COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2006AP2082
2007AP673

Cir. Ct. No. 2005CV432

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

TARCO SOUTH, INC.,

PLAINTIFF-APPELLANT,

V.

COLLINS OUTDOOR ADVERTISING, INC.,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Tarco South, Inc. appeals from a summary judgment order dismissing its action to have a lease with Collins Outdoor

Advertising Agency declared unenforceable, and from an order denying reconsideration. We affirm for the reasons discussed below.

BACKGROUND

¶2 Robert Tooke owned the stock in a Tennessee real estate corporation called Tarco, Inc. Robert's mother, Rachel Tooke, conducted some business on behalf of Tarco in Wisconsin after Robert moved to Florida in about 1976. She was probably on the payroll of Tarco and may have been its registered agent in this state. In 1977, Rachel signed a ten-year lease on Tarco's behalf, granting Collins-La Crosse Sign Corp. the right to use certain property in La Crosse for outdoor advertising for the price of $150 per year.

¶3 In 1988, Tarco transferred the La Crosse property to a successor Florida corporation called Tarco South, Inc. In 1990, Rachel signed a new lease purporting to rent the same La Crosse property to Collins Outdoor Advertising, the successor of Collins-La Crosse Sign Corp. The second lease specified an annual rent of $400, with a ten-year term which could be renewed twice at Collins' discretion. However, the lease represented that Rachel was the "Owner, Tenant, Agent or Officer" of the property without mentioning that Tarco South was the actual owner of the property. There was a handwritten notation stating "getting $720."

¶4 Robert's son, Michael Tooke, assumed some management of Tarco South after Robert had a heart attack around 2000 or 2001, and became its sole shareholder in 2002. In 2001 and 2002, Michael contacted Collins to request that they install a security light on the back of their billboard, which they did. Michael paid for the light, but Collins Outdoor Advertising paid for the installation, the electricity and replacement bulbs.

¶5 Collins Outdoor Advertising made annual rent payments from 1990 through 2003. The 1990 check for $400 was made to Rachel Tooke and endorsed by an unknown party. Beginning in 1992, Collins Outdoor Advertising began paying $720 per year in rent. This was the amount handwritten onto the lease, but there is no explanation in any of the summary judgment materials for the increase. The 1992 through 1997 checks were made to Rachel Tooke and Tarco and variously endorsed by Rachel Tooke, Patrick Tooke, and Tarco; the 1998 check was made to Tarco and endorsed by Tarco; the 1990 check was made to Tarco and endorsed by an unknown party; the 2000 check was made to Tarco and endorsed by Robert Tooke as president of Tarco; the 2001 through 2003 checks were made to Tarco and endorsed by Michael Tooke.

¶6 In 2004, Robert died and Michael attempted to renegotiate the lease with Collins Outdoor Advertising, claiming that he had only just discovered the existence of the 1990 lease and that it was invalid because the land was actually owned by Tarco South and Rachel had no authority to act for that entity. He did not cash the 2004 and 2005 rent checks. However, Michael continued to list himself as the owner of Tarco on correspondence to Collins Outdoor Advertising while he was attempting to renegotiate the terms of the lease.

¶7 Tarco South eventually sought a declaratory judgment holding that the 1990 real estate lease was unenforceable due to lack of compliance with WIS. STAT. §§ 706.02 and 706.03 (2005-06).[1] Those sections, commonly known as statute of fraud provisions, require that a document conveying an interest in real

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

property identify the property owner and be signed on the property owner's behalf, and that a conveyance shall be ineffective against a principal unless the agent "was expressly authorized, and unless the authorizing principal is identified as such in the conveyance or in the form of signature or acknowledgement." *See* WIS. STAT. § 706.03(1m). Collins Outdoor Advertising countered that Tarco South should be estopped from raising any alleged statute of fraud deficiency in the lease because it had been operating as if the lease were valid for fourteen years.

¶8 Collins Outdoor Advertising provided an affidavit with its summary judgment materials averring that Robert Tooke was fully aware of the lease negotiations in both 1977 and 1990, and physically present when the leases were signed. At the summary judgment hearing, counsel informed the court that Tarco disputed whether Robert was present when the 1990 lease was signed, since it had come to counsel's attention that Robert was actually in Florida at that time.

> [TARCO SOUTH'S ATTORNEY]: We're not sure it's material but they asserted that it is material in the sense that the equities favor enforcement of the lease. And if the Court's inclined to accept that equitable argument we wanted an opportunity to present evidence to the Court to the contrary.
>
> THE COURT: Well, also their argument was that Robert Tooke had the authority to authorize anybody to sign on behalf of the corporation and that he authorized Rachel Tooke and was present when this took place.
>
> [TARCO SOUTH'S ATTORNEY]: Correct. And we dispute that.
>
> THE COURT: I think it's extremely essential or material to the issues.

Tarco South did not further explain at the summary judgment hearing either the factual basis for believing that Robert was in Florida or why it was unable to present its evidence in a timely manner.

¶9 Counsel for Collins Outdoor Advertising argued that Tarco South had not submitted its claim that Robert was in Florida when the 1990 contract was signed in affidavit form, and thus its own claim that Robert was present was unrefuted for summary judgment purposes.

¶10 After hearing argument from both sides, and without further addressing the affidavit issue, the trial court reasoned that Tarco South's actions in cashing the rent checks and requesting lighting improvements "assumed the validity of the contract." It concluded that the equities favored enforcing the contract.

¶11 Tarco South moved for reconsideration, claiming there was "new evidence" that Robert was not present at the signing of the 1990 lease. It submitted an affidavit from Robert's ex-wife Elizabeth stating that Robert was in Florida at that time, as well as an affidavit from counsel explaining why he had not earlier submitted Elizabeth's affidavit. It also argued that the trial court had improperly used WIS. STAT. § 706.04 to excuse noncompliance with WIS. STAT. § 706.03, when § 706.04 is only available to excuse noncompliance with WIS. STAT. § 706.02.

