COURT OF APPEALS
DECISION
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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-0157

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

WILLIAM JAMES SCHMIDT,
A PERSONAL REPRESENTATIVE OF THE
ESTATE OF STELLA B. SCHMIDT,

PLAINTIFF-RESPONDENT,

V.

GERALD SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Gerald Schmidt appeals from a judgment awarding the Estate of Stella B. Schmidt $86,797.53 in principal and interest on a note

which was originally made by Gerald,[1] guaranteed and renewed by his late parents William and Stella Schmidt, and ultimately paid by Stella's estate.[2] We affirm.

¶2 In May 1983, Gerald borrowed $108,500 from First Banking Center-Burlington. Gerald's parents cosigned and guaranteed the note. As collateral for the loan, Gerald executed a farm security agreement which granted the bank a security interest in his farm equipment, livestock, feed and supplies. Gerald defaulted on the note, and to avoid enforcement of their guarantee, William and Stella executed a renewal note in May 1987 for $49,469.84—the amount of Gerald's outstanding principal balance on the May 1983 note. Gerald did not execute a renewal note.

¶3 There is no dispute that all of the funds derived from the May 1983 note were paid to or for the benefit of Gerald. From July 1990 to October 1997, William and Stella and their estates paid $37,327.69 in interest[3] on the renewal note. Stella's estate ultimately paid the bank the principal balance due under the renewal note—$49,469.84. Stella's estate then sued Gerald in implied contract and for contribution to recover interest and principal paid on the renewal note. Gerald raised various defenses.

¶4 After a court trial, the court made the following findings. Gerald entered into the 1983 note, which his parents cosigned and guaranteed, Gerald defaulted and the bank declared the 1983 note due and payable. To avoid court

[1] Gerald's wife, Barbara, also executed the note.

[2] William and Stella died in March and December 1995, respectively.

[3] This interest was paid within six years of the commencement of the estate's action against Gerald. Previous interest payments are not the subject of the estate's action.

action by the bank, William and Stella executed a renewal note in 1987. Thereafter, they and their estates paid interest on the renewal note and ultimately the principal balance due. Neither William nor Stella derived any benefit from the funds Gerald received under the 1983 note. The court found Gerald equitably liable to contribute and reimburse Stella's estate the $86,797.53 in principal and interest paid on his behalf. Gerald appeals.

¶5 We assume, as do the parties, that Stella's estate has a cause of action in contribution or implied contract[4] against Gerald for payments made relating to the indebtedness to the bank. At the close of the estate's case, Gerald moved to dismiss on statute of limitations grounds, claiming that the six-year limitations period of § 893.43, STATS.,[5] began to run in May 1987 when William and Stella executed the renewal note, which, Gerald contended, paid the 1983 note. The estate countered that the 1987 renewal note did not eliminate Gerald's obligation to his parents and a limitations period commenced each time Gerald's parents made an interest payment on the renewal note.

[4] In the absence of an express contractual provision, a contribution claim sounds in implied contract "to rectify an inequity resulting when a co-obligor pays more than a fair share of a common obligation." ***Kafka v. Pope***, 194 Wis.2d 234, 242, 533 N.W.2d 491, 494 (1995).

[5] Section 893.43, STATS., states:

> An action upon any contract, obligation or liability, express or implied, including an action to recover fees for professional services, except those mentioned in s. 893.40, shall be commenced within 6 years after the cause of action accrues or be barred.

¶6 The court rejected Gerald's limitations defense.[6] The court noted that Gerald was the original maker and William and Stella were cosigners and guarantors on the May 1983 note. Gerald did not renew the May 1983 note; William and Stella did. The renewal note did not extinguish the May 1983 obligation; it merely renewed it. William and Stella retained their right of contribution in implied contract to recover amounts they paid on the note.

¶7 We agree with the circuit court that the estate's action against Gerald was timely. Resolution of the limitations question turns upon whether the 1987 renewal constituted payment of the 1983 note. If the renewal constituted payment, the claim against Gerald arose in 1987. If, however, the renewal did not constitute payment, the six-year limitations period applied to each payment made by Gerald's parents within the six years preceding the commencement of the estate's action against Gerald and for the principal payment made during the litigation. *See* ***Bushnell v. Bushnell***, 77 Wis. 435, 437, 46 N.W. 442, 443 (1890).

¶8 It is well settled that "a renewal by the giving of a new note or the extension of time in which to pay a pre-existing debt is not a discharge of the old and original obligation and the creation of a new obligation, but a mere carrying on of the prior obligation." ***Rosendale State Bank v. Holland***, 195 Wis. 131, 132, 217 N.W.

