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 REPLY 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 reply memorandum of law in support of its motion for summary judgment.

ARGUMENT

I. Summary judgment is appropriate because it is not reasonable to infer the Plaintiff forgave $322,000 of debt when there is no evidence to support Plaintiff forgave the debt other than Defendant's self-serving statements.

Defendant argues there is a dispute of material fact concerning whether Plaintiff forgave the remaining balance on the debt, and cites to a number of cases to support that a contract can be modified orally even though it provides it can only be modified in writing. While Plaintiff acknowledges oral modifications to a written contract may be permissible under Wisconsin law, the facts of this case do not support that conclusion.

The majority of the cases addressing oral modification of a contract requiring written changes deal with construction contracts and written change orders. See S & M Rotogravure

Services, Inc. v. Baer, 77 Wis. 454, 468-69, 252 N.W.2d 913 (1977); Wiggins Construction Co. v. Joint School District, 35 Wis.2d 632, 638, 151 N.W.2d 642 (1967); Sterling Engineering & Construction Co. v. Berg, 161 Wis. 280, 286-87, 152 N.W. 851 (1915); McGrath Construction Co. v. Waupaca-Green Bay Railway Co., 148 Wis. 372, 378, 134 N.W. 824 (1912).

Defendant is alleging Plaintiff simply forgave the remaining balance of approximately $322,000 due back in December of 2012 for no consideration provided on the part of the Defendant. This is quite different from a construction context where change orders are common and frequent, and the party who orally agrees to the modification derives some benefit from the change order. Defendant's allegation that Plaintiff forgave the debt is more than a mere change or addition to the parties' contract, it is essentially a cancellation of Defendant's entire remaining obligations under the contract. Further, Plaintiff would have benefitted nothing from forgiving the $322,000 balance of Defendant's debt.

It defies logic to conclude that Plaintiff would just forgive the Defendant's remaining debt of $322,000 back in December of 2012, and that there would be no paper trail regarding the forgiveness of that debt. If Plaintiff did in fact forgive the debt back in December of 2012, Defendant would have had to report the $322,000 as debt forgiveness income on his taxes; however, there is no evidence this was done.

Defendant cites to Koch v. Johnstone, Inc., 202 Wis. 445, 232 N.W. 883 (1930) to support that "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." (Def's Memorandum of Law, p. 6). However, a review of the Koch case shows a completely different factual scenario than the case at bar.

In Koch, the plaintiff orally promised to forgive and surrender three promissory notes owed by the defendant corporation as part of an agreement relating to the dissolution of the corporation. Id. Plaintiff never delivered or surrendered the notes as previously agreed, and later sued to recover on the promissory notes. Id. The court allowed the "parol evidence" of plaintiff's oral statements regarding surrender of the promissory notes because the dissolution agreement did not identify what debts defendant was required to pay. Id. The Court stated as follows:

> [Plaintiff's three] notes constituted evidence of an indebtedness owing by the corporation to the plaintiff, but, if that indebtedness had been paid or released or discharged prior to the execution or delivery of the written agreement, then the notes were but mere evidence of an indebtedness which did not exist. It was perfectly competent for the defendant Johnstone to show that, before the written agreement became an effectual and binding contract by delivery, this indebtedness had been released and discharged, and consequently did not constitute a part of the debts, liabilities, and obligations which he assumed by the terms of the written agreement. Koch v. Johnstone, Inc., 202 Wis. 445, 232 N.W. 883, 884-85 (1930).

Thus, "parol evidence" of the oral forgiveness of the promissory note was allowed in Koch because it occurred prior the execution of the written agreement for the dissolution of the corporation, and thus there was ambiguity regarding the debts owed by the corporation. That is not the case here. Fortune Avenue, LLC and Defendant Bedford had a legally binding promissory note, upon which Bedford made several payments. Bedford claims that Dave Van Den Heuvel, one of Fortune Avenue, LLC's principals, orally forgave the balance of the debt in December 2012, for absolutely no benefit or consideration for Fortune Avenue, LLC, and there is nothing in writing and no paper trail to confirm any debt forgiveness.

One has to question why parties would bother having a written contract, or require that modifications to the contract be in writing at all if the other party is able to make baseless assertions that the terms of the contract were entirely modified or waived. Summary judgment should be granted on plaintiff's behalf because it is simply not reasonable to infer that Plaintiff

forgave approximately $322,000 of debt based on the Defendant's self-serving statements alone, and no evidence of any consideration or benefit conferred onto the Plaintiff.

