No. 18-1835

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TISSUE TECHNOLOGY LLC, PARTNERS CONCEPTS DEVELOPMENT, INC., OCONTO FALLS TISSUE, INC. and TISSUE PRODUCTS TECHNOLOGY CORP.,

Plaintiffs-Appellants,

v.

TAK INVESTMENTS, LLC,

Defendant-Appellee.

Appeal From The United States District Court
For the Eastern District of Wisconsin Green Bay Division,
Case No. 2014CV1203
The Honorable William C. Griesbach, Chief Judge

REPLY BRIEF OF PLAINTIFFS-APPELLANTS TISSUE TECHNOLOGY, LLC, PARTNERS CONCEPTS DEVELOPMENT, INC. OCONTO FALLS TISSUE, INC. and TISSUE PRODUCTS TECHNOLOGY CORP.

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INTRODUCTION

Tak Investments, LLC addresses four (4) separate issues in its responsive brief. The Defendant-Appellee either cites no legal authority or avoids a complete discussion of the applicable law. This brief will address each of the four categories and try to weave each of the arguments into the overarching theme which is, quite simply, that the contracts in this case must be honored and enforced since they were freely entered into by the parties, are not precluded by law, and these claims were filed within the statute of limitations.

ARGUMENT

I. Defendant-Appellee's Argument that a Limited Liability Company Cannot Issue an Interest in itself is not Supported in the Law.

Defendant-Appellee, Tissue Technology LLC, argues that a limited liability company cannot issue an interest in itself, yet, it fails to cite a statute, case law or any public policy to support its proposition. The District Court adopted the argument while at the same time acknowledging that a corporation can issue stock in itself. (R.40 at 4; A-App 004). Ownership interests are diluted or increased every day by the purchase and sale of stock on the national exchanges or through private offerings. At the end of every trading day, the percentage of total stock ownership is 100%. How can the percentage of ownership be anything other than 100% in total? No law differentiates between the issuance of a membership interest in a limited liability company as opposed to issuance of stock in a corporation. Defendant-Appellee pulled this argument out of thin air, without any controlling authority and it should be dismissed as such because it interferes with the parties' right to freely contract.

The Illinois case cited by the defendant-appellee and adopted by the District Court, *Hanley v. Kusper*, 6 Ill. 452, 337 N.E.2d 1 (1975), was offered for the proposition that a corporation does not own itself. That is and always has been true but it is not dispositive of the question as to whether the company can issue shares in itself. The language cited is dicta and does not apply. The *Hanley* Court was only examining the applicability of the Illinois Constitution in a tax case. The Court was confronted with the issue of whether the Constitution prohibited the taxation of personal property in the circumstance of a bank trust where the constitution prohibited such taxation on the property if individuals. The Court did not even remotely address the question before this Court—whether a limited liability company can issue a membership share in itself. In applying this case to the subject action for the proposition that Tak Investments could not issue a membership interest in itself is clear error. No state or federal law prohibits the issuance of an interest to conduct business or pay the company's debts as was done here.

Wisconsin law provides that a contract must be honored as long as it is not violative of a statute, rule of law or public policy. *Jezeski v.* Jezeski, 316 Wis.2d 178 at 184, 763 N.W.2d 176 (Ct. App. 2008). There is no dispute but that in the current case all the conditions precedent were met when Tak Investments refused to honor its agreement that it provide the plaintiff-appellants with the 27% interest in Tak Investments LLC upon cancellation of the Final Business Terms Agreement. Nevertheless, Tak Investments refused to honor that Agreement.

Wisconsin law requires that parties to a contract act in good faith pursuant to the terms of the contract. A party to a contract has a duty to perform. *Milwaukee Cold Storage Co. v. York Corp.,* 3 Wis.2d 13, 87 N.W.2d 505 (1958); *Associates Financial*

Services, Co. v. Eisenberg, 51 Wis.2d 85, 168 N.W.2d 272 (1971). A party to a contract is subject to the common law duty to perform under the terms of the contract with care, skill, reasonable expedience and faithfulness to the purpose of the contract. *Milwaukee Cold Storage Co. v. York Corp.*, 3 Wis.2d 13 at 25, 87 N.W.2d 505 (1958).

