**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

March 11, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-0952**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

**Otto Radke, d/b/a Atoo Service and Investments,**

**Plaintiff-Respondent,**

**v.**

**Plantation Village Limited Partnership, Harry A. Marek, General Partner and Jerome J. Marek, General Partner,**

**Defendants-Appellants.**

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Plantation Village Limited Partnership and its general partners Harry A. Marek and Jerome J. Marek appeal from a judgment entered in favor of Otto Radke d/b/a Atoo Service and Investments, and from

the trial court's order dismissing the counterclaim against Radke by Plantation Village and the Mareks.[1]

This is a suit on a note given to finance a real-estate project in Florida. The note recited that it was for $515,000 and was repayable at the interest rate of 25% per year. In its answer, Plantation Village asserted a number of affirmative defenses, including an allegation that the loan's interest rate was usurious. Plantation Village also counterclaimed, contending that because the note was usurious under Florida law it was entitled to recover, under Florida law, its payments of principal and twice the amount of its interest payments. Radke moved for summary judgment on its claim for the unpaid balance on the note and for dismissal of Plantation Village's counterclaim. The trial court applied Wisconsin law, granted summary judgment to Radke, and awarded attorney's fees as authorized by the note.

Plantation Village contends: 1) that the trial court should have applied Florida law rather than Wisconsin law, and erred in concluding that no choice-of-law question was presented by the summary-judgment materials; 2) that there was a genuine issue of material fact as to whether Radke owned the note, as alleged in Radke's complaint; 3) that the trial court erroneously exercised its discretion in awarding attorney's fees to Radke; and 4) that the trial court erred in dismissing Plantation Village's counterclaim. For the reasons explained below, we affirm the trial court in all respects.

Summary judgment is used to determine whether there are any disputed facts that require a trial, and, if not, whether a party is entitled to judgment as a matter of law. RULE 802.08(2), STATS.; ***U.S. Oil Co., Inc. v. Midwest Auto Care Servs., Inc.***, 150 Wis.2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). Our review of a trial court's grant of summary judgment is *de novo*, but is based on the summary-judgment materials properly before the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987); ***Community Newspapers, Inc. v. West Allis***, 158 Wis.2d 28, 31–33, 461 N.W.2d 785, 786-787 (Ct. App. 1990) (trial court may exclude materials filed late under local rule and may grant summary judgment accordingly). Summary

[1] For ease of reference, Plantation Village and the Mareks will be referred to as "Plantation Village."

judgment must be entered if this evidentiary material demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." RULE 802.08(2), STATS.

In resisting entry of summary judgment, "an adverse party may not rest upon the mere allegations or denials of the pleadings but ... must set forth specific facts showing that there is a genuine issue for trial." RULE 802.08(3), STATS. Moreover, the party with the burden of proof on an issue must establish that there is at least a genuine issue of fact on that issue by submitting evidentiary material "set[ting] forth specific facts," RULE 802.08(3), material to that issue. ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 290-292, 507 N.W.2d 136, 139-140 (Ct. App. 1993). As we noted in ***Hunzinger***, "once sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial `to make a showing sufficient to establish the existence of an element essential to that party's case.'" ***Id.***, 179 Wis.2d at 291-292, 507 N.W.2d at 140 (quoting ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986)). We analyze the appeal against this background.

1. *Choice of Law*.

The trial court's oral decision indicated that it was not deciding whether choice-of-law principles required that Florida law be applied because no summary-judgment material had been presented to it that indicated that there was a conflict between the law of the forum, Wisconsin, and that of Florida. This is the correct approach. *See* ***Gravers v. Federal Life Ins. Co.***, 118 Wis.2d 113, 115, 345 N.W.2d 900, 901 (Ct. App. 1984) ("The threshold determination in a conflict of laws case is whether a genuine conflict exists.").[2] Plantation Village had the burden of demonstrating to the trial court that Florida law applied, as it contended, and, as a preliminary matter, that there was a genuine conflict between Florida and Wisconsin law. Under Rule 366(c) of the Rules for the First Judicial District, "[c]opies of non-Wisconsin authorities shall be filed with the court at the same time as the brief." Plantation Village

[2] The note, which was originally executed on July 9, 1992, was not subject to Wisconsin's usury law, § 138.05, STATS., which, with exceptions not material to this case, does not apply to loans made on or after November 1, 1981. Section 138.05(8)(c), STATS.

did not file with the trial court prior to the trial court's decision on Radke's motion for summary judgment the applicable Florida authorities in support of its argument that the trial court should apply Florida law. When it attempted to do so later, the trial court ordered the materials stricken as untimely. This was within the trial court's discretion. *See* ***Community Newspapers***, 158 Wis.2d at 31–33, 461 N.W.2d at 786-787 (trial court may exclude materials filed late under local rule and may grant summary judgment accordingly). Reviewing *de novo* the summary-judgment material before the trial court, we affirm the trial court's conclusion that Plantation Village did not demonstrate that there was a genuine conflict between Florida and Wisconsin law. *See* ***id***.

