COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1978

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

DUANE LESKY,

PLAINTIFF-APPELLANT,

V.

COUNTY OF LA CROSSE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

VERGERONT, J. Duane Lesky appeals the trial court's grant of summary judgment in favor of the County of La Crosse on his claims of breach of contract and promissory estoppel arising out of Lesky's lease of the concession at Goose Island Park. Lesky contends that there are disputed issues of fact on both claims, precluding summary judgment. We conclude there are no genuine issues

of fact and the County is entitled to judgment as a matter of law on both claims. We therefore affirm.

BACKGROUND

Lesky entered into a lease agreement with the County in May 1987 for the concession stand at Goose Island Park and for the permission to sell food and refreshments, bait, fishing supplies and to rent boats and other recreational equipment. Under the agreement, Lesky was to pay a rental fee for the stand the County had constructed and a percentage of the gross income from all sales except the camper fees; as to those fees, Lesky received twenty percent. Lesky was free to erect additional structures at his expense, with the County's approval. He had to remove those upon relinquishment or termination of the lease, unless he secured the County's approval for transfer of title to the County. He could move a mobile home into the park and reside there for payment of one dollar per year.

The lease agreement provided that its term was for one year, beginning January 1, 1987, and it would automatically renew for additional one-year periods unless either party served a written notice of intention to terminate on the other party at least sixty days prior to the expiration of the term. Another paragraph provided that Lesky could transfer or assign his interest in the agreement with the County's approval, which was not to be unreasonably withheld. The agreement also detailed Lesky's obligations with regard to operating the concession. The County could terminate the agreement if Lesky violated its terms and the violation persisted for five days after receipt of written notice. Paragraph 15 provided that "[t]he Concessionaire shall have the first option to renew this lease after the expiration thereof upon terms mutually agreeable between the … parties."

An addendum executed on December 11, 1987, added some standards of operation for Lesky as well as this provision: "Failure to carry out the provisions of this agreement may result in termination without a first option to renew this agreement, in spite of the last sentence in paragraph #15." An addendum executed on December 28, 1988, made additional changes not relevant to this decision.

On October 28, 1991, the County sent Lesky a letter notifying him that the lease agreement would terminate on December 31, 1991, and would not automatically renew. Lesky and the County entered into another written lease agreement for the Goose Island concession on December 30, 1991, for a three-year term beginning January 1, 1992. This agreement differed from the first regarding the stand rental fee, the concessionaire fee, the camper fees, and certain other aspects of the relationship. This agreement did not contain the language in paragraph 15 of the first agreement giving Lesky the first option to renew on mutually agreeable terms. The provisions allowing Lesky to assign or transfer his interests under the agreement and for removing his structures upon termination of the agreement remained the same.

Lesky and the County extended the second agreement for one year. When that agreement expired, the County entered into an agreement leasing the concession to a party other than Lesky, effective January 1, 1996.

Lesky's complaint alleged that the County breached its contract by "terminating Lesky's first option to renew the agreement of lease in October of 1991 and by eliminating Lesky's ability to transfer his interest as the Goose Island Park concessionaire to a third party, for consideration, contrary to the long established practice and custom of La Crosse County and prior Goose Island Park

concessionaires." The complaint also alleged that he had been induced to take actions in reliance on the first option to renew provision in the first lease, that the County knew or should have known that, and an injustice can only be avoided by enforcing the terms of the first lease, including the provisions on the option to renew and on transferring or assigning his rights under the agreement to a third party.

After answering the complaint, the County moved for summary judgment. The County submitted with its motion the written agreements and addendums between the parties. The County argued that it did not breach any contract with Lesky because it terminated the first lease agreement in accordance with its terms and Lesky entered into the second lease agreement, the terms of which the County complied with. The County also argued that the existence of written contracts between the parties barred Lesky's promissory estoppel claim and, in any case, it was not reasonable for Lesky to rely on anything other than the terms of the written contracts he entered into with the County.[1]

Lesky submitted materials in opposition to the motion which included evidence of the following. A prior concessionaire, Coy Sitze, had sold his right to do business under the contract with the County to Theron Fisher, who sold his interest to Frank Bakalars, who, in turn, sold his interest to Lesky for $58,000. In Lesky's view, $20,000 represented the cost of the mobile home, inventory and equipment, and $38,000 represented consideration for good will and the right to do business. Lesky deposed that, before entering into the 1987 contract with the County and the separate contract with Bakalars, he spoke to

[1] There were other arguments in the County's brief not relevant to this appeal.

