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DISTRICT III

July 9, 2024

To:

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Circuit Court Judge
Electronic Notice

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Douglas County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1174

Michael Patrick O'Keefe v. Amazon Inc. / Cricket Group Inc.
(L. C. No. 2022CV4)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Michael Patrick O'Keefe, pro se, appeals a circuit court order dismissing his amended complaint against Amazon Inc. and Capital One, N.A. (collectively, "the defendants"). O'Keefe argues that the circuit court did not have sufficient grounds for dismissal. Based upon our review

of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

We take the following facts from O’Keefe’s amended complaint.² O’Keefe purchased a Hensel bicycle on Amazon sometime “in or about 2020” using a Capital One credit card. O’Keefe subsequently returned the bicycle because he alleged it was defective. Amazon issued a return authorization on August 21, 2020, and both Amazon and Capital One initially credited O’Keefe’s account. Capital One subsequently informed O’Keefe that it was issuing a chargeback because Amazon notified Capital One “that the goods were as described and in good condition.” O’Keefe did not receive any notice from Amazon. O’Keefe attempted to resolve the issue, but neither defendant accepted responsibility. O’Keefe made payments on the charge “in order to not endanger his credit standing.” After O’Keefe filed suit in federal court, his “account was credited in an amount sufficient to reimburse [O’Keefe] for the payments he had previously made.”

On January 5, 2022, O’Keefe filed the present action pro se, submitting a statement in which he requested punitive damages from the defendants. He subsequently retained an attorney who filed an amended complaint on February 25, 2022. The amended complaint asserted a claim for punitive damages based on the defendants’ “willful and wanton disregard for [O’Keefe’s] rights.”

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

² O’Keefe initially filed this action pro se and submitted a statement to the circuit court containing his allegations against Amazon and Capital One. O’Keefe subsequently retained counsel who filed an amended complaint and represented O’Keefe at the hearing on the motions to dismiss.

Both defendants filed motions to dismiss on the ground that O’Keefe failed to state a claim on which relief could be granted. In their motions, the defendants explained that this action was O’Keefe’s fourth lawsuit arising from the same facts. Both defendants sought dismissal with prejudice.

At the motion hearing on May 27, 2022, O’Keefe “acknowledge[d] ... that punitive damages [are] not a stand-alone cause of action.” O’Keefe also requested permission to file a motion for leave to amend the complaint to add a claim for breach of contract or, alternatively, asked that the complaint be dismissed without prejudice. Capital One opposed this proposed amendment, arguing that O’Keefe would not be able to satisfy the elements for breach of contract and that punitive damages are not available for a breach of contract claim. Regarding O’Keefe’s alternative request for dismissal without prejudice, Capital One argued that because this lawsuit was O’Keefe’s fourth action based on the same facts, O’Keefe should not be given yet another opportunity to try to develop a theory of liability.

On June 1, 2022, the circuit court issued a written decision granting the defendants’ motions to dismiss O’Keefe’s complaint with prejudice. The court explained that O’Keefe had not filed a timely amendment under WIS. STAT. § 802.09(1)³ and that punitive damages were not available for the proposed breach of contract claim. On the following day, the court clarified that § 802.09(1) required O’Keefe to obtain leave of the court for any amendment because he had

³ The circuit court initially stated that O’Keefe could have amended his complaint as a matter of course prior to the motion hearing. *See* WIS. STAT. § 802.09(1) (“A party may amend the party’s pleading once as a matter of course at any time within 6 months after the summons and complaint are filed.”).

already amended his complaint once. The court later entered a written order of dismissal, and O’Keefe filed a pro se notice of appeal.

“Whether a complaint states a claim upon which relief can be granted is a question of law for our independent review.” *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693. Here, the only claim in O’Keefe’s amended complaint was a claim for punitive damages. The circuit court determined that “punitive damages are a remedy and not a cause of action.” Accordingly, the court dismissed O’Keefe’s amended complaint.

On appeal, O’Keefe argues that the circuit court erred by determining that there were sufficient grounds for dismissing his amended complaint. O’Keefe does not, however, cite any authority that would support a stand-alone claim for punitive damages.⁴ Capital One argues that “the rule is well established in this state that a claim for punitive damages alone is not sufficient to support a cause of action.” See *Hanson v. Valdivia*, 51 Wis. 2d 466, 474, 187 N.W.2d 151 (1971); see also *Tikalsky v. Friedman*, 2019 WI 56, ¶56, 386 Wis. 2d 757, 928 N.W.2d 502 (Ziegler, J., concurring) (“To seek ... punitive damages, a party must first succeed on an underlying cause of action. If the party does not succeed on an underlying cause of action, then it is not entitled to any relief.”). Because O’Keefe’s amended complaint did not include any underlying cause of action, the court properly dismissed it.

