COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP2867 **Cir. Ct. No. 2001CV331**

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

JUDITH M. PAULICK,

PLAINTIFF-RESPONDENT,

MICHAEL P. JAKUS,

INTERVENING PLAINTIFF-RESPONDENT,

V.

WILLIAM A. DENNY,

DEFENDANT-APPELLANT,

DENNY & YANISCH, LLP,

DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. William A. Denny appeals from a judgment in favor of Judith M. Paulick and Michael P. Jakus for their share of attorney fees earned during the parties' partnership. Denny argues that summary judgment determining that a partnership existed was improper because conditions precedent to the formation of a partnership did not occur and that there are disputed material facts concerning equal responsibilities and sharing of income. He also contends that the partnership terminated when Paulick and Jakus unilaterally withdrew their capital contributions, that the parties had an implied agreement on how to treat attorney fees received after the termination, that expenses incurred in generating a contingency fee should have been offset, that the contingency fee should have been distributed based on the hours expended by partners, and that Paulick was not entitled to equity relief because she failed to deposit attorney fees she earned into the partnership. Denny also challenges the allowance of prejudgment interest. We affirm the judgment of the circuit court.

¶2 In February 2001, Paulick commenced this action alleging that she, Jakus, and Denny agreed to form a law partnership, Denny and Yanisch, LLP, and practice law from the offices then occupied by Denny, that Denny failed to account to the partnership for fees billed to clients and income received, and that on December 30, 2000, Denny provided written notice that the partnership was terminated. She sought an accounting as part of the winding up of the partnership. In his answer, Denny admitted that Paulick entered into a partnership with himself and Jakus effective January 1, 2000, and that it was impliedly understood that all expenses of the partnership would be satisfied by all three partners equally and net income shared equally. He alleged that Paulick had withdrawn her $10,000 capital contribution from the partnership and failed to account to the partnership for fees

billed to some clients. His counterclaim demanded an accounting by Paulick of partnership assets. Judge Willis Zick was appointed as a special master to conduct a full accounting of Denny & Yanisch, LLP. An accountant was also appointed to prepare a report. Jakus was allowed to intervene as a plaintiff in the action.

¶3 While the action was pending, Denny received a large contingent fee as a result of the representation of Sherriane Weborg, regarding the death of her husband with the sinking of his fishing vessel, the Linda E, on Lake Michigan. Weborg had signed a contingent fee retainer agreement with Denny & Yanisch, LLP in July 2000. At an October 14, 2002 hearing, Denny's motion to amend his answer was granted. The amended answer denied the existence of a partnership and stated that "[t]he entity known as Denny & Yanisch, LLP was a partnership only in so far as third parties were concerned."

¶4 Paulick moved for partial summary judgment declaring that a limited liability partnership was in existence for the year 2000. The circuit court granted judgment that the partnership was in existence for the entirety of 2000. A trial to the court was conducted on issues related to winding up the partnership. Judgment was entered requiring Denny to pay Paulick $194,870.16 and Jakus $238,819.77, plus five percent interest on those amounts from April 12, 2002 until July 28, 2005.

¶5 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principle is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law, summary judgment is appropriate. ***Id.***; WIS. STAT. § 802.08(2) (2005-06).[1]

¶6 A partnership agreement may be proven by circumstantial evidence demonstrating that the conduct of the parties was of such a nature as to clearly express the mutual intent of the parties to enter into a contractual relationship. ***Heck & Paetow Claim Service, Inc. v. Heck***, 93 Wis. 2d 349, 359, 286 N.W.2d 831 (1980). To establish a partnership the parties must: "(1) intend to form a bona fide partnership and accept the accompanying legal requirements and duties, (2) have a community of interest in the capital employed, (3) have an equal voice in the partnership's management, and (4) share and distribute profits and losses." ***Tralmer Sales & Serv., Inc. v. Erickson***, 186 Wis. 2d 549, 563, 521 N.W.2d 182 (Ct. App. 1994). Here Paulick and Jakus have the burden of proof of establishing a partnership relationship. *See* ***id.***

¶7 Paulick presented the deposition testimony of Denny that he reached a consensus with Paulick and Jakus to form a new entity that would encompass all his "hard assets," such as desks, file cabinets, furniture, and office equipment and that each would put in $10,000 cash.[2] He admitted they were to share management and the profits and losses. Jakus confirmed that the parties agreed to form a partnership. To that end the three partners submitted a Limited Liability Legal Practice Registration form to the Wisconsin State Bar and filed a Registration Statement with the Wisconsin Department of Financial Institutions.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Denny formally practiced law with Attorney Richard Yanisch under the name of Denny & Yanisch.

