COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1282 **Cir. Ct. No. 2005CV1924**

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

GENE BLANCHAR,

PLAINTIFF-APPELLANT,

V.

LAKE LAND BUILDERS, INC.,

DEFENDANT,

CHAD STRUTZEL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

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

¶1 LUNDSTEN, J. Gene Blanchar appeals the circuit court's order dismissing his WIS. STAT. § 100.18(1) misrepresentation claim against Lake Land Builders, Inc., and Chad Strutzel, Lake Land's sole stockholder.[1] Blanchar entered into a contract to purchase a vacant lot from Lake Land, then entered into a second contract to have Lake Land construct a home on the lot. The purchase price of the lot was contingent on Blanchar hiring Lake Land to do the construction.

¶2 Blanchar argues that the circuit court erred in granting summary judgment to Strutzel on Blanchar's WIS. STAT. § 100.18 claim after concluding that Blanchar was not a member of "the public" for purposes of the statute. Blanchar also argues that the circuit court erred in concluding that his complaint failed to state a claim for piercing Lake Land's corporate veil. We agree with Blanchar's first argument and conclude, as a matter of law, that Blanchar was a member of the public. We disagree, however, with Blanchar's second argument. Accordingly, we reverse the part of the circuit court's order granting summary judgment to Strutzel on Blanchar's § 100.18 claim, but affirm the part of the order dismissing Blanchar's claim for piercing the corporate veil.[2]

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] We note that Blanchar's claim for breach of contract against Lake Land remains pending in the circuit court, but that the circuit court's order was nonetheless final as to Strutzel, the respondent. *See* WIS. STAT. § 808.03(1). Because Strutzel is the respondent, we generally refer to "Strutzel" rather than "Lake Land" when discussing the parties' arguments. We also note that the circuit court dismissed Blanchar's claim for intentional misrepresentation and that, on appeal, Blanchar does not challenge the dismissal of that claim.

Background

¶3 Blanchar and Lake Land entered into a contract in mid-September of 2004 for Blanchar to purchase from Lake Land a vacant residential lot. Under the written terms of the contract, Blanchar was to purchase the lot for $105,000. Strutzel informed Blanchar, however, that the lot would cost an additional $10,000 if Blanchar did not subsequently hire Lake Land to construct a home on the lot. Blanchar's understanding was that he was free to hire a builder other than Lake Land as long as he paid the additional $10,000 for the lot.

¶4 Blanchar chose Lake Land to build the home and, on November 1, 2004, Blanchar and Lake Land entered into a construction contract. According to Blanchar's complaint, earlier that same day Strutzel made two misrepresentations to induce Blanchar to enter into the construction contract. First, Blanchar alleged that Strutzel misrepresented that Strutzel would pass along savings relating to brick work on the house if Strutzel obtained the brick work at a cost lower than estimated. Second, Blanchar alleged that Strutzel misrepresented that Strutzel would insure the premises during construction. This latter alleged misrepresentation is significant because a tornado destroyed the house before construction was completed.

¶5 Blanchar claimed that Strutzel's misrepresentations on behalf of Lake Land violated WIS. STAT. § 100.18. In addition, Blanchar sought to pierce Lake Land's corporate veil and hold Strutzel personally liable for claims against Lake Land.

¶6 Strutzel moved for summary judgment, arguing that Blanchar was not a member of "the public" at the time of the alleged misrepresentations and, therefore, was not covered by WIS. STAT. § 100.18. Strutzel also argued that

Blanchar's complaint failed to state a claim for piercing the corporate veil. The circuit court agreed with both arguments and granted the motion. We reference additional facts as needed below.

Discussion

¶7 We review a grant of summary judgment *de novo*, applying the same standards as the circuit court. ***Thomas v. Mallett***, 2005 WI 129, ¶26, 285 Wis. 2d 236, 701 N.W.2d 523. Summary judgment is warranted if the parties' submissions show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). We construe the evidence in a light most favorable to the nonmoving party. ***Thomas***, 285 Wis. 2d 236, ¶4.

