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**DISTRICT II**

April 1, 2015

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You are hereby notified that the Court has entered the following opinion and order:

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2014AP1964

Don Smith v. Mark K. Smith (L.C. #2013CV775)

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

Don and Sharon Smith appeal an order denying their motion for summary judgment and granting the motions for summary judgment and dismissal in favor of Mark Smith, their son. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We affirm.

In the early 1990s, Don and Sharon loaned \$62,300 to Trinity Transfer, Inc. The loan made them 49% owners; Mark owned the other 51%. In October 2000, Mark's attorney sent

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Don and Sharon a letter stating the attorney's "understand[ing]" that, so as to make Mark the sole owner, they and Mark had entered into an agreement whereby Mark<sup>2</sup> would:

purchas[e] all stock owned by you ... and pay[] back all loans ... for the total sum of \$126,000.... [T]he terms of payment shall include a down payment in the amount of \$65,000 ... and a promissory note bearing interest at 9% per annum ... over a period of ten years ....

No down payment was made, nor was a promissory note drafted.

Trinity made payments of \$1,600 a month totaling \$107,200 until December 2006 when, having experienced increasing financial difficulty, Trinity became insolvent. Mark advised Don and Sharon that Trinity would be unable to make any further payments. The business eventually was liquidated.

In June 2013, Don and Sharon's accountant sent them and Mark's attorney a calculation of the payoff on the Trinity "note." Don and Sharon filed suit against Mark personally in October 2013. They alleged breach of contract, account stated, unjust enrichment/restitution, promissory estoppel, and breach of the duty of good faith and fair dealing. Both parties moved for summary judgment. Mark also moved for dismissal of the complaint. The circuit court granted Mark's motions. Don and Sharon appeal.

"A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint." *Watts v. Watts*, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987). Whether the complaint states a claim for relief is a question of law that this court reviews de novo. *Id.* A

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<sup>2</sup> The letter indicates that the agreement is between Mark and his parents. Mark contends it was Trinity, or its successor, Trinity Petroleum, Inc., which agreed to repay the loan. Whether it was Mark or Mark as Trinity is not essential to our decision.

complaint may be dismissed for failure to state a claim only if it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of the allegations. *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 82, 307 N.W.2d 256 (1981).

We review summary judgments de novo, using the same methodology as the circuit court. *Hardy v. Hoefflerle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

The circuit court concluded that the October 2000 letter was “[a]lmost ... but not quite” a written loan contract because it left too many terms undefined, that the concept of account stated did not apply because the letter from the account was simply a disputed demand letter,<sup>3</sup> and that, even if there were a contract, the six-year statute of limitations had expired. *See* WIS. STAT. § 893.43.

We agree that the statute of limitations rationale is dispositive. If the October 2000 letter formed a contract, it was breached when Mark informed them that no payments would be made after December 2006. Don and Sharon filed suit in October 2013, nearly seven years later. None of Don and Sharon’s equitable claims have merit. The circuit court properly granted Mark’s motions to dismiss and for summary judgment.

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<sup>3</sup> “An account stated is an agreement between a debtor and creditor that the items of a transaction between them are correctly stated in a statement rendered, that the balance shown is owed by one party to the other and that the party has promised to pay that balance to the other.” *Stan’s Lumber, Inc. v. Fleming*, 196 Wis. 2d 554, 565, 538 N.W.2d 849 (Ct. App. 1995).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to  
WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*