COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal No. 2014AP2061 **Cir. Ct. No. 2010CV1331**

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

JAMES SWIDERSKI,

PLAINTIFF-RESPONDENT,

ALEXANDER TRANSPORT, INC.,

PLAINTIFF,

V.

ALEX SWIDERSKI, GILMAN TRACTOR & IMPLEMENT, INC., WAUPACA TRACTOR, INC., ANTIGO MACHINERY SALES, INC. AND THORP PROPERTIES, LLC,

DEFENDANTS,

MARATHON IMPLEMENT COMPANY, INC.,

DEFENDANT-APPELLANT,

SWIDERSKI EQUIPMENT, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

SWIDERSKI POWER, INC. F/K/A SEI APPLETON, INC.,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Marathon County: ANN KNOX-BAUER, Judge. *Reversed and cause remanded for further proceedings*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Marathon Implement Company, Inc. appeals a judgment on a note payable to James Swiderski. The circuit court granted partial summary judgment to James concerning the validity of the note, whether the parties intended to modify their agreement by conduct, and the applicable interest rate.[1] We conclude genuine issues of material fact precluded summary judgment. Accordingly, we reverse and remand for further proceedings.

BACKGROUND

¶2 On March 31, 1987, Alex Swiderski entered into a purchase agreement for the assets of an existing implement dealership known as Marathon Implement, owned by David and Joyce Laszewski. The terms of the purchase agreement required an aggregate purchase price of $700,000. The purchase price allocated $200,000 for the purchase of an existing building; $50,000 for the land;

[1] The circuit court reserved issues for trial concerning deduction for construction work done on the property in 2008 or 2009. A jury subsequently determined the deduction was not authorized. In this opinion, we generally use first names when referring to members of the Swiderski family involved in this case.

$160,000 for parts; and $290,000 for equipment and tangible personal property other than whole goods. The payment terms were $25,000 down on the signing of the purchase agreement; $225,000 at closing; and $450,000 over fifteen years from the date of closing on a land contract plus annual interest at 8% on the unpaid balance. The land contract specified fifteen annual payments commencing April 15, 1988 and ending April 15, 2002.

¶3 The purchase agreement allowed Alex to assign his rights to other legal entities. In that regard, Alex created a wholly-owned subsidiary of Swiderski Equipment, Inc., to own the business assets that were the subject of the purchase agreement, including the Marathon Implement name. Alex and his son James Swiderski individually took title to the real estate and building, with Alex owning 75% and James 25%, respectively.[2]

¶4 The newly formed subsidiary, maintaining the name Marathon Implement Company, Inc., entered into a lease with Alex and James that provided Marathon Implement would pay them rent each month for the use of the real estate and building. By its terms, the lease required Marathon Implement to pay rent in the amount of $3,833.34 monthly, or $46,000.08 annually. James' share of the annual rent was $11,500.02.

¶5 As mentioned previously, the land contract promised to pay the Laszewskis $450,000 even though the portion of the purchase price allocated to the land and building was only $250,000. This scheme reduced the cash payment

[2] At the time Alex entered into the purchase agreement for Marathon Implement, James was an employee of Swiderski Equipment. Until 2013, James Swiderski owned a 34% share in Swiderski Equipment. Alex was majority shareholder and sole director of Swiderski Equipment.

required for the business assets by $200,000, with Alex and James personally incurring $200,000 additional debt for the benefit of Marathon Implement. A promissory note was executed from Marathon Implement to Alex in the amount of $150,000, and a note to James in the amount of $50,000, in accordance with their 75/25% ownership of the land and building. The notes provided the "principal shall be due and payable in full on April 14, 1992." The notes also provided for interest "at ten percent (10%) per annum on the unpaid balance." Principal and interest "not paid when due shall bear interest at eighteen percent (18%) from maturity until paid."

¶6 Each year, Marathon Implement sent Alex and James an I.R.S. form 1099 for their portion of the rent together with interest earned on the notes, and the parties paid their respective taxes based on that amount each year. However, Alex and James did not actually receive rent payments. Rather, Marathon Implement was allowed to keep the cash it otherwise contractually owed on the lease, and that amount was added to the principal amount owed on the notes to Alex and James. These "rental payments" were made every year from 1987 until 2002, when the land contract was paid off.[3] Thereafter, in 2003 and 2004, accrued interest for the year was forgiven.

¶7 Marathon Implement purportedly "tracked" the amounts owed on the notes in the form of ledger sheets. James' ledger sheet was identified as "Account #284." James set up the ledger accounts and made the initial entries that form the basis for his claim on the note. James calculated interest at 18%

[3] The ledgers indicate that Marathon Implement actually "paid" James more than the amount of rent to which he alleges entitlement.

compounded monthly. Pursuant to James' direction, the interest calculated at 10% annually was also compounded monthly.

