COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP1829 **Cir. Ct. No. 2009CV14372**

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

SCOTT L. BERGGREN, RIDGEVIEW D & J, LLC AND RIDGEVIEW HOLDINGS, LLC,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

REINHART BOERNER VAN DUREN, S.C., FRANCIS W. DEISINGER AND DANIEL J. BRINK,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed in part, reversed in part and cause remanded.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Scott L. Berggren, Ridgeview D & J, LLC, and Ridgeview Holdings, LLC (collectively "Berggren"), appeal from an order dismissing their complaint on the merits based on the "Settlement Agreement and Release" ("the Release") signed by all parties that Berggren attached to the complaint. Reinhart Boerner Van Duren S.C. and the individual defendants (collectively "the Reinhart parties") appeal from that portion of the order denying their request for reasonable attorney fees based on the same Release. We affirm the portion of the order dismissing the complaint because the Release bars all of the claims made in the complaint. We reverse the portion of the order denying attorney fees to which the defendants, as the prevailing parties, are entitled under the Release. We remand to the circuit court to determine the amount of attorney fees to be awarded.

BACKGROUND

¶2 According to the complaint, in late 2004, Berggren went into business with his then-attorney, Daniel Brink. Brink was a partner at the Reinhart law firm. The two discussed acquiring a machining business together and ultimately both invested significantly in Ridgeview, an entity formed to purchase the machining business. Bank funding for Ridgeview was also obtained.

¶3 Between mid-2006 and throughout 2007, Ridgeview lost significant amounts of money, to the extent that Ridgeview's lending bank considered initiating collection proceedings. The relationship between Berggren and Brink soured, and Berggren came to believe that Brink was not dealing fairly with him; rather, Berggren believed that Brink was working to the benefit of the Reinhart firm and an accountant. Berggren hired a Chicago-based attorney who threatened to sue the aforementioned persons and entities.

¶4 Ultimately, a forbearance agreement was reached with the lending bank, and the bank agreed to an infusion plan of $150,000 of new funds into Ridgeview. On January 7, 2008, Berggren met with the Reinhart parties and was presented with the Release. Berggren discussed the Release with his attorney by phone and was advised not to sign the document. Berggren, an admittedly sophisticated business man with successful business litigation experience, signed the Release, despite his attorney's advice. Berggren signed the Release a total of six times—once on behalf of himself personally, and the remaining five times on behalf of the business entities involved in his disputes with the Reinhart parties, namely Ridgeview Holdings, LLC; Ridgeview D & J, LLC; Darby Capital, LLC; Nanomet, LLC; and Alkire International Solutions, LLC.

¶5 As material to this appeal, the Release discharged all parties and entities, including the Reinhart parties, from any claims or causes of action, whether known or unknown, arising out of any act or omission before, or at the time of, the Release that related in any way to the disputes among the parties and entities.[1] In addition, all parties agreed that the prevailing party in any litigation

[1] The Release provides:

> Each Party ... releases and forever discharges each other Party … of and from any and all claims, causes of action, … and controversies in law or equity, whether presently known or unknown, … which Releasors or any one or more of them will have, now have or may have had against Releasees arising out of any act or omission occurring on or prior to the date of this Release that in any way relates to the [disputes among the parties][.]

relating to the Release would recover its costs and reasonable attorney fees relating to that litigation.[2]

¶6 Shortly after signing the Release, Berggren became the sole owner of Ridgeview. Approximately eighteen months after he consolidated his ownership and control of Ridgeview, Berggren filed a two hundred thirty-one paragraph complaint which included fifty-nine pages of facts alleged in support of fifteen causes of action against the Reinhart parties. All of the conduct attributed to the Reinhart parties is alleged to have occurred on or before the date the parties signed the Release. The causes of action, which Berggren asserts are supported by the complaint, include a variety of intentional frauds and negligent torts against the defendants, individually and collectively, relating to the business ventures and the professional conduct of the attorneys and accountant related thereto. The complaint also included a claim that Berggren signed the Release because of economic duress.

¶7 Attached to Berggren's complaint were thirteen exhibits, including the Release.[3] The Reinhart parties moved to dismiss the complaint, asserting that all claims alleged in the complaint were barred by the Release. They also requested attorney fees and costs under the terms of the Release. After briefing and a hearing, the circuit court dismissed Berggren's complaint with prejudice based on the Release, finding that Berggren effectively pled himself out of court by including the Release with the complaint. The circuit court also denied

[2] The Release, as relevant, provides: "In any litigation filed or maintained to enforce the terms of this Agreement or resulting from the breach of this Agreement, however, the prevailing party shall be entitled to recover its costs and reasonable attorneys' fees incurred in the litigation."

[3] The Settlement Agreement and Release is referred to in the complaint as "Exhibit H" and is attached to the complaint.

attorney fees to the Reinhart parties, simply stating that it "wasn't focusing" on the attorney fees issue, and it was "inclined not to grant attorneys' fees." Berggren appeals the dismissal of the complaint. The Reinhart parties appeal the denial of attorney fees under the Release.

