COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2080 **Cir. Ct. No. 2007CV635**

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

ANCHORBANK, FSB,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

DARRELL L. REHA,

DEFENDANT,

LUKOWITZ PROPERTIES, LLC, MATTHEW J. LUKOWITZ, BROOKE A. LUKOWITZ AND HIGHER GROUNDS COFFEE HOUSE, LLC,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Lukowitz Properties, LLC, Matthew Lukowitz, Brooke Lukowitz, and Higher Grounds Coffee House, LLC, (collectively, the Lukowitzes) appeal a judgment, entered on a jury verdict, dismissing their WIS. STAT. § 100.18[1] claim against AnchorBank, FSB. The Lukowitzes contend the circuit court erred by: granting summary judgment on their common law misrepresentation claims; excluding evidence that the Lukowitzes suffered personal injuries or emotional distress; and, refusing to change the jury's answer on whether the Lukowitzes suffered a monetary loss. The Lukowitzes also argue that one of the jury instructions misstated the law and that AnchorBank's counsel violated the court's ruling on a motion in limine by mentioning a settlement the Lukowitzes received in another case.

¶2 AnchorBank cross-appeals, arguing that the circuit court should have dismissed the Lukowitzes' WIS. STAT. § 100.18 claim on summary judgment. AnchorBank also offers alternate reasons why summary judgment on the common law misrepresentation claims was proper. Lastly, AnchorBank argues it is entitled to recover the attorney fees it incurred in defending against the Lukowitzes' counterclaim.

¶3 We affirm. First, we conclude the circuit court properly granted summary judgment on the common law misrepresentation claims. Second, we conclude the court should have granted summary judgment on the WIS. STAT. § 100.18 claim. Because the court should have dismissed the § 100.18 claim before trial, we need not address the Lukowitzes' additional arguments regarding

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

the exclusion of personal injury and emotional distress evidence, the court's refusal to change the jury's answer on monetary loss, an allegedly erroneous jury instruction, and AnchorBank's attorney's mention of the Lukowitzes' settlement.[2] Third, we conclude AnchorBank is not entitled to recover the attorney fees it incurred in defending against the counterclaim.

BACKGROUND

¶4 In spring 2006, Matthew and Brooke Lukowitz became interested in purchasing a building in Chippewa Falls. The building was owned by Brian Geraty, who operated a coffee shop on one part of the premises and leased other parts to tenants. Brooke wanted to run a coffee shop, and Matthew was looking for space where he could operate a church. The Lukowitzes were also interested in the building as a source of rental income.

¶5 The Lukowitzes began negotiating with Geraty in March 2006. They allege that, during negotiations, Geraty made "[g]ross misrepresentations" about the building's value and about the success of the coffee shop business. For instance, they allege Geraty told them the net operating income from the building's tenancies was almost $40,000 per year, while the actual net operating income was only $16,447 per year. They also allege Geraty told them the coffee shop grossed $15,000 per month, whereas it actually only grossed $9,000 each month.

[2] *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible grounds).

¶6 The Lukowitzes formed two limited liability companies—Lukowitz Properties, LLC, and Higher Grounds Coffee House, LLC. In April 2006, Lukowitz Properties made an offer to purchase the building and the coffee shop business, which Geraty accepted. They agreed on a total purchase price of $410,000—$340,000 for the building and $70,000 for the business. To finance the purchase, the Lukowitzes obtained a $150,000 loan from Matthew's uncle. Brooke contacted AnchorBank to obtain additional financing. AnchorBank agreed to loan Lukowitz Properties $272,000. Matthew, Brooke, and Higher Grounds Coffee House guaranteed the AnchorBank loan.

¶7 AnchorBank had also provided financing to Geraty when he purchased the building in 2002 and when he refinanced in 2005. As a result, AnchorBank had in its files some of Geraty's tax returns and an appraisal of the property done in connection with the 2005 refinancing. The 2005 appraisal was done by Bruce Christ, who had valued the property using both a sales comparison approach and an income capitalization approach. Using the sales comparison approach, Christ determined the value of the property was $320,000. Using the income capitalization approach, Christ determined the property was worth $360,000. Ultimately, Christ estimated the property was worth $340,000.

