



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

March 21, 2023

To:

Hon. Yadira Rein
Circuit Court Judge
Electronic Notice

Rene L'Esperance
Electronic Notice

Barb Bocik
Clerk of Circuit Court
Outagamie County Courthouse
Electronic Notice

Justin F. Wallace
Electronic Notice

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

2022AP100

Convenient ATM Services, Inc. v. The Riehl Stop, LLC
(L. C. No. 2021CV620)

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).

Convenient ATM Services, Inc., appeals an order dismissing its breach of contract claim against The Riehl Stop, LLC, and a subsequent order reaffirming that decision on reconsideration. 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 For the following reasons, we summarily reverse the circuit court's orders and remand for further proceedings on Convenient ATM's breach of contract claim.

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

On January 28, 2021, Convenient ATM and The Riehl Stop executed an “ATM Site/Location Agreement” (hereinafter, “the Agreement”) pertaining to the installation and operation of an ATM at The Riehl Stop’s business. The Agreement provided that Convenient ATM was “granted the exclusive right to operate one or more ATMs at [The Riehl Stop] during the term of this Agreement.” The Agreement had an effective date of January 28, 2021, and stated that it “shall be binding upon [Convenient ATM and The Riehl Stop] for a term of five (5) years commencing on the Effective Date.” The Agreement further provided:

If this Agreement is terminated without cause by [The Riehl Stop] prior to expiration of the initial term or any renewal term, [Convenient ATM] shall be specifically authorized to retain the last sixty (60) days of Commission as reimbursement for its initial set up expenses as well as being entitled to compensation for the loss of income for the remainder of the term caused by such early termination. Loss of income shall be determined utilizing an average of monthly revenue realized by [Convenient ATM] during the period of time the [ATM] was in operation at [The Riehl Stop], or two hundred dollars per month, whichever is greater.

On August 11, 2021, Convenient ATM filed the instant lawsuit against The Riehl Stop, asserting a single claim for breach of contract. Convenient ATM alleged that the Agreement “required” Convenient ATM to place an ATM on The Riehl Stop’s premises. Convenient ATM further alleged that The Riehl Stop had “refused to allow [Convenient ATM] to install the ATM in its business.” Because of The Riehl Stop’s refusal, Convenient ATM asserted that it was entitled to recover the damages specified in the Agreement. Specifically, Convenient ATM asked the circuit court to award it “\$200.00 per month for a period of five years for a total of \$12,000.00.”

The Riehl Stop filed a motion to dismiss for failure to state a claim upon which relief could be granted. According to The Riehl Stop, the Agreement “was that, at some point in the

future, [Convenient ATM] could put an ATM in The Riehl Stop and, at that point, charge [The Riehl Stop] certain commissions for ATM transactions and the like consistent with the agreement.” The Riehl Stop argued, however, that “nobody ever took any action on this agreement.” Because no ATM was ever installed on The Riehl Stop’s premises, The Riehl Stop argued that Convenient ATM “took no actions nor incurred any expense in reliance on the existence of this agreement.” The Riehl Stop further argued that the damages provision in the Agreement “kicks off with the actual installation of an ATM, which never happened.” In addition, The Riehl Stop argued that the Agreement was unenforceable due to a lack of consideration.

In opposition to The Riehl Stop’s motion to dismiss, Convenient ATM argued that “[t]here is no way this contract can be characterized as an executory contract. The only reason the Agreement wasn’t fulfilled was because [The Riehl Stop] refused to allow the installation of the ATM.”

The circuit court granted The Riehl Stop’s motion to dismiss in an oral ruling, reasoning that there was no “additional consideration” for the “exclusivity provision” in the Agreement. The court likened the exclusivity provision to an “option contract,” which is “voidable” “in the absence of consideration.” The court therefore concluded that, without additional consideration for the exclusivity provision, “the fact that [The Riehl Stop] refused to allow the ATM machine to be installed is not material.”

Convenient ATM moved for reconsideration, arguing that the exclusivity provision in the Agreement did not require separate consideration. Convenient ATM asserted that the exclusivity provision was not akin to an option contract because it “was not contingent upon some future

event. It was enforceable the day the contract was signed and is enforceable as a restrictive use clause within the consideration already agreed to by these commercial parties.”

The circuit court issued a written decision on Convenient ATM’s motion for reconsideration, in which it agreed that “the scant record of its [original] decision [was] insufficient to sustain the order dismissing [Convenient ATM’s] Complaint.” After additional analysis, however, the court again concluded that dismissal was warranted. First, the court concluded that there was insufficient consideration for the Agreement because “the mutual promises [in the Agreement] providing consideration required action by the parties to bind them,” and no such action was taken. The court also concluded that Convenient ATM did not sufficiently plead damages because Convenient ATM “did not actually plead lost income,” as no ATM was ever installed at The Riehl Stop. The court reasoned that the plain language of the Agreement indicated “an intention to provide those damages [for lost income] *after* the ATM machine was installed.” (Emphasis added.)

