

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 1, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2623

Cir. Ct. No. 2006CV66

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

GUNDERSON, INC.,

PLAINTIFF-APPELLANT,

V.

ASPIRUS WAUSAU HOSPITAL, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Gunderson, Inc., appeals from the judgment of the circuit court that granted summary judgment to Aspirus Wausau Hospital, Inc. Gunderson argues that the circuit court erred when it denied Gunderson's motion

for summary judgment and granted Aspirus's motion. Because we conclude that there are factual disputes that should be resolved at trial and, consequently, summary judgment was not appropriate, we reverse that part of the judgment of the circuit court that granted summary judgment to Aspirus and affirm that portion of the judgment that denied Gunderson's motion for partial summary judgment. We remand the matter to the circuit court for proceedings consistent with this opinion.

¶2 In 2004, Gunderson entered into a contract with Aspirus to provide surgical linens to Aspirus for a period of five years. At the time they entered into the contract, Gunderson and Aspirus had an ongoing business relationship. On November 22, 2005, Aspirus sent a letter to Gunderson stating that it would be terminating the contract starting December 31, 2005. Gunderson then sued Aspirus for breach of contract. Gunderson subsequently moved for partial summary judgment, arguing that Aspirus did not give it notice of the right to cure any alleged breaches in the contract and, instead, unilaterally terminated the contract. Aspirus also moved for summary judgment asserting that Gunderson had breached the contract.

¶3 The circuit court held a hearing on the motion, denied Gunderson's motion for partial summary judgment, and granted Aspirus's motion for summary judgment. The court found that Gunderson had breached the contract by "failing to supply the surgical linens ordered by Aspirus," and concluded that the shortages were "chronic and material." The court also found that Gunderson had "long-standing knowledge of the shortages." The court concluded that Gunderson had breached the contract, had "substantial opportunities to cure the shortages during the contract but failed to do so," and had failed to exercise its right to cure under the contract. Gunderson appeals.

¶4 This court reviews summary judgment decisions de novo, applying the same standards as the circuit court. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins an issue of material fact or law. *Id.* If we determine that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. *Id.* at 232. If the movant carries his or her initial burden, we then look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial. *Id.* at 232-33.

¶5 The question of whether there is a material breach of contract “is, except in clear cases, a question for the jury.” *Myrold v. Northern Wis. Coop. Tobacco Pool*, 206 Wis. 244, 249, 239 N.W. 422 (1931). Further, in order to establish a breach that constitutes repudiation of the entire agreement, “the nonperformance must be substantial and the breach so serious as to destroy the essential objects of the contract.” *Seidling v. Unichem, Inc.*, 52 Wis. 2d 552, 554, 191 N.W.2d 205 (1971).

¶6 In this case, the circuit court found that the contract provided that either party had the right to terminate the contract if either party failed in any material respect to provide services consistent with its obligations under the agreement. The court also went on to find that the facts were undisputed that Gunderson breached the contract and that the breach was material. We conclude, however, that the question of whether Gunderson breached the contract, and whether that breach was material, should have been submitted to a jury. The facts submitted by both parties lead to competing inferences, with Gunderson arguing one version and Aspirus arguing another. The circuit court, in essence, engaged in

a credibility determination finding that Aspirus's version of the events leading up to its decision to terminate the contact was more credible than Gunderson's version. Based on the record before us, we conclude that the issue of whether there was a breach of contract should be submitted to a jury.

¶7 This then leads to the question of whether Aspirus provided Gunderson with notice and a right to cure as provided by the contract. The question of whether there was notice and a right to cure becomes relevant if and when the jury determines whether there was a breach of the contract. Therefore, we do not address the parties' arguments on notice and the right to cure. Instead, we leave that issue to be determined on remand. For the reasons stated, the judgment of the circuit court is reversed in part and affirmed in part, and the matter is remanded to the circuit court for proceedings consistent with this opinion.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

