COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 96-3506

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

EMPIRE SCREEN PRINTING, INC., D/B/A EMPIRE MANAGEMENT TRUST, AND JAMES BRUSH, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CAROL F. BRUSH,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

PARK BANK, F/K/A BANK OF HOLMEN, DOUGLAS FARMER,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

COULEE STATE BANK,

DEFENDANT-THIRD-PARTY DEFENDANT,

DIRK GASTERLAND,

DEFENDANT.

APPEAL from an order and CROSS-APPEAL from a judgment and an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Judgment and orders affirmed.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

DEININGER, J. Park Bank appeals a post-judgment order denying its motion for the recovery of actual attorneys' fees it incurred in defending an action brought by James Brush and Empire Screen Printing, Inc. Brush and Empire (Respondents) cross-appeal the judgment, insofar as it (1) dismisses for insufficiency of evidence their claims against the Bank for misrepresentation and intentional infliction of emotional distress, and (2) directs a verdict in favor of the Bank on Respondents' claim for breach of the duty of good faith and fair dealing. Respondents also challenge the trial court's denial of their motions for relief from judgment and for a new trial. We conclude that the trial court did not err in dismissing Respondents' claims or in directing a verdict in the Bank's favor. We also conclude that the trial court did not erroneously exercise its discretion in denying Respondents' motions for relief from judgment and for a new trial. Finally, we conclude that the Bank's motion for the recovery of actual attorneys' fees was properly denied. Accordingly, we affirm the judgment and orders.

BACKGROUND

James Brush is the owner and operator of Empire Screen Printing, Inc., which is engaged in the business of printing pressure sensitive labels. In 1989, Empire began a banking relationship with Park Bank, formerly known as the Bank of Holmen. Prior to March 1993, the relationship and dealings between the parties was, by all accounts, amicable and mutually beneficial.

In 1989, the Bank loaned Respondents $210,000 (Note 1). Although the note was payable at the end of one year, it was amortized over five years. The note was renewed each time it became due in 1990, 1991 and 1992. In 1991 and 1992, the Bank made three additional loans to Respondents. A note for $170,000, dated August 21, 1991 (Note 2), had a final payment due on September 1, 1998; a note for $26,500, dated October 24, 1991 (Note 3), was due in October 1994; and the remaining note for $200,000, was dated February 5, 1992 (Note 4), and had a final payment due on February 5, 1995.[1] Because of its lending limits, the Bank sold Notes 2 and 4 to Coulee State Bank, but retained responsibility for administering the loans. As of March 1993, the unpaid balance on the four notes was slightly over $400,000.

Each loan was documented by a promissory note and secured by a General Business Security Agreement (GBSA), which pledged as collateral, Empire's equipment, inventory, fixtures, work in process, supplies and accounts receivable. Respondents also gave the Bank other security, including: (1) second liens on real estate occupied by Empire and on Brush's personal residence and other land owned by Brush; (2) a first mortgage on 160 acres of land in Trempealeau County; and (3) Brush's personal guaranty. According to the estimates in the Bank's loan file, the Empire collateral had a "loan support value" in excess of $2 million.

Beginning in 1992, a dispute arose between Respondents and the Internal Revenue Service (IRS), regarding the amount of federal taxes owed by Brush and Empire for tax years 1988 and 1989. At about this same time, Brush

[1] A fifth note for a real estate loan in the amount of $190,000, is not directly involved in this litigation.

created numerous trusts to which he conveyed virtually all of his personal and corporate assets. One of these trusts, Empire Management Trust, was apparently set up for the purpose of receiving Empire Screen Printing's accounts receivable as they were paid. After creating Empire Management Trust, Brush filed articles of dissolution for Empire Screen Printing, Inc. The Bank became aware of these transactions, and Note 1 was renewed for six months on September 18, 1992, in the name of Empire Management Trust instead of the corporation.

On March 4, 1993, the Bank became aware that the IRS had filed notices of federal tax liens against both Brush and Empire, claiming that Respondents owed in aggregate some $800,000 in taxes and penalties. On March 18, 1993, Brush and another officer of Empire met with Barry Bertelson, the Bank's loan officer who was responsible for Empire's account, and Douglas Farmer, the Bank's executive vice-president. The purpose of the meeting was to discuss Respondents' loans with the Bank in light of the IRS liens. The Bank officers were concerned that Brush was not responding appropriately to the IRS audit and collection efforts, in part because Brush had made statements that the IRS lacked the legal authority to collect income taxes, and also because the establishment of the numerous trusts, and the transfer of assets to them, had the appearance of an improper tax avoidance scheme. Brush testified, however, that he told the bank representatives not to be concerned because the dispute involved only the amounts of tax due and because he had successfully resolved similar disputes with the IRS in past years.

The parties dispute much of what transpired at the March 18, 1993, meeting. Respondents' witnesses testified that Farmer assured them that the Bank did not intend to call Respondents' loans, but Farmer testified that he gave no such assurance. Brush testified that based upon what had transpired at the meeting, he

believed that it was safe to assume that the Bank would take no action on the loans without further consultations between the parties. Bertelson acknowledged that, though it was "perhaps" appropriate for Brush to leave the meeting under this assumption, Brush had been told that "there was going to be a meeting with [Coulee State Bank], and it wasn't our decision solely to make as to what action would be taken by the bank."

Note 1 was due on the day of the meeting, March 18, 1993. Empire had previously paid the interest that came due on March 18th, and Brush testified that he believed the note was being renewed for a fourth time. The Bank's officers did not demand at the meeting with Brush on March 18th that Note 1 be paid, nor was renewal of the note discussed. On each prior renewal, the Bank had required Respondents to execute a renewal note, but that had not occurred for the March 18th due date.

