COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1512 **Cir. Ct. No. 2005CV524**

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

WAGAN, LLC, D/B/A THERMOCORE STRUCTURAL INSULATED PANEL SYSTEMS,

PLAINTIFF-RESPONDENT-CROSS-RESPONDENT,

V.

REX RATHBUN,

DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

DOMINION OF CANADA GENERAL INSURANCE COMPANY,

THIRD-PARTY
DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Chippewa County: FREDERICK A. HENDERSON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Rex Rathbun appeals an order dismissing his claims against Wagan, LLC, d/b/a Thermocore Structural Insulated Panel Systems, (Thermocore) and Dominion of Canada General Insurance Company (Dominion). Rathbun contends: (1) the circuit court improperly converted motions in limine into motions for summary judgment; and (2) factual disputes preclude summary judgment on the issues of agency, apparent authority, and Rathbun's status as a third-party beneficiary. Rathbun also argues the circuit court improperly lifted a stay on the enforcement of Thermocore's construction lien on Rathbun's property.

¶2 We reject Rathbun's arguments and affirm. First, we conclude the circuit court properly exercised its discretion by granting Thermocore's and Dominion's motions in limine. Once those motions were granted, it would have been impossible for Rathbun to prevail on his claims involving agency and apparent authority. Accordingly, the circuit court correctly dismissed those claims. Second, because Rathbun never pled a third-party beneficiary claim, the circuit court properly refused to allow him to proceed on a third-party beneficiary theory. Third, the stay on enforcement of the construction lien was contingent on the resolution of Rathbun's counterclaims against Thermocore. After Rathbun's counterclaims were dismissed, nothing prevented the circuit court from lifting the stay.

¶3 Dominion cross-appeals, arguing the circuit court erroneously concluded that a liability policy Dominion issued provided coverage for Rathbun's claims. Because we affirm the order dismissing Rathbun's claims, Dominion's cross-appeal is moot, and we need not address it.

BACKGROUND

¶4 In 2004, Rathbun entered into four contracts with Gary Ramsden, d/b/a Timber Frame Design Studio, regarding construction of a ten-thousand-square-foot timber frame home. Construction of a timber frame home involves erecting a post-and-beam skeleton—the timber frame—which is then enclosed using structural insulated panels. Under the contracts with Rathbun, Ramsden agreed to supply and install a timber frame and panels. Ramsden contracted with Thistlewood Timber Frame Homes to provide the timber frame and Thermocore to provide the panels. Rathbun himself did not have any contracts with Thistlewood or Thermocore.

¶5 Construction of Rathbun's home began in July 2004. However, Rathbun alleges a "vast breakdown in the construction of the project occurred" in the ensuing months. According to a projected production schedule Ramsden provided, erection of the timber frame should have been completed by July 17, 2004. After that, Rathbun alleges it should have taken about one week to place the panels. In actuality, the timber frame was not enclosed with panels until October 2004. Rathbun alleges that, in the interim, the panels were left outside unprotected and became water logged. As a result, they would not fit properly with the timber frame.

¶6 Ultimately, Ramsden failed to pay Thermocore for the panels. Thermocore obtained a default judgment against Ramsden for the unpaid amount. After Ramsden failed to satisfy the judgment, Thermocore filed a construction lien claim against Rathbun. In response, Rathbun filed a counterclaim against Thermocore, alleging that Thermocore was negligent and was responsible for the negligence of its agent, Ramsden. Rathbun also filed a third-party complaint

against Ramsden and Thistlewood. He alleged that Thistlewood and Ramsden were negligent, and that Thistlewood was responsible for Ramsden's negligence. In the alternative, Rathbun alleged Thistlewood had breached a contract with him.[1] Rathbun sought damages in the amount of $232,163.35.

¶7 Ramsden answered the third-party complaint, asserting he had filed for bankruptcy and had been granted a discharge. He was subsequently dismissed from the lawsuit. Rathbun amended his third-party complaint three times, adding various insurers he alleged had issued policies to Thistlewood. All of these insurers were eventually dismissed on coverage grounds, except Dominion. In the meantime, Thistlewood declared bankruptcy, received a discharge, and was dismissed from the case. This left Rathbun, Thermocore, and Dominion (Thistlewood's insurer) as the only remaining parties.

