

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 1, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-2818

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ALLAN ARNOLD,

Plaintiff-Appellant,

v.

**PVH, INC.,
a Wisconsin Corporation,**

Defendant,

**FOOD SERVICES, INC.,
a Wisconsin Corporation and
FIRSTAR BANK MILWAUKEE, N.A.,
a national banking association,**

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS P. DOHERTY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Allan Arnold appeals from a summary judgment dismissal of his suit against Food Services, Inc., and Firststar Bank Milwaukee, N.A.¹ Arnold's complaint alleged causes of action for unjust enrichment against Food Services and Firststar, and causes of action for civil conspiracy, promissory estoppel, and a violation of § 180.1202, STATS., against Firststar. The trial court concluded that there were no genuine issues of material fact and that Food Services and Firststar were entitled to summary judgment dismissal as a matter of law. We agree with the trial court and affirm.

I. BACKGROUND.

Arnold was a minority shareholder of PVH, Inc., a Wisconsin corporation involved in the food-vending business. Arnold and Pamela Von Haden were the corporation's two shareholders; Arnold invested \$100,000 in PVH and owned 24.5% of its stock, Von Haden owned the rest.

PVH was also funded by loans and two revolving credit agreements from Firststar that totalled over \$150,000. These debts were secured by a 1991 general security interest agreement in all of PVH's equipment, fixtures, and inventory.

In May 1993, Firststar notified PVH that it was delinquent on two loans and in default on a third. In June 1993, PVH entered into a contract with Food Services, whereby Food Services assumed the management of PVH's existing vending operations for a fee of eight percent of PVH's net profits. Any other profits up to \$15,000 per month were to go to PVH, with excess profits being retained by Food Services. In June 1993, PVH was again delinquent on its Firststar Loans; PVH and Firststar entered into a Collateral Surrender Agreement where PVH irrevocably and unconditionally surrendered its collateral; that is, all fixtures, equipment, etc.

Further, during the course of his involvement with PVH, Arnold guaranteed the leases of several vending machines leased by PVH. By the

¹ A third defendant, PVH, Inc., is not a party to this appeal.

spring of 1993, Arnold was obligated to make lease payments on four of those leases—totalling over \$5,500 per month. PVH used this equipment but did not reimburse Arnold for its use. Once Arnold became aware of PVH's contract with Food Services and the collateral surrender to Firststar, he voiced his concerns to Firststar as all cash generated by PVH's operations was paid partially to Firststar and partially to Food Services, with Arnold receiving no payments from PVH's sales.

Through the early fall months of 1993, Arnold and Firststar held meetings to rectify the situation. Firststar allegedly represented to Arnold that if he and PVH were to enter into a lease for the equipment for which he had financial responsibility, Firststar would release payments to him to defray the costs of the equipment for which he was financially responsible. Hence, in October 1993, Arnold purchased the vending equipment at issue in two of PVH's vending leases and cured the defaults on the remaining leases. A written lease between Arnold and PVH was then prepared, but it was never executed for reasons Arnold alleged were beyond his control. PVH, unable to remain solvent, was liquidated.

Arnold then filed suit against PVH, Firststar, and Food Services for unjust enrichment, conspiracy, promissory estoppel, and violating § 180.1202, STATS. The essence of his claims was that the agreements entered into by PVH, Food Services, and Firststar “resulted in a situation where [he] was bearing the burden of paying the capital costs of certain vending machine equipment, the revenue of which was being shared by [Firststar and Food Services].” Further, he alleged in affidavits that he was not aware of the agreement between PVH and Food Services and the Collateral Surrender Agreement with Firststar until July 1993, and that he never received notice of the surrender of PVH's assets to Firststar.

Food Services and Firststar separately moved for summary judgment, arguing that there were no genuine issues of material fact and hence, that they were entitled to dismissal of the claims as a matter of law. The trial court granted their motions in a memorandum decision and later filed a judgment dismissing Arnold's complaint against them.

II. ANALYSIS.

Arnold's complaint alleged causes of action against Food Services and Firststar for unjust enrichment, and causes of action for civil conspiracy, promissory estoppel, and a violation of § 180.1202, STATS., against Firststar. We review each cause of action separately.

“Summary judgment is appropriate to determine whether there are any disputed factual issues for trial and `to avoid trials where there is nothing to try.” *Caulfield v. Caulfield*, 183 Wis.2d 83, 91, 515 N.W.2d 278, 282 (Ct. App. 1994) (citation omitted). When we review a motion for summary judgment, we apply the same methodology as the trial court, but we do not accord the trial court's conclusion any deference. *Kotecki & Radtke, S.C. v. Johnson*, 192 Wis.2d 429, 436, 531 N.W.2d 606, 609 (Ct. App. 1995). The methodology is oft repeated:

[W]e first examine the pleadings to determine whether they state a claim for relief. If the pleadings state a claim and the responsive pleadings join the issue, we then must examine the evidentiary record to analyze whether a genuine issue of material fact exists or whether the moving party is entitled to judgment as a matter of law. Further, “[o]n summary judgment, we must draw all justifiable inferences in favor of the non-moving party, including questions of credibility and of the weight to accorded particular evidence.”

Bay View Packing Co. v. Taff, 198 Wis.2d 654, 674, 543 N.W.2d 522, 529 (Ct. App. 1995) (citations omitted).

A. Unjust enrichment claim.

Arnold's complaint first alleges that the agreements between PVH, Food Services, and Firststar “confers a financial benefit upon them, the acceptance and retention of which is inequitable to Arnold without paying him the Value thereof, to wit, the lease expenses for which he is liable.” The elements of a cause of action in equity for unjust enrichment are:

- (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention by the defendant of the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value.”

