ***Wausau Med. Ctr. v. Asplund***, 182 Wis. 2d 274, 291, 514 N.W.2d 34 (Ct. App. 1994) (citation omitted).

¶15 Beginning with the first element, we consider the factual submissions on which Gebhardt relies. As to Bosben's "representation of fact," Gebhardt relies on his averment that Bosben "represented" to him in late December 2007 and early January 2008 that if he, Gebhardt, agreed to enter into an employment contract with Jones, he "would be paid all amounts due [him] under the [2006] asset purchase agreement and employment agreement at the time of closing on the re-sale to … Jones …." Taking this averment as true, we conclude this representation was a promise to pay Gebhardt at some time in the

future, and not a statement of fact as required for a claim of intentional misrepresentation.[4]

¶16 As to Bauman, Gebhardt relies on his own averment that Bauman prepared the payoff letter and termination agreement "purportedly embodying the writings needed to effect our agreement as to payment at closing." The payoff letter Bauman drafted provided:

> This letter confirms that upon [Gebhardt's] receipt of payment by or on behalf of Main Fire in an amount equal to $446,038.00 (the "Payoff Amount") by business check or wire transfer … the payment obligations set forth in Section 2.2 of the [2006] Purchase Agreement shall be deemed satisfied in full … and Main shall have no further obligations thereunder.

The termination agreement Bauman drafted provided:

> Upon payment by the Company to Gebhardt of … the "Termination Payments", the [2006] Employment Agreement shall be terminated, and shall be of no further force or effect concurrent with the close of business on the date immediately preceding the closing of the transactions contemplated by the Purchase Agreement … and Gebhardt hereby acknowledges and agrees that no further sums or amounts, other than the Termination Payments are owed to him by the Company.

¶17 We will assume without deciding that, as Gebhardt argues, by drafting these documents Bauman is implicating himself in any representations made in the documents and, further, that the quoted language can reasonably be read to imply an intention or a promise to pay Gebhardt. This is not a

[4] Gebhardt does not point to evidence that, at the time Bosben represented that Gebhardt "would be paid all amounts due [him] under the [2006] asset purchase agreement and employment agreement at the time of closing on the re-sale to … Jones," Bosben did not have the intent to do this.

representation of present or pre-existing facts, but an intent or promise to do something in the future.

¶18 Gebhardt also argues that under ***Kaloti Enterprises, Inc. v. Kellogg Sales Co.***, 2005 WI 111, 283 Wis. 2d 555, 699 N.W.2d 205, both Bosben and Bauman had a duty to disclose to him, at whatever time Bosben changed his mind about paying Gebhardt at the January closing, that he no longer intended to pay him at that time. ***Kaloti*** recognizes the prior case law establishing that an intentional misrepresentation claim may arise either from a failure to disclose a material fact or from a statement of a material fact which is untrue; and it establishes the circumstances in which a party to a business transaction has a duty to disclose such that a failure to do so will satisfy the first element of the claim for intentional misrepresentation. ***Id.***, ¶13. However, there is no suggestion in ***Kaloti*** or the cases it cites that a party's change of intent to do something in the future is the type of "material fact" that must, depending on the circumstances, be disclosed. Gebhardt does not provide a rationale for treating a change in intent to do a future act as a material fact that must be disclosed, given that a representation that one will do something in the future is not considered a "representation of fact" under the case law. Accordingly, we are not persuaded by his argument that either Bosben or Bauman had a duty to disclose Bosben's change in intent.[5]

¶19 Because Gebhardt has presented no factual material from which a reasonable jury could infer that either Bosben or Bauman made a false

[5] It is not clear to us when, under Gebhardt's view of the facts, he believes Bosben changed his mind about signing the termination agreement and payoff letter. However, any disputed facts on this point are not material without a developed legal theory that places an obligation on Bosben or Bauman to disclose a change in Bosben's intent.

representation of fact, we conclude the circuit court properly granted summary judgment in their favor on this claim, as well as on their claim for enhanced damages for fraudulent conduct.[6]

B. Promissory Estoppel

¶20 Gebhardt contends that, even if Bosben and Bauman's promise to pay him at the Jones closing is not sufficient to support his fraud claim, he is entitled to an order enforcing the promise based on the doctrine of promissory estoppel. Gebhardt contends he relied on this promise in signing the termination agreement and payoff letter on January 10, 2008, and the employment contract with Jones on the morning of January 11.

