

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

FORTUNE AVENUE, LLC,

Plaintiff,

Case No. 18-C-1362

v.

HOWARD BEDFORD,

Defendant.

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

NOW COMES the Plaintiff, Fortune Avenue, LLC, by its attorneys, Janssen Law LLC, and files the following memorandum of law in support of its motion for summary judgment.

STATEMENT OF FACTS

1. The defendant, Howard Bedford, executed an Unsecured Promissory Note dated October 21, 2011 (hereinafter "10/21/11 Note"), payable to the plaintiff, Fortune Avenue, LLC, in the amount of Three Hundred Fifty Thousand and 00/100 Dollars (\$350,000). (Aff. of Robert J. Janssen ("RJJ") ¶2 – Exhibit A).
2. The 10/21/11 Note provides for a variable interest rate, adjusting to one percentage point above the Index Rate, with a minimum interest rate of no less than 5.5% until the maturity date. (Id. – Exhibit A, Section 2(b)).
3. The 10/21/11 Note has detailed language which provides for an accelerated interest rate of an additional 5% in the event of default, and delinquency charges of 5% of the unpaid monthly payment. (Id. – Exhibit A, Section 2(d) & 2(f)).

4. The 10/21/11 Note also provides for the application of Wisconsin law as the governing law, and states the 10/21/11 Note “may not be supplemented or modified except in writing and signed by Maker and Lender.” (Aff. of RJJ ¶2 – Exhibit A, Section 10 & Section 8).
5. The defendant made five payments to date to plaintiff totaling \$42,365.74 (\$8,395.83 on 2/29/12; \$8,434.31 on 3/31/12; \$8,472.97 on 4/30/12; \$8,511.81 on 5/31/12, and \$8,550.82 on 7/31/2012). (Complaint, ¶ 5).
6. Despite multiple requests by plaintiff for repayment, defendant has failed, neglected and refused to pay the remaining balance due on the 10/21/11 Note according to its terms. (Complaint, ¶¶6-7; Aff. of RJJ ¶ 3; Exhibit B - Bedford Depo. p. 38, lines 14-20, p. 39, lines 1-25).
7. As of April 25, 2019, the total balance due under the 10/21/11 Note is \$592,316.76, which includes the unpaid principal of \$322,499.81, interest of \$1,527.39 (at the rate of 5.5% through August 31, 2012 prior to loan being in default), interest of \$228,816.95 (at the rate of 10.5% from September 1, 2012 to April 25, 2019 after the loan was in default), and delinquency charges of \$40,000.00 (80 months x \$500.00 per month between September 2012 and April 2019), plus all costs of collection before and after judgment, including actual attorneys’ fees, as provided for in the 10/21/11 Note. (Aff. of RJJ ¶¶ 2 & 4; Exhibit A – Section 7; Exhibit C – Excel spreadsheet with interest and delinquency charge calculations).
8. Defendant admits he signed the 10/21/11 Term Loan Agreement and Promissory Note on his own accord, with no one threatening him or requiring him to sign. (Aff of RJJ ¶3; Bedford Depo. p. 29, lines 9-11).

9. Defendant admits he reviewed and understood the 10/21/11 Note prior to signing. (Aff. of RJJ ¶ 3; Bedford Depo. p. 30, lines 4-17).
10. Defendant acknowledges he followed the terms of the 10/21/11 Note until December of 2012, when he alleges he was released from the obligation. (Aff. of RJJ ¶ 3; Exhibit B - Bedford Depo. p. 31, lines 4-11).
11. Defendant asserts that Dave Van Den Heuvel, one of plaintiff's representatives, told defendant on December 5, 2012 that defendant did not have to pay on the 10/21/11 debt any further because the debt was a family problem with Dave's brother, Ron Van Den Heuvel. (Aff. of RJJ ¶ 3; Bedford Depo. p. 31, lines 12-17; p. 33, lines 10-13; p. 37, lines 5-11). [NOTE this fact is disputed by plaintiff]
12. Paragraph 10 of the 10/21/11 Term Loan Agreement signed by the defendant provides that "[n]o amendment, modification, termination or waiver of any provision of this Agreement shall in any event be effective unless it is in writing and signed by Lender and Borrower[.]" (Aff. of RJJ ¶3; Bedford Depo. Exhibit 1).
13. Paragraph 8 of the 10/21/11 Promissory Note signed by the defendant provides that "[t]his Note may not be supplemented or modified except in writing and signed by Maker and Lender." (Aff. of RJJ; ¶2 – Exhibit A).
14. Defendant did not follow up with Dave Van Den Heuvel, or send any written communication to document or confirm his belief that plaintiff had forgiven the remaining balance due under the 10/21/11 Note. (Aff. of RJJ ¶ 3; Bedford Depo.p. 41, lines 1-8).
15. David Van Den Heuvel has never told Howard Bedford the remaining debt under the 10/21/11 Note was forgiven or waived. (Aff. of David Van Den Heuvel; ¶2).