¶8 Accountants for Swiderski Equipment and its subsidiaries prepared consolidated financial statements, which show the notes listed in each financial statement from 1987 through 2008 as notes payable to Alex and James. Fairly soon after the notes were created, the financial statements showed the due date for the notes as May 1, 1997. In 1996, the financial statements restated the due date for the notes to May 1, 2007. One of the reasons for extending the due date was the recommendation of Swiderski Equipment's accountants to keep the due date more than one year out so that the notes would be considered long-term debt. In 2006, the financial statements list a "note payable to James Swiderski, due on demand …."

¶9 Copies of Marathon Implement's annual meeting minutes stated that the "actions of the directors and officers during the last year were reviewed and approved." The minutes also stated that other business "reviewed and discussed included the year end financial statements, taxes, supplier contracts and insurance."

¶10 James made a formal demand for payment of his note on January 21, 2009. Alex never made a demand for payment of his corresponding note. James then commenced a lawsuit against various parties, including Marathon Implement, on September 8, 2010.[4] Marathon Implement sought summary judgment dismissing James' claims on the grounds of statute of limitations, statute of frauds

[4] James filed an amended complaint on March 15, 2012.

and laches.[5] James moved for partial summary judgment compelling Marathon Implement to "pay to James Swiderski all amounts owed to him in regard to a Note Payable, kept in the records of Marathon Implement Company, Inc. as account #284, plus all applicable interest."

¶11 The circuit court concluded there was no genuine issue of material fact as to either the validity of the note to James, or the parties' intent to modify the note. The court further concluded the note "clearly sets forth a rate of 10 percent interest, with a default rate of 18 percent." The court stated:

> Further, the demand for the payment on the promissory note is not barred by the statute of limitations. James made a demand for payment of his note on January 21, 2009. The ledgers and documents from the Board of Directors for [Marathon Implement] approved the note and accumulated rent every year. The parties' intent to extend the terms of this promissory note is shown by the uncontroverted accounting records. In addition, the ledgers show periodic payments and additions between 1988 and 2004. Said payments and additions re-set the statute of limitations, and the applicable statute of limitations for a note due on demand is six years from the date of the demand. This action was commenced on September 8, 2010 – well within the six years. This evidence shows a clear and unequivocal intent by the parties to reset the obligation and thus the statute of limitations.

¶12 Accordingly, the circuit court denied Marathon Implement's summary judgment motion. It also granted James partial summary judgment on the validity of the note, in the amount reflected in account #284, and with interest at 10% until "the default in January 2009, when demand was made and no

[5] In its reply brief, Marathon Implement acknowledges that it "has not claimed and is not claiming that there was insufficient consideration for the April 15, 1987 note nor is it claiming that James' claims on the Note are barred by the general statute of frauds."

payments on principle or interest were made. After that time, the interest rate is 18 percent." Marathon Implement now appeals.

DISCUSSION

¶13 Marathon Implement insists James' claim on the note is barred by the statute of limitations, pursuant to WIS. STAT. §§ 403.118(1), 893.43 and 893.45. Marathon Implement argues the note expressly provided the principal was due and payable in full on April 14, 1992. James failed to show unequivocal evidence that Marathon Implement, as opposed to James individually as the creditor, modified the note prior to the expiration of the statute of limitations on April 14, 1998. Furthermore, the only "payments" made prior to April 15, 2002 were for rent, and Marathon Implement's rental "payments" stopped as of April 11, 2002 when the land contract was paid off. Therefore, Marathon Implement argues that even if the statute of limitations was extended six years from April 11, 2002, James' lawsuit was barred by his failure to commence suit on or before April 11, 2008.

¶14 Marathon Implement also argues that even if the claims are not barred by the statute of limitations, genuine issues of material fact exist as to whether the parties intended to modify the notes to "re-set" the obligation and extend the statute of limitations. Finally, Marathon Implement argues the circuit court erred by accepting James' interest calculations as correct.

¶15 We conclude genuine issues of material fact exist regarding the extent, if any, to which the parties intended to modify the notes. Depending on what the factfinder may determine on the issue of the parties' intent, any claims on the note may or may not be precluded by an applicable statute of limitations. We also conclude questions of facts exist as to the calculation of interest and we

therefore decline to reach the interest issue. Accordingly, we reverse and remand for further proceedings.

