COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1982 **Cir. Ct. No. 2013CV1519**

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

MIL ACQUISITION VENTURE, L.P.,

PLAINTIFF-RESPONDENT,

V.

BOURAXIS PROPERTIES (NEW BERLIN PROJECT), LLC, PAUL BOURAXIS, FREIDA BOURAXIS AND CHAMPION COMPANIES OF WISCONSIN, INC.,

DEFENDANTS,

MOHNS, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. In this foreclosure action, contractor Mohns, Inc., appeals the circuit court's judgment that dismissed Mohns' counterclaims against the foreclosure plaintiff, MIL Acquisition Venture, L.P. Mohns argues that the circuit court should have allowed Mohns' claims to proceed. For the most part, Mohns' claims depend on whether Mohns may rely on a contract to which Mohns was not a party. As we explain below, Mohns fails to persuade us that Mohns may rely on that contract. We affirm.

Background

¶2 According to the allegations in Mohns' pleadings, in 2005 Mohns began furnishing construction work for a developer of a condominium project. The developer obtained a loan from BMO Harris Bank National Association for the project's construction.[1]

¶3 In 2011, the developer became delinquent in paying Mohns. When Mohns threatened to cease work on the project, the developer advised Mohns to contact BMO for assurances that Mohns would get paid from loan funds.

¶4 Mohns contacted BMO and, according to Mohns, received assurances that about $223,000 in loan funds remained to pay Mohns for completed and pending work. After receiving these assurances, Mohns continued work on the project.

[1] The developer initially obtained the loan from M&I Bank. M&I was subsequently acquired by, and merged into, BMO Harris Bank National Association. For ease of discussion, in the text we refer only to BMO.

¶5 On July 21, 2011, BMO sold the construction loan at issue here to MIL Acquisition Venture. BMO and MIL entered into a loan sale agreement that required MIL to assume BMO's "obligations and liabilities" relating to the underlying loan.

¶6 Mohns continued to perform work into July or August 2011. According to Mohns, Mohns received additional assurances from MIL in September 2011 regarding payment. However, Mohns never received further payment from BMO or MIL for Mohns' work. Mohns filed construction liens against the underlying condominium property.

¶7 In July 2013, MIL filed this foreclosure action against the developer, alleging that the developer was in default on the loan and naming Mohns as an additional defendant. MIL alleged that its interests as a mortgage holder were superior to Mohns' lien interests. Mohns answered, and pled counterclaims against MIL for unjust enrichment and for "equitable subordination."

¶8 MIL moved for summary judgment on Mohns' two counterclaims. Mohns moved for leave to amend its pleadings to add additional counterclaims against MIL for constructive fraud and for breach of contract. The circuit court heard the motions together, granted MIL's motion for summary judgment, and denied Mohns' motion for leave to amend its pleadings to add counterclaims.

Discussion

¶9 We review a grant of summary judgment de novo, applying the same standards as the circuit court. ***Mach v. Allison***, 2003 WI App 11, ¶14, 259 Wis. 2d 686, 656 N.W.2d 766 (WI App 2002). A party is entitled to summary judgment if there are no disputed issues of fact and that party is entitled to

judgment as a matter of law. ***Id.*** We review the circuit court's grant or denial of a motion for leave to amend pleadings for an erroneous exercise of discretion. ***Id.***, ¶20.

¶10 Mohns frames its arguments in terms of whether summary judgment was appropriate, not only on Mohns' claims for unjust enrichment and equitable subordination, but also on Mohns' proposed claims for constructive fraud and breach of contract. Mohns asks us to consider all four claims under the de novo summary judgment standard because, according to Mohns, the circuit court addressed all four claims on the merits even though the court stated that it was denying Mohns' motion for leave to amend Mohns' pleadings. Our review of the record supports Mohns' interpretation of what the circuit court did, and we will do as Mohns asks. It seems obvious that, if it is appropriate to grant summary judgment against Mohns with respect to the proffered additional counterclaims, it was likewise proper to prohibit adding those same claims to the pleadings. For the reasons explained below, we conclude that Mohns fails to show that summary judgment was improper on any of Mohns' claims.

