COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1671 **Cir. Ct. No. 2007CV110**

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

KNOX ENTERPRISES, INC., D/B/A KNOX CABINETS AND DAVID L. KNOX,

PLAINTIFFS-APPELLANTS,

V.

CYNTHIA K. JETZER, BRUCE ROSENTHAL, DAVID MESICK, FORT DEARBORN PARTNERS, INC., ADVANCED WOODWORKING EQUIPMENT, INC., NANCY KOHLER AND JOHNSON FINANCIAL GROUP, INC., D/B/A/ JOHNSON BANK,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Knox Enterprises, Inc., d/b/a Knox Cabinets, and David L. Knox (collectively, "Knox"; where necessary to distinguish, "Mr. Knox") appeal from judgments granting separate summary judgments to Cynthia K. Jetzer; Bruce Rosenthal, David Mesick, Fort Dearborn Partners, Inc., Advanced Woodworking Equipment, Inc., and Nancy Kohler; and Johnson Financial Group, Inc., d/b/a Johnson Bank ("Johnson Bank"), entirely disposing of Knox's case. Because we conclude that the appeal can be disposed of on that basis, we do not reach the other issue, claim preclusion. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (court need address only dispositive issues).

¶2 Knox is a cabinet manufacturer. Now-defunct Kohler General Corporation made woodworking equipment, among other things. Cynthia Jetzer was the owner and sole shareholder of Kohler General. In June 2002, Knox began negotiating with Bruce Rosenthal of Kohler General about purchasing a piece of woodworking equipment. On July 10, the parties entered into a written contract to purchase the machine for $197,340 on the following terms:

> **Terms:** $30,000 Down payment with purchase order.
>
> $29,202 [One] week from date of purchase order.
>
> 30% [$59, 202] Upon start of assembly.
>
> 30% [$59, 202] Upon notification of "ready to ship", payment prior to shipment.
>
> 10% [$19, 734] Balance due net thirty days of ship date.

¶3 The contract also provided that, subject to prior orders, shipment would be approximately seven weeks from acceptance of the order. Seven weeks

was approximately September 1, 2002. Kohler General invoiced Knox for the first three payments on July 10, 15 and 23, which Knox paid. The first two invoices represented a divided down payment. The third followed Rosenthal's alleged representation that assembly of the machine had commenced.

¶4 Mr. Knox telephoned Kohler General on or about September 12 to inquire about the machine's status. He testified that someone identifying himself as David Mesick told him the machine soon would be ready to ship and that sending the money would expedite the process, as the check had to clear first.[1] Although Mesick did not name a specific shipping date and Knox was not invoiced for the ready-to-ship installment, Knox authorized its bank to send the $59,202 due upon this alleged ready-to-ship notification, bringing to $177,606 the amount it paid Kohler General for the machine.

¶5 Kohler General never shipped the machine.

¶6 Meanwhile, Kohler General was having cash-flow problems, in part due to a large debt it owed Johnson Bank. In August 2002, Kohler General hired Mesick to provide business-turnaround consulting. Mesick was a partner in Fort Dearborn Partners, a management consulting firm. The financial woes continued.

¶7 On December 26, 2002, Kohler General filed for receivership under WIS. STAT. ch. 128 (2007-08).[2] The circuit court appointed Mesick receiver. Acknowledging that Johnson Bank held a properly perfected security interest in all

[1] The complaint alleges that Mesick and Rosenthal both told Knox on or about September 12 the machine was ready to ship.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

of Kohler General's assets, Mesick sought approval to sell them. The court approved the sale of Kohler General's assets to newly formed Advanced Woodworking. Nancy Kohler, Jetzer's mother, was named the registered agent of Advanced Woodworking. Knox objected to the sale of the machine, but later stipulated that it would drop its objection in exchange for Johnson Bank's security interest in it. The stipulation also extinguished Kohler General's obligation to complete the machine. The circuit court authorized transfer of the machine to Knox and relieved Mesick of his responsibilities as receiver.

¶8 The machine lacked parts necessary to complete assembly. Knox declined Advanced Woodworking's offer to sell it a new machine. Instead, Knox sold the unfinished machine's parts to Advanced Woodworking for $30,000 and purchased a new one elsewhere.

