COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1784 **Cir. Ct. No. 2014CV381**

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

JAMES MARCH,

PLAINTIFF-RESPONDENT,

V.

THOMAS D. LINN AND TDL MANAGEMENT COMPANY,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

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

¶1 NEUBAUER, P.J. This is a uniform commercial code (UCC) case about a secured party's need to obtain the debtor's consent, after default, to repossession of the collateral in satisfaction of the obligation. The transaction was

the sale of restaurant equipment, the assignment of a lease to the restaurant premises, along with the right to use the restaurant name. When the debtor defaulted on payments, the secured party filed suit seeking repossession of the restaurant premises and equipment. Regarding the circuit court's order that the debtor defaulted and the secured party can repossess the restaurant premises, we affirm. Regarding the repossession of the secured collateral, while the UCC allows strict foreclosure upon default, wherein the secured party can repossess the collateral in exchange for a full or partial satisfaction of the debt, such a resolution requires the debtor's consent after default. *See* WIS. STAT. § 409.620 (2013-14).[1] This requirement cannot be waived by the parties' agreement. *See* WIS. STAT. § 409.602(10). The debtor here did not consent. Therefore, we reverse the order granting summary judgment to the secured party and remand the case for further proceedings not inconsistent with this opinion.

BACKGROUND

¶2 In August 2009, James March, President of JM Restaurants, Inc., sold the operation of his Bel'Gustos restaurant, located in New Berlin, to Thomas Linn, sole owner of TDL Management Company. The parties entered into several agreements to transfer the restaurant operation, including a purchase agreement for the assets, fixtures and good will, a promissory note and security agreement, and an assignment and assumption of lease. Under the promissory note and security agreement, Linn pledged as security all of the assets that were subject to the purchase agreement. A UCC-1 financing statement was filed with the state of

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Wisconsin to perfect the security interest. The record does not reflect that the collateral was designated as fixtures on the UCC-1 financial statement filing, as would be indicated on the UCC Financing Statement Addendum Form UCC1Ad. Linn paid $50,000 down, and the promissory note was for $160,000.

¶3 Under the Promissory Note and Security Agreement, the parties, Linn (Makers) and March (Holders), agreed to the following regarding "Cross Default":

> Makers acknowledge and agree that if Makers default on the terms of this Promissory Note and Security Agreement, that Holders shall have the right to repossess the tangible assets subject to the transaction, and also to retake possession of the sub-leased premises, so that Holders may resume operation of the Bel'Gustos restaurant.

In addition, the agreement provides that upon default that is not cured, "Holders shall immediately and without notice have all rights and remedies for default provided by the Wisconsin Uniform Commercial Code and this Agreement." The agreement further specifies that "[w]hen notice of sale or disposition of the Collateral is required by law, written notice delivered at least ten days prior to such sale or disposition shall be deemed reasonable."

¶4 Linn quit paying on the note in November 2013. In February 2014, March filed suit, asking for an order allowing him to repossess the restaurant assets and directing Linn to vacate the premises and a judgment against Linn in the amount of $54,586.29, the outstanding balance on the promissory note, "less any amounts received from any sale of the assets pledged as security." March moved for summary judgment, stating that Linn was in default under the promissory note and the sublease. The circuit court granted March summary judgment, finding that March "has elected to pursue the remedy set forth in the Promissory Note and

Security Agreement whereby Plaintiff would repossess the restaurant along with the fixtures and the equipment in the event of a default." The circuit court found that Linn was in default and ordered Linn to turn over the keys to the restaurant to March and allow him to take possession of the premises and all tangible assets. Linn appeals, arguing that there was a genuine dispute of material fact regarding the default, which should have precluded summary judgment; March's repossession was in violation of the UCC; and the agreement's repossession remedies are ambiguous and should be construed in Linn's favor.

DISCUSSION

Standard of Review

¶5 We review the circuit court's decision on summary judgment de novo, using the same methodology as the circuit court. ***Kraenzler v. Brace***, 2009 WI App 131, ¶8, 321 Wis. 2d 265, 773 N.W.2d 481; *see also* WIS. STAT. § 802.08(2). The interpretation and application of the statutes that make up the UCC are questions of law that we review without deference to the circuit court. ***Kraenzler***, 321 Wis. 2d 265, ¶8.

No Genuine Dispute of Material Fact That Linn Defaulted

¶6 Linn's first argument is that the circuit court should not have granted summary judgment because there was a genuine dispute of material fact. Linn testified at his deposition that March agreed, in a November 2013 phone conversation, to allow him to postpone "a payment or two," but that it was "never clearly defined exactly how many … payments." Linn also testified that there was no written correspondence or further discussion about delayed payment until Linn received the summons and complaint in this lawsuit. March avers in an affidavit

that he told Linn he would defer the November payment as long as Linn made the December payment. It is undisputed that Linn did not make any payment after the October 2013 payment.

