COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP462 **Cir. Ct. No. 2014CV605**

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

ALCO CAPITAL GROUP, LLC,

PLAINTIFF-RESPONDENT,

V.

DAVID T. WHITEHEAD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: PHILLIP A. KOSS, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 GUNDRUM, J. David T. Whitehead appeals from an order denying him summary judgment, dismissing his counterclaims, and entering summary judgment in favor of ALCO Capital Group, LLC. We affirm.

Background

¶2 In 2008, Whitehead had two credit card accounts with Chase Bank, N.A. He opened the account that is the subject of this action in November 2008, transferred debt in the amount of $36,982.97 from another credit card account to this account, and also drew a convenience check for $14,198.10. At the time Whitehead opened the account, he was a resident of Illinois.

¶3 By electronic check, Whitehead made the minimum payments on the credit card debt in January, February, and March 2009. He made no payments in April or May 2009, but a payment of $1016 was made on June 17, 2009. From July 2009 through January 2010, payments were made to the account each month in the amount of $914. The November, December and January payments were "returned." Thus, the last payment made to the account and not returned was the October 16, 2009 payment. The billing statements for this credit card account were sent to Whitehead at his Illinois address through June 2009 and were thereafter mailed to him at a home he had built in Wisconsin to which he and his wife relocated in July 2009.

¶4 ALCO filed this action on July 18, 2014, alleging it acquired the rights to Whitehead's credit card debt. Whitehead answered by alleging Illinois' statute of limitations applies to this action and ALCO's claim is barred thereunder. Whitehead also filed counterclaims alleging ALCO violated the federal Fair Debt Collection Practices Act and Telephone Consumer Protection Act.

¶5 Whitehead moved for judgment on the pleadings and summary judgment. ALCO sought dismissal of Whitehead's counterclaims and summary judgment on its own claims. The circuit court concluded the action did not accrue until ALCO "wrote-off" the credit card debt on May 31, 2010, and therefore, the

action was commenced within both Wisconsin's six-year and Illinois' five-year statute of limitations. The court denied Whitehead's motion for summary judgment, dismissed his counterclaims, and granted summary judgment to ALCO.[1] Whitehead appeals.

Discussion

¶6 Our review of a circuit court's decision on summary judgment is de novo. ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶11, 318 Wis. 2d 622, 768 N.W.2d 568. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** When, as here, both parties have moved for summary judgment, we may accept that no genuine issue of material fact exists and we may decide the matter on the legal issues presented. *See* ***Millen v. Thomas***, 201 Wis. 2d 675, 682-83, 550 N.W.2d 134 (Ct. App. 1996). What statute of limitation applies and whether the limitation period has run are also matters of law we review independently. ***Laughland v. Beckett***, 2015 WI App 70, ¶15, 365 Wis. 2d 148, 870 N.W.2d 466; ***Estate of Hegarty ex rel. Hegarty v. Beauchaine***, 2001 WI App 300, ¶14, 249 Wis. 2d 142, 638 N.W.2d 355.

¶7 On appeal, Whitehead does not dispute either the existence of the credit card account or that he owes "in excess of $51,000" on that account. Rather, he disputes the enforceability of the debt. Whitehead asserts the circuit court should have excluded the credit card statements ALCO submitted in

[1] On appeal, Whitehead makes no arguments related to the dismissal of either of his counterclaims; therefore, we deem him to have abandoned those claims. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

response to Whitehead's motion and in support of its own motion. Whitehead also contends ALCO's cause of action accrued when he initially missed payments on his credit card account in April and May 2009 while he was living in Illinois and thus Illinois' five-year statute of limitations period applies, barring this action filed in July 2014.

Consideration of the Credit Card Statements

¶8 In its decision and order, the circuit court stated: "The affidavit of Marc Dobberstein submitted for [ALCO] properly admits the credit card statements which evidence the debt of [Whitehead]; and the affidavit of [Whitehead] admits the existence of the account, the indebtedness, and his failure to pay the debt as alleged in [ALCO's] complaint." Whitehead asserts the court should have excluded the credit card statements filed by ALCO in support of its claim because Dobberstein was not qualified to submit Chase's business records into evidence.