Convenient ATM now appeals, arguing that the circuit court erred by granting The Riehl Stop’s motion to dismiss and by reaffirming that decision on reconsideration. “A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint.” *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693 (citation omitted). To survive a motion to dismiss, a complaint must allege facts that, if true, would entitle the plaintiff to relief. *Id.*, ¶21. “Upon a motion to dismiss, we accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom.” *Id.*, ¶19. We also consider any documents that are “attached to the complaint and made a part thereof.” *Friends of Kenwood v. Green*, 2000 WI App 217, ¶11, 239 Wis. 2d 78, 619 N.W.2d 271. We do not, however, add facts in the process of construing a complaint, nor do we accept as true any legal

conclusions alleged therein. *Data Key Partners*, 356 Wis. 2d 665, ¶19. Whether a complaint states a claim upon which relief can be granted is a question of law that we review independently. *Id.*, ¶17. The interpretation of an unambiguous contract also presents a question of law for our independent review. *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 507, 434 N.W.2d 97 (Ct. App. 1988).

On reconsideration, the circuit court concluded that Convenient ATM’s complaint failed to state a claim upon which relief could be granted for two reasons: (1) the Agreement was unenforceable due to a lack of consideration; and (2) Convenient ATM did not adequately plead damages. We disagree with both of these conclusions.

“The elements of an enforceable contract are offer, acceptance, and consideration.” *Runzheimer Int’l, Ltd. v. Friedlen*, 2015 WI 45, ¶20, 362 Wis. 2d 100, 862 N.W.2d 879. Consideration is “a detriment incurred by the promisee or a benefit received by the promisor at the request of the promisor.... Neither the benefit to the promisor nor the detriment to the promisee need be actual.” *Id.*, ¶21 (citation omitted). “Additionally, ‘a promise for a promise, or the exchange of promises, will constitute consideration to support any contract of [a] bilateral nature.’” *Id.* (alteration in original; citation omitted).

In this case, The Riehl Stop incurred a detriment by entering into the Agreement, and Convenient ATM received a benefit. Namely, The Riehl Stop granted Convenient ATM the exclusive right to operate an ATM at The Riehl Stop for a specified period of time. Moreover, the parties exchanged mutual promises. The Riehl Stop promised that Convenient ATM would have the exclusive right to operate an ATM at The Riehl Stop for the specified time period, and, in exchange, Convenient ATM promised to pay The Riehl Stop a portion of the surcharge

imposed for each chargeable ATM transaction. Under these circumstances, adequate consideration existed for the Agreement.

The circuit court cited *Nevill v. Johnson Controls International PLC*, 364 F. Supp. 3d 932 (E.D. Wis. 2019), in support of its determination that the Agreement lacked sufficient consideration. The *Nevill* court stated, “In order for mutual promises to furnish consideration for each other and thus create a binding contract, they must impose some legal liability on the persons making them.” *Id.* at 947 (citation omitted). Accordingly, there is no consideration “where performance is solely at the party’s option or discretion, such as when the party is free to either perform or withdraw from the contract at will.” *Id.* (citation omitted).

Based on *Nevill*, the circuit court concluded that the “mutual promises providing consideration” in this case “required action by the parties to bind them.” Specifically, the court concluded that the parties’ mutual promises were not binding until an ATM was actually installed at The Riehl Stop. Because no ATM was ever installed, the court concluded that both parties were free to withdraw from the contract at will, and performance was solely at each party’s option or discretion. *See id.* The court essentially viewed the Agreement as being akin to an option contract. In the court’s interpretation, the Agreement merely governs the parties’ future relationship in the event that an ATM is, at some point, actually installed at The Riehl Stop.

We disagree with the circuit court’s analysis. Instead, we conclude that the Agreement unambiguously granted Convenient ATM the “exclusive right to operate one or more ATMs” at The Riehl Stop. The Agreement had an effective date of January 28, 2021, and expressly stated that it “shall be binding” on the parties “for a term of five (5) years commencing on the Effective

Date.” We read these unambiguous provisions as granting Convenient ATM the right “to operate” an ATM at The Riehl Stop beginning on January 28, 2021, and continuing for five years after that date. The Agreement did not merely grant Convenient ATM the right or option to operate an ATM at The Riehl Stop at some unspecified point in the future; it granted Convenient ATM the right to do so as of January 28, 2021. Accordingly, and contrary to the circuit court’s rationale, performance of the Agreement was not merely at each party’s option or discretion. Under these circumstances, *Nevill* does not support a conclusion that the Agreement is unenforceable due to a lack of consideration.²

The circuit court also concluded that Convenient ATM’s complaint failed to state a claim because it did not adequately plead damages. The court stated that Convenient ATM “did not allege any facts in the [c]omplaint that it incurred expenses on this contract” and “did not actually plead lost income.” The court reasoned that the “five-year revenue stream [that Convenient ATM] claims it was promised depended on the ATM actually being installed.” In essence, the court concluded the Agreement’s plain language showed that the parties did not intend Convenient ATM to be able to recover damages for lost income until after it installed an ATM at The Riehl Stop.

