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DISTRICT II

February 17, 2021

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

2019AP2351 BMO Harris Bank N.A. v. Paschen Gillen Skipper Marine Joint Venture (L.C. #2014CV437)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Paschen Gillen Skipper Marine Joint Venture ("Joint Venture") appeals from a judgment of the Ozaukee County Circuit Court granting summary judgment to BMO Harris Bank N.A. ("BMO"). 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 (2017-18).[1] We determine that the circuit court erred in granting BMO's motion for summary judgment in what BMO characterizes as a "fight over proceeds from an arbitration award won by a non-party," (discussed below) because there are disputed issues of material fact. Accordingly, we reverse.

The origin of this case dates back to 2009 and, as a result, the record is voluminous and complex. However, given disputed issues of fact which preclude summary judgment here, the facts relevant to our resolution of this appeal are more limited. The parties do not dispute the following background facts.

The Joint Venture is a general contractor that was hired by the Public Building Commission of Chicago ("PBC") to perform the work necessary to complete what the parties refer to as "the 31st Street Harbor Project." The Joint Venture subcontracted with the Edward E. Gillen Company ("Gillen") to construct the breakwater that forms the harbor, and Gillen entered into a purchase order contract with Specialty Granules, Inc. ("SGI") to supply the stone necessary to construct the breakwater.[2] Gillen then assigned the SGI purchase order contract to one of its subcontractors, DLH Construction and Trucking, Inc. ("DLH").

In 2011, Gillen began experiencing significant delays and financial problems as a direct result of SGI's inability to meet its contractual obligations. Early in 2012, Gillen abandoned its subcontract, leaving the Joint Venture on its own to complete the harbor project. Around this same time, Gillen and DLH filed a demand for arbitration against SGI seeking damages stemming from

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Beginning around 1990, BMO (and its predecessor in interest) loaned Gillen several million dollars. Gillen's debts were secured by general security agreements.

SGI's nonperformance. In 2014, the arbitrator awarded over $14 million to Gillen, et al., and over $1 million to SGI.

The parties to this appeal diverge on the facts here, where it concerns the ownership of the arbitration award against SGI. BMO claims that Gillen alone owns the award proceeds and the Joint Venture claims that it owns the award or, if not owned entirely by the Joint Venture, then DLH owns at least part of the award. If the award belongs entirely to Gillen, rather than the Joint Venture or DLH, then BMO asserts that it has rights to the proceeds over those of the Joint Venture. BMO argued on summary judgment that the circuit court needed to determine whether the asset was Gillen's in order for BMO to have an interest in it; in other words, as Gillen's lender, any rights of BMO to the proceeds necessarily flow only through Gillen, as there is nothing in the record to suggest that BMO had any lending relationship with DLH or the Joint Venture.

The Joint Venture, which spent over $13.6 million completing Gillen's contract work, asserted its exclusive ownership of the arbitration award proceeds through its equitable subrogation rights in an action that SGI commenced against Gillen in the Cook County Circuit Court in Illinois in early 2012.[3] Gillen and DLH subsequently filed a motion in the Illinois action seeking dismissal of the Joint Venture's claim for equitable subrogation and assertion of its rights to the arbitration award. Gillen and DLH lost their motion with the Illinois court because the court determined that the Joint Venture had pled a set of facts which, if proven, would make the Joint Venture the equitable owner of the arbitration proceeds.

[3] There were also legal proceedings related to the 31st Street Harbor Project filed in the Eastern District of New York, but none of the parties to this action contend that these proceedings have any bearing on the issues currently before us.

BMO, in its capacity as Gillen's bank, did not seek to intervene in the arbitration or the Cook County action to assert either a contractual priority to the proceeds, or its own claim to the arbitration proceeds in equity. Instead, in 2014, after the arbitrator issued its decision, BMO filed the current declaratory judgment action against the Joint Venture, Gillen, and DLH in the Ozaukee County Circuit Court, asserting its rights to the arbitration proceeds. The circuit court subsequently granted a stay in the action "in its entirety, pending resolution or decision in the pending Cook County Consolidated Action (Cook County Circuit Court Case No. 12-CH-417, specifically 12-CH-3946 which is consolidated within it ...) or until further order of this Court."

In 2019, without explanation, the circuit court lifted the stay upon BMO's motion. BMO moved for summary judgment concerning ownership of the arbitration proceeds that remain at issue in the Illinois action, arguing that the arbitration award belongs to Gillen and that BMO is entitled to the award as the first-priority creditor. The Joint Venture objected to the motion arguing, among other things, that genuine issues of material fact exist regarding the ownership of the arbitration award.

