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 MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO ALTER OR AMEND JUDGMENT

Defendant Howard Bedford ("Bedford"), by and through his attorneys, Godfrey & Kahn, S.C., submits this memorandum of law in support of his Rule 59(e) Motion to Alter or Amend Judgment.

INTRODUCTION

In its decision following the court trial held on September 12, 2019, the Court rejected Bedford's equitable estoppel defense on the basis that no promise was made on which Bedford could have relied. Actions that induce reliance, such as a promise, are one basis for an estoppel defense. The other basis is non-action, which is present here.

Following the Bedford's execution of a Promissory Note (the "Note") on October 21, 2011, Plaintiff Fortune Avenue, LLC ("Fortune Avenue") made demands for payment on Bedford in March, May, June, and November of 2012. Most important, though, is what happened over the ensuing five and one-half years: nothing. In an about-face from its past conduct, Fortune Avenue made no further demands for payment from December 5, 2012 to June 13, 2018.

Bedford reasonably relied on this non-action in his decision to not make payments on the Note after December 5, 2012, and he did so to his detriment. Interest continued to accrue during

this period of inaction, with the total due under the Note ballooning to $551,946.44 as of the date of the judgment. Because the undisputed evidence establishes that the elements of equitable estoppel are met based on Fortune Avenue's inaction, the Court should grant Bedford's motion and amend the amount of judgment to $321,530.84, the amount the parties stipulated to be due as of December 5, 2012.

BACKGROUND

On October 21, 2011, Bedford signed a Note pursuant to which he agreed to pay Fortune Avenue $350,000. (Pl.'s Trial Ex. 2.) After signing the Note, Bedford received a number of periodic requests for payment from Dave Van Den Heuvel ("Dave"), an authorized agent of Fortune Avenue. (Sept. 12, 2019 Ct. Trial Tr. ("Tr."), Dkt. No. 36, at 69:3-6.) Among these requests for payment were four emails from Dave to Bedford, the last of which is dated November 28, 2012. (Pl.'s Trial Exs. 3-6.) Neither Dave nor any other person affiliated with Fortune Avenue made further payment demands on Bedford from December 5, 2012, the date Bedford testified that he met with Dave in De Pere, until June 13, 2018. (Def.'s Trial Ex. 1008; Tr. 31:3-8, 69:22-70:2, 76:19-77:4.) Bedford made five payments totaling over $42,000 in 2012. (Tr. 69:12-14).

Following December 5, 2012, Bedford understood that his obligations under the Note had been forgiven. (Tr. 72:9-15.) On January 18, 2017, James Kellam, a bookkeeper who oversaw Fortune Avenue's finances, sent a renewal note to Bedford. (Tr. 41:11-15, 45:11-13.) Kathy Sampson signed for Kellam's letter, which was addressed to Straubel Paper Company. (Def.'s Trial Ex. 1011.) Bedford never received Kellam's letter. (Tr. 77:5-10.) While Bedford had an interest in Straubel Company, Inc., he had no connection to Straubel Paper Company. (Tr. 75:5-76:18.) On June 13, 2018, Fortune Avenue's counsel sent a letter to Bedford demanding payment on the Note. (Pl.'s Trial Ex. 11.) Bedford did not reside at either of the addresses on counsel's

letter, and he did not receive notice of the letter until the commencement of this lawsuit. (Tr. 77:22-78:12.)

Bedford raised equitable estoppel as an affirmative defense in his Answer to the Complaint and at trial. (Dkt. No. 4 at 2; Tr. 106:15-18.)[1] In its decision following the September 12, 2019 court trial, the Court addressed Bedford's equitable estoppel affirmative defense as follows:

> Mr. Smies: Your Honor, on the issue of equitable estoppel, which was raised on the Defense in the pleadings and in the Court's decision on summary judgment, I take it the Court's not deciding whether that --
>
> The Court: I am. I am. I mean, I don't find equitable estoppel because there was no promise made. I think equitable estoppel may have surfaced if there had been a promise made. I don't find any promise made here that would support a claim of equitable estoppel.

