

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 15, 2007

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 No. 2006AP1905

Cir. Ct. No. 2005CV1924

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

GENE BLANCHAR,

PLAINTIFF-APPELLANT,

v.

**LAKE LAND BUILDERS, INC. AND STATE FARM
FIRE & CASUALTY COMPANY,**

DEFENDANTS,

CHAD STRUTZEL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
SARAH B. O'BRIEN, Judge. *Reversed and cause remanded.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Greg Blanchar appeals from an order dismissing his complaint against Chad Strutzel. His claims against Strutzel included intentional misrepresentation and violation of WIS. STAT. § 100.18 (2005-06),¹ the statutory bar on fraudulent misrepresentation in commerce. The trial court concluded that these were claims upon which it could not grant relief. The issue is whether the court erred by dismissing them on that basis. We reverse.

¶2 Strutzel was president of Lakeland Builders, Inc., and negotiated a contract for Lakeland to build a home for Blanchar. The contract included estimates for various projects, including \$74,000 for brickwork. Blanchar's complaint alleged that Strutzel promised to pass along any savings if Strutzel obtained the brickwork at a lower cost. Blanchar also alleged that Strutzel promised to insure the premises during the construction, a promise also contained in the contract between Lakeland and Blanchar. The dispute arose when Blanchar learned that Strutzel paid \$51,000 for the brickwork but billed him \$68,000, and failed to provide the promised insurance.²

¶3 The relevant portions of the complaint were the following paragraphs:

7. On November 1, 2004, before the agreement was signed, defendant Strutzel told plaintiff in a conversation at defendant Strutzel's home that the price was based on "estimates" in the construction cost breakdown sheet. Plaintiff also was told by defendant Strutzel at that time that he (Strutzel) had not yet received all the estimates and that the price would be lower if he received estimates that

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² The failure to insure became significant when the house suffered severe tornado damage before Lakeland completed building it.

were lower. Defendant Strutzel stated specifically that he was waiting for an estimate from someone who might do the brickwork cheaper and that if the estimate was lower, the price would be lower.

8. On November 1, 2004, before the construction agreement was signed defendant Chad Strutzel told plaintiff in a conversation at defendant Strutzel's home that he would obtain insurance insuring the work and property against loss or damage until the house was completed and accepted by the plaintiff.

....

21. Defendant Strutzel, with intent to sell real estate and services to the plaintiff and to induce the plaintiff to enter into contracts made, published and disseminated in this state statements and representations to the plaintiff relating to the purchase of real estate and services which were untrue, deceptive, and misleading. These statements are set forth in paragraphs 7 and 8 above.

....

25. The statements contained in paragraphs 7 and 8 above were made by defendant Strutzel knowing they were false and with the intent to induce plaintiff to enter into the construction agreement with the defendants.

....

47. Defendants breached the contract by charging plaintiff an excessive amount for brick work.

48. Defendants breached the contract by failing to purchase a contractor's multiple perils all risk coverage as required by the contract.

The trial court concluded that these paragraphs did not provide the basis for either the intentional misrepresentation claims or the statutory misrepresentation claim. The court reasoned that Strutzel's alleged statements were unfulfilled promises to perform future acts as opposed to actionable misrepresentations. The court indicated that its decision would have differed had Blanchar sufficiently alleged that Strutzel did not intend to fulfill the promises when he made them.

¶4 We review de novo the dismissal of a complaint for failure to state a claim on which relief can be granted. *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶11, 270 Wis. 2d 146, 677 N.W.2d 233; see WIS. STAT. § 802.06(2)(a)6. A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the pleading. *Evans v. Cameron*, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985). We must accept as true the facts alleged in the complaint. See *Tietsworth*, 270 Wis. 2d 146, ¶11. A complaint may be dismissed for failure to state a claim only if “it is quite clear that under no conditions can the plaintiff recover.” *Morgan v. Pennsylvania Gen. Ins. Co.*, 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979). For fraud/misrepresentation claims, the complaint must state the circumstances of the fraud with particularity. WIS. STAT. § 802.03(2). However, a person’s intent, knowledge or other states of mind may be stated generally. *Id.*

¶5 To prevail on his intentional misrepresentation claim, Blanchar was required to plead the following: (1) Strutzel made a representation of material fact; (2) it was untrue; (3) the representation was made on Strutzel’s personal knowledge or under circumstances in which he necessarily ought to have known the truth or untruth of the statement; (4) Strutzel had an economic interest in the transaction; and (5) Blanchar believed Strutzel’s representation to be true and relied on it to his detriment. See *Schurmann v. Neau*, 2001 WI App 4, ¶10, 240 Wis. 2d 719, 624 N.W.2d 157.