A. Whether Blanchar Was A Member Of "The Public" For Purposes Of His WIS. STAT. § 100.18 Claim

¶8 A claim for WIS. STAT. § 100.18(1) misrepresentation has three elements: (1) the defendant made a representation to "the public" with the intent to induce an obligation; (2) the representation was untrue, deceptive, or misleading; and (3) the representation caused the plaintiff a pecuniary loss. ***K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.***, 2007 WI 70, ¶19, 301 Wis. 2d 109, 732 N.W.2d 792; *see also* WIS JI—CIVIL 2418. The dispute in this case concerns only the first element, namely, whether Blanchar was a member of "the public" at the time of Strutzel's alleged misrepresentations.[3]

[3] WISCONSIN STAT. § 100.18(1) reads, in full, as follows:

(continued)

¶9 WISCONSIN STAT. § 100.18(1) does not define who is a member of "the public." In ***State v. Automatic Merchandisers of America, Inc.***, 64 Wis. 2d 659, 221 N.W.2d 683 (1974), the court explained that the "important factor" in determining whether a plaintiff is a member of the public "is whether there is some particular relationship between the parties." ***Id.*** at 664. As to what constitutes a "particular relationship," the supreme court has more recently indicated that "[t]he existence of a particular relationship '… depend[s] upon its own peculiar facts and circumstances and must be tested by the statute in the light of such facts and circumstances.'" ***K&S Tool & Die***, 301 Wis. 2d 109, ¶27 (citation omitted). Accordingly, the question here is whether, at the time of the alleged misrepresentations by Strutzel on the date the construction contract was signed, Blanchar and Lake Land had a "particular relationship."

> No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

¶10 According to Blanchar, there was no "particular relationship" because he was not differently situated than other members of the public who negotiate with a builder to construct a custom home. Blanchar states that it is "inconceivable [that] the legislature intended to deny an individual the protections of § 100.18 because the individual purchased a lot from a builder, the builder prepared plans for a house, and obtained bids from subcontractors." Blanchar argues that the fact that the lot would cost him an additional $10,000 if he did not choose Lake Land as his builder did not bind him to Lake Land and should not protect Lake Land from liability under the statute.[4]

¶11 Strutzel reaches the opposite conclusion from the same facts. He does not argue that his interactions with Blanchar were unusual for a custom home builder and buyer. Rather, he asserts that the lot purchase agreement, combined with undisputed evidence showing that (1) he and Blanchar worked together over a period of months to develop a building plan specific to Blanchar's lot, (2) Strutzel paid for drafting services, and (3) Strutzel collected subcontractor bids, demonstrates a "particular relationship" as a matter of law.

¶12 Our view is more closely aligned with Blanchar's than Strutzel's. Based on the undisputed facts, we conclude that no jury could reasonably find that Blanchar and Lake Land had a "particular relationship" solely because the alleged

[4] Although Blanchar argues that there is a factual dispute that prevents summary judgment, he has not identified any material dispute of fact. So far as we can discern, he relies solely on undisputed evidence. For example, he contends that it is undisputed that he was not bound to choose Lake Land as his builder, but rather could choose a different builder if he was willing to pay Strutzel an additional $10,000 for the lot. We agree that this fact and the other facts we discuss in this opinion cannot be disputed. Accordingly, we address Blanchar's argument only to the extent that he contends that the undisputed facts show that he did not have a "particular relationship" with Lake Land.

misrepresentations occurred after Blanchar and Strutzel engaged in the sort of interactions that are common between custom home builders and buyers. We perceive no reason why the legislature would exempt from the reach of WIS. STAT. § 100.18 custom home builders who work with potential customers to develop plans for a particular building site. To hold otherwise would contravene the purpose of the statute, namely, to provide broad protections to consumers and others from misrepresentations that induce sales. *See* ***Tim Torres Enters., Inc. v. Linscott***, 142 Wis. 2d 56, 72, 416 N.W.2d 670 (Ct. App. 1987) (referring to the "broad remedial scope of sec. 100.18 and its protective purpose"); ***Bonn v. Haubrich***, 123 Wis. 2d 168, 173, 366 N.W.2d 503 (Ct. App. 1985) ("The intended purpose of sec. 100.18(1), Stats., is to protect consumers from untrue, deceptive or misleading representations made to promote the sale of a product."); *see also* ***K&S Tool & Die***, 301 Wis. 2d 109, ¶35 (purpose of statute is "protecting Wisconsin residents from untrue, deceptive, or misleading representation made to induce action").

