COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1214 **Cir. Ct. No. 2006CV1809**

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

COST CUTTERS LEASING, LLC,

PLAINTIFF-RESPONDENT,

V.

KLMP, LLC, CARRIE MADDEROM, DAVID C. LIND AND DENNIS J. POTERACKI,

DEFENDANTS,

JAYSON W. MADDEROM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

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

¶1 LUNDSTEN, J. The circuit court granted summary judgment against Jayson Madderom in favor of Cost Cutters Leasing. Madderom appeals the judgment. The parties' dispute arises from an agreement that was, in Madderom's words, "the culmination of approximately one year of negotiations" between Cost Cutters and another business entity in which Madderom was a shareholder. Madderom argues that the agreement is unconscionable and, therefore, unenforceable. We disagree and affirm the circuit court's judgment.

Background

¶2 Madderom is a shareholder in KLMP, LLC, a successor entity to ABC Disposal, Inc., a domestic corporation which had accumulated over $1.2 million in debt. According to Madderom, ABC's shareholders reorganized ABC into KLMP and entered into an arrangement with Cost Cutters in order to infuse needed capital into their business.

¶3 Under the arrangement, Cost Cutters acquired title to ABC's equipment and leased it back to KLMP under two master lease agreements, a promissory note, and a demand promissory note. In addition, Cost Cutters required a personal guaranty from Madderom. We refer to all of these documents collectively as the "agreement."

¶4 Cost Cutters sued KLMP, Madderom, and other former ABC shareholders, alleging that they defaulted on the agreement. Only Madderom answered, and he admitted a failure to make payments under the agreement. Cost Cutters moved for summary judgment. Madderom opposed the motion, arguing that the agreement was unconscionable. The circuit court rejected this argument, granted Cost Cutters' motion, and entered a judgment in Cost Cutters' favor. Madderom appealed.

¶5 We reference additional facts in the discussion section below.

Discussion

¶6 We review a grant of summary judgment by applying the same methodology as the circuit court, and our review is *de novo*. ***Pinter v. American Family Mut. Ins. Co.***, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. A party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2005-06).

¶7 Madderom argues that summary judgment was improper because the agreement, and in particular the guaranty, is unconscionable. "For a contract or a contract provision to be declared invalid as unconscionable, the contract or contract provision must be determined to be *both* procedurally *and* substantively unconscionable." ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53, ¶29, 290 Wis. 2d 514, 714 N.W.2d 155 (emphasis added). "The party seeking to invalidate a contract provision as unconscionable has the burden of proving facts that justify a legal conclusion that the provision is invalid." ***Coady v. Cross Country Bank, Inc.***, 2007 WI App 26, ¶25, 299 Wis. 2d 420, 729 N.W.2d 732, *review denied*, 2007 WI 114, 302 Wis. 2d 105, 737 N.W.2d 432 (No. 2005AP2770).

¶8 Madderom first argues that the circuit court erred by assuming that he was required to submit expert testimony in order to establish that the agreement was unconscionable. More specifically, Madderom complains about the circuit court's apparent assumption that expert testimony was necessary to establish that the terms of the agreement were commercially unreasonable and, therefore, substantively unconscionable. Cost Cutters concedes that there is no general

requirement that expert testimony is needed to establish substantive unconscionability. We agree with Cost Cutters' concession, but need not dwell on the issue, because we conclude that Madderom's unconscionability defense fails for a lack of *procedural* unconscionability.

¶9 In ***Wisconsin Auto Title Loans***, the supreme court described the procedural unconscionability inquiry as follows:

> Determining whether procedural unconscionability exists requires examining factors that bear upon the formation of the contract, that is, whether there was a "real and voluntary meeting of the minds" of the contracting parties. The factors to be considered include, but are not limited to, age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms would have been permitted by the drafting party, and whether there were alternative providers of the subject matter of the contract.

Wisconsin Auto Title Loans, 290 Wis. 2d 514, ¶34 (footnotes omitted). Using these factors for guidance as applicable, we turn to Madderom's summary judgment materials and the facts that he asserts support a conclusion of procedural unconscionability.

¶10 Madderom's affidavit submitted in opposition to Cost Cutters' summary judgment motion shows that ABC was a domestic corporation consisting of three major shareholders, including Madderom, with liabilities in excess of $1.2 million. In the affidavit, Madderom avers that the agreement at issue was the "culmination of approximately one year of negotiations between ABC Disposal and Cost Cutters Leasing." Madderom relies on the affidavit as establishing the following additional facts:

1. Madderom and his fellow shareholders were "between the proverbial rock and a hard place" because their fledgling business was in substantial debt and they needed an infusion of capital to survive.

