COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2011

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 Nos. 2010AP1285
2010AP1448

Cir. Ct. No. 2009CV3509

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

CAROLINE APARTMENTS JOINT VENTURE,

PLAINTIFF-APPELLANT,

V.

M&I MARSHALL & ILSLEY BANK,

DEFENDANT-RESPONDENT,

STERN BROTHERS & CO.,

DEFENDANT.

APPEALS from a judgment of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. Caroline Apartments Joint Venture (CAJV) appeals from a judgment dismissing its claims against M&I Marshall & Ilsley Bank for breach of contract, fraud, and breach of fiduciary duties relating to a municipal bond financing transaction. CAJV argues that material factual disputes exist which preclude summary judgment in M&I's favor, that M&I was not entitled to an award of attorney fees, and that the circuit court erroneously exercised its discretion in determining the attorney fees award. Because parole evidence cannot be introduced to challenge or vary the terms of the parties' integrated contract, we affirm the judgment. With respect to M&I's motion for reasonable attorney fees and costs incurred postjudgment and in this appeal, we remand for a hearing before the circuit court to determine what, if any, attorney fees and costs should be awarded.

¶2 CAJV is a partnership that owns an apartment community in Waukesha. The property is financed with tax-exempt municipal revenue bonds. Interest to the bondholders is variable and the rate is determined weekly by the remarketing agent, Stern Brothers & Co. M&I issued a letter of credit (LOC) through February 2012, which supplies the liquidity and creditworthiness of the bonds. Interest is paid and bonds are redeemed by draws against the LOC. Under a Reimbursement Agreement and First Amendment to Reimbursement Agreement (hereafter, "amended reimbursement agreement"), CAJV agreed to reimburse M&I for payments made under the LOC and all reasonable out-of-pocket costs and expenses, including reasonable attorney fees, incurred by M&I in the enforcement or preservation of its rights under the agreement.

¶3 The interest rate on the bonds is tied to the strength of the bank issuing the underlying LOC and investors' consequential perception of the quality of the bonds. In early 2009, M&I reported huge losses for 2008. As a result, its

Standard and Poor's counterparty credit rating was downgraded from A to A- and its financial strength rating from Moody's was downgraded from B to C+. The downgrading of M&I's creditworthiness caused Stern Brothers to raise the interest rate on the bonds. In April 2009, the sole bondholder, Evergreen Investment, tendered the bonds for payment.[1] Stern Brothers was unable to remarket the bonds and the full amount of bond redemption was drawn against the LOC. CAJV defaulted on the amended reimbursement agreement with M&I. CAJV eventually found a replacement LOC to support the remarketing of the bonds but at higher costs.

¶4 CAJV commenced this action against M&I, alleging five causes of action: breach of contract, breach of the implied covenant of good faith, fraud in the inducement,[2] unjust enrichment, and equitable estoppel. CAJV alleged that by representations of M&I principals regarding its financial strength and conservative lending practices, the bank had a contractual duty and duty of good faith to maintain the creditworthiness of the LOC so that the bonds could trade at the lowest possible interest rate. It claimed that M&I breached the contract and duty of good faith by making risky loans in Arizona, Florida, and elsewhere that went into default and seriously damaged M&I's creditworthiness. It also claimed the duty of good faith was breached by M&I's failure to disclose its risky loan activity so as to permit CAJV to seek alternative credit sources before the bonds were rendered unmarketable. The unjust enrichment claim sought to disgorge from

[1] CAJV's complaint explains how the bonds were caught up in the 2008 financial crisis and perceived weaknesses of banks. Evergreen Investments was a division of Wachovia Corporation, which financially collapsed in the fall of 2008.

[2] This cause of action was dismissed for failure to be stated with particularity and is not the subject of this appeal.

M&I extra interest and fees CAJV had to pay as a result of the default under the amended reimbursement agreement caused by the decline of M&I's creditworthiness and by no fault of CAJV. CAJV alleged that by its failure to maintain credit worthiness to permit a reasonable bond interest rate, M&I was also equitably estopped from collecting the default interest rate and fees.