The next day, Friday, March 19th, 1993, Farmer, Bertelson, Dirk Gasterland, who was president of Coulee State Bank, and lawyers representing both banks met to discuss the matter. Two additional facts had surfaced since the prior day's meeting with Brush. First, the daily balance in Empire's checking account at the Bank had declined, from prior average daily balances of between $400,000 and $600,000, to a balance of less than $200,000 on March 19, 1993. Those at the meeting suspected that Respondents were diverting collateral by depositing receipts from Empire's accounts receivable elsewhere. This suspicion was later confirmed when it was learned that, on March 18th, Brush had opened an account at another bank into which Empire's receipts were thereafter deposited. Secondly, the Bank became aware during the meeting that the State of Wisconsin had filed state tax liens against Respondents totaling some $100,000.

The discussion at the March 19th meeting centered on the IRS liens and the possible effects the enforcement of those liens would have on Respondents' business and on the Bank's priority positions on the various items of collateral. There was also a concern that Respondents might seek relief in bankruptcy court, thereby hampering the Bank's ability to proceed against the collateral and forcing it into a possible battle over assets with the IRS. The participants at the meeting apparently discussed a range of options, from doing nothing to commencing a lawsuit. Gasterland, however, recalled no discussion about starting a lawsuit or seizing Empire's bank account. That testimony notwithstanding, the Bank officers during the meeting authorized their attorneys to file a lawsuit against Respondents, which in fact was accomplished by 5:00 p.m. that day. The Bank also took steps to offset and attach the remaining cash in Respondents' checking account at the Bank, which then had a balance of some $180,000.

The pleadings filed by the Bank's counsel on March 19, 1993, contained several factual inaccuracies. The Bank's witnesses testified that these inaccuracies were unintentional and were due to the hurried nature in which the pleadings were drafted in order to file them that day. After the suit was filed, a circuit court judge issued a writ of attachment which was subsequently served on the Bank. The Bank had set-off some $125,000 in Empire's checking account to pay Note 1, and the remainder of the funds in the account were surrendered to the sheriff pursuant to the writ of attachment.

On Monday, March 22, 1993, Brush received a letter from Bertelson advising him of the set-off that had taken place on March 19th. Later that day, Brush met with Bertelson and Farmer at the office of the Bank's attorneys. No agreement was reached that allayed the Bank's concerns regarding Brush's efforts

to resolve the IRS liens in a manner that would not jeopardize repayment of the loans or the Bank's collateral position. Brush was then served with the summons and complaint in the Bank's collection action. The Bank, however, agreed to give Respondents time to pay-off the remaining notes before moving forward with further collection efforts, and it also agreed to honor checks written on the now empty checking account so long as Respondents made deposits at the end of each day to cover the processed checks.

Note 1 had been fully paid by the March 19th set-off of funds from Empire's checking account. Approximately two weeks later, Respondents paid Note 2 and Note 4 in full, and the Bank agreed to leave Note 3 in effect. The Bank then dismissed its lawsuit. The Bank's attorney testified that he originally requested Brush to pay the Bank's attorneys' fees as a condition of the Bank dismissing the lawsuit. Brush objected to paying the fees, and Farmer then instructed counsel to "just waive the attorneys' fees" if that was "what this was going to take to get him to pay the other loans off."

On April 7, 1993, the IRS levied on accounts owed to Empire by twenty-three of its customers. Respondents claimed that, as a result of the Bank's actions in calling the notes, Empire was unable to pay the IRS as soon as Respondents had hoped, and the corporation was, therefore, forced to file bankruptcy in mid-April, 1993. Before the bankruptcy stay was in effect, the IRS had seized some $450,000 of Empire's accounts receivable. The bankruptcy proceedings were subsequently dismissed; Empire Screen Printing, Inc., was re-established; and Respondents ultimately resolved all of their outstanding federal and state tax delinquencies.

Respondents commenced the present litigation in August 1993, several months after the Bank had dismissed its lawsuit to collect the notes. They claimed damages on several theories arising out of the Bank's conduct in March 1993. The case was tried to a jury. At the close of Respondents' case, the trial court dismissed for insufficiency of evidence Respondents' claims for misrepresentation and intentional infliction of emotional distress. At the close of all evidence, the trial court directed a verdict in favor of the Bank on the remaining claims for breach of contract and breach of the duty of good faith and fair dealing. No questions were submitted to the jury for a verdict.

The Bank subsequently filed a motion for recovery of its actual attorneys' fees and costs. It had not, however, counterclaimed for actual attorneys' fees or raised the issue prior to trial. Respondents opposed the motion for actual attorneys' fees and moved for a new trial, asserting that the trial court erred in dismissing their various claims. They also moved for relief from judgment and for discovery sanctions grounded on alleged misrepresentations by the Bank's counsel regarding a trial exhibit.

The trial court denied all three motions. The Bank appeals the court's order denying its motion for actual attorneys' fees. Respondents cross-appeal the trial court's dismissal of their misrepresentation and intentional infliction of emotional distress claims, the directed verdict in favor of the Bank on the good faith and fair dealing claim, and the denial of their motions for relief from judgment and for a new trial.[2]

[2] The trial court also directed a verdict against Respondents on their breach of contract claim. Respondents do not address the disposition of that claim in their cross-appeal.

