COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 1998

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. 97-3688

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

METROPOLITAN LIFE INSURANCE COMPANY, A NEW YORK CORPORATION,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

JAMES WILSON ASSOCIATES, A WISCONSIN LIMITED PARTNERSHIP, DARRELL R. WILD, KEY PERSONNEL, INC., A WISCONSIN CORPORATION, FIRST NATIONWIDE BANK, A FEDERAL SAVINGS BANK, THE FIRST NATIONAL BANK OF PORTAGE, A WISCONSIN BANKING CORPORATION, BANK OF SUN PRAIRIE, A WISCONSIN BANKING CORPORATION, JWP INVESTORS, A WISCONSIN GENERAL PARTNERSHIP, JOHN C. KIRKPATRICK, ASHOK KUMAR, ALAN W. BABCOCK, THOMAS C. LALLY, ROBERT W. EDLUND, FIAZ A. CHOUDRI AND BRUCE G. FELLAND,

DEFENDANTS,

CAPITOL INDEMNITY CORPORATION, A WISCONSIN CORPORATION,

INTERESTED PARTY-APPELLANT-

CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed in part and reversed in part.*

Before Dykman, P.J., Eich and Roggensack, JJ.

DYKMAN, P.J. Capitol Indemnity Corp. (Capitol) appeals from an order denying its motion to terminate its liability for interest on a mortgage note and to terminate its liability for attorneys fees as of September 10, 1996. Capitol argues that it made a good faith tender payment on this date to satisfy Metropolitan Life Insurance Company's (Metropolitan) mortgage lien, and that any deficiency between the amount tendered and the amount owed was the result of Metropolitan's failure to provide accurate and complete figures regarding the lien amount. We conclude that because Capitol knew that this tender payment was not the full amount of the lien, Metropolitan was entitled to the additional interest and attorneys fees.

Metropolitan cross-appeals from the provision of the order compelling it to pay Capitol interest on the funds it held in a suspense account, which the court had ordered Metropolitan to apply to the mortgage note. We conclude that because Capitol has suffered no harm as a result of this bookkeeping procedure, it is not entitled to interest on those amounts. Accordingly, we affirm in part and reverse in part.

BACKGROUND

This appeal concerns an office building located at 131 West Wilson Street in Madison, Wisconsin (property). In 1973, James Wilson Associates (JWA) gave a first mortgage on the property to Metropolitan. JWA later gave a second mortgage to First Nationwide Bank. JWA defaulted on its first mortgage in 1994, and Metropolitan began foreclosure. First Nationwide cross-claimed for foreclosure of its mortgage. Metropolitan waited while First Nationwide proceeded with its foreclosure of the property.

After starting the foreclosure, Metropolitan asked the trial court to appoint a receiver to manage and operate the property. The court appointed Opitz Management, Inc. (receiver). The trial court directed the receiver to collect all rents from the property and pay Metropolitan $27,309.99 a month to be applied against JWA's note. Rents collected in excess of that amount were to be held in the receiver's account. The receiver made these payments to Metropolitan from February 1995 to August 1996. Metropolitan deposited them in a "suspense account" as an internal bookkeeping matter, allegedly to protect itself in case third parties filed suit regarding these amounts. In addition to the funds in the suspense account and the receiver's account, the Bank of Sun Prairie held rental payments from the U.S. Secret Service, a tenant of the property, in the amount of $27,455.21.[1]

[1] JWA had assigned its rights to these lease payments to the Bank of Sun Prairie. However, these assignments were subordinate to the first and second mortgages and their rent assignments. The Bank of Sun Prairie and First Nationwide Bank entered into a stipulation on November 18, 1994, which stated that the Bank of Sun Prairie would continue to collect rents from the U.S. Secret Service unless and until the trial court decided that the Bank of Sun Prairie's interest in the rental payments was inferior to the interests held by Metropolitan or First Nationwide Bank.

