COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2716 **Cir. Ct. No. 2011CV900**

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

JODY SCHUTTE,

PLAINTIFF-APPELLANT,

V.

RUSS DARROW GROUP, INC. AND MIKE DARROW,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Jody Schutte appeals from an order dismissing his complaint against Mike Darrow and his former employer, Russ Darrow Group, Inc. ("Darrow" and "Russ Darrow"; "the Darrows," if both). Schutte alleged that

Darrow, a Russ Darrow executive, breached a confidential settlement agreement that had resolved Schutte's previous defamation action against Russ Darrow and one of its employees. We affirm the prior order denying Schutte's motion to seal the proceedings but reverse the order granting the Darrows' motion to dismiss.

¶2 We accept as true the following facts stated in the complaint and their reasonable inferences. *See* ***Walberg v. St. Francis Home, Inc.***, 2005 WI 64, ¶6, 281 Wis. 2d 99, 697 N.W.2d 36. In 2007, Schutte filed a lawsuit alleging that Russ Darrow employee Pat Bolger defamed him and that Russ Darrow negligently hired, trained or supervised Bolger. The complaint was filed under seal because of the nature of the statements and Schutte proceeded as "John Doe." Schutte later agreed to dismiss the case pursuant to a negotiated written settlement and release. The parties agreed that the "terms and amount" of the agreement were to remain strictly confidential and that no party would "disparage, defame, or make negative comments" about another.

¶3 In the lawsuit giving rise to this appeal, Schutte's complaint alleged that the Darrows breached the terms of the settlement agreement, invaded his privacy, and defamed him when Darrow made statements to unnamed third parties that Schutte "had sued the Darrow Group and forced them to pay Mr. Schutte a lot of money." Schutte also claimed that Russ Darrow negligently hired, trained or supervised Darrow. After the circuit court denied Schutte's motion to seal his identity in this suit, Schutte filed an amended complaint removing his defamation claim. In lieu of an answer, the Darrows moved to dismiss Schutte's complaint and for attorney fees pursuant to a clause in the settlement agreement.

¶4 The circuit court granted the motion to dismiss on grounds that, as a matter of law, Darrow's statements did not constitute either a breach of the

settlement agreement or an invasion of Schutte's privacy. It reasoned that disclosing that Schutte had sued Russ Darrow and "forced" it to pay him "a lot of money" could not be construed as "highly offensive to a reasonable person," *see* WIS. STAT. § 995.50(2)(c) (2009-10),[1] given the many lawyer ads on television, and because "a lot of money" was highly ambiguous. The court thus found no violation of the settlement agreement's confidentiality or non-disparagement clauses. With no foundational tort remaining, the court also dismissed Schutte's negligent-hiring claim. He appeals.

¶5 Schutte first contends the circuit court erred in denying his prior nonfinal motion to seal his identity. *See* WIS. STAT. RULE 809.10(4). We disagree. A party's identity is presumed to be public information, *see* ***Doe v. City of Chicago***, 360 F.3d 667, 669 (7th Cir. 2004), and the use of fictitious names is disfavored, ***Doe v. Blue Cross & Blue Shield United of Wis.***, 112 F.3d 869, 872 (7th Cir. 1997). The plaintiff may rebut the presumption of disclosure by demonstrating that the harm of revealing his or her identity exceeds the likely harm from concealing it. ***City of Chicago***, 360 F.3d at 669**.** The court must determine independently whether "exceptional circumstances" justify a departure from the normal way of proceeding. *See* ***Blue Cross & Blue Shield United of Wis.***, 112 F.3d at 872. Pseudonyms may be allowed, for example, when necessary to protect the privacy of children, rape victims, or other particularly vulnerable parties or witnesses. ***Id.***

¶6 Laying the framework for the first lawsuit, Bolger allegedly had said that Schutte was a homosexual, a "crook" and a "slimeball," and had had an affair

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

and fathered a child with a married woman. Darrow's statement did not disclose the content of Bolger's statements, however. Further, the circuit court concluded that the perhaps defamatory comments basically were "name[-]calling, bar[-]talk kind of claims." We agree with the court that Schutte did not carry his burden of showing that the public interest in open proceedings was trumped by his interest in protecting himself from the embarrassment many lawsuits entail. The decision to keep the record unsealed was not error at this stage of the proceedings.

¶7 We turn to the propriety of granting the Darrows' motion to dismiss. A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. ***Beloit Liquidating Trust v. Grade***, 2004 WI 39, ¶17, 270 Wis. 2d 356, 677 N.W.2d 298. The motion admits "the truth of all properly pleaded material facts and all reasonable inferences deriving from them." ***First Nat'l Bank of Wis. Rapids v. Dickinson***, 103 Wis. 2d 428, 432, 308 N.W.2d 910 (Ct. App. 1981). The complaint should be liberally construed, ***id.***, and "should not be dismissed as legally insufficient unless it appears certain that a plaintiff cannot recover under any circumstances," ***Beloit Liquidating Trust***, 270 Wis. 2d 356, ¶17. We review the disposition of a motion to dismiss de novo. ***Id.***

¶8 Schutte emphasizes that Darrow disclosed the identity of parties in a *sealed* lawsuit and to a *confidential* settlement and release, yet the circuit court concluded that the complaint did not state a claim for breach of contract. A settlement and release is a contract and is governed by traditional contract requirements. *See* ***Gielow v. Napiorkowski***, 2003 WI App 249, ¶¶13-14, 268 Wis. 2d 673, 673 N.W.2d 351. Construction of a contract essentially is determining the parties' intent. While normally a matter of law for the court, if the contract is ambiguous the question of intent is one for the trier of fact. ***Armstrong v. Colletti***, 88 Wis. 2d 148, 153, 276 N.W.2d 364 (Ct. App. 1979). We construe a

contract based on the whole instrument and the surrounding conditions and circumstances. ***Gielow***, 268 Wis. 2d 673, ¶14.

