**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 26, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2007AP1207-FT** **Cir. Ct. No. 2006CV751**

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

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**HOUGHTON WOOD PRODUCTS, INC.,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SOUTHWOOD DOOR COMPANY, LLC,**

**DEFENDANT-APPELLANT,**

**WELLS FARGO BANK NA AND INDUSTRIAL RECOVERY SERVICES,**

**GARNISHEES.**

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APPEAL from a judgment of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed*.

Before Peterson, Brunner and Bridge, JJ.

¶1 PER CURIAM. Southwood Door Company, LLC, appeals a summary judgment in favor of Houghton Wood Products, Inc., consisting

primarily of interest on past due accounts.[1] Southwood argues Houghton is barred from seeking interest payments by the doctrines of equitable estoppel, waiver and laches. We disagree and affirm.

¶2 Southwood is an affiliate of Oshkosh Door Company, with a principal place of business located in Mississippi. Houghton is a Wisconsin corporation engaged in the business of selling wood products. The present dispute involves a series of transactions between the parties. Between September 2003 and December 2005, Houghton made thirty-five shipments of wood products to Southwood for use in its manufacturing process. On each occasion, Southwood placed a separate purchase order which specified the terms, "Net 30 days." Upon receipt of the purchase order, Houghton would deliver the wood products and issue an invoice containing the following notation in capital letters: PAST DUE ACCOUNTS WILL BE CHARGED 1 ½ % INTEREST PER MONTH. Southwood made frequent payments on its account but balances were not paid in full within thirty days of receipt. Many payments were made in round numbers, such as increments of $10,000 or $20,000.

¶3 In December 2005, Southwood decided to obtain wood products from another supplier. At that time, Southwood had a substantial past due account. For the next six months, Southwood continued to make periodic payments, usually in the amount of $5,000.[2] In June 2006, Southwood tendered a

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] The record indicates that prior to December 2005, Southwood made approximately sixty-five payments. In the first six months of 2006, Southwood made approximately sixteen payments, not including a final check for $4,845.55, which was never cashed. On two occasions, Southwood paid $5,958.79 and $5,951.23. On each other occasion during that time period, Southwood made payments of $5,000. Southwood made over eighty total payments.

check in the amount of $4,845.55 with the notation "final payment – ACCOUNT PAID IN FULL." Houghton refused to cash the check, claiming Southwood owed over $60,000 on the account at that time, mostly accrued interest. Southwood contended the attempts to charge interest were improper.

¶4 In August 2006, Houghton commenced a lawsuit seeking to collect the money owed on the past due account. The parties submitted opposing summary judgment motions. The circuit court granted summary judgment to Houghton, and Southwood now appeals.

¶5 Summary judgment methodology is well-known and will not be fully repeated. Our review of the circuit court's grant of summary judgment is de novo. ***Millen v. Thomas***, 201 Wis. 2d 675, 682, 550 N.W.2d 134 (Ct. App. 1996). Summary judgment is appropriate when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶6 Southwood does not dispute that the invoices stated past due accounts would be charged 1½% interest per month. This court held in ***Mid-State Contracting, Inc. v. Superior Floor Company***, 2002 WI App 257, 258 Wis. 2d 139, 655 N.W.2d 142, that adding a contract term by way of invoices containing a notation of an interest rate is appropriate under WIS. STAT. § 402.207. We indicated the question is not whether the entity acquiesced to permit the interest charge but, rather, whether it objected to it. ***Mid-State***, 258 Wis. 2d 139, ¶15. There is no evidence that Southwood objected to the notation on the invoices regarding interest.