On July 2, 1996, Capitol purchased the property, subject to Metropolitan's lien, at a sheriff's sale. Following the confirmation of the sale on August 15, 1996, Capitol's president, George Fait, contacted Metropolitan and inquired as to the amount owed on the first mortgage. On August 23, 1996, Paul Heller, Metropolitan's Portfolio Manager, responded with a letter and the following payoff statement:

Principal Balance after 7/1/94 installment	$3,326,953.20
Interest from 7/1/94 through 6/30/95	$ 281,127.55
Interest from 7/1/95 through 6/30/96	$ 281,127.55
Interest from 7/1/96 through 8/23/96	$ 42,169.14
Late Fees	N/A
Plus: Attorney's Fees and recording costs	Unknown at this time
Less: Suspense Funds (as of 8/23/98)	$(546,199.80)
Less: Receiver's Account funds to be applied to first mortgage	Unknown at this time
Total Due on 8/23/96	$3,385,177.64

Heller concluded the letter by saying, "The per diem interest rate may be used to calculate additional daily interest. Please contact me to discuss the scheduling of a pay-off of the loan and I will provide you with wiring instructions."

Fait called Heller on August 27, 1996, stating that his firm could satisfy the note within thirty days of receiving satisfactory evidence of the principal balance of the loan. On August 29, 1996, Heller responded in a letter stating that Metropolitan had already provided Fait with payoff statements—the most recent being August 23, 1996. Heller also revised a prior statement he made in his August 23, 1996 letter in which he indicated that any funds forwarded to

Metropolitan from the receiver's account would serve to reduce the payoff amount of the loan. He wrote the following:

> It has come to my attention that the ruling stating that the receiver's Account will be paid to [Metropolitan] could potentially be appealed. Therefore, the receiver's funds will not be applied to the amount owed to [Metropolitan] until the appeal period has lapsed or any appeal is defeated. If there is an appeal which [Metropolitan] is forced to defend, any legal fees will be considered to be recoverable because the payment of the receiver's funds to [Metropolitan] ultimately benefits the property's owner.[2]

On September 3, 1996, Capitol tendered a check for $2,500,000.00 to be applied toward the mortgage note. Steven C. Karp, an attorney for Metropolitan, returned Capitol's check along with a letter stating that "Prepayment of less than the entire indebtedness is not allowed by the terms of the referenced loan."

On September 10, 1996, Fait tendered a second check for $3,177,536.00, along with a letter stating that he was unable to write a check for the exact amount, because he had not received any information from Metropolitan or its attorney as to the balance on the first mortgage. Fait stated that he was unsure how Capitol could pay off the entire amount owed when "nobody knows what the exact amount will be until the receiver renders his final Accounting and

[2] On September 9, 1996, the trial court issued an order stating "that the Receiver shall pay to the Dane County Clerk of Circuit Court all of the balance in the Receiver's Account as finally determined by the court … [and] that the Dane County Clerk of Circuit Court, upon receiving payment from the Receiver, shall pay all of the amount, except $27,455.21, to Metropolitan Life Insurance Company." The $27,455.21 amount was for the Secret Service rents that were being disputed in a separate action. The receiver filed its final accounting on September 13, 1996, indicating a fund balance of $118,301.15 in the receiver's account, and deposited this amount with the trial court. On September 16, 1996, the trial court ordered that the Secret Service lease payments, which were previously held by the Bank of Sun Prairie and then deposited with the Dane County Clerk of Circuit Court, be paid to Metropolitan.

the court makes its final decision on several matters concerning funds that rightfully should go to the first mortgagee to reduce the balance outstanding[.]"

Because Metropolitan allegedly did not provide him with information regarding the amount of Secret Service rents held by the Bank of Sun Prairie or the amount held in the receiver's account, Fait stated that he was forced to estimate these amounts when calculating Capitol's tender amount. Fait determined that $200,000 should be deducted for these amounts, resulting in a tender of $3,177,536. Fait concluded the letter by saying, "At least, this way the interest stops on that majority of the first mortgage that Capitol Indemnity is responsible for and we then will only have $200,000 plus or minus to come to an agreement on."