¶8 AnchorBank vice president Paul Piikkila told Brooke about the Christ appraisal and told her AnchorBank would not require a new appraisal before providing financing. Piikkila stated that the Christ appraisal was accurate and that, if the Lukowitzes used the appraisal, they could save money and close

sooner.[3] Piikkila also informed Brooke that she was free to get an independent appraisal. The Lukowitzes chose not to have the building reappraised. Brooke, who had been a real estate agent for five years, was familiar with Christ and his firm. She understood that Christ's appraisal had been done for AnchorBank's benefit, not for the Lukowitzes' benefit. Before closing, Brooke spent about an hour reviewing the Christ appraisal and other financial information Geraty provided. Matthew never read the Christ appraisal.

¶9 The transaction closed on May 1, 2006. The Lukowitzes allege that "in short order" they learned that Geraty had misrepresented the building's value and the coffee shop's revenue and that the Christ appraisal was not accurate. On September 1, 2006, the Lukowitzes filed a lawsuit against Geraty and his real estate broker. That case ultimately settled in September 2008. The Lukowitzes received $175,000 from the broker's insurance company and $10,000 from Geraty's insurer. They also received a judgment against Geraty for $270,000. Geraty paid $5,000 at the time of settlement and agreed to pay $700 per month thereafter. Using the settlement proceeds, the Lukowitzes repaid the $150,000 loan made by Matthew's uncle.

¶10 In the meantime, Lukowitz Properties stopped making its monthly payments to AnchorBank. In March 2007, AnchorBank and the Lukowitzes entered into a debt modification agreement, under which AnchorBank agreed to

[3] On appeal, the Lukowitzes also contend that Piikkila told them buying Geraty's building would be "a particularly good deal." However, the portions of the record the Lukowitzes cite do not support this assertion. We will not consider unsupported assertions of fact. *See* ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964).

accept reduced payments on the loan. The agreement contained a waiver clause, which stated:

> **5. WAIVER.** I waive all claims, defenses, setoffs, or counterclaims relating to the Prior Obligation, or any document securing the Prior Obligation, that I may have.

¶11 The Lukowitzes failed to make the reduced payments required by the debt modification agreement, and AnchorBank began foreclosure proceedings. The Lukowitzes counterclaimed, asserting negligent misrepresentation and strict responsibility misrepresentation claims. They also alleged AnchorBank made false statements to induce them to purchase Geraty's property, contrary to WIS. STAT. § 100.18(1). Essentially, the Lukowitzes contended that Piikkila lied to them when he said the Christ appraisal was accurate. They argued Piikkila knew or should have known about the appraisal's inaccuracy because AnchorBank had Geraty's tax returns and other financial information on file. The Lukowitzes claimed they had suffered financial harm, emotional distress, and personal injury as a result of Piikkila's misrepresentations.

¶12 AnchorBank obtained a foreclosure judgment against Lukowitz Properties in January 2008,[4] and the Lukowitzes' counterclaim continued. In January 2010, the circuit court ruled on cross-motions for summary judgment. The court granted partial summary judgment for the Lukowitzes, ruling that certain language in the loan documents did not entitle AnchorBank to recover the attorney fees it incurred in defending against the counterclaim. The court also granted partial summary judgment for AnchorBank, dismissing the Lukowitzes'

[4] The bank did not, however, enforce the loan guaranties made by Matthew, Brooke, or Higher Grounds Coffee House, and no deficiency judgment was entered.

negligent misrepresentation and strict responsibility misrepresentation claims. The court reasoned that, because the Lukowitzes had not established that AnchorBank had a fiduciary duty to them, their common law misrepresentation claims could not succeed. However, the court refused to grant summary judgment on the Lukowitzes' WIS. STAT. § 100.18 claim, which proceeded to trial in May 2010.