¶16 On a motion for summary judgment, courts decide whether there is a genuine issue of material fact; courts do not decide facts. *See* WIS. STAT. § 802.08(2). A court must carefully scrutinize the supporting and opposing papers offered by the parties, and should not grant summary judgment "unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy." ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), *abrogated on other grounds by* ***Olstad v. Microsoft Corp.***, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139. "While the legal effect to be given an agreement may, in a proper case, be determined on a motion for summary judgment, where there is a dispute as to the intent of the parties to the agreement, a fact issue is presented, and summary judgment is inappropriate." ***Racine County v. Oracular Milwaukee, Inc.***, 2010 WI 25, ¶34, 323 Wis. 2d 682, 781 N.W.2d 88 (quoting ***Lemke v. Larsen Co.***, 35 Wis. 2d 427, 431, 151 N.W.2d 17 (1967)).

¶17 The note to James provided, in part, as follows:

> PROMISSORY NOTE
>
> The undersigned promises to pay James J. Swiderski fifty thousand and no/100 dollars ($50,000.00) plus interest at ten percent (10%) per annum on the unpaid balance.
>
> The principal shall be due and payable in full on April 14, 1992. Interest on the unpaid principal balance shall be paid on or before March 31 of each year. The first interest payment shall be made on March 31, 1988.
>
> ….
>
> Principal and interest not paid when due shall bear interest at eighteen percent (18%) from maturity until paid. This instrument shall mature and become immediately due and payable if interest and principal is not paid when due,

> notice thereof being hereby expressly waived. The undersigned waives presentment for payment, demand, notice of non-payment, protest and notice of protest, and consents to any and all extensions and renewals hereof without notice.

¶18 The circuit court adopted James' argument that there was no genuine issue of material fact regarding "ongoing modifications" to the notes, "first to extend the due dates, then to add a demand feature." The court concluded these modifications were clearly adopted and written into the corresponding ledger sheets and financial statements. The court stated the "ledgers and documents from the Board of Directors for [Marathon Implement] approved the note and the accumulated rent every year." The court also stated the uncontroverted accounting records showed a "clear and unequivocal intent by the parties to reset the obligation and thus the statute of limitations."

¶19 However, Marathon Implement's bylaws prohibited it from borrowing money that was not authorized under a resolution:

> 5:02. Loans. No indebtedness for borrowed money shall be contracted on behalf of the corporation and no evidences of such indebtedness shall be issued in its name unless authorized by or under the authority of a resolution of the Board of Directors. Such authorization may be general or confined to specific instances.

¶20 Alex submitted an affidavit in opposition to partial summary judgment, averring that he was not aware "of any resolution by the Board of Directors of Marathon Implement Company, Inc., since 1990, that would authorize or otherwise state a debt incurred by the Corporation to the benefit of James J. Swiderski." James insists the requirement for a corporate resolution is a "mischaracterization," because Marathon Implement "did not borrow additional amounts from James Swiderski, but instead retained cash equal to amounts already undisputedly owed under the Lease." However, this argument ignores the fact that

one of the reasons given for extending the due date on the notes was the accountant's recommendation to keep the due date more than one year out so that the notes would be considered as long term debt.

¶21 James also argues Marathon Implement "explicitly agreed to any and all extensions and renewals" on the note in the language of the note itself, which states: "The undersigned waives presentment for payment, demand, notice of non-payment, protest and notice of protest, and consents to any and all extensions and renewals hereof without notice."

¶22 James contends Marathon Implement thus "consented to the changes to the due date, as well as the change to the James Note to make it a demand note, back when it signed the Promissory Note in April of 1987." However, this language in the note conflicts with the requirement in the corporate bylaws prohibiting borrowing money without a corporate resolution. Accordingly, James has not demonstrated the right to judgment on this issue "with such clarity as to leave no room for controversy." ***Grams***, 97 Wis. 2d at 338.

¶23 In addition, the minutes from the annual meetings of the shareholders and directors of Marathon Implement fail to support entitlement to judgment as a matter of law. The minutes from an annual meeting allegedly held on April 19, 1988, state as follows: "The promissory notes outstanding to Alex Swiderski and James J. Swiderski were reviewed and it was reported that interest was paid according to the terms of the notes and that the payments were also being made on the note to Alex Swiderski Implement, Inc." Significantly, it is irrefutable that interest was not paid as purported in the minutes, nor were payments made on the note as described, although I.R.S. form 1099s were sent each year and taxes paid on the respective amounts.

¶24 Minutes from annual meetings for each year following 1998 also provide boilerplate language concerning financial statements: "Other business reviewed and discussed included the year end financial statements, taxes, employees, supplier contracts and insurance." However, the minutes do not reference the note or lease, and fail to indicate with any particularity what was discussed pertaining to the financial statements. Contrary to the circuit court's ruling, the minutes do not show "clear and unequivocal" evidence of board of director approval of the note and accumulated rent each year.