On September 11, 1996, Metropolitan's attorney, Steven Karp, returned the check for $3,177,536 with a letter that again stated that prepayment for less than the full amount is not permitted under the terms of the loan. Karp also disputed Fait's assertion that Metropolitan had not provided him with information on how to determine the actual balance on the mortgage. He stated that he sent Capitol a payoff statement on August 23, 1996, and other communications providing Capitol with a "reasoned explanation of the outstanding balance." Karp concluded his letter by offering the following option to Capitol regarding those amounts collected by the receiver:

> As you correctly state, the amount that may be transferred from the Receiver would reduce the indebtedness payable to [Metropolitan]. As you also know, First Nationwide Bank took the position that the Receiver funds are payable to First Nationwide Bank and First Nationwide Bank could very well appeal the order transferring the funds to [Metropolitan] when entered. Upon payment in full of [Metropolitan's] mortgage loan, without reduction of payments from the Receiver, [Metropolitan] is willing to

> assign all of its rights with respect to such Receiver monies to your company. Please contact [Metropolitan's] local counsel if you have any interest in pursuing this suggested resolution.

On September 26, 1996, Capitol filed a motion for an order that would: (1) cease the accrual of interest on the mortgage lien as of September 11, 1996; (2) apply the amounts received by Metropolitan and held in its suspense account against the lien; (3) assess interest on the funds held in the suspense account; and (4) award Capitol its actual attorneys fees and costs. This motion was amended to also request that Metropolitan be denied additional attorneys fees after it rejected Capitol's tender on September 11, 1996.

On October 23, 1997, the trial court held that the money paid by the receiver to Metropolitan should have accrued interest, because those amounts were "not applied to reduce the outstanding amount of the note as received and instead were placed in a non-interest bearing Account where they could be used by Metropolitan for their benefit." It concluded that five percent interest should be assessed from the date the funds were received to the date those amounts were applied to the payment of the mortgage.

The court denied Capitol's motion to terminate the accrual of interest and additional attorneys fees as of September 10, 1996, concluding that there were too many unresolved issues regarding the amount owed as of that date. It decided that any risk regarding an appeal of the trial court's orders should be assumed by Capitol, not Metropolitan. It also concluded that Capitol's attempt to tender less than the full amount was an attempt to re-negotiate the debt rather than a good faith tender for the amount due. Because the tender was not for the full amount of the judgment, the trial court ordered that Metropolitan was entitled to

interest, attorneys fees and costs incurred on and after the date of the attempted tender.

Capitol appeals the trial court's order that its tender offer did not stop the accrual of interest on the note. Metropolitan cross-appeals the order requiring it to pay interest on those amounts paid to it by the receiver and held in its suspense account.

STANDARD OF REVIEW

Resolution of these issues on appeal requires the application of case law to an undisputed set of facts. Therefore, the issues present questions of law that we review *de novo*. *See* ***Chang v. State Farm Mut. Auto. Ins. Co***., 182 Wis.2d 549, 560, 514 N.W.2d 399, 403 (1994).

DISCUSSION

1. *Appeal*

The first issue is whether Capitol's tender payment of September 10, 1996, should have terminated the accrual of interest on the mortgage note and terminated additional attorneys fees as of that date. Generally, in order to constitute a valid tender, the tenderer must offer all that the tenderee is entitled to, and a tender for less than the amount due is insufficient. *See generally*, ***Gause v. C.T. Management, Inc.***, 637 A.2d 434, 438 (D.C. 1994); ***Maddox v. Wright***, 489 N.E.2d 133, 137-38 (Ind. Ct. App. 1986); ***DeLashmutt v. Keller***, 602 P.2d 312, 314 (Or. Ct. App. 1979). This tender payment should also include all necessary expenses incurred or damages suffered by the creditor by reason of the default of the debtor. ***James v. Hogan***, 47 N.W.2d 847, 853 (Neb. 1951), *modified on other*

grounds, 48 N.W.2d 756 (Neb. 1951); ***Smith v. Sovereign Camp, W.O.W.***, 28 S.E.2d 808, 813 (S.C. 1944).

Capitol, however, contends that the general rule is subject to the following exception:

> The rule is without application, however, and the tender, although deficient, is held sufficient where the creditor alone knows the correct amount and fails or refuses to make disclosure to the debtor, who, acting in good faith, tenders the amount he believes to be due.