¶13 Before trial, the court granted AnchorBank's motion in limine to exclude evidence that the Lukowitzes had suffered emotional distress or personal injuries. The court reasoned that emotional distress and personal injury damages are not available under WIS. STAT. § 100.18, which only allows recovery for "pecuniary loss." The court also granted the Lukowitzes' motion in limine to exclude references to the Lukowitzes' settlement with Geraty and his real estate broker.

¶14 The jury ultimately determined that AnchorBank had violated WIS. STAT. § 100.18(1) by making an untrue, deceptive, or misleading statement of fact with intent to induce the Lukowitzes to purchase Geraty's property. However, the jury concluded the Lukowitzes had not suffered any monetary loss as a result of the violation. The Lukowitzes filed a postverdict motion, asking the court to change the jury's answer to the monetary loss question and to grant a new trial on damages. The court denied the Lukowitzes' motion and entered judgment on the verdict, dismissing the Lukowitzes' counterclaim.

DISCUSSION

I. Common law misrepresentation claims

¶15 The Lukowitzes first contend the circuit court erred by granting summary judgment on their common law misrepresentation claims. We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2). Here, the circuit court granted summary judgment on the Lukowitzes' common law misrepresentation claims after concluding that, based on the undisputed facts, AnchorBank did not owe a fiduciary duty to the Lukowitzes. Although our reasoning differs from the circuit court's, we agree for two reasons that summary judgment was proper. *See* ***Bence v. Spinato***, 196 Wis. 2d 398, 417, 538 N.W.2d 614 (Ct. App. 1995) (On review of summary judgment, we may affirm based on a theory or reasoning different from that relied upon by the circuit court.).

¶16 First, we conclude the Lukowitzes waived their common law misrepresentation claims when they signed the debt modification agreement. The agreement contains a clause entitled "**WAIVER**," which states, "I waive all … Counterclaims relating to the Prior Obligation, or any document securing the Prior Obligation, that I might have." The term "Prior Obligation" is defined as "my existing agreement described above in the PRIOR OBLIGATION INFORMATION section[.]" The prior obligation information section describes the Lukowitzes' $272,000 loan from AnchorBank.

¶17 The debt modification agreement is a contract, and the interpretation of a contract presents a question of law that we review independently. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 30, 577 N.W.2d 32 (Ct. App. 1998). If a contract's terms are unambiguous, we construe the contract as it stands. ***Id.*** at 31. Here, the waiver clause in the debt modification agreement is clear and unambiguous. By signing the agreement, the Lukowitzes agreed to waive any counterclaims they might have that were related to their AnchorBank loan. The Lukowitzes' common law misrepresentation claims are clearly related to their loan—the Lukowitzes allege that an AnchorBank employee made false statements to induce them to take out the loan and buy Geraty's property. As AnchorBank points out, "[i]f there had been no loan, there would be no claim." Thus, by signing the debt modification agreement, the Lukowitzes waived their common law misrepresentation claims.

¶18 The circuit court determined that the Lukowitzes did not waive their misrepresentation claims because "a victim of fraud may [not] waive the right to assert a claim before learning of the existence of the fraud." We disagree. There are a number of situations in which a party may waive any claims it has, including misrepresentation claims, before it knows exactly what those claims may be. For instance, a party may waive all claims against another party, whether known or unknown, by signing a general release. A party may also sign a contract containing an integration clause that states the contract is the final and complete expression of the parties' agreement and disclaims reliance on any representations not found in the contract. *See, e.g.*, ***Peterson v. Cornerstone Prop. Dev., LLC***, 2006 WI App 132, ¶¶36-37, 294 Wis. 2d 800, 720 N.W.2d 716 (integration clause in contract barred any claim of reliance on false representations). In either of these situations, a party may waive misrepresentation claims before learning of the existence of the misrepresentation.

