COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2878 **Cir. Ct. No. 2005CV920**

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

CARL A. MANCINI,

PLAINTIFF-APPELLANT,

V.

DARYL L. MATHEWS AND MATHEWS PROPERTIES, LLC,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Nettesheim, J.

¶1 PER CURIAM. Carl A. Mancini has appealed from a judgment dismissing his complaint against Daryl L. Mathews and Mathews Properties, LLC, and from an order denying his motion to amend his complaint. The complaint was dismissed on summary judgment. We affirm both the judgment and the order.

¶2 This action arises from a lease agreement between Mathews Properties as lessor and Arrow Products, Inc., as lessee. The lease was for a ten-year period, commencing on June 1, 2001. It provided that "Lessee may not transfer its interest in this Lease or sublet the premises or any part thereof without the written consent of Lessor, which consent shall not be unreasonably withheld."

¶3 When the lease was signed and throughout the time period pertinent to this lawsuit, Mancini owned four percent of the shares of Arrow Products, and was the sole shareholder in Arrow Holding Corporation, which owned the remaining 96 percent of the Arrow Products stock. When the lease was executed, Mancini signed a guarantee, which stated that "part of the consideration for the leasing of the described premises by Mathews Properties, LLC to Arrow Products, Inc. is the undersigned's covenant to guarantee the payment of rentals reserved in said Lease and the performance of all of the other provisions of said Lease."

¶4 According to Mancini's complaint, after entering the lease Arrow Products encountered financial problems and entered into negotiations with I.T.S. Fabry, an international company based in France. The complaint alleges that on October 23, 2003, Fabry offered to purchase one of Arrow Products' three divisions and, as part of the proposed sale, offered to pay $50,000 to Arrow Products and to assume other financial obligations of Arrow Products, including its obligations under the lease.[1] The complaint alleges that Fabry agreed to allow Arrow Products to continue to operate its other two divisions in the leased

[1] In their respondents' brief, Mathews and Mathews Properties dispute the extent of the obligations Fabry agreed to assume, but acknowledge that their disagreement with the facts as set forth by Mancini is not relevant in determining whether the trial court properly granted summary judgment dismissing Mancini's complaint.

property. However, according to the complaint, Daryl Mathews indicated that he would not do business with Fabry. According to the complaint, the prospective contract with Fabry therefore broke down and, by April 2, 2004, Arrow Products' financial difficulties had grown, leading Mancini to transfer all of his shares of Arrow Products and Arrow Holding Corporation to Mathews in exchange for the release of his guarantee.

¶5 In his complaint, Mancini alleged that Mathews Properties breached the lease agreement and its contractual obligation to Mancini as guarantor of the lease by unreasonably withholding consent to the assignment of the lease to Fabry. In addition to the breach of contract claim, Mancini alleged tortious interference with a prospective contract, contending that Mathews and Mathews Properties wrongfully interfered with Arrow Products' prospective contractual relationship with Fabry by unreasonably refusing to consent to an assignment of the lease to Fabry.

¶6 Mathews and Mathews Properties moved for summary judgment dismissing the complaint. In his affidavit in opposition to the motion, Mancini attested to the facts alleged in his complaint. He further alleged that when he informed Mathews of the Fabry offer and requested his consent to the assignment of the lease, Mathews indicated that he would not do business with Fabry under any circumstances and that he "hate[d] the French." Mancini alleged that Mathews refused to consent even when Mancini offered to personally guarantee the obligations of Fabry under the lease.

¶7 In his affidavit, Mancini reiterated that when Mathews Properties withheld consent to the assignment or sublease, the proposed agreement with Fabry broke down. He further contended that after negotiations with Fabry broke

down, an investor group led by David Alpert made an offer to purchase the assets of all three divisions of Arrow Products and was also willing to assume Arrow Products' obligations under the lease. He alleged that Mathews refused to do business with Alpert unless Alpert agreed to modifications of the lease, and Arrow Products' negotiations with Alpert fell through.

¶8 Mancini attested that by April 2, 2004, having lost two opportunities to sell all or part of Arrow Products, the financial difficulties of Arrow Products grew to the point that he had no choice but to transfer all of his shares in Arrow Products and Arrow Holding Corporation to Mathews. He further alleged that before rejecting the Fabry deal and when discussing Mancini's obligations under the guarantee, Mathews told Mancini that Mathews had a figurative gun to Mancini's head and that "the round is chambered." He alleged that Mathews told him that he would hound Mancini's family for payment on the guarantee even after Mancini's death if Mancini did not transfer his shares in Arrow Products. He alleged that Mathews' conduct was intended to deprive him of his shares in Arrow Products.

