

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

Appeal No. 2008AP2717

Cir. Ct. No. 2007CV6359

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

HARAMBEE COMMUNITY SCHOOL, INC.,

PLAINTIFF-RESPONDENT,

v.

CLEVELAND LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Cleveland Lee appeals *pro se* from a judgment entered following the grant of summary judgment in favor of Harambee Community School, Inc., dismissing Lee's counterclaims seeking unpaid compensation he claimed Harambee owed him. Lee makes four claims on appeal:

(1) the trial court erred in finding that Lee provided “personal services” to Harambee and that the two-year statute of limitations under WIS. STAT. § 893.44(1) (2007-08)¹ was applied to bar his counterclaims for unpaid compensation; (2) the trial court erred when it found he was estopped from pursuing a claim for unjust enrichment; (3) the computation on the six-year statute of limitations for the travel reimbursement was erroneous; and (4) the court of appeals should exercise its discretionary reversal power under WIS. STAT. § 752.35 because the real controversy has not been fully tried and/or justice has miscarried. We affirm the trial court on all issues.

BACKGROUND

¶2 Lee served on Harambee’s Board of Directors from 1984 until 2002. From 1986 on, he worked for the school as the business director (or in some other capacity) where he was responsible for “total operations” of the school. When Lee left the school in January 2002, an audit was conducted on the school’s finances. According to a certified public accountant hired to assist the auditor, the school records were a mess and some important files were missing. When Lee was asked about the missing files, he indicated that the files were stolen although he had never reported the break-in.

¶3 The auditor found three Harambee bank accounts that Lee used. One was “Harambee Community School, Inc.,” which paid out legitimate expenses but also sent large amounts of cash to two other accounts: “Harambee

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Child Care, Inc.” and “hot lunch.” It was alleged that these two other accounts were used by Lee to funnel money to himself and other businesses he controlled.

¶4 The State prosecuted Lee for the embezzlement, filing fifteen charges against him.² At his trial, Lee admitted that he paid himself and his businesses from these accounts, but claimed they were for “services or goods” and to reimburse himself for travel expenses and/or loans he had made to Harambee. During the criminal trial, Lee never asserted that Harambee owed him money for unpaid compensation or travel reimbursement. The jury convicted Lee on all counts and he was sentenced to thirteen years, consisting of seven years of initial confinement followed by six years of extended supervision. The court ordered Lee to pay \$642,000 in restitution, which was the amount determined to have been embezzled by him. More specific facts pertinent to the criminal suit are set forth in our opinion affirming Lee’s conviction. See *State v. Lee*, No. 2006AP1737-CR, unpublished slip op. (WI App Sept. 25, 2007).

¶5 In June 2007, Harambee filed a civil suit against Lee seeking \$642,000 for conversion and civil theft. In response, Lee filed counterclaims for unpaid compensation. Both parties moved for summary judgment and Harambee moved to dismiss Lee’s counterclaims. The trial court granted Harambee’s motion for summary judgment, but denied Lee’s motions. The trial court also denied Harambee’s motion seeking to dismiss the counterclaims at that time.

² Lee was charged with fifteen felonies: two counts of theft from a business, contrary to WIS. STAT. § 943.20(1)(b) (2005-06); ten counts of forgery and uttering, contrary to WIS. STAT. § 943.38(2) (2005-06); and three counts of filing false and fraudulent tax returns, as a party to a crime, contrary to WIS. STAT. §§ 71.83(2)(b)1. (2005-06) and 939.05 (2005-06).

¶6 Subsequently, Harambee moved for summary judgment on Lee's counterclaims. Lee filed a motion to stay the enforcement of the restitution judgment and a motion seeking sanctions against Harambee for failing to file a pretrial report. In October 2008, the trial court entered an order granting Harambee's motion and denying Lee's motions. Judgment was entered dismissing the counterclaims. Lee now appeals.

DISCUSSION

I. Standard of Review

¶7 This case arises out of the trial court's decision on a summary judgment motion. Our review in cases on appeal from summary judgment is well-known. We review orders for summary judgments independently, employing the same methodology as the trial court. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We shall affirm the trial court's decision granting summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2).

