COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-0126

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

WATERLOO & SIOUX FALLS, LTD., P/K/A BADGER ASSOCIATES; ST. PAUL LIMITED PARTNERSHIP, P/K/A EXEL INN OF ST. PAUL; GRAND RAPIDS LIMITED PARTNERSHIP, P/K/A GRAND RAPIDS ASSOCIATES; AND MILWAUKEE SOUTH LIMITED PARTNERSHIP, P/K/A EXEL INN OF MILWAUKEE SOUTH,

PLAINTIFFS-APPELLANTS-
CROSS RESPONDENTS,

V.

NATIONAL GUARDIAN LIFE INSURANCE COMPANY,

DEFENDANT-RESPONDENT-
CROSS APPELLANT.

APPEAL and CROSS-APPEAL from an order[1] of the circuit court for Dane County: MICHAEL B. TORPHY, Judge. *Affirmed*.

Before Eich, C.J., Vergeront and Deininger, JJ.

EICH, C.J. National Guardian Life Insurance Company (NGL) held eight mortgages on properties owned by several interrelated partnerships, collectively known as Waterloo. Waterloo was refinancing the debts, and Friday, November 19, 1993, was established as the payoff date. On November 19, NGL informed Waterloo that payment would be due by 2:00 p.m. Waterloo did not pay the mortgages until Monday, November 22, and thus became liable for additional interest. Waterloo sued, claiming that NGL's action in setting a 2:00 p.m. deadline was improper. And, because NGL had failed to timely provide satisfactions for three of the mortgages, Waterloo also asked the court to impose the monetary penalties set forth in § 706.05(10), STATS.[2]

The trial court ruled that NGL's imposition of the 2:00 p.m. deadline was permissible and dismissed Waterloo's first cause of action claiming that NGL's action in that regard constituted a breach of the mortgage contracts. The court also concluded that NGL failed to comply with § 706.05(10), STATS., and awarded $5100 to Waterloo, representing seventeen days' penalty for each of the

[1] There is no formal order or judgment in the record, only a document signed by the trial judge and entitled "Decision After Trial," which announces the court's decision and concludes with the notation "It is so ordered." Proposed findings of fact, conclusions of law and judgment were never signed by the trial court or entered by the clerk of circuit court. Rather than delaying the case further, we will construe the court's "Decision After Trial" as a final order, inasmuch as it does, by its terms, finally dispose of the case.

[2] The statute provides that, unless otherwise requested, mortgage holders must execute and record satisfactions within thirty days of the payoff date or, when requested, within seven days. Violation of the statute subjects the mortgagee to "penalty damages" of $100 per day, up to a total of $2000, plus "actual damages."

three mortgages. The court denied additional damages, concluding that Waterloo did not incur additional legal fees in obtaining the missing satisfactions. Waterloo appeals the dismissal of its contract claim and NGL cross-appeals the statutory penalty award. We agree with the trial court's decision in both respects and affirm the order.

The facts are not in dispute.[3] Waterloo owns motel properties throughout the Midwest. Five of them, one in Wisconsin and four in other Midwest states, were subject to a total of eight mortgages held by NGL. As indicated, the mortgages were scheduled to be paid in full on Friday, November 19, 1993. At some time on that date, NGL informed Waterloo that it would have to receive payment by bank wire no later than 2:00 p.m. in order for the payment to be credited on that date. Payments made after that time would not be credited until the following business day, Monday, November 22, thus accruing additional per-diem interest costs. A prior payoff statement from NGL referred only to November 19 as the due date; no mention was made of a 2:00 p.m. cutoff.

When Waterloo found it would be unable to wire funds to NGL's account before 2:00 p.m. on the 19th, one of its principals or employees contacted NGL to discuss the matter. The discussions culminated in a faxed, handwritten note from Waterloo indicating that it would wire the funds only if NGL would

[3] All of the lengthy statements of fact in Waterloo's brief are simply copied verbatim from its complaint, with occasional inserts of general, nonspecific record references. Many of these references are simply to the complaint itself, while other record citations for specific factual statements direct us to multi-page groupings—sometimes groupings of ten pages or more—as the purported source. Such short-cut briefing not only makes the briefs exceedingly difficult to read and evaluate but violates the spirit, if not the letter, of the rules of appellate procedure and is of little, if any, assistance to the reviewing court. Indeed, we have repeatedly held that arguments supported by such citations are "inadequate" and justifiably may be ignored on appeal. ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 377-78 (Ct. App. 1980).

agree not to charge any additional interest. NGL declined to provide such assurance, and Waterloo, waiting until Monday, November 22, to wire the funds, paid an additional $3,817.32 interest to satisfy the loans.

On or about November 24, Waterloo, not having received written satisfactions of the mortgages, wrote to NGL requesting that they be provided within seven days, as provided in § 706.05, STATS. On December 1, NGL executed and delivered satisfactions for five of the eight mortgages to Waterloo. Through an apparent oversight, satisfactions were not provided for three of the mortgages on properties located in Iowa and South Dakota. Several days later, without making any further contact with NGL, Waterloo brought this lawsuit. When NGL learned (for the first time) from the summons and complaint that three of the satisfactions had not been sent to Waterloo, it immediately tendered them.

I. The 2:00 P.M. Deadline

The trial court found that the establishment of cutoff times, such as NGL's 2:00 p.m. deadline, was a "standard business practice" in the mortgage industry and dismissed Waterloo's claim to recover the additional three days' interest.

