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

FORTUNE AVENUE, LLC,

Plaintiff,

v.

HOWARD BEDFORD,

Defendant.

Case No. 18-CV-1362

DEFENDANT'S REPLY MEMORANDUM 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 reply memorandum in support of his Rule 59(e) Motion to Alter or Amend Judgment.

INTRODUCTION

Equitable estoppel based on non-action is appropriate here. In a departure from its pattern of making demands on Bedford for payment on an October 21, 2011 Promissory Note (the "Note"), Fortune Avenue, LLC ("Fortune Avenue") abruptly stopped making payment demands. Bedford, who had made payments in response to past demands, reasonably relied on Fortune Avenue's non-action, which spanned over five and one-half years, to his detriment. Because the undisputed evidence establishes that each of the elements of equitable estoppel is met, Fortune Avenue should be estopped from collecting interest as of December 5, 2012 and the amount of judgment should be amended to $321,530.84 to reflect the amount due on the Note as of that date.

In opposition, Fortune Avenue argues that estoppel is inapplicable on several grounds, none of which have merit. First, Fortune Avenue's argument that Bedford's reliance was unreasonable in itself renders the estoppel doctrine obsolete in many contractual settings and

divorces the doctrine from its principal subject matter, the parties' conduct. An examination of such conduct demonstrates that Bedford's reliance was in fact reasonable under the circumstances. Second, Fortune Avenue's argument that Bedford did not change his position sufficient to trigger the estoppel doctrine misconstrues and reads the reliance element out of the doctrine. Third, Fortune Avenue's references to Wisconsin's statute of limitations and the no-waiver language in the Note are red herrings, as neither is implicated in the estoppel analysis. Last, applying a non-default interest rate despite holding that estoppel applies would further, rather than curtail, injustice.

ARGUMENT

I. Fortune Avenue's Almost-Six-Year Non-Action Beginning on December 5, 2012 Estops It from Collecting Interest After That Date

In response to Bedford's motion, Fortune Avenue does not meaningfully dispute that each of the elements of equitable estoppel is met. *See Scheurer v. Fromm Family Foods LLC*, 863 F.3d 748, 753 (7th Cir. 2017) (listing the elements of equitable estoppel); *Vill. of Hobart v. Brown County*, 2005 WI 78, ¶ 36, 281 Wis. 2d 628, 698 N.W.2d 83 (same). As an initial matter, Fortune Avenue does not dispute, and in fact admits, that it engaged in non-action by not making a demand on Bedford for payment under the Note from December 5, 2012 to June 13, 2018. (Def.'s Trial Ex. 1008).

Regarding reasonable reliance, Fortune Avenue argues that Bedford's belief that the remaining balance on the Note would be forgiven absent consideration is unreasonable in itself. This argument fails for two reasons. First, Fortune Avenue effectively asks the Court to adopt a per se rule that it is never reasonable for a party to believe that a monetary contractual obligation can be unilaterally forgiven. To adopt this rule would effectively nullify the application of estoppel in a variety of contractual settings, in contravention to the longstanding recognition of estoppel's

"operat[ion] with respect to all contracts." *Spohn v. Johnson*, 190 Wis. 446, 209 N.W. 725, 728 (1926). More importantly, adopting this rule would impermissibly shift the estoppel doctrine's focus away from "the conduct of the parties," *In re Olsen*, 604 B.R. 790, 805 (Bankr. W.D. Wis. 2019) (citation omitted), toward an *a priori* determination of the doctrine's suitability. *See Milas v. Labor Ass'n of Wis., Inc.*, 214 Wis. 2d 1, 9, 571 N.W.2d 656 (1997) ("The estoppel doctrine, also called equitable estoppel or estoppel *in pais*, focuses on the conduct of the parties.").

Second, an examination of the proper subject matter—the parties' conduct—demonstrates that Bedford's reliance on Fortune Avenue's non-action was reasonable. To collect on the Note, Fortune Avenue, through Dave Van Den Heuvel ("Dave"), would make periodic requests for payment to Bedford. In response to Dave's requests, Bedford made five payments totaling over $42,000 in 2012. Following December 5, 2012, and in a break from past conduct, neither Dave nor anyone else from Fortune Avenue requested payment, leading Bedford to reasonably believe that Fortune Avenue no longer expected payment under the Note. Fortune Avenue's non-action continued for five and one-half years, and each month of silence that passed reinforced Bedford's belief that Fortune Avenue no longer sought payment.

Also unconvincing is Fortune Avenue's argument that Bedford did not change his position to his detriment. Fortune Avenue notes that Bedford did not make payments on the Note after July 31, 2012, meaning his non-payment after December 5, 2012 did not constitute a change in position sufficient to invoke the estoppel doctrine. This argument interprets the requirements of equitable estoppel too narrowly and erroneously assumes that a change in Bedford's reason for non-payment (i.e., reliance on non-action) beginning in December of 2012 is incapable of supporting an estoppel defense.

According to Fortune Avenue, Bedford only changed his position, in a legal sense, on July 31, 2012 when he ceased payment on the Note, and as long as non-payment continued no further change in position sufficient to support estoppel occurred. This interpretation invites the Court to use one court's characterization of the elements of equitable estoppel (requiring a change in position) and read it narrowly to exclude as a "change in position" Bedford's reliance on Fortune Avenue's non-action as a basis for non-payment. The Court should decline this invitation, as the notion of positional change is merely one iteration of the reliance element of estoppel. *See, e.g.*, *Vill of Hobart*, 2005 WI 78, ¶ 36 (stating elements of equitable estoppel with no mention of positional change, but with focus on inducement of reasonable reliance).

