

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

FORTUNE AVENUE, LLC,
Plaintiff,

Case No. 18-CV-1362

v.

HOWARD BEDFORD,
Defendant.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S
PROPOSED FINDINGS OF MATERIAL FACT**

Defendant Howard Bedford, by and through his counsel, Godfrey & Kahn, S.C., and in response to Plaintiff's Proposed Findings of Material Fact,¹ states as follows:

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).

RESPONSE: Undisputed.

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)).

RESPONSE: Undisputed.

¹ Plaintiff did not file a separate document containing proposed findings of fact as contemplated by Civil L.R. 56(b)(1)(C), but instead listed proposed findings of fact in its brief in support of its motion for summary judgment.

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)).

RESPONSE: Undisputed.

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).

RESPONSE: Undisputed.

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).

RESPONSE: Undisputed.

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).

RESPONSE: Bedford does not dispute that Plaintiff made multiple requests for payment in 2012 prior to December 5, 2012, and sent correspondence by counsel dated June 13, 2018, making a demand for payment. Bedford disputes that any balance is due on the Note as a result of the forgiveness of the debt on December 5, 2012, and the Plaintiff’s unreasonable delay in seeking to enforce the Note. (Bedford Decl. ¶¶ 12, 14.)

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).

RESPONSE: Bedford does not dispute the Plaintiff's arithmetic, but does dispute that any balance is due on the Note as a result of the forgiveness of the debt on December 5, 2012, and the Plaintiff's unreasonable delay in seeking to enforce the Note. (Bedford Decl. ¶¶ 12, 14.)

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).

RESPONSE: Undisputed.

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).

RESPONSE: Undisputed.

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).

RESPONSE: Undisputed.

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]

RESPONSE: Undisputed.

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).

RESPONSE: Undisputed.

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).

RESPONSE: Undisputed.

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).

RESPONSE: Undisputed.

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).

RESPONSE: Disputed. (Bedford Decl. ¶ 12.)

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).

RESPONSE: Undisputed.

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).

RESPONSE: Undisputed.

Dated this 28th day of May, 2019.

By: s/ Jonathan T. Smies
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