¶9 The confidentiality and non-disparagement paragraphs of the parties' "Full and Final Confidential Settlement and Release" provide in relevant part:

> 12. CONFIDENTIALITY. Except as expressly set forth below, the Parties agree that *the terms and amount* of the Agreement shall be strictly confidential, and shall not be disclosed, either directly or indirectly, to anyone, including, but not limited to, past, present and future employees of Darrow. Mr. Schutte may divulge *the existence and contents* of this Agreement only to his spouse, attorneys and tax advisors or preparers, pursuant to an order from a court of law; or as otherwise required by law. Should Mr. Schutte divulge the terms of this Agreement to legal counsel or tax advisors or preparers, he shall ensure that they will be similarly bound to keep the same confidential….
>
> 13. NON-DISPARAGEMENT AND INCITEMENT OF CLAIMS. The Parties agree that they will not disparage, defame, or make negative comments about one another (including Darrow's past or current customers, employees, agents, contractors, parent, affiliates, officers or directors)…. (Emphasis added.)

¶10 Seizing upon "terms and amount" and "existence and contents" in the confidentiality clause, the circuit court found that using different phrases reflects the parties' intent to impose different obligations. The court observed:

> [Schutte] was not to disclose quote *existence*, unquote and quote, *contents* unquote of that agreement. [Russ Darrow and Bolger] were not to disclose terms and amount.
>
> …. So, the conclusion we reach is [Darrow] was free under that agreement to disclose the existence and contents as long as any existence or contents did not disclose terms and amount ….

> So, if [Darrow] was free to disclose the existence as long as he doesn't disclose terms and amount, the existence more clearly encompasses identity than terms does.
>
> And being able to disclose contents would allow one to disclose that money was paid as long as the amount wasn't disclosed.

¶11 We read it differently. The confidentiality clause expressly *permits* Schutte to divulge the existence and contents of the agreement to specific individuals. It does not do anything similar for the Darrows. Given the opening language of that clause, "[e]xcept as expressly set forth below," we fail to see how Darrow "was free to disclose the existence" of the agreement to anyone.

¶12 The agreement's title together with a dedicated confidentiality clause and the instrument's limiting language satisfy us that the parties intended that the terms be kept strictly confidential. As Schutte proceeded anonymously in the previous lawsuit, we conclude that the parties' identities is a material term of the agreement and that Schutte has stated a cognizable claim that Darrow breached it by disclosing Schutte's name. His related claim that the Darrows breached the duty of good faith and fair dealing inherent in a contract presents a question for the factfinder. *See* ***Amoco Oil Co. v. Capitol Indem. Corp.***, 95 Wis. 2d 530, 542, 291 N.W.2d 883 (Ct. App. 1980).

¶13 The circuit court also concluded that Schutte's invasion-of-privacy claim under WIS. STAT. § 995.50(2)(c) did not state a claim. An invasion-of-privacy claim requires that: (1) there was a public disclosure of facts regarding the plaintiff; (2) the disclosed facts were private; (3) the disclosure would be "highly offensive to a reasonable person"; and (4) the defendant acted "either unreasonably or recklessly as to whether there was a legitimate public interest in the matter, or with actual knowledge that none existed." *See* ***Zinda v. Louisiana***

Pac. Corp., 149 Wis. 2d 913, 929-30, 440 N.W.2d 548 (1989) (addressing the identical predecessor to § 995.50, WIS. STAT. § 895.50).

¶14 The circuit court concluded that, as a matter of law, Darrow's statement that Schutte sued and got a lot of money could not be "highly offensive" because the fact that Russ Darrow was "forced" to pay implies merit to Schutte's underlying claims. Schutte argues, however, that what is "highly offensive" is that Darrow's disclosure violated his rightful expectation of privacy in a confidential agreement. We conclude that the allegations set forth in Schutte's amended complaint are sufficient to state a claim.

¶15 The circuit court similarly concluded as a matter of law that because Darrow's statement was not "highly offensive" it also was not disparaging. We disagree. An inference reasonably could be drawn that Darrow divulged the fact of the underlying lawsuit precisely to disparage Schutte because, in a business where reputation is all, a hearer could infer that Schutte is a disloyal troublemaker. Whether the disclosure violated the non-disparagement clause thus raises a factual issue for a jury. *See* ***id.*** at 921 (jury question presented when statement capable of both defamatory and nondefamatory meaning).

¶16 We reverse the grant of the motion to dismiss and the dismissal of the negligent-hiring claim and the award of attorney fees. We do not address the Darrows' objection to certain factual assertions in Schutte's reply brief.

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

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