UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

FORTUNE AVENUE, LLC,

Plaintiff,

v.

HOWARD BEDFORD,

Defendant.

Case No. 18-CV-1362

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant Howard Bedford ("Bedford"), by and through his attorneys, Godfrey & Kahn, S.C., submits this Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment.

INTRODUCTION

Plaintiff's motion for summary judgment on its claim to enforce the loan agreement and promissory note should be denied for two reasons. First, there is a plain dispute of material fact in this case concerning whether David Van Den Heuvel, one of the Plaintiff's principals, orally released Bedford from his obligations under the contracts at issue in this matter, the Term Loan Agreement and the Unsecured Promissory Note (collectively, the "Loan"), or waived Plaintiff's contractual rights under the same documents.

Despite language in the Term Loan Agreement and the Unsecured Promissory Note purporting to require any modifications to be in writing, Wisconsin law provides that such clauses do not prohibit the oral modification or waiver of a contractual term. Wisconsin law is also clear that a party may orally release a maker of a promissory note from any further obligation under the note.

This case presents two divergent accounts of a conversation. On the one hand, Bedford states that on December 5, 2012, Dave Van Den Heuvel, on behalf of Plaintiff, orally released Bedford from his obligations pursuant to the note. Dave Van Den Heuvel denies that he ever made such statements. This conflicting testimony results in a plain dispute of fact. Since a party to a contract in Wisconsin may orally waive performance of contract, this dispute is material.

Summary judgment is also inappropriate because the facts fail to establish that Bedford's affirmative defense of laches is inapplicable. It is undisputed that after December 5, 2012, Plaintiff did not communicate any intent to enforce the note to Bedford until its counsel sent Bedford a letter on June 13, 2018 in a prelude to this suit being filed on July 17, 2018. Thus, notwithstanding the differing accounts of the parties of the conversation at the end of 2012, Plaintiff's unreasonable delay of nearly five and a half years in asserting its rights, which prejudiced Bedford, should result in a finding of laches.

Accordingly, the Court should deny Plaintiff's motion for summary judgment and set this matter for trial.

BACKGROUND

Bedford was introduced to Ron Van Den Heuvel ("Ron") in 2010. Bedford learned that Ron was pitching a new business opportunity involving the recycling of food-contaminated waste into energy. (Def.'s Additional Proposed Findings of Fact ("DAPFF") ¶ 1.) Ron claimed that various proprietary processes he had developed would make this process a success, and referred to it as "Green Box." (DAPFF ¶ 1.) Ron asked Bedford to invest in the project and assist him in seeking additional investors. (DAPFF ¶ 1.)

Bedford agreed and did invest in Ron's companies and aided him in seeking additional investors. (DAPFF ¶ 2.) Ron and the companies he ran had difficulties with various creditors.

One such creditor was SHF XII, LLC ("Stonehill"). (DAPFF ¶ 3.) In 2010, Stonehill and Ron entered into settlement discussions, which resulted in a settlement agreement and mutual release effective as of December 31, 2010 (the "Settlement Agreement"). (DAPFF ¶ 3.) As part of that agreement, Bedford executed a guarantee of a payment to be made to Stonehill in the amount of $750,000. (DAPFF ¶ 3.)

Spirit Construction Services, Inc. ("Spirit") was a company owned by Ron's brothers. (DAPFF ¶ 4.) In 2011, Dave Van Den Heuvel ("Dave") contacted Bedford about his discussions with Spirit's bank, Baylake Bank, concerning payments required under the Settlement Agreement. (DAPFF ¶ 4.) Part of that discussion contemplated Spirit paying $750,000 to Stonehill. (DAPFF ¶ 4.) Dave stated to Bedford "[w]e will borrow you the monies to pay them or something like that." (DAPFF ¶ 4.)

Bedford eventually parted ways with Ron. On August 25, 2011, Bedford learned information that caused him to believe that Ron was involved in fraud.[1] (DAPFF ¶ 5.) Bedford confronted Ron about it and announced the fact that he was leaving and would no longer do business with Ron. (DAPFF ¶ 5.) Ron reacted angrily and proceeded to punch Bedford in the face as he was leaning over to pick up his brief case. (DAPFF ¶ 5.) As a result, Bedford obtained medical treatment that day at a hospital in Sheboygan, Wisconsin on his drive back home to Illinois. (DAPFF ¶ 5.)

On October 21, 2011, Bedford signed the $350,000 unsecured Promissory Note at issue in this case in favor of Fortune Avenue, LLC, a company Bedford understood to be affiliated with Spirit. By this time, Bedford wanted nothing more to do with Ron or any of his companies.

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[1] As the Court will recall, consistent with his pleas of guilty, Ron was convicted of various fraud charges in *United States v. Van Den Heuvel, et al*, Case No. 16-CR-640 (E.D. Wis. filed April 19, 2016) and *United States v. Van Den Heuvel*, Case No. 17-CR-160 (E.D. Wis. filed Sept. 19, 2017).

