COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2709-FT **Cir. Ct. No. 2007CV1790**

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

DANIEL BUCKETT,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

GLENN JANTE AND ELSIE JANTE,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Glenn and Elsie Jante appeal and Daniel Buckett cross-appeals from a circuit court judgment awarding damages and an equitable lien to Buckett on a theory of unjust enrichment because Buckett paid property

taxes for the years 1981-92[1] on a parcel of property owned by the Jantes and their predecessors in title. On appeal, the Jantes argue that Buckett's unjust enrichment claim should have been barred by laches. On cross-appeal, Buckett seeks to recover taxes he paid on the parcel for the 1993-2005 tax years. Pursuant to a presubmission conference and this court's order of November 17, 2009, the parties submitted memorandum briefs. Upon review of those memoranda and the record, we affirm the circuit court.

¶2 The facts of this matter are set out in ***Buckett v. Jante,*** 2009 WI App 55, 316 Wis. 2d 804, 767 N.W.2d 376 ***(Buckett I)***, and we do not repeat them here at length. Buckett and the Jantes claim that they have each been paying real estate taxes on the same two-acre parcel of property. The parcel was actually owned by the Jantes and family members who preceded them in title. The parcel was created in the late 1960s when Racine county relocated County Highway A and separated two acres of the Jantes' property from the balance of their property. The parcel ended up south of the highway, adjacent to Buckett's property, while the rest of the Jantes' property remained north of the highway. Buckett received and paid the tax bills on the Jantes' parcel for the tax years 1981 to 2005. In 2007, Buckett sued the Jantes to recover the taxes he paid on the Jantes' parcel. In ***Buckett I,*** we reversed the circuit court and remanded for a determination of Buckett's unjust enrichment claim and to resolve factual questions relating to the Jantes' double taxation claim, i.e., whether the Jantes also paid taxes on the parcel, so that they were not unjustly enriched by Buckett's tax payments on the same parcel. ***Id.***, ¶32.

[1] We describe the years Buckett paid taxes on the parcel by the tax year, not the year when Buckett actually paid the taxes.

¶3 On remand, both parties sought summary judgment. The Jantes' summary judgment motion appended materials showing that Buckett paid taxes on the parcel for tax years 1981-2005. The Jantes also submitted an excerpt from Buckett's deposition in which he testified that in 1993, he received an additional tax bill, but he did not inquire about that bill even though he wondered why he received it.[2] Buckett thought the tax bill might have something to do with his divorce or the property behind his home.

¶4 Buckett's summary judgment motion argued that the Jantes could not show that they paid taxes on the parcel to support their double taxation theory. Therefore, Buckett conferred a benefit via his tax payments and should be able to recover the taxes he paid.

¶5 At the summary judgment hearing, the parties agreed that the Jantes owned the parcel and that this was the same parcel upon which Buckett had been paying taxes since 1981. Buckett conceded that it was not until 1993 that he received an additional tax bill and first wondered about his tax obligations. Buckett believed the separate tax bill had to do with his divorce, did not inquire regarding the bill, and continued paying property taxes on the parcel through 2005.

¶6 The Jantes argued that because their legal description and total acreage was never reduced by the two-acre parcel, they must have been paying taxes on the parcel all along, even while Buckett paid taxes under the parcel number the county assigned as a result of unknown circumstances. Buckett countered that the Jantes did

[2] The additional tax bill Buckett received in 1993 was not for the parcel at issue in this case. However, the arrival of an additional tax bill for an unknown property should have prompted Buckett to inquire regarding his tax obligations.

not prove that the two-acre parcel was included on the Jantes' tax bill for the 1981-2005 tax years.

¶7 The Jantes opposed Buckett's request for an equitable lien for the taxes he paid on the parcel. The Jantes argued that although they farmed the land, they did not obtain title to the parcel from the elder Mrs. Jante's estate until 1991. Therefore, the lien should not cover Buckett's tax payments for the 1981-91 tax years. And, because the Jantes did not learn until 2005 that Buckett had been paying taxes on the parcel, Buckett should not have an equitable lien for the period from 1991-2005. Buckett responded that his equitable interest in the parcel, the res, attached in 1981 regardless of who owned the property then or later.