ANALYSIS

If Respondents were to prevail on any of their claims of error, we would not necessarily need to address the denial of the Bank's request for actual attorneys' fees. For this reason, and for ease in presentation, we analyze below the issues raised by the appeal and cross-appeal in the order in which the issues arose in the trial court.

a. Dismissal of Respondents' Misrepresentation Claims

A trial court may grant a motion to dismiss at the close of a plaintiff's case only when "'it finds, as a matter of law, that no jury could disagree on the proper facts or the inferences to be drawn therefrom,'" and no credible evidence exists to support a verdict for the plaintiff. ***American Family Mut. Ins. Co. v. Dobrzynski,*** 88 Wis.2d 617, 624-25, 277 N.W.2d 749, 752 (1979) (quoted source omitted); *see* § 805.14(1) and (3), STATS. Owing to a trial court's better position from which to decide the weight and relevance of testimony, appellate courts "'must also give substantial deference to the trial court's better ability to assess the evidence.'" ***Weiss v. United Fire and Cas. Co.,*** 197 Wis.2d 365, 388-89, 541 N.W.2d 753, 761 (1995) (quoting ***James v. Heintz,*** 165 Wis.2d 572, 577, 478 N.W.2d 31, 33 (Ct. App. 1991)). When considering the appropriateness of the trial court's action:

> [T]his court must view the evidence in the light most favorable to the [party against whom the motion is made]. However, this court has held that it will not reverse a trial court's ruling on a motion for dismissal (nonsuit) unless such ruling is clearly wrong.

Olfe v. Gordon, 93 Wis.2d 173, 185-86, 286 N.W.2d 573, 579 (1980) (citation omitted); *see* § 805.14(1).

In order to prevail on a claim for misrepresentation, a plaintiff must prove the following elements by clear and convincing evidence: (1) the defendant made a representation of fact; (2) such representation was untrue; (3) the defendant made the representation knowing it was untrue or recklessly without caring whether it was true or false; (4) the representation was made with the intent to deceive and to induce plaintiff to act upon it to the plaintiff's pecuniary damage; and (5) the plaintiffs believed such representation to be true and reasonably relied on it to their damage. WIS J I–CIVIL 2401; *see* ***Lundin v. Shimanski,*** 124 Wis.2d 175, 184, 368 N.W.2d 676, 680-81 (1985). An unfulfilled promise will not support a claim for misrepresentation unless it can be shown, by clear and convincing evidence, that the person making the promise had no intention of actually performing at the time the promise was made. ***Consolidated Papers, Inc. v. Dorr-Oliver, Inc.,*** 153 Wis.2d 589, 594-95, 451 N.W.2d 456, 459 (Ct. App. 1989) (citing ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.,*** 150 Wis.2d 80, 87, 440 N.W.2d 825, 827 (Ct. App. 1989)).

When deciding the Bank's motion to dismiss, the trial court accepted as true Brush's testimony that Farmer promised on March 18th not to call the notes before meeting again with Brush. We do likewise. The trial court concluded that, even if the promise was made, no credible evidence had been presented to support the remaining elements of Respondents' misrepresentation claims, stating "the jury could not find to the requisite standard by clear, satisfactory, and convincing evidence that the elements of those claims have been proven." We agree.

After reviewing the evidence in the light most favorable to the Respondents, we conclude that the trial court was not clearly wrong in dismissing Respondents' misrepresentation claim because there was no credible evidence that

Farmer had decided to call the notes and commence a collection action at the time of his meeting with Brush on March 18th. Respondents offered no evidence to refute testimony by Farmer and others that those decisions were made the following day during the meeting between the Bank's representatives, Mr. Gasterland from Coulee State Bank, and the attorneys for both banks.

Respondents assert, however, that there was sufficient evidence from which the jury could have inferred that Farmer had no intention to perform the promise he made on March 18th. Their theory is that Farmer purposely misled Brush in order to encourage Respondents to keep depositing funds in the Empire checking account at the Bank, which was not required by the terms of the notes. By lulling Brush into a false sense of security, the Bank could thus maximize the amount it would seize on the 19th. In support of this theory, Respondents assert that the evidence showed that the Bank performed the set-off before 3:00 p.m. on March 19th, which was prior to the conclusion of the meeting between the bankers and their attorneys in which the decision to sue and set-off was made. Respondents argue that this "suggests that Farmer was acting on the basis of a personal agenda which he established on March 18"; that Farmer, who owned more than 50% of the stock of the Bank, had both a personal and professional motive to misrepresent his intentions; and that the jury could have disbelieved the subsequent testimony from the Bank's attorney that he assembled fifty-six pages of documents and filed them with the court between the time the meeting ended and 5:00 p.m. that same day.

In order to accept Respondents' theory, however, jurors would have had to engage in considerable speculation. There was credible and unrefuted evidence establishing that the set-off transaction in question was not computer-generated, but was entered manually, and thus, it did not have to be completed by

3:00 p.m. as are transactions accomplished electronically through the federal reserve clearing house. In fact, the banking document which memorialized the set-off specifically references the case number of the lawsuit filed against Brush on the 19th, which was not available until the Bank filed the lawsuit just before 5:00 p.m. on the 19th. In short, nothing in the record refutes Farmer's testimony during his adverse examination by Respondents that the set-off was performed late in the day or in the early evening of March 19th, following the decisions made during the meeting earlier that day.