II. Summary judgment is appropriate because Defendant's affirmative defense of laches does not apply.

Defendant argues summary judgment should be denied because there is undisputed evidence supporting Defendant's affirmative defense of laches. Defendant cites Zizzo v. Lakeside Steel & Mfg. Co., 2008 WI App 69, 312 Wis.2d 463, 752 N.W.2d 889, in support of his arguments for laches. However, the Zizzo case is distinguishable in several important respects, and not does preclude entry of summary judgment in this case.

In Zizzo, the defendant loaned plaintiff's parents money in 1989, and secured its loans with a mortgage on their property. Id. at ¶1. No payments were ever made, and the defendant never made any attempts to collect or foreclose on the mortgage. Id. Plaintiff's parents died, and plaintiff became the owner of the mortgaged property. Id. In 2005, the plaintiff brought a declaratory judgment action asking the court to discharge the defendant's mortgage on several grounds, including laches. Id.

Ultimately, the court decided to bar the defendants from enforcing the mortgage on the grounds of laches because there was (1) unreasonable delay, no action had been brought on the mortgage in 18 years despite no payments made; (2) lack of knowledge on the plaintiff's part that the mortgagees would assert rights under the mortgages because they had not done so during this time [1989-2007]; and (3) prejudice because the original mortgagors and note-signers were dead, and plaintiff had no way of getting any favorable evidence about the notes' and mortgage's execution and validity. Zizzo, 2008 WI App 69, ¶5. The court of appeals affirmed the trial court on the issue of laches. Id. at ¶22.

While the facts in the Zizzo case support the court's decision to release the plaintiff's property from defendant's mortgage, the facts in this case do not support releasing the Defendant from the remaining balance owed on the October 21, 2011 Promissory Note.

First, in Zizzo, more than 15 years had passed since the loan originated, and defendant had not started any action to collect on the debt or enforce the mortgage. Zizzo, 2008 WI App 69, ¶1. The six-year statute of limitations for the notes securing the loan for the mortgaged property had long since expired, and were no longer enforceable. Id. at ¶4. In this case, the October 21, 2011 Promissory Note was less than seven years old when the collection action was commenced, and less than six years had passed since defendant's last payment on the Promissory Note on July 31, 2012. (Pl's Statement of Facts ¶5 - Complaint, ¶5). Thus, unlike Zizzo, where the statute of limitations had long since expired on the defendant's notes, Plaintiff was still within the statute of limitations on the October 21, 2011 Promissory Note when the collection action was filed.

Second, in Zizzo, the court found that plaintiff lacked knowledge the mortgagees would assert rights under the mortgage because they had not done so from 1989 to 2007, despite the fact that not one payment had been made. Id. at ¶5. In the case at bar, Plaintiff's representatives sent Defendant several emails regarding late payments before December of 2012, and also sent a letter on January 18, 2017 (almost 18 months before the collection action was filed) with a renewal note for the October 21, 2011 Promissory Note. (Pl's Statement of Facts ¶¶ 6 & 16 - Aff. of RJJ ¶ 3; Exhibit B - Bedford Depo. p. 38, lines 14-20, p. 39, lines 1-25; Aff. of Jim Kellam ¶ 3; Exhibit A). The January 18, 2017 letter included interest calculations through December 31, 2016. (Pl's Statement of Facts ¶16 - Aff. of Jim Kellam ¶ 3; Exhibit A).

Defendant made no effort to contact Plaintiff to dispute the remaining balance and accruing interest on the Promissory Note after receiving the January 18, 2017 correspondence. (Pl's Statement of Facts ¶17 - Aff. of Jim Kellam; ¶4; Aff. of David Van Den Heuvel; ¶3). If Defendant truly believed the debt was forgiven or no longer valid, one would expect a response denying liability for the remaining debt at that time. For Defendant to simply ignore Plaintiff's requests for a renewal promissory note in January of 2017, and then later claim he did not expect that he would have to repay the debt is simply not logical.

Finally, in Zizzo, the court found there was prejudice to the plaintiff because the original mortgagors and note-signers in Zizzo were dead, and could not provide evidence on plaintiff's behalf regarding the validity of the notes and mortgage. Zizzo, 2008 WI App 69, ¶5. That is not the case here. Defendant has appeared in this action, and is able to present evidence and testimony regarding the October 21, 2011 Promissory Note. Defendant's claim that he was prejudiced because there is additional interest, default interest, and late fees, is not valid because the terms of the contract that both parties agreed to and signed provided for additional interest and fees upon default. For Defendant to now claim he is prejudiced by the additional interest and fees caused by his own behavior is disingenuous.

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: June 11, 2019

By: s/ Robert J. Janssen

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