¶8 In January 2008, the circuit court granted Thermocore summary judgment on its construction lien claim against Rathbun. However, the court also ordered that Thermocore "may not execute upon this Judgment until the rest of this case has been settled with the Court." The court reasoned that, in the event Rathbun succeeded in his counterclaim against Thermocore, the amount owed pursuant to the lien would serve as an offset against Rathbun's recovery.

¶9 A jury trial on Rathbun's counterclaims and third-party claims was scheduled for the first week of March 2010. On January 29, 2010, Dominion filed motions in limine asking the court, among other things, to bar Rathbun "from arguing or submitting evidence that [Ramsden] was an agent of [Thistlewood] or

[1] Rathbun now concedes that he did not have any contract with Thistlewood.

[Thermocore]." Dominion argued the record was completely devoid of evidence that Ramsden was Thistlewood's or Thermocore's actual agent, or that Ramsden had acted with apparent authority on their behalf. On February 1, 2010, Thermocore also filed a motion in limine seeking "[a]n order prohibiting any reference or discussion of [Ramsden] being in an agency relationship with [Thermocore] as there is insufficient evidence to raise a prima facia [sic] issue of agency and therefore no question for the jury."

¶10 Thermocore also filed objections to Rathbun's proposed jury instructions and special verdict. Specifically, Thermocore complained that Rathbun was attempting to raise several claims he had never pled, including a claim that Rathbun was a third-party beneficiary of Ramsden's contracts with Thermocore and Thistlewood.

¶11 The circuit court set a hearing on Thermocore's and Dominion's motions in limine for February 19, 2010, and also noted that it would "hear any objections to the proposed Jury Instructions[]" on that date. Before the hearing, Rathbun filed several documents, including a brief in response to Thermocore's motions in limine; a brief in response to Dominion's motions in limine; a 103-page affidavit in opposition to the motions in limine; and, a letter brief responding to Thermocore's objections to Rathbun's proposed jury instructions and special verdict. In the letter brief, Rathbun indicated he no longer intended to pursue negligence claims against Thermocore and Dominion. Instead, Rathbun stated he "[was] electing to pursue apparent authority and third-party beneficiary claims per his amended special verdict …."

¶12 At the February 19 hearing, the circuit court began by considering Thermocore's and Dominion's motions in limine regarding agency and apparent

authority. The court concluded there was insufficient evidence to create a jury question on whether Ramsden was the agent of Thermocore or Dominion or acted with apparent authority on their behalf. Accordingly, the court granted Thermocore's and Dominion's motions in limine. The court then recognized that, given its ruling, Rathbun would be unable to prevail at trial on any claims involving agency or apparent authority. The court therefore dismissed those claims.

¶13 The court then inquired whether there was anything left of Rathbun's case. Rathbun responded that he still had a third-party beneficiary claim. After hearing arguments from both sides, the court concluded there was no evidence that Rathbun was a third-party beneficiary of Ramsden's contracts with Thermocore and Thistlewood. The court therefore refused to allow Rathbun to proceed on a third-party beneficiary theory.

¶14 On May 24, 2010, the court entered a written order dismissing all claims against Thermocore and Dominion. The court also ordered that the funds Rathbun had deposited as security for Thermocore's construction lien were to be released to Thermocore, effectively lifting the stay on enforcement of the construction lien. Rathbun filed a motion for reconsideration of the court's May 24 order. However, he only challenged that portion of the order releasing the construction lien funds. He did not seek reconsideration of the dismissal of his claims against Thermocore and Dominion.

¶15 While the motion for reconsideration was pending, Rathbun filed a notice of appeal from the entirety of the May 24 order. Dominion cross-appealed, challenging the circuit court's determination that its policy provided coverage for Rathbun's claims. Rathbun then filed an amended motion for reconsideration,

again addressing only the release of the construction lien funds. Following a hearing, the circuit court denied Rathbun's reconsideration motion.

DISCUSSION

I. Agency and apparent authority

¶16 On appeal, Rathbun first contends that the circuit court erred in its determinations regarding agency and apparent authority. Specifically, he contends the court improperly converted motions in limine on these subjects into motions for summary judgment. He then argues that factual disputes preclude summary judgment. We disagree. First, we conclude the trial court properly exercised its discretion by granting Thermocore's and Dominion's motions in limine. Second, we conclude that, having granted those motions, the court properly determined that Rathbun's claims involving agency and apparent authority should be dismissed because it would have been impossible for Rathbun to prevail on those claims at trial.