Respondents also cite ***Ma v. Community Bank,*** 494 F.Supp 252 (E.D. Wis. 1980), *aff'd in part and rev'd in part on other grounds,* 686 F.2d 459 (7th Cir. 1982), in support of their claim that, if Farmer did not knowingly misstate the Bank's intentions on March 18th, he at least acted with reckless disregard of certain facts when he told Brush the Bank would not call Respondents' notes. Respondents' claim here is that Farmer created the impression that he had the authority to make the decision when he promised not to call the Empire notes, when in fact, Gasterland and Coulee State Bank needed to be consulted prior to giving such assurances. In ***Ma,*** a bank teller informed a depositor that if a savings certificate of deposit (SCD) was lost or stolen, the bank would issue the depositor a new one. ***Id.*** at 254. Three of the depositor's SCDs were subsequently stolen and the bank refused to replace them. ***Id***. at 254-55. At trial, the teller testified that, when he made the representation regarding the SCDs to the depositor, he had no idea about what would happen if an SCD was lost or stolen. ***Id***. at 255. The court found that the statement to the depositor was made in reckless disregard of the truth and it was therefore, a false representation made with the intent to defraud. ***Id***. at 259. Respondents argue that like the teller in

Ma, Farmer led Brush to believe that Farmer had special knowledge of facts that would justify the expectations he was raising, when in fact he did not.

The chief problem with this argument is that, even if there was evidence from which jurors could infer that Farmer spoke in reckless disregard of the fact that a decision on the notes was not solely his to make, Respondents did not meet their burden to show that they acted in some way in justifiable reliance on Farmer's statement, and thereby incurred a loss. *See* ***id.*** at 259. Had Farmer not made the statement attributed to him on March 18th, what would Respondents have done differently over the next several days, and how were they harmed by their claimed reliance on the statements? The record is devoid of evidence that Respondents acted in some specific way between March 18th and March 22nd, to their detriment in reliance on the statements. To the contrary, the evidence strongly suggests that Respondents' circumstances would have been no different on March 22nd, when they first learned of the Bank's decision to commence collection efforts, than if the March 18th meeting had never taken place. It is undisputed that Empire opened a new account at a different bank on March 18th and began depositing corporate receipts there the same day; that even though suit was filed on March 19th, the Bank agreed to give Empire sufficient time to arrange for payment of the notes before it proceeded against other collateral; and that arrangements were made to allow checks on the now-depleted checking account to be covered without bouncing.

In short, to the extent that Respondents established that they had suffered harm on account of the Bank's conduct in March 1993,[3] that harm was occasioned by decisions made and actions taken on March 19th, not by anything that was said on March 18th. There was no credible evidence to show that Farmer intentionally misled the Respondents on March 18th, and even if a promise was recklessly made that day, Respondents offered no evidence that they relied on it to their detriment. The trial court was not clearly wrong in dismissing the Respondents' misrepresentation claims at the close of their case.

(b) Dismissal of Respondents' Claim for Intentional Infliction of Emotional Distress

The trial court also dismissed Brush's claim for intentional infliction of emotional distress at the close of Respondents' case. The court concluded that Respondents had not provided sufficient clear and convincing evidence that the Bank acted intentionally for the purpose of causing emotional distress or that the Bank's conduct toward Brush was extreme and outrageous. Respondents maintain that in so doing, the trial court was clearly wrong because it "substituted its judgment for that of the jury."

In order to prevail on the emotional distress claim, Brush was required to prove that Farmer and the Bank "acted for the purpose of causing emotional distress." WIS J I—CIVIL 2725. Whether or not one acts with such a purpose can reasonably be inferred from the extreme and outrageous nature of a

[3] The Bank argues in its brief that we may sustain the trial court's actions on all claims by concluding that the Respondents failed to present sufficient evidence that Brush or Empire suffered any damages on account of the Bank's conduct. The Bank points out that there was uncontroverted evidence introduced at trial that Empire's gross sales, profits and profit margins all increased in 1993 and following years. Because we conclude that there was insufficient evidence to establish the elements of Respondents' various claims, we do not reach the issue of whether damages were sufficiently proved.

party's conduct. ***McKissick v. Schroeder,*** 70 Wis.2d 825, 832, 235 N.W.2d 686, 690 (1975). The trial court correctly noted that this means:

> [T]he jury, must find that the average member of the community would find such conduct as a complete denial of the individual's dignity as a person. The conduct must be gross and extreme and not merely in the field of carelessness or bad manners.

See ***Alsteen v. Gehl,*** 21 Wis.2d 349, 359-60, 124 N.W.2d 312, 318 (1963). Respondents claim that the following evidence was sufficient to establish that the conduct of Farmer and the Bank was extreme and outrageous: (1) the Bank had many times the collateral it needed; (2) the Bank was not in any immediate danger of incurring a loss because it retained a first priority collateral position on Empire's accounts receivable through April 14; and (3) Farmer lied in the pleadings filed by the Bank in its collection action against Respondents.

As we discuss in more detail below, the Bank was contractually entitled to demand payment on the notes in the event of any acts of default, or if the Bank "deem[ed] itself insecure." The latter ground for acceleration of the notes requires a good faith belief that "the prospect of payment or performance is impaired." Section 401.208, STATS. We consider below whether the Respondents produced sufficient evidence to allow a jury to conclude that the Bank did not act in good faith. For present purposes, however, we conclude that the evidence cited as tending to show that the Bank acted too hastily in exercising its acceleration and collection rights under the notes and security agreements, falls far short of evidence that it acted "extremely and outrageously" toward Brush as an individual.

