COURT OF APPEALS DECISION DATED AND RELEASED

June 14, 1995

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

NOTICE

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

No. 94-1925

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

GEORGE CHRISTON and G. CHRISTON, INC., a Wisconsin corporation,

Plaintiffs-Appellants,

v.

THRESHERMEN'S MUTUAL INSURANCE COMPANY, a Wisconsin corporation,

Defendant,

NOVAK'S INC., a Wisconsin corporation, and JERINA PANDELI,

Defendants-Third Party Plaintiffs-Respondents,

v.

HARVEY PLUCINSKI, ROBERT VAN RIPER, d/b/a VAN RIPER WRECKING, ABC INSURANCE COMPANY, WOODLAND CONSULTANTS, INC., f/k/a ALMARCO ENGINEERING, LARRY D. FOWLER and

XYZ INSURANCE COMPANY,

Third Party Defendants.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. George Christon and G. Christon, Inc. ("Christon") appeal from a summary judgment dismissing their claims against Threshermen's Mutual Insurance Company, Novak's Inc. and Jerina Pandeli. Because we conclude that summary judgment was appropriate, we affirm.

On review, we apply the summary judgment methodology set forth in § 802.08, STATS., in the same manner as the trial court. ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Where, as here, the pleadings state a claim for relief, ***Loveridge v. Chartier,*** 161 Wis.2d 150, 167, 468 N.W.2d 146, 150 (1991), we determine whether any material issues of fact exist by examining the parties' submissions in support of and in opposition to summary judgment, *see* ***id.*** In the absence of material issues of fact, summary judgment is appropriate. *See* ***Rach v. Kleiber,*** 123 Wis.2d 473, 478, 367 N.W.2d 824, 827 (Ct. App. 1985). Where cross-motions for summary judgment have been filed, we review each motion individually to determine whether it establishes the existence of any material facts. ***City of Edgerton v. General Casualty Co.,*** 172 Wis.2d 518, 529, 493 N.W.2d 768, 772 (Ct. App. 1992), *aff'd in part, rev'd in part on other grounds,* 184 Wis.2d 750, 517 N.W.2d 463 (1994), *cert. denied*, 514 U.S. ___, 115 S. Ct. 1360 (1995).

In May 1986, Christon purchased Novak's Restaurant and the real estate upon which it operated from Jerina Pandeli and Novak's Inc.[1] In July 1992, Christon brought suit against Novak's Inc. and Pandeli after the restaurant

[1] Pandeli owned the real estate and was president and sole shareholder of Novak's Inc. The real estate was transferred to her in 1980 after her husband, Novak, died.

building began settling due to structural defects. Christon's breach of contract and strict responsibility misrepresentation claims were premised on allegations that Pandeli and her late husband had been the general contractors on the building, that the building was negligently constructed upon sand and the debris of the previous restaurant building which had been destroyed by fire, and that Pandeli had represented to Christon that the building was defect free.[2] The defendants denied the material allegations in Christon's complaint.[3]

Pandeli sought summary judgment on the ground that she could not be held liable to Christon for the condition of the building because she was not a builder-vendor, a prerequisite for liability under ***Bagnowski v. Preway, Inc.,*** 138 Wis.2d 241, 405 N.W.2d 746 (Ct. App. 1987). She also argued that Christon's contract claim was barred under § 893.43, STATS., because it was not brought within six years after the claim accrued. Christon filed a cross-motion for summary judgment on the basis that Pandeli was the general contractor for the construction of the building and the building was not constructed in compliance with regulations regarding the soil conditions necessary for proper weight-bearing capacity.

The trial court granted summary judgment to Pandeli because Christon's contract claim was time barred, Pandeli was not liable to Christon for the allegedly negligent construction as a matter of law, and Christon had not established that Pandeli had knowledge of the building's defects. The trial court observed "[t]he mere fact that Novak Pandeli signed the building permit application as 'contractor' is insufficient itself to raise a triable issue in light of the overwhelming unrebutted evidence that defendants hired professionals to raze the burned building and construct a new one." We agree with the trial court.

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[2] Christon also brought a bad faith claim against his insurer, Threshermen's Mutual, claiming coverage for the progressive collapse of the building due to conditions not disclosed by Pandeli.

[3] Novak's and Pandeli brought a third-party action against: (1) Harvey Plucinski, a participant in the construction; (2) Robert Van Riper, d/b/a Van Riper Wrecking, who performed demolition and excavation at the site; (3) Van Riper's insurer; (4) Woodland Consultants, Inc., which provided design and engineering services in the construction of the building; and (5) Woodland's insurer. These parties are not respondents on appeal.

In order for Pandeli to be liable to Christon for the allegedly defective condition of the building, she must have been the builder-vendor, that is, an entity in the business of building on property owned by it and selling the constructed premises and the land to the public. *See* ***Bagnowski***, 138 Wis.2d at 247-48, 405 N.W.2d at 749-50.[4] Pandeli's summary judgment motion stated that she was not in the business of building commercial properties for sale, that the building had been built to house the restaurant operation, and that her late husband, who was not in the construction business, had hired the builder and made decisions regarding the building. Christon countered this assertion by reiterating that Pandeli owned the property and built a building upon it.[5]

The summary judgment record does not indicate that Pandeli did anything more than supervise the construction. This activity does not catapult her into the role of a builder-vendor, a prerequisite for liability under ***Bagnowski***. In the absence of a material issue of fact on this point, the trial court properly granted summary judgment to Pandeli. The trial court also properly denied Christon's cross-motion for summary judgment because it did not demonstrate the existence of a material fact relating to the central issue: whether Pandeli was a builder-vendor as required by ***Bagnowski***.

Christon's strict responsibility misrepresentation claim also fails under ***Bagnowski.*** Misrepresentation is a claim in tort. ***Grube v. Daun***, 173 Wis.2d 30, 51, 496 N.W.2d 106, 113 (Ct. App. 1992). ***Bagnowski*** precludes liability in tort under the facts of this case. *See also* ***Moore v. Brown***, 170 Wis.2d 100, 486 N.W.2d 584 (Ct. App. 1992).

Bagnowski also disposes of Christon's breach of contract claim. Christon alleged a failure of consideration because the building was negligently constructed. However, this claim is premised upon Pandeli's liability for the allegedly negligent construction. We have already held that she is not liable

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[4] Although the definition of "builder-vendor" used in ***Bagnowski v. Preway, Inc.***, 138 Wis.2d 241, 405 N.W.2d 746 (Ct. App. 1987), arose in the residential property context, the definition is equally applicable in the commercial property arena.

[5] We note that the permit for removing debris and filling the basement level to the ground identified the contractor as Van Riper Wrecking and the Pandelis as the owners. The Pandelis appear as the general contractors and owners on the permit for constructing the building.

under ***Bagnowski*** and the facts of this case. Therefore, we need not reach the trial court's conclusion that the claim was barred by the applicable statute of limitations.

By the Court.—Judgment affirmed.

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