¶21 A party is entitled to prevail on a claim of promissory estoppel if: (1) the promise is one that the promisor should reasonably expect to 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 be avoided only by enforcement of the promise. ***McLellan v. Charly***, 2008 WI App 126, ¶50, 313 Wis. 2d 623, 758 N.W.2d 94 (citing ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis. 2d 683, 698, 133 N.W.2d 167 (1965)).

¶22 Turning to the promissory estoppel claim against Bosben, we consider the first element. As already mentioned, there is evidence that Bosben represented to Gebhardt in December 2007 and January 2008 that he would pay

[6] Gebhardt asserted a separate claim for enhanced damages for fraudulent conduct under WIS. STAT. §§ 943.20 and 895.446. Section 943.20 is the criminal statute for theft, and § 895.446 provides for a civil cause of action for "any person who suffers damage or loss by reason of intentional conduct that … is prohibited under s. … 943.20 …."

him the balance due under the 2006 asset purchase and employment agreements at the time of the Jones closing. The undisputed facts show that Bosben and Gebhardt both intended that there would be a signed written agreement terminating Gebhardt's employment with Main and determining the amount he was due under the asset purchase and employment agreements. It is undisputed that, after Bosben's initial representation to Gebhardt, there were negotiations between the parties on the amounts due. It is also undisputed that Bauman prepared draft documents for Bosben's and Gebhardt's signatures, there were revisions, and Gebhardt signed the two documents but Bosben did not execute and deliver them to Gebhardt.

¶23 The inquiry under the first element is whether, based on these facts, Bosben should have reasonably expected that the representation he made to Gebhardt in December 2007 and January 2008 would induce action or forbearance of a definite and substantial character by Gebhardt even if the contemplated written documents were not executed. Gebhardt does not develop an argument explaining why Bosben should have reasonably expected this, or, put differently, why Gebhardt's reliance on Bosben's oral representation was reasonable given that he knew written documents intending to memorialize the parties' agreement were anticipated. Indeed, Gebhardt's argument section on promissory estoppel simply lists the elements of this claim.

¶24 Bosben's initial representation was very general, lacking details on such critical points as the amount of the payment to Gebhardt and the manner of payment. The only reasonable inference from the record is that both parties understood that these details were to be negotiated and memorialized in a written agreement. We conclude it was not reasonable for Gebhardt to act in reliance on Bosben's initial representation before the anticipated written agreement was

executed. *See* ***Ziolkowski v. Caterpillar, Inc.***, 800 F. Supp. 767, 782 (E.D. Wis. 1992) (applying the elements of promissory estoppel under Wisconsin law and concluding that, because a formal written agreement was intended by both parties, it was unreasonable for one party to act in reliance upon an informal promise until a formal and more detailed written contract had been executed).

¶25 With respect to Gebhardt's promissory estoppel claim against Bauman, there is no evidence that Bauman made a representation to Gebhardt that he would be paid at the closing.[7] However, even if Bauman were somehow implicated in Bosben's initial representation, our reasoning in the preceding three paragraphs would then apply to Bauman. We therefore conclude the circuit court properly granted summary judgment in favor of Bosben and Bauman on Gebhardt's claim of promissory estoppel.

C. Breach of the Duty of Good Faith and Fair Dealing

¶26 Gebhardt contends that Main breached its duty of good faith and fair dealing by selling all of its assets to Jones, which resulted, according to Gebhardt, in Main's inability to employ him and to make quarterly payments to him under the asset purchase and employment agreements.

[7] At his deposition, Gebhardt asserted that any promise by Bauman that he would be paid immediately after closing was either via email or through Steve Yoder, the president of Main's holding company. Gebhardt admitted that there were only three emails exchanged between Bauman and him before the closing, none of which included a promise that Gebhardt would be paid at the closing. Moreover, Gebhardt admitted that Yoder had never said that Bauman specifically promised he would be paid at closing, nor did Yoder mention Bauman's name during the time Gebhardt signed the payoff letter and termination agreement. Finally, Bauman averred that he did not draft any document that mentioned paying Gebhardt on January 11, 2008, or any other date.

