COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1097 **Cir. Ct. No. 2008CV250**

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

VOYAGER VILLAGE P.O.A., INC.,

PLAINTIFF-RESPONDENT,

V.

BROOKS DENNIS LETOURNEAU,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Burnett County: KENNETH L. KUTZ, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Brooks Letourneau appeals a judgment dismissing his counterclaims after a bench trial. Voyager Village P.O.A., Inc. (the Association) sued Letourneau for unpaid property owners association annual lot dues. Letourneau counterclaimed, alleging common law and statutory

misrepresentation claims and breach of contract. Letourneau claimed he was misled to believe that his purchase of additional adjacent vacant lots would not result in additional, per lot, annual dues. We agree with the circuit court that Letourneau's common law claims are barred by the economic loss doctrine, that the statutory claims fail because the real estate agent was acting as an independent contractor, and that the contract claims fail because Letourneau may not rely on parol evidence. We therefore affirm.

BACKGROUND

¶2 Letourneau purchased a vacant lot in 1999. The purchase was subject to a recorded Declaration of Covenants, a copy of which Letourneau received. The recorded covenants required lot owners to pay annual assessments to the Association for every lot owned.[1] However, the covenants provided that when a home was constructed on contiguous lots, the owner could apply to have the lots treated as a single lot for purposes of the declaration.[2]

[1] ARTICLE IX, Section 1. of the declaration provided:

> Each Owner of a Lot ..., by acceptance of a deed or other conveyance, whether or not it shall be so expressed [therein], shall be deemed to ... agree to pay to the Association general assessments .... The annual assessment ... shall be a charge on the land and shall be a continuing lien upon the Lot ... against which each such assessment is made.

Further, ARTICLE I, (d) defined a "Lot" as "any numbered lot shown upon any recorded final plat of the Properties."

[2] ARTICLE IV, Section 5. of the declaration provided:

(continued)

¶3 In 2005, Letourneau received two documents by mail promoting a special offer allowing Association members to purchase adjacent lots at a discount. The first was a letter directed to "All members of the [Association]," from "Brian Langdon / Northwoods Properties." The letter explained that Northwoods was the broker and marketing agency for the Voyager Village development, and stated:

> Last year, as you may recall, the Association's directors approved a plan that enables current members to expand their ownership to a grand total of four contiguous lots without being assessed an increase in annual dues for the larger parcel. .... As a member of the POA, you can buy additional lots adjacent to your property at a 40% discount. But keep in mind that this price reduction expires December 31, 2005, and any purchase is subject to current title restrictions and POA rules.

The second document was a flyer from Northwoods. It noted that Northwoods' office was located within Voyager Village and that its real estate agents lived there as well. The flyer indicated: "Voyager Village will allow you to buy the adjoining lot, subject to restrictions, at a 40% discount through December 31, 2005 to combine up to 4 lots and pay one association dues."[3]

> Whenever two or more contiguous Lots in the development shall be owned by the same person, and such person shall desire to use two or more of them as a consolidated site for a single dwelling house, he shall apply to the [Association] for a permission to depart from the setback requirements along the internal Lot lines of the consolidated site. If written permission for such a use shall be granted, and a building built in departure of the original setback requirements, the Lots constituting the consolidated site shall be treated in other respects as a single Lot for the purpose of applying this Declaration.

[3] The record contains an Association pamphlet that sets forth the recorded declaration's contents. Additionally, the pamphlet includes several addenda. It is unclear whether the addenda were recorded. ADDENDUM B, dated April 29, 2001, provides:

(continued)

¶4 Letourneau met with one of Northwoods' agents, David Anderson. Anderson informed Letourneau that he was a dual agent, representing both the Association and any prospective buyers. The circuit court noted, but did not resolve, conflicting testimony concerning the discussions between Anderson and Letourneau. Letourneau stated he brought the two promotional mailings with him and that Anderson assured him the vacant lots would be combined as one for assessment purposes. Letourneau also testified Anderson did not provide a copy of the covenants or direct him to the particular section addressing combining lots for assessment purposes. Anderson, on the other hand, testified that, consistent with his normal practice, he discussed the covenants and restrictions on the lots with Letourneau.