Furthermore, Respondents presented no evidence to refute Farmer's testimony that the errors in the complaint and affidavit filed in the Bank's collection suit were inadvertent errors occasioned by the haste with which the

documents were drafted and signed. The Bank argues, therefore, that Farmer's signing of the affidavit was thus not shown to constitute extreme and outrageous conduct, and we agree. To qualify as "extreme and outrageous," conduct must be of a variety that the "average member of the community must regard [said conduct] as being a complete denial of the plaintiff's dignity as a person." ***Alsteen,*** 21 Wis.2d at 359-60, 124 N.W.2d at 318. We conclude that the filing and signing of hastily prepared pleadings containing inadvertent errors, without more, does not constitute sufficient evidence of "extreme and outrageous" conduct to survive a motion to dismiss.

Finally, Respondents argue that the jury could have found the Bank's conduct to be a complete denial of Brush's dignity as a person because of testimony showing that, after the Bank's collection actions, some of Brush's employees "slammed" him, voicing doubts about his abilities as a businessman and losing trust in him. The trial court analyzed this argument as follows:

> You can't bootstrap elements that are required to be proven by clear, satisfactory, and convincing evidence by what the results were -- or the potential results were of conduct.
>
> There is no showing at all that, even if it's conceded that Mr. Farmer engaged in some point -- to him, some type of conduct that resulted in Mr. Brush suffering emotional distress, that that was somehow intended.
>
> It's, also -- There's no showing that the conduct, in and of itself, was extreme and outrageous. The evidence is contrary to that.

We agree. Evidence tending to show that Brush was distressed by his financial circumstances is not a substitute for evidence establishing the necessary elements of intentional infliction of emotional distress.

(c) Directed Verdict on Duty of Good Faith and Fair Dealing Claim

After the close of all evidence, the trial court concluded that Respondents had not established that the Bank breached its duty of good faith and fair dealing when it called the notes and demanded immediate payment. The court, therefore, entered a directed verdict in favor of the Bank. We will reverse the judgment directing a verdict for the Bank on Respondents' claim of breach of the duty of good faith and fair dealing only if we are convinced that the trial court was "clearly wrong." ***Foseid v. State Bank of Cross Plains,*** 197 Wis.2d 772, 784, 541 N.W.2d 203, 208 (Ct. App. 1995).

Courts are required to "view the evidence most favorably [to the party against whom the verdict was sought to be directed] because if there is any credible evidence that sustains [a] cause of action … that issue should have been presented to the jury." ***Block v. Gomez,*** 201 Wis.2d 795, 805, 549 N.W.2d 783, 787 (Ct. App. 1996); *see* § 805.14(1) and (4), STATS. A motion for a directed verdict should be granted only when the evidence "is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion." ***Liebe v. City Finance Co.,*** 98 Wis.2d 10, 18-19, 295 N.W.2d 16, 20 (Ct. App. 1980). We must, however, give the trial court "'substantial deference'" due to its better ability to assess the evidence, and we should not reverse the granting of a directed verdict motion unless the record shows the trial court to be clearly wrong. ***Leen v. The Butter Co.,*** 177 Wis.2d 150, 155, 501 N.W.2d 847, 849 (Ct. App. 1993) (quoted source omitted).

Notes 2, 3 and 4 contain the following language, known as an "insecurity clause":

> If any installment is not paid when due or if Lender deems itself insecure, the unpaid balance shall, at the option of the Lender, and without notice mature and become immediately payable.

Acceleration under an insecurity clause is authorized under § 401.208, STATS., so long as it is invoked in good faith. Specifically, § 401.208, states:

> **Option to accelerate at will.** A term providing that one party or the party's successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when the party deems himself or herself insecure" or in words of similar import shall be construed to mean the party may do so only if the party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

This court has explained that "[t]he touchstone of good faith is honesty in fact and reasonableness." ***Schaller v. Marine Nat'l Bank,*** 131 Wis.2d 389, 403, 388 N.W.2d 645, 651 (Ct. App. 1986). However, as the trial court noted in its decision to direct a verdict, we have also stated:

> Wisconsin law does recognize that "[e]very contract implies good faith and fair dealing between the parties to it, and a duty of cooperation on the part of both parties." But where, as here, a contracting party complains of acts of the other party which are specifically authorized in their agreement, we do not see how there can be any breach of the covenant of good faith. Indeed, it would be a contradiction in terms to characterize an act contemplated by the plain language of the parties' contract as a "bad faith" breach of that contract.

Super Valu Stores, Inc. v. D-Mart Food Stores, Inc., 146 Wis.2d 568, 577, 431 N.W.2d 721, 726 (Ct. App. 1988) (citation and quoted source omitted).

As of March 19, 1993, Respondents owed the Bank $416,000, not including the amount due on Note 5, which is not involved in this litigation. The parties dispute what the "liquidation value" of the Bank's collateral was at that time. The Bank claims the evidence establishes that the liquidation value of the collateral securing Notes 2 and 4 was approximately $1 million dollars. Respondents, however, claim to have established that there was more than $12

million of collateral securing the debt which, according to the Bank's own estimates, would produce over $2 million in a liquidation setting. For the purpose of this analysis, we accept that there was sufficient evidence for a jury to conclude that the $2 million collateral liquidation figure was correct.

On March 4, 1993, the Bank became aware that the IRS had filed liens totaling approximately $800,000, against Respondents. There was some dispute and considerable confusion in the testimony regarding the precise effect these liens would have on the Bank's priority position with respect to Empire's accounts receivable from March 4th forward. Again, we accept Respondents' contention that the evidence could be interpreted as showing that the Bank would have retained a first priority position on accounts receivable collected through approximately April 14th. Additionally, the Bank had first priority on all accounts receivable which had been collected prior to March 4, 1993, Empire's inventory, real estate on Note 5 (not called by the Bank), and second liens on other collateral. In short, Respondents claim the evidence shows that the Bank was abundantly secured, and the jury could thus have determined that the Bank did not act in good faith when it deemed itself insecure on Notes 2 and 4.