¶9 The trial court granted summary judgment dismissing Mancini's complaint on the ground that Mancini, as an individual, lacked standing to bring this action. When reviewing a grant of summary judgment, we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. ***Coopman v. State Farm Fire & Cas. Co***., 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). Summary judgment is warranted when "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) (2005-06).[2] In our review we, like the trial court, are prohibited from deciding issues of fact; our inquiry is limited to determining whether a material factual issue exists. ***Coopman***, 179 Wis. 2d at 555. The evidence, and the inferences therefrom, must be viewed in the light most favorable to the party opposing the motion. ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). Any reasonable doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment. ***Heck & Paetow Claim Serv., Inc. v. Heck***, 93 Wis. 2d 349, 356, 286 N.W.2d 831 (1980).

¶10 Applying these standards here, we conclude that the trial court properly granted summary judgment dismissing Mancini's complaint. As discussed above, the lease agreement was between Arrow Products, a corporation, and Mathews Properties. Mancini is no longer a shareholder in Arrow Products, and therefore may not bring a derivative action as a shareholder. He contends, however, that he is entitled to bring his claims individually because Mathews' conduct was directed at him personally and he sustained direct injury as a result of it. He also contends that he has standing to enforce the terms of the lease either as a party to the lease or as a third-party beneficiary of it.

¶11 Mancini's arguments are unavailing. In Wisconsin, a shareholder in a corporation may not bring a direct action for a claim accruing to the corporation unless an individual right of the shareholder is being impaired. ***Read v. Read***, 205 Wis. 2d 558, 570, 556 N.W.2d 768 (Ct. App. 1996). "Where the injury to the

[2] All references to the Wisconsin Statutes are to the 2005-06 version.

corporation is the primary injury, and any injury to stockholders secondary, it is the derivative action alone that can be brought and maintained." ***Rose v. Schantz***, 56 Wis. 2d 222, 229, 201 N.W.2d 593 (1972). However, when the injury alleged is primarily an injury to the individual shareholder rather than the corporation, an individual action may be maintained. *See* ***Jorgensen v. Water Works, Inc.***, 218 Wis. 2d 761, 776-77, 582 N.W.2d 98 (Ct. App. 1998).[3]

¶12 In ***Rose***, 56 Wis. 2d at 229, the court held that actions by defendant officers and directors which depleted corporate funds and threatened to put the corporation out of business were primarily injuries to the corporation, even though the actions could have a negative impact on the corporation's shareholders. In ***Read***, 205 Wis. 2d at 569-70, the court held that mismanagement of a corporation and self-dealing by its controlling directors and shareholders primarily resulted in injury to the corporation, not the individual shareholder attempting to bring a direct action alleging the violation of a fiduciary duty. In ***Jorgensen***, 218 Wis. 2d at 776, the court held that allegations of waste and mismanagement of corporate assets were primarily injuries to the corporation, and could not support a direct action by shareholders. However, it permitted individual shareholders and directors to pursue a direct action alleging that the defendants were depriving them of dividends and wrongfully removing them from the board of directors, concluding that these were injuries primarily to the plaintiff shareholders, not the corporation. ***Id.*** at 776-77.

[3] The respondents are in error when they contend that a shareholder may only maintain an action as an individual when injury or damage is *only* to the individual stockholder, and not to the corporation or all of the shareholders as a whole. An individual action may be maintained when the injury alleged is *primarily* to the individual rather than the corporation. *See* ***Jorgensen v. Water Works, Inc.***, 218 Wis. 2d 761, 776-77, 582 N.W.2d 98 (Ct. App. 1998).

¶13 We conclude that the facts set forth in Mancini's complaint and affidavit allege injury primarily to the corporation, Arrow Products, not Mancini personally. Mancini alleged in his affidavit that Mathews' wrongful conduct in unreasonably refusing to consent to an assignment of the lease or sublease was directed at him personally in order to deprive him of his interest in Arrow Products. However, his complaint alleged breach of contract and tortious interference with contract, both of which arose from Mathews Properties' failure to consent to the assignment of the lease or a sublease. Since Arrow Products was the lessee, it was Arrow Products whose rights were impaired if Mathews Properties' failure to consent constituted a breach of the lease agreement. Similarly, since the prospective contract allegedly interfered with by Mathews Properties was a prospective contract between Arrow Products and Fabry, not Mancini and Fabry, it follows that the primary injury from the alleged breach of contract and tortious interference with contract was to Arrow Products, the corporation that entered into the lease.