¶19 Furthermore, the Lukowitzes concede that, at the time they signed the debt modification agreement, they were aware of the alleged misrepresentations Anchor Bank made to them. The Lukowitzes admit they became aware of the misrepresentations shortly after May 1, 2006. They did not sign the debt modification agreement until March 2007. Thus, even assuming that "a victim of fraud may [not] waive the right to assert a claim before learning of the existence of the fraud[,]" the Lukowitzes knew about the existence of the alleged fraud before signing the debt modification agreement.

¶20 The Lukowitzes contend that the circuit court could not grant summary judgment based on the waiver clause because waiver is a question of fact for the jury to decide. However, where contract language is unambiguous, construction of the contract language is a question of law, not fact. ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶32, 330 Wis. 2d 340, 793 N.W.2d 476. The debt modification agreement contained language that unambiguously waived any counterclaims related to the Lukowitzes' loan. Accordingly, summary judgment on the Lukowitzes' common law misrepresentation claims was proper.

¶21 Moreover, even if the Lukowitzes had not waived their common law misrepresentation claims, summary judgment would still have been proper. Both negligent misrepresentation and strict responsibility misrepresentation claims require the plaintiff to prove that the defendant made a false statement of fact. *See* ***Malzewski v. Rapkin***, 2006 WI App 183, ¶¶19-20, 296 Wis. 2d 98, 723 N.W.2d 156. Based on the undisputed facts, we conclude Piikkila did not make *any* statement of fact, true or untrue, regarding the Christ appraisal.

¶22 The Lukowitzes complain that Piikkila told them the Christ appraisal was "accurate." This is a statement of opinion, not fact. A statement of opinion

cannot give rise to a misrepresentation claim. *See, e.g.*, ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 22, ¶68, 308 Wis. 2d 103, 746 N.W.2d 762; ***Loula v. Snap-On Tools Corp.***, 175 Wis. 2d 50, 54, 498 N.W.2d 866 (Ct. App. 1993). We have previously stated that "[a] representation is one of opinion if it expresses only the maker's judgment as to quality, value, authenticity, or other matters of judgment." ***Consolidated Papers, Inc. v. Dorr-Oliver, Inc.***, 153 Wis. 2d 589, 594, 451 N.W.2d 456 (Ct. App. 1989). Here, Piikkila merely expressed his own opinion about the quality of the Christ appraisal.

¶23 Furthermore, while the Lukowitzes argue that Christ's valuation of the property is inaccurate, that valuation, by its express terms, is merely an opinion about the property's value. In at least six places, the Christ appraisal states that it constitutes an "opinion" or an "estimate." By stating that the appraisal was "accurate," Piikkila was therefore expressing his own belief about the accuracy of Christ's opinion. A statement that another person's opinion is accurate must itself be a statement of opinion. Piling one opinion on top of another, even where one statement vouches for the accuracy of the other, does not transform either statement into a statement of fact. Consequently, the Lukowitzes have not established that Piikkila made any statement of fact regarding the Christ appraisal. Summary judgment on the Lukowitzes' common law misrepresentation claims was therefore proper.

II. WISCONSIN STAT. § 100.18 claim

¶24 The circuit court denied AnchorBank's summary judgment motion with respect to the Lukowitzes' WIS. STAT. § 100.18 claim. That claim proceeded

to trial, and the jury determined that, although AnchorBank violated the statute, the Lukowitzes did not suffer any monetary loss due to the violation.[5] In accordance with the jury's verdict, the court entered judgment dismissing the Lukowitzes' § 100.18 claim. On appeal, the Lukowitzes raise several claims of error regarding the trial and the circuit court's refusal to change the jury's answer on monetary loss. *See supra*, ¶1. However, we need not address these arguments because we conclude that, for the same reasons summary judgment on the common law misrepresentation claims was proper, the court should also have granted summary judgment on the § 100.18 claim.