A. Thermocore's and Dominion's motions in limine

¶17 "The purpose of [a] motion in limine is to obtain an advance ruling on admissibility of certain evidence." ***State v. Wright***, 2003 WI App 252, ¶37, 268 Wis. 2d 694, 673 N.W.2d 386. We will affirm a circuit court's decision to admit or exclude evidence absent an erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. A court properly exercises its discretion when it examines the relevant facts, applies a proper legal standard, and, using a demonstrated rational process, reaches a reasonable conclusion. ***Id.***

¶18 Here, the circuit court concluded Rathbun had not produced enough evidence to create a jury question with respect to agency or apparent authority. The court reasoned that, due to this lack of evidence, references to agency or apparent authority would cause the jury to speculate. We conclude the court properly exercised its discretion.

Agency—Thermocore

¶19 An agency relationship exists "'only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.'" ***Johnson v. Minnesota Mut. Life Ins. Co.***, 151 Wis. 2d 741, 748, 445 N.W.2d 736 (Ct. App. 1989) (quoting RESTATEMENT (SECOND) OF AGENCY § 15 (1957)). Thus, to prove that Ramsden was Thermocore's agent, Rathbun needed to present evidence that: (1) Thermocore authorized Ramsden to act on its behalf; and (2) Ramsden consented to act on Thermocore's behalf.

¶20 To establish these elements, Rathbun relies on his own deposition testimony that Ramsden said he was a "dealer" for Thermocore and "insinuated" he was Thermocore's agent. However, this testimony does not establish a "manifestation" by Thermocore authorizing Ramsden to act on its behalf. Rathbun also argues that the contracts between Rathbun and Ramsden created an agency relationship between Ramsden and Thermocore because they stated that Thermocore would provide the panels for Rathbun's house. Again, though, Rathbun does not explain how provisions in the contracts between Ramsden and Rathbun can establish a "manifestation" by Thermocore authorizing Ramsden to act on its behalf. Rathbun simply has not produced any evidence that Thermocore authorized Ramsden to act as its agent. Accordingly, the circuit court properly

exercised its discretion by barring Rathbun from presenting evidence or argument that an agency relationship existed.

Agency—Thistlewood

¶21 Similarly, Rathbun has failed to produce any evidence of an agency relationship between Ramsden and Thistlewood. In support of his claim that Ramsden was Thistlewood's agent, Rathbun asserts that: (1) Ramsden said he was Thistlewood's agent;[2] (2) the contracts between Rathbun and Ramsden identified Ramsden as an authorized dealer of Thistlewood's products; and, (3) the contracts between Rathbun and Ramsden stated that Thistlewood would provide

[2] Rathbun refers us to the following three lines of his own deposition testimony as proof that Ramsden said he was Thistlewood's agent:

> Q: Did [Ramsden] ever say to you, I'm an agent of Thistlewood Timber Frame Homes?
>
> A: Yes.

However, placed in context, Rathbun's testimony is not so clear-cut. He actually testified:

> Q: Did [Ramsden] ever say to you, I'm an agent of Thistlewood Timber Frame Homes?
>
> A: Yes.
>
> Q: As distinct from dealer, he represented himself as an agent?
>
> A: I'm not sure about the distinction between agent and dealer.
>
> *Q: Um, as you sit here today, do you ever recall Mr. Ramsden saying I am an agent—using that specific word agent—of Thistlewood Timber Frame Homes?*
>
> *A: Um, I would say no, from my recollections.*

(Emphasis added.) Thus, when read as a whole, Rathbun's deposition testimony does not support Rathbun's claim that Ramsden stated he was Thistlewood's agent.

the timber frame and drawings for the project and that payments to Thistlewood would be nonrefundable. However, none of Rathbun's proffered evidence establishes a manifestation by Thistlewood authorizing Ramsden to act on its behalf. In fact, the authorized dealer agreement between Thistlewood and Ramsden states, "This agreement does not and shall not be construed to create any … agency … as between Thistlewood and [Ramsden] …." Thus, the only known "manifestation" by Thistlewood on the subject of agency bars Ramsden from acting as Thistlewood's agent. Again, in light of the complete lack of evidence establishing an agency relationship, the circuit court properly exercised its discretion by barring Rathbun from presenting evidence or argument that Ramsden was Thistlewood's agent.