74 AM. JUR. 2D *Tender* § 22 (1974).

Capitol argues that this exception is applicable because Metropolitan "neglected or was unable or unwilling to provide" information regarding two key components that Capitol needed in order to determine the full amount owed. Those two key components were Metropolitan's attorney fees and the funds held in the receiver's account. Capitol argues that without this information, it was forced to estimate the amount that it should include in its tender payment. Capitol contends that because this estimation was made in good faith, its tender payment should have stopped the accrual of interest and attorneys fees.

There is a significant flaw in this argument.[3] The alleged exception requires that the creditor know the full amount owed. However, Metropolitan asserts in its August 23rd payoff statement that it did not know the full amount owed. In particular, it was unaware of the status of funds held in the receiver's account and the Secret Service rents held by the Bank of Sun Prairie.

[3] While we question whether this exception exists, Capitol relies upon it to substantiate its argument. Therefore, for the purpose of this appeal, we will apply the elements of the asserted exception to the facts of this case.

Metropolitan argues that it was the uncertainty over these and other amounts that also precluded it from including attorneys fees in its August 23rd payoff statement.

Capitol argues that even if Metropolitan was unaware of these amounts when it prepared the August 23rd payoff statement, it was under a duty to provide Capitol with the information as it became available. Capitol relies upon ***Laycock v. Parker***, 103 Wis. 161, 186, 79 N.W. 327, 333-34 (1899), to support its position that when a debtor requests a statement of the balance owing, and the creditor is in sole possession of that pertinent information, a creditor has an obligation to furnish a debtor with a statement of the full amount due or the relevant information to enable the debtor to calculate the amount due. Capitol argues that Metropolitan did not comply with this duty, because it never contacted Capitol as to these "unknown" amounts.

Metropolitan responds by pointing out that it was not until September 9, 1996, that the trial court ordered the payment of the receiver's funds to Metropolitan, and it was not until September 16, 1996, that the trial court concluded that Metropolitan was also entitled to the Secret Service rents. In addition, there was a possibility that these orders would be appealed, leading to further litigation and additional attorneys fees. In short, Metropolitan argues that it could not have accurately determined the full amount owed on or before September 10.[4]

[4] Since we conclude that Metropolitan was unaware of the full amount owed on its mortgage at the time the tender payment was made, we will not consider whether it "failed or refused" to provide the information. We also will not address whether Capitol acted in "good-faith" when making its tender payment.

Capitol also relies upon language in ***Johnson v. Pearson Agri-Systems, Inc.***, 119 Wis.2d 766, 350 N.W.2d 127 (1974), which holds that the court should deny interest recovery where the "withholding party has no means available to determine that the amount which he had to tender in order to prevent interest from accruing." ***Id.*** at 772, 350 N.W.2d at 130 (quoting ***Wyandott Chem. Corp. v. Royal Elec. Mfg.***, 66 Wis.2d 577, 587, 225 N.W.2d 648, 653 (1975)). Capitol asserts that because Metropolitan failed to provide it with amounts for the attorneys fees and receiver's funds, interest should no longer accrue after its September 10 payment. ***Johnson*** discussed pre-verdict interest in a tort case, a context much different from the situation we now face. Capitol fails to satisfactorily explain why it should have the use of its money, while Metropolitan should at the same time be deprived of interest for the use of its money. We conclude that ***Johnson*** is inapplicable here.

Finally, Capitol relies on the principles of equity to support its position. Capitol contends that any deficiency in payment was due to Metropolitan's failure to provide the relevant information, and that it would be inequitable to punish it for Metropolitan's failure to satisfy its obligations. Metropolitan contends that plaintiffs seeking equitable relief must come to the court with clean hands, and because Capitol has unclean hands, it should be denied equitable relief.