[6] The timeliness of the commencement of actions at law is governed by statutes of limitation, whereas the timeliness of equitable actions such as contribution, *see* ***Foss v. Madison Twentieth Century Theaters, Inc.***, 203 Wis.2d 210, 221, 551 N.W.2d 862, 867 (Ct. App. 1996), is governed by considerations of laches, *see* ***Suburban Motors of Grafton, Inc. v. Forester***, 134 Wis.2d 183, 187, 396 N.W.2d 351, 353 (Ct. App. 1986). Laches is an equitable defense to an action based on unreasonable delay in bringing suit under circumstances that prejudice the opposing party. *See* ***Sawyer v. Midelfort***, 217 Wis.2d 795, 806, 579 N.W.2d 268, 271 (Ct. App. 1998), *aff'd,* 227 Wis.2d 124, 595 N.W.2d 423 (1999). Because the parties and the court treated the question as one of limitations rather than laches and the circuit court's decision on the limitations question does not include a consideration of the laches factors, we review the court's limitations ruling.

645, 646 (1928) (quoted source omitted). In the absence of an express agreement, the renewal does not discharge the old obligation but merely carries on the prior obligation, "unless and except it appears that the parties agreed that it should be a destruction of the old and creation of a new obligation." ***Wisconsin Trust Co. v. Cousins***, 172 Wis. 486, 503, 179 N.W. 801, 807 (1920).

¶9 Gerald argues that he, his parents and the bank acted as if they intended that Gerald's obligation would be extinguished by his parents' execution of the renewal note. The record does not contain any evidence of such an agreement, and an agreement cannot be inferred from the bank's pursuit of William and Stella on their guarantee and their subsequent willingness to enter into a renewal note.

¶10 As additional evidence that the renewal note could be executed without affecting Gerald's original obligation, we note that the May 1983 note contained the following provision relating to renewals: "Without affecting the liability of any Maker, indorser, surety or guarantor, the holder may, without notice, grant renewals or extensions, accept partial payments, release or impair any collateral security for the payment of this Note or agree not to sue any party liable on it." This provision indicates that the bank could renew the note without affecting the liability of any maker, i.e., Gerald. While we recognize that the claim against Gerald is made by the estate, this provision from the original note is further support for our conclusion that the parties did not intend to extinguish Gerald's obligation when his parents renewed the note.

¶11 Finally, the record reveals that there were family discussions subsequent to the 1987 renewal about Gerald's obligation to his parents, which obligation Gerald conceded at that time. This evidence contradicts Gerald's

contention that he and his parents considered his obligation extinguished upon the 1987 renewal.

¶12 Gerald next argues that the estate's action is barred on estoppel, laches, and accord and satisfaction grounds because he: (1) transferred equipment to his parents in the belief that they were assuming the remaining balance due on the note; and (2) assigned to his parents lease payments from a subtenant.[7] Gerald claims that the lease payments and equipment transfers exceeded the amount due on the note.

¶13 The circuit court found otherwise. Betty Felten, Gerald's sister, who managed their parents' financial affairs from 1988 forward, testified that William and Stella owned the leased property and claimed all of the tenant's rental payments as income paid directly to them by the tenant. The written lease does not show Gerald as a party.

¶14 The court found that the lease under which rent was paid by a tenant farmer, Katzman, was between William and Stella, the owners of the farm, and Katzman, and did not involve Gerald. The court found that there was insufficient evidence of an alleged verbal agreement between Gerald and his parents to apportion Katzman's lease payments between Gerald and his parents or to demonstrate that Gerald had a right to sublease the property to Katzman. Therefore, the court found any rent paid by Katzman did not reduce Gerald's obligation to his parents. These findings are not clearly erroneous, *see* § 805.17(2), STATS., based on the evidence adduced at trial.

[7] In 1978, William and Stella leased a portion of their farm to Gerald and his wife, Barbara, for a three-year term. Gerald remained in possession of the farm at all times material to this case.

¶15 Gerald also relies upon his 1985 transfer of equipment to his parents to support his claim that he satisfied his obligation relating to the bank note. The equipment, which was collateral for the 1983 note, was sold for the bank's benefit and the bank applied the proceeds to Gerald's obligation on the 1983 note. However, in January 1986, Barbara Schmidt admitted in a written document that a $50,418 balance remained on Gerald's 1983 note after application of the proceeds of the equipment sale.

¶16 The court also considered Gerald's claim that the equipment transferred to his parents had a value of between $50,000 to $60,000. The court found the testimony of Gerald's appraiser to be less than credible and found that even after the equipment was sold, Gerald still owed $50,000 on the 1983 note. Equipment which was withheld from the auction was ultimately sold to Gerald's brother for $18,000, with the proceeds applied to Gerald's 1983 note. Even though Gerald argues that this equipment was worth more than $18,000, the court did not err in finding that this equipment was worth substantially less than Gerald's proposed valuation. Gerald's theory that his surrender of encumbered equipment and Katzman's lease payments fully satisfied his obligation on the 1983 note is unsupported by the evidence adduced at trial.

¶17 Gerald's laches argument is premised on his contention that his parents assumed the note for him and the estate waited too long to collect upon it. Because we have already held that William and Stella did not assume Gerald's obligation, we reject this argument.[8]

[8] To the extent that we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Management of Wis., Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1977) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

By the Court.—Judgment affirmed.

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