COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2212 **Cir. Ct. No. 2006CV11614**

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

STEPHEN BARTELT,

PLAINTIFF-APPELLANT,

V.

ROSEN NISSAN AND ANTHONY HUNTOON,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed and cause remanded with directions.*

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

¶1 LAROCQUE, J. Plaintiff, Stephen Bartelt, appeals from an order dismissing his unjust enrichment complaint for failure to state a claim upon which

relief can be granted.[1] Defendant Rosen Nissan, Inc. ("Rosen") moves for costs, fees and reasonable attorney fees under the frivolous appeal statute, WIS. STAT. RULE 809.25 (2005-06).[2] We affirm the order and grant the motion.

¶2 Bartelt filed a complaint against the named defendants, alleging a cause of action for unjust enrichment, and seeking the return of $30,000. The trial court granted Rosen's motion to dismiss for failing to state a claim.[3]

¶3 Whether a complaint states a claim upon which relief can be granted presents a question of law which we review *de novo*. ***Weber v. City of Cedarburg***, 129 Wis. 2d 57, 64, 384 N.W.2d 333 (1986). We recently described the standard of review on a motion to dismiss a complaint as follows:

> Our standard of review is well-settled: "A motion to dismiss a complaint for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. All facts pleaded and reasonable inferences that may be drawn from such facts are accepted as true, but only for purposes of testing the complaint's legal sufficiency. Nevertheless, legal inferences and unreasonable inferences need not be accepted as true. A complaint should not be dismissed as legally insufficient unless it appears certain that a plaintiff cannot recover under any circumstances."

Torres v. Dean Health Plan, Inc., 2005 WI App 89, ¶6, 282 Wis. 2d 725, 698 N.W.2d 107 (citation omitted).

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[1] There is no appearance by Anthony Huntoon in the record. This court's order of April 4, 2008, states that the mail this court sent to Huntoon at the address listed has been returned as undeliverable. We ordered the appeal to continue.

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

[3] The complaint also alleged a claim for conversion, but Rosen has withdrawn it, and it is not an issue on appeal.

¶4 The three elements of a cause of action for unjust enrichment are: "(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention by the defendant of the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value." ***Puttkammer v. Minth***, 83 Wis. 2d 686, 688-89, 266 N.W.2d 361 (1978). "In an action for unjust enrichment, recovery is based upon the universally recognized moral principle that one who has received a benefit has the duty to make restitution when to retain such benefit would be unjust." ***Id.*** at 689 (citations, ellipses, bracketing and quotation marks omitted).

PLAINTIFF'S COMPLAINT AND ARGUMENT

¶5 We will examine Bartelt's unjust enrichment complaint in more detail, but in essence, he alleges: Huntoon contracted with Rosen to purchase three vehicles; then, after Rosen made a threat to charge Huntoon with theft if it did not receive payment of $30,000, Bartelt, with Rosen's knowledge, loaned Huntoon the $30,000 "due to the threat"; Huntoon tendered the loan funds to Rosen; Rosen eventually repossessed the vehicles, but also kept, and refused to return, the $30,000.

¶6 We agree with Bartelt that the third element of his claim for unjust enrichment is "the crux of the plaintiff's case." This element requires that the circumstances pled render it unjust for Rosen to retain the $30,000 benefit. We will address Bartelt's arguments closely, but in summary, he contends: The threat to seek criminal charges against Huntoon coerced Bartelt to loan the money to Huntoon; and after Rosen repossessed the vehicles, it refused to return the $30,000, thereby creating circumstances that render retention of the money unjust.

¶7 Despite drafting flaws,[4] we read Bartelt's complaint to allege (as numbered by us): (1) Huntoon contracted with Rosen to purchase three Nissan vehicles; (2) Bartelt was not a party to the purchase contract; (3) Bartelt made a loan to Huntoon of $30,000 following the purchase contract; (4) Huntoon then tendered the $30,000 to Rosen; (5) Rosen knew that the funds were the proceeds of Bartelt's loan to Huntoon; (6) Bartelt loaned Huntoon the money "due to threats" made by Rosen against Huntoon to seek criminal theft charges against Huntoon if Rosen did not receive payment; (7) Rosen has since repossessed the vehicles and refused to return the $30,000 received in exchange for the vehicles; (8) Bartelt never drove any of the vehicles in question, and is not responsible for any damage caused to them by Huntoon; (9) Bartelt is entitled to return of his $30,000; (10) neither Huntoon nor Rosen has a right to the $30,000; and (11) those funds should be repaid to Bartelt on grounds of unjust enrichment.

¶8 The last three allegations are legal conclusions, and not relevant to the issue of failure to state a claim. *See* ***Torres***, 282 Wis. 2d 725, ¶6. We will address each of the first eight allegations individually, and as a whole. *See* ***Lewis v. Sullivan***, 188 Wis. 2d 157, 164, 524 N.W.2d 630 (1994) ("[A] complaint in a civil action should not be dismissed as legally insufficient unless it is clear that there are no circumstances under which the plaintiff can recover.")

