COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2134

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

CORPORATE DEVELOPMENT ASSOCIATES, INC.,

PLAINTIFF-APPELLANT,

V.

JOHNSON CONTROLS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: FRANK T. CRIVELLO, Judge. *Reversed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Corporate Development Associates, Inc., (CDA) appeals from the circuit court order dismissing its complaint seeking a declaratory judgment against Johnson Controls, Inc. for breach of contract. CDA alleged that Johnson Controls failed to pay it a "buy-side fee" (finders fee) for assisting with Johnson Controls' acquisition of Prince Corporation. CDA contends that the

circuit court erred in granting Johnson Controls' motion to dismiss for failure to state a claim upon which relief may be granted based on CDA's alleged failure to have a real estate broker's license. Johnson Controls argued, and the circuit court agreed, that CDA's failure to allege that it was a licensed real estate broker, under South Carolina law, rendered the alleged contract void because, under South Carolina law, it would be illegal for one without a real estate broker's license to assist in the purchase and sale of a business.[1] Because we conclude that the record fails to provide sufficient facts from which a court could conduct a conflict-of-laws analysis, and because we conclude that the circuit court made factual findings which were without sufficient basis in the record, we reverse.

I. BACKGROUND

According to the complaint, CDA is a South Carolina corporation with it principal offices located in Hilton Head, South Carolina. It provides services relating to corporate mergers, acquisitions and divestitures. Johnson Controls is a Wisconsin corporation, with its principal offices in Glendale, Wisconsin. It manufactures a variety of products and, as part of its corporate development, it acquires other companies.

[1] S.C. CODE ANN. § 40-57-20 (Law. Co-op 1996), provides:

> **Requirement of license; punishment for violation**.
>
> It is unlawful for any person to act as a real estate broker, counsellor, real estate salesman, property manager, or real estate auctioneer or to advertise or assume to act as such without first having obtained a license issued by the Real Estate Commission. Any person violating this provision is guilty of a misdemeanor and, upon conviction, must be punished by a fine of not more than five hundred dollars or by imprisonment for a term of not more than six months, or both, in the discretion of the court.

The complaint alleges that in 1996, James A. Anderson, president of CDA, attempted to contact William P. Killian, vice president in charge of corporate development at Johnson Controls, "to solicit Johnson Controls' interest in acquiring Prince [a Michigan manufacturing company]." The compliant further alleges:

> After leaving a message for Killian indicating that he (Anderson) wished to present an acquisition for Johnson Controls' consideration, Anderson was contacted by Killian's assistant requesting that Anderson send Killian a fax providing more information about the company to be acquired. In response to that request, Anderson sent Killian a fax describing but not specifically identifying Prince. After receiving the fax, Killian called Anderson …. Early in that conversation, Anderson confirmed to Killian that Prince was the company referred to in Anderson's April 29 fax. Killian acknowledged Johnson Controls was not pursuing the acquisition of Prince and that he had not realized Prince was a potential candidate for acquisition. As the conversation progressed, Killian sought more information from Anderson regarding Prince, its availability for acquisition and an effective strategy for initiating and accomplishing such acquisition. Before providing the information sought by Killian and at Killian's request, Anderson explained the formula for the "buy-side fee" his company would expect for finding Prince as an acquisition for Johnson Controls and for providing the necessary intermediary services toward the completion of the acquisition transaction. Killian stated the fee agreement proposed by Anderson was fair and agreed that if the information Anderson was offering to provide to Killian contributed and led to Johnson Controls' acquisition of Prince, the fee would be paid.
>
> 5. In reliance upon these statements by Killian, Anderson provided Killian with information sought by Killian regarding the history leading to Prince's desire to be acquired, estimates regarding the cost of acquiring the company, the identity of the key Prince personnel to deal with in the acquisition process and other important information helpful in forming an acquisition strategy. After receiving this information from Anderson, Killian told Anderson he would contact him again shortly regarding the proposed acquisition. He did not do so.

> 6. The plaintiff has reason to believe that shortly after obtaining the information Anderson provided to Killian . . . Johnson Controls, . . . utilizing the information obtained from Anderson pursued the acquisition of Prince . . . bypassing any involvement on the part of [CDA leading to the purchase of Prince for 1.4 billion dollars.]

Johnson Controls moved to dismiss the complaint arguing that, under South Carolina law, if a contract existed, it was unenforceable because CDA did not have a license to act as a broker in the transaction. The circuit court, applying the South Carolina real estate broker's license statute, concluded that because CDA had failed to allege that it was a licensed real estate broker, any alleged contract between CDA and Johnson Controls was void and therefore unenforceable.

