STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

APPEAL NO. 2020-AP-2013

VHC, INC.,

Plaintiff,

v.

TISSUE TECHNOLOGY, LLC,

Defendant-Third-Party Plaintiff-Appellant,

v.

NICOLET BANKSHARES, INC.,

Third-Party Defendant-Respondent.

Appeal from the Circuit Court of Brown County
The Honorable John P. Zakowski, Presiding,
Circuit Court Case No. 2019CV000903

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Respondent, while repeatedly criticizing the Appellant, sets forth two (2) absurd statements from the outset in its Statement on Oral Argument and Publication. The Respondent chides the Appellant because the Appellant alleged the factual background is complex, yet, the Respondent stated the facts are not so complex – while thereafter utilizing 11 pages of its brief to advise the Court as to the procedural background. (Brief of Respondent at pgs. 2-13). The Respondent further states "the Court need not address the merits of the claim" which is precisely their preference because the merits militate against the actions of the Respondent. (Brief of Respondent at pg. 2).[1] Because the Respondent does not want the Court to get to the merits and because this case is actually quite complex, the Respondent has done everything it can to make this case difficult. The Respondent also stated in its brief "The problem, of course, is the note was not paid, it was negotiated…" (Respondent's Brief at pg. 20). Despite all of this, the Court, by granting summary judgment, purportedly decided the case on the merits, despite the Appellant having been denied the opportunity to take discovery or have any inkling of the "negotiated terms." Tissue Technology, LLC's case has never been heard. Justice requires that Tissue Technology, LLC be allowed its day in Court, to have its claims heard on the merits, rather than the wrangling that the Respondent prefers in order to deprive the Appellant of its day in court.

[1] The Respondent tells this Court there is no need to address the merits but also conversely claims the case was decided on the merits in order to advance its claim preclusion argument.

ARGUMENT

I. THE RESPONDENT ARGUES THERE IS NO NEED FOR DISCOVERY BECAUSE THERE IS NOTHING TO DISCOVER, YET, WE HAVE NO IDEA OF THE "NEGOTIATED TERMS".

The Trial Court granted summary judgment despite there having been no opportunity for the Appellant to find out the facts and circumstances of this case. Citing *Northern States Power Company v. Burgher*, 189 Wis.2d 541, 525 N.W.2d 723 (1995), the Respondent alleges that the Motion for Summary Judgment was based on res judicata and therefore discovery was unnecessary because the claim was actually litigated or could have been litigated in the prior lawsuit. As an initial matter, the claim was not actually litigated, to wit: the transfer of the Sales and Marketing Agreement to VHC, Inc. when the debt was somehow satisfied. No Court has ever ruled on this part of the case. The second portion of the argument, that the claim could have been litigated in the prior lawsuit is without merit. The Appellant asked the Trial Court to allow it to include the new allegations of the transfer of the Agreement from Nicolet Bank to VHC, Inc. and the Trial Court, the Honorable Timothy Hinkfuss presiding, denied that request. The Respondent would have the Appellant file an appeal in that case in order to have the Appellate Court determine whether Judge Hinkfuss had abused his discretion in failing to allow Tissue Technology, LLC to amend its pleadings with the new information. Wis. Stat. §802.09(1). Leave is to be freely given. *Tietsworth v. Harley Davidson, Inc.,* 2007 WI 97, 303 Wis.2d 94, 735 N.W.2d 418. Since Judge Hinkfuss refused to allow that,

and it being a discretionary matter with the Trial Court, Tissue Technology, LLC had no other option but to file a new lawsuit so its claims could be heard on the merits after some discovery was conducted.

In its Brief, the Respondent says the debt wasn't paid, rather, it was "negotiated." What does this mean? How could the Appellant have amended its complaint in the first action? What would the Appellant have alleged occurred regarding this transaction of which it knew nothing—and still has no information? Any such amendment would likely been the subject of another Motion to Dismiss or a Motion for Summary Judgment which, absent discovery, would put this case in no better position because the facts would not be able to be adduced. The path suggested by the Respondent seems to disregard counsel's requirements to bring meritorious claims and with candor toward the tribunal. SCR 20:3.1 and 3.3. Judge Hinkfuss' decision to preclude the amendment and discovery, deprived the Appellant of its day in Court and leaves Tissue Technology, LLC without the opportunity to be heard. This clearly deprives the Appellant of substantial rights and remedies to which it is entitled.

The Trial Court adopted the Respondent's claim preclusion argument but did so erroneously. Claim preclusion is a replacement for the old concept of res judicata. *Northern States v. Bugher*, 189 Wis.2d 541 at 551, 525 N.W.2d 723 at 728 (S. Ct. 1995). Claim preclusion provides that a final judgment is conclusive provided all issues were litigated or might have been litigated. The Appellant tried to have the present issue litigated before Judge Hinkfuss but the Appellant was denied that

opportunity. As a result, the final requirement, that the matter could have been litigated in that action was not an opportunity afforded the Appellant. The request to allow an amendment to pleadings was denied. The elements of claim preclusion were not met. The elements are (1) an identity of parties or their privies; (2) and identity between causes in the two suits; and, (3) a final judgment on the merits. *Id*. In the present case, there are not an identity of causes since the transfer of the Sales and Marketing Agreement to VHC was initially unknown to the Appellant and never litigated in the prior court. Additionally, there was no final judgment on the merits because the merits were never addressed—in either of the trial courts that have handled these claims.

