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 RESPONSE MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT

NOW COMES the Plaintiff, Fortune Avenue, LLC, by its attorneys, Janssen Law LLC, and files the following response memorandum of law in opposition to Defendant's Motion to Alter or Amend Judgment.

ARGUMENT

I. The equitable estoppel defense is not applicable in this case, and the Court was correct in rejecting Defendant's equitable estoppel defense.

Defendant argues Fortune Avenue's inaction from December 5, 2012 to June 13, 2018 estops it from collecting interest accruing as of December 5, 2012. However, the written contract between the parties, the October 21, 2011 Unsecured Promissory Note, specifically states "[l]ender may also fail or delay in exercising any right, power or remedy under this Note without waiving any such right, power or remedy." (Trial Ex. 1013). Thus, the terms of the parties' contract precludes the Defendant from raising the estoppel defense based on non-action by the lender, Fortune Avenue.

Even if the contract was silent regarding inaction or delay on the part of Fortune Avenue, the elements of equitable estoppel still have not been satisfied in this case. Under Wisconsin law, the elements of equitable estoppel 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." *Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 2005 WI App 189, ¶17, 286 Wis.2d 403, 703 N.W.2d 737 (citations omitted).

Fortune Avenue concedes that it did not attempt to contact Defendant regarding the outstanding debt owed between December 5, 2012 and January 18, 2017, a period of four years and one month; however, this does not necessarily mean that Defendant was reasonable in his reliance on the lack of collection efforts by Fortune Avenue. Defendant's belief that Fortune Avenue would just forgive or waive the remaining of balance of $321,530.84 with no consideration provided from the Defendant is unreasonable in itself, and should not support a defense for equitable estoppel.

Defendant cites to *Legacy Prop. Mgmt. Servs., LLC v. Koier*, 2009 WI App 41, ¶12, 316 Wis.2d 775, 766 N.W.2d 242 (unpublished – attached to Plaintiff's Memorandum of Law in Support of Motion to Amend/Alter Judgment), and *Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 2005 WI App 189, ¶22-23, 286 Wis.2d 403, 703 N.W.2d 737, in support of its argument that the period of inaction by Fortune Avenue was sufficient to warrant an equitable estoppel defense. However, the *Legacy Property* case and the *Affordable Erecting* case are entirely distinguishable.

The *Legacy Property* case involved an appeal from an order denying defendant's motions to vacate a default judgment of eviction and money judgment, and requested return of all garnished funds arising out of the small claims judgments. *Legacy Prop. Mgmt. Servs.*, 2009 WI

App 41, ¶1. Defendant alleged the judgments were void because she was improperly served. *Id.* However, defendant failed to bring a motion to vacate the judgment until over two years after she learned about the small claim judgments, and not until well after the judgment was satisfied and the money had been dispersed to the plaintiff. *Id.* ¶¶10-11.

The court of appeals held that defendant was equitably estopped from raising the issue of void judgments because her non-action for over two years of failing to raise a defense and object to the judgments and garnishment induced reasonable reliance on plaintiff that its suits were proper, and it would be extremely detrimental to require plaintiff to pay back money rightfully owed to plaintiff because of defendant's refusal to pay rent at an apartment she leased. *Legacy Prop. Mgmt. Servs., LLC*, 2009 WI App 41, ¶12.

Affordable Erecting involved a breach of contract dispute and counterclaim for breach of contract and common carrier liability. *Affordable Erecting, Inc.*, 2005 WI App 189, ¶2. The parties and their insurers participated in mediation on May 21, 2003, and reached an agreement to settle all claims that arose out of the same facts and issues. *Id.* at ¶3.

The attorneys for the parties signed the agreement, and Affordable's attorney added a notation "[s]ettlement contingent on approval from Tracy Haferkorn [owner of Affordable] by May 22, 2003 at 12:00 p.m." *Id.* at ¶4. A formal settlement document and a stipulation and order for dismissal was drafted and circulated on June 4, 2003, and all parties signed and cashed their settlement checks except Affordable. *Id.* at ¶5. On July 24, 2003, the circuit court sent out an order for dismissal without prejudice on the grounds that the matter had not been diligently prosecuted. *Id.* at ¶6.