Fisher, who had become the Director of Parks and Property for the County. Lesky expressed concerns about the one-year term of the lease and Fisher stated that had been in his concession contract with the County, and in the contracts of the other concessionaires. According to Lesky, Fisher told him the first option to renew was there to protect his investment and also that he (Fisher) expected the lease renewal to continue that way because it had not changed over the years. According to Fisher, the County knew of the financial terms between Bakalars and Lesky.

Lesky's submissions also showed that he objected to the omission of the first option to renew term in the second lease agreement, but signed it nevertheless. In addition Lesky presented evidence that the parties who entered into the lease agreement with the County effective January 1, 1996, were required to purchase his inventory but not his mobile home and equipment, in spite of Lesky's request that such a provision be included.

Lesky argued that the County breached the 1987 lease agreement by terminating it without cause and breached the second lease agreement by failing to reimburse him for his investment capital after terminating that agreement without cause. As to both agreements, Lesky argued that the County breached the implied covenant of good faith. Promissory estoppel applied, he argued, because it was reasonable for him to rely on the County's conduct with prior concessionaires and on the "option to renew" in the first lease agreement, and the written contract did not bar application of that doctrine because the contract did not cover the total business relationship between the parties.

The trial court granted the County's motion for summary judgment, agreeing with the County that there were no disputed issues of material fact and

that the County had not breached either lease agreement or the obligation of good faith implied in every contract.[2] On appeal, Lesky renews his arguments concerning the first lease agreement.

DISCUSSION

Breach of Contract

We review summary judgments de novo, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Generally summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

The interpretation of a contract is a question of law, which we review de novo. ***Edwards v. Petrone***, 160 Wis.2d 255, 258, 465 N.W.2d 847, 848 (Ct. App. 1990). The objective in construing a contract is to ascertain the intent of the parties from the contractual language. ***Waukesha Concrete Prods. Co. v. Capitol Indem. Corp.***, 127 Wis.2d 332, 339, 379 N.W.2d 333, 336 (Ct. App. 1985). If the terms of the contract are plain and unambiguous, it is the court's duty to construe the contract according to its plain meaning even though one of the parties may have construed it differently. ***Waukesha Concrete Prods. Co. v. Capitol Indem. Corp.***, 127 Wis.2d 332, 339, 379 N.W.2d 333, 336 (Ct. App. 1985). Whether a contract is ambiguous in the first instance is a question of law, which we decide independently of the trial court. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis.2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987). Ambiguity exists in a contract if it is reasonably

[2] It appears the trial court did not separately address the claim of promissory estoppel.

susceptible to more than one meaning. ***Id.*** If a contract is ambiguous, the court then may consider evidence beyond the document itself to determine the intent of the parties. ***Spencer v. Spencer***, 140 Wis.2d 447, 450, 410 N.W.2d 629, 630 (Ct. App. 1987).

The trial court entered a written opinion carefully evaluating Lesky's claim for breach of contract, and we agree with its analysis. Like the trial court, we conclude that the 1987 lease agreement plainly permitted the County to prevent the automatic renewal of that lease by sending a timely notice, which it did. The provision permitting a termination by the County for violations of the agreement does not conflict with the "non-renew" provision and plainly does not mean that the agreement continues indefinitely unless Lesky violates its terms. Rather the "termination for breach" provision permits the County to terminate the agreement *within* its one-year term if the conditions of that provision are met. Nor does the December 11, 1987 addendum create any uncertainty concerning the "non-renew" provision in the agreement. The addendum does not affect the "non-renew" provision in any way, but rather states that the "first option to renew" provision does not apply if the agreement is terminated because of Lesky's violation of its terms.

Since we conclude that these provisions are not ambiguous, we, like the trial court, also conclude that the extrinsic evidence Lesky submits to show his understanding of these terms is not relevant.

Lesky also contends that, even if the County did not breach the express terms of the 1987 agreement by not renewing it, there are factual issues regarding whether it breached its duty of good faith. On this issue, again, we agree with the trial court.

Wisconsin law recognizes that every contract implies good faith and fair dealing between the parties to it. ***Foseid v. State Bank of Cross Plains***, 197 Wis.2d 772, 796, 541 N.W.2d 203, 212 (Ct. App. 1995). This concept of good faith:

> "[e]xcludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." …
>
> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

Id. (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a & d).