The evidence at trial also established, however, that as of March 19, 1993, Respondents were in serious default in payment of federal and state taxes, and liens had been filed by both taxing authorities. Respondents' own expert testified that by March 19, 1993, the Bank's security in accounts receivable had probably been impaired by some $600,000 because of the filing of the IRS liens. Respondents also acknowledged at trial that they had opened a checking account at a new bank, into which they were then depositing proceeds from accounts receivable, without informing the Bank of their action or intentions. Additionally,

the legal ownership of various items of collateral had been placed in question by the creation of the numerous trusts and the asset transfers.

It was upon these facts that the trial court entered the directed verdict in the Bank's favor. We conclude that the trial court was not clearly wrong in determining that, because there was undisputed evidence that several events of default had occurred, a jury could not properly find that the Bank had not acted in good faith when it took the actions it did to accelerate Notes 2, 3 and 4 on March 19, 1993.

Respondents also claim, however, that the Bank failed to act in good faith when it offset the checking account to satisfy Note 1 instead of renewing it. Respondents presented evidence that the note had been renewed at least twice before, and that they believed that Note 1 was being renewed on March 18, 1993. Respondents argue that, based on these facts, a jury could have found the Bank was neither "honest in fact" nor reasonable when it claimed the note was past due on March 19th and seized over $125,000 from Respondents' account to satisfy it. This court has previously held that past renewals of a debtor's note, without more, do not support a debtor's claim that the note was renewed. ***Southern Wis. Cattle Credit Co. v. Lemkau,*** 140 Wis.2d 830, 840, 412 N.W.2d 159, 163 (Ct. App. 1987). Note 1, by its express terms, was due in full on March 18, 1993; it contained no provisions for future renewals; and it granted the Bank the right to set-off deposit accounts after "an event of default, without notice or demand." Thus, as with the Bank's actions regarding Notes 2, 3, and 4, the actions it took on Note 1 were "specifically authorized in the[] agreement, [and] we do not see how there can be any breach of the covenant of good faith." ***Super Valu Stores***, 146 Wis.2d at 577, 431 N.W.2d at 726.

Finally, Respondents argue that their good faith claim should have gone to the jury because the Bank had either waived all defaults of which it was aware on March 18th, or that it should be estopped from asserting them because of Farmer's statements at the March 18th meeting with Brush. In moving for a directed verdict, the Bank cited five acts by Respondents as justification for the actions it took on March 19, 1993: (1) failure to keep collateral free from liens; (2) failure to pay all lawful taxes due; (3) failure to pay Note 1 when due; (4) the transfer of proceeds from Empire Screen Printing, Inc., to Empire Management Trust; and (5) Empire Screen Printing, Inc.'s ceasing to exist. Respondents acknowledge that some of these acts were defaults under the notes and GBSAs then in effect, but they claim that any defaults were waived when Doug Farmer, being aware of the defaults, promised on March 18th that he would not call the notes. As we have noted, Farmer and Bertelson denied making such a promise to Respondents, but again, this court must view the evidence in a light most favorable to Respondents. ***Olfe,*** 93 Wis.2d at 185-86***,*** 286 N.W.2d. at 579. Therefore, for purposes of this analysis, we accept as true that Farmer, on behalf of the Bank, waived any acts of default of which he was aware when he met with Brush on March 18, 1993.

Wisconsin courts recognize the doctrine of waiver in contract cases. *See* ***Hanz Trucking, Inc. v. Harris Bros. Co.,*** 29 Wis.2d 254, 264-65, 138 N.W.2d 238, 244 (1965); ***Christensen v. Equity Co-op. Livestock Sale Ass'n,*** 134 Wis.2d 300, 303-05, 396 N.W.2d 762, 763-64 (Ct. App. 1986). The ***Christensen*** court defined waiver as the "voluntary and intentional relinquishment of a known right." ***Id***. at 303, 396 N.W.2d at 763. To show waiver, however, it is necessary that Respondents establish that:

> [T]he person against whom the waiver is asserted [(the Bank)] ha[s at the time] knowledge, either actual or

> constructive, of the existence of [its] rights or the facts upon which [it] depend[ed]. Waiver cannot be established by a consent given under a mistake of fact.

State v. Mudgett, 99 Wis.2d 525, 530-31, 299 N.W.2d 621, 625 (Ct. App. 1980) (citing ***Davies v. J.D. Wilson Co.,*** 1 Wis.2d 443, 467, 85 N.W.2d 459, 471 (1957)).

New facts regarding the Empire loan accounts came to light the very next day, March 19th, when the Bank became aware of the following facts, as summarized by the trial court in its bench decision:

> [T]hat the amount in the account that was in the [B]ank had been drawn down and, in fact, as it turned out, were transferred to a different bank account in a different bank.
>
> And [the Bank was] also informed of an additional $100,000.00 tax lien, state tax lien. The state tax lien, in and of itself, is yet another act of specific default.

We acknowledge that Empire's transfer of deposits to a different bank did not violate any specific provisions of the notes or GBSAs. But the fact of the markedly declining checking account balance, together with evidence of a previously unknown default, the state tax lien, were certainly material to any decision to forego immediate collection activities on the Empire loans. The trial court was thus not clearly wrong when it determined that these new and material facts, of which the Bank was unaware on March 18th, negated any waiver given that day.