II. Statute of Limitations

¶8 The first issue is whether the trial court properly applied the two-year statute of limitations in WIS. STAT. § 893.44(1) or if the trial court should

have applied the six-year statute of limitations in WIS. STAT. § 893.43. We hold that the trial court correctly applied the two-year statute of limitations.³

¶9 WISCONSIN STAT. § 893.44(1) provides in pertinent part: “Any action to recover unpaid salary, wages or other compensation for personal services, except actions to recover fees for professional services ... shall be commenced within 2 years after the cause of action accrues or be barred.”

¶10 WISCONSIN STAT. § 893.43 provides in pertinent part: “An action upon any contract, obligation or liability, express or implied, including an action to recover fees for professional services ... shall be commenced within 6 years after the cause of action accrues or be barred.”

¶11 Thus, based on the language set forth in these two statutes, WIS. STAT. § 893.44 applies when a person sues to seek compensation for “personal services” and WIS. STAT. § 893.43 applies when a person sues to recover fees for “professional services” pursuant to a contract or a contract generally. Case law has addressed the distinction between what constitutes personal services under the former and what constitutes professional services under the latter. In *Estate of Javornik v. Vodnik*, 35 Wis. 2d 741, 151 N.W.2d 721 (1967), our supreme court explained:

“[P]ersonal services” ... means human labor such as is commonly rendered in return for a salary or a wage in the case of an employee and for “other compensation” in the

³ Lee also argues that the trial court improperly granted summary judgment because a jury should have decided whether a contract existed after listening to testimony from the witnesses. We reject this contention because Lee’s claims were barred by the statute of limitations. Whether a statute of limitations applies and bars an action is a question of law, properly decided on a summary judgment motion. See *Ritt v. Dental Care Assoc., S.C.*, 199 Wis. 2d 48, 60, 543 N.W.2d 852 (Ct. App. 1995).

case of an independent contractor or one not in an employee relationship. Such human labor must be in the nature of a service as distinguished from the endproduct or the fruit of the service. While some personal services may result in a salable article or an end-product, the distinguishing feature of personal services for the purpose of this section is whether the human labor itself is sought and is the object of the compensation or whether the end-product of the service is purchased.

Id. at 749. Here, Lee alleged that he was under contract with Harambee and that he was an independent contractor providing a professional service; thus, he believes the six-year statute of limitations should control his claim for unpaid compensation. The trial court found that the unpaid compensation Lee sought was for personal services. The record supports the trial court's finding.

¶12 During Lee's tenure with Harambee, he worked as its business manager and chief financial officer. There was no written contract and the services Lee provided were "personal" as he took payment for his labor and not for an end product of that labor. Lee worked on a variety of projects, performed background checks, paid bills, made deposits and did other tasks similar to a typical employee in a finance or business department. Lee did not have any professional degree in finance or business. Based on our review of the record, we conclude the trial court's finding that Lee provided personal services was not erroneous. The compensation Lee seeks is for his labor, not for the end product or the fruit of his labor. Thus, the two-year statute of limitations under WIS. STAT. § 893.44(1) applies.

¶13 Lee argues that he was not an employee, but an independent contractor and as such, he was offering professional rather than personal services. Whether Lee was an employee or an independent contractor is not material as the

Javornik test applies to both categories. See *Saunders v. DEC Int'l, Inc.*, 85 Wis. 2d 70, 76-77, 270 N.W.2d 176 (1978).

¶14 Accordingly, because the two-year statute of limitations applies, Lee's counterclaims seeking compensation for his services are time-barred. Lee stopped working for Harambee in January 2002. He had two years from his cessation date to make a claim for unpaid compensation. No claim was made until July 9, 2007. Thus, the trial court correctly ruled that his counterclaims for unpaid compensation were barred by the limitation set forth in WIS. STAT. § 893.44(1).

III. Unjust Enrichment

¶15 Lee's second claim is that the trial court erred in ruling that his claim for unjust enrichment was barred. Harambee responds that: (1) Lee's claim for unjust enrichment is barred because Lee never pled it in his counterclaim or amended counterclaim; and (2) even if it had been properly pled, it should be denied under the doctrines of laches or unclean hands. The trial court concluded that Lee failed to plead unjust enrichment: "Although the parties both address the issue of whether Lee has a claim for unjust enrichment, Lee does not assert such a claim in any of his pleadings." Despite so ruling, the trial court went on to address the issues of laches and unclean hands. We agree with the trial court that Lee failed to plead unjust enrichment in either his counterclaim or amended counterclaim and therefore need not reach the issues of laches and unclean hands.