Apparent authority—Thermocore

¶22 "[A]pparent authority binds a principal to acts of another who reasonably appears to a third person to be authorized to act as the principal's agent[.]" ***Mared Indus., Inc. v. Mansfield***, 2005 WI 5, ¶22, 277 Wis. 2d 350, 690 N.W.2d 835. Proof of three elements is necessary to establish apparent authority: "(1) acts by the agent or principal justifying belief in the agency; (2) knowledge thereof by the party sought to be held; and (3) reliance thereon by the plaintiff consistent with ordinary care and prudence." ***Lamoreux v. Oreck***, 2004 WI App 160, ¶52, 275 Wis. 2d 801, 686 N.W.2d 722. Furthermore, "representations of the agent alone cannot be the basis for a finding of apparent authority. Apparent authority must be traceable to the principal." ***Mattice v. Equitable Life Assur. Soc.***, 270 Wis. 504, 515, 71 N.W.2d 262 (1955).

¶23 Rathbun contends Ramsden had apparent authority to act for Thermocore because: (1) Ramsden told Rathbun he was a "dealer" for

Thermocore; (2) Ramsden "insinuated" he was Thermocore's agent; and (3) Ramsden's contract with Rathbun led Rathbun to believe Ramsden was Thermocore's agent. Even assuming these acts could qualify as "acts by the agent … justifying belief in the agency," *see* ***Lamoreux***, 275 Wis. 2d 801, ¶52, Rathbun has not presented any evidence that Thermocore *knew* about Ramsden's acts. Accordingly, Rathbun would have been unable to prove the second element of apparent authority at trial—"knowledge [of the agent's acts] by the party sought to be held[.]" *See* ***id.*** Rathbun has not shown that his belief in Ramsden's authority to act for Thermocore was "traceable to" Thermocore. *See* ***Mattice***, 270 Wis. at 515. Consequently, the circuit court properly granted Thermocore's motion in limine regarding apparent authority.

Apparent authority—Thistlewood

¶24 The circuit court also properly granted Thistlewood's motion in limine regarding apparent authority. Rathbun argues Ramsden had apparent authority to act for Thistlewood because: (1) Ramsden told Rathbun he was Thistlewood's agent;[3] (2) Ramsden told Rathbun he was a "dealer" for Thistlewood; (3) Ramsden's contracts with Rathbun led Rathbun to believe Ramsden was Thistlewood's agent; and (4) Thistlewood's website listed Ramsden as an authorized dealer of its products. The first three pieces of evidence Rathbun cites fail the apparent authority test's second prong. There is no evidence that Thistlewood knew Ramsden said he was its agent or dealer, and there is no evidence Thistlewood knew about any of the provisions in the contracts between

[3] Again, we question whether the record actually supports Rathbun's claim that Ramsden said he was Thistlewood's agent. *See supra* n.2.

Ramsden and Rathbun. Thus, any claim of apparent authority based on Ramsden's representations and the Ramsden-Rathbun contracts must fail.

¶25 With respect to Thistlewood's website, clearly Thistlewood knew that its website listed Ramsden as an authorized dealer. However, merely listing Ramsden as a dealer does not qualify as an "act[] by the … principal justifying belief in the agency," the first element of the apparent authority test. *See* ***Lamoreux***, 275 Wis. 2d 801, ¶52. Rathbun seems to be under the impression that the terms "agent" and "dealer" are synonymous. He is mistaken.

¶26 Black's Law Dictionary defines a dealer as "a person who purchases goods or property for sale to others; a retailer." BLACK'S LAW DICTIONARY 427 (8th ed. 2004). Similarly, Webster's Third New International Dictionary defines a dealer as "one that does business … a person who makes a business of buying and selling goods esp. without altering their condition." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 581 (unabr. 1993). The Wisconsin Fair Dealership Act uses a similar definition. There, a dealer is defined as "a person who is a grantee of a dealership[.]" WIS. STAT. § 135.02(2).[4] A "dealership," in turn, is a "contract or agreement, either expressed or implied, whether oral or written, between 2 or more persons, by which a person is granted the right to sell or distribute goods or services[.]" WIS. STAT. § 135.02(3)(a). Under all of these definitions, a dealer is essentially a person who buys goods from one party and sells them to another.