¶27 Every contract implies good faith and fair dealing between the parties to it, and a duty of cooperation by both parties. ***Ekstrom v. State***, 45 Wis. 2d 218, 222, 172 N.W.2d 660 (1969) (citation omitted). This duty of good faith requires that a party to a contract "will not intentionally and purposely do anything to prevent the other party from carrying out his [or her] part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." ***Id.*** But where a contracting party "complains of acts of the other party which are specifically authorized in their agreement … it would be a contradiction in terms to characterize an act contemplated by the plain language of the parties' contract as a 'bad faith' breach of that contract." ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis. 2d 569, 577, 431 N.W.2d 721 (Ct. App. 1988).

¶28 Thus, we examine the language of the asset purchase and employment agreements between Gebhardt and Main to determine whether Main's subsequent sale of the business to Jones was contemplated by these agreements, as Bosben/Main contend, or whether the sale destroyed Gebhardt's right to obtain the benefits contemplated by the agreements, as Gebhardt maintains.

¶29 Section 2.2 of the 2006 asset purchase agreement provides for the payment of the purchase price to Gebhardt as follows:

> [E]nding with the calendar quarter ending June 30, 2008 (the "Installment Payment Period"), Buyer shall pay to [Gebhardt] a payment … equal to thirty percent (30%) of the Buyer's gross sales for the most recently completed calendar quarter, up to a maximum amount not to exceed Buyer's Net Profit for such calendar quarter ….

It is undisputed that, after the sale of the business to Jones, Main no longer had any sales upon which to base its quarterly payments to Gebhardt. However, the same contract provision expressly contemplates that the total quarterly payments as of June 30, 2008, may not be enough to pay Gebhardt the full purchase price. It provides:

> To the extent that the total aggregate Installment Payments are less than the Purchase Price upon the expiration of the Installment Payment Period, such shortfall shall be evidenced by a promissory note … and shall accrue interest at the rate of … (7.5%) per annum until paid in full ….

¶30 Accordingly, when the installment payment period ended on June 30, 2008, the promissory note was activated. The note, too, includes a provision for quarterly payments to Gebhardt based on thirty percent of gross sales, which at that time were zero because the business had been sold. However, the note also provides that "all principal and interest under this Note shall be due and payable in full no later than July 31, 2010." Like section 2.2 of the asset purchase agreement, the note contemplates that the full purchase price may not be paid from sales and, in that case, will not be paid until July 31, 2010.

¶31 Gebhardt relies on the provision in the promissory note that a default occurs when Main "shall be dissolved or liquidated," and he argues that the sale to Jones was a liquidation. According to Gebhardt, we should construe the asset purchase agreement and employment agreement to implicitly prohibit the sale to Jones because the promissory note was attached to and part of the terms of the asset purchase agreement.

¶32 As we explain in the next section, we conclude that the sale to Jones did not constitute a default under the note on the "shall be liquidated" ground. However the important point here is that this default provision in the note is not

properly read as a term of the asset purchase agreement or the employment agreement. The note did not become activated until July 1, 2008, two years later than the effective dates of the asset purchase and employment agreements. The very fact that the parties specifically provided in the promissory note that Main is in default under the note if it "shall be liquidated," but did not include any similar language in the asset purchase agreement or employment agreement, demonstrates that the parties did not intend to include that provision in those two agreements.

¶33 Because the asset purchase agreement expressly contemplates that the full purchase price may not be paid in full from sales, and establishes a mechanism for payment in that event that does not depend on Main's continued ownership of the business, the sale to Jones was not a breach of the duty of good faith and fair dealing implied in either that agreement or the employment agreement.[8]

D. Default on Promissory Note

¶34 As noted above, the promissory note, which became activated on July 1, 2008, provides that certain occurrences constitute an "event of default," one of which is "[m]aker shall be dissolved or liquidated." Gebhardt contends that the sale of Main's assets to Jones was a "liquidation" within the meaning of this provision. In the event of a default, the note provides that Gebhardt may declare the entire unpaid principal balance and accrued interest immediately due; the note further provides that, until paid in full, a specified higher rate of interest applies. It

[8] In addition to his claim of breach of the duty of good faith and fair dealing, Gebhardt has also alleged a claim of breach of the asset purchase agreement based on the sale to Jones. Because Gebhardt does not present an argument in his main brief that there are undisputed facts that entitle him to summary judgment on this claim, we decline to address this claim.

is undisputed that on August 8, 2008, Gebhardt's counsel sent to Main a notice of default under the note and demanded immediate payment and that Main has not paid.