¶13 We are not suggesting that custom home builders and buyers never have a "particular relationship" before entering into a building contract. The required inquiry looks to the "peculiar facts and circumstances" of each case. *See* ***K&S Tool & Die***, 301 Wis. 2d 109, ¶27. However, so far as the undisputed evidence here shows, Blanchar and Strutzel's interactions reflected a typical situation in which a customer wishes to build on a vacant lot and works with a custom builder, and the builder hopes that the result will be a final contract to build the project. Strutzel does not argue otherwise, with perhaps one exception that we take up in the next paragraph.

¶14 The fact that Blanchar would have been required to pay $10,000 more for his lot if he did not choose Lake Land as his builder did not significantly

alter the parties' relationship. Contrary to Strutzel's assertion, Blanchar was not bound to select Lake Land as his builder. Rather, Blanchar was simply bound to pay Strutzel $10,000 more for the lot if he did not select Lake Land.[5] Accordingly, we conclude that the lot-price-contingency aspect of the parties' agreement is insufficient to transform their custom home builder-buyer relationship into the type of "particular relationship" that would take the parties outside the statute's reference to "the public."

¶15 In granting summary judgment to Strutzel, the circuit court focused solely on the fact that Blanchar agreed to purchase the lot at a price that was contingent on entering into a building contract with Lake Land. We have concluded, however, that this is not sufficient to establish the requisite "particular relationship" between a custom home builder and buyer. Although a prior contract between parties certainly may be a relevant factor in the "particular relationship" analysis, it is not dispositive. More important is the overall nature of the relationship.

¶16 Our decision in ***Kailin v. Armstrong***, 2002 WI App 70, 252 Wis. 2d 676, 643 N.W.2d 132, does not support Strutzel's or the circuit court's view. We concluded in ***Kailin*** that the plaintiffs there were no longer members of "the public" with respect to a seller of real estate once they had entered into a contract to purchase the real estate. *See* ***id.***, ¶¶1, 5, 43-45. We said that "a statement made

[5] Strutzel asserts that Blanchar "admits that by [entering into the lot purchase agreement], [Blanchar] obligated himself to buy the building services from Lake Land Builders, Inc." The only record citation Strutzel provides to support this assertion is to a portion of one of Blanchar's affidavits, and it does not support the assertion. We find nothing in the evidence Strutzel cites from which a fact finder could reasonably infer that Blanchar was bound by the lot purchase agreement to enter into a construction contract with Lake Land.

to the particular party with whom one has contracted is not a statement made to 'the public.'" ***Id.***, ¶43. This statement in ***Kailin***, however, was plainly directed at the situation where two parties have already entered into the contract at issue and the alleged misrepresentations occur after the contract is finalized. We reasoned that WIS. STAT. § 100.18(1) is directed at misrepresentations made to induce, and that *post*-contract misrepresentations logically cannot induce *that* contract; therefore, such misrepresentations are not made to induce "the public." *See* ***id.***, ¶44.

¶17 Here, as Blanchar points out, there are two distinct contracts. The alleged misrepresentations occurred *before* the parties entered into the contract at issue, the construction contract. Blanchar alleges that the misrepresentations induced the construction contract, not the lot purchase agreement. The construction contract is the relevant "offered item." *See* ***K&S Tool & Die***, 301 Wis. 2d 109, ¶26 (a plaintiff is "no longer a member of 'the public' … once he or she has entered into a contract to purchase the offered item"). Strutzel provides no persuasive reason why Blanchar would have been any less susceptible to misrepresentations by Strutzel to induce a construction contract than to misrepresentations by any other custom home builder who Blanchar was free to retain before contracting with Strutzel.

¶18 Strutzel argues that Blanchar was not "the public" for purposes of the alleged misrepresentations because any statements Strutzel made to Blanchar in connection with the construction contract were directed only at Blanchar with Blanchar's particular situation in mind. The case law states, however, that "the public" under WIS. STAT. § 100.18(1) may refer to only one individual and may even include statements made "in private." ***Id.***, ¶23. Thus, this argument does not strengthen Strutzel's position.

¶19 In sum, we conclude as a matter of law, based on the undisputed facts, that Blanchar was still a member of "the public" with respect to Lake Land at the time of Strutzel's alleged misrepresentations.