Puttkammer v. Minth, 83 Wis.2d 686, 689, 266 N.W.2d 361, 363 (1978).

The trial court concluded at summary judgment that Food Services and Firststar did not receive a benefit because they received that which they were entitled to as creditors of PVH under the agreements and credit arrangements. The trial court noted that Arnold's position “contravenes basic precepts of corporate law which favors creditor's rights to corporate profits over shareholders' rights.” The trial court was correct. PVH's profits from the use of the vending machines were paid to PVH's creditors, that is, Firststar and Food Services. Arnold was merely a shareholder of PVH who allowed PVH to use the equipment without negotiating a formal lease for its use. Arnold's complaint did not state a cause of action for unjust enrichment because there was no benefit conferred upon either Firststar or Food Services. Thus, the trial court properly dismissed this cause of action at summary judgment.

B. Conspiracy.

Arnold's complaint next alleges that:

PVH and Firststar did conspire to deprive Arnold of his statutory rights as a shareholder and director of PVH, and they did conspire to create a scheme whereby they would unlawfully profit from the receipts of vending machines the costs of which they were intentionally avoiding and shielding themselves from, all to the great damage of Arnold.

The trial court concluded that the summary judgment materials presented “no evidence of [an] agreement between Firststar, Food Services and Von Haden to profit from the receipts of the vending machines.” We agree that the summary judgment materials do not state a cause of action for civil conspiracy.

“To state a cause of action for civil conspiracy, the complaint must allege: (1) The formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from such act or acts.” *Onderdonk v. Lamb*, 79 Wis.2d 241, 247, 255 N.W.2d 507, 510 (1977). Further, “[t]he gravamen of a civil action for damages resulting from an alleged conspiracy is ... not the conspiracy itself but rather the civil wrong which has been committed pursuant to the conspiracy and which results in damage to the plaintiff.” *Id.* at 246, 255 N.W.2d at 509.

Here, the summary judgment materials show neither an unlawful act by the parties, nor an agreement to unlawfully profit from the receipts of the vending machines. At most, the evidence shows an attempt by the parties to keep PVH operating and to satisfy its creditors. The trial court was correct to dismiss this cause of action against Firststar.

C. Promissory estoppel.

Next, Arnold's complaint alleged that he, “acting in reliance upon the statements made by the Firststar representatives,” agreed with PVH to purchase the leased vending equipment and cure the defaults on the others, and that he would then lease or sublease that equipment to PVH for \$5,000 per month. Arnold further alleged that he did purchase the equipment and cure the defaults, that a lease was prepared but never signed, and that “Firststar would no longer honor its commitment to Arnold, and in fact directed PVH not to enter into a lease with him.” Hence, he alleged that the statements by Firststar “constituted promises which ... should have reasonably expected to induce the actions on the part of Arnold taken by him, and they are therefore binding and enforceable.” The trial court concluded that Firststar's statement was a conditional promise insufficient to trigger a claim for promissory estoppel. We agree.

The elements for a cause of action for promissory estoppel are: “(1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee? (2) Did the promise induce such action or forbearance? (3) Can injustice be avoided only by enforcement of the promise?” *Schaller v. Marine Nat. Bank of Neenah*, 131 Wis.2d 389, 401, 388 N.W.2d 645, 650 (Ct. App. 1986).

We agree with the trial court that the summary judgment materials only show, at best, a conditional promise on the part of Firststar and that this conditional promise was insufficient as a matter of law to trigger the doctrine of promissory estoppel. As the trial court noted:

The condition of the promise that [Arnold] receive[] a payment from PVH for the use of the vending machine was that [Arnold] negotiate a formal lease with PVH, a third party. [Arnold] was not able to negotiate the said lease.... [Further, Arnold] provided no evidence tending to prove that the defendant failed to perform the alleged promise for reasons other than the failed condition.

For this reason, the trial court properly dismissed the promissory estoppel cause of action against Firststar.

D. Section 180.1202, STATS., violation.

Finally, Arnold's complaint alleged that under § 180.1202, STATS., the surrender of PVH's assets to Firststar was “illegal and contrary to law, and under the circumstances Arnold is entitled to an accounting of the funds received by Firststar from Food Services, which funds should be paid over to Arnold on account of the equipment lease liabilities.” Section 180.1202(1), STATS., provides in relevant part:

Except as provided in sub. (5), a corporation may sell, lease, exchange or otherwise dispose of all, or substantially

all, of its property, with or without good will, otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, upon adoption of a resolution by the board of directors approving the proposed transaction and approval by its shareholders of the proposed transaction.

The trial court correctly concluded that § 180.1202 does not place any obligation or duties on corporate creditors and, further, that the rights created under § 180.1202 “could not prevent the Collateral Surrender Agreement because [Arnold] was a 24.5% shareholder and Von Haden was a 75.5% shareholder and her approval was sufficient.” Further, to accept Arnold's reading of the statute would create chaos in financial circles because every time a corporation performed badly and legally surrendered its assets to its creditors, the corporation's minority shareholders would have a cause of action against the creditors. The trial court properly dismissed this cause of action against Firststar.

III. SUMMARY.

In short, the trial court properly granted summary judgment dismissal to Firststar and Food Services because the summary judgment materials clearly show that there were no genuine issues of material fact with respect to any of the alleged causes of action, and that Firststar and Food Services were entitled to summary judgment as a matter of law. Therefore, the judgment dismissing the complaint against Firststar and Food services is affirmed.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.