¶5 Prior to answering the complaint, M&I moved for summary judgment.[3] M&I asserted that the written agreements were fully integrated and did not permit variance of terms or duties by proof of oral representations or agreements. CAJV's opposing affidavit explained that CAJV's interest in the creditworthiness of the LOC so that the bonds would carry a low interest rate was known to M&I and that M&I represented it was "the oldest and largest bank in Wisconsin," that it "was conservative, and only made diversified and well secured loans," that it "did not make risky loans or engage in aggressive lending activity," and that it "expected to maintain its strong credit rating for years to come." The circuit court granted summary judgment, concluding that the LOC stated that it is a full representation of the parties' undertaking and it contains no promise that potential bond investors will accept the LOC as a strong indicator of bond value. The court determined that parole evidence of oral promises could not be considered because the agreements expressly exclude any additional understandings. *See* ***Dairyland Equip. Leasing, Inc. v. Bohen***, 94 Wis. 2d 600,

[3] Because the motion for summary judgment was pending when the answer was due, the parties stipulated that the time for M&I to answer the complaint was extended to April 5, 2010. The circuit court granted summary judgment on March 22, 2010, thus alleviating the need for M&I to answer. We reject CAJV's position that the allegations in the complaint are deemed admitted for summary judgment purposes because M&I failed to answer the complaint. The time to answer was extended and M&I was not in default with respect to the answer. ***Daughtry v. MPC Systems, Inc.***, 2004 WI App 70, ¶30, 272 Wis. 2d 260, 679 N.W.2d 808, on which CAJV relies, is factually different and has no application.

608, 288 N.W.2d 852 (1980). It further concluded that there was no good faith duty beyond the terms of the written agreement and that CAJV had not established a separate oral contract. The claims against M&I were dismissed. Judgment was granted to M&I for $100,917.85 for costs and attorney fees.

¶6 We review decisions on summary judgment de novo, applying the same methodology as the circuit court. ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** at 496-97; WIS. STAT. § 802.08(2) (2009-10).[4] The party moving for summary judgment has the burden of establishing the absence of a factual dispute and that he or she is entitled to judgment as a matter of law. ***Grosskopf Oil, Inc. v. Winter***, 156 Wis. 2d 575, 581, 457 N.W.2d 514 (Ct. App. 1990). However, the ultimate burden of demonstrating that there is sufficient evidence to go to trial is on the party that has the burden of proof on the issue that is the object of the motion. ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993). Here, CAJV's claims all rest on establishing that there was a contractual agreement that M&I would maintain creditworthiness so that the bonds would trade at lowest possible interest rate. We consider what proof CAJV makes of that contractual agreement.

[4] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶7 CAJV relies on a prior oral agreement which is not embodied in the written contracts. The parole evidence rule bars proof of oral agreements that vary or contradict written terms when the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement. ***Dairyland Equip.***, 94 Wis. 2d at 607. Thus, the question here becomes whether the parties intended the written contracts to be the final and only expression of their agreement.

¶8 M&I points to the merger clause in the LOC.[5] "Absent claims of duress, fraud, or mutual mistake, a written provision which expressly negatives collateral or antecedent understandings makes the document a complete integration." ***Id.*** at 608. CAJV contends that the LOC is not in fact a contract between itself and M&I and that it only sets forth M&I's obligation to the beneficiary of the LOC, the bond trustee. *See* WIS. STAT. § 405.103(4) (rights and obligations of an issuer to a beneficiary are independent of the existence, performance, or nonperformance of a contract out of which the letter of credit arises, including contracts between the issuer and applicant).

¶9 The "independence principle" embodied in WIS. STAT. § 405.103(4) confirms that the obligation of the issuer of a letter of credit to pay the beneficiary

[5] The LOC provides:

> This Letter of Credit sets forth in full our undertaking, and such undertaking shall not in any way be modified, amended, amplified or limited by reference to any document, instrument or agreement referred to herein (including, without limitation, the Bonds), except only certificates required herein and the Uniform Customs referred to herein; and any such reference shall not be deemed to incorporate herein by reference any document, instrument or agreement except such certificates.

