

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2015

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. 2014AP2492

Cir. Ct. No. 2012CV594

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DON FRAZIER,

PLAINTIFF-APPELLANT,

V.

CJB RENTALS, LLC AND CHRISTOPHER J. BAUER,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments and an order of the circuit court for St. Croix County: HOWARD W. CAMERON, JR., Judge. *Reversed and cause remanded with directions.*

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Don Frazier appeals judgments and an order granting CJB Rentals, LLC, strict foreclosure on a land contract and awarding \$1 nominal damages to Frazier in his breach of contract action against CJB Rentals

and Christopher J. Bauer. After a trial to the court, the circuit court initially ruled in Frazier's favor on the breach of contract action and set the matter for further proceedings to establish Frazier's damages. On reconsideration, the court concluded it lacked authority to bifurcate liability and damages under WIS. STAT. § 805.05(2) (2013-14).¹ Concluding Frazier failed to prove damages, the court awarded Frazier nominal damages and granted strict foreclosure on the land contract. Because we conclude Frazier adequately proved damages and, to prevent Bauer's unjust enrichment, should have been awarded title to the property, we reverse the judgments and order and remand the matter with directions.

BACKGROUND

¶2 Under the terms of the land contract, CJB Rentals sold the property to Frazier for \$30,000 consisting of a \$4000 down payment and \$400 per month payments commencing on August 1, 2010 until the remaining balance plus seven percent annual interest was paid. The contract required Frazier to insure the property, and if he failed to do so, CJB Rentals would pay the insurance premiums and be reimbursed by Frazier. After Frazier's insurance policy was cancelled, Bauer, CJB's owner, purchased insurance for the property. Bauer named himself as the only insured party.

¶3 On August 18, 2011, the house caught fire and was seriously damaged. Bauer received a payment from the insurance company. Frazier commenced this action alleging breach of contract based on Bauer's failure to

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

insure Frazier's interest in the property.² Frazier's complaint alleged Bauer purchased a \$105,500 insurance policy for the real estate and \$2000 for personal property. Frazier requested the equitable remedy of a constructive trust to secure the insurance proceeds. CJB Rentals and Bauer claimed the land contract had been terminated and replaced by a landlord/tenant agreement, and counterclaimed for strict foreclosure based on Frazier's failure to make the periodic payments.

¶4 The circuit court made several findings that are not challenged on appeal. It pierced the corporate veil, making CJB Rentals and Bauer interchangeable parties. It found the land contract had not been terminated as of the date Frazier filed the summons and complaint, and rejected Bauer's assertion that a landlord/tenant relationship had been created to replace the land contract. The court found Frazier was still paying \$400 per month on the land contract and was paying Bauer for the insurance on the property. Based on these findings, the court ordered mediation on damages and, if no agreement was reached, the court would set a hearing date for determination of damages.

¶5 CJB and Bauer filed a motion for reconsideration arguing Frazier's failure to prove damages at the trial precluded any further proceedings on damages because WIS. STAT. § 805.05(2) does not authorize the court to bifurcate issues. They also requested foreclosure on the land contract based on Frazier's failure to make the scheduled payments. The circuit court concluded it lacked authority to bifurcate the liability and damage issues, and Frazier presented neither newly discovered evidence nor a manifest error of law or fact to justify reopening the

² Frazier's complaint also alleged fraud and conversion. The circuit court found no evidence to support those claims and Frazier does not challenge those findings on appeal.

case. The court rejected Frazier’s claim that he was entitled to the full amount of the policy limits because that measure of damages would be the maximum he could recover and not an accurate measure of his actual loss. Therefore, the court awarded Frazier \$1 nominal damages. Having concluded Frazier was not entitled to the insurance proceeds to pay the amounts due on the land contract and had failed to make payments after the fire, the court granted strict foreclosure on the land contract. The court also denied Frazier’s subsequent motions for reconsideration and for relief from the judgment pursuant to WIS. STAT. § 806.07(1)(a) and (h).

DISCUSSION

¶6 The circuit court properly refused to proceed with its initial plan of allowing Frazier an additional opportunity to prove damages. We reach this conclusion without deciding whether WIS. STAT. § 805.05(2) allows bifurcation of issues when trial is to the court. Rather, we conclude there was no basis for allowing Frazier a “second kick at the cat” to establish his damages at trial. *Conway v. Division of Conservation*, 50 Wis. 2d 152, 161, 183 N.W.2d 77 (1971). The court did not indicate it was bifurcating issues before or during the trial, and placed no restrictions on Frazier establishing his damages at the trial. A plaintiff who fails to meet his burden of proof as to all of the elements of his claim should not be given an opportunity to shore up the record in the absence of newly discovered evidence or a manifest error of law or fact. *Koepsell’s Olde Popcorn Wagons, Inc. v. Koepsell’s Festival Popcorn Wagons Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. Therefore, to the extent Frazier seeks to recover his actual damages or the full amount of the insurance policy, the circuit court properly disallowed a second opportunity to present proof on those questions.

¶7 However, we conclude Frazier adequately proved substantial damages and was entitled to creation of a constructive trust to prevent Bauer's unjust enrichment. A court of equity may impose a constructive trust when one party receives a benefit, the retention of which would be unjust against the other party. *Suburban Motors of Grafton, Inc. v. Forester*, 134 Wis. 2d 183, 187, 396 N.W.2d 351 (Ct. App. 1986).³ Under the terms of the land contract, Bauer was entitled to \$30,000 in return for title to the property. He would be unjustly enriched if he were allowed to retain the property as well as the insurance proceeds. Upon payment of the full amount due on the land contract, whether by Frazier or the insurance company, fairness dictates that Bauer convey the property in its damaged state.⁴ In his trial testimony, Bauer admitted receiving \$92,000 or \$97,000 from the insurance company. Based on that admission, the court could calculate the amount of damages Frazier incurred due to Bauer's failure to insure Frazier's interest in the property. Frazier was entitled to the amount the insurance company paid minus the amount remaining due on the land contract. Because the insurance proceeds have paid Bauer the amount due on the land contract, title to the property should be transferred to Frazier.

¶8 On remand, the court shall determine whether Bauer received \$92,000 or \$97,000, depending on Bauer's credibility. The court may accept the

³ Because a court of equity may create a constructive trust to avoid unjust enrichment, we do not rely on WIS. STAT. § 631.07(4) for authorization to create the trust.

⁴ This case is distinguished from *Disrud v. Arnold*, 167 Wis. 2d 177, 184, 482 N.W.2d 114 (Ct. App. 1992), where the land contract vendor foreclosed and the vendee had no interest in the realty at the time of the fire. This case is also distinguishable from *Hendricks v. M.C.I. Inc.*, 152 Wis. 2d 363, 365-66, 448 N.W.2d 289 (Ct. App. 1989), where the vendor took it upon himself to insure the property even though the land contract placed the responsibility on the vendee.

lower amount because it is definitively proven by Bauer's admission, or the greater amount because it was in Bauer's interest to understate the amount he received and the court found Bauer not credible on other matters. The court shall then create a constructive trust for the insurance proceeds and award Bauer the amount remaining due on the land contract, award Frazier the remainder, and award Frazier title to the property.

By the Court.—Judgments and order reversed and cause remanded with directions.

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