¶9 Knox filed suit against Jetzer, Rosenthal, Mesick, Fort Dearborn, Advanced Woodworking, Peter Kohler, Nancy Kohler and Johnson Bank alleging, *inter alia*, misrepresentation, conversion, tortious interference, conspiracy and negligent and intentional infliction of emotional distress.[3] The gist of the complaint was that the defendants collectively and individually misrepresented Kohler General's grim financial position to defraud Knox and other customers for the defendants' personal gain. Knox sought its $177,606 out-of-pocket damages, "additional losses and damages to be proved," and punitive damages.

[3] Knox first commenced the action in October 2004 in a California state court. The case was moved to federal court, and Knox voluntarily dismissed the action after Johnson Bank was dismissed on jurisdictional grounds. Knox filed this action in February 2007.

Peter Kohler, Nancy Kohler's husband and Jetzer's father, died in December 2007 and was dismissed from the case. Also, Knox eventually withdrew the emotional distress claims.

¶10 Johnson Bank, Jetzer and the other five defendants as a group filed three separate motions for summary judgment. After a hearing, the circuit court concluded both that Knox did not present enough to avoid summary judgment and that, under the doctrine of claim preclusion, Knox was barred from bringing this action because it could have litigated these claims in the December 2002 receivership. The court granted the motions and dismissed all of Knox's claims. Knox appeals. We will supply more facts as necessary.

¶11 We review a decision on summary judgment de novo using the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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).

Intentional, Strict Responsibility and Negligent Misrepresentation

¶12 Knox's complaint alleged that Rosenthal, Mesick and Johnson Bank, through an unidentified employee, knowingly misrepresented Kohler General's financial viability; to induce Knox's continued payments, Rosenthal and Mesick misrepresented the progress of the machine—Rosenthal on July 23 that assembly had begun and Rosenthal and Mesick around September 11 or 12 that the machine was ready to ship; and Rosenthal and Johnson Bank through the unknown employee misrepresented that the bank would hold Knox's payment in a custodial account specifically for payment toward the machine. The allegations all implicate Kohler General's financial instability.

¶13 All three forms of misrepresentation require proof that the representation be of a fact, be untrue and be believed to be true by the plaintiff and relied upon to his or her detriment. *See* ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶13, 270 Wis. 2d 146, 677 N.W.2d 233. Intentional misrepresentation further requires proof that the defendant made the misrepresentation either knowing the statement was false or recklessly not caring whether it was, and also made it with intent to deceive and to induce the plaintiff to act on it to his or her detriment. ***Id.*** The plaintiff's reliance must not be negligent or unjustifiable. *See* ***Lambert v. Hein***, 218 Wis. 2d 712, 731, 582 N.W.2d 84 (Ct. App. 1998); *see also* WIS JI—CIVIL 2403. The pleadings must state the circumstances constituting fraud with particularity, specifying the individuals involved and where, when and to whom the misrepresentations were made. *See* ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶21, 283 Wis. 2d 555, 699 N.W.2d 205; *see also* WIS. STAT. § 802.03(2).

¶14 Knox does not establish with sufficient particularity that all of the statements actually were made, were untrue or that the alleged makers knew or recklessly did not care if the representations were untrue. Even had Knox made those showings, its claim still is insufficient because it fails to show why its reliance on the alleged misrepresentations was not negligent or unjustifiable.

¶15 Mr. Knox testified that others in the industry advised him before Knox ever entered the contract that Kohler General "was in some financial difficulty" and Knox "ought to be careful." He also testified that, although familiar with Dun & Bradstreet business assessment reports, he did not run one on Kohler General. The D&B report Knox's own bank's attorneys ran in October 2002 showed Kohler General in the highest risk category. The availability of objective information undercuts the reasonableness of Knox's reliance.

¶16 In addition, Knox alleged it was induced to wire a $59,202 payment by representations that the machine was ready to ship. Mr. Knox's deposition testimony, however, shows that he acted on his own initiative. Mr. Knox testified that Rosenthal told him sometime between September 2 and September 12 that the machine was not quite ready but "they would have it out as soon as possible" and that Mesick told him "everybody" was working on it and "it is going to get shipped out." Mr. Knox conceded Mesick did not say the machine was ready to ship or give a date certain for shipping and that his company was not invoiced for the "ready-to-ship" payment. As for Johnson Bank, Mr. Knox testified that he called one of the Johnson Bank branches, but did not recall which one, and spoke to a Johnson Bank employee, the identity of whom he never knew. Mr. Knox testified that he made the call *after* directing his own bank to wire the money and for the purpose of ensuring that the bank received the wire.[4] The facts and circumstances do not justify Knox's reliance.