"For relief to be denied a plaintiff in equity under the 'clean hands' doctrine, it must be shown that the alleged conduct constituting 'unclean hands' caused the harm from which the plaintiff seeks relief." *See* ***Timm v. Portage County Drainage Dist.***, 145 Wis.2d 743 752, 429 N.W.2d 512, 516 (Ct. App. 1988) (quoting ***Security Pac. Nat. Bank v. Ginkowski***, 140 Wis.2d 332, 339, 410 N.W.2d 589, 593 (Ct. App. 1987)). "[I]t must clearly appear that the things from

which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct." *See* ***S & M Rotogravure Serv., Inc. v. Baer***, 77 Wis.2d 454, 467, 252 N.W.2d 913, 919 (1977).

While Metropolitan was unable to provide Capitol with certain critical information, it was Capitol's decision to tender partial payment causing the additional interest and attorneys fees to continue. Capitol knew that it was required to include attorneys fees in its tender offer, but it failed to do so. Nor did it tender an amount that reasonably would cover attorneys fees. We conclude that Capitol came into this matter with unclean hands, and therefore is not entitled to the equitable relief it requests.

Because we affirm the trial court's decision regarding the accrual of interest and attorneys fees, we need not discuss further Capitol's assertion that it is entitled to recover its actual attorneys fees and costs for litigating this matter.

2. *Cross-Appeal*

In its cross-appeal, Metropolitan argues that the trial court erred by ordering Metropolitan to pay interest to Capitol on the funds held in its suspense account. Because the critical facts in this case are not in dispute, this issue presents a question of law that we review *de novo*. ***Chang v. State Farm Mut. Auto. Ins. Co***., 182 Wis.2d 549, 560, 514 N.W.2d 399, 403 (1994).

In December 1994, the trial court ordered the receiver to collect rents and profits from the property. From those amounts, the receiver was to pay Metropolitan $27,309.99 every month, which Metropolitan was to apply against JWA's loan. Metropolitan received these payments from February 1995 to August 1996, and placed them in a suspense account. During this period of time, interest

continued to accrue on the principal at the rate of $23,454.45 per month. In addition, because JWA stopped making payments on the loan in September 1994, there was approximately $117,000.00 of unpaid interest that accrued between September 1994 and February 1995.

In deciding this issue, the trial court concluded that "[i]nterest should be paid because [these monthly payments of $27,309.99] were not applied to reduce the outstanding amount of the note as received and instead were placed in a non-interest bearing account where they could be used by Metropolitan for their benefit." It ordered that "[p]ayments by the receiver to the Suspense Account should accumulate interest at the legal rate of five percent from the date the funds were received to the date of the application of the Suspense Account to the payment of the mortgage." This decision entitles Capitol to a sum in excess of $20,000.00.

Metropolitan contends that Capitol has no standing to receive interest on these funds and was not harmed by Metropolitan's decision to place these payments in its suspense account. Without addressing the issue of standing, we agree that Capitol has not established how it was harmed. The receiver paid Metropolitan $27,309.99 per month, and the mortgage note required that $23,454.45 of that amount go toward the regular monthly interest on the loan, leaving $3,855.54 to be applied against the unpaid interest. These payments were made from February 1995 to August 1996. After deducting the monthly interest on the loan from these payments, there was a remaining total of around $70,000.00.

This remaining amount was insufficient to satisfy the $117,000.00 owed in back interest, and it certainly was insufficient to satisfy the over

$3 million owed on the principal balance. And because no additional principal or interest was owed on the mortgage as a result of Metropolitan's decision to place the funds in the suspense account, the total amount owed on the lien would have remained the same had Metropolitan applied the $3,855.54 every month or applied the $70,000.00 all at once. For a plaintiff to be entitled to a remedy, he or she generally needs to first establish that he or she has been harmed. Capitol has not demonstrated how it has been harmed by Metropolitan's bookkeeping procedure. We therefore reverse the trial court's decision to award interest on the amount held in the suspense account.

CONCLUSION

We affirm the trial court's a decision that Capitol's tender payment was insufficient to cease further accrual of interest, costs, and attorneys fees. We reverse the trial court's decision to award Capitol interest on the funds held in Metropolitan's Suspense Account.

By the Court—Order affirmed in part and reversed in part.

Not recommended for publication in the official reports.