¶35 The circuit court granted summary judgment to Main and Bosben on this claim, stating in its written decision that there was no default because the quarterly payments were due out of sales, and, since there were no sales, nothing was due until July 31, 2010, when the entire balance would be due. The written decision does not refer to Gebhardt's argument in his brief in the circuit court that there was a default on the note because the sale to Main constituted a liquidation and therefore all amounts had become due upon his August 8, 2008, notice of default to Main.

¶36 Gebhardt contends the court erred in dismissing his claim for default on the promissory note because, before issuing its written decision on the summary judgment motion, the court had ruled on the issue of liquidation in a manner favorable to him. Specifically, at a hearing on a discovery issue on February 5, 2009, the court commented that it had read the summary judgment briefs and was prepared to rule on whether Main's business was liquidated by the sale to Jones. The court ruled that "for purposes of summary judgment … the business was liquidated by that transaction and the transfer of the funds to Main … and Bosben." The court referred to this ruling in its written decision on summary judgment, stating that "this decision does not address that claim." The court re-affirmed that earlier ruling in its conclusion to the written decision, in which it denied Gebhardt's motion for summary judgment "except as to my February 4, [sic] 2009, ruling regarding liquidation."

¶37 Because we were unclear why the circuit court did not view its February 5, 2009, ruling to require the conclusion that there was a default on the promissory note, we asked for supplemental letter briefs on this topic. However, despite the supplemental briefs, we are still uncertain of the court's view of the relationship between its February 5, 2009, ruling on liquidation and Gebhardt's claim of default on the promissory note. However, because we apply the same methodology as the circuit court and our review is de novo, we undertake an independent inquiry on whether Gebhardt is entitled to summary judgment on his claim that Main defaulted on the promissory note by selling the business to Jones.[9]

¶38 When we construe a contract, we attempt to ascertain the intent of the parties as expressed in the contract language. *See* ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. If the language is unambiguous, we presume the parties' intent is evidenced by the words they chose and we apply that plain language as the expression of the parties' intent. *See* ***id.*** Whether contract language is plain or ambiguous is a question of law, subject to our de novo review, as is the meaning of plain contract language. ***Lynch v.***

[9] Gebhardt states in his supplemental brief that Bosben/Main did not appeal the circuit court's February 5, 2009, ruling on liquidation and did not challenge it in their responsive brief and therefore have abandoned it. We disagree. In its written decision the circuit court ruled in their favor by concluding there was no default on the promissory note and dismissing that claim, so they had no basis for appealing on that claim. Gebhardt's argument in his main brief simply asserts that the circuit court erred in dismissing the claim under the promissory note because of its February 5, 2009, ruling. Gebhardt does not develop an argument with reference to the language of the "shall be liquidated" default provision explaining why that ruling was correct. He needed to do this because we decide de novo whether there was a default under this provision and do not defer to the circuit court's ruling. Since Gebhardt does not address the merits of this issue, it is not surprising that Bosben/Main do not. We asked for supplemental briefing to give both sides the opportunity to more fully present their positions. In discussing this issue, we draw from the parties' briefs in the circuit court because their supplemental letter briefs on this point are not as detailed and either refer to their circuit court briefs or summarize them.

Crossroads Counseling Ctr., Inc., 2004 WI App 114, ¶19, 275 Wis. 2d 171, 684 N.W.2d 141.

¶39 The language at issue here is the phrase "shall be … liquidated." In his brief in the circuit court Gebhardt relies on this definition from ***Larson v. Tax Commission***, 233 Wis. 190, 196, 288 N.W. 250 (1939): "A corporation is said to be liquidating 'when it begins to dispose of the assets with which it carried on the business for which it was organized and begins to distribute the proceeds from the disposition of such assets, or the assets themselves,' whether pursuant to a resolution for dissolution or not." According to Gebhardt, the sale to Jones meets this definition because there is no dispute that all Main's physical assets were sold, it no longer operates as a fire protection contractor, and it has no sales. In addition, Bosben acknowledged in his deposition that he was "winding up [the assets and obligations.]"

¶40 Bosben/Main agree in their brief in the circuit court that the quoted language from ***Larson*** describes the *process* of liquidating, but, they assert, the plain contract language, "shall be … *liquidated*" (emphasis added) requires that the process of liquidation has been completed.[10] Bosben/Main assert that the

[10] We note that the ***Larson*** description of liquidation is, in general, consistent with the activities described in WIS. STAT. § 183.0903(2), which governs LLCs and presumably governs Main. WIS. STAT. § 183.0903 provides:

> Winding up. A dissolved limited liability company continues its legal existence but may not carry on any business *except that which is appropriate to wind up and liquidate its business.* [Emphasis added.] Unless otherwise provided in an operating agreement:
>
> ….