Conversion, Unjust Enrichment and "Money Had and Received"

¶17 Knox alleged that Johnson Bank took and retained funds earmarked for the machine. The circuit court dismissed these claims because Knox failed to make "any showing" that Johnson Bank acted improperly. We agree.

[4] Knox submitted a 2005 declaration—analogous to an affidavit—from the California action in response to these summary judgment filings. The declaration stated that the conversation with Johnson Bank occurred *before* sending the payment. We conclude this submission does not create a genuine issue of material fact. We may disregard an affidavit that contradicts a party's own sworn testimony, even though the affidavit was made before the sworn testimony. *See* ***Yahnke v. Carson***, 2000 WI 74, ¶¶11, 16, 20, 236 Wis. 2d 257, 613 N.W.2d 102, *and* ***Darnell v. Target Stores***, 16 F.3d 174, 176-77 (7th Cir. 1994).

¶18 The elements of conversion are: (1) controlling or taking property belonging to another (2) without the owner's consent (3) in a manner that seriously interferes with the owner's rights to possess the property. *See* ***Bruner v. Heritage Cos.***, 225 Wis. 2d 728, 736, 593 N.W.2d 814 (Ct. App. 1999).

¶19 Knox's payments were received into Kohler General's operating account at Johnson Bank. Kohler General also had a separate blocked account at Johnson Bank into which Kohler General channeled payments made to it for parts and service work. After Kohler General defaulted on its debt to Johnson Bank in July 2001 the two entities entered into a series of forbearance agreements. The second one entitled Johnson Bank to twenty-three percent of the blocked account deposits, not those, like Knox's, in the operating account. Mr. Knox testified that he knew of no money or property belonging to Knox that Johnson Bank took, held on to and should return to Knox. The conversion claim was properly dismissed.

¶20 The claims of unjust enrichment and money had and received are mirror images of each other. *See* ***Meyer v. Laser Vision Inst., LLC***, 2006 WI App 70, ¶21, 290 Wis. 2d 764, 714 N.W.2d 223. The elements are similar, each requiring that the plaintiff conferred a benefit upon the defendant, which it would be inequitable for the defendant to retain without payment. *See* ***S & M Rotogravure Serv., Inc. v. Baer***, 77 Wis. 2d 454, 460, 252 N.W.2d 913 (1977) (unjust enrichment); *see also* ***Graf v. Neith Coop. Dairy Prods. Ass'n***, 216 Wis. 519, 522-23, 257 N.W. 618 (1934) (money had and received).

¶21 As noted, Knox paid Kohler General; it conferred no benefit on Johnson Bank. In addition, these claims both are governed by equitable principles and do not lie where the parties have entered into a contract. *See* ***Meyer***, 290 Wis. 2d 764, ¶22. The circuit court also properly dismissed these claims.

Tortious Interference

¶22 Tortious interference is a third party's improper, intentional and unjustified interference with a party's performance of a contract. *See* ***Dorr v. Sacred Heart Hosp.***, 228 Wis. 2d 425, 456, 597 N.W.2d 462 (Ct. App. 1999). The prime purpose of the interference must be to interfere with the contractual relationship. *See* ***Briesemeister v. Lehner***, 2006 WI App 140, ¶¶48, 49, 295 Wis. 2d 429, 720 N.W.2d 531; *see also* WIS JI—CIVIL 2780.

¶23 Knox alleged that all of the defendants tortiously interfered with its contract with Kohler General by diverting Kohler General funds and/or receipts to Johnson Bank, by having Advanced Woodworking purchase Kohler General's assets and inventory, by dissolving Kohler General and by continuing Kohler General's business under the name of Advanced Woodworking. We disagree.