BMO asserted at the summary judgment hearing that the main issue facing the circuit court was whether the arbitration award is "a Gillen asset, or is it somehow, under some theory, the property of the Joint Venture." The Joint Venture argued that the ownership of the arbitration proceeds is unsettled and that the Joint Venture and DLH may also have claims to the proceeds.

After argument, the court granted BMO's summary judgment motion. The court found that the arbitration award is a Gillen asset and that despite the fact that DLH had been involved in the arbitration proceedings, the court did not "know what happened to [DLH]." As such, the court did not consider whether DLH may have rights to all or part of the arbitration proceeds. The circuit

court decided BMO's summary judgment motion on the "ground of equity" and concluded that the equities weighed in BMO's favor.

The Joint Venture appeals, arguing in part that we should reverse the circuit court's "drastic remedy" of a grant of summary judgment. In support of its argument, the Joint Venture highlights the material factual disputes in the case, including the as-yet-litigated right to the arbitration proceeds, which is at issue before the Illinois court in an action filed prior to this action. BMO contends that there are no disputed facts, only a disagreement over "the legal standards." BMO argues that the arbitration proceeds belong to Gillen and not DLH or the Joint Venture. Moreover, BMO asserts, "[i]f the Joint Venture actually believed that [DLH] should have been treated as the owner [of the arbitration proceeds], it should have intervened in either the arbitration or follow-on proceedings."[4]

A circuit court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). We review de novo a circuit court's grant of summary judgment, applying the same standards and methodology as applied by the circuit court. ***BMO Harris Bank, N.A. v. European Motor Works***, 2016 WI App 91, ¶14, 372 Wis. 2d 656, 889

[4] BMO ignores the Joint Venture's equitable subrogation claim in the Illinois case and the denial of Gillen/DLH's motion to dismiss in that action, and has not provided us with any explanation as to why it did not seek to intervene in that action at the time that BMO brought this action, or why, for that matter, this dispute over the Gillen/DLH arbitration award should be litigated here when there is another action pending. Although the Illinois court rejected a motion to dismiss, the complaint's factual allegations were detailed and appear to largely track those raised by the Joint Venture here. Neither party has argued that the facts relevant to the Joint Venture's claim to equitable subrogation differ from one action to another and both acknowledge that both disputes address the same money—the arbitration award.

N.W.2d 165. "We owe no deference to the … court's determination and we will reverse a summary judgment ... if material facts were in dispute." ***Id.*** (citations omitted).

For reasons we now discuss, we conclude that the circuit court erred in granting BMO's summary judgment motion. The decision by the court was premature given the fact that the main issue—namely, who owns the arbitration proceeds—is disputed here and is still a live issue before the Cook County court. The circuit court in the instant case acknowledged that the ownership of the proceeds and surrounding issues are disputed facts, stating at the summary judgment hearing as follows:

> Now, I think I have to make some findings so that the ... [r]eviewing [c]ourt can—could take a look at this and say, what did [the circuit court] do.
>
> And to a large extent ... I would say there are discreet bundles of facts that are largely undisputed ....
>
> And then there are disputes, for example, the payment, and the—or the pot of money, where that came from and what it represents, and there are some disputes in there ....

Notably, the circuit court did not address the fact that the dispute over who owns the arbitration proceeds is still active in Cook County. Nor did the court address the existence of this factual dispute in the context of its relevance to the Joint Venture's claim for equitable subrogation in this action. Indeed, the court noted that if the dispute only involved Gillen and Joint Venture, that the latter would have a "really good case for … equitable subrogation." Nevertheless, the court went on to weigh the equities as between BMO and the Joint Venture, deciding that they balanced in BMO's favor, and concluded that because the arbitration was brought over SGI's breach of its contract with Gillen and DLH, "as a matter of law, that pot of money ... is an asset of Gillen's."