¶14 While Arrow Products' problems may have had an effect on Mancini by jeopardizing his financial interest in Arrow Products and increasing the risk that he would be held liable on his guarantee, these were secondary effects, not the primary injury caused by the alleged breach of contract and tortious interference with a prospective contract.[4] Since the injury caused by

[4] ***Buschmann v. Professional Men's Ass'n***, 405 F.2d 659 (7th Cir. 1969), does not assist Mancini. In that case, the individual shareholder bringing the action had personally entered into a contract with the defendant prior to the creation of the corporation. ***Id.*** at 660-61. While the shareholder's cause of action and a corporate cause of action arose from the same wrongful acts by the defendant, the shareholder's action was personal, not derivative, arising from promises made directly to him by the defendant prior to the creation of the corporation. ***Id.*** at 662-63. In contrast, the rights Mancini sought to enforce when he alleged breach of contract and tortious interference with contract were rights that belonged to Arrow Products, not to him personally.

Mathews Properties' conduct in refusing to consent to the assignment or sublease was primarily an injury to Arrow Products, Mancini could not maintain the direct action brought by him.

¶15 In reaching this conclusion, we also reject Mancini's claim that he has standing to enforce the provisions of the lease either as a party to the lease or as a third-party beneficiary of it. As a general rule, only parties to a contract and third-party beneficiaries of a contract may sue under the contract. ***State ex rel. Journal/Sentinel, Inc. v. Pleva***, 155 Wis. 2d 704, 709, 456 N.W.2d 359 (1990). Mancini contends that he is a party to the lease agreement because the guarantee signed by him was attached to the lease and incorporated in it. In addition, he relies on language in the guarantee indicating that Mathews Properties entered into the lease with Arrow Products at the request of Mancini, and that part of the consideration for Mathews Properties' agreement to enter the lease was the personal guarantee provided by Mancini. Mancini contends that since he was expressly obligated to guarantee performance of the lease, it follows that the parties intended him to be able to enforce the terms of the lease, including Mathews Properties' promise not to unreasonably withhold consent to an assignment or sublease.

¶16 Mancini's argument is without merit. As is clear from a review of the terms of the lease, the parties to the lease agreement were Arrow Products and Mathews Properties. While Mancini's guarantee may have been an inducement for Mathews Properties to enter the lease agreement, it did not convert Mancini from a guarantor to a party to the lease. Whatever rights were possessed by Mancini pursuant to the guarantee were separate and distinct from the contractual

rights and obligations between Mathews Properties and Arrow Products under the lease agreement.[5]

¶17 Mancini contends that, at a minimum, he is a third-party beneficiary entitled to enforce the provisions of the lease agreement. However, to maintain an action as a third-party beneficiary, a plaintiff must show that the parties intentionally entered the contract directly and primarily for his benefit, and the contract must indicate an intention to secure some benefit to him. ***Schell v. Knickelbein***, 77 Wis. 2d 344, 348-49, 252 N.W.2d 921 (1977). A person is not a third-party beneficiary under a contract if his was only an indirect benefit, merely incidental to the contract between the parties. ***Id.*** at 349.

¶18 Mancini's guarantee created an obligation on his part, not a direct benefit to him. To the extent he received any benefit from Arrow Products' obtaining the lease, it was merely an indirect benefit, and provides no basis for concluding that the lease agreement was entered primarily or directly for his benefit, or with the intention of securing a benefit to him.[6]

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[5] Mancini relies on section 24.E. of the lease, which states in part: "This Lease, including all exhibits, riders and addenda, constitutes the entire agreement between the parties." However, while Mathews Properties may have required a guarantee as a condition of entering the contract with Arrow Products, and giving the guarantee may have formed part of the agreement between Mathews Properties and Arrow Products, the mere fact that it was given by Mancini did not convert him into a party to their lease agreement.