¶25 James argued in the circuit court that the parties "frequently modified the due date of the Swiderski Notes in the years following 1987." James insisted the ledger sheets and financial statements established by conduct that the parties agreed to change the due dates on the notes first to May 1, 1997, and then to May 1, 2007. The financial statements "ultimately incorporate[d] a demand feature" as shown by the September 30, 2006 financial statement, to carry the notes on the books as indebtedness in the form of a demand note. James also argues that Alex himself described his note as a demand note "in each and every Statement of Financial Condition between 2001-2010."

¶26 However, none of the ledgers or financial statements are signed by Marathon Implement, and there is evidence the financial statements were prepared by accountants who never saw the note or the lease when preparing the financial statements. Accountant Thomas Gelhar testified that he never saw nor was advised of the terms of the actual $50,000 note dated April 15, 1987 until he saw it at his deposition. Gelhar subsequently submitted an affidavit attempting to "clarify parts of the testimony given in my deposition …." Gelhar stated he was "not sure why the [due] date was moved ahead 5 years" from 1992 to 1997:

> The $50,000 Promissory Note to James Swiderski shows a due date of April 14th, 1992. The Corporate Financial Statement that I prepared for the fiscal year ended 9-30-1987 shows a due date of April 14th, 1997 and I was asked why they are different. First, this is the same note. Other than the due date being exactly 5 years later, all other details of the $50,000 Promissory Note match Marathon Implement Company's records, namely account #284. The ledger I reviewed at my deposition ties out every year from 1987 to current. I am not sure why the date was moved ahead 5 years. I believe it could be one of four reasons: 1) I misunderstood whoever told me the dates from [Swiderski Equipment], 2) Someone from [Swiderski Equipment] gave me the wrong date, 3) My assistant made a typographical error, or 4) We had the actual Promissory Note and made a clerical error listing the date.

The record similarly fails to unequivocally explain why the due date was carried forward ten years from 1997 to 2007, or how the 2007 due date transformed into a demand note.

¶27 James also argued below that the forgiveness of interest, included in the ledger sheets as a "credit," showed "sufficient evidence of a new or continuing contract." *See* ***Marshall v. Holmes***, 68 Wis. 555, 559, 32 N.W. 685 (1887). However, that James individually, as creditor, chose to forgive interest does not unequivocally demonstrate agreement by Marathon Implement to a new or continuing contract, as Marathon Implement took no action; it merely received forgiveness of interest.

¶28 A genuine issue of material fact also exists as to whether the parties treated the ledger accounts as capital investments. Alex stated that James "always told me the Note was fictitious, and there was no note, but that it was a capital account for purposes of having a tax benefit in the future upon the sale of the Company." Alex stated, "Jim and I knew that it was a—just a fictitious way of doing it." Accountant Allan Dassow also testified:

> From an accounting standpoint and the tax law standpoint, when I look at what was there, I struggle with the term note. That's where I struggle. It's not necessarily context. Because from a tax standpoint, one would argue that that's additional contribution to capital.
>
> Based on what I saw of the—of the information, it—one could certainly argue that it's additional capital contribution as opposed to a note.

Indeed, James testified in his divorce proceeding that he did not loan Marathon Implement any money and that the ledgers were simply "an accounting thing that we did for accounting reasons, tax reasons, bank reasons."

¶29 The evidence was therefore not sufficient to show "a clear and unequivocal intent by the parties to reset the obligation and thus the statute of limitations." The material presented on the motion for partial summary judgment was subject to conflicting interpretations, and reasonable persons could differ as to its significance. It was thus improper to grant partial summary judgment. *See* ***Grams***, 97 Wis. 2d at 338-39.

¶30 Accordingly, we reverse the judgment and remand for further proceedings. Depending on what the factfinder determines on the issue of the parties' intent concerning modification of the note, any claims on the note may or may not be precluded by an applicable statute of limitations.

¶31 Finally, the circuit court simply adopted James' interest calculations, which compounded interest monthly. The note provided for "interest at ten percent (10%) per annum on the unpaid balance." Similarly, the note stated principal and interest "not paid when due shall bear interest at eighteen percent (18%) from maturity until paid." The language of the note itself contained no specific reference to compounding on a monthly basis, and the court erred by simply adopting James' interest calculations.

¶32 We reject James' suggestion that Marathon Implement waived the interest issue in the circuit court proceedings. James' interest calculations were not the primary subject of his motion for partial summary judgment. Indeed, James' motion requested an order compelling Marathon Implement to pay "all amounts owed to him in regard to a Note Payable, kept in the records of Marathon Implement Company, Inc. as account #284, plus all applicable interest." James' brief in support of his motion failed to develop any argument concerning compound interest. Marathon Implement objected to any entitlement whatsoever to payment on the note. We conclude the interest issue was preserved, and upon remand the interest issue shall be revisited if applicable.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2013-14).