"is an obligation independent of any other claim that may exist among the parties to the letter of credit contract." ***Admanco, Inc. v. 700 Stanton Drive, LLC***, 2010 WI 76, ¶22, 326 Wis. 2d 586, 768 N.W.2d 759. That principle does nothing to define the contract between the issuer, M&I here, and the applicant, CAJV here. By its very nature, the LOC is executed by only one party and is not in the form of a traditional contract demonstrating consideration and mutual obligations. *See* ***id.***, ¶20 (the letter of credit is not like other devices creating legal obligations and it forms a unique legal relationship among the parties); ***Bank of Cochin Ltd. v. Mfrs. Hanover Trust Co.***, 612 F. Supp. 1533, 1537 (S.D.N.Y. 1985) ("Not a contract, the letter of credit has been best described as 'a relationship with no perfect analogies but nevertheless a well defined set of rights and obligations.'" (Citation omitted.)). The opening recital in the LOC refers to CAJV as the borrower and references that draws on the LOC be made for the "account of the Borrower, pursuant to a Reimbursement Agreement, as amended on the even date herewith." In turn the amended reimbursement agreement serves the desire to amend the form of the LOC and specifically references the LOC by requiring CAJV to repay the amount of each draw on the LOC and fees relating to the issuance of the LOC and draws on it. In short, neither the LOC nor the amended reimbursement agreement has purpose without the other. The LOC is a part of the bundle of contracts defining M&I's undertaking with respect to the bonds and its obligations to CAJV and cannot, as CAJV contends, simply be ignored. *See* ***Admanco, Inc.***, 326 Wis. 2d 586, ¶21 (the applicant is considered one of the three parties to a letter of credit).

¶10 The merger clause in the LOC renders the LOC and amended reimbursement agreement fully integrated contracts. *See* ***Dairyland Equip.***, 94 Wis. 2d at 608. No question of fact exists as to whether the contracts are fully

integrated. Parole evidence of any additional oral agreements is not admissible. ***Id.*** at 607. The contracts do not give M&I any responsibility for the value of bonds, their marketability, or the determination of the variable interest rate.[6] CAJV cannot meet its burden to establish that there was a contractual agreement that M&I would maintain creditworthiness so that the bonds would trade at the lowest possible interest rate. Where, as here, the moving party demonstrates that there are no facts of record that support an element on which the opposing party has the burden of proof and the party opposing summary judgment fails to establish the existence of an element essential to that party's case, summary judgment is appropriate.[7] *See* ***Transportation Ins. Co.***, 179 Wis. 2d at 291-92.

¶11 CAJV argues that its claim that M&I breached the implied covenant of good faith attendant to every contract survives any determination that there was no specific contractual obligation to maintain creditworthiness and support the strength of the LOC. ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995), recognizes that "a party may be liable for breach of the implied contractual covenant of good faith even though all the terms of the written agreement may have been fulfilled." However, the duty of good faith represents

> a guarantee by each party that he or she "will not intentionally and purposely do anything to prevent the other party from carrying out his or her part of the agreement, or

[6] For this reason, CAJV's claims for unjust enrichment and equitable estoppel fail. Those claims are dependent on an obligation of M&I to guarantee the tradability of the bonds and prevent a default under the amended reimbursement agreement. No such obligation existed.

[7] We need not address the alternative arguments that the alleged agreement to maintain creditworthiness to insure that the bonds would trade with a low interest rate does not in fact conflict with the contracts and that the postdefault amendment to the contracts operated as an accord and satisfaction of CAJV's contract claim.

> do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."

Tang v. C.A.R.S. Prot. Plus, Inc., 2007 WI App 134, ¶41, 301 Wis. 2d 752, 734 N.W.2d 169 (citation omitted). Even accepting as undisputed fact that M&I undertook risky loan practices and incurred substantial financial losses that lowered its creditworthiness, the behavior of which CAJV complains was not intentionally directed at CAJV or intended to prevent CAJV's performance.[8] Summary judgment dismissing the claim for the breach of the implied duty of good faith was also appropriate.

¶12 CAJV contends that M&I is not entitled to recover its attorney fees incurred in this litigation because CAJV's claims were not based on written provisions in the amended reimbursement agreement. We summarily reject this nonsensical characterization of the litigation. CAJV sought to expand M&I's contractual obligations. At a minimum, CAJV sought to recover default interest and fees paid under the amended reimbursement agreement. M&I incurred attorney fees related to "enforcing, protecting or preserving its rights" under the amended reimbursement agreement. The provision in the agreement for the payment of attorney fees was triggered.[9]

[8] It is not for the courts to save CAJV from the unforeseen cascading effect of the financial crisis that reduced the profitability of its financing arrangement.