Finally, Respondents contend that the Bank was "estopped" from taking collection actions without first notifying Respondents after the initial waiver occurred. "While the words 'waiver' and 'estoppel' are often used interchangeably, they represent distinct but related doctrines." ***Milas v. The Labor Ass'n of Wis., Inc.,*** 214 Wis.2d 1, 9, 571 N.W.2d 656, 659 (1997) To invoke

equitable estoppel, Respondents must establish that the following four elements exist: (1) action or non-action, (2) by the party against whom estoppel is asserted, (3) which induces reasonable reliance by the other party, and (4) which is to that other party's detriment. ***DOR v. Moebius Printing Co.,*** 89 Wis.2d 610, 634, 279 N.W.2d 213, 223-24 (1979). We acknowledge that the doctrine of equitable estoppel can preclude the assertion of rights under a contract. ***Gabriel v. Gabriel,*** 57 Wis.2d 424, 428, 204 N.W.2d 494, 496 (1973). However, as we have discussed with regard to the misrepresentation claim, Respondents' actions on and after March 18th were not indicative of any reliance on a waiver by Farmer. The Respondents, after the meeting with Farmer, immediately opened a new account at a different bank and began depositing funds there. Respondents did not establish at trial that they did or failed to do anything specific between March 18th and 22nd on account of what they claim they were told on March 18th, and thus, there can be no estoppel.

In summary, the Respondents argue in essence that the Bank gave them a "clean slate" on March 18th, and that it could not, in good faith, have deemed itself insecure the next day as it alleged in the collection suit complaint. We reject this notion. The Bank was not required to erase all knowledge of the acts of default that had occurred prior to March 18th, even if it had chosen to forego collection actions as of that date. Given the Bank's knowledge of those acts, together with the new information it gained on March 19th, "a reasonable and impartial jury properly instructed could reach but one conclusion," ***Liebe,*** 98 Wis.2d at 18-19, 295 N.W.2d at 20, and that is that the Bank "in good faith believe[d] that the prospect of payment or performance [by Empire was] impaired." Section 401.208, STATS. We cannot, therefore, conclude that the trial court was "clearly wrong" in directing a verdict for the Bank.

(d) Motion for Relief from Judgment

We will not reverse a trial court's order denying a motion for relief from judgment "unless there has been a clear abuse of discretion." ***Shuput v. Lauer,*** 109 Wis.2d 164, 177, 325 N.W.2d 321, 328 (1982). If there is exists "'a reasonable basis for the trial court's determination[,]'" ***Hedtcke v. Sentry Ins. Co.,*** 109 Wis.2d 461, 471, 326 N.W.2d 727, 732 (1982) (quoted source omitted), we will affirm a trial court's exercise of discretion where the court has undertaken "'a reasonable inquiry and examination of the facts as the basis of its decision' and has made a 'reasoned application of the appropriate legal standard to the relevant facts in the case.'" ***Brown v. Mosser Lee Co.,*** 164 Wis.2d 612, 617, 476 N.W.2d 294, 296 (Ct. App. 1991) (quoted source omitted). It is not necessary for this court to agree with the trial court's exercise of discretion, and moreover, we generally "look for reasons to sustain a discretionary determination." ***Prahl v. Brosamle,*** 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987).

During the second day of trial, Dirk Gasterland, president of Coulee State Bank, was asked to identify and describe Exhibit 184, an excerpt from a credit bureau report which showed that, in addition to the federal tax liens, almost $100,000 in state tax liens had been filed against Brush, his wife, and Empire. The exhibit also indicated that it had been faxed to Gasterland during his March 19th meeting with officers of the Bank and their attorneys. The Bank acknowledges that this document "influenced the discussion and decision made by the group on that day," even though the complaint in the collection suit filed March 19th against Respondents makes no mention of state tax liens.

When the Bank's counsel began to question Gasterland about Exhibit 184, Respondents objected on the ground that the document had not been

produced during discovery. The Bank's counsel stated that the document had been among documents produced by Coulee State Bank during discovery, and Respondents' counsel accepted this statement. The court then received Exhibit 184 into evidence. After the trial was over, however, Respondents learned that Exhibit 184 had not been produced by any party during discovery even though it was covered by their discovery requests. It is undisputed that the Bank's counsel first saw the document a few days before trial during a trial preparation session with the attorney who had prepared and filed the earlier collection suit against Respondents.

Respondents assert, correctly, that the Bank's newly acquired knowledge of the state tax liens on March 19th proved to be a critical factor in the trial court's decision to direct a verdict against Respondents on their breach of good faith and fair dealing claim. Since Respondents did not have knowledge of Exhibit 184 prior to trial, they argue that they should be granted relief from the judgment under § 806.07(1)(a) and (c), STATS.[4] The trial court, however, determined that Bank's counsel's assumption that Exhibit 184 had been produced in discovery by Coulee State Bank was "appropriate." The trial court explained its decision as follows:

> Certainly the document was significant, but I think under all of the circumstances there is nothing in the conduct of [Bank's counsel] or his client that would require the Court to grant a new trial on this basis. I think it would be, I think [Bank's counsel] used the term, unjust to the [Bank].

[4] Section 806.07(1), STATS., provides that a "court may relieve a party … from a judgment" for various reasons, including "surprise," par. (a), and "[f]raud, misrepresentation, or other misconduct of an adverse party," par. (c).

We conclude that the trial court undertook a reasonable inquiry into the matter and properly exercised its discretion. Respondents have not explained in their brief how they were prejudiced by non-discovery of the exhibit prior to trial—that is, how they would have conducted the trial any differently had they known of the exhibit. There is also no evidence in the record to refute the trial court's finding that Exhibit 184 was not intentionally withheld. Respondents' motions for relief from judgment and for a new trial based on grounds of "surprise" or "misconduct of an adverse party" was properly denied by the trial court. *See* § 806.07(1)(a) and (c), STATS.