¶24 Jetzer and Johnson Bank entered agreements to pay down Kohler General's debt well before Rosenthal and Kohler General did business with Knox. The agreements gave Johnson Bank a perfected security interest in all of Kohler General's assets and authorized the bank to withdraw a percentage of payments made to Kohler General for parts and service work and deposited in the blocked account. Accordingly, any "diversion" of funds was pursuant to the parties' prior agreements, not for the prime purpose of interfering with Knox's contract. Further, it was not unjustified. Johnson Bank's effort to protect a legal right is not improper conduct. *See* ***Cudd v. Crownhart***, 122 Wis. 2d 656, 662, 364 N.W.2d 158, 161 (Ct. App. 1985). Mesick's role as consultant likewise was not for the prime purpose of interfering with Knox's contract but to advise Kohler General on turning around its business. Just as Mesick's acts as receiver were consistent with

his legal obligations, Advanced Woodworking's purchase of Kohler General's assets also was done pursuant to a court order and thus not improper.

¶25 We agree with the circuit court's conclusion that Knox's claims against Nancy Kohler and Advanced Woodworking did not state a claim. Advanced Woodworking was not formed until the receivership on December 26, 2002, and Nancy Kohler, whose only tie to Kohler General was as mother of its owner, had no decision-making authority at Kohler General. Thus, neither could have tortiously interfered by participating in any alleged diversion of Kohler General's funds. Any involvement in the purchase of Kohler General's assets and inventory was privileged because the court approved the sale.

¶26 Knox also alleged damages beyond the approximately $177,000 it paid Kohler General for the machine. Knox offers no expert support for the damage claim, however. Moreover, Advanced Woodworking did not exist when Kohler General breached the contract, and Nancy Kohler was not a part of Kohler General. Accordingly, Knox has not established a causal connection between the alleged interference and the unspecified damages. *See* ***Dorr***, 228 Wis. 2d at 456 (tortious interference requires proof of a causal connection between the interference and the alleged damages).

Aiding and Abetting

¶27 Knox alleged that all defendants aided and abetted an unlawful scheme to defraud it and other Kohler General customers and creditors by commingling customer funds with Kohler General revenues and then diverting the combined monies to Johnson Bank for the defendants' benefit, leaving Kohler General without sufficient capital to fulfill its contracts. In Wisconsin, a person may be held civilly liable for aiding and abetting if he or she: (1) undertakes

conduct that as a matter of objective fact aids another in the commission of an unlawful act; and (2) consciously desires or intends that his conduct will yield such assistance. ***Edwardson v. American Family Mut. Ins. Co.***, 223 Wis. 2d 754, 764, 589 N.W.2d 436 (Ct. App. 1998). Mere presence is not aiding and abetting unless an intent to assist is communicated. *See* ***Winslow v. Brown***, 125 Wis. 2d 327, 336-37, 371 N.W.2d 417 (Ct. App. 1985).

¶28 Knox sets forth no specific facts showing that any of the defendants communicated an intent to assist with the allegedly illegal conduct, let alone that it was illegal in the first instance. Moreover, Advanced Woodworking and Nancy Kohler were not even "present" during this time period.

Conspiracy

¶29 Finally, Knox alleged that the defendants conspired to damage it by diverting payments collected under the contract for their own gain, knowing Kohler General never would deliver the machine to Knox.

¶30 A conspiracy is two or more persons acting together to accomplish either an unlawful purpose or a lawful purpose by an unlawful means. *See* ***Onderdonk v. Lamb***, 79 Wis. 2d 241, 246, 255 N.W.2d 507 (1977). There is no such thing, however, as a civil action for conspiracy. ***Singer v. Singer***, 245 Wis. 191, 195, 14 N.W.2d 43 (1944). An action exists for damages caused by acts pursuant to a conspiracy but none for the conspiracy alone. ***Id.*** A plaintiff must state with specificity the acts engaged in to further the conspiracy and must show that the purposes of the conspiracy were accomplished in damage to the plaintiff. ***Onderdonk***, 79 Wis. 2d at 247.

¶31 Mr. Knox testified that he could not identify funds, other than salaries paid in the course of business, that originated from Knox and were diverted to Fort Dearborn or Rosenthal for their personal benefit. He also testified that while he had seen Johnson Bank records that made it "appear[]" that Mesick, Nancy Kohler and Advanced Woodworking had done so, he did not have them at the deposition and could not recall them specifically. None appear in the record.