¶9 "Affidavits in support of and in opposition to a motion for summary judgment 'shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence.'" ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶10, 324 Wis. 2d 180, 781 N.W.2d 503. Whether an affidavit meets these requirements "may involve evidentiary rulings that are committed to the circuit court's discretion." ***Id.***, ¶13 (citations omitted). It may also involve evidentiary rulings "requir[ing] construction or application of a statute to a set of facts," which we review de novo. ***Id.***, ¶14; ***Deutsche Bank Nat'l Trust Co. v. Olson***, 2016 WI App 14, ¶20, 366 Wis. 2d 720, 875 N.W.2d 649; *see also*, ***Horak v. Building Servs. Indus. Sales Co.***, 2012 WI App 54, ¶11, 341 Wis. 2d 403, 815 N.W.2d 400. Here, whether we review the circuit court's

evidentiary ruling independently or under an erroneous exercise of discretion standard, the result is the same.

¶10 The Chase business records at issue are the credit card statements related to a credit card account of Whitehead. The statements were attached to the affidavit of Marc Dobberstein, a member/owner of ALCO. Dobberstein avers in his affidavit that he "is a custodian of the business records for Alco" and "[a]s part of his duties he has acquired personal knowledge of how the [attached] records and statements … are prepared, including the record[ ]-keeping procedures." He further avers that when purchasing defaulted credit, "Alco obtains and integrates Chase's electronic records of those accounts into Alco's own business records" and that a "review of those regularly kept records reflect that ... Whitehead was issued a credit card by [C]hase, failed to make payments after a long period of forbearance under a workout plan, and ultimately defaulted on the terms of the agreement."

¶11 The credit card statements were also attached to ALCO's complaint. Whitehead's answer, counterclaims, and affidavit in support of his motion for summary judgment adopt and/or affirm much of the key information contained in the credit card statements. In his counterclaim, Whitehead acknowledges entering into the contract with Chase for the credit agreement in this case, using "the credit card" until April 2009, and incurring "[t]he debt in this case." In his answer, Whitehead admits he "refuses to pay this debt despite due demand having been made by" ALCO.

¶12 Further, in his affidavit in support of his summary judgment motion, Whitehead avers that, prior to 2009, he "opened two Chase credit accounts" and payments on the accounts were "generally made by pre-authorized electronic

checks or electronic fund transfers," and he made payment on the account "which is the subject of this action" in March 2009, but was "unable to make payments" in April and May 2009. These averments corroborate the credit card statements, which show monthly payments on Whitehead's account being made through March 2009 by "Electronic Chk" and indicate payment was not received on the account in April and May 2009.

¶13 Additionally, in Whitehead's briefs in support of his motions for judgment on the pleadings and summary judgment, he relies on the credit card statements, treats them as accurate and factual documents which provide support for his motions,[2] and with his brief in support of judgment on the pleadings, submits the statements himself. In none of these filings does he develop an argument challenging the authenticity of the statements.

¶14 WISCONSIN STAT. §§ 909.01 and 909.015 (2015-16)[3] "provide the framework for authentication," a condition precedent to admissibility. ***State v. Giacomantonio***, 2016 WI App 62, ¶20, 371 Wis. 2d 452, 885 N.W.2d 394. Authentication is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Sec. 909.01. Authentication may be established by: "Appearance, contents, substance, internal patterns, or

[2] For example, in his briefs in support of his motions for judgment on the pleadings and summary judgment, Whitehead references the credit card statements and states: "[T]he 11/28/08-12/24/08 bill, shows Whitehead with a credit line of $57,000, available credit of $5,987, and interest rates on balances ranging from 13.99% to 19.24%." He also states in each brief: "It is undisputed that David Whitehead lived in Illinois when he missed payments entirely in April and May, 2009." These statements by Whitehead further corroborate the credit card statements, which show exactly what Whitehead asserts in these filings.

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

other distinctive characteristics, taken in conjunction with circumstances." Sec. 909.015. We conclude the appearance, contents and substance of the credit card statements, together with the "circumstances" of Dobberstein's affidavit and Whitehead's own submissions, provide evidence "sufficient to support a finding" the statements are what ALCO claims—documentation of Whitehead's debt on the Chase credit card account.

