

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 12, 2011

A. John Voelker
Acting 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. 2010AP456

Cir. Ct. No. 2008CV3980

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

B.G. LEIN MANAGEMENT CORP. AND CARTLEIN INVESTMENTS, LLC,

PLAINTIFFS-APPELLANTS,

V.

WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

J.K. CONTRACTORS, INC.,

DEFENDANT.

APPEAL from the judgment of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed.*

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. B.G. Lein Management Corp. and Cartlein Investments, LLC, appeal from the order granting summary judgment to West Bend Mutual Insurance Co. The court determined that West Bend did not have a duty to defend J.K. Contractors, Inc. in a suit brought against them by the appellants.¹ Cartlein argues that the circuit court erred when it granted summary judgment to West Bend because the court ignored the reasonable inferences to be drawn from the affidavits West Bend submitted in opposition to summary judgment, and that West Bend has a duty to defend J.K. Contractors. We conclude that affidavits submitted by Cartlein in opposition to summary judgment failed to establish the evidentiary facts necessary to support its claim. Consequently, we affirm the judgment of the circuit court.

¶2 Cartlein owns an apartment complex in Menomonee Falls, and B.G. Lein is the managing agent. Cartlein contracted with J.K. Contractors to do roofing and ventilation work on some of the buildings. Specifically, J.K. Contractors was supposed to remove and repair deteriorated decking and replace the decking and the roof. After J.K. Contractors completed the work, Cartlein discovered that the work had not been properly done, and sued J.K. Contractors and its insurance company, West Bend. The parties all agreed that West Bend had not provided coverage to J.K. Contractors for faulty workmanship. Cartlein argued, however, that the faulty roof repair caused damage to other parts of the buildings.

¶3 West Bend moved for summary judgment, asserting that it had no duty to defend at all in this case. West Bend argued that Cartlein had not alleged

¹ We will refer to them collectively as “Cartlein.”

that it had property damage as a result of the work J.K. Contractors did, but rather that the damages Cartlein sought were only for the removal and replacement of the decking as stated in the original contract. Cartlein responded, and submitted four affidavits in opposition to the motion. The circuit court concluded that the affidavits failed to establish that anything J.K. Contractors did caused the other damage to the buildings. The court granted summary judgment to West Bend, and Cartlein appeals.

¶4 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 Home Mgmt., Inc.*, 195 Wis. 2d 485, 496-97, 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 there are 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). In our review, we are limited to consideration of the pleadings and evidentiary facts submitted in support and opposition to the motion. See *Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 146 Wis. 2d 568, 573, 431 N.W.2d 721 (Ct. App. 1988).

¶5 Cartlein argues on appeal that the circuit court misapplied the summary judgment methodology and ignored the reasonable inferences in the affidavits it submitted. Summary judgment should not be granted if reasonable,

but differing, inferences can be drawn from undisputed facts. *Belich v. Szymaszek*, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999). The competing inferences, however, must be “reasonable.” *Id.* Further, “[a]ffidavits in support of and in opposition to a motion for summary judgment ‘shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence.’” *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶10, 324 Wis. 2d 180, 781 N.W.2d 503 (quoting WIS. STAT. § 802.08(3)).

¶6 Cartlein argues that the reasonable inferences from the affidavits it submitted established that J.K. Contractors’ work led to other damage in the buildings. After reviewing these affidavits, we agree with the circuit court that the affidavits did not establish a connection between the work performed by J.K. Contractors and the damage in other parts of the buildings.

¶7 Cartlein submitted four affidavits in opposition to West Bend’s motion. The affidavit of Louis Juhlmann contains his “Roof/Attic Investigation” report, which states that the purpose of his investigation was to document the condition of roof decks throughout the complex. The affidavit does not contain Juhlmann’s opinion that other damage in the buildings was caused by J.K. Contractors. The affidavit of Brian Cartledge asserts that the buildings have suffered “additional damage,” and that tenants have complained about “discoloration,” which “will require maintenance work.” Mr. Cartledge does not say that he observed any of this other damage, nor did he explain the basis for a claim that the damage was caused by J.K. Contractors’ work. The affidavit of Stuart Rothman establishes that J.K. Contractors did not properly perform the work they were hired to do. It says: “The scope of work required for the remedial repairs is the same as the scope of the work as described in the original contract.” The affidavit of Timothy Guilette states that he is professional estimator, and

includes his estimate of the costs of repairs, but does not provide any connection between the alleged damages and J.K. Contractor's work.

¶8 Contrary to Cartlein's assertions, none of these affidavits contain specific evidentiary facts that lead to a reasonable inference that the work J.K. Contractors did led to damage in other parts of the building. Because the affidavits were factually insufficient, the circuit court properly granted summary judgment to West Bend. And because we have concluded that summary judgment was appropriate, we need not address whether West Bend is required to defend J.K. Contractors on the other claims.

¶9 For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