¶12 The trial court found that Tarco South had a reasonable opportunity to present its affidavit prior to the original hearing, and stated that it had relied on general equitable principles, rather than WIS. STAT. § 706.04 to excuse Collins Outdoor Advertising's noncompliance with WIS. STAT. § 706.03.

STANDARDS OF REVIEW

¶13 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court.

Brownelli v. McCaughtry, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). Summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***, ¶24.

¶14 With respect to the application of estoppel on summary judgment, "if undisputed facts in the record lead to the conclusion that the elements of equitable estoppel are present, and no alternate view of the facts supports a contrary conclusion, the decision to apply the doctrine of equitable estoppel is within the circuit court's discretion." ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, ¶21, 291 Wis. 2d 259, 715 N.W.2d 620.

¶15 We review the trial court's decision whether to accept additional affidavits in support of a motion for reconsideration under the erroneous exercise of discretion standard. ***Teubel v. Prime Dev., Inc.***, 2002 WI App 26, ¶19, 249 Wis. 2d 743, 641 N.W.2d 461.

DISCUSSION

¶16 On appeal, Tarco South argues that summary judgment should not have been granted because there were disputed facts regarding Rachel's actual authority to sign the lease; that the trial court erroneously exercised its discretion in applying estoppel; and that the trial court erroneously exercised its discretion when it refused to allow Tarco South to submit additional affidavits on reconsideration. We will address these contentions in reverse order.

Elizabeth's Affidavit

¶17 Tarco South informed the court at the summary judgment hearing that it believed there might be a factual dispute regarding Robert's presence, and asked for an opportunity to present additional evidence on that point if the court was inclined to accept Collins Outdoor Advertising's equitable argument. However, Tarco South neither asked for a continuance, nor submitted an affidavit from counsel, at or prior to the summary judgment hearing, explaining why it was unable to obtain an affidavit from Elizabeth in a timely manner. *See* WIS. STAT. § 802.08(4). Counsel subsequently submitted an affidavit in conjunction with Tarco South's reconsideration motion stating that he "had difficulty contacting his client" after receiving the Collins affidavit.

¶18 The trial court refused to allow Tarco South to submit Elizabeth's affidavit on reconsideration because it was "not satisfied that the plaintiff could not have and should not have gotten the information before the Court before the last hearing and not having done so they should have, at a bare minimum, asked for a continuance to supply that information." We are satisfied the court's decision represented a reasonable exercise of discretion.

¶19 The Collins affidavit averring that Robert was present when the 1990 lease was signed was dated May 4, 2006. The summary judgment hearing was held on May 24, 2006. That gave Tarco South well over two weeks to produce any counter affidavits. Although counsel claimed to have had difficulty contacting his client prior to the summary judgment hearing, he had obviously been informed of Elizabeth's version of events prior to the hearing, since he informed the court of the facts later averred in Elizabeth's affidavit. Counsel did

not specify when he actually first spoke with Elizabeth or adequately explain why he could not have had Elizabeth fax an affidavit in time for the hearing.

¶20 In short, the information was not new, because counsel was aware of it prior to the hearing, and there was no compelling reason presented why counsel could not have either produced an affidavit in time for the hearing or requested a continuance at the hearing. Therefore, the trial court was within its discretion to refuse to allow the addition of Elizabeth's affidavit on reconsideration.

Equitable Estoppel

¶21 The parties are in agreement on this appeal that WIS. STAT. § 706.04 only operates to excuse noncompliance with WIS. STAT. § 706.02, but that general principles of equitable estoppel may still be applied to WIS. STAT. § 706.03. They rely on ***Triple Interest, Inc. v. Motel 6, Inc.***, 414 F. Supp. 589, 595-96 (W.D. Wis. 1976) for that proposition, and also refer to a six-part estoppel test used in that case. We agree that ***Triple Interest*** properly interpreted the plain language of § 706.04 as applying only to § 704.02. However, the equitable estoppel test currently used in Wisconsin is the more straightforward four-part test described in ***Affordable Erecting***, which applied estoppel to another statute of frauds provision. "The elements of equitable estoppel are: (1) action or nonaction, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or nonaction, and (4) which is to his or her detriment." ***Affordable Erecting***, 286 Wis. 2d 403, ¶17.

¶22 The summary judgment materials establish that all of the required elements were present here. Tarco South's acknowledged agents, Robert and Michael, acted in conformity with the amended 1990 lease by accepting rent checks over a period of many years. The suggestion that they could have believed

these rent checks related to a year-to-year holdover from the 1977 lease is not reasonable because the rent amount specified in the 1977 lease was only $150 per year, while Collins Outdoor Advertising was paying Tarco South the $720 annual amount specified in the amended 1990 lease. The only reasonable conclusion is that they were aware of the second lease, which had renewal provisions. Tarco South's acceptance of the rent checks induced the advertising agency to contract with its own customers to rent the billboard space, as well as expend money on the upkeep of the billboard and the lighting which Michael Tooke had requested. The payment of rent and contractual obligations incurred by Collins Outdoor Advertising would be to the advertising agency's detriment if it did not, in fact, have an enforceable lease on the premises. We are therefore satisfied it was within the trial court's discretion to grant equitable relief and enforce the amended lease.

Rachel's Actual Authority to Sign the Lease

¶23 In light of our decision that the trial court properly granted equitable relief, it is immaterial whether Rachel had the actual or purported authority to sign the amended lease on Tarco South's behalf. The whole point of the equitable remedy is to excuse non-compliance with the statute of frauds.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.