[4] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶27 An agent, on the other hand, is "one who is authorized to act for or in place of another[.]" BLACK'S LAW DICTIONARY 68 (8th ed. 2004); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 40 (unabr. 1993) (an agent is "one that acts for or in the place of another by authority from him."). One may be a dealer for a manufacturer—that is, a person who is authorized to sell the manufacturer's goods—without also being authorized to act on behalf of the manufacturer. Thus, the mere fact that Thistlewood identified Ramsden as its dealer did not make Ramsden its agent. The dealership listing on Thistlewood's website was not an "act[] by [Thistlewood] justifying [Rathbun's] belief in the agency[.]" *See* ***Lamoreux***, 275 Wis. 2d 801, ¶52. As a result, Thistlewood's website does not provide evidence that Ramsden had apparent authority to act for Thistlewood. Consequently, Rathbun failed to present any evidence of Ramsden's apparent authority, and the circuit court properly exercised its discretion by granting Thistlewood's motion in limine.

B. Dismissal of Rathbun's claims

¶28 After the circuit court determined that Rathbun should be barred from submitting evidence or argument regarding agency and apparent authority, the court concluded Rathbun's claims against Thermocore and Dominion should be dismissed. The court reasoned that the claims Rathbun had pled were dependent on the proposition that Ramsden was an agent of Thermocore or Thistlewood or had apparent authority to act on their behalf. If Rathbun could not present any evidence regarding agency or apparent authority, he would be unable to prevail on his claims at trial. Thus, the court concluded that, logically, a trial was unnecessary, and Rathbun's claims should be dismissed.

¶29 Rathbun asserts that, by dismissing his claims, the court converted motions in limine into motions for summary judgment. As a threshold matter, we note that Rathbun did not raise this argument in the circuit court. His written responses to Thermocore's and Dominion's motions in limine did not argue that the motions were improperly noticed motions for summary judgment. During the motion hearing, Rathbun did not object on the basis that the court had converted motions in limine into motions for summary judgment. Furthermore, Rathbun did not raise this argument in either his motion for reconsideration or his amended motion for reconsideration. Because Rathbun did not raise his summary judgment argument in the circuit court, he has forfeited his right to raise it on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first time on appeal are generally deemed forfeited).

¶30 We also disagree with Rathbun's argument on the merits. It is clear from the transcript of the motion hearing that the court believed it was ruling on motions in limine, not motions for summary judgment. The court stated:

> THE COURT: [Ramsden] is the representative. The representative isn't in my opinion [synonymous] with agent. The representative is like a dealer. I'm putting—so I'm putting this package together for you and we are going to get it from Thistlewood because this is what you want as opposed to Wausau [Homes] or whoever else is in the timber frame business. But I don't think it's enough, and I'm going to say no that would cause the jury to speculate, and I'm not going to allow that.
>
> So I don't think there is any agency. So we are not going to do that. So where does that leave us? So—*and I'm going to grant your motion in limine*.

(Emphasis added.) The court then inquired, "Is there anything left of this case now?" and concluded that, with respect to agency and apparent authority, there was nothing left. The court's conclusion was proper. Whenever a motion in

limine affects a key line of argument or essential piece of evidence in a case, the party propounding that evidence runs the risk that, if the motion is granted, the case will suffer and may be dismissed. This does not mean that granting a motion in limine on a critical piece of evidence is tantamount to granting a motion for summary judgment.

¶31 Moreover, even if the circuit court had decided to treat Thermocore's and Dominion's motions in limine as motions for summary judgment, that decision would have been within the court's authority. Our supreme court has noted that "it is well recognized that courts may sua sponte consider legal issues not raised by the parties." ***State v. Holmes***, 106 Wis. 2d 31, 39-40, 315 N.W.2d 703 (1982). Indeed, we recently considered and upheld a circuit court's decision in a complicated coverage action in which the court, on motions in limine, sua sponte decided to reconsider and grant motions for summary judgment it had previously denied. *See* ***Westport Ins. Corp. v. Appleton Papers, Inc.***, 2010 WI App 86, ¶¶27-28, 327 Wis. 2d 120, 787 N.W.2d 894.