The Respondent also chides the Appellant suggesting that it had never explained the need for discovery. Of course, there would be no need for discovery if Tissue Technology, LLC had all the answers and knew all of the circumstances concerning the transfer of the Sales and Marketing Agreement. The question isn't res judicata, the question is what happened factually and that can only be fleshed out with discovery of the hostile parties to this lawsuit. Wisconsin law says parties are entitled to discovery before summary judgment can be granted. Wis. Stat. §802.08(4); *Fortier v. Flambeau Plastics Company*, 164 Wis.2d 639, 476 N.W.2d 593 (Ct. App. 1990). Tissue Technology was not afforded that right. Noting that the contract in question calls for return of the Sales and Marketing Agreement to Tissue Technology, LLC upon payment of the debt, the Respondent states: "The problem, of course, is that the note was not paid; it was negotiated…" (Brief of Respondent

at pg. 20). This lack of clarity in its filings leads Tissue Technology, LLC to the conclusion that Nicolet Bankshares, Inc. transferred the Agreement to VHC under somewhat murky circumstances. If discovery were to be allowed, the nature and extent of the transaction would be fully known. Why has Nicolet Bank refused to "come clean?" How can any court determine a party's rights without learning the facts? Was there an issue of material fact? How would the Appellant know? Was the debt deemed satisfied by the "negotiated transfer?" Did VHC, the co-debtor or guarantor, pay cash to obtain the collateralized contract? In learning these very basic facts about the transaction, one would also presumably learn the thoughts and processes of the Nicolet employee who deemed it appropriate to transfer the Agreement. One could also learn whether the bank had any rules or other policies contra indicative to the subsequent transfer of the collateral to VHC, Inc. One could learn whether that transfer was made as a result of payment of the debt or some other "deal" that would explain the surreptitious actions of Nicolet Bank and/or VHC. What did Nicolet Bank's own documents say about the transaction? Were payments actually made? Were other considerations given? The "ceaseless lawsuits" complained of by Nicolet Bankshares, Inc., would not be necessary if Nicolet Bankshares, Inc. was simply forthcoming. Granted there are more questions raised in this section than answers provided but the questions are all salient, meant to demonstrate just how unjust it is to deprive the Appellant of discovery and point to the injustice of looking askance at the transaction and the Appellant's rights. By the way, and just so there is no confusion, Nicolet Bankshares, Inc. has only been

involved in two (2) of the lawsuits, both of which are apparently now before this Court. Tissue Technology is not looking for some type of reward, it seeks only to have its contract honored. The Respondent would like this Court to rely on formulaic uniform commercial code provisions to suggest that Nicolet Bank's transfer was acceptable, despite the fact that the transfer is contrary to the language of the Agreement itself.

II. THE LANGUAGE OF THE ASSIGNMENT REQUIRES RETURN OF THE COLLATERAL TO THE APPELLANT.

The clear language of the assignment of the collateral in this case provides that the Sales and Marketing Agreement was to be returned to Tissue Technology, LLC upon satisfaction of the debt. The language is straightforward and was already set forth in the Appellant's Brief and states as follows:

> ARTICLE V
> REASSIGNMENT
>
> Upon payment in full of the Note and the Indebtedness defined in the Commercial Security Agreement, the interests of Assignee in the Sales and Marketing Agreement herein assigned shall be released to Assignor and this agreement shall be terminated.

The quoted section is quite simple. When the Note is paid in full and the indebtedness extinguished, the Sales and Marketing Agreement was to be released to Tissue Technology, LLC and the Agreement terminated. There is nothing in this language that permits transfer as was done here. In fact, it would appear, on its face since no discovery was allowed, that somehow the debt was paid and thus the

Agreement is terminated. Yet, the Respondent believes it had the authority to transfer the Agreement despite clear contractual language to the contrary. Nicolet Bank is presumably in breach of its contract and Tissue Technology, LLC otherwise has no forum to have its claims adjudicated. The Respondent alleges that simple application of UCC law gives the Respondent shelter but the Respondent ignores basic, underlying UCC law which provides:

> 401.302 Variation by Agreement (1) Except as otherwise provided by sub. (2) or elsewhere in Ch. 401 to Ch. 411 the effect of provisions of Ch. 401 to Ch. 411 may be varied by agreement.

Wis. Stat. §401.201(1)(b) defines agreement:

> "Agreement" means the bargain of the parties in fact, as found in their language…"

The parties to this lawsuit agreed to terms that varied from the words of the UCC when they agreed the collateral was to be returned when the debt was paid. It would appear the debt was satisfied—somehow. The Appellant, and its creditors, request the case be heard on the merits.

CONCLUSION

It would be manifestly unjust if Tissue Technology, LLC never had its day in Court. It was precluded by the Trial Court in the initial action. It's now been precluded, by way of summary judgment, in the subsequent action despite the fact there was a never a merit-based decision by either Trial Court. The Trial Court should be reversed and this matter returned to the Circuit Court with an eye towards discovery and conclusion on the merits.

Dated this 1st day of March, 2021.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font and consists of 1,925 words and 8 pages.

Dated this 1st day of March, 2021.

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ELECTRONIC CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated at Milwaukee, Wisconsin this 1st day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2021, an electronic version of the Defendant-Third-Party Plaintiff-Appellant's Reply Brief was served upon the following via the Electronic Case filing System:

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I further certify that on the 1st day of March, 2021, a true and correct copy of the Defendant-Third-Party Plaintiff-Appellant's Reply Brief was sent via the United States Postal Service to:

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