¶7 There are no facts to support Linn's contention that the referenced conversation with March amounted to an agreement for an indefinite extension. Linn's own deposition testimony is that March told him he would defer "a payment or two." The agreement indicates that payments are due on the fifteenth of the month and that if installments are not received by the twentieth day of the month the agreement is in default. In the face of March's motion for summary judgment, Linn "must set forth specific facts showing that there is a genuine issue for trial." WIS. STAT. § 802.08(3). Even viewing the facts as alleged by Linn in the light most favorable to Linn, we still have him in default. We affirm the circuit court's finding that Linn was in default.

No Argument Developed Regarding Interest in Real Property

¶8 As to the remedy of repossession, we first note that Linn does not develop any argument regarding March's repossession of the leased restaurant premises. While Linn lumps the repossession of the leased premises in with his arguments regarding the right to use the restaurant name and the duty to offset the value of the repossessed collateral, nowhere does he focus on the propriety of March reentering the leased premises, whether under the agreement between March and Linn or the lease itself.[2] Linn makes no argument that the repossession

[2] We note that although the parties' agreement references rights and remedies under the sublease and lease, neither party included the lease in the record. The sublease does not address the ability to repossess the premises.

of the restaurant premises in light of the breach of the sublease should be part of our analysis under the UCC. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (we need not address underdeveloped arguments). The only identified secured interest is the collateral listed on the UCC financial filing statement. The promissory note permits repossession of the premises upon breach. Linn did not adequately challenge that part of the circuit court's order granting March the right to repossess the restaurant premises. Therefore, that part of the circuit court's order regarding March's repossession of the restaurant premises is affirmed.

Repossession of the Collateral Without Consent

¶9 Linn argues that March is not entitled to repossession of the collateral without offset under the UCC. Linn cites WIS. STAT. § 409.615, which requires a secured party to apply the proceeds from the disposition of the collateral to the debtor's obligation. March responds that WIS. STAT. § 409.610 says that after default, the secured party *may* sell the collateral, which indicates that a sale is not required.[3] Linn replies that if March wanted to repossess the collateral in full or partial satisfaction of the debt, he needed to get Linn's consent to do so. *See* WIS. STAT. § 409.620.

¶10 Strict foreclosure, or repossession of the collateral in full or partial satisfaction of the debt, is governed by WIS. STAT. §§ 409.620-.622. *See also*

[3] March never challenges Linn's assertion that the UCC applies to this transaction, citing WIS. STAT. § 401.109(1)(a). The agreement recognizes the necessity of filing a UCC financial statement covering the collateral, it gives to March all the rights and remedies for default granted by the UCC, and it recognizes that notice of a sale or disposition of collateral may be required by law. Indeed, the remedy March sought in his complaint—repossession with offset of obligation after disposition of collateral—is that to which he would be entitled under the UCC.

4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 34-10 (6th ed. 2010). The statutory scheme allows the secured party to accept the collateral in full or partial satisfaction of the obligation it secures only if the debtor consents after default. *See* § 409.620(1) and (1)(a). The debtor must agree "to the terms of the acceptance in a record authenticated after default." Sec. 409.620(3)(a), (b). A debtor may also be deemed to consent to acceptance of the collateral in full satisfaction of the obligation if the secured party sends the debtor, after default, a proposal and does not receive a notification of objection by the debtor within twenty days. Sec. 409.620(3)(b)1.-3. The provisions of § 409.620 may not be waived by the parties. WIS. STAT. § 409.602(10).

¶11 March's strict foreclosure on the restaurant equipment is invalid because Linn did not consent, as required by WIS. STAT. § 409.620. While the UCC allows March to repossess the collateral, March must proceed in a commercially reasonable manner in disposing of the collateral and applying the proceeds to offset the outstanding obligation. *See* WIS. STAT. §§ 409.609-.615. We note that these provisions cannot be waived by the parties in their agreement. WIS. STAT. § 409.602(6)-(8). The circuit court's order does not indicate that March must dispose of the collateral and credit Linn with the proceeds. The circuit court erred as a matter of law in granting March summary judgment on his strict foreclosure when Linn had not consented.

Ambiguity of Agreement

¶12 Finally, Linn argues that the repossession remedies in the contract are ambiguous and "should be construed to limit March's damages to his actual loss and not complete return of the restaurant and its assets without offsetting its value against the amount due." This argument is resolved by the UCC. As

discussed above, WIS. STAT. § 409.620 does not allow repossession of the collateral as satisfaction of the obligation without the debtor's consent, even if the parties agree otherwise in advance. WIS. STAT. § 409.602(10).

CONCLUSION

¶13 The UCC does not allow strict foreclosure unless the debtor has consented, after default, to the secured party's acceptance of the collateral in exchange for satisfaction of the obligation. Thus, it was error for the circuit court to order summary judgment granting March the right to repossess the restaurant equipment without Linn's consent. March could enforce his security interest in the restaurant equipment by repossessing the collateral, but he would have a duty to dispose of it in a commercially reasonable manner and apply the proceeds to Linn's obligation. That portion of the circuit court's order finding Linn in default and granting March the right to repossess the restaurant premises is affirmed.

By the Court.—Order affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.