[6] Mancini's reliance on ***State ex rel. Journal/Sentinel, Inc. v. Pleva***, 155 Wis. 2d 704, 456 N.W.2d 359 (1990), to support his claim that he is a third-party beneficiary is misplaced. In that case, the parties expressly incorporated the open meetings law into their contract. ***Id.*** at 709-10. While recognizing that the situation was unique, the supreme court construed the parties' incorporation of the open meetings law as an express intent by the parties to permit the public to enforce compliance with the provisions of the open meetings law. ***Id.*** at 710. It declined to address whether the public was a third-party beneficiary of the contract. ***Id.*** at 709.

¶19 Mancini also challenges the trial court's order denying his motion to amend his complaint. He moved to amend his complaint to allege that Mathews Properties breached an implied duty of good faith and fair dealing owed to him pursuant to the guarantee signed by him in his individual capacity. He alleged that Mathews Properties and Mathews therefore were liable for unreasonably refusing to consent to any proposed assignment or sublease.

¶20 After the expiration of the time permitted a party for amending his complaint as of right under WIS. STAT. § 802.09(1), the decision whether to grant a motion to amend a complaint lies within the trial court's discretion. ***Mach v. Allison***, 2003 WI App 11, ¶20, 259 Wis. 2d 686, 656 N.W.2d 766. This court will affirm the trial court's exercise of discretion if it applied the correct legal standard to the facts of record in a reasonable manner. ***Id.***

¶21 The trial court denied the motion to amend on the ground that the claim Mancini was attempting to assert was not viable. We agree. The rights and duties that existed between Mancini and Mathews Properties under the guarantee related to Mathews Properties' obligation to enter into a lease agreement with Arrow Products, and Mancini's responsibility for ensuring that Arrow Products' rent was paid and its other duties performed under the lease agreement. Mathews Properties fulfilled its obligation to enter a lease agreement with Arrow Products, and ultimately released Mancini from his obligation under the guarantee in exchange for his transfer of his stock. Mancini's rights under the guarantee, including any right of good faith and fair dealing, did not give him a right to assert claims belonging to Arrow Products under its lease, including a claim that Mathews Properties unreasonably withheld its consent to the assignment of the lease or a sublease. The trial court therefore correctly concluded that the claim

alleged by him in his proposed amended complaint had no merit, and acted within the scope of its discretion in denying the motion to amend.[7]

By the Court.—Judgment and order affirmed.

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

[7] By this decision, we are not making light of Mancini's claim that he was forced to sell his interest in the company to Mathews due to Mathews putting him in a corner from which he could not escape. Indeed, case law shows that contracts may, in some instances, be rescinded due to economic duress. *See, e.g.*, ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 109-111, 293 N.W.2d 155 (1980). The first element of such a cause of action is a wrongful or unlawful act. ***Id.*** at 109. The second element is that the victim was deprived, by the unlawful act, of his or her "unfettered will." ***Id.*** Third, that there resulted an unfair exchange, and fourth, that the threatened party has no adequate legal remedy. ***Id.*** at 109-110.

Here, taking Mancini's factual assertions as true—just for a moment—he was personally placed in dire financial straits due to Mathews' breaches of his leasing contract with Arrow. He was placed into a corner by Mathews' unreasonable withholding of consent to sublet until Mathews was able to wrest Arrow from Mancini. This resulted in the unfair exchange and, as we have seen by this very opinion, Mancini has no adequate legal remedy. Facts supporting all four elements of the doctrine of economic duress would appear to be present here.

But there are a couple of problems. First, Mancini never pled economic duress. Second, and probably more important, Mancini wanted money damages from Mathews. But economic duress is a creature of contract law that allows the victim to rescind a contract. It is not a tort in and of itself, which would allow for damages. The court of appeals decision in ***Wurtz*** tried to make the doctrine a tort in which damages could be obtained. *See* ***Wurtz v. Fleischman***, 89 Wis. 2d 291, 309, 278 N.W.2d 266 (Ct. App. 1979). That attempt was roundly rejected by the supreme court, which, on review, apparently resurrected the contract rescission concept of the economic duress doctrine. *See* ***Wurtz***, 97 Wis. 2d at 110-11. Thus, even if he could prove the facts he alleges, Mancini's only "remedy" would be staying on the hook for the lease and reacquiring the company which, according to him, was in financial trouble (perhaps partly as a result of Mathews' actions). It is thus no wonder that Mancini declined to pursue a duress claim, regardless of the allegation that Mathews told him he had a "gun to the head" and that "the round is chambered."