

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 5, 1999

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. 98-3423-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**NORTHWESTERN NATIONAL INSURANCE COMPANY OF
MILWAUKEE, WISCONSIN, A WISCONSIN CORPORATION,**

PLAINTIFF-RESPONDENT,

V.

ARTHUR S. YORKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DiMOTTO and DAVID A. HANSHER, Judges. *Affirmed and cause remanded.*¹

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¹ The judgment explains that it was based on an order for judgment granted by Judge DiMotto and rendered by Judge Hansher.

¶1 PER CURIAM. Arthur S. Yorkes appeals from a judgment granting the motion of Northwestern National Insurance Company of Milwaukee, Wisconsin (Northwestern National or the surety) for summary judgment. The circuit court determined that the surety had submitted evidence establishing a claim that Yorkes owed it \$60,659.83. Yorkes failed to submit any evidentiary material in opposition to the surety's motion for summary judgment and failed to respond to requests to admit served on him by the surety. The circuit court concluded that the record contained no disputes of material fact or competing inferences. On appeal, Yorkes contends that the terms of a tolling agreement of the parties rendered the surety's suit untimely. Because we hold that the circuit court properly rejected this defense in light of Yorkes's failure to submit the tolling agreement to the circuit court by affidavit or other evidentiary means contemplated by the summary judgment process, we affirm the circuit court's judgment.²

BACKGROUND

¶2 This is a collection action. Yorkes invested in four limited partnerships in 1984. He paid for his interests in the partnerships in cash and in promissory notes given to People's Bank. When Yorkes delivered his notes to People's Bank, he simultaneously requested and applied for investor surety bonds from Northwestern National to guarantee his payment of the notes. Yorkes's application included an indemnity agreement providing that in the event Northwestern National issued the surety bonds, Yorkes would indemnify

² This is an expedited appeal under RULE 809.17, STATS.

Northwestern National and hold it harmless from all claims, costs and liabilities that Northwestern National might incur because of the bonds.

¶3 After Northwestern National became Yorke's surety, People's Bank notified the surety that Yorke had defaulted in making payments under the terms of the promissory notes. Following the default, Northwestern National made payments to People's Bank under its bonds. Northwestern National then sued Yorke, pursuant to the indemnity agreement to recover "the amounts already paid to People's Bank on his behalf, together with interest thereon, from the date of the payments."

¶4 Yorke answered Northwestern National's complaint. His answer included a photocopy of a document entitled "Tolling Agreement." The tolling agreement provided that any claim by Northwestern National against Yorke to collect an alleged debt had to be commenced no later than one year after the surety received notice from Yorke regarding the final judgment or settlement of an action by People's Bank against Yorke. The tolling agreement provided, in pertinent part, that any amendment to its terms had to be in writing and had to be signed by the parties. Yorke's answer alleged that he gave Northwestern National such notice on December 11, 1996. Because Northwestern National filed its suit against Yorke on December 18, 1997, Yorke's answer sought the dismissal of the complaint as untimely.

¶5 Following receipt of Yorke's answer, the surety served requests to admit upon Yorke, including the following:

2. Please admit that Yorke, before he was represented by Attorney Patrick T. McMahon, was represented by Attorneys Justin Summer and Stephan Munzer, of the Law Firm of Munzer & Saunders, LLP, in connection with the dispute with NN which now forms the

subject matter of this lawsuit (hereinafter the “NN Dispute”).

3. Please admit that both Attorneys Justin Summer and Stephan Munzer, on behalf of Yorkes, extended the deadline set forth in the “Tolling Agreement” by which NN had to commence an action against Yorkes. The term “Tolling Agreement” means that agreement which is attached to Yorkes’ Answer in this case as Exhibit B.

. . . .

7. Please admit that Attorney Munzer, acting on behalf of Arthur S. Yorkes, extended the deadline for NN to sue Yorkes under the Tolling Agreement to January 9, 1998.
8. Please admit that the above-entitled action was timely commenced by NN against Yorkes within the extension of time granted by Yorkes’ lawyer, Stephan Munzer.

¶6 Yorkes failed to respond to the surety’s requests to admit. Subsequently, the surety moved for summary judgment. The surety’s motion incorporated its requests to admit into an affidavit and submitted the affidavit as part of the summary judgment record. The surety also filed an affidavit of one of its employees identifying and authenticating all of the transactional documents underlying its collection claim. Yorkes elected not to file any evidentiary response to the surety’s motion.

¶7 Following a hearing on the motion, the circuit court granted the surety’s motion. Yorkes appeals.

DISCUSSION

¶8 Summary judgment is appropriate to determine whether there are any disputed factual issues for trial and “to avoid trials where there is nothing to try.” *Rollins Burdick Hunter of Wis., Inc. v. Hamilton*, 101 Wis.2d 460, 470,

304 N.W.2d 752, 757 (1981). We use the same methodology as the trial courts in determining whether summary judgment should be granted or denied. *See Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). First, we examine the pleadings to determine whether they state a claim for relief. *See id.* at 317, 401 N.W.2d at 821. If a claim is stated and the responsive pleadings join the issue, we then examine the evidentiary record to determine whether a genuine issue of material fact exists and whether “the moving party is entitled to a judgment as a matter of law.” Section 802.08(2), STATS. Once the party moving for summary judgment

demonstrates that the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law,” the opposing party may avoid summary judgment only by “set[ting] forth specific facts showing that there is a genuine issue for trial.”

Transportation Ins. Co. v. Hunzinger Constr. Co., 179 Wis.2d 281, 291, 507 N.W.2d 136, 139 (Ct. App. 1993) (citation omitted; brackets in original); RULE 802.08(3), STATS.

¶9 In this case, once the surety submitted evidence in support of its collection claim, it was incumbent on Yorkes to submit evidentiary material, including a copy of the tolling agreement, to support his affirmative defense that the suit was untimely filed. This is because the party in opposition to the motion “may not rest upon the mere allegations or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial.” *Bank of Two Rivers v. Zimmer*, 112 Wis.2d 624, 632, 334 N.W.2d 230, 234 (1983) (quoted source omitted).

¶10 Here, Yorkes not only failed to submit evidentiary material in support of his affirmative defense, a defense that might have been dispositive of the suit, but also failed to reply to the surety's requests to admit. The failure to reply is construed as an admission. *See* § 804.11(1)(b), STATS.³ Such an admission is available for use as record evidence in a motion for summary judgment. *See Bank of Two Rivers*, 112 Wis.2d at 631, 334 N.W.2d at 233. Furthermore, such an admission is treated as conclusively establishing the issue. *See* § 804.11(2), STATS.⁴ It follows that Yorkes's admission that the tolling agreement was amended to permit the timely filing of the instant suit was dispositive of his affirmative defense. Accordingly, we hold that the circuit court properly entered judgment in favor of the surety on its collection suit.

¶11 Finally, we note that the surety indicates in its respondent's brief that it is "contractually entitled to the recovery of attorneys' fees for this action" and requests this court to remand the issue to the circuit court to assess and grant the additional fees expended by Northwestern National on this appeal. Yorkes filed no reply brief. Accordingly, we take the surety's claim to such fees as admitted

³ Section 804.11(1)(b), STATS., provides in pertinent part:

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon the defendant.

⁴ Section 804.11(2), STATS., provides in pertinent part:

EFFECT OF ADMISSION. Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission.

and grant Northwestern National's request for a remand. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments not refuted are deemed admitted).

By the Court.—Judgment affirmed and cause remanded.

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