Again, we disagree with the circuit court’s analysis. As just explained, we have concluded that the Agreement affirmatively granted Convenient ATM the right to operate an

² On appeal, The Riehl Stop cites *McLellan v. Charly*, 2008 WI App 126, 313 Wis. 2d 623, 758 N.W.2d 94, to support its argument that there was insufficient consideration for the Agreement. *McLellan* involved an option to purchase real estate. *Id.*, ¶1. The court concluded that “in order to make the option a binding option contract, consideration is required that is separate from the consideration for the sale.” *Id.*, ¶2. As explained above, however, the Agreement in this case is not akin to an option contract. Consequently, *McLellan* is not on point.

ATM at The Riehl Stop for a five-year period. The Agreement also states that if The Riehl Stop terminates the Agreement without cause prior to the expiration of the initial five-year term, Convenient ATM “shall be” entitled to “compensation for the loss of income for the remainder of the term caused by such early termination.” The Agreement further states that Convenient ATM’s loss of income “shall be determined utilizing an average of monthly revenue realized by [Convenient ATM] during the period of time the [ATM] was in operation at [The Riehl Stop], or two hundred dollars per month, whichever is greater.”

Convenient ATM attached a copy of the Agreement to its complaint. Convenient ATM also expressly referred to the Agreement’s damages provision in the complaint, alleging that the Agreement entitled Convenient ATM to recover compensation for its lost income and reciting the Agreement’s method for calculating lost income. Convenient ATM further alleged that The Riehl Stop had “refused to allow” Convenient ATM to install an ATM on its premises. Consistent with the Agreement, Convenient ATM therefore asked the circuit court to award it “\$200.00 per month for a period of five years for a total of \$12,000.00.” On this record, Convenient ATM adequately pled that it was entitled to recover \$12,000 in damages for lost income under the Agreement.³

³ Convenient ATM’s complaint also referred to the portion of the Agreement permitting Convenient ATM to “retain the last sixty (60) days of Commission as reimbursement for its initial set up expenses” in the event that The Riehl Stop terminated the Agreement without cause. Convenient ATM did not, however, ask the circuit court to award it any damages beyond the \$12,000 in damages for lost income specified by the Agreement. Moreover, as a matter of common sense, Convenient ATM could not have incurred any set-up expenses because Convenient ATM alleges that it was never able to install an ATM at The Riehl Stop. In addition, the Agreement permitted Convenient ATM to retain sixty days of commissions as reimbursement for its set-up expenses, but if no ATM was ever installed, then no commissions were ever earned.

(continued)

Furthermore, the Agreement's plain language does not show that the parties intended Convenient ATM to be able to recover damages for lost income only after an ATM was installed at The Riehl Stop. Unlike set-up expenses, which could only be incurred if Convenient ATM actually installed an ATM, Convenient ATM argues that it lost income as a result of The Riehl Stop's breach of the Agreement because it was unable to earn the money that it would have earned had an ATM been installed at The Riehl Stop. In addition, the Agreement provides that Convenient ATM's lost income shall be calculated as the "greater" of: (1) an average of Convenient ATM's monthly revenue during the time the ATM was in operation; or (2) \$200 per month. This language indicates that, even if Convenient ATM's average monthly income was \$0 because no ATM was ever installed at The Riehl Stop, Convenient ATM is still entitled to recover the "greater" amount of \$200 per month.

In summary, based on the allegations in Convenient ATM's complaint and the unambiguous terms of the Agreement, we conclude that there was sufficient consideration for the Agreement and that Convenient ATM adequately pled damages. We therefore reverse the circuit court's orders granting The Riehl Stop's motion to dismiss, and we remand for further proceedings on Convenient ATM's breach of contract claim. Notably, our decision should not be read as holding that Convenient ATM will necessarily be able to recover the damages alleged in its complaint. We conclude only that the court erred by granting The Riehl Stop's motion to dismiss for failure to state a claim upon which relief could be granted.

Thus, to the extent Convenient ATM argues on appeal that its complaint adequately pled that it was entitled to compensation for set-up expenses, we reject that argument. Accepting the allegations in Convenient ATM's complaint as true, the Agreement's unambiguous language shows that Convenient ATM is not entitled to recover set-up expenses under the circumstances presented here.

Upon the foregoing,

IT IS ORDERED that the orders are summarily reversed and the cause is remanded for further proceedings. 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