The fact that the defendant-appellee asserts as its basis for non-performance a legal standard which is without citation to controlling authority, and really no other reason but that it wishes to avoid performance, which clearly establishes it is acting in bad faith. In *Metropolitan Ventures v. GEA Assoc.*, 2006 WI 71, 291 Wis.2d 393, 717 N.W.2d 58 the Court stated:

> …the duty of good faith arises because parties to a contract, once executed, have entered into a cooperative relationship and have abandoned the wariness that accompanied their contract negotiations, adopting some measure of trust of the other party.

Id. at para. 36.

In *Market Street Assocs. Ltd. Partnership v. Frey*, 941 F.2d 588 (7th Cir. 1991), cited by the Court in *Metropolitan Ventures*, *supra*, Honorable Richard Posner, writing for this Court, discussed the duty of good faith in contracting where he plainly and succinctly opined that the difficulty in exercising good faith lies in executing under the parties' agreement, not in the negotiation stage:

> The formation of or negotiation stage is precontractual, and here the duty is minimized. It is greater not only at the performance but also at the enforcement stage, which is also post-contractual. A party who hokes up a phony defense to the performance of his contractual duties and then, when that defense fails (at some expense to the other party) tried on another defense for size can properly be said to be acting in bad faith.

Market Street Assocs. Ltd. Partnership v. Frey, *surpa*, at 595, *citing, Harbor Ins. Co. v. Continental Bank Corp.*, 922 F2d 357 at 363 (7th Cir. 1990). The OFTI Group maintains this description applies directly to this case.

The OFTI Group had a right to contract with the defendant-appellee for the issuance of a 27% interest in Tak Investments LLC. There is no law prohibiting such transfer. The assignment of that interest to the OFTI Group is not precluded. Wis. Stat. §183.0704. There is nothing to statutorily preclude the Managing member from exercising the authority to manage absent operating agreement prohibitions. Wis. Stat. §183.0106 and §183.0401. The members of the LLC gave their consent to the assignment when the company's manager obligated them—as the manager of a company is permitted. The plaintiff-appellants are entitled to enforcement of their contract since there is no doubt that the contract does not violate a statute, rule of law or public policy. To say otherwise is essentially making new law in complete derogation of precedent establishing the freedom to contract. Tak Investments, LLC should not be allowed to avoid its obligations.

II. The District Court's Interpretation of the Indemnification and Hold Harmless Provisions of the Final Business Terms Agreement Render the Entire Document Meaningless.

Tak Investments, LLC would have the Final Business Terms Agreement rendered a nullity because of language it claims provides that the OFTI Group's notes were to be paid by them, to themselves, and had agreed to hold Tak Investments, LLC harmless from its own claims to pay itself. This rationale is preposterous, yet, it was evidently adopted by the District Court.

It is clear when reading the Final Business Terms Agreement as a whole, that the parties were obligated to perform. The defendant-appellee would have its duty to perform be rendered a nullity. This makes no sense in view of the provisions of the agreement that called for prospective business, the issuance of a 27% interest in the defendant-appellee's company and cancellation of all of the above in the event the prospective business proved to be successful. The Tak Investments LLC would have this court believe that all of this was some phantom agreement. Note, however, pursuant to the terms of the phantom agreement, the defendant-appellee asked for the attorney's fees award pursuant to the same agreement they deemed inoperable.

The problem with the position of the defendant-appellee is that the Final Business Terms Agreement and the notes are to be rendered superfluous even though real value has been attached by the terms of the Final Business Terms Agreement and Notes. The agreements describe in themselves, the rights, duties and valuable consideration contemplated. Why enter into the contract at all if the agreement means nothing? It makes no sense from the standpoint of any of the parties to the agreements. Contract law in the State of Wisconsin requires that contracts are to be deemed rational business instruments that effectuate the intentions of the parties. *Bruns v. Rennebohm Drug Stores, Inc.*, 151 Wis.2d 88, 442 N.W.2d 591 (Ct. App. 1989). In adopting the position of Tak Investments, the District Court erred.