(continued)

undisputed facts show that Main is not liquidated because there is no dispute that, after the sale to Jones, Main was still in existence and was collecting outstanding accounts receivable from customers, as well as payments owed by Jones pursuant to a consulting agreement.

> (2) The persons winding up the business of the limited liability company may do all of the following in the name of and on behalf of the limited liability company:
>
> (a) Collect its assets.
>
> (b) Prosecute and defend suits.
>
> (c) Take any action necessary to settle and close the business of the limited liability company.
>
> (d) Dispose of and transfer the property of the limited liability company.
>
> (e) Discharge or make provision for discharging the liabilities of the limited liability company.
>
> (f) Distribute to the members any remaining assets of the limited liability company.
>
> (3) Dissolution of a limited liability company does not do any of the following:
>
> (a) Transfer title to the limited liability company's property.
>
> (b) Prevent transfer of all or part of a member's interest.
>
> (c) Prevent commencement of a civil, criminal, administrative or investigatory proceeding by or against the limited liability company.
>
> (d) Abate or suspend a civil, criminal, administrative or investigatory proceeding pending by or against the limited liability company at the time of dissolution.
>
> (e) Terminate the authority of the registered agent of the limited liability company.
>
> (f) Alter the limited liability of a member.

¶41 We agree with Bosben/Main. The use of the verb form "shall be liquidated" rather than "begins to liquidate" or "is in the process of liquidation" to describe the default plainly means that the default occurs when the liquidation is complete; in other words, it means that all the assets have been collected, the liabilities discharged and the remaining assets distributed. The undisputed facts show this has not occurred.

¶42 In his brief in the circuit court, Gebhardt contends that the parties intended that the sale of the business to Jones would trigger the acceleration of the full amount due him because that sale made the quarterly payments based on a percentage of gross sales impossible. Similarly, he contends that the parties could not have intended to allow Main to avoid the acceleration of payments after the sale to Jones simply by having accounts receivable because that enables Main to avoid paying Gebhardt anything more until July 31, 2010. However, the promissory note does not make the sale of the business an event of default, but uses the term "shall be liquidated." In addition, the promissory note plainly provides a mechanism for payment of the full amount of the purchase price in the event it is not paid from gross sales: the remainder is due on July 31, 2010. We derive the parties' intent from the unambiguous contract language, not from how one party—or even both parties—may interpret it. ***Campion v. Montgomery Elevator Co.***, 172 Wis. 2d 405, 416, 493 N.W.2d 244 (Ct. App. 1992).

¶43 Because we conclude that this default provision in the promissory note requires that Main be fully liquidated and because the undisputed facts show that it has not been, we disagree with any ruling by the circuit court to the contrary. However, the bottom line is that the circuit court granted summary judgment in favor of Main on Gebhardt's claim for default on the promissory note because it concluded there was no default, and this result is correct.

E. Breach of Bosben's Personal Guarantee

¶44 Bosben's personal guarantee applies to the asset purchase agreement and the promissory note. Because we have concluded that Main is entitled to summary judgment on Gebhardt's claim for default on the promissory note and on his claim for breach of the duty of good faith implied in the asset purchase agreement, it follows that Bosben is not liable on his personal guarantee. Accordingly, the circuit court properly granted summary judgment in favor of Bosben on this claim.

F. Breach of Employment Agreement

¶45 Gebhardt contends the circuit court erred in concluding that his claim of breach of the employment agreement should go to trial. He asserts he is entitled to summary judgment on this claim because Main has not paid him for the amount that is indisputably owed, which, he asserts, is the amount specified on the unexecuted termination agreement. Gebhardt argues that it is undisputed that neither he nor Main gave the notice required under the agreement before termination and therefore it is still in effect.[11] Main responds that Gebhardt "effectively quit" by signing the employment agreement with Jones and then, when he voided that agreement, not returning to work for Main. Gebhardt does not explain why the employment contract language requires notice by the employer if he quits. Because there are disputed issues of fact as to whether

[11] Gebhardt argued in the circuit court that he was owed unpaid wages under WIS. STAT. § 109.03. The court concluded that the statute did not apply to Gebhardt, and that his remedy, if any, is under a claim for breach of the employment agreement. Although Gebhardt has a heading in his main appellate brief entitled "Gebhardt Should Have Been Granted Summary Judgment On His Undisputed Wage Claims," the body of that argument addresses the employment agreement. Therefore we do not discuss a statutory claim.