2. William Kaminski, who controlled Cost Cutters, offered them the opportunity to save the business by paying down the debt in return for Cost Cutters acquiring and leasing back the equipment.

3. Madderom and the other shareholders were personally involved in negotiating the agreement.

4. The agreement was drafted by Cost Cutters' attorney and not explained to Madderom, who was not represented by an attorney.[1]

¶11 Our review of Madderom's affidavit and the other summary judgment materials suggests that some of the facts on which Madderom relies may be more speculation than reasonable inference. However, rather than attempt to distinguish the two, we will assume, without deciding, that each fact on which Madderom relies is a reasonable inference that can be drawn from the summary judgment materials. Accordingly, we will take those facts as undisputed for purposes of our summary judgment analysis. *See* ***Manor Enters., Inc. v. Vivid, Inc.***, 228 Wis. 2d 382, 389, 596 N.W.2d 828 (Ct. App. 1999) (in summary judgment analysis, we draw all reasonable inferences from the evidence in favor of the non-moving party).

[1] In his brief-in-chief, Madderom also relies on a promise by Kaminski to provide "future financing during the anticipated period before the business would be profitable." Cost Cutters argues that such a promise, if made, is an immaterial oral representation under a merger clause in the guaranty. In his reply brief, Madderom does not respond to Cost Cutters' argument. Accordingly, we take Madderom to have conceded the matter. *See* ***Hoffman v. Economy Preferred Ins. Co.***, 2000 WI App 22, ¶9, 232 Wis. 2d 53, 606 N.W.2d 590 (Ct. App. 1999) ("An argument to which no response is made may be deemed conceded for purposes of appeal."). In any event, we conclude that such a promise by Kaminski would not affect the conclusion we reach on the question of procedural unconscionability.

¶12 Madderom argues that these undisputed facts are "substantial evidence" of procedural unconscionability, make a "colorable claim" of procedural unconscionability, or, at a minimum, demonstrate a material factual dispute precluding summary judgment on the question. We disagree.

¶13 The facts on which Madderom relies are directed primarily to the procedural unconscionability factors of "relative bargaining power, who drafted the contract, [and] whether the terms were explained to the weaker party." *See* ***Wisconsin Auto Title Loans***, 290 Wis. 2d 514, ¶34. Madderom's argument seems to be that ABC's financial difficulties, combined with Madderom's lack of legal representation and Cost Cutters' failure to explain the agreement to him, demonstrate the type of gross disparity in bargaining power or unfair surprise ordinarily associated with procedural unconscionability. We are not persuaded.

¶14 ABC's pressing need for capital put it at an obvious bargaining disadvantage. However, "[a] bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party." RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d. (1979), *quoted in* ***Wisconsin Auto Title Loans***, 290 Wis. 2d 514, ¶49 n.42; *see also* 7 CORBIN ON CONTRACTS § 29.4, at 393 (revised ed. 2002) ("Superior bargaining power is not in itself a ground for striking down a resultant contract as unconscionable."). Perhaps more to the point, ABC was free to seek an agreement with some other entity willing to provide capital in exchange for assets. None of the undisputed facts suggest that ABC was bound to deal with Cost Cutters.

¶15 Moreover, the fact that the agreement was the culmination of a year of negotiations undercuts any claim that ABC and Madderom lacked bargaining

power or had no choice but to accept whatever terms Cost Cutters was willing to offer. Nothing in the record suggests that ABC and Madderom had no meaningful choice as that concept is used in the law of procedural unconscionability.

¶16 That Cost Cutters drafted the agreement, that Madderom was without the assistance of counsel, and that Cost Cutters did not explain the agreement's provisions to Madderom are also of minimal significance under the circumstances. Madderom submitted no evidence from which it could be reasonably inferred that he was lacking in business acumen, business experience, education, or intelligence. Notably, Madderom does not say which terms of the agreement would have been difficult for a non-lawyer to understand or which terms he did not understand. In sum, Madderom does not explain how it might be inferred that Cost Cutters took advantage of any inadequate knowledge on Madderom's part.

¶17 In asserting that there was procedural unconscionability, Madderom relies on ***Wisconsin Auto Title Loans*** and ***Coady***. If anything, however, these cases underscore the weakness of his assertion. Both cases involved adhesion contracts in the consumer credit context where the indigent or low-income consumers had no opportunity to negotiate. *See* ***Wisconsin Auto Title Loans***, 290 Wis. 2d 514, ¶¶43, 50-53; ***Coady***, 299 Wis. 2d 420, ¶¶30-31, 35, 38-39. As already explained, the agreement before us was the product of a year's negotiations between two business entities, and Madderom was a major shareholder in one of those entities. The result we reach is a straightforward counterpoint to cases such as ***Wisconsin Auto Title Loans*** and ***Coady***.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.