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DISTRICT II

June 15, 2022

To:

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Circuit Court Judge
Electronic Notice

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
Electronic Notice

Charles J. Hertel
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You are hereby notified that the Court has entered the following opinion and order:

2021AP976 Joseph Gedemer v. Fond du Lac School District (L.C. #2019CV210)

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

Joseph Gedemer appeals from an order of the circuit court granting summary judgment to the Fond du Lac School District (the District) and dismissing his claim for breach of contract. 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.

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

On October 5, 2016, Gedemer, then a junior at Fond du Lac High School, spoke to some students at lunch and sent messages on social media in order to, as he would later describe it, "create a revolution among students who would begin to coincide at a better state than they were before." Although Gedemer's professed intent was to peacefully "bring together groups of students who did not previously talk to each other[,]" school officials and parents perceived his conduct to be a threat. Gedemer was suspended from school for three days and school officials moved ahead with plans to consider expelling him. Timothy Scottberg, who served at the time as the high school's vice principal, investigated Gedemer's conduct. Scottberg spoke with students and parents but did not take any handwritten notes of these conversations and did not take any written statements.

In January 2017, before the District held an expulsion hearing, Gedemer and his parents entered into an agreement with the District under which Gedemer agreed to voluntarily withdraw from the high school through the end of the school year in exchange for the District holding his expulsion proceeding in abeyance (the Agreement). The Agreement allowed Gedemer to apply for reenrollment in the District the following school year if he met certain conditions. In Paragraph 10 of the Agreement, which is the focus of this lawsuit, the parties addressed the handling of certain documents related to Gedemer:

> This agreement is considered a confidential pupil record and will be held subject to WIS. STAT. § 118.125 and Family Educational Rights & Privacy Act (FERPA). No pupil records, other than the official transcript, will be provided to any post-secondary institution except as directed by the parents or adult student with written consent. Disciplinary records, and the related attendance records, will be held in the school district counsel's office for five (5) years post graduation and destroyed at the end of the five (5) year period.

Gedemer and his parents asked that the last sentence in Paragraph 10 be added to the Agreement because they were concerned that information from any records regarding the incident might be disclosed and harm Joseph in the future and wanted all of the records stored in one place and then destroyed. Pursuant to the Agreement, Gedemer enrolled at a different school for the remainder of the school year and chose to remain there for his final year of high school, after which he graduated and was accepted at the Institute of Production and Recording in Minneapolis, Minnesota.

In June 2018, Gedemer's father went to the District's office and asked for copies of the records it was holding pursuant to the Agreement. In response, the District provided him with: (1) a copy of the Agreement; (2) attendance records; (3) "a few brief narrative comments"; (4) a disability evaluation; and (5) one discipline referral. Gedemer's father believed that additional records should have been in the file based on what he had learned about how the incident should have been investigated. To investigate further, Gedemer submitted a letter to the District's superintendent dated August 30, 2018, asking for a "second time a copy of the complete record regarding myself." The letter specifically requested any witness statements, notes, "documented student/staff conversations, records, etc. from any source in the … District."

The District responded to Gedemer's letter on September 18, 2018, providing copies of the documents Gedemer's father had been shown in the District office and a collection of emails. These were all of the records in the District's possession responsive to Gedemer's request. In responding to Gedemer's request, the District asserted it did not withhold any documents related to the conduct that gave rise to the Agreement.

Not satisfied with the District's response, Gedemer commenced this action in May 2019, alleging that the District breached the Agreement by failing to maintain certain records as required under Paragraph 10. Gedemer alleged further that the records the District had allegedly not retained "were critical to … his educational aspirations" and "to help reconcile relationships that have been damaged or lost as a consequence of the actions taken by [the District], including former acquaintances, friends and members of the educational community." Gedemer also alleged that the District's breach had harmed his ability "to be accepted into institutes of higher education and have damaged [his] prospects for post-high school education."