¶8 The circuit court concluded that there were no disputed issues of material fact. The key dates for summary judgment purposes were 1981 (when Buckett could prove he started paying taxes on the parcel and paid $11,817 in taxes through the 1992 tax year), 1991 (when the Jantes acquired the parcel from the elder Mrs. Jante's estate), and 1993 (when Buckett received an unexpected tax bill and did not inquire about it). The court concluded that the Jantes did not demonstrate that they also paid taxes on the parcel so that double taxation occurred. Therefore, the Jantes did not defeat Buckett's unjust enrichment claim for the benefit he conferred by paying $11,817 in taxes on the parcel through the 1992 tax year. The court granted Buckett an equitable lien on the parcel to avoid unjustly enriching the Jantes.

¶9 Turning to the Jantes' defenses, laches and failure to mitigate, the court concluded that it was undisputed that Buckett could not have known that he was paying taxes on the parcel until 1993 when he received an unexpected tax bill. At that point, the court reasoned, "a person of ordinary intelligence and prudence under the same or similar circumstances would not have acted in the same

fashion" and would have taken some steps to investigate. Therefore, Buckett could not recover for taxes paid for the 1993-2005 tax years because he failed to mitigate his damages. The Jantes appeal, and Buckett cross-appeals.

¶10 An appeal from a grant of summary judgment raises an issue of law that we review de novo by applying the same standards employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. ***Streff v. Town of Delafield***, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994). Cross motions for summary judgment are the equivalent of a stipulation of facts permitting the court to decide the legal issues. ***Streiff v. American Family Mut. Ins. Co.***, 114 Wis. 2d 63, 64-65, 337 N.W.2d 186 (Ct. App. 1983), *rev'd on other grounds*, 118 Wis. 2d 602, 348 N.W.2d 505 (1984).

¶11 A circuit court's decision to grant equitable relief in an action for unjust enrichment is discretionary, but whether the undisputed facts satisfy the elements of unjust enrichment presents a question of law that we review de novo. ***Tri-State Mechanical, Inc. v. Northland College,*** 2004 WI App 100, ¶13, 273 Wis. 2d 471, 681 N.W.2d 302 (citations omitted). "To recover on a claim for unjust enrichment, three elements must be proven: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under circumstances that makes its retention inequitable." ***Id.,*** ¶ 14 (citations omitted). In ***Buckett I,*** we noted that mistakenly paying someone else's taxes is a prime example of an unjust enrichment claim. ***Buckett,*** 316 Wis. 2d 804, ¶18.

¶12 The timeliness of an unjust enrichment claim is governed by laches. *See* ***Suburban Motors of Grafton, Inc. v. Forester,*** 134 Wis. 2d 183, 187, 396 N.W.2d 351 (Ct. App. 1986). A claim is barred by laches if there is an unreasonable delay, if the person had knowledge of the events and acquiesced, and if the person asserting laches is prejudiced by the delay. ***Yocherer v. Farmers Ins. Exch.,*** 2002 WI 41, ¶23, 252 Wis. 2d 114, 643 N.W.2d 457. A court sitting in equity exercises its discretion with regard to the remedy and, in doing so, may consider the conduct of the parties. ***Zinda v. Krause,*** 191 Wis. 2d 154, 174-75, 528 N.W.2d 55 (Ct. App. 1995) ("One of the fundamental tenets of equity is that a person seeking equitable relief must come to the court with clean hands."). A party's failure to mitigate is a relevant aspect of a party's conduct and a proper consideration for a court sitting in equity.

¶13 On appeal, the Jantes argue that Buckett should have known as early as 1981 that he was paying taxes on the parcel because the tax bills from 1981 forward bear the parcel number for the two-acre parcel. This claim is not supported by the summary judgment record. The documents the parties submitted showing that Buckett paid the taxes were created in 2008 from a review of the records in the Racine County treasurer's office. Therefore, the documents necessarily referred to the parcel number assigned to the two acres in 1993.[3] There is no dispute that Buckett did not know and did not have cause to know or suspect that from 1981-1992, he was paying taxes on property he did not own. There are no conflicting inferences to be drawn from these undisputed facts. ***Rady v. Lutz,*** 150 Wis. 2d 643, 647, 444 N.W.2d 58 (Ct. App. 1989).

[3] In their depositions, Glenn Jante and Buckett agreed that the parcel received a separate parcel number in 1993 or 1994.

