COURT OF APPEALS
DECISION
DATED AND RELEASED

February 5, 1997

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

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No. 96-0469

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

ALLEN R. RADTKE, JR., and SIMONE ENGINEERING, INC.,

Plaintiffs-Appellants,

v.

EAST MEQUON BUSINESS PARK LIMITED PARTNERSHIP and EAST MEQUON DEVELOPMENT CORPORATION,

Defendants-Respondents,

EAST MEQUON DEVELOPMENT CORPORATION,

Third Party Plaintiff,

v.

GIC DEVELOPMENT, INC., a Wisconsin corporation, and JOHN O. GRAHAM,

Third Party Defendants.

APPEAL from a judgment of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed*.

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

PER CURIAM. Allen R. Radtke, Jr. and Simone Engineering, Inc. appeal from a judgment dismissing four causes of action against East Mequon Business Park Limited Partnership and East Mequon Development Corporation (collectively, the Partnership) for the failure to make Radtke a limited partner in the Partnership. They argue that summary judgment was inappropriate because it was error to exclude consideration of negotiations because of a merger clause in a lease between Simone Engineering and the Partnership and issues of fact exist as to promises and representations made to Radtke and Radtke's reliance on them. We affirm the dismissal of the complaint.

Radtke is the president and sole shareholder of Simone Engineering. The Partnership owned and developed commercial real estate in the City of Mequon. GIC Development, Inc. was the general partner of the Partnership. Larry Huffman was the only limited partner of the Partnership. GIC's president, John O. Graham, was a personal friend of Radtke's. Graham had involved Radtke as a limited partner in several residential developments during their personal relationship.

In late 1988 and early 1989, Radtke was looking for a new location for expansion of Simone. The Partnership, through GIC and Graham, proposed development of certain real estate in a business park for Simone's use. Radtke was interested in owning rather than leasing a building. Graham suggested that Radtke be given a limited partnership interest in the Partnership if Simone leased from the Partnership.

Believing that he would be given a limited partnership interest, Radtke, on behalf of Simone, executed a lease agreement with the Partnership on September 1, 1989. In October 1989, a draft of an amendment to the partnership agreement admitting Radtke as a special limited partner was prepared and reviewed. Terms and drafts were reviewed and discussed over the next few years. The Partnership agreement was never amended to include Radtke's participation. In 1992, East Mequon Development Corporation replaced GIC as the general partner of the Partnership.

Radtke commenced this action in 1994. Radtke's complaint alleged four causes of action: breach of the oral contract to form a partnership with Radtke, promissory estoppel, misrepresentation, and breach of the duty of utmost good faith in negotiations regarding the formation of a new partnership.[1] He sought to recover the excessive costs incurred in leasing from the Partnership over those costs of obtaining comparable facilities elsewhere. The circuit court dismissed the fourth cause of action for the breach of the duty of utmost good faith for the failure to state a claim. Summary judgment was entered dismissing the remaining causes of action. The circuit court concluded that the undisputed facts established that there was not an enforceable contract to form a partnership, only an "agreement to agree," and that Radtke's reliance on Graham's representations was unreasonable.

We review decisions on summary judgment de novo, applying the same methodology as the circuit court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995); § 802.08(2), STATS. That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***M & I First Nat'l Bank***, 195 Wis.2d at 496-97, 537 N.W.2d at 182.

Radtke first argues that it is an undisputed fact that there was an explicit promise to give him a partnership interest and the circuit court erred in applying the parol evidence rule[2] to bar evidence of partnership terms discussed prior to the signing of the lease. It may be that the merger clause in the lease was not effective to bar the agreement to give Radtke a partnership interest. *See* ***Federal Deposit Ins. Corp. v. First Mortgage Investors***, 76 Wis.2d 151, 158, 250 N.W.2d 362, 366 (1977) ("Parol evidence is always admissible with

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[1] These causes of action were set forth in Radtke's second amended complaint. The first amended complaint alleged a breach of a fiduciary duty instead of the breach of the duty of utmost good faith.

[2] The parol evidence rule is that when the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be contradicted or varied by proof of prior written or oral agreements. *See* ***Federal Deposit Ins. Corp. v. First Mortgage Investors***, 76 Wis.2d 151, 156, 250 N.W.2d 362, 365 (1977). It is a rule of substantive law and not a rule of evidence. *See* ***id.***

respect to the issue of integration, that is parol evidence is admissible to show whether the parties intended to assent to the writing as the final and complete (or partial) statement of their agreement."). We need not decide this because even considering the parol evidence, nothing more than an agreement to agree existed.

