COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2009

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. 2008AP3049 **Cir. Ct. No. 2007CV3610**

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

ROETTGERS COMPANY, INC.,

PLAINTIFF-RESPONDENT,

V.

JEFFREY T. CURRO,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

CURRO'S AUTOMOTIVE SERVICES, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

SCOTT OIL COMPANY,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Jeffrey Curro appeals pro se from a foreclosure judgment. He argues that summary judgment was inappropriate because he challenged the validity of the mortgage held by Roettgers Company, Inc., and the amount due, and because he had viable counterclaims. We affirm the judgment.

¶2 Starting in July 1987, Roettgers supplied gasoline and related products to Curro for the gas station he operated in Brookfield, Wisconsin. In August 2002, Roettgers asked Curro to secure his growing debt and a mortgage was executed and recorded in Roettgers's favor. In May 2007 Curro stopped selling gasoline at his station. In September 2007, Roettgers terminated its relationship with Curro because the debt had grown to $177,658.28. Roettgers sought foreclosure on the mortgage. In his answer to the complaint, Curro asserted as an affirmative defense that "he does not believe that he signed" the mortgage. Curro alleged two counterclaims; one for "breach of promise" claiming Roettgers had overcharged for gasoline products and made intentional misrepresentations that Shell Oil Company required modifications to the gas station for Shell branding, and the second for slander of title by recording the mortgage with an alleged forgery of Curro's signature.[1] In opposition to

[1] Curro also filed a third-party complaint against Scott Oil Company alleging that Scott conspired with Roettgers to overcharge Curro for gasoline. The record does not reflect the disposition, if any, of the third-party complaint. Scott Oil is not a respondent in this appeal. We do not address Curro's argument that a reasonable jury could find that Scott Oil conspired with Roettgers to breach the implied duty of good faith or slander title.

Roettgers's motion for summary judgment, Curro filed an affidavit stating, "I do not recall ever signing the mortgage pertinent to this action…." Summary judgment was entered granting foreclosure for $263,526.46, the total due including attorney fees, and dismissing Curro's counterclaims.

¶3 When reviewing a grant of summary judgment, we apply the same methodology as the circuit 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) (2007-08).[2] We will reverse a decision granting summary judgment if the circuit court incorrectly decided legal issues or material facts are in dispute. ***Coopman***, 179 Wis. 2d at 555. In our review we, like the circuit court, are prohibited from deciding issues of fact; our inquiry is limited to determining whether a material factual issue exists. *See* ***id.*** The evidence, and the inferences therefrom, must be viewed in the light most favorable to the party opposing the motion. ***Kraemer Bros., Inc. v. U.S. Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). Any reasonable doubt as to the existence of a factual issue must be resolved against the moving party. ***Maynard v. Port Publ'ns, Inc.***, 98 Wis. 2d 555, 563, 297 N.W.2d 500 (1980). The alleged factual dispute, however, must concern a fact that affects the resolution of the controversy, and the evidence must be such that a reasonable jury could return a verdict for the nonmoving party.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Clay v. Horton Mfg. Co., 172 Wis. 2d 349, 353-54, 493 N.W.2d 379 (Ct. App. 1992).

¶4 Curro first argues that summary judgment was improper because genuine issues of material fact exist regarding the validity of the mortgage and the amount of the alleged debt. In support of summary judgment Roettgers offered the August 2002 signed, notarized, and recorded mortgage, an affidavit from the notary public (a Roettgers employee) confirming Curro's execution of the mortgage in the notary's presence, an agreement executed by Roettgers in August 2004 to subordinate its mortgage to a mortgage Curro gave to M&I Bank, and an affidavit stating that $217,326.24 was owed on Curro's account as of May 31, 2008, with interest accruing at $107.17 per day.

¶5 What did Curro offer in opposition? As to the validity of the mortgage, he only offered his affidavit that he did not remember signing the mortgage. This is insufficient to create a genuine issue of fact as to whether the signature on the mortgage was forged. A statutory presumption exists that the notarized signature is genuine. WIS. STAT. § 706.07(3)(c). Further, under WIS. STAT. § 891.25 the document itself is proof that it was signed "until denied by the oath or affidavit of the person by whom it purports to have been signed." Curro did not deny that he signed the mortgage. Instead he merely asserted he didn't remember signing it. Whether or not he remembers signing the document is not a disputed fact that affects the outcome. *See* ***Metropolitan Ventures, LLC v. GEA Associates***, 2006 WI 71, ¶21, 291 Wis. 2d 393, 717 N.W.2d 58 ("summary judgment is appropriate only when there is no dispute over facts that would affect the outcome of the case").