Mohns' Reliance On The Loan Sale Agreement

¶11 We begin with what we view as a threshold issue that is also largely dispositive. That issue is whether Mohns may rely on the loan sale agreement between BMO and MIL to hold MIL liable for BMO's conduct prior to the loan purchase. In particular, as we understand it, as a basis for holding MIL liable for BMO's assurances that Mohns would be paid for Mohns' work, Mohns seeks to rely on provisions in the loan sale agreement stating that MIL assumed BMO's "obligations and liabilities."

¶12 The circuit court concluded that Mohns could not rely on the loan sale agreement because Mohns is neither a party to the agreement nor a third-party beneficiary of the agreement. Under Wisconsin law, only a party to a contract or a third-party beneficiary of the contract may enforce the contract. ***Goossen v. Estate of Standaert***, 189 Wis. 2d 237, 249, 525 N.W.2d 314 (Ct. App. 1994).

¶13 Mohns does not argue that Mohns was a party to, or a third-party beneficiary of, the loan sale agreement. Further, Mohns acknowledges that the agreement contains an express provision stating that the agreement is for BMO's and MIL's benefit only and has no third-party beneficiaries. That provision states:

> The terms and conditions of this Agreement … exist only for the benefit of the parties to this Agreement …. No other Person is (or shall be deemed to be) a third-party beneficiary of this Agreement.

¶14 Nonetheless, Mohns argues that Mohns can rely on the loan sale agreement because Mohns is claiming that, under the sale agreement, MIL has "successor liability." With little explanation, Mohns asserts that successor liability is a type of "claim" that is distinct from a third-party beneficiary "claim," and that Mohns may bring a successor liability claim under ***Columbia Propane, L.P. v. Wisconsin Gas Co.***, 2003 WI 38, 261 Wis. 2d 70, 661 N.W.2d 776.

¶15 We begin by observing that Mohns never alleged a distinct "claim" against MIL for successor liability in the circuit court. Moreover, Mohns' claims are largely based on alleged false assurances by BMO, and Mohns does not explain why Mohns could not pursue BMO directly for BMO's alleged misconduct. Regardless, Mohns' limited "successor liability" argument based on ***Columbia Propane*** fails to persuade us.

¶16 In ***Columbia Propane***, an entity named People's Gas sold property to a second entity named Wisconsin Gas, which then sold the property to a third entity, Columbia Propane. *See* ***id.***, ¶¶3, 4-6. Subsequently, environmental contamination was discovered on the property, which had been caused by the gas manufacturing operations of People's Gas, and Columbia Propane sought to hold Wisconsin Gas liable based on provisions in the purchase agreement between Wisconsin Gas and People's Gas. *See* ***id.***, ¶¶1-2, 5-7.

¶17 The supreme court explained in ***Columbia Propane*** that "[t]he general rule of successor liability in the context of asset purchase agreements is that a 'corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation,' subject to certain exceptions." ***Id.***, ¶15 (quoted source omitted). One of the exceptions is "'when the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability.'" ***Id.***, ¶18 (quoted source omitted). The ***Columbia Propane*** court concluded that the contract between Wisconsin Gas and People's Gas did not meet this exception, and, on that basis, rejected Columbia Propane's attempt to hold Wisconsin Gas liable based on that contract. *See* ***id.***, ¶¶1-3, 7, 26, 31.

¶18 Here, we acknowledge that the loan sale agreement between BMO and MIL contains provisions that appear to meet the exception. That is, MIL expressly contracted with BMO to assume BMO's obligations and liabilities. However, it is not clear from ***Columbia Propane*** that this necessarily means that a third party like Mohns may, in effect, enforce the transfer of liability provisions in that agreement and then rely on those provisions to assert claims against MIL. Mohns is not similarly situated to Columbia Propane, a subsequent purchaser of assets giving rise to liability. Moreover, ***Columbia Propane*** contains no discussion of the effect of an express provision like the one here stating that a

contract is for the benefit of the contracting parties only. For these reasons, we are not persuaded by Mohns' reliance on ***Columbia Propane***.