The enforcement of an oral contract requires that the terms be complete and definite with reasonable certainty. *See* ***Witt v. Realist, Inc.***, 18 Wis.2d 282, 297, 118 N.W.2d 85, 93 (1962). There must be a meeting of the minds and mutual assent to the terms of the agreement. *See* ***Ziolkowski v. Caterpillar, Inc.***, 800 F. Supp. 767, 779 (E.D. Wis. 1992).

It is undisputed that Graham had proposed to Radtke that he become a limited partner with respect to the building Simone would lease and participate in 50% of the cash flow generated from the building and receive 50% of the proceeds of the sale of the building. Radtke admitted at his deposition that there was no discussion or agreement about his management rights as a limited partner, including his ability to approve or disapprove the sale of the building. Nor was there any discussion or agreement on how the building would be valued if there was a sale of the entire business park, how long the limited partnership interest would last, or Radtke's rights upon dissolution of the partnership. Radtke acknowledged that these were issues that would be "dealt with" or "worked out" after the lease was signed and the partnership agreement reduced to writing. Additionally, Radtke admitted that after signing the lease he sought a partnership agreement which would insulate his limited partnership interest in the one building from financial risks associated with the entire project. He admitted that the issue of insulating his interest was not discussed with Graham and that it was another issue that had to be agreed upon after the lease was signed. Radtke admitted that what exactly his 50% participation meant was not clearly defined when the lease was signed.

The record establishes that the terms of the oral agreement were not definite. Moreover, after the lease was signed, Radtke and Graham involved their respective attorneys in drafting and reviewing a proposed partnership agreement. Radtke was negotiating terms. The continuing negotiations reflect that there was no meeting of the minds on the terms of Radtke's limited partnership. *See* ***Ziolkowski***, 800 F. Supp. at 779-80. Although Radtke would have us believe that the parties intended the "gaps" in their

agreement to be filled by Wisconsin partnership law, the continuing negotiations and Radtke's interest in insulating his interest belie that possibility.[3] Also, there is no evidence that the parties ever discussed that the partnership would be governed by the simple provisions of partnership law. At best, the oral contract was an agreement to agree and unenforceable. *See* ***Witt***, 18 Wis.2d at 298, 118 N.W.2d at 94. We conclude that the breach of contract claim was properly dismissed.

We turn next to the claim of promissory estoppel. To recover on a promissory estoppel theory a party must establish that: (1) there was a promise the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) the promise induced such action or forbearance; and (3) injustice can be avoided only by enforcement of the promise. *See* ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis.2d 683, 698, 133 N.W.2d 267, 275 (1965).

The circuit court determined that Radtke's reliance on promises made by Graham was not reasonable. Radtke argues that reasonable reliance is not an element of promissory estoppel and is a factual issue dependent on a full development of the facts. The reasonableness of reliance on a promise is one of several considerations bearing on the determination of whether an injustice can only be avoided by enforcement of the promise. *See* ***U.S. Oil v. Midwest Auto Care Servs., Inc.***, 150 Wis.2d 80, 91-92, 440 N.W.2d 825, 829 (Ct. App. 1989). The determination of whether enforcement is necessary to avoid an injustice is a policy question to be decided by the court in the exercise of its discretion. *See* ***id.*** at 89, 440 N.W.2d at 828. The weighing of the various considerations is also a discretionary determination. Thus, we consider whether the circuit court erroneously exercised its discretion in concluding that no injustice exists. If the facts are undisputed, reasonable reliance is a question of law. *See* ***Ritchie v. Clappier***, 109 Wis.2d 399, 406, 326 N.W.2d 131, 134 (Ct. App. 1982).

[3] Radtke contends that the mere fact that contracting parties agree to memorialize their oral contract in writing at a later date does not mean that there is no enforceable contract. While that may be, because the oral contract here fails for indefiniteness, we need not decide if a factual issue exists as to whether the agreement to reduce the partnership deal to writing was a condition precedent to enforceability.

It is undisputed that due to the personal and trusting relationship he had with Graham, Radtke relied on Graham's promise that a partnership interest would be delivered. Radtke admitted that he relied on the promise without concern for whether the other partner in the partnership had agreed to allow Radtke to become a partner. Radtke knew that a written contract was contemplated. The deal had fairly high stakes and was apparently Radtke's first limited partnership venture involving his own business. Moreover, Radtke was a sophisticated businessman and investor. Radtke's "blind faith" in Graham's ability to deliver an acceptable partnership arrangement does not excuse Radtke's failure to act as a reasonably prudent investor. He should have known that the anticipated written contract making him a limited partner would not be a simple document. Yet he chose to rely on an informal and indefinite promise which came from only one of two partners in the Partnership. Both the formality or definiteness of the promise and the sophistication of the parties are proper considerations in determining whether an injustice exists. *See* ***Silberman v. Roethe***, 64 Wis.2d 131, 146-47, 218 N.W.2d 723, 730-31 (1974). As a matter of law, it was unreasonable of Radtke to act on the promise that a partnership interest would be conferred until a formal and more detailed written contract had been executed. *See* ***Ziolkowski***, 800 F. Supp. at 781.