¶5 The two met later to prepare an offer to purchase. Letourneau testified that Anderson confirmed there would be only one assessment. Letourneau further claimed Anderson did not explain any restrictions on the future use or sale of the lots. The purchase offer Anderson prepared contained no reference to lot assessments, or the joining of lots for that purpose. It did,

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> Applications to combine lots shall be received ... by March 31st to qualify for payment of one general assessment.
>
> A maximum of four (4) contiguous lots may be combined ....
>
> To combine lots ... prior to new construction, an approved building permit is required from the [Association] by March 31st of anticipated construction year and substantial progress shall be completed prior to January 1st of the following year.
>
> ....
>
> Should the conditions for combining lots not be satisfied by December 31st of the year the application is requested, assessments for each lot must be paid for that year.

however, provide: "The Grantee agrees that [lots 24, 25, and 26] shall never be conveyed separately from Lot 23 ... and that if this restriction is ever violated by the Grantee ..., title to the land conveyed herein shall immediately revert to the Grantor ...."

¶6 Following Letourneau's purchase of the three additional vacant lots, he received a letter from the Association indicating he would be required to pay four separate assessments on his vacant lots. Letourneau refused to pay, and the Association ultimately sued. It contended Letourneau owed approximately $10,800 in dues and interest on his three additional vacant lots for 2006 through 2009.

¶7 Following a bench trial, the court issued a written decision dismissing Letourneau's counterclaims and granting judgment on the Association's claim. The court concluded Letourneau's common law tort claims were barred by the economic loss doctrine, the statutory claims failed because Anderson was an independent contractor, and the contract claims failed because Letourneau could not rely on parol evidence. Letourneau now appeals.

DISCUSSION

¶8 Letourneau alleged claims of intentional, negligent, and strict responsibility misrepresentation against the Association. The court, "[a]ssuming without deciding" that Anderson told Letourneau all four vacant lots would be combined for assessment purposes, held that the claims were barred by the

economic loss doctrine.[4] Generally, the economic loss doctrine bars tort claims alleging that a product is inferior, does not work for the general purposes for which it was manufactured, or does not meet a contracting party's expectations. ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶¶28-29, 283 Wis. 2d 555, 699 N.W.2d 205. Application of the economic loss doctrine presents a question of law subject to independent review. ***Id.***, ¶10.

¶9 Letourneau does not dispute that his claims are generally subject to the economic loss doctrine.[5] Instead, he argues the fraud in the inducement exception applies. For the narrow fraud in the inducement exception to apply, the misrepresentation must have induced the buyer to enter into the contract and must be "'extraneous to, rather than interwoven with, the contract.'" ***Id.***, ¶42 (quoting ***Digicorp, Inc. v. Ameritech Corp.***, 2003 WI 54, ¶47, 262 Wis. 2d 32, 662 N.W.2d 652). Stated otherwise, the exception does not apply to matters whose risk and responsibility relate to the quality or characteristics of the goods for which the

[4] The circuit court further concluded that pursuant to ***Shister v. Patel***, 2009 WI App 163, 322 Wis. 2d 222, 776 N.W.2d 632, the economic loss doctrine would not bar Letourneau's tort claims against Anderson or Northwoods, because they were not parties to the purchase contract. The court noted, however, that "those persons are not party to this action, and their liability will have to be determined at some other time."

[5] In the circuit court, Letourneau argued that, pursuant to WIS. STAT. § 895.10, the economic loss doctrine did not apply to real estate transactions. The court rejected that argument because the facts giving rise to this case occurred before the statute's effective date in April 2009.