We disagree with the circuit court's determination that this is a matter of law. As the court acknowledged in the quotation cited above, and the Cook County court recognized by refusing to grant the motion to dismiss the Joint Venture's assertion of its rights to the proceeds, the ownership of the proceeds is, indeed, legally viable and depends on the facts. We fail to see how we would reach a different conclusion. For example, as the Joint Venture points out in its brief, Gillen and DLH sought in the arbitration (and were initially awarded) over five million dollars for the payment of subcontractor invoices that Gillen and DLH claimed they paid, although the Joint Venture asserts that this is a disputed fact. The Joint Venture submits the affidavit of its forensic accountant asserting neither Gillen nor DLH paid as much as one dollar toward such invoices. Instead, the Joint Venture alleges that it actually stood in Gillen's shoes and resolved several of those invoices by paying out over three million dollars in negotiated settlements. Therefore, the Joint Venture argues, it should be deemed the owner of the arbitration proceeds, with its rights taking precedence over any rights BMO might have to the proceeds. *See* ***Millers Nat'l Ins. Co. v. City of Milwaukee***, 184 Wis. 2d 155, 168-69, 516 N.W.2d 376 (1994) ("[T]he right to subrogation arises 'when a person other than a mere volunteer pays a debt which in equity and good conscience should be satisfied by another[,]'" and "subrogation may be permitted as between two parties when 'the rights of those seeking subrogation have greater equity than the rights of those who oppose it.'" (citations omitted)). BMO disputes these allegations by pointing to statements in the

arbitration award describing the overall nature of the dispute between Gillen/DLH and SGI, but has not identified any definitive facts to dispute the damages pointed to by the Joint Venture.[5]

As the circuit court noted, there are factual issues surrounding DLH's role in this litigation, including whether DLH has or had any entitlement to the proceeds. To explain, the arbitration demand stated that the claims of Gillen and DLH were based on SGI's contract breach, which occurred after Gillen assigned that contract to DLH. Further, Gillen and DLH asserted in related litigation that the arbitration demand against SGI was "filed by DLH, as an assignee of Gillen"; that "DLH asserted claims [in the arbitration] under its direct purchase order with [SGI], and as an assignee of Gillen under the exclusive mining contract"; and that the arbitration "[a]ward was issued to DLH, as an assignee of Gillen." Moreover, DLH and Gillen asserted in related litigation that "DLH is the legal assignee and owner of Gillen's claims." In fact, in its answer to BMO's amended complaint, DLH asserted that it is the owner of the arbitration award. Thus, as of the writing of this summary disposition, it appears that Gillen, DLH, and the Joint Venture remain in a factual battle in Cook County over ownership rights to the arbitration proceeds.[6]

In granting summary judgment, the circuit court appears to have set aside the fact that DLH may have some claim to the arbitration proceeds and the disputes related to this fact. The court

[5] Indeed, BMO acknowledges that the Joint Venture "may be owed some of the money (it claims $13 million, but only a portion of that even arguably seems related to the arbitration proceeds)" and suggests that the Joint Venture's "ongoing Illinois litigation could result in it recovering some or all of that." BMO argues that its claim is only for $7 million and that this amount supports BMO's claim to have greater equity rights. This only underscores that there are disputed issues of fact relating to ownership of the arbitration award.

[6] The record establishes that BMO reached a settlement agreement with DLH and others releasing them as parties to this current action. The parties do not present any arguments indicating whether or to what extent this might matter to the issues before us. Accordingly, we assume without deciding that it does not impact our analysis.

dismissed DLH's potential ownership of the arbitration proceeds based upon its finding that "it was a[n] odd assignment" of rights from Gillen to DLH and because the court was not aware of "what happened to [DLH]."

These disputed facts alone (Who paid the subcontractors? How much was paid to them? What does the pot of money from the arbitration represent? Where did it come from? Does DLH fit into this picture?), whose existence was noted by the circuit court, are enough for the Joint Venture to successfully defend against BMO's claim to entitlement to summary judgment as to ownership of the arbitration proceeds. The circuit court's determination that Gillen is the owner of the arbitration proceeds is contrary to the Illinois court's prior ruling that the same claim for equitable subrogation concerning ownership of the arbitration proceeds is legally viable and should proceed to trial in the previously filed Illinois action. The court's ruling also fails to recognize that BMO's rights to recovery flow through Gillen and that, if Gillen loses the battle over ownership of the arbitration award, then there are no Gillen funds to which BMO's security interest could attach.[7]

The circuit court's own statements regarding the uncertain status of the assignment to DLH and the other factual disputes exemplified above underscore why DLH's, the Joint Venture's, and Gillen's ownership interests in the arbitration proceeds should not have been decided on summary

[7] The circuit court denied the Joint Venture's equitable claim despite finding that the Joint Venture had to step in due to its obligations as the general contractor to complete the project. Namely, the circuit court observed, the Joint Venture "had to step into the shoes of Gillen to complete the work that Gillen didn't do, and [Gillen] left them high and dry." The court went on to explain that the Joint Venture had to "pick up the pieces" after "Gillen walked off the job" to avoid having to pay large amounts of damages if the 31st Street Harbor Project was left incomplete. While BMO disputes this conclusion, based largely on discrete contractual provisions involving Gillen, it fails to address the Joint Venture's obligations to the PBC. In any event, we decline to decide this complex factual issue as a matter of law on this limited record, and because it also will undoubtedly be litigated in the Illinois action.