¶15 WISCONSIN STAT. § 908.03(24) provides that a hearsay statement is not excluded by the hearsay rule even if it is "not specifically covered by any of the foregoing [hearsay] exceptions," so long as the statement has "comparable circumstantial guarantees of trustworthiness." This "residual hearsay exception is designed as a catch-all exception that allows hearsay statements that may not comport with established exceptions, but which still demonstrate sufficient indicia of reliability to be admitted." ***State v. Huntington***, 216 Wis. 2d 671, 687, 575 N.W.2d 268 (1998). The same reasons supporting our conclusion that the credit card statements are authentic also support our conclusion that the credit card statements and the information therein have "circumstantial guarantees of trustworthiness" "comparable" to the other hearsay exceptions, such that the circuit court's consideration of them was proper, at a minimum, under the "catchall" hearsay exception, § 908.03(24).

¶16 Whitehead also argues "[t]here is no clear record that Alco has the right to the account." The record sufficiently establishes ALCO's right. Dobberstein avers he is a member/owner of ALCO, custodian of its business records, and makes the affidavit based upon his personal knowledge; ALCO's "business practices include purchasing defaulted credit card accounts that originated with Chase Bank USA, NA,"; ALCO "has acquired all right, title and interest in Whitehead's account" and "is the lawful owner of the credit card

indebtedness" owed by Whitehead "by virtue of an assignment from the original card owner" Chase; and ALCO "became the assignee of the account on or about March 28, 2014." Documents attached to Dobberstein's affidavit include bills of sale showing assignments of debt from Chase to Thunderbolt Holdings, Ltd., LLC, from Thunderbolt to Pilot Receivables Management, LLC, and from Pilot to ALCO.[4] March 28, 2014, is the date identified on the bill of sale for Pilot's assignment to ALCO. Dobberstein's affidavit together with the other previously discussed support in the record related to the authenticity and admissibility of the credit card statements support a determination that ALCO has the right to sue Whitehead on his debt.

The Statute of Limitations

¶17 Whitehead also argues that even if the credit card statements are properly considered and ALCO has the right to sue on his credit card debt, its claim is barred by the applicable statute of limitations. He maintains the cause of action accrued when he missed payments on his credit card account in April and May 2009, and because he was living in Illinois at the time, Illinois' five-year statute of limitations period applies, barring this action filed in July 2014.

¶18 ALCO, on the other hand, argues the cause of action did not accrue until Chase wrote off the debt in June 2010, long after Whitehead moved to Wisconsin, and thus, Wisconsin's six-year statute of limitations period applies and this action was timely filed. ALCO also argues that even if the cause of action did not accrue with Chase's write off of the debt, it accrued after Whitehead's

[4] Each bill of sale indicates there are attachments which specifically identify the accounts/debts being assigned; however, those attachments are not included as part of the record.

July 2009 move to Wisconsin because several payments were made on this account following that move and thus, Wisconsin's limitation period applies. Consistent with this last argument, we conclude Wisconsin's statute of limitations period applies.

¶19 In ***St. Mary's Hospital Medical Center v. Tarkenton***, 103 Wis. 2d 422, 424, 309 N.W.2d 14 (Ct. App. 1981), we stated that a partial payment on a debt "made prior to the running of the statute of limitations" sets the statute of limitations "running from the date of the payment." If we consider Illinois law, as Whitehead urges us to do, we find a similar rule, with ***St. Francis Medical Center v. Vernon***, 576 N.E.2d 1230, 1231 (Ill. App. Ct. 1991), holding that "part payment of a debt tolls the statute of limitations such that it commences to run from the date of last payment." We conclude the statute of limitations began to run in relation to Whitehead's credit card debt no earlier than the last payment on the debt, which was months after Whitehead had moved to Wisconsin in July 2009.

¶20 Whitehead asserts, however, that he did not authorize the post-July 2009 payments on this debt—that Chase took the money from his bank account without his authorization. In ***St. Mary's***, we affirmatively cited to our supreme court's statement in ***Davison v. Hocking***, 3 Wis. 2d 79, 86, 87 N.W.2d 811 (1958):

> A partial payment, to operate as a new promise and avoid the bar of the statute of limitations, must be made under such circumstances as to warrant a clear inference that the debtor *recognized the debt as an existing liability*, and *indicated* his willingness, or at least *an obligation*, to pay the balance.

St. Mary's, 103 Wis. 2d at 426 (emphasis added; citations omitted). Here, the partial payments were made under circumstances warranting a clear inference that

Whitehead recognized the Chase credit card debt as an existing liability and indicated an obligation to pay it.