Gebhardt quit his employment with Main, whether Main terminated him, or whether the employment contract remains in effect, we conclude the circuit court properly denied summary judgment on this claim.

II. Bosben/Main Counterclaims

¶46 Bosben/Main filed counterclaims for common law misrepresentation, fraudulent representation under WIS. STAT. § 100.18,[12] breach of fiduciary duties, breach of the employment agreement, breach of the asset purchase agreement, and declaratory judgment.[13] As noted above, the circuit court did not rule on Gebhardt's motion for summary judgment on the counterclaims, stating that they were not properly before the court on summary judgment. Gebhardt contends, and our review of the record confirms, that he did move for summary judgment on the counterclaims and his accompanying brief addressed them. We also note that Main/Bosben responded to these arguments in its brief in opposition in the circuit court. Because both parties address the counterclaims on

[12] WISCONSIN STAT. § 100.18(1) provides:

> Fraudulent representations. (1) No person … with intent to sell … any real estate, merchandise, securities, employment, service, or anything offered by such person … to the public for sale … with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase [or] sale … shall make … a statement or representation of any kind to the public relating to such purchase [or] sale …. which … statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

[13] Bosben/Main also asserted a counterclaim for a declaratory judgment regarding Main's financial obligations under the asset purchase agreement and Bosben's obligations under his personal guarantee. Gebhardt does not address this counterclaim on appeal, although some, if not all, of the substantive issues raised by this counterclaim appear to be addressed by Gebhardt's arguments on his claims. Because he makes no separate argument addressing this counterclaim, we do not consider it.

appeal and because our review is de novo, we consider Gebhardt's arguments on the counterclaims. We conclude that his arguments do not entitle him to summary judgment on any counterclaim.[14]

¶47 Gebhardt contends that, with respect to certain alleged misrepresentations, Bosben/Main's pleading does not state a claim for relief under either common law misrepresentation or WIS. STAT. § 100.18.[15] We address only one allegation—that "[p]rior to entering into the June 2006 Asset Purchase Agreement at issue, Chad Gebhardt assured Bruce Bosben that the sale to [Main] could be financed entirely by quarterly 'Installment Payments' from the expected profit and cash flow of the business enterprise." The pleading alleges that, at the time Gebhardt made this representation, he either "knew or should have known [the] statement[] [was] untrue," that Bosben relied on it in entering into the agreement, and that he and Main suffered certain types of damages as a result.

¶48 Gebhardt contends that, as a matter of law, Bosben/Main could not have relied on this alleged representation because in the asset purchase agreement the parties agreed that, in addition to the quarterly payments, the purchase price still due would be paid on July 31, 2010.[16] Gebhardt's cursory argument, unsupported by a legal authority or a developed rationale, does not persuade us

[14] In this analysis, we do not consider arguments that are made for the first time in Gebhardt's reply brief. *See* ***A.O. Smith Corp.***, 222 Wis. 2d at 492-93.

[15] The first step of summary judgment analysis is whether the complaint or counterclaim states a claim for relief. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987). In analyzing the pleading for this purpose, we take the allegations as true and construe them liberally in favor of the claimant. ***Id.***

[16] We accept Gebhardt's apparent premise that this provision in the asset purchase agreement is part of the pleadings, but it would not matter if it were not. Our analysis treating the asset purchase agreement as a submission outside the pleading would be the same.

that this feature of the asset purchase agreement precludes reliance on Gebhardt's representation. Liberally construed, this allegation is a representation of how much revenue the business had been generating and, thus, could reasonably be expected to generate after the sale with Gebhardt still in charge. From Bosben/Main's perspective, it is in their interest to have the business generate sufficient gross sales to pay off Gebhardt as soon as possible, even if there is a provision for payment in full on July 31, 2010, if that has not occurred. Viewed in this way, the July 31, 2010, payoff provision does not require the legal conclusion that Bosben did not rely on the alleged representation in entering into the agreement.

¶49 Because the allegations concerning this representation are not deficient based on the argument Gebhardt presents, we do not address his arguments regarding the deficiencies in either pleading or proof of other alleged misrepresentations.