2. *Radke's Ownership of the Note.*

Radke's complaint alleged, and he submitted an affidavit that averred, that he owned the note in question. Although Plantation Village denied that Radke owned the note, and submitted affidavits by the Mareks that it argues support its contention that there is a genuine issue of material fact with regard to whether Radke owned the note, Harry A. Marek's affidavit merely asserts his "information and belief" that Radke is not the note's owner, and Jerome J. Marek's affidavit states that he "is informed and verily believes" that Radke does not own the note. These averments are insufficient under RULE 802.08(3), STATS., to raise a genuine issue of material fact so as to preclude the grant of summary judgment. *See* ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis.2d 555, 571, 278 N.W.2d 857, 864 (1979) ("An affidavit made on information and belief does not satisfy the statutory requirement that the affidavit be made on personal knowledge and set forth evidentiary facts as would be admissible in evidence."). Accordingly, Radke's ownership of the note was established for summary-judgment purposes.

3. *Attorney's Fees.*

The note upon which collection was sought contains a provision making the defendants liable "for all costs of collection before and after judgment, including reasonable attorney fees." Plantation Village claims that the fees awarded by the trial court are excessive.

A trial court's award of attorney's fees is vested within its discretion and will be upheld on appeal unless that discretion is erroneously exercised. ***Hughes v. Chrysler Motors Corp.***, 197 Wis.2d 973, 987, 542 N.W.2d 148, 153 (1996); ***Standard Theatres v. Department of Transportation***, 118 Wis.2d 730, 747, 349 N.W.2d 661, 671 (1984). A trial court is vested with discretion in approving requests for attorney's fees in situations like this because the trial court is aware of the nature and complexity of the proceeding litigated before it, as well as the value of the legal services rendered in the case. *See* ***Tesch v. Tesch***, 63 Wis.2d 320, 334–335, 217 N.W.2d 647, 654-655 (1974); *see also* ***Standard Theatres***, 118 Wis.2d at 749–752, 349 N.W.2d at 672-673 (trial court may consider that party responsible for the fees increased the complexity of the case).

In support of his application for attorney's fees, Radke submitted an affidavit by his lawyer detailing the work performed and the hourly rate charged. Plantation Village did not request a hearing or seek discovery to develop a factual basis for its challenge to the fees; rather, it presented only argument, and raised only questions. After hearing argument by both sides, and after reviewing the detailed affidavit of services submitted to the trial court in the affidavit of Radke's lawyer, the trial court determined that the fees were reasonable.[3] On appeal, Plantation Village repeats the arguments it made to the trial court, but, as before the trial court, those arguments have no evidentiary support in the record. We see no erroneous exercise of trial-court discretion.

4. *The Counterclaim*.

In support of its contention that the trial court erred in dismissing its counterclaim, Plantation Village repeats its assertion that the trial court should have embarked on a choice-of-law analysis. As it recognized before the

---

[3] The trial court expressed its frustration with the adequacy of Plantation Village's response to the affidavit submitted by Radke's lawyer:

> That brings us to the matter of the attorney's fees. What I have in front of me is an affidavit that details the time and the charges and the expenses. I have nothing except argument to say that the fees charged are anything but reasonable. I have nothing but argument to say that the time is anything but reasonable.
>
> And I think the mere reference to the fact that there's reference made to some other litigation pending down in Florida, that was brought up in this case by the defense, and I think that that has to do with the preparation of this case in order to determine exactly what litigation if any is pending in Florida and the impact that it has on this case.
>
> In the absence of some expert testimony to the contrary, I can't say that what happened here was unreasonable, so I have to decide the case based on the record. The record I have is an affidavit that says this is the time we spent, this is the amount of our charges. It appears that the hourly rates are within the bounds of reason and therefore the court will grant the request -- the fees as requested by the plaintiff.

trial court, however, that issue was decided by the trial court on summary judgment. Plantation Village's counterclaim was based on its view that Florida law governed the transaction and that the transaction was usurious under Florida law. Given our affirmance of the trial court's grant of summary judgment to Radke on that issue, we affirm the trial court's order dismissing the counterclaim as well.[4]

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[4] Plantation Village's lawyer told the trial court:

> Certainly there's a genuine conflict between Wisconsin and Florida law. Florida law essentially prohibits usury transactions, usury transactions being defined as something over 25 percent. Obviously in our counterclaim we allege that the plaintiffs engaged in a scheme to charge over 25 percent.
>
> That -- with respect to that, I know that the court has ruled on that issue and I will assume that the court will follow its ruling before. However, I believe that it was appropriate to be here today in order to clear up the record with respect to the counterclaim.