(e) Bank's Motion for Recovery of Actual Attorneys' Fees

Finally, having concluded above that the judgment entered in favor of the Bank should not be disturbed, we now address the Bank's appeal of the trial court's order denying its request to recover actual attorneys' fees from Respondents. Wisconsin follows the "American Rule," which provides that parties are generally responsible for their own attorneys' fees. ***Hunzinger Constr. Co. v. Granite Resources Corp.,*** 196 Wis.2d 327, 338, 538 N.W.2d 804, 809 (Ct. App. 1995). Under the American Rule, attorneys' fees may not be awarded unless authorized by statute or by a contract between the parties. ***Id***. Since there is no statutory obligation for the losing party to pay attorneys' fees on the present facts, the issue is purely a contractual one. The interpretation of a contract is a question of law which we review de novo. ***Rock Lake Estates Unit Owners Ass'n v. Lake Mills,*** 195 Wis.2d 348, 355, 536 N.W.2d 415, 417-18 (Ct. App. 1995).

The contracts on which the Bank relies to support its claim for fees are the promissory notes executed by the Respondents in favor of the Bank. The Bank asserts that the notes "[p]lainly . . . contemplate[] that the makers' obligation

to pay attorneys' fees and costs do not end at the moment the notes are paid off." Notes 2 and 4 specifically provide:

> All Makers, indorsers, sureties, and guarantors agree to pay all costs of collection before and after judgment, including reasonable attorneys' fees ....

The Bank would have us interpret the phrase "costs of collection" to include the attorneys' fees it incurred in defending this action commenced by the Respondents. The Bank claims that these attorneys' fees "directly resulted from Park Bank's efforts to collect on the notes" and that, therefore, the attorneys' fees were "costs of collection" even though "unanticipated and indirect and beyond the normal administrative costs of collecting on a promissory note." Thus, the Bank's rationale is that "but for Park Bank's lawful efforts of collection, the [present] lawsuit would never have been filed and these attorneys' fees would not have been incurred."

We reject this argument and concur with Respondents that "[t]he fees incurred by the Bank in defending against [Respondents'] claims were not costs of collection because there was nothing to collect." The Bank had already successfully collected the notes from Respondents when it incurred the attorneys' fees at issue. The fact that Respondents' present lawsuit was factually related to the Bank's prior collection efforts does not convert the fees incurred by the Bank in defending this action into "costs of collection." The notes permit recovery of the Bank's costs of collection, not all direct and indirect costs arising from all disputes between the parties. We "will not construe an obligation to pay attorneys' fees contrary to the American Rule unless the contract provision clearly and unambiguously so provides," ***Hunzinger,*** 196 Wis.2d at 340, 538 N.W.2d at 809. The attorneys' fees provisions of the notes simply do not "clearly and unambiguously" encompass the Bank's fees in defending the present litigation.

The Bank also argues that it is entitled to recover its actual attorneys' fees and costs because of the following language contained in Notes 1 and 3:

> All Makers, indorsers, sureties, and guarantors agree to pay all costs of collection before and after judgment, including reasonable attorneys' fees *(including those incurred in successful defense or settlement of any counterclaim brought by Maker* or incident to any action or proceeding involving Maker brought pursuant to the Federal Bankruptcy Code) ....

(Emphasis added.) The Bank asserts that the present litigation, commenced by Respondents, should be considered a counterclaim. In support of its argument, the Bank cites a definition of counterclaim from Black's Law Dictionary, and FED. R. CIV. P. 13(a), which would require Respondents to have filed their present claims in the Bank's collection lawsuit or have them barred.

We reject this argument as well. Section 802.07(1), STATS., provides that "[a] *defendant* may counterclaim any claim which the *defendant* has against a *plaintiff*." (Emphasis added.) The language strongly implies that a counterclaim is a claim raised by a defendant in an action commenced by a plaintiff, not a separate and subsequent lawsuit brought against a former plaintiff by a former defendant, which is what we have here. The language of the notes does not call for the payment of attorneys' fees incurred in the defense of subsequent actions commenced by the maker of the note. "'We cannot ignore the draftsman's failure to use an obvious term, especially where it is the draftsman who is urging a tenuous interpretation of a term in order to make it applicable to a situation that would clearly have been covered if the obvious term had been chosen.'" ***Hunzinger,*** 196 Wis.2d at 340, 538 N.W.2d at 809 (quoted source omitted). Because Respondent's complaint in the present action is not a counterclaim, we again conclude that the language of Notes 2 and 3 cannot be read

to establish the Bank's contractual right to recover its actual attorneys' fees in defending this lawsuit.[5]

CONCLUSION

The trial court's dismissal of Respondents' claims for misrepresentation and intentional infliction of emotional distress, and its direction of a verdict in favor of the Bank on the breach of good faith and fair dealing claim, were not clearly wrong because for each claim, Respondents produced insufficient evidence to establish one or more required elements. The trial court also did not erroneously exercise its discretion in denying Respondents' motion for relief from judgment. Finally, we conclude that the trial court did not err in denying the Bank's motion for actual attorneys' fees. Accordingly, we affirm the judgment and orders appealed from.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.

[5] Since we have concluded that the Bank has no contractual right to recover its actual attorneys' fees in this action, we need not consider whether the Bank waived any claim to recover its fees by failing to plead it.