COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1340 **Cir. Ct. No. 2008CV5311**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

JP MORGAN CHASE BANK,

PLAINTIFF-RESPONDENT,

V.

EDWARD O. ALLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*

Before Kessler, Brennan and Neubauer, JJ.

¶1 PER CURIAM. In this action on a promissory note, the circuit court concluded that the borrower, Edward O. Allen, waived his contractual right to arbitrate his dispute with the lender, JP Morgan Chase Bank, N.A. (Chase). The

circuit court granted summary judgment to Chase, and dismissed Allen's counterclaims. Allen appeals, and we affirm.[1]

BACKGROUND

¶2 In 2004, Allen borrowed $100,000 from Chase's predecessor in interest, and he executed a promissory note agreeing to repay the loan in monthly installments. Allen failed to make payments when due, and Chase demanded repayment in full pursuant to the acceleration clause in the parties' contract. Allen did not comply. The procedural history of Chase's subsequent efforts to collect on the debt underlies the issues on appeal, and we review it in some detail.

¶3 On May 15, 2008, Chase filed a summons and complaint in Milwaukee County circuit court. Chase served Allen by publication in the *La Jolla Light*, a California newspaper, and by mailing a copy of the summons and complaint to Allen's home address in La Jolla, California.

¶4 On September 30, 2008, Allen filed an answer to the complaint. On November 18, 2008, he filed a second answer along with a counterclaim asserting that Chase acted in bad faith by enforcing the acceleration clause in the party's contract. He demanded punitive damages and other relief.

¶5 Chase moved to dismiss Allen's counterclaim. Chase also filed a motion for summary judgment accompanied by affidavits and supporting documents showing that Allen defaulted on his loan payments. Allen responded

[1] Allen appears *pro se* in this appeal, as he did in the circuit court proceedings. He explained to the circuit court that he has a law degree, and we treat him as we would a represented entity. *See* ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992) (*Pro se* appellants "are bound by the same rules that apply to attorneys on appeal.").

with a brief opposing Chase's motion for summary judgment, a "motion to file first amended counterclaim," and a proposed amended pleading. In his submissions, Allen admitted that he fell behind in his obligations to Chase, but he contended that the bank accepted additional payments and therefore waived any right to enforce the contract term allowing the bank to require accelerated payments upon his default.

¶6 On January 20, 2009, the circuit court conducted a hearing. Allen appeared by telephone and, pursuant to the terms of the loan agreement, requested arbitration in advance of any further court proceedings. The circuit court did not reach the merits of the pending motions but instead granted a sixty-day stay of proceedings to permit Allen an opportunity to initiate the arbitration process. Allen, however, did not initiate arbitration within the sixty-day time frame, and Chase renewed its motion for summary judgment. Three days before the hearing on Chase's renewed motion, Allen filed a document demanding that Chase initiate arbitration and pay the associated fees and costs. In the alternative, Allen asked the circuit court to consider the brief that he filed earlier opposing Chase's motion for summary judgment.

¶7 Allen failed to appear at the hearing on Chase's renewed motion, and the circuit court conducted the hearing in his absence after fruitless attempts to reach him by telephone. The court first determined that Allen waived any contractual right that he had to arbitrate the dispute. The court next determined that no material facts were in dispute: Allen defaulted on his loan, the terms of the parties' agreement permitted Chase to demand full payment upon default, and Allen failed to pay in full upon demand. The court considered Allen's written submissions and determined that Allen did not demonstrate the existence of a

genuine issue for trial. The court therefore granted summary judgment to Chase and dismissed Allen's counterclaims. Allen appeals.

DISCUSSION

¶8 Allen first asserts that the circuit court should have dismissed the litigation because Chase had an obligation to pursue arbitration. The claim is groundless.