¶9 The first five allegations in Bartelt's complaint relate to the first two elements of a claim for unjust enrichment: Bartelt conferred a benefit upon Rosen, and Rosen had an appreciation or knowledge of the benefit. We will assume, for

[4] The complaint is not in compliance with WIS. STAT. § 802.04(2): all of the averments are not made in numbered paragraphs nor limited as far as practicable to a statement of a single set of circumstances. Some allegations are repeated in somewhat different terms.

the sake of brevity that the complaint sufficiently establishes the first two elements of an unjust enrichment claim.

¶10 The remaining three allegations in the complaint as detailed above, allege Rosen's threat, Rosen's possession of both the vehicles and the $30,000, and Bartelt's lack of responsibility for any damage to the vehicles caused by Huntoon. These allegations relate to the third element of an unjust enrichment claim, and the real issue of this appeal: whether the complaint sufficiently states facts and reasonable inferences so that the allegations give rise to circumstances that make the retention of the loan proceeds inequitable.

¶11 As to the threat to charge Huntoon with theft, Bartelt argues: "money was coerced from him under threat of criminal charges against his friend." The complaint does not allege nor raise an inference that Huntoon was "his friend." In reviewing a complaint to determine if it states a claim, the court looks only to the four corners of the complaint. ***Heinritz v. Lawrence Univ.***, 194 Wis. 2d 606, 610-11, 535 N.W.2d 81 (Ct. App. 1995).

¶12 Bartelt's remaining argument is made in conclusory fashion, stating only that a "threat to seek criminal charges against Huntoon if payment was not received" constitutes coercion. While we may decline to review an issue inadequately briefed, ***In re Estate of Balkus v. Security First Nat'l Bank***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985), because Bartelt's claim rests in large measure on the threat allegations, we will address it.

¶13 Under Wisconsin law, "[w]hoever … maliciously threatens to accuse or accuses another of any crime … with intent thereby to extort money" is guilty of a crime. WIS. STAT. § 943.30(1). The requirement of malice means that the person who makes the threat must have an illegal intent, because "the essence of

the offense [of extortion] is making a threat *to get something to which the person is not lawfully entitled*."[5] *See* WIS JI—CRIMINAL 1473A Cmt. 4 (emphasis added).

¶14 While this standard is part of the criminal law in our state, we see no reason, nor does Bartelt advance any argument, to support application of a different standard in a civil action invoking equity. The complaint here contains no allegation or inference that Rosen sought money to which it was not entitled. Of equal significance, in context of the equity of Rosen's conduct, the complaint neither states nor raises an inference that Rosen lacked grounds to seek a criminal theft charge, or did so in bad faith. The threat allegations, therefore, fail to state a claim in support of the third element of the claim of unjust enrichment.

¶15 The next allegation, (7), is that Rosen repossessed the vehicles and retained the $30,000. Here, Bartelt's argument again strays outside the four corners of the complaint. He states that in addition to the vehicles and the money, Rosen has a "judgment against Anthony Huntoon for their damages." This is not a fact alleged anywhere in the complaint, and we do not consider it.[6]

¶16 Moreover, Bartelt fails to develop his argument to explain the relevance of his allegation. We will assume, however, that he means to suggest

[5] "[E]xtortion…1a) the act of extorting, or getting money, etc. by threats.…" WEBSTER'S NEW WORLD COLLEGIATE DICTIONARY (4th ed. 2001).

[6] If we were to accept Bartelt's invitation to consider the existence of a judgment, we would have to consider Rosen's response. Rosen invites us to take judicial notice of the judgments in the Milwaukee County Circuit Court, arguing that it has two judgments: (1) a money judgment in excess of $31,000 against Huntoon, and (2) a declaratory judgment against Huntoon, declaring that Rosen has the right to keep the $30,000. Such judgments imply that Rosen did not receive a double recovery. We decline Rosen's invitation for the same reasons we decline to consider Bartelt's use of extraneous matters.

that the complaint alleges Rosen made a double recovery. A double recovery may give rise to an unjust enrichment claim under a variety of circumstances, as for example, in certain insurance cases involving equitable subrogation or the "made whole" doctrine. *See generally* ***Petta v. ABC Ins. Co.***, 2005 WI 18, 278 Wis. 2d 251, 692 N.W.2d 639.

¶17 Here the complaint does not give rise to an inference of double recovery. There are insufficient facts to allow the reader, in assessing the equitable circumstances of Rosen's recovery, to determine whether $30,000 was the full purchase price or only a fraction of it, and if the latter, what fraction; whether the vehicles were new or used; what the fair market value of the vehicles was at any relevant time; or what other damages, if any, to which Rosen was entitled. The absence of these facts and inferences are magnified in light of the allegation in (8), that Huntoon, not Bartelt, damaged the vehicles. The only reasonable inference relevant to the equities of Rosen's recovery is that the vehicles were worth less, in some unknown sum, after Rosen took possession than they were when sold. Thus, the complaint fails to sufficiently state a credible claim for double recovery.