Bedford made five payments to Plaintiff totaling $42,365.74 in 2012. (DAPFF ¶ 7.) Dave Van Den Heuvel periodically reminded Bedford by e-mails in 2012 to make payments. (DAPFF ¶ 8.) On November 29, 2012, Bedford received an email from Dave stating, "Howard need some more payments." (DAPFF ¶ 9.) Bedford responded back and noted that he would be in Green Bay the following Tuesday and Wednesday, December 4 and 5, and that Bedford could meet with him. (DAPFF ¶ 9.)

The morning of December 5, 2012, Dave called Howard and requested a meeting. Bedford then went to Dave's offices that morning in De Pere and met with him. (DAPFF ¶¶ 10-11.) In the course of that meeting, Dave expressed to Bedford that Bedford need not worry about any payments pursuant to the Note the Plaintiff in this lawsuit is seeking to enforce. (DAPFF ¶ 11.) Bedford understood Dave to be speaking on behalf of Fortune Avenue, LLC, and indicated that because the Note was originally related to debts attributable to his brother, Ron, this debt held by Fortune Avenue, LLC was a family concern. (DAPFF ¶ 11.) Dave expressed that Bedford should never have been brought into the situation and that he would not be looking for any more money from Bedford. (DAPFF ¶ 11.) Dave told Bedford not to worry about making any more payments. (DAPFF ¶ 11.) Bedford took Dave to mean that Bedford was relieved of any obligation to make further payments on the Note. (DAPFF ¶ 11.)

For the ensuing five and one-half years, Fortune Avenue, LLC never sent any further correspondence to Bedford regarding the Loan. (DAPFF ¶ 13.) Fortune Avenue, LLC had not made any demand on Bedford concerning allegedly late or missing payments over this same period of time, from December 5, 2012 until June 13, 2018. (DAPFF ¶ 14.) On June 13, 2018, counsel for Fortune Avenue, LLC sent correspondence to Bedford demanding payment pursuant to the Note. Plaintiff filed this lawsuit on July 17, 2018. (DAPFF ¶ 13; ECF No. 1-1.)

SUMMARY JUDGMENT STANDARDS

"Summary judgment is appropriate when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Abdollahzadeh v. Mandarich Law Group, LLP*, 922 F.3d 810, 814 (7th Cir. 2019) (quoting Fed. R. Civ. P. 56). "A genuine dispute of material fact exists if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id*. (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A court entertaining a motion for summary judgment must draw all reasonable inferences for the nonmoving party and view the record in the light most favorable to the nonmoving party. *Terry v. Gary Community School Corp.*, 910 F.3d 1000, 1004 (7th Cir. 2018) (citing *Barbera v. Perason Educ., Inc.*, 906 F.3d 621, 628 (7th Cir. 2018)). Credibility determinations should not be made on a motion for summary judgment. *See Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992) ([S]ummary judgment is not a procedure for resolving a swearing contest.").

ARGUMENT

I. A Dispute of Material Fact Exists Concerning Whether Plaintiff Forgave the Loan.

Plaintiff's reliance on language in the loan documents purporting to prohibit oral modifications is misplaced. This is because Wisconsin courts have long held that unless a contract is one required by law to be in writing, a contract is subject to oral modification, even though the contract provides it be modified only in writing. *See S&M Rotogravure Service, Inc. v. Baer*, 77 Wis. 2d 454, 468-69, 252 N.W.2d 913 (1977) ("It is universally accepted that, unless a contract is one required by law to be in writing, the contract can be modified orally although it provides it can be modified only in writing.") (citing 4 *Williston on Contracts* § 591 (3d Ed. Jaeger 1961); 6 *Corbin on Contracts* § 1295 (1962)). The Seventh Circuit has also held that this is the state of the law in Wisconsin. *Allen & O'Hara, Inc. v. Barrett Wrecking, Inc.*, 898 F.2d 512, 518 (7th Cir.

1990) ("It is clear under Wisconsin law that a written contract may be subsequently modified orally by the parties."). Thus, while the parole evidence rule may apply to defeat attempts to vary the written terms of a document to be a fully integrated contract, "it has no implication when the issue is whether one of the parties later waived strict compliance with those terms." *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1289 (7th Cir. 1986).

Consistent with these principles, the Wisconsin common law recognizes the waiver, alteration, or surrender of important rights by oral statements or conduct. Thus, a creditor can waive his written security interest in collateral and right to approve collateral sales by conduct which impliedly consents to sale of that collateral. *Christensen v. Equity Co-op. Livestock Sale Ass'n*, 134 Wis. 2d 300, 303-305, 396 N.W.2d 762 (Ct. App. 1986). Even constitutional rights are subject to waiver by expressions or conduct inconsistent with that right. *State v. Hampton*, 2010 WI App 169, ¶¶ 35-44, 330 Wis. 2d 531, 793 N.W.2d 901. Significantly, the Wisconsin Supreme Court has held that a holder of a promissory note may orally agree not to enforce its right to payment under the debtor's note. *Koch v. Johnstone, Inc.*, 202 Wis. 445, 232 N.W. 883 (1930).