B. Whether Blanchar's Complaint Failed To State A Claim For Piercing Lake Land's Corporate Veil

¶20 Blanchar argues that the circuit court erred when it concluded that he failed to state a claim for piercing Lake Land's corporate veil. Whether a complaint states a claim upon which relief can be granted is a question of law that we review *de novo*. *See* ***John Doe 67C v. Archdiocese of Milwaukee***, 2005 WI 123, ¶19, 284 Wis. 2d 307, 700 N.W.2d 180. This inquiry is the same as the first step in our summary judgment analysis. *See* ***Prah v. Maretti***, 108 Wis. 2d 223, 228, 321 N.W.2d 182 (1982) ("In deciding a motion for summary judgment the initial question is the same as that on a … motion to dismiss the complaint for failure to state a claim upon which relief can be granted ….").

¶21 Wisconsin follows "notice pleading," which is intended to eliminate various technical aspects of pleading, and we must liberally construe Blanchar's complaint so as to do substantial justice. *See* ***John Doe***, 284 Wis. 2d 307, ¶¶35-36. We accept as true all the facts pleaded and all the inferences that can reasonably be derived from those facts. ***Eternalist Found., Inc. v. City of Platteville***, 225 Wis. 2d 759, 770, 593 N.W.2d 84 (Ct. App. 1999).

¶22 Even notice pleading, however, has certain basic requirements. A complaint must contain "[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises." WIS. STAT. § 802.02(1)(a). The complaint must "'contain a statement of the general factual circumstances in support of the claim presented.'"

Ziemann v. Village of North Hudson, 102 Wis. 2d 705, 713, 307 N.W.2d 236 (1981) (quoting Judicial Council Committee's Note, 1974). Moreover, we may not "add facts in the process of liberally construing the complaint." ***John Doe***, 284 Wis. 2d 307, ¶19. The court must dismiss a claim if, "'[u]nder the guise of notice pleading, the complaint … requires the court to indulge in too much speculation leaving too much to the imagination of the court.'" ***Id.***, ¶36 (citation omitted).

¶23 With these standards in mind, we turn to the elements required to pierce the corporate veil and we assess the sufficiency of Blanchar's complaint in light of those elements. The parties agree that the elements are set forth in ***Consumer's Co-op of Walworth County v. Olsen***, 142 Wis. 2d 465, 419 N.W.2d 211 (1988), and are as follows:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or [a] dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 484.[6]

[6] The court in ***Consumer's Co-op of Walworth County v. Olsen***, 142 Wis. 2d 465, 419 N.W.2d 211 (1988), also said that "[a] test which is essentially identical has been articulated as a two-prong test requiring: '(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual [shareholders] no longer exist; and (2) that, if (continued)

¶24 Additionally, the court in ***Consumer's Co-op*** listed several factors that inform the first element. Those factors include a failure to hold corporate board meetings, a failure to maintain records, inadequate capitalization at the inception of the corporation, intermingling of personal and corporate funds, shareholders' treating the corporate assets as their own, withdrawal of capital from the corporation at will, shareholders holding themselves out as being personally liable for the debts of the corporation, failure to issue stock, and managing the corporation without regard to its independent existence. *See* ***id.*** at 490 n.10.

¶25 Blanchar's complaint begins with general factual allegations followed by three labeled claims: (1) violation of WIS. STAT. § 100.18, (2) common law "fraud/misrepresentation," and (3) breach of contract. Each of the three labeled claims includes additional factual allegations. The complaint also includes a fourth, unlabeled claim, which consists in its entirety of the following three allegations:

> 44. Realleges the allegations contained in paragraphs 1-16 [general factual allegations], and paragraphs 28-43 [breach of contract allegations].
>
> 45. On information and belief alleges that Lake Land Builders, Inc. is not a bona fide, legal corporation because Chad Strutzel has failed to properly treat the corporate entity separate from his personal business, and as a result the law requires that Lake Land Builders' corporate veil be pierced.
>
> 46. Alternatively, Lake Land Builders is a non-corporate entity owned and operated by Chad Strutzel, and as a result Chad Strutzel is personally and individually liable to the plaintiff for damages arising from the breaches of contract.

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the acts are treated as those of the corporation alone, an inequitable result will follow.'" ***Id.*** at 484 n.5 (citation omitted). Here, we follow the parties' lead and focus on the three-element test.

