

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2018

Sheila T. Reiff
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. 2017AP2527-FT
STATE OF WISCONSIN**

Cir. Ct. No. 2014CV156

**IN COURT OF APPEALS
DISTRICT III**

TISSUE TECHNOLOGY, LLC,

PLAINTIFF-RESPONDENT,

V.

ST PAPER, LLC,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

V.

**OCONTO FALLS TISSUE, INC., PARTNERS CONCEPTS
DEVELOPMENT, INC. AND TISSUE PRODUCTS
TECHNOLOGY CORPORATION,**

THIRD-PARTY DEFENDANTS.

APPEAL from an order of the circuit court for Oconto County:
JAY N. CONLEY, Judge. *Reversed and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. ST Paper, LLC appeals an order¹ denying its motion for summary judgment on a breach-of-contract claim brought against it by Tissue Technology, LLC.² We conclude that Tissue Technology is not the real party in interest to enforce the contract because it assigned all of its rights under the contract to a bank as collateral. We therefore reverse the order on appeal and remand with directions that the circuit court enter summary judgment in favor of ST Paper.

BACKGROUND

¶2 In September 2006, the parties to this appeal entered into an Amended and Restated Sales and Marketing Agreement (the Agreement) under which Tissue Technology would act as an exclusive representative for ST Paper, and ST Paper would pay Tissue Technology a commission for sales of ST Paper's products. Relevant to this appeal, the contract provided that it could "not be assigned by either [party] without the express prior written consent of the other," and that its terms also would be binding upon the parties' successors and assigns.

¶3 In April 2007, as collateral for a loan and with written consent of ST Paper, Tissue Technology assigned to Nicolet National Bank (Nicolet) all of

¹ We granted leave to appeal a nonfinal order on January 17, 2018.

² This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Tissue Technology's rights and interests in the Agreement. Those rights expressly included "any and all Commissions due" and "the right to take any and all such actions as necessary, either in the name of the Assignor or Assignee, for breach of payment with respect to any fees due" under the Agreement. The assignment instrument (the Assignment) further provided that, upon Tissue Technology's payment in full of the note to Nicolet, "the interests of [Nicolet] in the [Agreement] herein assigned shall be released to [Tissue Technology] and this agreement shall be terminated." There is no assertion in the summary judgment materials that Tissue Technology has satisfied Nicolet's note.

¶4 In February 2013, Tissue Technology and Nicolet signed a Restated and Amended Assignment of Sales and Marketing Agreement and Pledge of Commercial Tort Claim (the Amended Assignment). The Amended Assignment reiterated several terms from the original Assignment, again stating that Tissue Technology assigned to Nicolet all of its rights in the Agreement, including the right to any commissions. The Amended Assignment then purported to grant to Tissue Technology "a limited license to collect, at [Tissue Technology]'s own expense, amounts due and owing by ST Paper" under the Agreement, "so as to give [Tissue Technology] standing to file [a lawsuit against ST Paper]." The Amended Assignment further provided that Tissue Technology would obtain Nicolet's prior written approval before entering into any settlement agreement with ST Paper, and that any proceeds from the lawsuit would be applied to Tissue Technology's indebtedness to Nicolet. Unlike the original Assignment, ST Paper did not sign or otherwise provide written consent for the Amended Assignment.

¶5 In August 2014, Tissue Technology filed suit against ST Paper, seeking to recover over \$4,000,000 in commissions Tissue Technology claimed it had earned after December 2008, under theories of a breach of contract and/or a

violation of the Wisconsin Sales Representative Act. ST Paper filed an answer, which it subsequently amended, raising an affirmative defense that Tissue Technology lacked standing to enforce the contract because it had assigned its rights under the contract to Nicolet, and was not the real party in interest. The parties filed cross-motions for summary judgment. The circuit court denied both parties' motions, and ST Paper now appeals.

STANDARD OF REVIEW

¶6 This court reviews summary judgment decisions independently, applying the same legal standard and methodology employed by the circuit court. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. We determine whether there are any material facts in dispute that entitle the opposing party to a trial. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751. Here, because there is no disagreement between the parties as to the existence or terms of the Agreement, Assignment and Amended Assignment, we decide the question of whether Tissue Technology can pursue a claim against ST Paper under those documents as a matter of law.

