

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2014

Diane M. Fremgen
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 No. 2014AP370

Cir. Ct. No. 2012SC1097

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JOHN ANTHONY MOLLIKA,

PLAINTIFF-RESPONDENT,

V.

4TH BASE LLC AND PETER PAPARA,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Oneida County:
MICHAEL H. BLOOM, Judge. *Affirmed.*

¶1 STARK, J.¹ 4th Base LLC and Peter Papara appeal a small claims judgment entered in favor of John Mollica. Mollica, as a buyer, paid \$5,000 in earnest money pursuant to a real estate sales contract. 4th Base, which is owned

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

by Papara, was subsequently substituted as the buyer in the sales contract. Mollica brought a small claims action against 4th Base and Papara, seeking to be reimbursed for his earnest money payment. The circuit court granted judgment in favor of Mollica. We affirm.

BACKGROUND

¶2 At the small claims trial, the following facts were undisputed. Partners Mollica and Papara entered into a commercial real estate contract with Northwoods National Bank for the purchase of Budreau's Supper Club. Mollica paid the \$5,000 earnest money required by the contract.

¶3 Following the payment of the earnest money, Mollica and Papara learned that Northwoods would not include Mollica as a borrower on any loan issued by Northwoods. On September 27, 2012, Mollica and Papara signed an amendment to the purchase contract, which Northwoods accepted. The amendment provided, "The purchaser is 4th Base LLC and not ... John Mollica and Peter A. Papara as individuals."

¶4 Papara is the president of, and controls, 4th Base. Mollica is not a member of 4th Base and had no authority to act on behalf of the company. The parties agreed that, when 4th Base was substituted as buyer, Mollica was completely removed from the real estate transaction between Northwoods and 4th Base.

¶5 At this point, the parties' versions of events differ. According to Mollica, the agreement he had to purchase the supper club with Papara as partners ended on September 27, when 4th Base was substituted as buyer. Mollica testified that on September 27, and again on October 5, he requested that Papara reimburse

him \$5,000 for the earnest money payment. Mollica also testified that, on October 5, Papara asked him to pay half of the remaining down payment. Mollica declined because he was not a partner in the deal or part of the transaction, and because he did not trust Papara.

¶6 Papara testified that, although 4th Base was the buyer, the partnership arrangement between Mollica and Papara continued to exist. He explained that, even though 4th Base was going to be purchasing the property, he and Mollica were each going to contribute half of the down payment. Papara also testified that Mollica never requested to be reimbursed for the earnest money payment. Ultimately, the transaction between 4th Base and Northwoods did not close. Papara testified the transaction did not close because Mollica failed to finance half of the down payment. According to Papara, “when [Mollica] did not come up with his down payment,” their partnership arrangement ended.

¶7 On December 3, 2012, Mollica brought the present small claims action against Papara and 4th Base, seeking his “money for deposit of earnest money to buy Budreau’s Supper Club.” On February 1, 2013, a cancellation agreement and mutual release form was signed by Northwoods and by Papara on behalf of 4th Base. The agreement released the \$5,000 earnest money to Northwoods.

¶8 Following the small claims trial, Mollica argued that, after 4th Base was substituted as buyer, he was no longer part of the real estate transaction and the partnership agreement he had with Papara ended. Accordingly, he asserted 4th Base and Papara were required to reimburse the \$5,000 earnest money payment. In support, Mollica argued in part that it would be “highly inequitable” for 4th Base and Papara to avoid reimbursing him for the payment. He emphasized:

Mollica lost authority to act in connection with the real estate transaction. He lost any entitlement to become a title owner to the subject real estate. Accepting the defendants' argument would be to conclude that the defendants became free to follow through on the real estate transaction or not follow through, with the only party to lose being Mollica. Neither Papara nor the LLC posted any money in the transaction. It makes no sense to contend that Mollica forfeited the \$5,000.00.

¶9 4th Base and Papara responded that Mollica did not retain an interest in the earnest money when 4th Base took over as buyer, emphasizing that the September 27 amendment did not discuss the \$5,000 earnest money payment. They also argued that, even though 4th Base was purchasing the property, Papara's and Mollica's agreement to be partners was still in existence and Mollica agreed to finance half of the down payment. Finally, they argued that, when Mollica refused to finance his share of the down payment, the transaction failed to close and 4th Base and Papara properly directed the payment of the \$5,000 earnest money to Northwoods as a result of the breach.

¶10 The circuit court issued a thorough and detailed decision. It first emphasized that both parties agreed that Mollica was "out of the transaction" when 4th Base took over as buyer. The court then noted that Mollica's and Papara's positions regarding the impact that 4th Base's status as buyer had on their continuing business relationship was "irreconcilable[.]" However, the court found Mollica's version of events more credible,² and as a result, "the partnership

² In support of the circuit court's determination that Mollica's version was more credible, it reasoned:

Papara has established a track record of making false and misleading statements relative to this matter, i.e. falsely advising [Northwoods] regarding Mollica's injury and continued involvement in the transaction. Furthermore, Papara's implication that Mollica stole the money for the

(continued)

between the parties ended at the time of the September 27, 2013 [sic] amendment to the purchase contract.” Because Mollica was “out of the transaction” and the partnership arrangement between Mollica and Papara no longer existed, the circuit court granted judgment in favor of Mollica. It concluded 4th Base and Papara “were responsible for repaying Mollica for the \$5,000.00 earnest money payment he had made.” 4th Base and Papara appeal.