(Tr. 106:15-24.) The same day, judgment was entered in favor of Fortune Avenue in the amount of $551,946.44. (Dkt. No. 31.) This was based on a calculation of the amount that would be due on the Note as of September 12, 2019, which included a default interest rate of 10.5% beginning on September 1, 2012. (Pl.'s Trial Ex. 8.) The amount owed on the Note as of December 5, 2012 was $321,530.84. (Pl.'s Trial Ex. 8.)

LEGAL STANDARD

Rule 59(e) permits a party to file a motion to alter or amend a judgment within 28 days after entry of judgment. Fed. R. Civ. P. 59(e). "A court may grant a Rule 59(e) motion to alter or amend the judgment if the movant presents newly discovered evidence that was not available at the time of trial or if the movant points to evidence in the record that clearly establishes a manifest error of law or fact." *Matter of Prince*, 85 F.3d 314, 324 (7th Cir. 1996). A "manifest error" is not established by the "disappointment of the losing party," but rather concerns the "disregard,

[1] Bedford also asserted the affirmative defense of laches in his Answer [Dkt. No. 4 at 2], and in his memorandum of law in opposition to Plaintiff's motion for summary judgment [Dkt. No. 15 at 7-8].

misapplication, or failure to recognize controlling precedent." *Sedrak v. Callahan*, 987 F. Supp. 1063, 1069 (N.D. Ill. 1997) (citation omitted). The purpose of Rule 59(e) is to "enable[ ] the court to correct its own errors and thus avoid unnecessary appellate procedures." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996). "The decision whether to grant or deny a Rule 59(e) motion is entrusted to the sound judgment of the district court." *Matter of Prince*, 85 F.3d at 324.

ARGUMENT

I. Fortune Avenue's Inaction from December 5, 2012 to June 13, 2018 Estops It from Collecting Interest Accruing as of December 5, 2012.

The Court rejected Bedford's estoppel defense because it found that no promise was made upon which Bedford could have reasonably relied. While an action that induces reliance, such as a promise, may provide a basis for an estoppel defense, so, too, can inaction. "Under Wisconsin law, equitable estoppel requires: (1) action or non-action; (2) on the part of one against whom estoppel is asserted; (3) which induces reasonable reliance thereon by the other, either in action or non-action; (4) which is to the relying party's detriment." *Scheurer v. Fromm Family Foods LLC*, 863 F.3d 748, 753 (7th Cir. 2017) (citation and internal quotations marks omitted); *Vill. of Hobart v. Brown County*, 2005 WI 78, ¶ 36, 281 Wis. 2d 628, 698 N.W.2d 83.

Here, the undisputed evidence demonstrates that each of these elements is met. By its own admission, Fortune Avenue did not make a demand on Bedford for payment of the Note from December 5, 2012 to June 13, 2018. Although Fortune Avenue, by counsel, sent a demand letter to Bedford on June 13, 2018, Bedford never received that letter, which was incorrectly addressed. Not until the filing of this action did Bedford become aware that Fortune Avenue sought payment on the Note after December 5, 2012. Understanding Fortune Avenue's past conduct with respect to collection, by which Dave would contact Bedford directly and demand payment, Bedford

reasonably relied upon Fortune Avenue's five-and-one-half-year silence and made no payments on the Note.

Fortune Avenue's over five-and-one-have-year inaction is especially egregious given that the Note matured on March 10, 2015. (Pl.'s Trial Ex. 2; Def.'s Trial Ex. 1011.) Almost two years had passed since the Note matured before Fortune Avenue attempted to mail Bedford a renewal note, and no further action was taken to ensure that Bedford actually received the renewal note. (Tr. 50:2-4, 51:7-18.) Maturity aside, courts have found far shorter periods of inaction capable of supporting equitable estoppel. *See, e.g.*, *Legacy Prop. Mgmt. Servs., LLC v. Koier*, 2009 WI App 41, ¶ 12, 316 Wis. 2d 775, 766 N.W.2d 242 (unpublished) (holding defendant equitably estopped from raising legal issue after two years of non-action);[2] *Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 2005 WI App 189, ¶¶ 22-23, 286 Wis. 2d 403, 703 N.W.2d 737 (holding plaintiff equitably estopped from reasserting breach of contract claim after almost three years of non-action following the execution of mediation agreement).

Bedford's reliance was also to his detriment. As a consequence of Bedford's reliance on Fortune Avenue's inaction, interest continued to accrue on the Note – most of it at a penalty rate of 10.5% – totaling $230,415.60, the difference between the $551,946.44 amount of judgment and the $321,530.84 amount owed as of December 5, 2012. In light of the evidence of record, each of the elements of equitable estoppel is met. By its own inaction and Bedford's reasonable reliance thereon, Fortune Avenue should be estopped from collecting interest accrued on the Note beginning December 5, 2012.

[2] A copy of this unreported decision is attached as **Exhibit 1**.

CONCLUSION

For all of the above reasons, the Court should grant Bedford's motion and amend the amount of the judgment to $321,530.84, the amount owed on the Note as of December 5, 2012.

Dated this 10th day of October, 2019.

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316 Wis.2d 775
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of Wisconsin.

LEGACY PROPERTY MANAGEMENT SERVICES, LLC, d/b/a Timber Ridge Apartments, Plaintiff-Respondent,
v.
Judith KOIER, Defendant-Appellant.

No. 2008AP1914.
|
Feb. 24, 2009.

West KeySummary

1 **Estoppel**
Failure to Assert Title or Right
Estoppel
Acquiescence

The named tenant on a lease was equitably estopped from raising arguments of improper service against a landlord. The tenant did live at the leased property but paid rent for her daughter and would most likely have received notice of eviction for non-payment of rent when the daughter received it and moved out even though it was not served on her at her home. Had she not received notice then, the tenant did receive notice when the landlord began garnishing her wages for the unpaid rent and she requested a payment plan. Further, the tenant waited two years and the rent was fully paid when she brought the challenge to service and then it would have been extremely detrimental to require the landlord to pay back money rightfully owed to it.

Cases that cite this headnote

APPEAL from an order of the circuit court for Milwaukee County: Mel Flanagan, Judge. *Affirmed.*

Opinion

¶ 1 CURLEY, P.J. [1]

***1** Judith Koier appeals from an order denying her motions to vacate a default judgment of eviction and a default money judgment and return all garnished funds arising out of the two 2005 small claims judgments. One judgment evicted her from an apartment owned by Legacy Property Management Services, LLC (Legacy), doing business as Timber Ridge Apartments (Timber Ridge), and the other ordered her to pay a money judgment for unpaid rent. Later, her wages were garnished until the $2820.68 money judgment and costs were paid. [2] Koier claims that the trial court erred in denying her motion because the underlying judgments were void due to improper service. Although the trial court incorrectly ruled that Koier's motion was subject to the reasonable time requirement found in Wis. Stat. § 806.07(2) (2007-08), the right result was reached because here, the doctrine of equitable estoppel prohibited Koier from raising the void judgment issue. Therefore, this court affirms, albeit on other grounds. *See State v. Holt,* 128 Wis.2d 110, 124-25, 382 N.W.2d 679 (Ct.App.1985) (We may affirm a trial court's decision on other grounds even if we do not agree with its reasoning.).

I. BACKGROUND.

¶ 2 According to the affidavits and documents found in the record, in 2004, Koier rented a Timber Ridge apartment for her daughter and two grandchildren after her daughter was unable to rent it due to an inadequate credit rating. Before renting to Koier, Legacy required Koier to provide sufficient information so that Legacy could obtain her credit report. To this end, she gave them her address, telephone number, social security number, and her employer's name. Koier signed a lease that specifically permitted her daughter and grandchildren to live in the apartment. In March 2005, the acting property manager left a "Notice To Pay Rent Or Vacate Premises" at the apartment. When the rent was not paid,

Legacy started an eviction action against Koier claiming that she was delinquent in paying the rent. Despite having Koier's actual address, the process server attempted personal service on Koier at the leased apartment. A copy of the eviction summons and complaint were also mailed to her using the leased apartment address. On the return date for the eviction action, Koier did not appear. Her daughter, however, made an appearance and the caption was amended to add her as a defendant.[3] Eventually, a default judgment of eviction was entered against Koier.

¶ 3 In November 2005, Legacy commenced an action seeking a money judgment against Koier for $2820.68, in addition to costs related to the action. This amount was calculated by multiplying the months the rent had gone unpaid and subtracting out the security deposit. Again, despite knowing Koier's actual address, the address for Koier listed on the summons and complaint seeking the money judgment was the Timber Ridge apartment, and the process server attempted to serve her with a copy of the summons and complaint at that address. An affidavit of the process server states that he was told that the occupants had moved out in the middle of May 2005, and the affidavit claims that the process server attempted to locate Koier through the post office and Consolidated Court Automated Programs (CCAP), without success. Copies of the small claims publication notice and complaint were mailed to Koier at the Timber Ridge address. The law firm representing Legacy then served the summons by publication. A default judgment was entered against Koier.

¶ 4 Koier's wages were then garnished to satisfy the outstanding judgment. According to the letter brief submitted on behalf of Legacy, Koier's attorney then contacted Legacy's attorney in January 2006. Koier's attorney requested various documents regarding the eviction and the money judgment. These documents were sent to him. Later, Koier's attorney called Legacy's attorney's office and stated that Koier wished to pay $500 per month on the judgment. Despite Legacy's approval of the payment plan, the payment arrangement never went into effect. Legacy was then forced to commence two subsequent garnishment actions, and the judgment was ultimately satisfied in October 2006. At no time during these discussions was the service of process issue ever raised.

***2** ¶ 5 In June 2008, motions seeking to vacate the judgments based upon improper service were filed by Koier. The trial court denied the motions, stating that the reasonable time requirement found in WIS. STAT. § 806.07 prohibits the entertaining of the motions.[4] This appeal follows.

II. ANALYSIS.

¶ 6 Koier argues that because the default judgments were based on void judgments, the reasonable time limitation found in WIS. STAT. § 806.07 does not apply. This court agrees with the latter argument; to wit, that the reasonable time requirement found in § 806.07(2) does not apply because § 806.07 does not govern small claims actions. Section 806.07 reads, in relevant part:

> **Relief from judgment or order. (1)** On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> (d) The judgment is void;
>
> (e) The judgment has been satisfied, released or discharged;
>
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
>
> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.
>
> **(2)** *The motion shall be made within a reasonable time,* and, if based on sub. (1)(a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1)(b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

(Emphasis added.)

¶ 7 The case of *King v. Moore,* 95 Wis.2d 686, 291 N.W.2d 304 (Ct.App.1980), is instructive. There, this court determined that the time limit set by the small claims statute within which a defendant can move to reopen a default judgment takes precedence over the time limit in WIS. STAT. § 806.07. *King,* 95 Wis.2d at 689-90, 291 N.W.2d 304. The statute controlling default judgments in small claims actions is found in WIS. STAT. § 799.29(1), and reads:

> **Default judgments. (1)** MOTION TO REOPEN. (a) There shall be no appeal from default judgments, but the trial court may, by order, reopen default judgments upon notice and motion or petition duly made and good cause shown.
>
> ***3** (b) In ordinance violation cases, the notice of motion must be made within 20 days after entry of judgment. In ordinance violation cases, default judgments for purposes of this section include pleas of guilty, no contest and forfeitures of deposit.
>
> (c) *In other actions under this chapter, the notice of motion must be made within 12 months after entry of judgment* unless venue was improper under s. 799.11. The court shall order the reopening of a default judgment in an action where venue was improper upon motion or petition duly made within one year after the entry of judgment.

(Emphasis added.)

¶ 8 Therefore, a defendant normally has twelve months to bring a motion to reopen a small claims default judgment. Under this statute, Koier's motion to vacate would have been tardy. However, as explained by our supreme court in *Neylan v. Vorwald,* 124 Wis.2d 85, 100, 368 N.W.2d 648 (1985), a void judgment may be expunged by a court at any time. Extrapolating from the holding in *Neylan,* a void judgment would not be subject to the time limitation found in WIS. STAT. § 799.29(1) that requires a motion to reopen a default judgment "within 12 months after entry of judgment." But that conclusion does not end the analysis.

¶ 9 Here, the doctrine of equitable estoppel comes into play. The doctrine of equitable estoppel focuses on the conduct of the parties. *Affordable Erecting, Inc. v. Neosho Trompler, Inc.,* 2005 WI App 189, ¶ 17, 286 Wis.2d 403, 703 N.W.2d 737, *aff'd,* 2006 WI 67, 291 Wis.2d 259, 715 N.W.2d 620. The elements of the doctrine are: "(1) action or nonaction, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or nonaction, and (4) which is to his or her detriment." *Id.*

¶ 10 Before applying the facts of this case to the elements, it is important to examine when Koier would have actually learned of the suits. First, it is quite likely that Koier knew of the existence of the eviction action back in 2005, despite the failure to serve her at her actual residence, because her daughter appeared at the hearing and would have, in all likelihood, told Koier of the suit. Also, presumably she would have been aware of her daughter and grandchildren's move out of the apartment sometime in May 2005, as reported to the process server. However, even if her daughter chose not to tell Koier of the eviction action and Koier was unaware of their move, then Koier would first have had knowledge that she had been sued in both the eviction action and the money judgment in early 2006 because: (1) money was being taken out of her wages; and (2) she hired a lawyer to contact Legacy's attorney and obtain the documents related to the suit, including the affidavits of service.

¶ 11 It is at this point that it would have been reasonable for Koier to challenge the service of both suits, as she now had notice that the summons and complaint were both served at the leased apartment rather than her residence. Instead, Koier chose to negotiate a payment plan which she later abandoned. This, in turn, required Legacy to commence two additional garnishment actions against her. It was not until the judgment was satisfied and the money dispersed to Legacy that Koier decided to challenge the service of the earlier suits. This was slightly more than three years after the first action was filed, and over two years after her attorney contacted Legacy's attorney.

***4** ¶ 12 Applying the elements of equitable estoppel, Koier's nonaction for over two years of failing to raise a possible defense to either the eviction or the money judgment and her failure to object to the garnishment induced reasonable reliance on Legacy that its various suits were proper. So, too, Koier's failure to challenge the garnishment resulted in Legacy's attorney believing he was free to disperse the funds taken from Koier's wages to Legacy. It would be extremely detrimental to now require Legacy to pay back money rightfully owed to it because of Koier's refusal to pay rent at an apartment that she leased. Thus, Koier is equitably estopped from now raising the issue of void judgments. For these reasons, the order of the court denying the motion to vacate and return the garnished money is affirmed.

Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

All Citations

316 Wis.2d 775, 766 N.W.2d 242 (Table), 2009 WL 439756, 2009 WI App 41

Footnotes

1 This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

2 These matters were consolidated by the trial court. Because this appeal is from two small claims actions, no written order is in the file, and this court is relying on the docket entries pursuant to WIS. STAT. § 808.03(1)(b) (2007-08).
All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

3 Later, her name was removed from the caption as she was added by the clerk in error.

4 At the time that this motion was heard, Legacy had pending a large claim action against Koier for additional rent because the apartment could not be rented for the remainder of the lease. That case is not part of this appeal.