The District moved for summary judgment, arguing that it did not breach the Agreement and that Gedemer had not suffered any cognizable legal injury for which damages could be awarded. The circuit court granted the District's motion. Finding no disputes in the material facts, the court deemed Gedemer's supposition that a more robust investigation into his conduct had been conducted, and that additional documents pertaining to that investigation must exist, to be "raw pure speculation." Gedemer appeals.

We independently review a grant of summary judgment using the same methodology as the circuit court. *See* ***Secura Ins. v. Super Prods. LLC***, 2019 WI App 47, ¶11, 388 Wis. 2d 445, 933 N.W.2d 161. Summary judgment "shall be rendered 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).

A claim for breach of contract requires proof of three elements: "(1) a contract between the plaintiff and the defendant that creates obligations flowing from the defendant to the plaintiff;

(2) failure of the defendant to do what it undertook to do; and (3) damages." ***Brew City Redev. Grp., LLC v. Ferchill Grp.***, 2006 WI App 39, ¶11, 289 Wis. 2d 795, 714 N.W.2d 582, *aff'd* 2006 WI 128, 297 Wis. 2d 606, 724 N.W.2d 879. Neither party disputes that the Agreement satisfies the first element. Gedemer alleges that the District breached its obligations under Paragraph 10, specifically the requirement that the District hold "[d]isciplinary records, and the related attendance records" in the "school district counsel's office for five (5) years post graduation" and destroy them "at the end of the five (5) year period."

The District sought summary judgment as to the element of breach and filed an affidavit from Scottberg, the school official who investigated Gedemer's behavior. Scottberg averred that he did not obtain any witness statements or take any notes of the conversations he had with students and parents about Gedemer's conduct in the course of his investigation. Scottberg stated further that the District has not withheld any documents in response to Gedemer's "requests that relate in any way to the conduct that gave rise to the Agreement" and that the witness statements and notes that Gedemer "believes exist do not exist and have never existed."

To survive summary judgment, Gedemer had to establish a genuine issue of material fact on the element of breach "by submitting evidentiary material set[ting] forth specific facts … pertinent to that element." ***Moran v. Milwaukee County***, 2005 WI App 30, ¶5, 278 Wis. 2d 747, 693 N.W.2d 121 (alteration in original; citation omitted). Gedemer did not do so. He has presented no evidence, via affidavit or otherwise, to contradict the statements in Scottberg's affidavit. Accordingly, we must accept as true that the District has not withheld any documents from Gedemer related to the incident and that the documents Gedemer claims are missing from his disciplinary file do not exist. *See* ***Estate of Oaks v. Stouff***, 2020 WI App 29, ¶29, 392 Wis. 2d 352, 944 N.W.2d 611 ("[E]videntiary facts stated in the affidavits are to be taken as true

if not contradicted by other opposing affidavits or proof." (alteration in original; citation omitted)).

Gedemer's arguments are not persuasive. He argues that the emails provided in response to his written request but not shown to his father when he visited the District office must have been kept somewhere other than the office. He further suggests that the production of these emails supports his contention that there must be other responsive documents. Gedemer cites no evidence in the summary judgment record to support either assertion. They are pure speculation on his part. Based on the record before us, it is just as likely that the emails were stored electronically in the District office when Gedemer's father arrived and were either deemed not responsive or were inadvertently overlooked. Either scenario is irrelevant, as the emails were later produced to Gedemer. His speculation concerning where the emails were stored or that they indicate additional documents must exist is not sufficient to raise a genuine issue of material fact on the issue of breach.[2]

Gedemer further contends that he has not been given access to "the entire set of documents about the Incident" based on his understanding of what documents should have been generated in the investigation, including a police report, witness statements, and other