[9] We also summarily reject CAJV's contention that the attorney fee provision is ambiguous because it did not specifically reference an entitlement to attorney fees in a direct action with CAJV. We need not be concerned with CAJV's assertion that the simple application of the attorney fees provision would permit M&I to recover its attorney fees even if M&I was not the prevailing party. Those are not the facts of this case.

¶13 In support of its motion for an award of attorney fees, M&I submitted affidavits from its lead attorneys to which all invoices for services rendered in relation to this action were attached. An affidavit indicated the billing rate for the two lead attorneys and that the rate was set within the context of the local competitive market for legal services from law firms of comparable size. M&I sought a total award of $134,035.65 for costs and attorney fees.

¶14 CAJV argues that M&I failed to meet its burden of demonstrating the reasonableness of the fees which rendered the circuit court's award an erroneous exercise of discretion. *See* ***Bettendorf v. Microsoft Corp.***, 2010 WI App 13, ¶16, 323 Wis. 2d 137, 779 N.W.2d 34 (the amount of the attorney fees award is left to the discretion of the circuit court; the party seeking the award bears the burden of demonstrating the reasonableness of the requested fees). At the outset, we reject CAJV's suggestion that the circuit court improperly shifted the burden of proof to CAJV. The court's discussion of CAJV's challenge to the reasonableness of the fees, including its comment that M&I "cast the gauntlet," was merely a warning to CAJV to be specific in its objection.

¶15 The circuit court did not question the adequacy of the proof offered by M&I. M&I's supporting affidavit was adequate to demonstrate to the circuit court the billing rates, the hours worked, and nature of work performed. It was a sufficient basis for the circuit court to exercise its discretion and its particular familiarity with the local billing norms and the quality of the service rendered by counsel. *See* ***id.*** (the circuit court's determination is afforded deference because the circuit court is familiar with local billing norms and will likely have witnessed firsthand the quality of the services rendered).

¶16 The factors to be considered in determining the reasonableness of attorney fees include the time and labor required and the skill requisite to perform the legal service properly, the fee customarily charged in the locality for similar legal services, the amount involved and the results obtained, the time limitations imposed by the client or by the circumstances, the nature and length of the professional relationship with the client, and the experience, reputation, and ability of the lawyer or lawyers performing the services. ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶25, 275 Wis. 2d 1, 683 N.W.2d 58. The circuit court acknowledged that M&I's motion for summary judgment was merely an expansion or reworking of an earlier motion to dismiss. However, it observed that the complexity of the financing transaction required certain expertise in counsel and that considerable effort in time was appropriate to reduce the complexity of the case for presentation to the court. It also noted that the services were provided in a short period of time by the desire to impose a vigorous defense. It found the billing rate charged by two lead attorneys to not be excessive given the expertise needed. That finding is not clearly erroneous in the absence of any proof contradicting counsel's affidavit. The court was concerned that the billing of services performed by paralegal or attorneys other than lead counsel could have been duplicitous. It limited the recovery of attorney fees to the services performed by lead counsel, a sum of $99,759.62. The court demonstrated a proper exercise of its discretion based on the factors relevant to this case.

¶17 Based on the cost and attorney fees provisions in the amended reimbursement agreement, M&I moves for an award of $37,975.08, as costs and attorney fees incurred postjudgment and on appeal. CAJV does not address M&I's motion. Consequently, we remand for a hearing before the circuit court to determine what, if any, additional attorney fees or costs should be awarded under

the agreement. *See* ***Shands v. Castrovinci***, 115 Wis. 2d 352, 362, 340 N.W.2d 506 (1983) (the circuit court is the appropriate forum for determining reasonable appellate attorney fees); ***Bettendorf***, 323 Wis. 2d 137, ¶39. Appellate costs permitted under WIS. STAT. RULE 809.25(1)(b) may be taxed upon timely application under RULE 809.25(1)(c), and no duplicate recovery allowed in the circuit court.

By the Court.—Judgment affirmed and cause remanded with directions.

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