16. On or about January 18, 2017, Jim Kellam, one of plaintiff's representatives, sent defendant a letter with a renewal note for the 10/21/11 Note. (Aff. of Jim Kellam ¶ 3; Exhibit A).
17. Upon information and belief, defendant did not contact Mr. Kellam, Dave Van Den Heuvel, or any other representatives or employees of the plaintiff to dispute or assert that the 10/21/11 Note had been forgiven. (Aff. of Jim Kellam; ¶4; Aff. of David Van Den Heuvel; ¶3).

FEDERAL SUMMARY JUDGMENT STANDARD

In order to succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party." Brummett v. Sinclair Broad. Grp., Inc., 414 F.3d 686, 692 (7th Cir. 2005).

When considering a motion for summary judgment, the court shall view all reasonable inferences from the facts in a light most favorable to the nonmoving party. Baron v. City of Highland Park, 195 F.3d 333, 338 (7th Cir. 1999). If the nonmoving party fails to establish the existence of an essential element on which the party will bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex, 477 U.S. at 322.

ARGUMENT

- I. Plaintiff is entitled to summary judgment as a matter of law because there are no issues of material fact, and the 10/21/11 Promissory Note signed by defendant is plain and unambiguous.**

Wisconsin law must be applied in this case because the Promissory Note between the parties contains a choice-of-law provision designating the application of Wisconsin law. (Aff. of

RJJ; ¶2 – Exhibit A, p. 3). In Wisconsin, the interpretation of an unambiguous written contract presents a question of law. Town Bank v. City Real Estate Development, LLC, 2010 WI 134, ¶32, 330 Wis.2d 340, 793 N.W.2d 476 citing Admanco, Inc. v. 700 Stanton Drive, LLC, 2010 WI 76, ¶15, 326 Wis.2d 586, 786 N.W.2d 759.

Wisconsin courts have long recognized the importance of protecting parties' freedom to contract. Town Bank, 2010 WI 134, ¶33. "[T]he best indication of the parties' intent is the language of the contract itself." Id. citing Levy v. Levy, 130 Wis.2d 523, 535, 388 N.W.2d 170 (1986). Contract language is construed in accordance with its plain or ordinary meaning. Id. Unless a contract is ambiguous, meaning it is susceptible to more than one reasonable interpretation, the court will not consider extrinsic evidence relating to the parties' intent. Id. (citations omitted).

The plain and unambiguous terms of the 10/21/11 Note indicate that plaintiff loaned defendant the principal sum of \$350,000, and defendant promised to pay back the loan, with interest, by March 10, 2015. (Statement of Facts ¶1 - Aff. of RJJ; ¶2 – Exhibit A).

There is no dispute defendant signed the 10/21/11 Term Loan Agreement and Promissory Note on his own accord, with no one threatening him or requiring him to sign. (Statement of Facts ¶8 - Aff. of RJJ ¶ 3; Bedford Depo. p. 29, lines 9-11). There is no dispute defendant reviewed and understood the terms of the 10/21/1 Promissory Note prior to signing the documents. (Statement of Facts ¶9 - Aff. of RJJ ¶ 3; Bedford Depo. p. 30, lines 4-17). Further, there is no dispute defendant failed to make any payments on the 10/21/11 Note since July 31, 2012, and defendant has failed to pay the remaining balance due on the 10/21/11 Note according to its terms. (Statement of Facts ¶¶5-7).