A new tax payer identification number was obtained. A new checking account was opened and each partner deposited $10,000 to the account. These undisputed facts demonstrate that the parties intended to form a partnership and accept the accompanying legal requirements and duties, had a community of interest in the capital employed for the purpose of starting the partnership, and agreed to share equally management and profits.

¶8 Denny claims that a condition precedent to the formation of the partnership was the purchase of his office furniture and equipment and when that failed to occur, the partnership never happened. However, nothing establishes that the purchase was a condition precedent. At best Denny established that within four months of forming the partnership, the purchase was to be completed for no less than $30,000. Something that is to occur within four months cannot be a condition precedent, particularly when the parties engaged in other conduct that demonstrated the partnership had commenced.

¶9 Denny contends that because Paulick and Jakus unilaterally withdrew their capital contributions, there was in fact no equal voice in partnership activities. He also claims that there was in fact no sharing of the profits of the partnership because the accounting reflected that Paulick and Jakus took draws but Denny did not. There is no evidence that the partners were restricted in the use of the capital contributions or draws. Denny admitted that there was no discussion about the circumstances under which capital could be withdrawn or about partner draws. Moreover, the withdrawal of capital and unequal draws do not bear on partnership formation. Rather, as Denny later argues, those acts might constitute breach of the partnership agreement, an occurrence after the partnership is in existence.

¶10 Having concluded that a partnership was formed, we turn to Denny's claim that it terminated in June 2000, before the retainer agreement with Weborg for the Linda E case was signed. He claims that the failure to purchase the office furniture and equipment and withdrawal of the capital contributions signaled the end of the partnership. A material breach of a contract may relieve the other party to the contract of the obligation of performance. *See* ***People's Trust & Sav. Bank v. Wassersteen***, 226 Wis. 249, 254, 276 N.W. 330 (1937). However, notice that the contract is terminated is required. *See* ***Guentner v. Gnagi***, 258 Wis. 383, 391, 46 N.W.2d 194 (1951) ("[i]f a party means to rescind a contract because of the failure of the other party to perform it, he should give a clear notice of his intention to do so"). *See also* ***Stolper Steel Prod. Corp. v. Behrens Mfg. Co.***, 10 Wis. 2d 478, 490, 103 N.W.2d 683 (1960) (the party must treat the conduct of the breaching party as a breach; quoting ***Woodman v. Blue Grass Land Co.***, 125 Wis. 489, 495, 103 N.W. 236, 104 N.W. 920 (1905) (on rehearing: "The law with regard to an anticipatory breach of an executory contract doubtless is that the other party must treat it as a breach, and that if he do not do so, but continue to demand performance, he will be held to have kept the contract alive for the benefit of both parties."). Unreasonable delay in asserting the right to rescission or conduct affirming the continuing existence of a contract may constitute waiver. *See* ***Grube v. Daun***, 213 Wis. 2d 533, 551, 570 N.W.2d 851 (1997). The question of waiver is one of law that this court can review independently. ***Id.***

¶11 Denny testified that when he discovered the capital withdrawals, he never told Paulick or Jakus that he would no longer do business with them or that

he considered the partnership terminated.[3] In fact, Denny never questioned the existence of the partnership until he filed his amended answer in 2002. Denny continue to use the LLC letterhead. Well into December 2000, Denny continue to demand at least $30,000 as payment by the partnership for the office furniture and equipment. Denny's handwritten note demonstrates the continuing existence of a partnership until he terminated it on December 30, 2000. In early 2001 he wrote letters to service providers explaining that the LLP had terminated in December 2000 and a new general partnership existed. Denny did not give notice that the agreement was terminated by the alleged breach of contract that occurred in June. By his delay in asserting that the partnership was terminated, Denny waived the materiality of the alleged breaches of the partnership agreement and cannot now claim that the termination occurred earlier. *See* ***Entzminger v. Ford Motor Co.***, 47 Wis. 2d 751, 755, 177 N.W. 2d 899 (1970). The circuit court properly determined that the partnership continued until December 30, 2000.

¶12 The winding-up of a legal services partnership is accomplished by an equitable accounting. *See* ***Gull v. Van Epps***, 185 Wis. 2d 609, 622, 517 N.W.2d 531 (Ct. App. 1994). We review the circuit court's broad discretion to accomplish a fair accounting between the parties. ***Id.*** at 626. A discretionary determination will be upheld if the circuit court applied the appropriate law and there is a reasonable basis for the determination. ***Consumer's Co-op of Walworth County v. Olsen***, 142 Wis. 2d 465, 472, 419 N.W.2d 211 (1988).

