

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 20, 2003

Cornelia G. Clark
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. 03-0271
STATE OF WISCONSIN**

Cir. Ct. No. 01CV001468

**IN COURT OF APPEALS
DISTRICT IV**

J.P. CULLEN & SONS, INC.,

PLAINTIFF-RESPONDENT,

V.

DAUL INDUSTRIES, INC.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
JOHN W. ROETHE, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Daul Industries appeals from an order that denied its motion for summary judgment on a promissory estoppel claim made against it by J.P. Cullen & Sons. We conclude that summary judgment was properly denied because there were material issues of fact that needed to be resolved by trial.

BACKGROUND

¶2 According to the complaint, J.P. Cullen & Sons, a general contractor, had decided to bid on a remodeling project for the Evansville Elementary School. The day the bids to the school district were due, J.P. Cullen & Sons received a bid from Daul Industries to act as a subcontractor for the structural steel/metals portion of the project. Because Daul Industries' bid was significantly lower than that of its competitors, J.P. Cullen & Sons contacted Daul Industries to inquire whether there had been a mistake. Daul Industries informed J.P. Cullen & Sons that the number was low because it needed the work, and that it would stand by the number. J.P. Cullen & Sons then incorporated Daul Industries' subcontracting bid into its own bid and won the general contract from the school district. Daul Industries subsequently refused to honor its subcontract bid, leaving J.P. Cullen & Sons contractually obligated to the school district to incur expenses over the amount of its bid price for the structural steel/metals component of the project.

¶3 In an affidavit submitted in support of Daul Industries' motion for summary judgment, Roger Daul, the president of Daul Industries, averred that the instruction manual for bidders, which his company obtained from the architectural firm that had designed the project, indicated that the school district would be purchasing certain materials, including structural steel components, directly from the supplier. He asserted that it was his understanding, based on the manual, that Daul Industries' bid to J.P. Cullen & Sons would be forwarded to the school district, and if accepted, would result in a contract between Daul Industries and the school district. He did not believe that Daul Industries was proposing to contract with J.P. Cullen & Sons to supply the structural steel for the project. He acknowledged that his company had discovered after the contract had been

awarded that its bid was more than \$100,000 too low, and had notified J.P. Cullen & Sons of the error. Daul Industries subsequently received a purchase order from Builders Supply Corporation (BSC)¹ indicating that the school district had elected to purchase materials from BSC and to deduct the costs of those materials from its contract with J.P. Cullen & Sons. Daul Industries advised J.P. Cullen & Sons that it would not execute the purchase order, noting that its bidding documents had stated its bid was subject to review and acceptance by its credit department.

¶4 In response to the summary judgment motion, J.P. Cullen & Sons submitted materials to support each of the allegations in the complaint, including contemporaneously taken notes, deposition transcripts, and correspondence.

STANDARD OF REVIEW

¶5 This court reviews summary judgment decisions de novo, applying the same methodology employed by the circuit court. *Frost v. Whitbeck*, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325, *aff'd* 2002 WI 129, 257 Wis. 2d 80, 654 N.W.2d 225. We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law. *Id.* If we conclude 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. *Id.* If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial. *Id.*

¹ BSC was a tax-exempt company affiliated with J.P. Cullen & Sons by virtue of the fact that it was owned by the same shareholders.

DISCUSSION

¶6 Promissory estoppel is a cause of action that lies when: (1) a promise has been made which 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 in fact induced such action or forbearance; and (3) injustice can be avoided only by enforcement of the promise. *Seater Constr. Co. v. Rawson Plumbing*, 2000 WI App 232, ¶20, 239 Wis. 2d 152, 619 N.W.2d 293.

¶7 The allegations in the complaint were sufficient to state a claim for promissory estoppel. That is, Daul Industries' bid to supply certain structural steel and metal components for a certain amount of money could be interpreted as a promise that Daul Industries should reasonably have expected J.P. Cullen & Sons to act upon, and that J.P. Cullen & Sons did act upon, to its detriment, such that it would be unjust not to enforce the bid. The answer joined issue by denying sufficient knowledge to concede key factual allegations of the complaint.

¶8 Daul Industries first contends the summary judgment materials show that any promise it made was to the school district, not to J.P. Cullen & Sons, because the project manual indicated that the school district would directly pay for steel and metal components. We disagree. The bid was submitted to J.P. Cullen & Sons, and there was nothing on its face specifying that the materials would be provided only to the school district directly. Even if that were the case, the bid would still have represented a promise from Daul Industries to J.P. Cullen & Sons that Daul Industries would provide the materials to the school district for a certain price in the event that J.P. Cullen & Sons became the prime contractor. *See Seater Constr. Co.*, 239 Wis. 2d 152, ¶24.

¶9 Assuming that its bid represented a promise, Daul Industries next argues that it reasonably did not expect J.P. Cullen & Sons to act in reliance upon the bid because the bidding document expressly stated that the bid was subject to approval by Daul Industries' credit department. However, J.P. Cullen & Sons provided deposition testimony in which Roger Daul acknowledged that he was aware that it was a general practice for prime contractors to gather subcontractor bids, and that if Daul Industries provided the lowest bid, there was every possibility that J.P. Cullen & Sons would incorporate the bid into its prime contractor bid. There was therefore, at the very least, a material factual dispute as to whether Daul Industries could reasonably expect that J.P. Cullen & Sons would act in reliance on the bid.

¶10 Daul Industries also claims the summary judgment materials would not support a finding that J.P. Cullen & Sons had acted to its detriment in reliance on Daul Industries' bid, because: (1) there was nothing to show that the school district had assigned its rights to BSC; (2) BSC was not a party to the action; and (3) BSC assumed the responsibility for purchasing the materials after Daul Industries notified J.P. Cullen & Sons that it would not honor its bid. These arguments appear to be premised on the notion that, because BSC submitted the purchase order, only BSC could have been harmed by Daul Industries' refusal to fill the order. Each of these contentions misses the point. The action that J.P. Cullen & Sons was allegedly induced to take was to incorporate Daul Industries' subcontract bid into its own prime contractor bid to the district. The injustice that J.P. Cullen & Sons could allegedly avoid only by enforcement of the promised bid arose from the fact that J.P. Cullen & Sons became contractually bound to provide the school district with the steel and metal components of the project at the price Daul Industries had bid, even though it ultimately cost much more to obtain those

materials. Whatever actions the district, J.P. Cullen & Sons, or its affiliate company BSC may have taken after Daul Industries informed J.P. Cullen & Sons by letter that it refused to provide the materials at its bid price would go to the amount of damages suffered, not to whether the elements of promissory estoppel had been met in the first instance. Accordingly, the trial court properly denied Daul Industries' motion for summary judgment.

By the Court.—Order affirmed.

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