DISCUSSION

I. Sufficiency of the Complaint.

Standard of Review

¶8 Under WIS. STAT. § 802.06(2)(a)6. (2009-10),[4] we review a motion to dismiss which tests the legal sufficiency of the complaint *de novo*. "Whether the complaint states a claim for relief is a question of law that we review independently." ***Friends of Kenwood v. Green***, 2000 WI App 217, ¶11, 239 Wis. 2d 78, 619 N.W.2d 271. "For purposes of review, we accept the facts stated in the

[4] WISCONSIN STAT. § 802.06(2)(a)6. provides in relevant part:

> **Defenses and objection; when and how presented; by pleading or motion; motion for judgment on the pleadings.**
>
> ….
>
> **(2)** HOW PRESENTED. (a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> ….
>
> 6. Failure to state a claim upon which relief can be granted.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

complaint, along with all the reasonable inferences that may be drawn from them, as true…. Unless it seems certain that no relief could be granted under any set of facts that the plaintiff could prove, dismissal of the complaint is improper." ***Id.***

¶9 WISCONSIN STAT. § 802.04(3)[5] provides that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." "While a complaint need not specifically deny the existence of any and all affirmative defense, it can, by inadvertence or otherwise, create or concede an affirmative defense fatal to its validity." ***Thomas v. Kells***, 53 Wis. 2d 141, 145, 191 N.W.2d 872 (1971) (footnote omitted). If allegations in the complaint are inconsistent with the terms of a document attached, the terms of the document govern. ***Friends of Kenwood***, 239 Wis. 2d 78, ¶11.

¶10 Berggren argues, in essence, that his complaint sufficiently puts forth various causes of action. We assume, without deciding, that Berggren does properly put forth multiple causes of action in his complaint; however, we conclude that those causes of action are barred by the Release, which is attached to, and thus a part of, the complaint.

¶11 We agree with the circuit court that Berggren effectively pled himself out of court by including the Release as part of the complaint. "A release is to be treated as a contract." ***Gielow v. Napiorkowski***, 2003 WI App 249, ¶14, 268 Wis. 2d 673, 673 N.W.2d 351. "The interpretation of a contract is a question of law that we review *de novo*. Unambiguous language in a contract must be enforced as it is written. Language in a contract is ambiguous only when it is

[5] WISCONSIN STAT. § 802.04(3) provides: "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

'reasonably or fairly susceptible of more than one construction.'" ***Teacher Ret. Sys. of Texas v. Badger XVI Ltd. P'ship***, 205 Wis. 2d 532, 555, 556 N.W.2d 415 (Ct. App. 1996) (citations omitted).

¶12 The Release acknowledges that disputes exist among the parties and that the parties mutually release and discharge each other from all claims or causes of action which arose before, or on the date of, its signing. The Release bars claims, whether then known or unknown, which relate to the business dealings in which the parties were involved. Specifically, the Release provides:

> Disputes exist among the Parties … relating to:
>
> The purchase, formation, organization, operation, capitalization, financing, guarantees and other aspects of Ridgeview Holdings, LLC, Ridgeview D&J, LLC, Darby Capital, LLC, Nanomet LLC, and Alkire International Solutions LLC [the Entities]; and
>
> *All legal or other work performed by Brink or Reinhart at any time for or on behalf of the Entities, Berggren,* [and others][.]
>
> *The parties desire to* enter into this Agreement to fully and *finally resolve all issues in any way relating to the Disputes.*
>
> NOW THEREFORE, in consideration of the mutual covenants, agreements and releases contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the Parties agree as follows:
>
> 2. Costs and Attorneys' Fees. … *In any litigation* filed or maintained *to enforce the terms of this Agreement or resulting from the breach of this Agreement,* however, *the prevailing party shall* be entitled to *recover its costs and reasonable attorneys' fees incurred in the litigation.*
>
> 3. Release. Each Party … releases and forever *discharges each other Party …* of and *from any and all claims, causes of action, …* and controversies in law or equity, *whether presently known or unknown, …* which Releasors or any

> one or more of them will have, now have or may have had against Releasees *arising out of any act or omission occurring on or prior to the date of this Release that in any way relates to the Disputes*[.]

(Emphasis added.)

¶13 There are fifteen causes of action alleged in the complaint, including one or more variations of the following claims scattered among various defendants: negligence, legal malpractice, breach of fiduciary duty, intentional interference with prospective economic advantage, fraud, breach of duty of good faith and fair dealing, usurpation of corporate opportunity, and conversion. All are based on conduct which, as alleged in the complaint, occurred during the business relationship among the parties, *before* they signed the Release.