¶6 Curro also argues that from a comparison of the signature on the mortgage to his signature on other documents a reasonable jury could find that the signatures do not match. We question, as the circuit court did, whether such a comparison can produce anything more than speculation that the signatures do not match because Curro's signature is not legible or punctuated with identifiable comparison points. *See* WIS. STAT. § 909.015(2) (a nonexpert may give an opinion as to the genuineness of handwriting only based on familiarity not acquired for purposes of the litigation). Thus, even if Curro had identified which signatures were genuinely his and a comparison is made,[3] it does not give rise to a reasonable inference that the mortgage signature was forged. *See* ***Belich v. Szymaszek***, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999) (competing inferences must be reasonable to create a genuine issue of material fact and "an inference is not supposition or conjecture; it is a logical deduction from facts proven and guesswork cannot serve as a substitute"). Curro could have offered the analysis of an expert witness to raise a question of whether the signature was a forgery. It was his burden and without it he failed to rebut the presumption of validity. *See* ***Jax v. Jax***, 73 Wis. 2d 572, 589, 243 N.W.2d 831 (1976).

¶7 That a Roettgers's employee acted as the notary on the mortgage does not give rise to a reasonable inference that the signature was forged or that the notary disregarded his statutory responsibilities. That the same employee was

[3] Roettgers points out that before the circuit court Curro did not identify which documents contained his real signature for comparison purposes. Curro raises for the first time on appeal that a comparison of signatures creates a issue of fact as to the validity of the signature on the mortgage. Generally issues or factual matters not presented to the circuit court will not be considered for the first time on appeal. ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154; ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 556, 508 N.W.2d 610 (Ct. App. 1993).

"negligent" in overcharging Curro at some point does not bear on his duties as a notary. Simply, Curro did not create a genuine issue of material fact regarding the validity of his notarized signature on the mortgage.

¶8 With respect to the amount owed on Curro's debt to Roettgers, Curro's affidavit stated that he had complained about prices he was being charged and was informed in January 2007 that he had been overcharged $28,500. Not only does a portion of his affidavit merely relay hearsay and must be disregarded, ***Kroske v. Anaconda American Brass Co.***, 70 Wis. 2d 632, 640-41, 235 N.W.2d 283 (1975), *superseded by statute on other grounds as stated in* ***Mullenberg v. Kilgust Mechanical Inc.***, 2000 WI 66, ¶¶13-14, 235 Wis. 2d 770, 612 N.W.2d 327, the affidavit does not contradict Roettgers's affidavit of the total amount due. Mere complaints about the prices charged does not dispute the total amount due. There is no indication that price adjustments were negotiated, that Curro ever objected to invoices he received, or that the amount due does not reflect adjustment for overcharges. Curro contends that Roettgers failed to meet its burden of proof because it never produced the invoices showing the accrued balance or payments made. He cites nothing in support of that contention. His claim is really one that Roettgers has not produced perhaps the best evidence of the debt. Summary judgment does not depend on the best evidence. It is enough that Roettgers presented some evidence—its sworn affidavit of the balance due—and that the evidence is not contradicted by other evidence. Based on this record, Roettgers was entitled to judgment as a matter of law.

¶9 We turn to Curro's arguments about his counterclaims. He first claims that he presented sufficient evidence for a reasonable jury to find that Roettgers breached the implied duty of good faith attendant to every contract. *See* ***Metropolitan Ventures***, 291 Wis. 2d 393, ¶35 ("[p]arties to a contract have a duty

of good faith to each other"). The first step in summary judgment methodology is to examine the pleadings to determine whether a claim for relief is stated. ***Clay***, 172 Wis. 2d at 353. An implied covenant of good faith is violated only where the conduct of a party to the contract is "arbitrary and unreasonable." ***Chase Lumber & Fuel Co. v. Chase***, 228 Wis. 2d 179, 194-95, 596 N.W.2d 840 (Ct. App. 1999). A breach of the implied duty of good faith requires intentional or purposeful conduct by one party to the contract which prevents the other party from carrying out its part of the agreement, or the commission of some arbitrary or unreasonable conduct that has the effect of destroying or injuring the right of the other party to receive the fruits of the contract. ***Metropolitan Ventures***, ¶35.