¶14 As noted in ***Buckett I,*** on remand the Jantes had to prove their defense to the unjust enrichment claim: that they also paid taxes on the parcel and therefore Buckett did not confer a benefit upon them. ***Buckett,*** 316 Wis. 2d 804, ¶¶24-25, 32. On remand, the Jantes only surmised that they had paid taxes on the parcel; they did not submit proof to support that claim. In ***Buckett I,*** we noted that the Jantes offered receipts for the tax years 1994 and later. ***Id.,*** ¶24 n.7. On remand, however, the Jantes did not submit tax receipts showing their payments for the tax years prior to 1994, even though they knew that Buckett was seeking recovery for taxes he paid back to the 1981 tax year. The tax rolls the Jantes submitted did not show who paid the taxes on the property, and the Jantes' summary judgment materials did not offer any analysis of the tax rolls on the question of double taxation. The Jantes also did not submit a survey of their property to tie that property into tax payments they claim they made. Buckett produced undisputed evidence that he paid the taxes on the parcel since the 1981 tax year. Therefore, the Jantes did not sufficiently counter Buckett's claim that he conferred a benefit under the law of unjust enrichment.

¶15 The Jantes argue that Buckett's unjust enrichment claim for the tax years 1981-92 should have been barred on laches grounds. It is undisputed that Buckett did not have an inkling before 1993 that something was amiss regarding his tax obligations. The Jantes argue that once Buckett was on notice in 1993 that something was amiss with his tax bills, he should have brought an unjust enrichment claim for the 1981-92 taxes contemporaneously with that discovery. Our review of the record reveals that the Jantes did not ask the circuit court to consider this specific argument. Rather, the Jantes argued in the circuit court that Buckett should have known in 1981 that he was paying taxes on property he did not own. This is not the same argument as made on appeal. We will not address

this issue for the first time on appeal. ***Segall v. Hurwitz,*** 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

¶16 On cross-appeal, Buckett argues that he paid all of the taxes on the parcel for the years 1981 to 2005, and recovery on his unjust enrichment claim should not have been limited to tax payments made through the 1992 tax year. Unjust enrichment sounds in equity and a court, sitting in equity, may consider equitable defenses, *see* ***Suburban Motors***, 134 Wis. 2d at 187, and the conduct of the parties, *cf.* ***Zinda,*** 191 Wis. 2d at 174. It is undisputed that Buckett took no steps to resolve the mystery of the additional tax bill he received in 1993, and we agree with the circuit court that he should have done so.[4] Based on the undisputed facts, the circuit court properly exercised its discretion and balanced the equities when it limited Buckett's unjust enrichment claim to the 1981-92 tax years.

¶17 The Jantes challenge the circuit court's award to Buckett of an equitable lien on the parcel for the 1981-92 taxes.

> The essential elements of equitable liens include (1) a debt, duty or obligation owing by one person to another[,] and (2) a res to which that obligation fastens, which can be identified or described with reasonable certainty. In Wisconsin, the equitable lien doctrine is based on the Restatement (2d) of Restitution. The Restatement provides that "[w]here property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched, an equitable lien arises."

Yorgan v. Durkin, 2006 WI 60, ¶38, 290 Wis. 2d 671, 715 N.W.2d 160 (footnote and citations omitted).

[4] We need not speculate as to what such an investigation would have revealed.

¶18 The Jantes argue that the parcel is not sufficiently identifiable so as to be the res to which the obligation attaches. We disagree. Both parties sought summary judgment and agreed that it was undisputed which parcel was the subject of Buckett's claims. A party cannot take an inconsistent position on appeal. ***Godfrey Co. v. Lopardo***, 164 Wis. 2d 352, 363, 474 N.W.2d 786 (Ct. App. 1991).

¶19 The Jantes protest that an equitable lien should not attach to the parcel because they had no notice that Buckett was paying taxes on the parcel during the time the elder Mrs. Jante owned the property and for the first two years they owned the property after purchasing it from her estate in 1991. An equitable lien relates back to the time it was created by the parties' conduct. ***Swanson v. Stoffregen (In re Stoffregen),*** 206 B.R. 939, 944 (Bankr. E.D. Wis. 1997). The equitable lien attached when Buckett paid the real estate taxes for the parcel starting in 1981 and continuing until Buckett should have investigated the arrival of an additional tax bill in 1993. We detect no misuse of circuit court discretion in fashioning this remedy.

¶20 We conclude that the Jantes were unjustly enriched because Buckett paid taxes on the parcel for the 1981-92 tax years, and Buckett conferred a benefit which the Jantes have accepted, retained and appreciated. ***Tri-State Mechanical,*** 273 Wis. 2d 471, ¶14; ***Buckett I,*** 316 Wis. 2d 804, ¶21. The res, i.e., the parcel, is identifiable. The circuit court properly exercised its discretion in fashioning a remedy (an equitable lien) and entering judgment against the Jantes for the taxes Buckett paid for the 1981-92 tax years.

¶21 No costs to either party on appeal.

By the Court.—Judgment affirmed.

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