Despite being bound by the terms of the Agreement such that it would favor Tak Investments, Tak Investments comes to this court again suggesting that the terms of the contract be read in such a way as to avoid its obligation:

> So far as reasonably practicable it (a contract) should be given a construction which will make it a rational business instrument and will effectuate what appears to have been the intentions of the parties. *Bitker & Gerner Company v. Green Investment Company*, 273 Wis.2d 116, 120, 76 N.W.2d 5490, at 552 (1956) (quoting *Waldo Bros. Company v. Platt Contracting Company*, 25 N.E.2d 770, 773 (Mass. 1940) (brackets added in *Bitker*):

Bruns v. Rennebohm Drug Stores, Inc., 151 Wis.2d 88 at 94, 442 N.W.2d 591 at 593 (Ct. App. 1989).

Defendant-Appellee's claim that the Final Business Terms Agreement makes no sense, so as to deem it unenforceable, obviates the document in its entirety. Courts must avoid illogical or unreasonable interpretations of contracts. *Estate of Ermenc v. American Family Mut. Ins. Co.*, 221 Wis.2d 478 at 484, 585 N.W.2d 679 (Ct. App. 1998). *See also, Borchardt v. Wilk*, 156 Wis.2d 420 at 427, 456 N.Ws2d 653 at 657 (Ct. App. 1990). The Final Business Terms Agreement, and the attending Investment Notes, must be read to make business sense and so as to avoid "illogical or unreasonable interpretation." *Estate of Ermenc*, *supra*. The OFTI Group has posited the only viable interpretation of the Final Business Terms Agreement that makes business sense. Tak Investments LLC has done nothing to show this court there is an underlying logic to the Final Business Terms Agreement. Rather, Tak Investments proffers the argument that the OFTI Group entered into a contract to assist in the paper mill sale transaction by executing an agreement that it knew was an agreement about nothing.

III. Defendant-Appellee Provides this Court with Information about Standing to Enforce Notes but Ignores Controlling Wisconsin Contract Law.

Defendant-Appellee fails to address the common business practice of a creditor holding collateral in order to secure indebtedness. The unrebutted testimony in this case is that the four notes in question were being held as collateral. In fact, Tak Investments

LLC cites to trial testimony in its own brief that the notes were being held as collateral as it relates to both Nicolet Bank and VHC. Inc. supported by the testimony of the parties holding the notes as collateral. (Appellees' Brief. pp 18-20). Similarly, Ronald Van Den Heuvel testified that the note being held by Associated Bank was transferred solely as collateral and had, in fact, been released, thought it had not been returned to Mr. Van Den Heuvel.[1] There was no contrary testimony.

The defendant-appellee cites to Wis. Stats. §403.203, which is applicable, but then, without further argument, concludes that the notes were transferred and therefore are only enforceable by the transferees. The defendant-appellee does not explain how that portion of the Wisconsin Statutes works with Wis. Stats. §409.313 which reads as follows:

> **§409.313 When possession by or delivery to secured party perfects security interest without filing.**
>
> (1) PERFECTION BY POSSESSION OR DELIVERY. Except as otherwise provided in sub. (2), a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certified securities by taking delivery of certified securities under §408.301.

The statute specifically provides for perfection of a security interest in instruments by taking possession of the collateral. Tak Investments LLC cites Wis. Stats. §403.301 for the purpose of establishing that an instrument must be in the possession of the holder in order to enforce the instrument. Yet, the law provides a person holding the instrument may only be a secured party where title to the instruments has not been passed. Tak Investments fails to engage in this analysis.

[1] Counsel for the plaintiff-appellant's currently holds the original of that note.

Dispositive of the issue, however, is Wis. Stats. §402.203 which specifically provides that an endorsement is required if an instrument is to be transferred. The statute reads:

> **403.203 Transfer of instrument; rights acquired by transfer.**
>
> (1) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.
> (2) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee may not acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.
> (3) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of endorsement by the transferor, the transferee has a specifically enforceable right to the unqualified endorsement of the transferor, but negotiation of the instrument does not occur until the endorsement is made.
> (4) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this chapter and has only the rights of a partial assignee.