¶50 Gebhardt raises the economic loss doctrine as a defense to the common law misrepresentation claim. We decline to address this argument because Gebhardt simply asserts that the primary purpose of the asset purchase agreement and employment agreement is to deliver goods without discussing the contents of these agreements.

¶51 Gebhardt raises another defense to the common law misrepresentation claim, as well as to the WIS. STAT. § 100.18 claim: that the integration clauses in the asset purchase agreement and employment agreement preclude as a matter of law reliance on a prior communication for purposes of either claim. He cites ***Peterson v. Cornerstone Property Development, LLC***,

2006 WI App 132, 294 Wis. 2d 800, 720 N.W.2d 716, in support of his contention.

¶52 Wisconsin follows the general rule that

> integration clauses which negate the existence of any representations not incorporated into the contract may not be used to escape liability for the misrepresentations.… [A]s a matter of public policy, tort disclaimers in contracts will not be honored unless the disclaimer is specific as to the tort it wishes to disclaim. In order to be effective, the disclaimer must make it apparent that an express bargain was struck to forgo the possibility of tort recovery in exchange for negotiated alternate economic damages.

Grube v. Daun, 173 Wis. 2d 30, 59-60, 496 N.W.2d 106 (Ct. App. 1992) (citations omitted).

¶53 In ***Peterson*** we applied the above standard to a contract in which "three different provisions expressed that all prior negotiations were excluded and that only the text of the written documents constituted the contract." ***Peterson***, 294 Wis. 2d 800, ¶37. One of the three clauses stated:

> The Buyer acknowledges, subject to the Limited Warranty contained in Exhibit E ... (c) other than those written representations concerning the condition of the Property contained in the Condominium Offer to purchase, including the Exhibits annexed thereto, *she has not relied on any representations made by the Seller in entering into the Condominium Offer to Purchase ....*

Id., ¶37 (emphasis in original). We concluded that the quoted integration clause "specifically disclaims the purchaser's right to rely on any alleged fraudulent misrepresentations" and that "the three provisions … provide exactly the kind of specific disclaimer that makes it apparent that an express bargain had been struck." ***Id.*** (citation omitted). Accordingly, we held the integration clauses barred a claim under WIS. STAT. § 100.18. ***Id.***, ¶40.

¶54 In his main brief, Gebhardt refers to the "contracts' integration clauses," but does not set forth the clauses he is relying on and does not compare them to those we found dispositive in ***Peterson***. In his reply brief, he quotes the "entire agreement" provision from the asset purchase agreement and from the employment agreement but does not explain why these clauses are the equivalent of the three clauses in ***Peterson***. We decline to develop Gebhardt's argument for him.

¶55 With respect to the counterclaims for breach of fiduciary duty and breach of the employment contract, Gebhardt contends that he is entitled to summary judgment under the business judgment rule as articulated and applied on summary judgment in ***Reget v. Paige,*** 2001 WI App 73, ¶20, 242 Wis. 2d 278, 626 N.W.2d 302.

¶56 The business judgment rule is a judicially created doctrine that contributes to judicial economy by limiting court involvement in business decisions where courts have no expertise, and contributes to encouraging qualified people to serve as directors by ensuring that honest errors of judgment will not subject them to personal liability. ***Id.***, ¶17 (citations omitted). It generally works to immunize individual directors from liability and protects the board's actions from scrutiny by the courts. ***Id.*** Procedurally, the business judgment rule creates an evidentiary presumption that the acts of the board of directors were done in good faith and in the honest belief that its decisions were in the best interests of the company. ***Id.***, ¶18.

¶57 In ***Reget*** we applied the business judgment rule in affirming dismissal on summary judgment of a claim of breach of fiduciary duty against directors of a corporation. ***Id.***, ¶¶19-22. The plaintiff alleged that the directors set