DISCUSSION

¶7 As a threshold matter, we note that having standing and being a real party in interest are distinct but related doctrines regarding the capacity to sue. Standing is a concept that “restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not done.” *Three T's Trucking v. Kost*, 2007 WI App 158, ¶16, 303 Wis. 2d 681, 736 N.W.2d 239. A standing analysis takes into account: (1) whether a party has asserted a personal interest or stake in the controversy; (2) whether the asserted

interest of the party would be adversely affected; and (3) whether judicial policy calls for protecting the party's asserted interest. *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶40, 333 Wis. 2d 402, 797 N.W.2d 789. A real party in interest is "one who has a right to control and receive the fruits of the litigation." *Mortgage Assocs., Inc. v. Monona Shores, Inc.*, 47 Wis. 2d 171, 179, 177 N.W.2d 340 (1970). Because Tissue Technology does not assert any basis for standing apart from being a real party in interest due to the limited license to collect that Nicolet granted it, we limit our discussion to that issue.

¶8 Here, the parties do not dispute that the Assignment transferred from Tissue Technology to Nicolet all rights to the commissions owed by ST Paper under the 2006 Agreement, as well as the contractual right to collect those commissions, until such time as Tissue Technology repaid Nicolet's note. It is well-settled law that a party's assignment of an existing right to another extinguishes that party's interest in the contract. *Tullgren v. School Dist. No. 1 of Vill. of Whitefish Bay*, 16 Wis. 2d 135, 142, 113 N.W.2d 540 (1962). Tissue Technology nonetheless contends that the Amended Assignment provided it with a "license" or permission to sue ST Paper to collect commissions on Nicolet's behalf. In support of this contention, Tissue Technology further asserts that WIS. STAT. § 402.210(2) authorizes the transfer of any property right, as long as the alienation of the right is not precluded by statute or contract. These contentions fail for multiple reasons.

¶9 To begin with, categorizing Nicolet's attempted transfer of the right to collect commissions under the Agreement back to Tissue Technology as a "license" rather than an "assignment" is a distinction without a difference. The issue is not, as Tissue Technology contends, whether statutes or the Agreement prevent any alienation of the right to collect commissions, but rather whether the

preconditions set forth in the Agreement for reassigning that right were satisfied. The Amended Assignment was invalid under the terms of the Agreement—by which Nicolet was bound as Tissue Technology’s assignee—because ST Paper did not provide written consent for Nicolet to reassign or “license” any of its rights under the Agreement.

¶10 Tissue Technology argues that construing the Agreement to prevent assignment of the right to collect the commissions leads to an absurd result because it effectively means that ST Paper would need to consent to be sued. That argument is without merit, however, because the assignee of the right to collect the commissions—Nicolet—needs no consent from ST Paper to file its own lawsuit.

¶11 Tissue Technology also argues that public policy should preclude enforcement of the nonassignment-without-consent clause in the Agreement because “[m]odern day debt collection is premised on assignment of causes that permit others to prosecute in the name of creditors.” It may be true that assignment of debt collections is the norm today. However, as ST Paper points out, this court has previously found nonassignment clauses to be enforceable. *See, e.g., J.G. Wentworth S.S.C. Ltd. P’ship v. Callahan*, 2002 WI App 183, ¶19, 256 Wis. 2d 807, 649 N.W.2d 694.

¶12 Next, even if the Amended Assignment of the right to collect the commissions were valid, it would not be sufficient to make Tissue Technology a real party in interest in the present lawsuit. We arrive at this conclusion because, pursuant to the terms of the Amended Assignment, Tissue Technology would still not control the litigation and the fruits of that litigation. Nicolet directs and controls the litigation pursued by Tissue Technology by retaining the right to approve any settlement. Nicolet controls the fruits of the litigation because Tissue

Technology is not seeking to recover commissions that are due to it; it is seeking to recover commissions that are due to Nicolet under the Assignment, which the parties agree still remains in effect. Therefore, Nicolet is the real party in interest. We conclude the circuit court erred in denying ST Paper's motion to dismiss Tissue Technology's claims on summary judgment. Accordingly, we reverse the circuit court's order and remand with directions for the circuit court to grant summary judgment in favor of ST Paper.

By the Court.—Order reversed and cause remanded with directions.

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