¶10 Curro's counterclaim did not specifically plead a cause of action for a breach of the implied duty of good faith. He alleged that overcharges resulting from a computer error damaged his business with regard to lost profits, cost of de-branding, and loss of sales as a result of such de-branding. Even considering Curro's complaint that Roettgers never gave him a requested itemization or information on the overcharges as a suggestion of subterfuge or evasiveness, *see* ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995) ("Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified."), nothing establishes the computer overcharges as arbitrary or unreasonable or links it to an impairment of Curro's ability to perform or receive benefits of the contract. Indeed Curro alleges that Roettgers offered to pay him $35,000 for the overcharge thus attempting to right the very wrong he complains about. Even if overcharges were admitted by Roettgers, the supply agreement between the parties gave Roettgers the right to set prices and to change prices, terms, and conditions without notice. Where a contracting party complains of acts of the other party

which are specifically authorized in their agreement, there is no breach of the implied duty of good faith. ***Super Valu Stores, Inc. v. D-mart, Food Stores, Inc.***, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988).

¶11 Curro also alleged that Roettgers represented that Shell Oil required certain reconstruction and modification of the gas station, that the representation was not true, that Roettgers knew it wasn't true, and that he relied on the representation to his detriment and substantial loss. Again there is no allegation linking the misrepresentation to conduct that had the effect of impairing Curro's ability to perform or receive benefits of the contract. The contract did not promise Curro profits.

¶12 Curro's allegation reads more like a claim of intentional misrepresentation. However, it lacks any allegation of intent by Roettgers to induce Curro's action for the purpose of pecuniary damage. Consequently Curro has not stated a cause of action for intentional misrepresentation. *See* WIS JI—CIVIL 2401 (elements of intentional misrepresentation claim include that the representation was made with intent to deceive and induce a person to act upon it to that person's pecuniary damage). Even if a misrepresentation claim is stated, it is barred by the economic loss doctrine. *See* ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶¶23, 29, 270 Wis. 2d 146, 677 N.W.2d 233 ("[t]he economic loss doctrine is a judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship" and is applied to intentional misrepresentation claims not related to inducing the contract).

¶13 Not only did Curro fail to allege a claim for breach of the implied duty of good faith, he failed to adduce sufficient evidentiary facts in support of his

claims to avoid summary judgment of dismissal. His affidavit in opposition to the motion for summary judgment does not include one evidentiary fact that his ability to perform or receive benefits of the supply contract was impaired by Roettgers's conduct. He merely asserts that he shut off his gas pumps because he was not making a profit on cash transactions and lost money on credit and debit transactions. This does little to establish that Roettgers's pricing was grossly out of step with market rates or that the terms and conditions set by Roettgers were arbitrary. Curro argues on appeal that overcharging prevented him from making feasible profits, that Roettgers's prices sent him to the poorhouse, that the failure to disclose that Scott Oil, and not Roettgers, was the Shell Oil wholesale supplier interfered with his ability to benefit from the supply agreement, and that Roettgers's president failed to adequately inform him of the contents of the mortgage he does not remember signing. None of these claims are supported by evidentiary facts.

¶14 We have already determined that Curro failed to establish evidentiary facts that the mortgage was a forgery. If follows that his counterclaim for slander of title fails. Summary judgment dismissing the counterclaims was proper.

¶15 Curro's final argument is that if he has not established that Roettgers breached the implied duty of good faith, slandered his title, or conspired with Scott Oil on those claims, it is because the attorneys he hired to represent him failed to properly investigate his claims. He makes broad assertions that his counsel failed to act as a reasonable attorney under the same circumstances. A remedy for ineffective counsel cannot be given in this action. "A civil litigant whose rights have been adversely affected by a negligent attorney may hold that attorney liable for any monetary losses caused by the negligence." ***Village of Big Bend v.***

Anderson, 103 Wis. 2d 403, 406, 308 N.W.2d 887 (Ct. App. 1981). That remedy is by a separate suit for malpractice. ***Id.***

By the Court.—Judgment affirmed.

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