DISCUSSION

¶11 On appeal, 4th Base and Papara argue they properly disbursed the \$5,000 earnest money to Northwoods when the real estate transaction failed to close. They emphasize that when 4th Base took over as buyer, “Mollica did not reserve any ownership of, or right to, the \$5,000.00 earnest money, in the September 27, 2012 Amendment To Offer To Purchase.” 4th Base and Papara also contend there is nothing in the sales contract that would have required 4th Base to pay “Mollica the \$5,000.00 earnest money that was disbursed to the seller.” Finally, they argue there was no agreement between them and Mollica regarding the earnest money.

¶12 4th Base and Papara’s appellate arguments miss the mark. First, whether 4th Base properly disbursed the earnest money to Northwoods when it

earnest money payment, while not categorically unreasonable in light of Mollica’s refusal to turn over bank records, suggests that Papara is somewhat unreliable in his claims. Finally, the fact that Papara signed the WB-45 Cancellation Agreement & Mutual Release form **after** being made aware of this lawsuit strongly suggests a willingness to do what is necessary to achieve the ends he seeks.

failed to close on the real estate transaction is not at issue in this case.³ Instead, this case is about whether 4th Base and Papara were required to reimburse Mollica for the earnest money payment that Mollica made when Mollica was a party to the real estate transaction. Although not explicitly stated by the circuit court, it is clear that the circuit court granted judgment in favor of Mollica under a theory of unjust enrichment.

¶13 “Unjust enrichment is an *equitable* doctrine, and the trial court’s decision to grant or deny a remedy is reviewed for [an] erroneous exercise of discretion.” *Ludyjan v. Continental Cas. Co.*, 2008 WI App 41, ¶6, 308 Wis. 2d 398, 747 N.W.2d 745 (emphasis added). We will sustain a discretionary determination if the circuit court “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

³ However, regarding the disbursement of the earnest money, we observe the sales contract provides in relevant part:

If this Offer does not close, the earnest money shall be disbursed according to a written disbursement agreement signed by all Parties to this Offer. *If said disbursement agreement has not been delivered to broker within 60 days after the date set for closing*, broker may disburse the earnest money: (1) as directed by an attorney who has reviewed the transaction and does not represent Buyer or Seller; (2) into a court hearing a lawsuit involving the earnest money and all Parties to this Offer; (3) as directed by court order; or (4) any other disbursement required or allowed by law.

(Emphasis added.) We also observe the transaction was supposed to close in October 2012 and 4th Base disbursed the money to Northwoods in February 2013.

¶14 An unjust enrichment claim requires proof of three elements: (1) a benefit that has been conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the benefit; and (3) acceptance and retention by the defendant of the benefit, under circumstances such that it would be inequitable to retain the benefit without payment. *Ludyjan*, 308 Wis. 2d 398, ¶7. Although the doctrine “does not apply where the parties have entered into a contract,” *Continental Casualty Co. v. Wisconsin Patients Compensation Fund*, 164 Wis. 2d 110, 118, 473 N.W.2d 584 (Ct. App. 1991), 4th Base and Papara repeatedly assert there was no agreement between them and Mollica regarding the earnest money payment.

¶15 In this case, the circuit court found that Mollica originally paid the \$5,000 earnest money, and, when 4th Base was substituted as buyer, Mollica requested on more than one occasion to be reimbursed by Papara for the earnest money payment. Papara never reimbursed Mollica for the payment. The circuit court also found that, when 4th Base was substituted as buyer, Mollica and Papara no longer had a business relationship and Mollica was completely “out of the transaction.” Accordingly, the circuit court concluded “the defendants were responsible for repaying Mollica for the \$5,000.00 earnest money payment he had made.”

¶16 Applying these findings to the elements of unjust enrichment, it is clear that: (1) Mollica’s \$5,000 earnest money payment conferred a benefit upon 4th Base and Papara; (2) 4th Base and Papara appreciated the \$5,000 earnest money payment because they did not have to independently make the payment required by the sales contract with Northwoods; and (3) 4th Base and Papara accepted and retained this benefit by refusing to reimburse Mollica for the earnest money payment, and it would be inequitable for 4th Base and Papara to retain this

benefit because Mollica was completely “out of the transaction” and would have no claim to the property. We conclude the elements of unjust enrichment were satisfied and the circuit court properly exercised its discretion by entering judgment in favor of Mollica. Accordingly, we affirm the circuit court’s small claims judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