¶26 Blanchar focuses on paragraph 45. He argues that paragraph 45 is an allegation of an "ultimate fact" sufficient to support his claim for piercing the corporate veil and that no further elaboration is necessary. We disagree, and conclude that Blanchar's allegations are insufficient.

¶27 First, paragraph 45 contains no discernible factual allegations. Whether Strutzel failed to "properly treat the corporate entity separate from his personal business" appears more akin to a legal conclusion that cannot be answered without at least some additional factual allegations describing what Strutzel actually did. Without more, paragraph 45 is insufficient for Blanchar to plead the first required element, whether Lake Land had at the relevant time "no separate mind, will or existence of its own." Although the allegation that Blanchar "failed to properly treat the corporate entity separate from his personal business" implicates some of the factors relevant to this element, it is unclear whether Blanchar's failure to "properly treat the corporate entity separate from his personal business" establishes that Lake Land had "no separate mind, will or existence" of its own with respect to the relevant transactions.

¶28 Second, even if we assume that paragraph 45 is sufficient to plead the first element, Blanchar's complaint lacks allegations pertaining to the third element.[7] The complaint contains neither specific allegations nor a general statement from which we could reasonably infer that Lake Land's alleged lack of a separate existence was a cause of Blanchar's injury. In short, the complaint contains no "'statement of the general factual circumstances'" in support of the

[7] Because we conclude that the complaint lacks allegations pertaining to the third element, we need not decide whether the complaint also lacks allegations pertaining to the second element.

third element of the claim. *See* ***Ziemann***, 102 Wis. 2d at 713 (citation omitted). The complaint, instead, requires that we "'indulge in too much speculation leaving too much to the imagination of the court.'" *See* ***John Doe***, 284 Wis. 2d 307, ¶36 (citation omitted).

¶29 Accordingly, we agree with the circuit court that Blanchar's complaint fails to state a claim for piercing Lake Land's corporate veil.

¶30 Blanchar argues that he presented evidence in his summary judgment materials that, when viewed in a light most favorable to him, demonstrates that he was entitled to pierce Lake Land's corporate veil. We are uncertain how to interpret this argument, but conclude that it must be interpreted in one of two ways. Blanchar is arguing either (1) that we should consider his evidentiary materials in deciding whether his complaint states a claim to pierce the corporate veil, or (2) that the circuit court could not dismiss that claim because there are issues of disputed fact material to that claim. Either way, the argument fails.

¶31 As for our first interpretation of Blanchar's argument, we know of no authority—and Blanchar supplies none—that would allow us to consider matters outside the pleadings in deciding whether his complaint states a claim. *Cf.* ***Heinritz v. Lawrence University***, 194 Wis. 2d 606, 610-11, 535 N.W.2d 81 (Ct. App. 1995) (when deciding whether a complaint states a claim upon which relief may be granted, courts are limited to an examination of the facts as stated in the complaint).

¶32 As for our second interpretation of Blanchar's argument, it incorrectly assumes that we may ignore or skip the first step in summary judgment methodology even when that step is disputed. Because the first step is disputed

here, we must begin with that step and ask whether Blanchar has stated a claim. We have already concluded that he has not, and that ends our summary judgment analysis. "[A]s we have consistently held, the first inquiry in any summary judgment motion filed by a defendant is whether the complaint states a claim upon which relief can be granted. If it does not, the analysis goes no further and the motion is granted." ***Bauer v. Murphy***, 191 Wis. 2d 517, 527, 530 N.W.2d 1 (Ct. App. 1995) (citation omitted).

¶33 Finally, Blanchar makes a waiver argument. Blanchar points out that Strutzel in his answer did not raise the affirmative defense of failure to state a claim and did not separately move to dismiss on that basis. Rather, Strutzel raised his failure-to-state-a-claim argument in his summary judgment motion, filed ten days after his answer.

¶34 We conclude, however, that Blanchar's waiver argument is itself waived. We do not find this issue raised anywhere in Blanchar's circuit court arguments. Even now, on appeal, the first time that Blanchar makes this argument with any clarity is in his reply brief. Consequently, we do not address the merits of Blanchar's waiver argument. *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶15, 273 Wis. 2d 76, 681 N.W.2d 190 (issues not preserved in the circuit court will generally not be considered on appeal); ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 (we need not consider arguments raised for the first time in a reply brief).

By the Court.—Order affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.