[3] In his affidavit in opposition to Paulick's motion for reconsideration, Denny asserted that he had told Paulick and Jakus "that I thought I had been turned into a sole proprietor." This conflicts with his earlier deposition testimony. The circuit court correctly found that it was a "sham affidavit" and did not consider it in deciding the motion for summary judgment. *See* ***Yahnke v. Carson***, 2000 WI 74, ¶¶20-21, 236 Wis. 2d 257, 613 N.W. 2d 102. Denny does not challenge the circuit court's "sham affidavit" ruling on appeal.

¶13 All partners of a dissolved law firm are entitled to share in fees for predissolution work in progress earned after dissolution. ***Gull***, 185 Wis. 2d at 624. "[T]he partner who completes work in progress is not entitled to any compensation beyond the fee he or she would have received for that work had the partnership not dissolved." ***Id.*** at 625.

¶14 Denny argues that ***Gull*** does not come into play because the parties agreed on how attorney fees would be split at dissolution. *See* ***id.*** at 621 (in the absence of agreement, partnership affairs are wound up under WIS. STAT. ch 178, the Uniform Partnership Act). His claim rests on the characterization that upon termination each partner took their files and "went home." He also points to the parties' failed attempts to enter into a written dissolution agreement. Denny himself counterclaimed for an accounting thereby negating the existence of agreement on how to divide legal fees generated by the partnership. He did not assert a dissolution agreement as an affirmative defense and participated in the judicial accounting. Although a draft agreement was presented, it was not signed. Denny explains why the agreement was not signed and thereby demonstrates that the partners did not have a meeting of the minds on dissolution issues. Denny cannot adopt as an implied contract certain provisions of the draft agreement and

ignore the provisions that caused him not to sign it. There is no dispute that an agreement was not reached.[4]

¶15 The circuit court adopted the accountant's report regarding the fees earned and overhead expenses to be offset. Denny claims that there was unequal treatment of fees received after December 31, 2000, on files open during the partnership. The accountant testified that *hourly* fees generated after 2000 on files open during the partnership were not included in her calculation. Denny does not point to any *hourly* fees he generated after 2000 that were included in the report. We will not make an independent search of the record to find the evidence supporting an appellant's argument. ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. His claim of unequal treatment with respect to *hourly* fees has no starting basis.

¶16 The principal dispute between the parties is the allocation of the large contingent fee received for the Linda E case.[5] Denny argues that the circuit court failed to deduct the considerable overhead expenses attributable to attorney time spent on the case after termination of the partnership. *See* ***Gull***, 185 Wis. 2d at 625 ("[T]he former partners of a dissolved law firm are entitled to reasonable overhead expenses, excluding partners' salaries, attributable to the production of

[4] Denny also claims that the methodology for dividing legal fees set forth in ***Gull v. Van Epps***, 185 Wis. 2d 609, 517 N.W.2d 531 (Ct. App. 1994), does not apply because the termination was caused by contravention of the partnership agreement. *See* ***id.*** at 622-23 (quoting WIS. STAT. § 178.33(1) that the partnership surplus is distributed to partners "[w]hen dissolution is caused in any way, except in contravention of the partnership agreement"). The argument is not developed and we do not consider it. ***Fryer v. Conant***, 159 Wis. 2d 739, 746 n.4, 465 N.W.2d 517 (Ct. App. 1990). It is sufficient to note that even if alleged breaches occurred, Denny waived them at the time they occurred. Although the alleged breaches may have created Denny's desire to terminate the partnership, his formal termination on December 30, 2000, was within his right to do so.

[5] The case produced a fee of nearly $700,000.

postdissolution partnership income."). The circuit court rejected Denny's proposed overhead allocations as based on unsound accounting and not approximating a realistic offset. The circuit court, as the trier of fact, has the responsibility to weigh the evidence and to determine credibility, and its findings will not be disturbed on appeal unless they are clearly erroneous. ***Johnson v. Miller***, 157 Wis. 2d 482, 487, 459 N.W.2d 886 (Ct. App. 1990). The accountant calculated an overhead offset by hours worked on the Linda E case during the partnership compared to total hours worked on all cases. Denny's calculation was based on the total Linda E fee compared to all revenues earned during the applicable period. Thus, Denny's estimation of the overhead offset was nearly 85% of his new partnership's fixed overhead expenses, including expenses that would have been incurred regardless of the Linda E case. Further, Denny could not testify as to the accuracy of the figures used in his calculation. Denny has proclaimed his new partner, Attorney Robert Stack, as his "numbers man." Stack indicated that some of the figures in Denny's overhead calculation were inaccurate. The shortcomings of a revenue-based calculation was demonstrated during Stacks' cross-examination. He agreed that a calculation based on an hours-expended comparison was preferred. The rejection of Denny's "evidence" was not clearly erroneous.[6]