¶19 Mohns provides no other authority to support its argument that Mohns may rely on the loan sale agreement between BMO and MIL. Thus, if there is some reason why Mohns' successor-liability argument should be a winning one, Mohns fails to identify it.

¶20 Accordingly, we conclude that Mohns cannot rely on the loan sale agreement to hold MIL liable for BMO's conduct. We turn to what remains of Mohns' arguments as to each of Mohns' four claims against MIL.

Unjust Enrichment

¶21 The elements of 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, 689, 266 N.W.2d 361 (1978).

¶22 Here, Mohns argues that the first element was met because Mohns continued work on the condominium construction project throughout 2011, enhancing the value of the underlying property to MIL's benefit as the foreclosing mortgage holder. Mohns argues that the second element was met because MIL knew of Mohns' continuing work. Finally, Mohns argues that the third element is met because MIL gave Mohns assurances that Mohns would be paid for Mohns' work.

¶23 Assuming without deciding that the first two elements are satisfied, Mohns' argument on the third element lacks factual support. While it appears there may be evidence that Mohns continued work in reliance on *BMO's* assurances of payment, Mohns fails to direct our attention to *evidence* supporting a finding that Mohns continued work in reliance on any MIL assurances. Mohns directs our attention instead to evidence showing that Mohns continued to perform work through July or August 2011 and that MIL first made an assurance of payment in September 2011. Even if MIL accepted and retained a benefit from Mohns, we fail to see how MIL did so under circumstances that were inequitable as between Mohns and MIL.

Equitable Subordination

¶24 Mohns asserts that bankruptcy courts have "developed the law of equitable subordination to remedy an inequity committed by one creditor to another by adjusting the relative priority of their claims." Mohns explains that, under this theory, Mohns seeks to have the court order that Mohns' construction liens be made superior to MIL's mortgage interest "to the extent that [Mohns] has been injured by MIL's conduct."

¶25 As we have indicated, however, Mohns fails to point to evidence showing that Mohns suffered inequity or injury because of MIL's conduct. Thus, we fail to see any basis for Mohns to assert equitable subordination against MIL, even according to Mohns' own definition of the claim.

¶26 As an additional, alternative basis for rejecting Mohns' equitable subordination claim, we agree with MIL that Mohns fails to cite any authority showing that equitable subordination is an available claim in a Wisconsin foreclosure proceeding.

Constructive Fraud

¶27 Mohns acknowledges that a claim for constructive fraud in Wisconsin generally requires as an element either a violation of "a rule of public policy" or the presence of a "confidential or fiduciary relation." *See* ***Boots v. Boots***, 73 Wis. 2d 207, 216-17, 243 N.W.2d 225 (1976) (quoted sources omitted). Mohns does not argue that either of those elements is present here, but invites us instead to broaden the categories of constructive fraud, something Mohns asserts that some other jurisdictions have done. We decline this invitation, which is better directed to our supreme court.

¶28 Moreover, even if we were to adopt a broader view of constructive fraud as Mohns suggests, we fail to see how Mohns could prove the claim. Mohns argues that there is constructive fraud here because MIL's assurances induced Mohns to perform additional work. As we have repeatedly said, however, Mohns fails to point to evidence that Mohns performed work in reliance on MIL's assurances. We therefore see no reason why the circuit court should have allowed Mohns' constructive fraud claim to proceed.

Breach Of Contract

¶29 Finally, Mohns argues that its breach of contract claim should have proceeded to trial because Mohns submitted evidence of an oral contract with MIL. So far as we can tell, the oral contract evidence Mohns is referring to is the evidence of MIL's September 2011 assurances. Because Mohns does not point to evidence that Mohns performed any work based on those assurances, we fail to see what damage any breach of this alleged oral contract could have caused. Mohns does not suggest that it suffered some other type of harm as a result of MIL's

alleged failure to follow through on those assurances. Thus, this alleged oral contract does not prevent summary judgment on Mohns' breach of contract claim.

Conclusion

¶30 For all of the reasons stated above, we affirm the circuit court's judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).