⁴ Among other things, an appellate brief must contain “the contention of the appellant, the reasons therefore, with citations to the authorities, statutes and parts of the record relied on.” WIS. STAT. RULE 809.19(1)(e). Although O’Keefe is proceeding pro se in this appeal, our supreme court has explained that pro se appellants “are bound by the same rules that apply to attorneys on appeal.” See *Waushara County v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992).

We now turn to whether the circuit court erred by dismissing the complaint with prejudice, rather than granting O’Keefe leave to amend the complaint to add a breach of contract claim. “The decision to grant leave to amend a complaint is within the [circuit] court’s discretion.” *Carl v. Spickler Enters., Ltd.*, 165 Wis. 2d 611, 622, 478 N.W.2d 48 (Ct. App. 1991). “We affirm a [circuit] court’s exercise of discretion if the court applied the correct legal standard to the facts of record in a reasonable manner.” *Mach v. Allison*, 2003 WI App 11, ¶20, 259 Wis. 2d 686, 656 N.W.2d 766 (2002).

In dismissing the complaint with prejudice, the circuit court found it significant that O’Keefe did not seek leave to amend the complaint before the hearing on the motion to dismiss. Moreover, the court questioned whether O’Keefe had any viable claim for relief, given O’Keefe’s allegation that he had already received a full refund. The court further noted that punitive damages are generally not available for a breach of contract claim. *See Entzinger v. Ford Motor Co.*, 47 Wis. 2d 751, 757, 177 N.W.2d 899 (1970) (“Punitive damages are not allowed for a mere breach of contract.”). Accordingly, the court concluded that “dismissal with prejudice is appropriate under the facts of this case.”

O’Keefe does not argue that the circuit court erred by rejecting the proposed breach of contract claim. On the contrary, O’Keefe agrees that this case does not involve a breach of contract. Because O’Keefe has abandoned the only argument for leave to amend the complaint that he made in the circuit court, we could affirm the court’s order on that basis alone.

Instead, O’Keefe argues that the defendants’ conduct amounts to fraud. The initial problem for O’Keefe is that he did not ask the circuit court for leave to amend his complaint to add a fraud claim. An “appellant [must] articulate each of its theories to the [circuit] court to preserve its right

to appeal.” *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476 (first alteration in original; citation omitted). As we explained in *Schonscheck*, “[i]t is ... unfair and certainly illogical to expect [circuit] courts to discern and resolve every ‘argument’ that could have been but was not raised in resolving an issue.” *Id.* Accordingly, O’Keefe has forfeited the argument that the court should have granted him leave to amend the complaint to add a claim for fraud. See *Northbrook Wis., LLC v. City of Niagara*, 2014 WI App 22, ¶20, 352 Wis. 2d 657, 843 N.W.2d 851 (“Arguments raised for the first time on appeal are generally deemed forfeited.”).

Capital One further argues that “dismissal with prejudice is appropriate” because “there is no likelihood that [O’Keefe] will succeed on” any underlying claim. See *Wisconsin Ass’n of Nursing Homes, Inc. v. Journal Co.*, 92 Wis. 2d 709, 721-22, 285 N.W.2d 891 (Ct. App. 1979) (holding that the circuit court did not err by denying the plaintiff an opportunity to replead because “plaintiffs would be equally unsuccessful given the opportunity to plead over”). In particular, Capital One contends that the fact that O’Keefe received a full refund would be fatal to a fraud claim, or any other claim for damages. See *D.R.W. Corp. v. Cordes*, 65 Wis. 2d 303, 309, 222 N.W.2d 671 (1974) (“Actual damage is an essential element in a cause of action based on fraud.”); *Hanson*, 51 Wis. 2d at 474 (“There must be a showing of some actual injury which would justify an award of actual or compensatory damages before punitive damages may be awarded.”).

In his reply brief, O’Keefe does not dispute that the facts set forth in his amended complaint are insufficient to state any claim for relief. Instead, O’Keefe asserts, for the first time, that he “was shorted \$.40 of full restitution.” O’Keefe’s assertion is inconsistent with his representations to the circuit court. Specifically, the amended complaint alleged that O’Keefe’s “account was credited in an amount sufficient to reimburse [O’Keefe] for the payments he had previously made.”

In addition, during the hearing on the motions to dismiss, O’Keefe’s attorney confirmed that O’Keefe “was compensated for exactly what he paid.” O’Keefe contends that his attorney misrepresented the facts. O’Keefe does not, however, explain why he did not raise this issue until his reply brief. “It is a well-established rule that we do not consider arguments raised for the first time in a reply brief.” *Bilda v. County of Milwaukee*, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

Because O’Keefe has not developed any argument that the circuit court erred by concluding that dismissal with prejudice was appropriate under the facts of this case, we affirm the circuit court’s order.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals