Janssen Law LLC

July 23, 2019

Via E-Filing
Honorable William C. Griesbach
United States District Court
Eastern District of Wisconsin

RE: Fortune Avenue, LLC v. Howard Bedford
Case no. 18-C-1362

Dear Judge Griesbach:

I represent plaintiff, Fortune Avenue, LLC, in the above referenced matter. Attorney Jon Smies represents, defendant, Howard Bedford. By copy of this correspondence, I am advising Attorney Smies of this transmittal via e-filing notification.

Please allow this letter to supplement the previous pleadings and oral arguments relating to Fortune Avenue's Motion for Summary Judgment.

The basis for Mr. Bedford's opposition to the Motion is his allegation that Dave Van Den Heuvel orally waived or forgave the remaining debt owed pursuant to the October 21, 2011 Unsecured Promissory Note.

The Note qualifies as a "negotiable instrument" pursuant to Wisconsin Statutes Section 403.104(1)(a)-(c), because it is an unconditional promise to pay a fixed amount of money, with interest, and it is payable to bearer or to order on demand or at a definite time, without out any further undertaking or instruction by the person promising payment. Summary judgment is appropriate as a matter of law, pursuant to Section 403.604, which provides that discharge of a negotiable instrument by cancellation or renunciation requires some intentional voluntary act, such as "surrender of the instrument to the party, destruction, mutilation or cancellation of the instrument . . . or "[a]greeing not to sue or otherwise renouncing rights against the party by a signed writing."

Although application of Section 403.604 has not been specifically addressed in this context in Wisconsin courts (state or federal), a Seventh Circuit case addresses the application of 810 ILCS 3-604, which is identical to Wisconsin statute. In Sms Demag Aktiengesellschaft v. Material Sciences, 565 F.3d 365 (7th Cir. 2009), Ed Escallon, TDC's CEO, sent MSC a letter purporting to memorialize an oral agreement providing for MSC to cancel $100,000 of TDC's debt under the Note. Id. at 368. MSC did not respond to Mr. Escallon's letter. Id. The court found that even if evidence of the alleged oral agreement existed, such agreement would be invalid under Illinois' version of the Uniform Commercial Code, which requires that cancellation of a note be in writing. Id. at 371, *citing* 810 Ill. Comp. Stat. §5/3-604(a).

Sms Demag Aktiengesellschaft also held that summary judgment for MSC was proper as there was no evidence that MSC ever promised TDC anything. Id., *citing* Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 887 (7th Cir. 1998) (bald assertions do not give rise to genuine issues of fact); McDonnell v. Cournia, 990 F.2d 963, 969 (7th Cir. 1993) (self-serving assertions without more will not defeat a motion for summary judgment).

Mr. Bedford's self-serving assertions that Fortune Avenue forgave the balance of his debt under the Note cannot defeat the Motion before the Court. There is no evidence in the record of any intentional voluntary act by Fortune Avenue to satisfy the requirements for cancellation or discharge of the Note pursuant to Section 403.604. Fortune Avenue never surrendered the Note to Mr. Bedford, ripped it up, destroyed it and/or otherwise indicated in writing that the Note was cancelled or forgiven.

Based on the arguments above, as well as the previous pleadings and oral arguments relating to the Motion, Fortune Avenue respectfully requests that the Court grant the Motion as there are no genuine issues of material fact, and Fortune Avenue is entitled to judgment as a matter of law because Mr. Bedford has defaulted and breached the plain and unambiguous terms of the Note.

By: s/ Robert J. Janssen
Attorney Robert J. Janssen
State Bar No. 1000525