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DISTRICT II

September 8, 2021

To:

Hon. Angela W. Sutkiewicz
Circuit Court Judge

Melody Lorge
Clerk of Circuit Court
Sheboygan County

Nathaniel Cade Jr.
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David M. Lucey
Foley & Lardner
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Eric L. Maassen
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Christine K. Nelson
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You are hereby notified that the Court has entered the following opinion and order:

2019AP1698

Timothy Dixon v. CRE Venture 2011-1, LLC (L.C. #2017CV148)

Before Gundrum, P.J., Neubauer and Stark, 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).

Timothy Dixon appeals from a circuit court order granting a motion for reconsideration and dismissing his amended complaint for failure to state a claim. Russell S. Long and Davis & Kuelthau, S.C. (hereafter Long) cross-appeal. 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 (2019-20).¹ We affirm the circuit court's order granting reconsideration and

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

dismissing Dixon's amended complaint. Because we affirm the order, we do not reach Long's cross-appeal.

We recite only those facts necessary to resolve the two issues before this court: whether the circuit court misused its discretion when it granted Long's motion for reconsideration and whether the circuit court erred when it dismissed Dixon's amended complaint for failing to state a claim against Long.

Dixon's amended complaint alleged a breach of contract claim against Long, counsel for CRE Venture 2011-1, LLC. As relevant to this appeal, CRE brought a mortgage foreclosure case against Dixon. Dixon's amended complaint² alleged a breach of contract claim against Long arising from the documents created in the mortgage foreclosure case. In paragraph forty-two of the amended complaint, Dixon alleged that "Long represented to counsel for Dixon, Matthew Jelenchick, that he would hold the Settlement Agreement and related documents in trust pending resolution of an additional potential dispute³ between [Dixon] and CRE. Rather than hold the documents in trust, Long immediately filed the settlement documents" in court. Dixon alleged that the filing of those documents breached Long's agreement with Jelenchick and/or Dixon to hold the documents in trust. Dixon further alleged that Long breached an implied duty

² The amended complaint also alleged various claims against CRE. The Dixon-CRE claims are not relevant to this appeal, and we do not discuss any aspect of them unless a claim relates to Dixon's breach of contract claim against Long.

³ This allegation appears to relate to the River Vision guaranty issue.

of good faith and fair dealing.⁴ Dixon alleged that the documents Long filed restricted his ability to dispose of real estate.

On two occasions, the circuit court addressed challenges to Dixon's amended complaint. The circuit court denied CRE's motion for judgment on the pleadings and then denied Long's motion to dismiss. Long sought reconsideration because the circuit court failed to distinguish between the claims against CRE and the claims against Long. The circuit court reconsidered and granted Long's motion to dismiss the amended complaint as to him.

Dixon challenges the circuit court's decision to reconsider its denial of Long's motion to dismiss. We review the circuit court's denial of a motion for reconsideration for an erroneous exercise of discretion. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. In determining whether the circuit court properly exercised its discretion in connection with the reconsideration motion, we consider the persuasive discussion of the purpose of such a motion in *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987) (citation omitted): "Motions for reconsideration serve a limited function; to correct manifest errors of law or fact or to present newly discovered evidence."

⁴ To the extent Dixon alleged that Long breached his contractual obligation to Dixon pursuant to the Settlement Agreement itself, we reject this claim. Long's client, CRE, was a party to the Settlement Agreement, not Long. Dixon has not offered any persuasive argument that Long was a beneficiary of or a party to the Settlement Agreement to support a claim that Long breached the Agreement.

As the circuit court recognized, its original ruling on Long’s motion to dismiss did not address issues relating to Long’s status in the case. The reconsideration motion was a proper vehicle for focusing the circuit court’s attention on the claims against Long. We conclude that the circuit court properly exercised its discretion when it granted Long’s motion for reconsideration.

We turn to the circuit court’s dismissal of Dixon’s amended complaint for failure to state a claim against Long. The court concluded that the amended complaint did not allege any facts supporting a legal conclusion that Long was a party to a contract.

“A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. Upon a motion to dismiss, we accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom. However, a court cannot add facts in the process of construing a complaint.” *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693 (citations omitted). “Factual assertions are evidenced by statements that describe: ‘who, what, where, when, why, and how.’” *Id.*, ¶21 n.9 (citation omitted). Legal conclusions asserted in a complaint are not sufficient “to withstand a motion to dismiss.” *Id.*, ¶19. Whether a complaint states a claim upon which relief can be granted presents a question of law we decide independently. *Id.*, ¶17. We may consider the documents attached to the amended complaint. *Soderlund v. Zibolski*, 2016 WI App 6, ¶¶38-39, 366 Wis. 2d 579, 874 N.W.2d 561.