In light of this clear authority, the language of the loan documents purporting to prohibit oral modification is ineffective as a matter of law. The Note, which could be prepayed according to its own terms, could have been performed within a year and therefor is not subject to the statute of frauds. *See* Wis. Stat. § 241.02. Further, Wisconsin law recognizes that the holder of a note may orally agree not to enforce its right to payment.

This leaves a factual dispute concerning whether Dave Van Den Heuvel in fact made the statements Bedford recounts releasing Bedford from his obligations under the Loan. Dave Van Den Heuvel avers that he never told Bedford that the remaining debt was forgiven or waived. (ECF No. 13.) Yet, in response to an e-mail sent by Van Den Heuvel to Bedford in late November

of 2012, Van Den Heuvel and Bedford did meet at Van Den Heuvel's offices in De Pere on December 5, 2012. (DAPFF ¶¶ 7-9.) The morning of that meeting, Van Den Heuvel called Beford. (DAPFF ¶ 8.) Bedford states that at that meeting Dave Van Den Heuvel acknowledged that Bedford should not have to deal with what was a family problem, given the fact the Loan had its genesis in an effort to resolve claims against Ron Van Den Heuvel. Thus, Bedford understood that he was no longer indebted to the Plaintiff.

The complete silence from the Plaintiff on the matter over the ensuing years is consistent with Bedford's account of the meeting. While Dave Van Den Heuvel had occasionally sent e-mails to Bedford in 2012 such as the one he sent in November of 2012 reminding Bedford that a payment was due, no such communications ever issued again from Van Den Heuvel after the meeting on December 5, 2012.

Bedford avers that Dave Van Den Heuvel forgave the Loan. Despite the fact Dave Van Den Heuvel's e-mails reminding Bedford to pay ceased and Plaintiff waited over five years before sending it sent demand letter to Bedford, Van Den Heuvel states otherwise. Viewing the facts in a light most favorable to Bedford, there is a dispute of a material fact making denial of Plaintiff's motion for summary judgment appropriate.

II. Summary Judgment Should be Denied Based on Undisputed Evidence Supporting Bedford's Affirmative Defense of Laches.

A second basis for the Court to deny Plaintiff summary judgment is that the facts viewed in a light most favorable to Bedford do not permit finding that Bedford's affirmative defense of laches fails. Bedford raised the defense of laches in his affirmative defenses. (ECF No. 4 at 2.)

The equitable doctrine of laches is separate from the statute of limitations. *Schafer v. Wegner*, 78 Wis. 2d 127, 135, 254 N.W.2d 193 (1977) ("Even if the statute of limitations did not bar this second cause of action, laches would."). "Laches is distinct from a statute of limitations

and may be found where the statute of limitations has not yet run." *Zizzo v. Lakeside Steel & Mfg. Co.*, 2008 WI App 69, ¶ 7, 312 Wis. 2d 463, 752 N.W.2d 889 (citing *Scafer*, 78 Wis. 2d at 132). The defense applies to both actions at law and in equity. *Id*.

There are three elements to laches: "(1) unreasonable delay by the party seeking relief, (2) lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming, and (3) prejudice to the party asserting laches caused by the delay." *Zizzo*, 2008 WI App 69, ¶ 7 (citing *State ex rel. Coleman*, 290 Wis. 2d 352, ¶¶ 27-29, 714 N.W.2d 900).

Here, it is undisputed that from the date Dave Van Den Heuvel and Bedford met on December 5, 2012, until June 13, 2018, the date Plaintiff's counsel sent a demand letter to Bedford, Plaintiff did not make any demands on Bedford concerning the Loan. Plaintiff filed this lawsuit on July 17, 2018. (ECF No. 1-1.) This delay of five-and-a-half years under these circumstances was unreasonable.

Further, based on the fact that he had not received any demands for payment on the Loan over these years, Bedford had no reason to believe that he would years later find himself a defendant in litigation seeking $592,316.76 in damages. There are no facts that support a finding that Bedford should have known that Fortune Avenue would bring this claim during those intervening years.

Finally, the prejudice to Bedford is plain. As a result of the years of delay, Bedford Plaintiff is now seeking hundreds of thousands of dollars in interest, default interest and late fees. (ECF No. 12-3.) Further, the evidence upon which Bedford could base his defense is now years older. The memories of witnesses fade over time, and documents and e-mails can be tossed and deleted. The undisputed facts are insufficient for the Court to conclude as a matter of law that Bedford's laches defense fails.

CONCLUSION

For all of the above reasons, the Court should deny Plaintiff's motion for summary judgment.

Dated this 28th day of May, 2019.

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