Our supreme court has found a breach of the covenant of good faith where the actions of one party, while not breaching any specific term of the written contract, "stripped nearly all the flesh from the bones" of the contract, "accomplishing exactly what the agreement of the parties sought to prevent." ***Chayka v. Santini***, 47 Wis.2d 102, 107, 176 N.W.2d 561, 564 (1970). However, we have also held that where a contracting party complains of acts of the other party that are specifically authorized by the agreement, there is no breach of the

covenant of good faith. ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis.2d 568, 577, 431 N.W.2d 721, 726 (Ct. App. 1988).[3]

The 1987 lease agreement specifically permitted either party to decide not to renew the agreement, upon proper notice, at the end of each one-year term. By its plain terms, Lesky was guaranteed the concession for one year and the first option to enter into another lease agreement on mutually agreeable terms (assuming he did not violate any term of the agreement). There is no suggestion in the agreement that Lesky was guaranteed any profits or any recoupment on the investments he might choose to make in his mobile home, or in facilities and structures he decided to erect. The County's decision not to renew at the end of the fifth one-year term did not strip "nearly all the flesh from the bones" of the agreement and did not subvert or evade the intent of the parties as expressed in the plain language of the agreement.

We reach the same conclusion concerning the County's decision not to agree to a "first option to renew" provision in the second lease agreement. There is evidence that Lesky objected to the elimination of this provision in the second agreement. But the first agreement, by its plain terms, did not obligate the County to include that provision in a second lease agreement, as the language "on terms mutually agreeable between the … parties" plainly states.[4] The implied duty of good faith is not a vehicle for considering extrinsic evidence to alter the plain

[3] Lesky argues that ***Sons of Thunder, Inc. v. Borden, Inc.***, 690 A.2d 575 (N.J. 1997), supports its position that the County breached its implied duty of good faith. We find it unnecessary to consider cases from other jurisdictions, since Wisconsin case law provides adequate guidance.

[4] We do not understand Lesky to be arguing that the County breached the 1987 lease agreement by not providing him the first option to enter into another lease agreement with the County.

terms of a contract. We conclude the County's actions—not renewing the first agreement after five years and entering into a second agreement for a three-year term that did not have the "first option to renew" provision—do not, as a matter of law, "violate community standards of decency, fairness, and reasonableness." ***Foseid***, 197 Wis.2d at 796, 541 N.W.2d at 213.

Promissory Estoppel

Lesky also claims that he is entitled to relief under the doctrine of promissory estoppel. The three elements of promissory estoppel are: (1) a promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) actual inducement of such action or forbearance, and (3) the need to enforce the promise to avoid injustice. ***Hoffman v. Red Owl Stores***, 26 Wis.2d 683, 698, 133 N.W.2d 267, 275 (1965). Lesky argues there is evidence of the first element because the County's conduct, including its conduct with prior concessionaires and representations made to Lesky by Fisher (whom Lesky asserts was the County's agent in 1987), constitute an implied promise not to refuse to renew Lesky's lease without just cause, regardless of the terms of the 1987 agreement. Lesky contends there is also evidence that he reasonably relied on that promise to his detriment.

The general rule is that the existence of a contractual relationship bars a claim based on promissory estoppel. ***Kramer v. Alpine Valley Resort, Inc.***, 108 Wis.2d 417, 425, 321 N.W.2d 293, 297 (1982). However, this rule is subject to an exception when the contract fails to address the essential elements of the parties' total relationship. ***Id.*** In ***Kramer***, the court concluded that the lease agreement did not embody the total business relationship between the parties

because "the narrowly drawn lease agreement dealt with one minor aspect, rent and space, of a much larger business relationship, a workshop-gallery open daily to the public." ***Id.*** The court therefore concluded that the lease agreement did not bar recovery for damages based on promises made to the plaintiff that the complex would be open on a daily basis throughout the year and was to be a permanent place for craftsmen to sell their products; those promises were essential features of the business relationship, the court concluded, because the written lease agreement was meaningless without the underlying promise that the complex would continue operating. ***Id.***

In contrast to the facts in ***Kramer***, the 1987 lease agreement was a comprehensive agreement dealing with the total business relationship between Lesky and the County. The agreement did address the term of the agreement, the renewal of the agreement, the conditions upon which Lesky could erect structures and facilities, and Lesky's rights regarding another lease agreement if this one were not renewed (through no fault of Lesky). Lesky's argument is with the interpretation of these provisions; but he cannot persuasively argue that the 1987 agreement did not address his rights and the County's obligations regarding termination of the agreement. We conclude there are no disputed facts concerning Lesky's claim for promissory estoppel and the County is entitled to judgment on that claim as a matter of law.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.