¶32 Rathbun next contends that he did not receive notice of any motions for summary judgment. However, Rathbun undisputedly received notice of Thermocore's and Dominion's motions in limine. Dominion filed its motions on January 29, 2010, and Thermocore filed its motions on February 1, 2010. Both Dominion and Thermocore asked the court to prohibit Rathbun from introducing evidence or argument regarding agency and apparent authority. The court scheduled a hearing on the motions in limine for February 19, 2010, and Rathbun had notice of the hearing. Rathbun filed multiple briefs responding to the motions in limine, as well as a 103-page affidavit. Under these circumstances, it is disingenuous for Rathbun to argue that he did not have proper notice of the pending motions or of their implications for his case.

¶33 Rathbun also contends he did not have sufficient opportunity to respond to Thermocore's and Dominion's motions. He argues that, had he known the importance of the motions in limine, he would have submitted additional evidence regarding his agency and apparent authority theories. Rathbun has not, however, made an offer of proof showing what that additional evidence might be.

¶34 Furthermore, Rathbun had several opportunities to submit additional evidence to the circuit court, but he did not do so. First, Rathbun could have submitted any additional evidence he possessed along with the affidavit he filed in response to the motions in limine. Second, during the motion hearing, Rathbun's counsel twice offered to supply the court with additional evidence by the following Monday, but counsel failed to do so. Third, during the three-month period between the court's oral decision and entry of the court's written order, Rathbun could have filed a motion for reconsideration along with an affidavit containing additional evidence for the court to consider. Again, Rathbun did not do so. Fourth, after the written order was entered, Rathbun filed a motion for reconsideration, and later an amended motion for reconsideration, but neither document addressed agency or apparent authority or provided additional evidence. Having failed to take advantage of these opportunities, Rathbun cannot now argue that the circuit court erred by preventing him from introducing additional evidence.

¶35 Finally, Rathbun argues he was entitled to a jury trial because "[m]atters such as agency [and] apparent authority … were for the jury to decide at the trial on March 1, 2010." He cites ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983), for the proposition that questions of agency and apparent authority are inherently factual in nature. We agree with Rathbun that agency and apparent authority are typically matters for the trier of fact to

decide. However, this does not mean that every person who claims an agency relationship exists is guaranteed a jury trial. Our supreme court has consistently held that cases should only go to trial where the plaintiff can establish a prima facie case; if the plaintiff cannot do so, his or her claims should be dismissed. *See, e.g.*, ***Glassey v. Continental Ins. Co.***, 176 Wis. 2d 587, 600, 500 N.W.2d 295 (1993); ***Paulsen Lumber, Inc. v. Anderson***, 91 Wis. 2d 692, 702, 283 N.W.2d 580 (1979).

¶36 Here, the circuit court carefully analyzed Rathbun's agency and apparent authority arguments. The court determined that the evidence proffered by Rathbun did not establish a prima facie case that Ramsden had an agency relationship with Thermocore or Thistlewood, or that he acted with apparent authority on their behalf. Because Rathbun could not establish a prima facie case of agency or apparent authority, the circuit court properly prohibited him from presenting those theories at trial. Without agency or apparent authority, Rathbun's claims could not have succeeded. Accordingly, the court properly dismissed his claims.

II. Third-party beneficiary to a contract

¶37 After the circuit court concluded that Rathbun could not proceed with any claims premised on agency or apparent authority, it inquired whether any of Rathbun's claims remained viable. Rathbun responded that he still had a third-party beneficiary claim.[5] "A person may enforce a contract as third-party beneficiary if the contract indicates that he or she was either specifically intended

[5] Rathbun also asserted that he had an implied contract claim. On appeal, Rathbun does not argue that he had an implied contract claim or that the circuit court erred by dismissing it.

by the contracting parties to benefit from the contract or is a member of the class the parties intended to benefit." ***Milwaukee Area Tech. College v. Frontier Adjusters of Milwaukee***, 2008 WI App 76, ¶20, 312 Wis. 2d 360, 752 N.W.2d 396. The circuit court concluded there was no evidence that Rathbun was a third-party beneficiary to any contract. It therefore refused to allow Rathbun to proceed on that theory.