¶7 Nevertheless, Southwood argues that equitable estoppel bars Houghton's right to seek interest. Equitable estoppel bars a claim when a party

has not asserted its right for an unreasonable length of time or it was lacking in diligence in discovering its right in such a manner as to place the other party at a disadvantage. ***Ryder v. State Farm Mut. Ins. Co.***, 51 Wis. 2d 318, 323, 187 N.W.2d 176 (1971) (citation omitted). Equitable estoppel has four elements: (1) action or inaction; (2) on the part of the one against whom estoppel is asserted; (3) which induces reasonable reliance thereon by the other, either in action or inaction; and (4) which is to its detriment. ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, ¶33, 291 Wis. 2d 259, 715 N.W.2d 620.

¶8 Southwood contends that during their twenty-six month business relationship, Houghton never asserted that interest was due on past balances and never attempted to collect interest on those balances. Southwood argues that only after it terminated the business relationship did Houghton assert that interest was due and attempt to collect the interest. Southwood insists this constituted non-action that induced a reasonable reliance on its part that interest would not be sought. We disagree.

¶9 This is not a case where Houghton did nothing for twenty-six months to collect interest. Invoices accompanied each delivery, right up to the cessation of the business relationship, and each new invoice had the same reminder in capital letters that interest would be charged on past due accounts. As the circuit court correctly observed, there was no evidence indicating that monthly bills were sent to Southwood. Rather, the evidence showed that Houghton sent separate invoices for each purchase, showing only the amount due for that particular purchase. Therefore, interest was never due when the particular invoice was generated. Southwood has submitted no authority that would require Houghton to issue a monthly bill or reminder of the entire amount due on Southwood's account.

¶10 Southwood claims that it relied on Houghton's choice of billing and accounting methods as non-action that amounted to a change in the terms of the invoices, which effectively waived any claim for interest. Even if the failure to send monthly bills or reminder notices constituted non-action that induced reliance by Southwood, we reject Southwood's argument and agree with the circuit court that the reliance would not be reasonable under the circumstances. It is not reasonable for one commercial entity to expect that another commercial entity would not charge interest on past due accounts, in direct contravention of the notice on each invoice. We reject Southwood's argument that equitable estoppel bars the claim.

¶11 Southwood next argues Houghton waived the claim for interest. Waiver is a voluntary and intentional relinquishment of a known right. ***Mansfield v. Smith***, 88 Wis. 2d 575, 592, 277 N.W.2d 740 (1979). The circuit court concluded that it "cannot find that the defendant submitted sufficient evidence to create a jury question on waiver." Southwood contends Houghton established a course of performance by "sleeping on its rights" and never billing Southwood for the unpaid interest. We agree with the circuit court that nothing suggests Houghton intentionally waived the right to collect interest. Southwood also insists that "it is almost universal practice in commercial circles that where unpaid balances are subject to interest charges, those interest charges are timely calculated and the amount due is then forwarded to the entity that is being charged interest." Southwood's argument in this regard is unsupported by citation to authority and we therefore will not address it. *See* ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286.

¶12 Finally, Southwood argues the doctrine of laches bars the claim. The circuit court did not address laches and Houghton argues in its response brief

the issue was not raised below. Southwood replies that it raised the issue of laches in its summary judgment brief in the circuit court. We conclude Southwood did not properly articulate or develop the argument below. Southwood cites to one sentence in the procedural history section of its summary judgment brief, where it stated: "Defendant Southwood defends on the basis that the claim is barred by the equitable doctrines of equitable estoppel, laches, and waiver…." However, laches was never mentioned in the argument or conclusion section of the brief.

¶13 The circuit court did not construe Southwood's arguments as including laches. Circuit "courts need not divine issues on a party's behalf." ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476. It is also a fundamental precept that we will not blindside circuit courts with reversals based on theories which did not originate in their forums. ***Id.*** (citation omitted). Although Southwood mentioned the word laches once in its summary judgment brief, as a practical matter the argument on laches was raised first on appeal and we therefore shall not address the issue. *See* ***State v. Rogers***, 196 Wis. 2d 817, 828-29, 539 N.W.2d 897 (Ct. App. 1995).

*By the Court.*—Judgment affirmed.

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