¶9 The parties' contract provides, in pertinent part, that "all disputes, claims and controversies ... shall be arbitrated pursuant to the Rules of the American Arbitration Association in effect at the time the claim is filed, upon request of either party." The interpretation of a contract is a question of law that we review *de novo*. ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (Ct. App. 1987). "Where the terms of a contract are plain and unambiguous, we will construe it as it stands." ***Id.*** We do not impose obligations that the parties did not undertake. ***Frost v. Whitbeck***, 2002 WI 129, ¶17, 257 Wis. 2d 80, 654 N.W.2d 225. The parties' contract did not impose an obligation on Chase to initiate arbitration. Rather, the contract permitted either party to request arbitration of a dispute.

¶10 In this case, Allen requested arbitration. Pursuant to WIS. STAT. § 788.02 (2007-08),[2] a circuit court shall stay any proceeding referable to arbitration upon a party's application, "providing the applicant for the stay is not in default in proceeding with such arbitration." The circuit court therefore

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

honored Allen's request and granted a sixty-day stay of the proceedings to permit Allen to initiate the arbitration process, but Allen did not exercise the option.

¶11 A party may, by its conduct, waive the right to arbitrate. ***Meyer v. Classified Ins. Corp.***, 179 Wis. 2d 386, 395-96, 507 N.W.2d 149 (Ct. App. 1993). "Whether conduct amounts to a waiver of the right to arbitrate is a mixed question of fact and law." ***Id.*** at 396. We uphold the circuit court's findings of fact unless they are clearly erroneous, but the application of the facts to the legal standard of waiver is a question of law that we review *de novo*. ***Id.***

¶12 Here, the circuit court conducted a hearing and found that Allen requested arbitration many months after the litigation began. When he did so, Chase had already filed dispositive motions and the parties had briefed the issues. The circuit court further found that Allen did not initiate arbitration within the sixty-day deadline imposed by the court. Only after the deadline expired and Chase renewed its motion for summary judgment did Allen file a document specifically asking that Chase both assume the responsibility for commencing arbitration and shoulder the cost of the arbitration process. These findings are not clearly erroneous; indeed, the record contains nothing to contradict them.

¶13 The circuit court concluded that Allen unnecessarily delayed resolution of the dispute by failing to capitalize on the opportunity to arbitrate. "Conduct which allows an action to proceed to a point where the purpose of arbitration—to obtain a speedy, inexpensive and final resolution of disputes—is frustrated is conduct that estops a party from claiming a right to a stay of the proceedings and referral for contractual arbitration." ***Id.*** at 399. We agree with the circuit court that Allen's conduct in this case constituted a waiver of the right to arbitrate.

¶14 Allen next contends that the circuit court erred by dismissing his counterclaims. We disagree.

¶15 Chase filed a summons and complaint on May 15, 2008. Allen filed an answer that did not include a counterclaim. Pursuant to WIS. STAT. § 802.09(1), "[a] party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed." Here, Allen filed an amended answer with a counterclaim on November 18, 2008, a date falling outside of the six-month period.[3] On January 13, 2009, he moved for leave to file a "first amended answer and counterclaims." Without waiting for a response from the court, he next submitted his proposed counterclaims.

¶16 Pursuant to WIS. STAT. § 802.09(1), the circuit court may extend the deadline for filing an amended pleading, but the court did not do so here.[4] After Allen moved to amend his pleadings, the circuit court stayed the entirety of the proceedings to permit arbitration without addressing Allen's motion. When Chase renewed its motion for summary judgment, Allen asked the court to consider his "previously filed brief against [the] motion for summary judgment," or,

[3] The record does not contain an affidavit of mailing or similar document demonstrating that Allen served Chase with the counterclaim at any time before he filed it on November 18, 2008.

[4] Allen states in his brief that the circuit court granted him leave to amend his pleadings, but he does not provide a citation to the record in support of his position. This court generally will not comb the record to find support for a litigant's contentions. ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. We are particularly unwilling to do so in this case because Allen supplies no helpful guidance. He asserts that, on January 12, 2009, the circuit court granted his motion to amend his answer and counterclaim, but the record reflects that he did not file the motion until January 13, 2009. Allen also contends that the circuit court granted him "leave to amend his complaint," but Allen, as the respondent in the circuit court, did not file a complaint, so the likelihood that the circuit court granted him leave to amend such a document seems remote.

alternatively, to require Chase to initiate and pay for arbitration. Thus, Allen abandoned his motion for leave to amend his pleadings and never successfully launched any counterclaims. *See* ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999) ("motion made but not pursued is abandoned").