Letourneau also argues, ironically—for the first time in his reply brief, that the Association forfeited any argument regarding the economic loss doctrine because it failed to address the issue in the circuit court. Arguments raised for the first time in a reply brief are generally disregarded. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981). Regardless, both Letourneau and the circuit court did address the economic loss doctrine.

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

parties contracted, or which otherwise involve performance of the contract. ***Id.***, ¶¶42-43.

¶10 Letourneau argues that Anderson's misrepresentation "did not relate to the character of the lots but rather was an extraneous issue concerning the amount that would be charged for assessments." We disagree. Whether the individual lots were effectively merged into a single lot directly implicates the characteristics of the lots. Moreover, Letourneau asserts that he believed the joining of the lots to be a material component of his contract with the Association. Indeed, he argues the Association breached the contract by failing to join the lots for purposes of the annual assessments. He could have protected his contractual rights to such a promise by simply including a provision in the contract to the effect that, "Seller agrees that lots w, x, y, and z are merged for purposes of the recorded declaration and shall be charged a single lot assessment." The economic loss doctrine's very "purpose is to preserve the distinction between contract and tort[.]" ***Id.***, ¶28.

¶11 We further observe that the provisions for annual assessments on individual lots and for joining the lots for purposes of the declaration are found in the previously recorded declaration that runs with the land and limits the title rights taken by Letourneau. Letourneau received a copy of that declaration when he purchased his first lot. The standard form offer to purchase Letourneau's new lots stated that conveyance of title was subject to "recorded building and use restrictions and covenants." The provisions are therefore intertwined with the real estate transaction. Because combination of the lots for assessment purposes relates to the character of the property purchased, involves performance of the contract, and is generally intertwined with the transaction, the fraud in the inducement exception is inapplicable.

¶12 Letourneau next argues the Association is both directly and vicariously liable for Anderson's misrepresentations as its agent under various statutory provisions, including WIS. STAT. § 452.133; WIS. STAT. § 452.134; WIS. STAT. § 452.135; and WIS. STAT. § 452.139(2)(a). Generally, these statutes set forth a real estate broker's duties to clients and customers. The circuit court held that the Association could not be held vicariously liable because it determined Anderson was an independent contractor.

¶13 Letourneau argues Anderson was the Association's agent, and not an independent contractor, because he was president of its board. Letourneau's argument lacks proper development and citation to legal authority. He cites no authority or theory establishing how an agency relationship results in vicarious liability in the first place. We therefore need not consider his vicarious liability argument further. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). Nonetheless, we observe that the circuit court accepted Anderson's testimony about his separation of duties between the Association and his real estate practice. Based on those facts, the court concluded Anderson was an independent contractor and therefore no liability could be imputed to the Association.[6] Again, Letourneau fails to present any meaningful analysis, aside from merely asserting that Anderson was not an independent contractor because of his position on the Association's board.

¶14 Letourneau also argues the Association is directly liable, pursuant to WIS. STAT. § 452.139(2)(a). Section 452.139 provides, as relevant:

[6] The court indicated Anderson might have liability for the alleged statutory violations but, again, noted he was not a party to this case.

> **452.139 Changes in common law duties and liabilities of brokers and parties. (1)** COMMON LAW DUTIES OF BROKER. The duties of a broker specified in this chapter or in rules promulgated under this chapter shall supersede duties or obligations under common law to the extent that those common law duties or obligations are inconsistent with the duties specified in this chapter or in rules promulgated under this chapter.
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> **(2)** MISREPRESENTATION BY BROKER. (a) A client is not liable for a misrepresentation made by a broker in connection with the broker providing brokerage services, unless the client knows or should have known of the misrepresentation or the broker is repeating a misrepresentation made to him or her by the client.

Letourneau argues the Association knew or should have known of the representations in the two promotional mailings that were sent to all members of the Association because Anderson, who admitted knowledge of the documents, was the president of the Association's board. That however, is the extent of Letourneau's argument. That is, he merely recites the language from para. (2)(a) and asserts that the Association is directly liable, regardless of agency law and vicarious liability.