The terminology used to describe a party's reliance on the other party's action or non-action is not dispositive. Instead, whether a party in fact detrimentally relied is the crux of the estoppel inquiry. Fortune Avenue adopts a narrow interpretation of the reliance element, arguing that whatever a "change in position" means (Fortune Avenue does not proffer a definition), it does not include a decision to continue to forgo payment based on another party's action or non-action. But Fortune Avenue's interpretation ignores Fortune Avenue's change in conduct and the prejudice Bedford suffered through continued non-payment.

As a person with a monetary obligation accruing interest, Bedford continued to assess whether payment on the Note was appropriate. Though Bedford decided not to make payments from August through November of 2012 because he believed Ron Van Den Heuvel would secure financing that would cover his obligations under the Note, Fortune Avenue's non-action beginning in December of 2012 induced him to, from that point forward, reasonably believe that Fortune Avenue no longer expected payment on the Note. (Sept. 12, 2019 Ct. Trial Tr. ("Tr."), Dkt. No.

36, at 84:20-85:9, 85:20-23, 86:4-7.) This decision to rely on Fortune Avenue's non-action was detrimental to Bedford, as interest continued to accrue on the Note.

In applying estoppel doctrine, courts necessarily consider whether and to what degree the relying party was prejudiced. *See, e.g.*, *Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 2005 WI App 189, ¶ 22, 286 Wis. 2d 403, 703 N.W.2d 737. Had Fortune Avenue, in line with its past conduct, made further demands for payment following December 5, 2012, then Bedford could have made payments on the Note, thereby reducing his outstanding balance. To suggest, as Fortune Avenue does, that Bedford's being subject to additional interest is insignificant in light of his past non-payment, even when a new action (or non-action) induced continued non-payment, eschews consideration of estoppel's elements altogether. The Court should reject this attempted bypass.

As a final matter, Fortune Avenue's references to Wisconsin's statute of limitations for contract actions and to no-waiver language in the Note are misdirected. Estoppel is a common law doctrine "grounded in basic principles of justice." *Kellogg v. Vill. of Viola*, 67 Wis. 2d 345, 350, 227 N.W.2d 55 (1975). The doctrine has never been tied to the statute of limitations, which is itself mutable, nor should it be, as it is an equitable doctrine. Reference to Wisconsin's statute of limitations is perhaps better made in the context of a laches defense, which concerns unreasonable delay. *See State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 19, 290 Wis. 2d 352, 714 N.W.2d 900. But even so, courts have recognized that laches, as an equitable doctrine, can apply in cases where the statute of limitations has not yet run. *See, e.g.*, *Veysey v. Nelson*, 397 P.3d 846, 848 (Utah Ct. App. 2017) ("[B]ecause laches may apply in situations where the statute of limitations has not yet run, the existence of a statute of limitations does not, as [plaintiff] suggests, automatically preclude application of the laches doctrine."); *Tenneco Inc. v. Amerisure Mut. Ins.*

Co., 761 N.W.2d 846, 864 (Mich. Ct. App. 2008) ("If laches applies, a claim may be barred even though the period of limitations has not run."). Equitable estoppel should be treated no differently.

Reference to no-waiver language in the Note is likewise misguided. Fortune Avenue relies on language in Paragraph 5 of the Note, stating "Lender may also fail or delay in exercising any right, power or remedy under this Note without waiving any such right, power or remedy." (Def.'s Trial Ex. 1013). As an initial matter, this language plainly applies only to waiver, not estoppel. Though related, these doctrines are distinct and should be treated as such. *See Milas*, 214 Wis. 2d at 9. Bedford does not claim that Fortune Avenue has waived its right to collect under the Note. Instead, Bedford argues that, Fortune Avenue's contractual right notwithstanding, his reasonable reliance on Fortune Avenue's non-action estops it from collecting interest after December 5, 2012. Fortune Avenue may have a contractual right to collect interest, but the question as to the applicability of estoppel doctrine based on the parties' conduct is a separate and distinct inquiry.

II. Applying a 5.5% Non-Default Interest Rate Would Only Further Injustice

Fortune Avenue requests that the Court apply a non-default interest rate of 5.5% to Bedford's balance on the Note in the event that estoppel applies. To estop collection of interest, Fortune Avenue reasons, would result in a windfall to Bedford and would be unjust to Fortune Avenue. This request flips the estoppel doctrine on its head. The doctrine of estoppel is enforced "to prevent injustice," not to perpetrate it. *See Spohn*, 209 N.W. at 728. Here, Bedford reasonably relied on Fortune Avenue's non-action following December 5, 2012, and he did so to his detriment. Were it not for Fortune Avenue's inducement, Bedford could have taken any number of different approaches to resolve his obligations under the Note. It is precisely because of Fortune Avenue's non-action that such alternatives were not explored. Awarding a non-default interest rate to Fortune Avenue would therefore intensify rather than diminish injustice.

CONCLUSION

For all of the foregoing reasons, as well as those stated in his principal memorandum of law, 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 13th day of November, 2019.

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