WISCONSIN COURT OF APPEALS
DISTRICT III

Appeal No. 2019AP000288

DANIEL J. PLATKOWSKI,

Plaintiff-Respondent,

v.

HOWARD BEDFORD,

Defendant-Appellant,

QUOTIENT PARTNERS, TISSUE TECHNOLOGY, LLC and RON VAN DEN HEUVEL,

Defendants.

Appeal from a Final Judgment of the Circuit Court of Brown County, the Honorable Kendall M. Kelley Presiding, Circuit Court Case No. 2016CV001137

REPLY BRIEF OF DEFENDANT-APPELLANT HOWARD BEDFORD

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INTRODUCTION

Unless the Court is inclined to reward Plaintiff-Respondent Daniel Platkowski's ("Platkowski") admitted deception, it should reverse the trial court's decision. Platkowski's position depends on a contradiction. First, Platkowski admitted to detailing in an email his plans to make it appear as if Defendant-Appellant Howard Bedford ("Bedford") had paid the full purchase price of the Bretting Machines (the "Machines") even though Platkowski knew Bedford had not done so. Second, Platkowski argues that the trial court correctly concluded that the Equipment Purchase Agreement was not a sham or an agreement to defraud a third party, and therefore not void at the time of formation. Both propositions cannot be true. If Platkowski did engage in a scheme to dupe Stonehill Converting, LLC ("Stonehill"), it cannot also be true that the (1) the Equipment Purchase Agreement was enforceable and (2) that Platkowski had clean hands.

ARGUMENT

The Court should not lose sight of Platkowski's wrongdoing in the forest of exhibits and Platkowski's cherry-picked testimony. This is a clear-cut issue. The trial court's factual findings were against the clear weight of the evidence because they contradict

undisputed evidence that Platkowski and Bedford engaged in a scheme to deceive Stonehill in order to allow Platkowski to escape an unprofitable lease. Their deceptive scheme also left Platkowski with unclean hands that should preclude the Court from granting him relief.

I. The Trial Court's Finding of Facts are Against the Clear Weight of the Evidence Because they Contradict Undisputed Evidence of Platkowski's Intent and Actions to Mislead Stonehill.

The great weight of the evidence shows that Platkowski and Bedford entered into the Equipment Purchase Agreement intending to lie to Stonehill in December 2010. Whatever happened after that cannot ratify that agreement, as it was void at its inception. *Greenlee v. Rainbow Auction/Realty Co., Inc.*, 218 Wis. 2d 745, 758, 582 N.W.2d 93, 97 (Ct. App. 1998) (parties to a void contract may not ratify it).

A. The undisputed facts show that Platkowski made the Equipment Purchase Agreement with the intent to defraud Stonehill.

The key date in this case is December 31, 2010. Before then, Platkowski was stuck in a lease of the Machines with Stonehill. Under the lease's terms, Stonehill could use the Machines through June 2015. Pivotal to this case is the fact that if the Machines were sold and the full purchase price were paid before

December 31, 2010, the lease with Stonehill would terminate. If the lease with Stonehill terminated, Platkowski would no longer be tied to a money-losing lease with Stonehill. Instead, he would be free to use or sell the Machines as he saw fit.

Given the December 31, 2010 deadline to sell the Machines and to prove that the full purchase price had been paid in full, it was crucial that Platkowski do so, or be stuck in a money-losing lease. It should not be surprising then, that Platkowki, with Bedford's help, tried to prove just that.

With December 31 quickly approaching, Platkowski and Bedford signed the Equipment Purchase Agreement on December 1 and December 9, 2010, respectively. (R. 116.) The only problem was that the purchase price had not been paid in full, which is what Platkowski's lease with Stonehill required for termination. After Stonehill pointed out to Platkowski that the Machines must be paid in full, Platkowski noted to Bedford that he not think the plan would "fly," and that "Somehow we have to overcome this point in the lease." (R. 180, App. 123.)