¶18 Bartelt's remaining contentions, in support of an equitable claim in general, repeatedly asserts facts not found in the complaint. He says that he did not merely lend money to Huntoon, but rather, he provided the $30,000 to "both defendants, in the form of a cashier's check, made payable to both…." He says "a principal of the Rosen dealership personally told him that charges of theft would be filed against Anthony Huntoon unless Stephen Bartelt provided money to cover part of Huntoon's liability." He says the $30,000 was "provided at the solicitation of defendants." None of these assertions are in the complaint.

¶19 Finally, Bartelt cites only one case in support of his complaint, ***Puttkammer***. That case affirmed the dismissal of an unjust enrichment claim, and is not supportive. *See*, 83 Wis. 2d at 695. The case arose out of an improvement to real estate. ***Id.***, at 687-88. The plaintiff contracted with a third party, the lessee of a supper club, to blacktop some of the access and service areas. ***Id.*** The defendant-owner of the property was not a party to the contract, but knew of and acquiesced in the work. ***Id.*** at 688. The value of his real estate was increased by about $2,500. ***Id.*** at 687-88. When the lessee defaulted and went bankrupt, the owner refused to pay the plaintiff for the work. ***Id.*** at 688. ***Puttkammer*** held that plaintiff's complaint failed to state a claim for unjust enrichment. ***Id.*** at 695.

¶20 ***Puttkammer*** distinguishes several other cases that upheld complaints alleging a theory of unjust enrichment. ***Id.*** at 691-93. The court observed: "Each of those cases was decided on the basis of the special relationship that existed between the party procuring the … [benefit] … and the party retaining the benefits." ***Id.*** at 692-93. "These cases are the exception to the general rule." ***Id.*** at 693. The special relationship to which the court refers were those of husband and wife, or mother and son, where one member of a family procured the benefit and the other member retained the benefit. *See* ***id.*** at 691-93. Here, there is no special relationship alleged or reasonably inferred between Huntoon, who procured the loan, and Rosen, who retained the benefit of the loan proceeds.

¶21 In conclusion, after reviewing the complaint and the arguments made, we hold that the complaint fails to state a claim, and we affirm the order dismissing it.

APPEAL COSTS AND FEES FOR FILING A FRIVOLOUS APPEAL

¶22 Rosen asks this court to find this appeal frivolous, and to impose attorney fees and costs in accord with WIS. STAT. RULE 809.25(3). We do so.

WISCONSIN STAT. RULE 809.25(3) provides in part:

> (a) If an appeal … is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under this section….
>
> (b) The costs, fees and attorney fees awarded under par. (a) may be assessed fully against the appellant … or the attorney representing the appellant … or may be assessed so that the appellant … and the attorney each pay a portion of the costs, fees and attorney fees.
>
> (c) In order to find an appeal … to be frivolous under par. (a), the court must find one or more of the following:
>
> ….
>
> 2. The party or the party's attorney knew, or should have known, that the appeal … was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

¶23 In determining whether such knowledge exists, we may consider the arguments counsel made on appeal. ***Vierck***, 119 Wis. 2d 394, 399, 351 N.W.2d 169 (Ct. App. 1984).

¶24 Counsel did not argue that existing law should be extended, modified or reversed, and, in the trial court, conceded that point. We find no reasonable basis for the appeal on those grounds.[7]

[7] At the sanction motion hearing in the trial court, June 11, 2006, during a discussion of the same language used in WIS. STAT. § 802.05, as that in § 809.25(3) there was this exchange:

(continued)

¶25 We also conclude that counsel knew that this appeal was without any reasonable basis in law or equity. Some of the arguments he advances to show that the complaint stated a claim are totally outside of the pleading: the existence of a judgment in favor of Rosen, used to imply a double recovery; the payment of a cashier's check payable to Rosen and Huntoon jointly, to imply a more direct involvement in the loan than is alleged in the complaint; that the threat characterized as coercion was to "a friend"; and that a principal of the Rosen dealership personally told Bartelt that charges of theft would be filed against Huntoon unless Bartelt provided money to cover part of Huntoon's liability. These statements, with no citation to the record, support our conclusion that counsel knew or should have known the appeal was without any reasonable basis in law or equity.

¶26 We therefore conclude that the costs, fees and reasonable attorney fees incurred by Rosen should be assessed against appellate counsel, rather than shared with the plaintiff. The motion for sanctions because of a frivolous appeal is granted, and we remand the case to the trial court to determine the proper amount of the assessment.

> [THE COURT]: Now … can you give me any good-faith reason to believe that the law should be changed in this matter, that this is the kind of transaction the law should protect whereas it wouldn't normally?
>
> [COUNSEL]: Your Honor, I don't believe I was asking for any kind of extension of the law here. I believe that what my client was stating was that he believed that he was entitled to the return of his money, that an unjust enrichment theory based on those three standards would appear to apply here.

By the Court.—Order affirmed and cause remanded with directions.

Not recommended for publication in the official reports.