Obviously, there can be no right to enforce a note absent an endorsement. The testimony in the present case is unanimous and contrary to the Tak Investments' position, i.e., that possession is not the talisman that permits, or deprives, a party of the right to sue. It is clear under Wisconsin law that a person who holds an instrument has certain rights as well as a non-holder who is in possession of the instrument and who maintains the right to sue under the instrument. Here, the sum of the notes including interest, far exceed the sums collateralized. It is clear under Wisconsin law that a security interest can be perfected by possession of the instrument. The individual or company holding that instrument would be a non-holder in possession and may have the right to enforce it, as would the "holder" of the instrument, in this case, the OFTI Group. There is no

testimony, document or any other offering to the court that would show that anyone but the plaintiffs-appellants hold legal title to the notes herein. Tak Investments could have produced contrary evidence, if it existed, but the record is bare.

IV. The Investment Notes were Attached as Exhibits to the Initial Complaint.

The defendant-appellee raises the issue of the statute of limitations and relation back avoiding, again, the clear and plain information that from the date of the filing of the complaint, the notes at issue were attached as exhibits. (R. l, Plaintiff-Appellants' Supp. App. 001-043).

The OFTI Group opted for the remedy of issuance of a 27% ownership interest in the defendant-appellee company. When the District Court failed to grant that requested relief, the plaintiffs-appellants had no other option but to sue on the notes that had been part of the transaction and part of this lawsuit from the outset and which serve as the basis of the value of that part of the transaction. The underlying lawsuit was filed on September 30, 2014, clearly within the six (6) year statute of limitations. The statute of limitations does not commence until there is a material breach. *CLL Assoc. Law Ltd. Partnership v. Arrowhead PAC Corp.*, 174 Wis.2d 604, 497 N.W.2d 115 (1993). There is no question but that the lawsuit was filed in a timely fashion relative to the date of breach. The defendant-appellee's only complaint is that the amended pleadings do not relate back to the originals.

Federal Rule of Civil Procedure 15(c) provides that the relation back doctrine applies when there is an amendment that asserts a claim or defense that arose out of the conduct, transaction or occurrence set out – or attempted to be set out – in the original pleading. FRCP 15(c)(b). In this case, as indicated, all of the events occurred out of the

same set of facts, to wit: the transfer of the ownership interest in the Oconto Falls tissue mill from the plaintiffs-appellants companies to the Tak-led companies including defendant-appellee, Tak Investments, LLC, and a subsidiary company, ST Paper, Inc.

The original Complaint was filed on September 30, 2014, well within the statute of limitations, included all of the claims now before this Court, but had elected the 27% remedy. When the District Court eliminated that remedy, the OFTI Group amended its complaint to seek recovery under the Notes. (R. 49, Plaintiff-Appellants' Supp. App. 044-088). The defendant-appellee even stated the statute of limitations ran on, or about, April 16, 2016—after the complaint was filed. (Appellees' Brief. pp 18-20).

There is no doubt but that the statute of limitations is satisfied by the relation back doctrine since all of the claims of the complaint and amended complaint arise out of the same transaction and occurrence and in this case, the notes themselves were attached to the complaint and formed the basis of the lawsuit. The defendant-appellee's argument in this regard must be rejected.

CONCLUSION

Tak Investments, LLC seeks to escape all of its responsibilities under both the Final Business Terms Agreement and the associated notes and seeks this Court's imprimatur on that avoidance. Tak Investments must be held to honor its agreements. It is respectfully requested that the judgment of the trial court be reversed and that the 27% interest in the subject company, as was as agreed, be awarded. In the alternative, it is respectfully requested that this court, in reversing the District Court, order judgment be entered in favor of the plaintiff-appellants in the amount of the notes, with interest as requested.

Dated at Milwaukee, Wisconsin this 20th day of August, 2018.

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CERTIFICATE OF COMPLIANCE WITH FRAP RULE 32(a)(7), FRAP RULE 32(g) and CR 32I

The undersigned, counsel of record for the plaintiffs-appellants, Tissue Technology, LLC, Tissue Products Technology Corp., Oconto Falls Tissue, Inc. and Partners Concepts Development, Inc. furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for brief produced with a proportionally spaced font. The length of this brief is 3,032 words.

Dated this 20th day of August, 2018.

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PROOF OF SERVICE

I hereby certify that on August 20, 2018, I electronically filed Appellants' Reply Brief and Supplemental Appendix with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. Additionally, copies will be sent to counsel of record via United States Postal Service, addressed as follows:

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Dated this 20th day of August, 2018.

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