So, as Platkowski admits, he and Bedford agreed to engage in a scheme. In fact, Platkowski admits to outlining the scheme in a December 29, 2010 email to Bedford:

Howard, I understand that the following can take place today to complete the transaction of the Purchase of the Bretting Napkin lines:

1. Howard wires to BayLake Bank $1.7 mm
2. Howard and Dan sign the Purchase Agreement for the Equipment
3. Dan receives a Cashier's Check from BayLake Bank for $3.2 mm.
4. Dan copies check, cashes check to BayLake Bank for your account.
5. Dan receives $200,000 for removal of the liens on the Brettings
6. Dan sends Stonehill Converting a copy of the check and a letter that the Brettings are paid in full.

Is this how you understand the transaction?
Dan

(R. 119, App. 127.) And two days later, on the last possible day to terminate the Stonehill lease, Platkowski sent a letter to Stonehill in an attempt to terminate the lease. He stated that he had sold the Machines "for full market value." (R. 132, App. 140.) He said this, even though he knew the purchase price had not been paid in full as his contract with Stonehill required.

While Platkowski attempts to minimize Bedford's focus on Platkowski's email and the events in late December 2010, that approach is flawed. The email and events in December 2010, which Platkowski does not dispute, evince an intent by Platkowski and Bedford to lie to Stonehill. That is the only possible inference from the events in December 2010, when Platkowski and Bedford signed the Equipment Purchase Agreement. If Platkowski and Bedford entered into the Equipment Purchase Agreement as part of a plan to deceive Stonehill, then the formation of the contract was flawed because it violated public policy.

B. Whether Attorney Winner was involved with the Equipment Purchase Agreement and Stonehill later entered into an agreement with Bedford is irrelevant because the Equipment Purchase Agreement's formation was flawed.

Instead of addressing the Equipment Purchase Agreement's problematic formation, Platkowski seeks to avoid the implication of his bad acts by focusing on transactions that occurred after December 31, 2010 or facts that have no bearing on his attempts to dupe Stonehill and terminate the lease.

For instance, Platkowski relies heavily on the fact that Bedford's attorney, Mr. Winner, was involved in the transactions regarding the Machines. So what? That an attorney assisted with an attempt to wrongfully terminate the Stonehill lease does not negate Platkowski's attempt to avoid the lease by deceiving Stonehill.

Moreover, Platkowski tries to argue that Stonehill's 2011 agreement to purchase the Machines is consistent with the December 2010 events. That argument does not follow from the facts. As late as December 31, 2010, Platkowski was attempting to terminate the lease. In fact, in the letter dated December 31, 2010, addressed to Stonehill, he stated that the Machines had been sold and that "Mr. Bedford will be in contact with you to discuss the

removal of the Equipment." (R. 132, App. 140.) If the Equipment Purchase Agreement were part of a plan to sell the Machines to Bedford so that Bedford could sell them to Stonehill, why would Stonehill have objected to Platkowski's assertion – eight minutes after Platkowski emailed his letter – that the lease was terminated? (R. 182, App. 141.) And why would Platkowski have told Stonehill that Bedford would arrange for removal?

What is clear from the record is that other negotiations with Stonehill were not concluded by the end of 2010, Platkowski's deadline to provide notice he had sold the Machines in order to terminate the lease with Stonehill. Stonehill and the other signatories to the settlement agreement did not sign the document until February of 2011. (R. 264 at 7, 101.)

Even if Stonehill eventually benefitted from the Machines, that is irrelevant to the question at hand. The legal issue before the Court is this: if the parties entered into an agreement with an intent to defraud a third party, is that agreement enforceable? The answer is "no." *See Abbot v. Marker*, 2006 WI App 174, ¶¶ 11-12, 295 Wis. 2d 636, 722 N.W.2d 162; Restatement (Second) Contracts, § 192; *Shea v. Grafe*, 88 Wis. 2d 538, 544, 274 N.W.2d 670 (1979). The record prior to at least February 2011, when

Bedford and Stonehill entered into their agreement, was that Platkowski and Bedford sought to deceive Stonehill.