[2] The District contends that the phrase "disciplinary records" is more limited than Gedemer argues, pointing to emails which were provided to Gedemer. Gedemer describes two of the emails in his discovery response as being related to an inquiry from another school but does not provide any record cite for the emails themselves. We need not address this issue since the District did provide the emails to Gedemer. But even if we assume that "disciplinary records" would encompass any existing documents relating to the incident, given that the District had suspended Gedemer and was considering expulsion, the evidence is undisputed that the District has no documents related to the incident beyond those it has already provided to Gedemer. Even if there were, we note that the Agreement does not unambiguously require the District to do what Gedemer claims—to gather and maintain all the documents associated with the incident in a disciplinary file. Paragraph 10 states only that "[d]isciplinary records, and the related attendance records" are to be held in the District counsel's office. Gedemer has not presented any evidence that the District breached this obligation.

documents. This contention is directly undermined by Scottberg's affidavit. Gedemer cites to no evidence in the record tending to show that the District possesses "disciplinary records" and "related attendance records" beyond what it has already provided to him, much less that the District is not storing those additional records in conformity with Paragraph 10.

Additionally, Gedemer urges us to draw an inference that the District breached the Agreement from several other facts, including that: (1) the school deemed Joseph a "threat," which purportedly triggered a requirement that it generate certain documents in the course of its investigation under the terms of an emergency preparedness manual Gedemer believes the school was obliged to follow; (2) the District's September 18, 2018 letter responding to Gedemer's written request for documents included the following heading: "RE: Response to Public Records Request"; and (3) the district representative who spoke with Gedemer's father in June 2018 exhibited a "blank stare" when Gedemer's father referred to the Agreement. An inference is a conclusion drawn from other facts through a process of reasoning. ***Belich v. Szymaszek***, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999). It requires more than supposition, conjecture, and guesswork. ***Id.***

Considered separately or together, these "facts" do not support an inference of breach. First, the emergency preparedness manual is not part of the record, and Gedemer cites no record evidence to support his belief that it applied to the District. More importantly, assuming the District was obliged to follow the manual, the District has presented unrefuted evidence that none of the documents it purportedly required the District to prepare has ever existed. Gedemer's contention that the opposite is true rests on nothing but speculation. Additionally, the contents of a heading on the District's September 18, 2018 letter and Gedemer's father's description of a District employee's facial response to a reference to the Agreement are not facts

to which reason may be applied to reach a conclusion that the District breached the Agreement. Particularly in view of Scottberg's affidavit, Gedemer has not identified any evidence from which a juror could reasonably conclude that the District has not retained "[d]isciplinary records, and … related attendance records" pertaining to Gedemer in its office.

Gedemer has also not presented evidence to suggest that any breach caused him legally cognizable harm for which damages could be awarded. In his Complaint, Gedemer alleged that the District's breach had "damaged [his] ability … to be accepted into institutes of higher education and … [his] prospects for post-high school education." On summary judgment, however, Gedemer shifted his focus, claiming that the District's breach had damaged his reputation and caused him to lose friendships. In his appellate brief, Gedemer expresses his belief that he "could approach old friends if he had a clearer picture of the Incident from a review of all of the documentation related to it" and that he has lost "the ability to clear his name and to have closure from this Incident." He also expresses concern that documents purportedly being withheld by the District may be disclosed in the future and cause him further harm.

Gedemer's assertions are not sufficient to withstand summary judgment. As the District points out, Gedemer acknowledged that he lost friends as the result of his conduct, not any purported breach of the Agreement. Even if there were additional records**,** we do not see how failing to maintain them in a confidential file in the District's counsel's office that was to be destroyed after five years would harm Gedemer's reputation or cause him to lose friends. The notion that the failure to maintain a confidential file has prevented Gedemer from repairing friendships or clearing his name is entirely speculative and equally specious. In addition, Gedemer points to no authority for the proposition that a loss of friendships is a legally cognizable harm entitling him to damages. Finally, Gedemer's concern that the District might

publicly disclose the documents it is purportedly withholding—even if he could show they existed—is not grounded in any evidence in the record and thus is also purely speculative.[3]

Therefore,

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

[3] Gedemer raises an additional argument: the District's breach entitles him, at a minimum, to an award of nominal damages. We decline to address this argument because of our determination that Gedemer has failed to show a breach and because Gedemer raised the argument for the first time in his reply brief. ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256.