¶14 Berggren also claims that he signed the Release under economic duress, apparently to defend against the otherwise obvious bar the Release establishes to the myriad other claims he asserts. In ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 293 N.W.2d 155 (1980), our supreme court explained the elements of economic duress as including: (1) the party alleging economic duress must show that he has been the victim of a wrongful or unlawful act or threat; (2) the act or threat must be one which deprives the victim of his unfettered will; (3) a direct result of these elements must be that the party threatened is compelled to make a disproportionate exchange of values or to give up something for nothing; and (4) the party threatened must have no adequate legal remedy. *See* ***id.*** at 109-10. "[M]erely driving a hard bargain or taking advantage of another's financial difficulty is not duress." ***Id.*** at 110. "A threat to do what the person making the threat has a legal right to do does not constitute duress[.]" ***Pope v. Ziegler***, 127 Wis. 2d 56, 60, 377 N.W.2d 201 (Ct. App. 1985).

¶15 Taking, as we must, all of the factual allegations in the complaint and reasonable inferences therefrom as true,[6] *see* ***Friends of Kenwood***, 239 Wis. 2d 78, ¶11, Berggren has alleged facts which defeat his claim that he was under economic duress when he signed the Release. First, the conduct Berggren alleges that the Reinhart parties engaged in relative to signing the Release is a threat to do what they had a legal right to do, namely refuse to invest any more money in Ridgeview or to assist Berggren in obtaining the bank's agreement to forebear collection of the existing debt. A threat to do what one has a legal right to do does not constitute duress. *See* ***Pope***, 127 Wis. 2d at 60. Second, before signing the Release six times, Berggren alleges that he had a phone conversation with his attorney, that his attorney advised against signing the Release, and that he nonetheless signed the Release later that same day. Thus, Berggren alleges facts from which the only reasonable conclusion is that he was not deprived of his "unfettered will" when he chose to sign the Release. *See* ***Wurtz***, 97 Wis. 2d at 109-10. Third, as a result of the forbearance agreement with the lending bank and its cash infusion, Ridgeview was able to avoid collection efforts. After signing the Release, Berggren became the sole owner of Ridgeview, which was a functioning company saved from collections. Finally, Berggren's admitted successful prior experience as a business litigant, his representation by an attorney of his choice when he signed the Release, and his claims based on acts by various parties before he signed the Release, make the inference inescapable that Berggren had "an adequate legal remedy" when he chose to sign the Release. Berggren had the option of refusing to sign and initiating litigation. To conclude that Berggren did

[6] We note that this polemic complaint makes liberal use of editorial comment and metaphorical allusions. We have struggled to unearth the factual allegations which are often buried under rhetorical embellishment. We ignore such rhetorical flourishes and evaluate the complaint based only on allegations of fact.

not have an adequate legal remedy would allow Berggren to retain the benefits he received because of the Release, while simultaneously abrogating his obligations under the Release to the other parties.

¶16 We conclude that all of the claims in the complaint are barred by the Release, or by the factual allegations in the complaint. Not one of the causes of action alleged is based on conduct by any defendant *after* the Release was signed. The elements of economic duress, which might otherwise be a defense to the Release, are vanquished by the facts Berggren alleges in the complaint. We affirm the circuit court's dismissal of the complaint with prejudice.

II. Attorney Fees Pursuant to the Release.

Standard of Review

¶17 As we noted above, releases are interpreted as contracts. ***Napiorkowski***, 268 Wis. 2d 673, ¶14. Unambiguous language is to be enforced as written. ***Teacher Ret. Sys. of Texas***, 205 Wis. 2d at 555.

¶18 The Release specifically provides that: "In any litigation filed or maintained to enforce the terms of this Agreement or resulting from the breach of this Agreement, … the prevailing party *shall* be entitled to recover its costs and reasonable attorneys' fees incurred in the litigation." (Emphasis added.) The use of the word "shall" in attorney fees provision evidences clear intent not to leave the decision whether to award fees to the circuit court's discretion. *See* ***Shands v. Castrovinci***, 115 Wis. 2d 352, 357, 340 N.W.2d 506 (1983) ("[T]he use of the word 'shall' in the relevant statutory provision indicates attorney fees awards for prevailing tenants are mandatory."). We conclude that the language in this provision is unambiguous. It did not give the circuit court discretion to refuse to

award reasonable attorney fees to the prevailing party simply because it was "inclined not to grant attorneys' fees."

¶19 The allegations in the complaint all related directly or indirectly to the business dealings between Berggren and the Reinhart parties that occurred before, or at the time, the Release was signed. Because the entire complaint was dismissed with prejudice, the Reinhart parties are the prevailing parties in the litigation. Thus, under the specific language of the Release, the Reinhart parties are entitled to their reasonable attorney fees.

CONCLUSION

¶20 For the foregoing reasons, the portion of the order dismissing the complaint is affirmed. The portion of the order denying attorney fees pursuant to the terms of the Release is reversed, and the case is remanded to the circuit court to determine the reasonable attorney fees to which Reinhart, Deisinger and Brink are entitled.

By the Court.—Order affirmed in part, reversed in part and cause remanded.

Not recommended for publication in the official reports.