We are not persuaded that any other consideration neutralizes Radtke's unreasonable reliance. We conclude that the circuit court properly exercised its discretion in determining that the promissory estoppel claim failed because of Radtke's unreasonable reliance.

Radtke's misrepresentation claim was also properly dismissed. Radtke alleges that at the time the promise was made to make him a partner, the Partnership knew facts which prevented Radtke from being made a partner, namely, that Huffman had not agreed to admit Radtke as a partner. One element of a claim of misrepresentation is reliance upon the representation resulting in damage. *See* ***Ritchie***, 109 Wis.2d at 404, 326 N.W.2d at 134. The reliance must be reasonable. *See* ***id.***

Radtke's unjustifiable reliance also overruns the misrepresentation claim. As noted earlier, Radtke admitted that he acted on the promise without concern for whether the other partner in the partnership had agreed to allow Radtke to become a partner. Also, there is no evidence that Huffman refused to admit Radtke into the Partnership and that is why Radtke never obtained the

partnership interest. Even if there was a misrepresentation, it was not one resulting in damages.

Prior to the filing of a second amended complaint, Radtke's claim for a breach of fiduciary duty was dismissed. Radtke argues that the Partnership owed him a fiduciary obligation arising out of the promise to form a partnership. He claims that the fiduciary obligation is present during the negotiations to form a partnership.

There is no support in Wisconsin law for Radtke's position. Radtke argues that other states have construed the Uniform Partnership Act, ch. 178, STATS., to impose the fiduciary obligation during negotiations. *See* ***Waite on Behalf of Bretton Woods Acquisition Co. v. Sylvester***, 560 A.2d 619, 625 (N.H. 1989); ***Elk River Assocs. v. J. David Huskin***, 691 P.2d 1148, 1152 (Colo. Ct. App. 1984); ***Allen v. Steinburg***, 223 A.2d 240, 246 (Md. 1966); ***Solomont v. Polk Dev. Co.***, 54 Cal. Rptr. 22, 27 (Cal. Ct. App. 1966). However, those cases involve instances where a partnership actually resulted from the negotiations. The parties became partners.

We are not persuaded that a fiduciary relationship can be imposed between parties who never became partners. The Uniform Partnership Act only applies to partners. Specifically, § 178.18, STATS., provides that a *partner* is accountable as a fiduciary. "A fiduciary relationship arises from a formal commitment to act for the benefit of another (for example, a trustee) or from special circumstances from which the law will assume an obligation to act for another's benefit." ***Merrill Lynch, Pierce, Fenner & Smith v. Boeck***, 127 Wis.2d 127, 136, 377 N.W.2d 605, 609 (1985). The formal commitment comes only with the execution of the partnership agreement. The duty is dependent on the creation of the partnership.

Radtke never became a partner. The fiduciary relationship which exists between partners never came into play. There are no circumstances here from which the law would assume a fiduciary relationship between the Partnership and Radtke. The claim was properly dismissed.

Because no fiduciary duty exists between the parties, the claim for a breach of the duty of utmost good faith has no basis.[4] The duty of utmost good faith is a description of the duty owed by fiduciaries. *See* ***General Automotive Mfg. Co. v. Singer***, 19 Wis.2d 528, 533, 120 N.W.2d 659, 662 (1963); ***Shevel v. Warter***, 256 Wis. 503, 505, 41 N.W.2d 603, 605 (1950); ***Bank of California v. Hoffmann***, 255 Wis. 165, 171, 38 N.W.2d 506, 509 (1949).

Radtke's final argument challenges the circuit court's denial of a motion in limine to exclude from evidence at trial alleged other wrongful conduct by Radtke.[5] We conclude that summary judgment was proper and the action was properly dismissed. We need not address this remaining claim.

By the Court.—Judgment affirmed.

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

[4] Radtke's argument that his claim for a breach of the duty of utmost good faith is undeveloped. We will not address arguments inadequately briefed and which lack citation to proper legal authority. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).

[5] The motion sought to exclude use of a "Tenant Estoppel Letter" from Simone to a financial institution with representations about the terms of Simone's lease which did not reflect rent concessions made to Simone.