¶38 Rathbun now argues that the circuit court improperly granted summary judgment on this third-party beneficiary claim. However, because Rathbun never pled a third-party beneficiary claim, the circuit court's decision was correct. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987) (we may affirm on reasoning other than that employed by the circuit court).

¶39 "[T]o state a claim based on third-party beneficiary status, the complaint must allege facts sufficient to show that the agreement that was breached was entered into primarily and directly for plaintiff's benefit or the complaint must have attached a copy of the agreement that demonstrates that purpose." ***Hoida, Inc. v. M & I Midstate Bank***, 2006 WI 69, ¶19, 291 Wis. 2d 283, 717 N.W.2d 17. Rathbun's counterclaim against Thermocore alleged that: (1) Thermocore was negligent; and (2) Thermocore was responsible for Ramsden's negligence. The words "third-party beneficiary" did not appear in the counterclaim. Moreover, Rathbun did not allege that Thermocore had breached any agreement that was "entered into primarily and directly for [Rathbun's] benefit." *See* ***id.*** Nor did Rathbun attach a copy of any such agreement to his counterclaim. Thus, under ***Hoida***, Rathbun failed to plead a third-party beneficiary claim with respect to Thermocore.

¶40 Rathbun also failed to plead a third-party beneficiary claim with respect to Thistlewood, Dominion's insured. His third-party complaint against Thistlewood alleged that: (1) Thistlewood was negligent; (2) Thistlewood was responsible for Ramsden's negligence; and (3) Thistlewood breached a contract with Rathbun. Again, the third-party complaint does not contain the words "third-party beneficiary." Rathbun never alleged that Thistlewood entered into a contract with Ramsden "primarily and directly for [Rathbun's] benefit." *See* ***id.*** Moreover, Rathbun did not attach a copy of any agreement to the third-party complaint. Consequently, Rathbun did not plead a third-party beneficiary claim with respect to Thistlewood.

¶41 Rathbun argues that, even if he did not formally plead a third-party beneficiary claim, Thermocore and Dominion consented to try the case on that basis. However, Rathbun has not pointed to any instance where Thermocore or Dominion, either orally or in writing, agreed to allow a third-party beneficiary claim. In fact, it appears that Rathbun first raised his third-party beneficiary theory in his proposed jury instructions and special verdict. Thermocore promptly filed written objections to those documents, contending that Rathbun had never pled a third-party beneficiary claim. Then, at the February 19 motion hearing, both Thermocore and Dominion argued that Rathbun should not be able to bring a third-party beneficiary claim. Thus, there is no support for Rathbun's contention that Thermocore and Dominion consented to try the case on a third-party beneficiary theory.

¶42 Citing WIS. STAT. § 802.09(2), Rathbun suggests that the circuit court should have allowed him to amend his pleadings to conform to the evidence. However, Rathbun never moved the court for an amendment to conform to the evidence. We generally do not consider arguments raised for the first time on

appeal. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). Because Rathbun never pled a third-party beneficiary claim, and never sought leave to amend his pleadings, the circuit court correctly refused to allow him to proceed on a third-party beneficiary theory.

III. Stay on enforcement of the construction lien

¶43 Rathbun next contends that the circuit court erred by lifting the stay on the enforcement of Thermocore's construction lien. Rathbun argues the court "erroneously exercised its discretion in reversing its prior order with respect to the lien deposit." However, we do not agree that the court reversed its prior order by lifting the stay.

¶44 When the court granted summary judgment on Thermocore's construction lien claim, it also ordered that Thermocore "may not execute upon this Judgment until the rest of this case has been settled with the Court." The stay was not indefinite. Instead, it was contingent on the conclusion of the case. The case was concluded on May 24, 2010, when the court issued a written order dismissing Rathbun's claims against Thermocore and Dominion. Thus, as of May 24, the contingent basis for the stay was removed, and nothing prevented the circuit court from lifting the stay.

¶45 Moreover, as Thermocore points out, after the stay was lifted, the construction lien funds were released. Consequently, Thermocore contends the "issue of a stay to prevent that from happening is now moot." Rathbun does not respond to this argument, and we therefore deem it conceded that the issue of the stay is moot. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). We need not address moot

issues. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425.

By the Court.—Order affirmed.

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