Plaintiff is not aware of any assertion that the contract language of the 10/21/11 Term Loan Agreement and Promissory Note are ambiguous or unenforceable. In fact, defendant acknowledges he followed the terms of the 10/21/11 Note until December of 2012, when he alleges he was released from the obligation. (Statement of Facts ¶10 - Aff. of RJJ ¶ 3; Exhibit B - Bedford Depo. p. 31, lines 4-11). Defendant claims Dave Van Den Heuvel told defendant during a meeting on December 5, 2012 that defendant did not have to pay on the 10/21/11 debt any further because it was a family problem with Dave's brother, Ron Van Den Heuvel. (Statement of Facts ¶11 - Aff. of RJJ ¶ 3; Exhibit B - Bedford Depo. p. 31, lines 12-17; p. 33, lines 10-13; p. 37, lines 5-11). However, Dave Van Den Heuvel never told Howard Bedford the remaining debt under the 10/21/11 Note was forgiven or waived. (Statement of Facts ¶15 - Aff. of David Van Den Heuvel; ¶2).

Defendant's allegation that the remaining balance on the 10/21/11 Note was forgiven should not be allowed to defeat plaintiff's motion for summary judgment because the written terms of the 10/21/11 Term Loan Agreement and Promissory Note expressly prohibit any such oral modifications. Paragraph 10 of the 10/21/11 Term Loan Agreement signed by the defendant provides that "[n]o amendment, modification, termination or waiver of any provision of this Agreement shall in any event be effective unless it is in writing and signed by Lender and Borrower[.]" (Statement of Facts ¶12 - Aff. of RJJ ¶3; Bedford Depo. Exhibit 1).

Of greatest importance is the wording in the Promissory Note itself. Paragraph 8 of the 10/21/11 Promissory Note signed by the defendant provides that "[t]his Note may not be supplemented or modified except in writing and signed by Maker and Lender." (Statement of Facts ¶13 - Aff. of RJJ; ¶2 – Exhibit A).

Not only is there no signed writing or agreement on plaintiff's behalf to show the 10/21/11 Note was forgiven, there is not even any written communication or documentation from defendant confirming any such agreement or arrangement. (Statement of Facts ¶14 - Aff. of RJJ ¶3; Exhibit B - Bedford Depo. p. 41, lines 1-8). Defendant never attempted to so much as send an email confirming or documenting that the debt was indeed forgiven, even though there was over \$322,000 still left to be paid on the 10/21/11 Note in December of 2012. (Statement of Facts ¶14 & 7 - Aff. of RJJ ¶ 4; Exhibit C – Excel spreadsheet with interest and delinquency charge calculations).

Despite defendant's claim that the debt was forgiven in December 2012, plaintiff's representatives sent defendant a letter with a renewal note on or about January 18, 2017 to renew the 10/21/11 Note. (Statement of Facts ¶16 - Aff. of Jim Kellam ¶ 3; Exhibit A). Yet, despite receiving the request for the renewal note, Mr. Bedford never followed up with any of plaintiff's representatives to assert that the 10/21/11 Note was forgiven. (Statement of Facts ¶17 - Aff. of Jim Kellam; ¶4; Aff. of David Van Den Heuvel; ¶3).

Other than defendant's own self-serving testimony that Dave Van Den Heuvel told him plaintiff would forgive the remaining debt under the 10/21/11 Note, there is no evidence to support defendant's defense in this case. If defendant is allowed to defeat summary judgment by simply asserting that plaintiff made an oral statement releasing him from his obligation to repay his remaining balance of over \$322,000 in December of 2012 on the 10/21/11 Note, it is difficult to envision a scenario where summary judgment could be granted in a case involving default on a promissory note.

CONCLUSION

Plaintiff respectfully requests the Court grant its motion for summary judgment on the grounds that there are no genuine issues of material fact, and plaintiff is entitled to judgment as a matter of law because the defendant has defaulted and breached the plain and unambiguous terms of the October 21, 2011 Promissory Note.

Dated: April 25, 2019

By: s/ Robert J. Janssen

Robert J. Janssen

State Bar No. 1000525

Janssen Law, LLC

3000 Riverside Drive, Suite 210

Green Bay, WI 54301

Phone: (920) 425-4844

Fax: (920) 425-4845

Email: bob@janssenlawfirm.com

Attorneys for Plaintiff, Fortune Avenue, LLC