II. ANALYSIS

CDA contends that the circuit court erroneously granted Johnson Controls' motion to dismiss. CDA argues that the circuit court, without the benefit of any record, "went outside the complaint and made unwarranted factual assumptions upon which it decided South Carolina law applied and that the South Carolina real estate broker's licensing statute required dismissal of the complaint." Consequently, CDA contends that the circuit court dismissal was, at the very least, premature. We agree.

We review a circuit court's decision to grant or deny a motion to dismiss for failure to state a claim *de novo*. *See* ***Town of Eagle v. Christensen***, 191 Wis.2d 301, 311-12, 529 N.W.2d 245, 249 (Ct. App. 1995). The purpose of the motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint. *See* ***id.*** at 311, 529 N.W.2d at 249. Since pleadings are to be liberally construed, a claim will be dismissed only if "it is quite clear that under no conditions can the plaintiff recover." ***Id.*** (citations omitted).

In Wisconsin, the "groupings of contacts" rule governs the determination of which state law applies to resolve contract disputes. *See* ***Handal v. American Farmers Mut. Cas. Co.***, 79 Wis.2d 67, 73, 255 N.W.2d 903, 906 (1977). Contract rights are to be determined by the local law of the state with which the contract had its most significant relationship. *See* ***id.*** To determine which state has the most significant contact, a court must evaluate: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." ***Id.*** at 74 n.2, 255 N.W.2d at 906 n.2.

The circuit court concluded:

> The issue is which state law controls the contract. [Johnson Controls] allege[s] that three possible state laws may apply to this contract. They [sic] allege it doesn't matter what state law applies since under any law the contract is unenforceable.
>
> ….
>
> Here the alleged contract was allegedly negotiated and entered into over the phone lines between South Carolina and Michigan. The parties are incorporated in South Carolina and Wisconsin. The location of the subject matter of the contract and the place of performance of the contract would have been South Carolina, if CDA had been given the opportunity to fulfill what it alleges were the terms of the contract. Since that vast majority of these contacts are with South Carolina, under this test[,] it would appear to be that the proper state law to apply to this alleged contract would be South Carolina law.

CDA does not dispute the circuit court's use of a conflict-of-laws analysis; rather, it contends that the court incorrectly applied the test to the facts as alleged in the complaint. First, CDA contends that the circuit court erred in concluding that the vast majority of contacts were with South Carolina and that the formation of the contract occurred in South Carolina. In support of its argument,

CDA notes that while the allegations in the complaint indicate that the agreement on which CDA claims a right to collect a fee occurred during Killian's telephone call to Anderson, that fact alone is insufficient for finding the contract was formed in South Carolina. Quoting the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 188(2) cmt. e (1971), CDA argues that "'the place of contracting'" is the place "'where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect. . . .'" *See also* ***Paulson v. Shapiro***, 490 F.2d 1, 6-8 (7th Cir. 1973) (applying Wisconsin law). It further notes that where an acceptance of an offer is given by telephone, it is generally held that the place of contracting is where the acceptor speaks his acceptance. *See* ***Horton v. Haddow***, 186 Wis.2d 174, 181, 519 N.W.2d 736, 739 (Ct. App. 1994). Thus, CDA argues, in the instant case, because Killian was in Michigan at the time he allegedly accepted Anderson's offer of assistance, the place of contracting would have been Michigan.

We need not resolve this conflict-of-laws issue because we conclude that the record is insufficiently developed to make this determination. The pleadings simply do not provide sufficient information to allow for a conflict-of-laws analysis.

Moreover, we also conclude that the circuit court erred by basing its dismissal on factual assumptions that appear to be contrary to the allegations in the complaint. Specifically, the circuit court found that CDA was a "broker" under the South Carolina statutes,[2] and concluded that the contract was unenforceable because CDA did not have a real estate broker's license.

[2] S.C. CODE ANN. § 40-57-10 (Law. Co-op 1996), provides:

(continued)

Liberally construing the allegations in the complaint as we must, however, we conclude that it is possible that what CDA views as merely providing information and "intermediary services" would not require a license, regardless of which of the three states' laws applied. Indeed, the complaint does not specify whether the alleged acquisition involved real estate. We conclude, therefore, that without a factual determination of what CDA did, it is difficult, if not impossible, to determine which state's laws apply, whether CDA was in fact a "broker," and whether its services required a real estate broker's license. Accordingly, we reverse the order of the circuit court and remand for further proceedings.

By the Court.—Order reversed.

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

Definitions.
As used in this chapter:

(1) "Broker" means any person who for a fee, commission, or other valuable consideration, or with the intent or expectation of receiving a fee, commission, or consideration, negotiates or attempts to negotiate the listing, sale, auction, purchase, exchange or lease of any real estate or of the improvements thereon, or negotiates or attempts to negotiate, or solicits or attempts to solicit, a referral with respect to the foregoing activities, ….