¶21 According to Whitehead's affidavit, he had "pre-authorized" electronic checks and electronic fund transfers as a means of paying the amount due each month on both of his credit card accounts with Chase. He made payments on the account at issue in this case through March 2009; but in April and May 2009 he was "unable to make payments on either Chase account." "In or around June 2009," Whitehead received letters from Chase for each account "offer[ing] something called a 'Balance Liquidation Program.'" Whitehead contacted Chase to inquire about enrolling in the program "on each card"; however, he verbally authorized electronic fund transfer payments only for his other account. He "was interested in settling the other account," which had a smaller balance, but the account at issue in this case "was in excess of $51,000 and required larger payments than [he] was willing to make." Whitehead avers he did not "immediately" realize Chase had withdrawn more money from his checking account than he had authorized. However, he never states he did not receive the post-June 2009 credit card statements for the account at issue in this case, which were mailed to him at the Wisconsin residence he and his wife moved to in July 2009. The statements show payments were being made on the account and that while payments were being made, Chase reduced the interest rate on the account from 29.99% to 2%. Further, Whitehead identifies no evidence of record, and we are unable to find any, indicating he at any time objected to the payments being made upon learning of them or took steps to have Chase return those payment amounts to him.

¶22 Here, Whitehead recognized the debt as an existing liability and indicated an obligation to pay it. Thus, pursuant to ***St. Mary's***, we conclude the

statute of limitations period did not begin to run any earlier than the date of the last unreturned payment made on this account, in October 2009, which was when Whitehead lived in Wisconsin. Thus, Wisconsin's six-year statute of limitations period applies, and ALCO's July 18, 2014 filing of its action on Whitehead's credit card debt is timely. *See* ***Abraham v. General Cas. Co. of Wis.***, 217 Wis. 2d 294, 310-13, 576 N.W.2d 46 (1998) (holding that a cause of action arises "where as well as when the final significant event that is essential to a suable claim occurs").

¶23 Accordingly, we affirm the decision of the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶24 HAGEDORN, J. (*dissenting*). It is a fundamental precept of summary judgment law that all inferences must be made in favor of the nonmoving party. David T. Whitehead avers through affidavit that he did not authorize funds to be withdrawn from the particular credit account here. We must take this as true. In my view, the majority does not do so, and further, presents an incomplete view of the law in concluding that Whitehead's unauthorized payments operated as a new promise that tolled the statute of limitations. Accordingly, I dissent.

¶25 The majority concludes that Whitehead's partial payments acted as a new promise because they "were made under circumstances warranting a clear inference that Whitehead recognized the Chase credit card debt as an existing liability and indicated an obligation to pay it." Majority, ¶20. Its conclusion rests largely on the fact that there is no record of Whitehead's contemporaneous objection to the payments and the inference that he probably received the statements showing the payments and the reduced interest rates.

¶26 This is a tough sell on summary judgment. The majority's inferences would be reasonable had Whitehead not submitted an affidavit explaining that Chase wrongly took payments without his authorization. But such contrary evidence is before us, and therefore contrary inferences must bind us. We are not permitted to disregard or weigh the evidence. At the very least,

whether the payments were voluntary and operated as a recognition of and promise to pay the debt is a disputed material fact.[1]

¶27 Even more fundamentally, however, the majority's description and application of the law is incomplete and inaccurate. Simply stated, the law requires that a partial payment operating as a new promise that tolls the statute of limitations must be voluntary.

¶28 The majority relies on ***St. Mary's Hospital Medical Center v. Tarkenton***, 103 Wis. 2d 422, 424, 309 N.W.2d 14 (Ct. App. 1981). In ***St. Mary's***, the plaintiff hospital filed suit to obtain outstanding debt incurred by a patient, Tarkenton. ***Id.*** at 423. Tarkenton countered that the six-year statute of limitations had already run. ***Id.*** at 423-25. The court, however, explained that Tarkenton explicitly authorized his insurer to make payments on his behalf. ***Id.*** This showed "that Tarkenton recognized his obligation to pay St. Mary's and consented to the manner in which that obligation was partially paid." ***Id.*** at 427. Hence, the payment was properly considered to come from him and constituted a new promise that tolled the statute of limitations. ***Id.*** The point is worth repeating: Tarkenton consented to the payment by assigning partial payment responsibility to