judgment on this record. *See* ***Martin v. Tower Ins. Co.***, 119 Wis. 2d 48, 349 N.W.2d 90 (Ct. App. 1984) (summary judgment inappropriately granted by circuit court where genuine questions of fact raised concerning equitable entitlement to proceeds at issue); *see also* ***Shovers v. Shovers***, No. 2008AP2012, unpublished slip op. ¶¶30-31 (WI App Aug. 25, 2009) (summary judgment not appropriate where there existed "disputed facts as to whether a valid [stock] transfer occurred" and, thus, a dispute as to ownership of the asset); ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 515-16, 383 N.W.2d 916 (Ct. App. 1986) ("Findings of fact ... depart from summary judgment methodology.... If a factual issue exists, the motion must be denied.").

BMO suggests that none of the disputed facts matter—it asserts that it is an innocent party and as such, as between itself and the Joint Venture, BMO should be entitled to the funds as a matter of equity. Put somewhat differently, BMO argues that the Joint Venture would only be entitled to the benefit of the equitable subrogation doctrine if there was not an innocent party involved. However, BMO does not persuasively establish that the Joint Venture's potential equitable entitlement to some or all of the arbitration proceeds is irrelevant or that BMO's equitable claim is entitled to priority over the Joint Venture's potential equitable rights as a matter of law. For example, BMO fails to provide controlling authority to counter the Joint Venture's assertion that its "rights as subrogee of Gillen's and DLH's unpaid subcontractors and suppliers stand in front of BMO as a secured creditor of Gillen." In fact, BMO effectively concedes this point in stating that such "subrogation interests *can* at times take such precedent." Thus, BMO fails to persuade us that controlling legal principles dictate that a bank takes priority over an equitable subrogor in a contractor case in general and as a matter of law, much less in a contractor case

where there are disputed issues of fact as to whether the bank's client is entitled to the funds in the first place vis a vis equitable subrogation claims.[8]

In sum, the circuit court's fact-finding at the summary judgment stage was inappropriate. *See* ***Elsen***, 128 Wis. 2d at 516 ("In either event, denial or grant [of summary judgment], the trial court makes no factual findings."). The dispute over who owns the arbitration proceeds is a live one, as are the other related factual issues discussed above. And, because it is unclear whether the proceeds are a Gillen asset, a Joint Venture asset, a DLH asset, or some combination of these possibilities, the judgment by the court was improvidently granted. We reverse the circuit court's order of summary judgment and remand for proceedings consistent with this summary disposition.[9]

Upon the foregoing reasons,

[8] In its briefing, the Joint Venture provides us with persuasive authority in support of the proposition that the rights of an equitable subrogee defeat those of a bank with a perfected security interest, regardless of whether the bank is deemed an "innocent party." BMO's response to this authority is that the cases cited by the Joint Venture all involve sureties, and the Joint Venture was not a surety here. BMO's response is inadequate to defeat the argument, however, because it fails to recognize that the cases cited by the Joint Venture involved actions which sounded in equity, not in contract. *See, e.g.*, ***Hartford Fire Ins. Co. v. Henry Bros. Const. Mgmt. Servs.***, No. 10-CV-4746, 2014 U.S. Dist. LEXIS 120452, at *4 (N.D. Ill. Aug. 28, 2014); ***Safeco Ins. Co. v. Wheaton Bank & Tr. Co.***, No. 07 C 2397, 2009 U.S. Dist. LEXIS 67755, at *2 (N.D. Ill. Aug. 4, 2009).

[9] The Joint Venture also makes several arguments regarding the parties' differing interpretations surrounding the application of equity to BMO's claim and whether that doctrine should apply under the circumstances of this case. Because we dispose of this appeal on the ground that summary judgment was improperly granted due to the existence of material disputed facts, we need not address the other issues raised by the parties. *See* ***MBS-Certified Pub. Accts., LLC v. Wisconsin Bell Inc.***, 2013 WI App 14, ¶26, 346 Wis. 2d 173, 828 N.W.2d 575 ("[W]e decide cases on the narrowest possible grounds." (alteration in original; citation omitted)). We also need not address BMO's claim preclusion argument because it was raised for the first time on appeal. *See* ***Schonscheck v. Paccar, Inc***., 2003 WI App 79, ¶10, 261 Wis. 2d 769, 661 N.W.2d 476.

IT IS ORDERED that the judgment of the circuit court is summarily reversed, pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals