

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 25, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2006AP1060

Cir. Ct. No. 2005CV309

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CREEKWOOD FARMS INCORPORATED,

PLAINTIFF-APPELLANT,

V.

DAYBREAK FOODS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Jefferson County:
RANDY R. KOSCHNICK, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Creekwood Farms appeals from a judgment that dismissed its amended complaint against Daybreak Foods for fraud in the inducement of a real estate contract, breach of that contract, and breach of the duty of good faith and fair dealing. We affirm for the reasons discussed below.

BACKGROUND

¶2 We accept the following alleged facts as true for the purpose of evaluating the sufficiency of the amended complaint. Daybreak Foods and Creekwood Farms both ran egg laying and processing operations. The parties entered into negotiations for Daybreak Foods to purchase most of Creekwood Farms' assets. During the negotiations, one of Daybreak Foods' agents stated that obtaining financing for the proposed acquisition "would not be a problem." At the time he made this statement, the agent knew but did not disclose that Daybreak Foods would not be able to obtain financing from its existing lender unless it was first able to sell another property in an unrelated transaction. Believing that there would be no impediment to financing, Creekwood Farms signed a letter of intent in which it agreed to cease all other attempts to sell its assets in exchange for Daybreak Foods' promise to proceed in good faith on the acquisition.

¶3 The parties subsequently entered into a contract whereby Daybreak Foods agreed to purchase Creekwood Farms' assets, subject to certain conditions. One of those conditions was that Creekwood Farms would use its "best efforts" to secure financing on "satisfactory terms" by the closing date. Prior to the closing date, Creekwood Farms notified Daybreak Foods that it was electing to terminate the purchase agreement because it had not been able to sell its other property and obtain satisfactory financing from the lender of its choice. Daybreak Foods then refused an offer from Creekwood Farms to facilitate other financing options. Due to a downturn in the egg market, Creekwood Farms has since been unable to sell its operation to anyone else at a comparable price.

¶4 Creekwood Farms filed suit, and eventually amended its complaint to allege: (1) Daybreak Foods had breached the letter of intent and the terms of

the contract by failing to proceed in good faith and use its “best efforts” to obtain financing; (2) Daybreak Foods had breached an implied covenant of good faith by failing to advise Creekwood Farms of the need to sell an additional property to get financing from its existing lender and by refusing to accept other potential financing options; and (3) Daybreak Foods had fraudulently induced the contract both by concealing its need to sell the other property and by making an intentionally false statement that financing would not be a problem. The circuit court dismissed the amended complaint for failure to state a claim upon which relief could be granted. Creekwood Farms appeals on the fraud and good-faith issues.

DISCUSSION

¶5 A motion to dismiss for failure to state a claim upon which relief can be granted “tests the legal sufficiency of the complaint,” and is therefore reviewed de novo by this court. *Doe v. Archdiocese of Milwaukee*, 2005 WI 123, ¶19, 284 Wis. 2d 307, 700 N.W.2d 180 (citation omitted). We accept all facts alleged in the complaint as true, and will also make reasonable inferences in favor of the plaintiff, but need not make any unreasonable inferences or accept legal conclusions asserted in the complaint. *Larson v. Burmaster*, 2006 WI App 142, ¶17, ___ Wis. 2d ___, 720 N.W.2d 134. A complaint should not be dismissed as legally insufficient “unless it appears certain that a plaintiff cannot recover under any circumstances.” *Id.* (citation omitted).

Misrepresentation Claims

¶6 We begin with Creekwood Farms’ claims of intentional misrepresentation, otherwise known as the common-law tort of fraud. *See*

generally *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶12, 283 Wis. 2d 555, 699 N.W.2d 205.

To state a claim for intentional misrepresentation, the following allegations must be made:

(1) the defendant made a factual representation; (2) which was untrue; (3) the defendant either made the representation knowing it was untrue or made it recklessly without caring whether it was true or false; (4) the defendant made the representation with intent to defraud and to induce another to act upon it; and (5) the plaintiff believed the statement to be true and relied on it to his/her detriment.

An intentional misrepresentation claim may arise either from a failure to disclose a material fact or from a statement of a material fact which is untrue.... However, a person in a business deal must be under a duty to disclose a material fact before he can be charged with a failure to disclose.

Id. at ¶¶12-13 (citations omitted). Creekwood Farms claims that Daybreak Foods both failed to disclose a material fact—namely, its need to sell the other property in order to obtain financing—and also made an untrue material representation that financing would not be a problem. Daybreak Foods counters that Creekwood Farms is barred from raising either of these tort claims by the economic loss doctrine.

¶7 The economic loss doctrine “preclude[es] contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship.” *Id.* at ¶27 (citation omitted). The term “economic loss” generally refers to “a product failing in its intended use or failing to live up to a contracting party’s expectations.” *Id.* at ¶29 (citations omitted). The doctrine bars misrepresentation claims based on negligence or strict liability. *Id.* at 30.

However, intentional misrepresentation claims which occurred prior to the formation of the contract—*i.e.*, constituting fraud in the inducement of the contract—are allowed “where the fraud is extraneous to, rather than interwoven with, the contract.” *Id.* at ¶¶30, 42 (citation omitted).

¶8 The first issue we must decide, therefore, is whether the instances of fraud alleged by Creekwood Farms were extrinsic to the contract. Both the statement that “financing would not be a problem” and the nondisclosed information that Daybreak Foods would need to sell other property in order to obtain financing from its existing lender directly related to the contingency in the contract that Daybreak Foods would need to obtain favorable financing before going through with the purchase. An evaluation of Daybreak Foods’ existing assets, debts and liquidity would be standard factors to be considered in any financing decision, and thus encompassed in the financing contingency clause. Creekwood Farms ought to have been able to reasonably anticipate the possibility of Daybreak Foods’ failure to meet that contingency for whatever reason. Looked at another way, if Daybreak Foods had been able to sell the other property and thus obtain the financing it wanted from its existing lender, both the tort and breach of contract claims would disappear. We therefore conclude that the fraud claims were in fact interwoven with the contract and the economic loss doctrine bars recovery under either of Creekwood Farms’ misrepresentation theories, regardless whether the allegations in the complaint would otherwise be sufficient to state claims under those theories.

Good Faith and Fair Dealing Claim

¶9 Under Wisconsin law, “[e]very contract implies good faith and fair dealing between the parties to it, and a duty of cooperation on the part of both

parties.” *Estate of Chayka v. Santini*, 47 Wis. 2d 102, 107 n.7, 176 N.W.2d 561 (1970) (quoting 17 AM. JUR. 2D *Contracts* § 256 (2006)). Creekwood Farms argues that this general obligation means that a buyer under a purchasing agreement containing a financing contingency has a duty to exercise good faith in attempting to secure financing. Even assuming that proposition to be true, however, we are not persuaded that the allegations in the complaint show a breach of good faith here.

¶10 The complaint alleged that Daybreak Foods was unable to obtain the financing it wanted from its existing lender because it was unable to sell certain property, and it thereafter refused to consider what Creekwood Farms characterizes as other “commercially reasonable” financing options, including a financing offer from Creekwood Farms. Under the purchasing contract, however, it was solely within Daybreak Foods’ discretion to determine what financing terms it considered reasonable or favorable. There was no specification that it must accept any “commercially reasonable” financing offer or financing at a certain rate. Moreover, the complaint did not allege that the financing offer Creekwood Farms made or any other offer it could have facilitated would have matched the terms Daybreak Foods could have gotten from its own lender if it had sold the other property. Nor was there any allegation that Daybreak Foods failed to make a reasonable attempt to sell the other property. Quite simply, the need to sell the other property in order to obtain what Creekwood Farms considered to be favorable financing was a circumstance which already existed at the time the contract was signed. Nothing that Daybreak Foods has alleged would establish that Creekwood Farms failed to act in good faith to perform under the contract given that existing circumstance.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