¶15 Letourneau does not, however, even mention that the circuit court overlooked his direct liability argument,[7] much less explain whether he believes WIS. STAT. § 452.139(2)(a) refers to common law claims, creates its own cause of action, or merely sets forth a standard for other statutory claims. His two references to para. (2)(a) simply appear amidst a jumble of arguments addressing

[7] Letourneau did cite WIS. STAT. § 452.139(2)(a) in his two trial briefs for the proposition of direct liability, and the circuit court's decision acknowledges his reliance on that section. Letourneau's argument there, however, was similarly, if not more, vague and undeveloped than his argument here.

various sections of WIS. STAT. ch. 452; vicarious liability; and common law claims for strict, negligent, and intentional misrepresentation.

¶16 The Association, for its part, fails to respond to Letourneau's argument; its brief never mentions WIS. STAT. § 452.139 or direct liability. Ordinarily, we would treat this as a concession. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). However, Letourneau's vague, unorganized argument regarding § 452.139(2)(a) is not adequately developed. We therefore do not consider it further. *See* ***Flynn***, 190 Wis. 2d at 39 n.2.

¶17 Letourneau next argues he had a valid breach of contract claim for the Association's failure to combine the four vacant lots for assessment purposes. Letourneau's argument, however, relies on Anderson's alleged oral statements and the representations set forth in the two promotional mailings. This argument fails because it improperly, and entirely, relies on parol evidence.

¶18 If a contract is unambiguous, our attempt to determine the parties' intent ends with the language of the contract, without resort to extrinsic evidence. ***Huml v. Vlazny***, 2006 WI 87, ¶52, 293 Wis. 2d 169, 716 N.W.2d 807. Further, as the circuit court observed, the offer to purchase contains an integration clause stating that the written contract is the complete and final agreement between the parties and that all prior agreements and discussions were merged therein. The integration clause precludes consideration of parol evidence. *See* ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶39, 330 Wis. 2d 340, 793 N.W.2d 476.

¶19 Additionally, Letourneau fails to address the circuit court's reliance on the integration clause to preclude consideration of parol evidence. Therefore,

we deem Letourneau to have conceded the validity of that holding. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

¶20 Letourneau further argues that the parties' contract was void because it contained a restraint on alienation and because it was ultra vires. The circuit court held that these claims were not adequately pled, explaining: "The first time that these claims are even mentioned is in the defendant's written closing arguments, long after the plaintiff would be put on notice of these claims and have a fair opportunity to respond to them at trial." Again, Letourneau fails to address this holding. He therefore concedes its validity. *See* ***id.***

¶21 As a final matter, we observe that, while neither party's briefs are models of appellate practice, the Association's brief is particularly troubling. At one point, it asserts:

> The fact finder in this case, Judge Kutz[,] after hearing all the testimony ... believed agent, David Anderson, that Letourneau had received proper brokerage services from Anderson before and up to the time of closing. In that the judge heard the testimony and is in the best position to judge the credibility of the competing witnesses, this credibility judgment should be upheld.

The Association provides no record citation for this assertion. It cannot because the representation is entirely contrived. As noted above, the circuit court found it unnecessary to resolve conflicting testimony. Further, as we observed in footnotes one and three, the court noted Anderson may in fact be liable for the alleged tort and statutory violations. The Association also asserts: "The judge in his decision stated[,] 'The court finds Anderson's testimony credible' and in this case found Anderson did explain to Letourneau the singular reason for [consolidation] of [Association] lots." While the first half of this assertion is literally true, the court's credibility determination was limited to uncontroverted testimony

regarding Anderson's separation of duties as board president and as real estate agent. The court made no findings whether Anderson explained anything to Letourneau. Counsel's misrepresentations to this court are dismaying, to say the least.

By the Court.—Judgment affirmed.

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