On March 2, 2004, Affordable filed a complaint in another county's circuit court alleging the same facts, and making a claim against the same defendant, Neosho. *Affordable Erecting,*

Inc., 2005 WI App 189, ¶7. This complaint was filed almost a year after the mediation, and over seven months after the circuit court had dismissed the prior action. *Id.* at ¶18. Defendant Neosho filed a motion to enforce the settlement agreement and to dismiss Affordable's claim with prejudice. *Id.* at ¶7.

The court found that all the elements of equitable estoppel were met because Affordable conceded the first two elements (the action of attending the mediation hearing and not being decisive in assuring the parties the case was not settled). *Affordable Erecting, Inc.*, 2005 WI App 189, ¶18. Affordable disputed that Neosho reasonably relied on the contingent approval of the mediation, and argued it should have known Affordable did not agree. *Id.* The court disagreed. *Id.* The court found detrimental reliance based on the fact that Neosho chose to sign the mediation agreement, cash the check, and forgo legal alternatives based on Affordable's nonaction. *Id.* at ¶22.

The *Legacy Property* and *Affordable Erecting* cases are entirely distinguishable from the case at bar. In *Legacy Property*, a lawsuit had been completed, default judgments awarded, defendant's wages had been garnished for money she rightfully owed to plaintiff, and defendant waited over two years to challenge the validity of the judgment. *Legacy Prop. Mgmt. Servs., LLC*, 2009 WI App 41, ¶¶10-12. In *Affordable Erecting*, a previous lawsuit had been filed, the parties participated in mediation, the attorney for one of the parties failed to timely notify the other parties that his client did not approve the global settlement reached at mediation, and the case had even been dismissed by the court for failure to diligently prosecute. *Affordable Erecting, Inc.*, 2005 WI App 189, ¶¶2-6.

Unlike *Legacy Property* and *Affordable Erecting*, no previous lawsuit has been filed in this case, and there was no unreasonable delay by counsel in prosecuting this action. It is no

coincidence that both of these cases involved lawsuits that had been filed and resolved, given the interest of the court in finality of judgments and timely challenges to the same. *See, e.g., Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶¶33-36, 326 Wis.2d 640, 785 N.W.2d 493 (Wis., 2010). Why have a six-year statute of limitations for a contract action if a defendant is able to avoid his/her obligations under the contract by claiming a defense of equitable estoppel within the six year limitations period?

Although Fortune Avenue may have been delayed in its collection efforts, Defendant was not prejudiced by this delay considering he had not made a payment in over four months prior to December 5, 2012. "[E]quitable estoppel requires that the party against whom estoppel is asserted caused another party to change position to his or her detriment." *Affordable Erecting, Inc.*, 2005 WI App 189, ¶20 (citation and internal quotation marks omitted).

Defendant did not change his position based on Fortune Avenue's non-action in collecting on the debt because Defendant had not made a payment to Fortune Avenue his debt owed since July 31, 2012, almost four months before December 5, 2012. (Complaint, ¶5). Thus, Defendant cannot claim he was changed his position after the December 5, 2012 meeting when he was not making timely payments from the start. *Id.* Further, Defendant stopped making payments well before the meeting where he alleged the debt was forgiven, and he did not make payments after that meeting. Thus, there was no change in Defendant's position to support his defense of equitable estoppel.

II. In the event the Court determines equitable estoppel does apply, interest must still be calculated at the non-default rate of 5.5% pursuant to the October 21, 2011 Promissory Note.

In the event the Court finds the defense of equitable estoppel does apply, Plaintiff respectfully requests the Court calculate interest at the non-default rate of 5.5% pursuant to the

October 21, 2011 Promissory Note. If Defendant is allowed to reduce the judgment to $321,530.84, and not pay any interest on the outstanding debt after December 5, 2012, this would result in a huge windfall to the Defendant, and would be unjust to the Plaintiff. Plaintiff must be compensated for the lost use of the money lent to Defendant, and compensated for the time value of money.

CONCLUSION

For all of the reasons stated above, Plaintiff respectfully requests the Court deny Defendant's motion to alter or amend judgment in this case.

Dated: October 30, 2019

By: s/ Robert J. Janssen

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