Because the trial court's findings of fact concerning the Equipment Purchase Agreement were against the weight of the evidence, the Court should reverse the trial court.

II. Bedford Preserved his Unclean Hands Argument by Pleading it as an Affirmative Defense and Introducing Evidence of Platkowski's Deception.

Platkowski's waiver argument is unfounded. The party "'alleging error has the burden of establishing, by reference to the record, that the error was raised before the trial court.'" *Shadley v. Lloyds of London,* 2009 WI App 165, ¶ 26, 322 Wis. 2d 189, 204, 776 N.W.2d 838, 845. Bedford asserted his unclean hands defense to the trial court at the earliest possible opportunity: in his answer. (R. 22.)

Despite admitting that Bedford did raise the unclean hands issue before the trial court, Platkowski seeks to obfuscate the legal standard by arguing that Bedford waived the unclean hands defense because he did not use the magic words "unclean hands" at trial. Bedford asserted that Platkowski had unclean hands in his answer. At trial he put forth evidence – much of it stipulated to by Platkowski – that supported that defense.

In fact, a review of Platkowski's written correspondence shows that he actively sought to terminate the Stonehill lease by entering into the Equipment Purchase Agreement and on multiple occasions misrepresenting to Stonehill that the termination provision was satisfied. At closing arguments, Bedford's attorney argued that Platkowski sought to deceive Stonehill and that this was part of a scheme to defraud Stonehill. *See, e.g.,* R. 264 at 217 ("The intention was to create the appearance that the machines have been sold to Mr. Bedford for full payment and payment in full by the end of the year when, in fact, that was not the case, and when, in fact, it couldn't have been."). Deception and fraud are both the type of unlawful acts that would support an unclean hands defense. *UMB Bank, N.A. v. Whitehead*, 2018 WI App 16, ¶ 24, 380 Wis. 2d 281, 913 N.W.2d 233 (citing *S & M Rotogravure Serv. v. Baer*, 77 Wis. 2d 454, 466, 252 N.W.2d 913 (1977) ("An unclean-hands defense implies 'substantial misconduct constituting fraud, injustice or unfairness.'")).

That the trial court concluded "there's no reason to believe that anybody here was actually misled . . ." does not absolve Platkowski of his inequitable conduct. (R. 264 at 233.) Stonehill was not misled because it caught Platkowski in his

misrepresentations, as evidenced by its December 14, 2010 letter in response to Platkowski's December 9, 2010 letter and its email on December 31, 2010 denying that the termination provisions had been fulfilled. (R. 126, App. 126; R. 182, App. 141.) Even as late as February 23, 2011, Stonehill declined Platkowski's request for "a letter that states and acknowledges that you now agree with the sale of the Brettings?" (R. 136.)

The fact remains that Platkowski used the Equipment Purchase Agreement as a ruse to wrongfully terminate the Stonehill lease. He should not be able to profit from his own wrongdoing. The trial court failed to consider that, and the record warrants a reversal in favor of Bedford.

CONCLUSION

For all of the above reasons, as well as those stated in Bedford's principal brief, the Court should reverse the trial court and direct the trial court to enter judgment in favor of Bedford.

Dated this 2nd day of July, 2019.

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RULE 809.19(8)(D) CERTIFICATION

I hereby certify that this brief and accompanying appendix conform to the rule contained in s. 809.19(8)(b) for a brief and appendix produced with a proportional serif font. The length of those portions of this brief referred to in s. 809.19(1)(d), (e), and (f) is 1,754 words.

By: s/ Jonathan T. Smies
Jonathan T. Smies

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this Certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

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CERTIFICATE OF SERVICE

I certify that I filed the Reply Brief of Defendant-Appellant in the above-captioned appeal with the Clerk of the Wisconsin Court of Appeals and served a copy on counsel of record this 5th day of July, 2019 by first class mail.

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Dated this 5th day of July, 2019.

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