¶17 Perhaps even more importantly, Allen failed to state claims upon which relief may be granted. Allen denominated his counterclaims as "tortious interference with contract," "breach of contract," "breach of fiduciary duty/breach of implied covenant of good faith and fair dealing," "civil conspiracy," and "prima facie tort." In his proposed pleadings, he contended that Chase acted unlawfully and in bad faith by enforcing the acceleration clause and pursuing full payment of the loan upon Allen's default. In his briefs, Allen argues that Chase's actions were improperly motivated by "greed" and a desire to "bleed[] him dry."

¶18 "Parties to a contract have a duty of good faith to each other." ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶35, 291 Wis. 2d 393, 717 N.W.2d 58. Allen's overarching claim, however, is that Chase enforced a contract term because doing so was in the bank's best economic interests. This allegation is not actionable. A contracting party cannot complain that acts specifically contemplated by the contract constitute bad faith conduct. ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988). The circuit court properly dismissed Allen's counterclaims.

¶19 We turn to Allen's contention that the circuit court erroneously granted summary judgment to Chase. Allen's arguments lack merit, and we reject them.

¶20 Summary judgment is properly granted when the record reflects the absence of a genuine issue of material fact, and the moving party is entitled to

judgment as a matter of law. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). This court reviews summary judgment decisions *de novo,* applying the same standards employed by the circuit court. ***Id.*** The summary judgment methodology is well established and need not be exhaustively repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. We view the materials in the light most favorable to the party opposing the motion. ***Id.***, ¶23. A party opposing summary judgment, however, "may not rest upon the mere allegations or denials of the pleadings but ... must set forth specific facts showing that there is a genuine issue for trial." WIS. STAT. § 802.08(3).

¶21 In this case, Chase demonstrated that Allen borrowed a substantial amount of money and defaulted on the loan. Allen did not file any evidentiary material sufficient to refute the bank's entitlement to judgment. Allen made allegations that Chase acted in bad faith by demanding that he repay the entire loan when he fell behind in his payments, but the parties' contract contains an acceleration clause that permits the bank to demand payment in full upon Allen's default. Nothing in Allen's submissions demonstrates that the acceleration clause is unenforceable.

¶22 Allen suggests that Chase waived its right to demand immediate repayment in full upon default because the bank did not invoke the acceleration clause when he first failed to make timely payments. The contract, however, contains a "no-waiver" provision that states: "lender may delay or forego enforcing any of its rights or remedies under this note without losing them." Allen cites no authority prohibiting such provisions. *Cf.* ***Monarch Coaches, Inc. v. ITT Indus. Credit***, 818 F.2d 11, 13 (7th Cir. 1987) (holding that a "no-waiver" provision is enforceable) (applying Illinois law).

¶23 Allen also argues that Chase was not entitled to summary judgment because service of the action by publication was improper. We disagree. First, the record contains the affidavit of a process server showing numerous unsuccessful attempts to serve Allen at his home at different times of day over a ten-day period. Thus, Chase appropriately resorted to service by publication and thereby obtained personal jurisdiction over Allen. *See* WIS. STAT. § 801.11(1)(c). Second, Allen did not assert that the circuit court lacked personal jurisdiction over him, and he affirmatively sought various forms of relief from the circuit court, including damages on his counterclaims and a stay of proceedings to permit arbitration. By these actions, Allen waived any potential claim that the circuit court lacked personal jurisdiction over him in this matter. *See* ***Artis-Wergin v. Artis-Wergin***, 151 Wis. 2d 445, 453, 444 N.W.2d 750 (Ct. App. 1989).

¶24 Finally, we observe that Allen did not file a reply brief in this appeal. Accordingly, Allen is deemed to concede the arguments proffered by Chase in support of the circuit court's decision in this case. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (arguments that are not refuted are deemed conceded). For all of the foregoing reasons, we affirm.

By the Court.—Judgment affirmed.

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