compensation so high for five employees that it had to be viewed as dividends. ***Id.***, ¶19. In moving for summary judgment, the directors submitted corporate documents showing that the board of directors established the compensation for employees except those who are also board members; compensation for board members, which included three of the five identified by the plaintiff, was established by a compensation committee of three board members who had no stock in the company and were not part of the extended family to which the great majority of shareholders belonged. ***Id.***, ¶¶6, 19. We concluded this established a prima facie factual basis for dismissal of the breach of fiduciary duty claim. ***Id.***, ¶22. Therefore, in order to survive summary judgment, the plaintiff had to "come forward with sufficient evidentiary facts to make a prima facie case" that the directors had "willfully compensated [the employees] excessively for the services they provided to the corporation in an effort to pay them dividends, which they willfully withheld from other shareholders." ***Id.***, ¶20. We concluded the plaintiff had failed to do this because there was no evidence or reasonable inference from the evidence that the board or the compensation committee had acted in anything other than good faith. ***Id.***, ¶¶20-21. Specifically, we stated that none of the following evidence gave rise to a reasonable inference of bad faith or fraud: evidence that the compensation was at the high end, evidence that the corporation had the ability to pay dividends, and evidence that the two employees whose compensation was set by the board were part of the extended family to which the majority of shareholders belonged. ***Id.***, ¶¶21-22.

¶58 It is clear that ***Reget*** does not modify the general rule that a defendant moving for summary judgment must present factual submissions that show a prima facie defense. *See* ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). Gebhardt, the defendant on the

counterclaims, does not refer us to any specific submissions of his that show a prima facie defense but instead asserts that, "based upon his affidavits and the unrefuted presumption," he is entitled to summary judgment on the breach of fiduciary duty claim and breach of the employment contract claim. Our review of Gebhardt's two affidavits leaves us uncertain as to which provisions he believes establish a prima facie defense such that Bosben/Main, in order to avoid summary judgment under the business judgment rule, must make a showing (or "prima facie case," to use our language from ***Reget***) that Gebhardt acted in bad faith in managing the company. However, even if we assume Gebhardt has established a prima facie defense under the business judgment rule, we agree with Bosben/Main that their submissions create reasonable inferences that Gebhardt acted in bad faith.[17]

¶59 Bosben's second affidavit avers:

> [D]uring the period he managed Main Fire Protection, Gebhardt over-billed customers of Main Fire Protection for portions of contract work that had not yet been completed by Gebhardt and his work crews. While doing so, Gebhardt continued to insist that the amount of his installment payments should be based on his own over-billings, including amounts customers were disputing as not yet owed, and he threatened to quit the business and sue Main Fire Protection and me if Main Fire Protection did not continue to include his yet uncollected and unearned billings in calculating his payment. Main Fire Protection's business experienced financial strain as a result of Gebhardt's threats and insistence on payments beyond the parties' originally-intended construction of the payment provision, 2.2, by creating cash flow issues and threatening the stability of operations, which were managed principally by Gebhardt….

[17] Bosben/Main do not contend that the business judgment rule does not apply to their counterclaims for breach of fiduciary duty and breach of the employment contract. We therefore assume without deciding that it does.

> ….
>
> The problems caused by Gebhardt had the effect of benefiting Gebhardt at the expense of Main Fire Protection, including billing customers in advance of performance, which issues are the subject of the setoff claims in this action.
>
> ….
>
> … Gebhardt did so in order to pad his quarterly payments under the Asset Purchase Agreement and put me and Main Fire in a position where we could not object to Gebhardt's unreasonable demands and mismanagement out of concern for his repeated threats to quit the business and leave us with no ability to meet such contractual obligations.

These averments are sufficient to give rise to a reasonable inference that Gebhardt acted in bad faith in that he intended to increase his monthly payments even though it was detrimental to the company and to weaken the company so that he would have more leverage. These averments are not like the evidence that we rejected as inadequate to make a prima facie case for bad faith in ***Reget***. There may be other relevant averments in Bosben's affidavit, but it is not necessary to discuss them. We are satisfied that Bosben's submissions are sufficient to create a triable issue of fact on Gebhardt's business judgment defense to the breach of fiduciary duty and breach of employment contract counterclaims.

¶60 Gebhardt does not present an argument supporting his entitlement to summary judgment on the counterclaims for breach of the asset purchase agreement and for declaratory judgment that is distinct from arguments he has already made in the context of his own claims. We have already addressed those and so do not discuss these two counterclaims in this section.

CONCLUSION

¶61 We affirm the court's grant of summary judgment in favor of the defendants on Gebhardt's claims of fraud, promissory estoppel, breach of the duty of good faith and fair dealing, default on the promissory note, and liability under Bosben's personal guarantee. We also affirm the court's denial of summary judgment on Gebhardt's claim for breach of the employment agreement. Finally, we conclude Gebhardt is not entitled to summary judgment on Bosben/Main's counterclaims. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.