¶6 Blanchar was also required to plead that Strutzel had a present intent not to perform, because one cannot base a claim of misrepresentation on future events or facts not in existence when the representation was made, nor on unfulfilled promises. *Id.*

¶7 Blanchar included all five elements of the misrepresentation claim in his allegations. In paragraphs 7, 8, 47 and 48 of the complaint Blanchar alleged that Strutzel promised to pass along any reduced price for brickwork, but did not, and promised to obtain insurance, but did not. He alleged in paragraph 25 that Strutzel knew the statements were false when he made them. He also alleged Strutzel's financial interest in the transaction, and his reliance on Strutzel's promises, to his detriment.

¶8 Furthermore, Blanchar pled the five elements with sufficient particularity. “[D]etailed pleading [of fraud claims] protects persons from casual allegations of serious wrongdoing and puts defendants on notice so that they may prepare meaningful responses to the claim.” *Putnam v. Time Warner Cable of Se. Wis., L.P.*, 2002 WI 108, ¶26, 255 Wis. 2d 447, 649 N.W.2d 626 (citation omitted). Blanchar's complaint put Strutzel on notice of specific facts that formed the basis of the claim and allowed him to prepare a meaningful response. He cannot reasonably argue otherwise.

¶9 The only problem with the complaint, in the trial court's view, was the fact that it merely alleged unfulfilled promises to perform a future event, without adequately pleading that Strutzel had no intent to perform at the time he made the promises. However, we see no difference between Blanchar's allegation that “the statements ... were made by defendant Strutzel knowing they were false and with the intent to induce plaintiff ...,” and an allegation that Strutzel had no intent to perform his promises. They convey the same message. Strutzel could not know that his promises to perform certain acts were false, while at the same time intending to perform them.

¶10 Blanchar also adequately pled his WIS. STAT. § 100.18 claim. An allegation of intent is not necessary to state a claim under § 100.18. In *State v. American TV & Appliance of Madison, Inc.*, 146 Wis. 2d 292, 300, 430 N.W.2d 709 (1988), the supreme court identified two elements to a § 100.18 claim: an advertisement or announcement must exist, and the advertisement must contain a statement which is “untrue, deceptive or misleading.” There is no third element of intent. In any event, even if the claim required an allegation of present intent not to perform, as we hold in the previous paragraph Blanchar sufficiently made that allegation.

¶11 Strutzel argues that any claim of misrepresentation regarding brickwork must be dismissed because Blanchar could not reasonably rely on a promise directly contradicted by the subsequent contract between the parties. However, the contract with Lakeland does not contradict Strutzel’s promise of a potentially lower price. The contract clearly states that the prices for various jobs, including brickwork, were estimates.

¶12 Strutzel also argues that Blanchar could not reasonably rely on Strutzel’s promise to personally buy the insurance when the contract Blanchar signed with Lakeland provided that Lakeland would buy the insurance. But the complaint does not allege that Strutzel promised to personally buy the insurance. That is Strutzel’s interpretation, not Blanchar’s. Blanchar alleged that Strutzel was speaking for Lakeland, as its president, when he made the promise.

¶13 Although the subject of this appeal is the trial court’s decision on the motion to dismiss the complaint, Strutzel contends that the insurance claim should be dismissed using summary judgment methodology, because Blanchar does not deny Strutzel’s averment that he never made an oral promise to buy insurance. By

affidavit Blanchar expressly denied Strutzel's version of their conversation during which the promise either was or was not made. What was said in that conversation remains a material factual dispute.

¶14 Strutzel presents additional alternative grounds for affirming dismissal. They were neither timely argued to the trial court nor considered by it, and we decline to address them.

By the Court.—Order reversed and cause remanded.

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