[1] Usually, we treat cross motions for summary judgment as a stipulation the facts are undisputed. *See* ***BMO Harris Bank, N.A. v. European Motor Works***, 2016 WI App 91, ¶15, 372 Wis. 2d 656, 889 N.W.2d 165. However, we may do so only if "neither [party] argues that factual disputes bar the other's motion." ***Hussey v. Outagamie Cty.***, 201 Wis. 2d 14, 18, 548 N.W.2d 848 (Ct. App. 1996). The parties here dispute whether Whitehead authorized payment on the account, a fact crucial to the issue of whether the statute of limitations was tolled. Therefore—as we deal with each motion for summary judgment—we must draw all inferences favorable to each nonmoving party. *See* ***Bergman v. Bernsdorf***, 271 Wis. 401, 407, 73 N.W.2d 595 (1955) ("[I]t is the rule in this state that summary judgment may not be granted in a situation where it appears from the affidavits that circumstances exist which tend to support an inference of essential ultimate fact contrary to that contended for by the movant.").

his insurer. Tarkenton's consensual payment presents a stark contrast to the nonconsensual payment here.

¶29 In case there were any doubt, the proposition cited in ***St. Mary's*** that the majority relies on comes from ***Davison v. Hocking***, 3 Wis. 2d 79, 86, 87 N.W.2d 811 (1958). The issue in ***Hocking*** was whether payments made by the defendant to the decedent were intended to apply to a note—which had become unenforceable due to the statute of limitations—or were intended as a gift.[2] ***Id.*** at 88-89. The court explained:

> It is well established in this state that in order to renew a debt once barred, there must be an express acknowledgment of the debt with the intention to renew it as a legal obligation. A partial payment, to operate as a new promise and avoid the bar of the statute of limitations, must be made under such circumstances as to warrant a clear inference that the debtor recognized the debt as an existing liability, and indicated his willingness, or at least an obligation, to pay the balance.

Id. at 86. The court went further, explaining that the effectiveness of tolling "rests in the *conscious and voluntary act* of the defendant, *explainable only* as a recognition and confession of the existing liability." ***Id.*** at 87 (quoting ***Ferris v. Curtis***, 127 P. 236, 238 (Colo. 1912) (emphasis added)). In the end, the court found no evidence establishing that the defendant intended the payments to be applied towards the note. ***Hocking***, 3 Wis. 2d at 87-88. Hence, the court concluded the plaintiff did not meet its burden "to establish a clear inference that the defendant recognized the note as an existing liability or that he indicated a willingness on his part to pay the balance." ***Id.*** at 88.

[2] The defendant claimed that the payments were intended to cover the decedent's medical expenses. ***Davison v. Hocking***, 3 Wis. 2d 79, 85-86, 87 N.W.2d 811 (1958).

¶30 ***Hocking*** stands for the proposition that a partial payment must be a "conscious and voluntary act"—and indeed, "explainable only" as such. ***Id.*** at 87. General treatises on the subject say the same—and even cite ***Hocking*** for support.[3] C.J.S. perhaps says it most directly:

> A part payment, in order to be effectual to toll or interrupt the statute of limitations, must be voluntary, on account of the legal obligation, accepted by the creditor, made under such circumstances as recognize the whole of the debt as subsisting, and be consistent with an intent to pay the balance.

54 C.J.S. *Limitations of Actions* § 384 (2016) (citing ***Hocking***, 3 Wis. 2d 79); *see also* 51 AM. JUR. 2D *Limitation of Actions* § 326 (2016) (In order to toll the statute, the payments "must indicate the debtor's intent that it constitute a part payment of the debt in question."); § 328 (payments must be voluntary).

¶31 The majority's incomplete statement of law makes its factual inferences regarding Whitehead's payments all the less appropriate. On summary judgment, I simply do not see how payments made to Chase due to their mistake and without authorization constitute a voluntarily proffered partial payment. Whether Whitehead's payments were voluntary and indicative of a clear intent to constitute part payment of the debt is, at the very least, a disputed material fact. Therefore, summary judgment was improper.

¶32 Other questions remain if I am correct, but it would be merely an academic exercise to explore those questions here. Moreover, the party's briefs regarding whether the Wisconsin or Illinois statute of limitation applies was

[3] ***Hocking*** quoted extensively from treatises that described the law in substantially the same manner as the current versions of those same treatises. *See* ***Hocking***, 3 Wis. 2d at 86-87.

frustratingly devoid of legal analysis. Finding that there are disputed material facts, and finding that ALCO did not meet its burden of proving it is entitled to judgment as a matter of law, I would reverse.