¶16 In his counterclaims, Lee claimed an entitlement to six different categories of relief due to Harambee's legal obligations under WIS. STAT. § 893.43, "**Action on contract.**" In his amended counterclaim, Lee presented three sections: (1) "**FACTS**"; (2) "**Habit; Routine Practice Wisconsin § 904.06(a)** [sic]," in which he asserted facts and made a claim for unfair labor

practices under the National Labor Relations Act, 29 U.S.C. § 151 et seq.; and (3) “**ACTIONS ON CONTRACT WISCONSIN § 893.43.**” Nowhere in either pleading does Lee make a claim for unjust enrichment either by name or by elements. As the trial court noted in its decision of October 9, 2008, his first mention of it was during summary judgment briefing when he asserted that denying his contract claims would unjustly enrich Harambee. Because Lee has failed to properly plead a claim for unjust enrichment, we affirm the trial court and dismiss that claim.

¶17 As already noted, we need not address the issue of laches and unclean hands. But we note that the trial court ruled that the unjust enrichment claim is barred by the doctrine of unclean hands. Under that doctrine, anyone who is guilty of substantial misconduct ““in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties and arising out of the transaction”” will not be granted relief. *Wisconsin Patients Compensation Fund v. St. Mary’s Hosp.*, 209 Wis. 2d 17, 37, 561 N.W.2d 797 (Ct. App. 1997) (citation omitted). Here, Lee was found guilty of stealing \$642,000 from Harambee. During the criminal trial, he testified that he controlled the finances, he paid himself, he “ran the operations.” And, he was found guilty of fifteen felonies. Clearly, Lee’s hands are not clean.

IV. Computation on Travel Reimbursement

¶18 The trial court ruled that the travel reimbursement claim was separate from Lee’s claims for unpaid compensation. As noted earlier, the trial court found that the unpaid compensation was for “personal services” subject to the two-year statute of limitations. The trial court, however, ruled that Lee’s claim

seeking travel reimbursement expenses was a contractual claim subject to the six-year statute of limitations under WIS. STAT. § 893.43.

¶19 Lee claimed he was entitled to travel reimbursement expenses of \$1350 a month from 1991 through 2002. The trial court applied the six-year statute of limitations to determine if any of Lee's travel expenses were time-barred. The trial court used the date Lee asserted his counterclaims—July 9, 2007—and looked back six years from that date, concluding that any travel expenses prior to July 9, 2001 were time-barred and non-recoverable. Thus, the trial court concluded that Lee was only entitled to assert a claim for travel expenses from July 9, 2001 until January 2002, when he ceased his employment with Harambee.

¶20 Lee argues in this appeal that the trial court incorrectly used a look-back date instead of the date on which his claim actually accrued, which would have been when the relationship deteriorated—in January 2002. We need not even address Lee's argument in this regard because there is no evidence in the record establishing that any contract existed for Harambee to pay Lee's monthly expenses. Lee failed to submit any evidence, aside from his conclusory and self-serving statements, that a contract for travel reimbursement existed. Accordingly, we reject his claim.⁴

⁴ Lee asserts that Harambee's failure to pay his travel expenses arises to a constitutional violation. This claim is without merit. Harambee was not a state actor, but a private party and therefore, Lee cannot assert due process violations against it. See *Schultz v. Sykes*, 2001 WI App 260, ¶15, 248 Wis. 2d 791, 638 N.W.2d 76.

V. Miscellaneous

¶21 In the last section of his brief, Lee lumps together a variety of undeveloped assertions upon which he asks this court to exercise our discretionary reversal authority under WIS. STAT. § 752.35. We see nothing in this record compelling us to do so.

¶22 Lee argues he should have been given a restitution hearing, that the trial court should have granted his motion for sanctions and his motion to stay the judgment, that he had a right to actually be present at the pretrial conference instead of simply appearing by phone and that Harambee's lawyer had *ex parte* contact with the court. Harambee responds to each of Lee's assertions in its response brief setting forth valid reasons as to why this court should reject Lee's arguments. Lee failed to file a reply brief to refute Harambee's response. Accordingly, his failure to reply results in concessions to Harambee's position. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (we may take as a concession the failure to refute a proposition asserted in a response brief in a reply brief).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