¶17 Under ***Tonn v. Reuter***, 6 Wis. 2d 498, 95 N.W.2d 261 (1958), Denny argues that the Linda E fees should have been pro rated among the three partners according to the time spent by each one in producing the fees. He claims

[6] Denny suggests that a $100,000 bonus paid to Stack was part of the overhead to be offset against the Linda E fee. A bonus is a one-time discretionary occurrence and not overhead or necessary expense. Moreover, Denny made a unilateral decision to give Stack the bonus.

it is the only equitable division. ***Tonn*** has no application here because it involved a case where counsel was discharged and the contingent fee was attained by successor legal counsel. The court held: "[T]he proper measure of damages to apply in a case like the present is the amount of contingent fee based upon the amount of settlement or judgment ultimately realized by the client, less a fair allowance for the services and expenses which would necessarily have been expended by the discharged attorney in performing the balance of the contract." ***Id.*** at 505. ***Gull***, 185 Wis. 2d at 625, expressly governs the disposition of attorney fees earned by a former partner with respect to cases that constitute an asset of the partnership. As the circuit court found, although the accountant's final report could be "more perfect," it represents a fair accounting. We affirm the judgment allocating the partnership income.[7]

¶18 The final claim with respect to the accounting is that Paulick should not recover in equity because she does not have clean hands. *See* ***Kenosha County v. Town of Paris***, 148 Wis. 2d 175, 188, 434 N.W.2d 801 (Ct. App. 1988) (a fundamental tenet for equitable relief is that one who seeks equity must have clean hands). Denny contends that Paulick has unclean hands because she failed to deposit $20,358 into the partnership account, she retained barter benefits that should have been shared with the partnership, and she contracted with clients, billed clients, and undertook collection actions in her own name for work performed during 2000. The circuit court concluded that the action for an accounting came on the heels of dissolution and it would not fault any partner who

[7] Denny makes an undeveloped claim that it was inequitable that he paid all the income taxes attributable to the Linda E fee. Denny does not demonstrate where he argued that issue to the circuit court. Moreover, the circuit court ordered the parties to cooperate in the filing of required tax returns.

recovered fees in separate accounts anticipating a timely accounting. Paulick fully cooperated with the appointed accountant and consistently invited an accounting. As we have just observed, the circuit court concluded that there was a fair accounting. The accountant's report made adjustments for erroneous deposits to individual accounts for attorney fees earned during 2000. We are not persuaded that the circuit court's weighing of the equities of the situation was an erroneous exercise of discretion.

¶19 Interest from April 12, 2002, to the date of the circuit court's written decision after the accounting trial was awarded on the amounts Denny owed Paulick and Jakus. Denny argues that interest is not allowable because damages were not liquidated or determinable by reference to some objective standard. *See* ***Johnson v. Pearson Agri-Systems, Inc.***, 119 Wis. 2d 766, 771, 350 N.W.2d 127 (1984). This issue is raised for the first time on appeal and we need not address it.[8] *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). It is sufficient to observe that in equity cases the circuit court has discretion to allow interest. *See* ***Estreen v. Bluhm***, 79 Wis. 2d 142, 156, 255 N.W.2d 473 (1977). April 12, 2002, is the approximate date Denny received the Linda E fee. The fee was disbursed in short order despite a pending motion to have the fee deposited into a trust account pending the accounting. The Linda E fee was the majority of what was owed to Paulick and Jakus. Since interest serves the purpose of compensating one to whom payment is due for the lack of the use of the money,

[8] In her post-trial brief Paulick argued that interest should be awarded as a matter of equity because the case could have been resolved years earlier if Denny had acknowledged the partnership's interest in the Linda E fee. Denny did not respond to the request in his post-trial response brief. Denny's motion for reconsideration or argument at the hearing held on that motion did not challenge the award of interest.

id., it is reasonable to require interest on the Linda E fee until the accounting was complete. The circuit court's decision to award interest as part of the equitable remedy between the parties is not demonstrated to be an erroneous exercise of discretion.[9]

By the Court.—Judgment affirmed.

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

[9] Paulick argues that interest was imposed as a sanction. The circuit court's decision does not indicate that rationale.