¶25 First, the Lukowitzes waived their WIS. STAT. § 100.18 claim when they signed the debt modification agreement. As discussed above, by signing the debt modification agreement, the Lukowitzes agreed to waive any counterclaims they might have related to their AnchorBank loan. *See supra*, ¶¶16-17. The § 100.18 claim is clearly related to the AnchorBank loan because the Lukowitzes allege the bank made a false representation to induce them to take out the loan. Again, without the loan, there would be no counterclaim. Thus, the Lukowitzes waived the counterclaim by signing the debt modification agreement.

¶26 Second, as with their common law misrepresentation claims, the Lukowitzes cannot prove a violation of WIS. STAT. § 100.18 because they cannot establish that Piikkila made a false representation of fact. To prevail on a § 100.18(1) claim, a plaintiff must prove that: (1) the defendant made a representation to the public with intent to induce an obligation; (2) the

[5] A person who establishes a violation of WIS. STAT. § 100.18 is only entitled to recover "pecuniary loss" suffered as a result of the violation. *See* WIS. STAT. § 100.18(11)(b)2.

representation contained an "assertion, representation or statement of fact which is untrue, deceptive or misleading"; and (3) the representation caused the plaintiff to suffer a pecuniary loss. *See* WIS. STAT. §§ 100.18(1), (11)(b)2.; *see also* ***K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.***, 2007 WI 70, ¶19, 301 Wis. 2d 109, 732 N.W.2d 792. Again, we conclude the Lukowitzes have not established that Piikkila made any statement of fact regarding the Christ appraisal. He merely expressed an opinion that the appraisal was accurate. *See supra*, ¶¶22-23. Thus, the circuit court should have granted summary judgment on the Lukowitzes' § 100.18 claim.

III. Attorney fees

¶27 In its cross-appeal, AnchorBank argues it is entitled to recover the attorney fees it incurred in defending against the Lukowitzes' counterclaim. AnchorBank cites its commercial loan agreement with the Lukowitzes, which provides that AnchorBank is entitled to recover "all expenses of collection, enforcement, or protection of [AnchorBank's] rights and remedies under this Agreement or any other Loan Document[,]" including attorney fees and costs. The mortgage and guaranties the Lukowitzes signed contain similar provisions.

¶28 "In Wisconsin, attorney's fees are not recoverable unless such fees are expressly allowed by contract or statute." ***Borchardt v. Wilk***, 156 Wis. 2d 420, 426, 456 N.W.2d 653 (Ct. App. 1990). Moreover, a party is not entitled to attorney fees based on a contractual provision unless the contract language "clearly and unambiguously so provides." *See* ***Hunzinger Constr. Co. v. Granite Res. Corp.***, 196 Wis. 2d 327, 340, 538 N.W.2d 804 (Ct. App. 1995). "Contract language is … ambiguous if it is susceptible to more than one reasonable

interpretation." ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶10, 266 Wis. 2d 124, 667 N.W.2d 751.

¶29 Here, the attorney fee provisions in the loan documents are susceptible to more than one reasonable interpretation. The provisions state that AnchorBank may recover attorney fees incurred in the "collection, enforcement, or protection" of its rights and remedies under the loan documents. One reasonable interpretation of this language is that AnchorBank may recover its attorney fees because the Lukowitzes' counterclaim arose in the context of a collection action, and AnchorBank had to defend against the counterclaim in order to enforce its contractual rights, particularly the waiver clause. However, it would be equally reasonable to conclude that attorney fees are not available because, by defending against the counterclaim, AnchorBank was not actually "collect[ing], enforc[ing], or protect[ing]" its rights and remedies under the loan agreements. As the Lukowitzes point out, AnchorBank has already recovered the attorney fees it incurred in prosecuting the foreclosure action. Moreover, the loan documents do not specifically mention counterclaims, and one could reasonably conclude that, if the parties had intended AnchorBank to be able to recover attorney fees for defending against a counterclaim, the loan documents would have said so. Accordingly, the attorney fee provisions are ambiguous, and AnchorBank is not entitled to recover the fees it incurred in defending against the Lukowitzes' counterclaim.

By the Court.—Judgment affirmed.

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