It is axiomatic that a breach of contract claim requires a contract between the parties. Dixon argues that correspondence between Jelenchick, his counsel, and Long, CRE’s counsel, created an enforceable contract. “[A] contract consists of an offer, an acceptance and

consideration. An offer and acceptance exist when mutual expressions of assent are present. Consideration exists if an intent to be bound to the contract is evident.” *Gustafson v. Physicians Ins. Co. of Wis., Inc.*, 223 Wis. 2d 164, 173, 588 N.W.2d 363 (Ct. App. 1998) (citation omitted). When the facts are undisputed, the existence of a contract is a question of law for our independent review. *See id.*

We review the allegations in the amended complaint and the documents attached to the amended complaint. *Data Key Partners*, 356 Wis. 2d 665, ¶19; *Soderlund*, 366 Wis. 2d 579, ¶¶38-39. Attached as an exhibit to the amended complaint is Jelenchick’s October 4, 2012 letter to Long stating:

Enclosed please find the signed settlement documents related to CRE and Willows loans, along with the Lease and personal guaranty for Stacked Burger Bar. Also enclosed is the original Stipulation and Order appointing receiving. [sic] Mr. Heaton’s signature will be forthcoming on Monday. I am providing you the settlement and release papers, along with the Lease, to be held in trust until resolution of the River Vision guaranty issue.

We conclude that the October 4 letter does not constitute an offer and does not state consideration.⁵ “An offer must be so definite in its terms ... that the promises and performances to be rendered by each party are reasonably certain.” *Malone by Bangert v. Fons*, 217 Wis. 2d 746, 769, 580 N.W.2d 697 (Ct. App. 1998). Even if the October 4 letter were an offer, the amended complaint does not allege that Long accepted and agreed to act as Jelenchick stated in his October 4 letter. The amended complaint also does not allege that Long had an intent to be bound by the alleged contract between him and Jelenchick, evidencing consideration.

⁵ Dixon argues that the consideration for the contract was an agreement to address the River Vision guaranty issue separately. There is no allegation that Long was a party to any of the settlement-related documents between Dixon and CRE or the River Vision guaranty.

We note the presence in the record of Long's October 30, 2012 letter to Jelenchick⁶ stating:

In accordance with your request, enclosed herewith are conformed copies of [the stipulation and other documents]. Also enclosed is a fully executed lease for the property located at 170 South 1st Street, Milwaukee. I continue to hold the settlement agreement in trust pending resolution of the River Vision guaranty.

The October 30 letter is not attached to the amended complaint. *See Soderlund*, 366 Wis. 2d 579, ¶¶38-39. More importantly, the October 30 letter is not the subject of any factual allegations in the amended complaint.

In the absence of “who, what, where, when, why, and how” allegations regarding acceptance and consideration, *Data Key Partners*, 356 Wis. 2d 665, ¶21, n.9 (citation omitted), the amended complaint merely alleges a legal conclusion that Long was party to a contract. Because the amended complaint did not state a claim against Long upon which relief could be granted, the circuit court properly dismissed the amended complaint as to Long. Absent any contractual obligation owed by Long, the breach of good faith and fair dealing similarly fails.

Dixon argues that the amended complaint states a claim for fraud. For multiple reasons, we disagree. First, Dixon conceded in the circuit court that the amended complaint did not allege fraud. Second, the amended complaint does not plead fraud specifically. WIS. STAT. § 802.03(2); *Friends of Kenwood v. Green*, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271. Finally, the fraud claim appears to be raised for the first time on appeal. *See Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) (we do not consider

⁶ Long's letter appears as an exhibit to CRE's answer to Dixon's original complaint. The letter does not appear as an exhibit to Dixon's amended complaint which added the breach of contract claim against Long.

issues raised for the first time on appeal). Based on the foregoing reasons, we do not consider this argument further.

We take the same approach to Dixon's argument that Long was liable for tortious conduct. The amended complaint alleges claims in contract, not tort. Furthermore, the tort claim appears to be raised for the first time on appeal. We decline to consider this issue raised for the first time on appeal. *See id.*

Dixon's reply brief does not cause us to reach a different disposition in this case. For example, Dixon relies upon Long's answer to paragraph nine of the amended complaint as evidence that Long had a contract to hold the documents in trust. However, paragraph nine alleges matters relating to the creation of the Settlement Agreement and makes no allegation relating to any agreement by Long to hold any documents in trust.⁷

⁷ While we have considered all of the arguments in the briefs, we only discuss those arguments that are necessary to our decision. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (we are not bound to the manner in which the parties have structured or framed the issues). Arguments not mentioned are deemed rejected. *See id.*

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed 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