



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 IV

February 21, 2013

To:

Hon. C. William Foust
Circuit Court Judge
215 South Hamilton, Br 14, Rm 7109
Madison, WI 53703

Scott K. McCarthy
Murphy Desmond S.C.
400 Midland Court #102
Janesville, WI 53546

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Anthony R. Varda
DeWitt Ross & Stevens S.C.
Suite 600
Two East Mifflin St.
Madison, WI 53703-2865

Mark Hazelbaker
Hazelbaker & Associates S.C.
3555 University Avenue
Madison, WI 53705

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

2011AP2077

Chad A. Gebhardt v. Standard Mechanical LLC
(L.C. # 2010CV3103)

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

Chad Gebhardt appeals a summary judgment order that dismissed (among other claims not raised here) his claim for damages resulting from the alleged fraudulent transfer of a Consulting Agreement in connection with the sale of assets from a business Gebhardt had formerly owned. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. *Frost v. Whitbeck*, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325. We first examine the pleadings to determine whether the complaint states a claim and whether the answer joins an issue of fact or law. *Id.* If issue has been joined, we examine the parties' affidavits and other submissions to determine whether the movant has made a prima facie case for judgment and, if so, whether there are any material facts in dispute that would entitle the opposing party to trial. *Id.*; see also WIS. STAT. § 802.08(2).

It is undisputed that Gebhardt sold the assets of a fire protection business to a company owned by Bruce Bosben, pursuant to an agreement involving quarterly payments of the purchase price and the continued employment of Gebhardt. A third company, owned by Dave Jones, subsequently bought the ongoing business, Main Fire Protection, LLC, without completing the remaining payments owed to Gebhardt under the original purchase agreement.

According to paragraph 22 of the complaint, the Main Fire Protection assets purchased by Dave Jones' company "includ[ed] a Consulting Agreement worth approximately \$300,000." According to paragraph 29 of the complaint, the Consulting Agreement required Dave Jones Fire Protection to make payments of over \$3,000 a month for a period of 84 months to another company owned by Bosben called Plumbing Ventures, which was the sole stockholder of Main Fire Protection. Paragraph 37 of the complaint further alleged that "the transfer of the Consulting Agreement to Plumbing Ventures, LLC, in connection with the sale of the assets of Main Fire Protection, LLC ... was for the purpose of hindering, delaying and defrauding Chad Gebhardt in collection of amounts due him." Finally, in the closing paragraph of the complaint, Gebhardt demanded that "the transfer of the Consulting Agreement to Plumbing Ventures, LLC

from Main Fire Protection, LLC be declared a transfer in fraud of creditors pursuant to Wis. Stat. § 242.04.”

The circuit court dismissed Gebhardt’s claim for a fraudulent transfer of the Consulting Agreement on the ground that the summary judgment materials established that there had never been any transfer or assignment of the Consulting Agreement from Main Fire Protection to Plumbing Ventures; the agreement had always been between Dave Jones Plumbing and Plumbing Ventures (now known as Standard Mechanical).

On this appeal, Gebhardt does not dispute the circuit court’s determination that Main Fire Protection never held or was party to the Consulting Agreement. Instead, Gebhardt first argues that the circuit court misconstrued the nature of his claim—which he now contends was that Bosben caused a fraudulent transfer of assets that would have otherwise been available for Main Fire Protection to use to pay Gebhardt by arranging for the company that bought Main Fire Protection (i.e., Dave Jones Plumbing) to enter into a Consulting Agreement with the company that had previously owned Main Fire Protection (i.e., Bosben’s Plumbing Ventures/Standard Mechanical) as part of a financing deal, rather than having Dave Jones Plumbing pay Main Fire Protection directly for its assets. In other words, Gebhardt now asserts a theory of a fraudulent diversion of a stream of income from Dave Jones Plumbing that should have gone to Main Fire Protection instead of Plumbing Ventures/Standard Mechanical, rather than a fraudulent transfer of assets previously owned by Main Fire Protection to Plumbing Ventures/Standard Mechanical.

However, as we have just described, that is not the way Gebhardt framed his fraudulent transfer claim in his complaint. Nor was that theory articulated with sufficient clarity in Gebhardt’s summary judgment submissions. To the contrary, it was reasonable for the circuit

court to construe Gebhardt's arguments as it did based on Gebhardt's multiple references to the transfer of the agreement, which included a heading in his brief: "MFP Holdings' transfer of the consulting agreement to Standard Mechanical was a transfer in fraud of creditors." Given Gebhardt's continual references to a transfer that never happened, we conclude that the circuit court properly dismissed the claim set forth in the complaint and that Gebhardt has forfeited the issue of whether the Consulting Agreement was used as a vehicle to fraudulently transfer other assets. See *Schwittay v. Sheboygan Falls Mut. Ins. Co.*, 2001 WI App 140, ¶16 n.3, 246 Wis. 2d 385, 630 N.W.2d 772 ("A party must raise an issue with sufficient prominence such that the trial court understands that it is called upon to make a ruling."); *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶¶10-11, 261 Wis. 2d 769, 661 N.W.2d 476 (this court will generally not consider issues raised for the first time on appeal so that we don't "blindsided trial courts with reversals based on theories which did not originate in their forum" (quoted source omitted)).

As an alternative to his assertion that the circuit court misconstrued his claim, Gebhardt appears to argue that he should be allowed to change his theory of the case, even at this late stage, because the allegation in his complaint that the Consulting Agreement was at one time a Main Fire Protection asset was based upon deposition testimony, given by Bosben in a prior case, asserting that Dave Jones owed \$231,000 on a note to Main Fire Protection, as well as an affidavit Bosben made and then cited to this court in his brief on appeal in that case, averring that: "Main still has assets, including consulting fees owed by Jones" With respect to Bosben's deposition testimony, we do not see anything in the excerpts included in the record²

² We note that the record has been paginated to include two items "25" with no item "24," but we will treat the Varda affidavit to which Bosben's deposition testimony is attached as item "24," as indicated on the index to the record.

establishing that the note to which Bosben was referring was the Consulting Agreement, as opposed to some separate instrument relating to the purchase of Main Fire Protection's assets, particularly since the \$231,000 figure does not match the total amount that would be due under the Consulting Agreement. Nor do we have the Bosben affidavit before us in the current appellate record.³ In short, Gebhardt has not provided this court with a sufficient factual basis to support his allegation that Bosben misled him about the Consulting Agreement being an asset of Main Fire Protection.

Finally, we note that, even if the circuit court did overlook or fail to comprehend some aspect of Gebhardt's claim against Bosben and Plumbing Ventures/Standard Mechanical, Gebhardt has still failed to articulate, in his brief-in-chief, any theory under which Dave Jones or his company would be liable for a fraudulent transfer.

IT IS ORDERED that the summary judgment order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals

³ To the extent that Gebhardt suggests that this court affirmatively found in our prior decision that the Consulting Agreement was an asset of Main Fire Protection, he is misconstruing our opinion. While it is true that we referenced Bosben's assertion about the Consulting Agreement being among Main Fire Protection's assets, the focus of our discussion was on the fact that the company was still collecting on obligations, not specifically what those obligations were.