The court's finding in this regard is supported by the record. A banking witness for NGL acknowledged that all banks "have some cutoff point for the receipt of funds." And when asked whether 2:00 p.m. was "a common cutoff point for the acceptance of crediting sums to one's account," he stated: "I think 2:00, 3:00, there's lots of different cutoff times. I can't say what would be a common one or a majority, but I think there were a number of institutions that

probably used a 2:00 cutoff time." And while one witness testified to the contrary, the trial court could reasonably accept NGL's evidence on the point.[4]

Waterloo correctly points out that, in order for an industry custom to be applied in a given case, the party against whom it is applied must have actually known—or had reason to know—of the custom. ***Schaeffer v. Dudarenke***, 89 Wis.2d 483, 493-94, 278 N.W.2d 844, 849 (1979). Stated another way, an industry custom, or "trade usage," will be binding on the parties to a contract where "the usage exists in such transactions and … it is generally known by persons under similar circumstances." ***Id***. (quoting RESTATEMENT OF CONTRACTS § 247 (1932)). While the trial court did not make a specific finding as to the precise extent of Waterloo's knowledge—or the overall general knowledge—of such time restrictions, it is undisputed that Waterloo, knowing in advance that November 19 was the date on which payment was to be made, did nothing to ascertain NGL's payment procedures until sometime on the payoff date. And even then, Waterloo had apparently not made final arrangements to secure and transmit the necessary funds to meet the deadline—or even to transmit the funds before the close of business on November 19. Instead, Waterloo waited until the following Monday, November 22, to make the transfer. The trial court found in this regard that "[n]o alternatives to wired payment [were] requested or presented by [Waterloo] and none [were] discussed by the parties."

Waterloo has not persuaded us that its lack of knowledge of the 2:00 p.m. cutoff prior to its telephone call to NGL on the payoff date should negate

[4] Indeed, Waterloo's own expert witness on the subject conceded that he had "heard" of 2:00 p.m. bank cutoff times.

NGL's reliance on what the trial court could properly find, on the evidence submitted, was an applicable industry custom.

Waterloo disagrees, claiming that what it did or did not do on the due date is immaterial because NGL had already "breach[ed]" the mortgage agreements by indicating that it would not accept funds after 2:00 p.m. Thus, says Waterloo, "whether [it] tendered performance properly or not … was irrelevant" because NGL's imposition of the 2:00 p.m. cutoff constituted an "anticipatory breach" of the mortgage contracts which excuses its own failure to pay on the due date.

It is true that one who "intentionally repudiates" a contractual obligation in advance cannot complain of the other party's nonperformance of his or her obligations under the contract. ***Repinski v. Clintonville Fed. Sav. & Loan Ass'n,*** 49 Wis.2d 53, 59, 181 N.W.2d 351, 354-55 (1970). We have, however, upheld the trial court's determination that NGL's 2:00 p.m. deadline is in line with established practice in the mortgage industry. Consequently, there was no "breach" on NGL's part—anticipatory or otherwise—which would excuse Waterloo's failure to pay off the mortgages in a timely fashion. Waterloo has not, in short, satisfied us that there was any error in the circuit court's decision dismissing its contract claim against NGL.

II. The Statutory Penalties

NGL argues that the circuit court's imposition of the $100-per-day penalty under §706.05(10), STATS., was invalid because the three properties on which it failed to provide satisfactions in a timely manner are located in other states, and thus the provisions of chapter 706 do not apply. It bases this argument on § 706.05(1), which states that conveyances and other instruments "affect[ing]

title to land in this state" are entitled to be recorded in the county in which the land lies. Whatever the effect of that language—and it is not at all clear on the point NGL argues—we agree with Waterloo that the parties agreed in the mortgage documents that Wisconsin law would apply to any disputes arising thereunder. The documents contain the following two provisions:

> Although the mortgages securing this loan will involve improved real estate parcels in various states, this loan is to be considered as offered, accepted and consummated in Wisconsin, and therefore governed by Wisconsin laws relating to interest, usury and foreclosure.
>
> * * * * *
>
> This note and the indebtedness evidenced thereby shall be governed by the laws of Wisconsin ….

Choice-of-law provisions such as these are generally considered valid unless they are found to be "substantively unreasonable in view of the bargaining power of the parties." ***Leasefirst v. Hartford Rexall Drugs, Inc.,*** 168 Wis.2d 83, 88, 483 N.W.2d 585, 587 (Ct. App. 1992) (citations omitted). Here, the mortgages were drafted by NGL, and we see no inequity in holding the company to the language it chose. There is no question that the three satisfactions were late, and the trial court's award of $5100 simply computes the statutory penalty.[5]

[5] Waterloo suggests in its brief that it should be awarded "costs and attorneys fees" on its penalty claim, in addition to the $5100 penalty imposed by the trial court. But it has not developed any argument as to why the trial court's ruling on the point was improper. As indicated, the trial court reasoned that because NGL provided the missing satisfactions as soon as it was notified—and, according to NGL, that fact was first made known to them when they were served with the summons and complaint—it was not necessary for Waterloo to commence an action to obtain them. Waterloo's only response is to again quote the conclusory allegations of its complaint that "[t]o assume [NGL] would have given the satisfactions upon request would have been speculation and would likely have been ignored considering how [NGL] was already mistreating the plaintiffs[']account at the time." We see no error in limiting the penalties to $5100.

By the Court.—Order affirmed.

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