¶32 Because we have determined that the circuit court correctly dismissed the other tort claims in Knox's complaint, we also must conclude that its conspiracy claim fails. Moreover, the attestations in the affidavit of Knox's expert dispels any notion of concerted action among the alleged conspirators, instead painting a picture of defendants at cross-purposes. It asserts, for example, that Johnson Bank directed and controlled distributions and payments to Jetzer, Nancy Kohler and any entity Jetzer owned; that the forbearance agreements prevented Jetzer and Nancy Kohler from making claims against the bank; and that the bank forbade Jetzer's involvement in Advanced Woodworking.

¶33 Nor does Knox particularly allege what misrepresentations it broadly claims Advanced Woodworking and Nancy Kohler made in furtherance of the conspiracy. Mr. Knox testified that he is unaware that Nancy Kohler ever made any direct misrepresentations and conceded no one at Knox ever spoke to her. Likewise, since Advanced Woodworking did not exist during this time period and Nancy Kohler had no access to Kohler General funds, neither could have conspired to collect money from Knox and divert it for their own benefit.

Claims Against Jetzer

¶34 The circuit court resolved the claims against Jetzer on the basis of claim preclusion. Knox therefore offers no argument regarding the propriety of

granting summary judgment as it relates to her. As our review on summary judgment is de novo, however, we approach the claims from that perspective.

¶35 Knox alleged that, despite Jetzer's "more than ample resources," she intentionally undercapitalized Kohler General and, with other defendants, tortiously interfered, conspired and aided and abetted to divert funds for her own benefit and to evade creditors. It further alleged that Jetzer is personally liable for Kohler General's debts because Kohler General essentially was Jetzer's alter ego.

¶36 Our examination of the summary judgment submissions satisfies us that there is no genuine issue as to any material fact. *See* WIS. STAT. § 802.08(2). Knox's filings do not set forth specific facts showing that there exists a genuine issue requiring a trial. Knox cannot rest on the mere allegations of the complaint. *See* ***Fifer v. Dix***, 2000 WI App 66, ¶15, 234 Wis. 2d 117, 608 N.W.2d 740; *see also* WIS. STAT. § 802.08(3). We conclude that the claims against Jetzer properly could have been dismissed on summary judgment.

Claims Against Fort Dearborn

¶37 The only allegations expressly naming Fort Dearborn claim that Fort Dearborn, of which Mesick was a partner, was vicariously liable for Mesick's misrepresentations. An employer may be vicariously liable for an employee's torts if a master/servant relationship exists between them. ***Kerl v. Rasmussen***, 2004 WI 86, ¶18, 273 Wis. 2d 106, 682 N.W.2d 328. Knox made no attempt to establish that Mesick was Fort Dearborn's servant—*i.e.*, was subject to Fort Dearborn's control or right to control—while performing his roles as consultant or receiver. *See* ***id.***, ¶19. And even if Fort Dearborn could be held vicariously liable for Mesick's torts, we already have concluded that Knox has stated no claim for any tort against Mesick, thus negating a viable claim against Fort Dearborn.

¶38 Knox also apparently includes Fort Dearborn in the claims against "all Defendants" alleging tortious interference, conspiracy and aiding and abetting. As with Jetzer, Knox does not amplify the allegations in the complaint to establish the existence of a genuine issue of material fact.

¶39 In sum, Knox's filings are insufficient to avoid summary judgment. Despite its rhetoric, the affidavit of its expert, O.K. Johnson, does not create genuine issues of fact for trial. Nor do his characterizations of the facts, such as that Johnson Bank "was singularly focused without regard to Kohler General's contracts and customers," establish liability. Indeed, we may disregard those attestations of which he does not have personal knowledge. *See* ***Leszczynski v. Surges***, 30 Wis. 2d 534, 538, 141 N.W.2d 261 (1966).

¶40 Lastly, Knox's appellate counsel has filed a false certification that the appellants' appendix meets the requirements in WIS. STAT. RULE 809.19(2)(a). It does not include, however, the portions of the oral ruling showing the circuit court's reasoning, a part of the record "essential to an understanding of the issues raised." *See* ***State v. Bons***, 2007 WI App 124, ¶23, 301 Wis. 2d 227, 731 N.W.2d 367 (the appendix must include the record items truly relevant and essential to an understanding of the issues raised, particularly the circuit court's ruling). Counsel therefore is sanctioned $150 for providing a deficient appendix and a false appendix certification. *See* ***id.***, ¶25. Counsel shall pay $150 to the clerk of this court within thirty days of the release of this opinion.

By the Court.—Judgments affirmed.

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