COURT OF APPEALS DECISION DATED AND FILED

May 23, 2002

Cornelia G. Clark
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. 01-1309 | **Cir. Ct. No. 99-CV-2332**

STATE OF WISCONSIN | **IN COURT OF APPEALS DISTRICT IV**

THE ALEXANDER COMPANY, INC.,

PLAINTIFF-RESPONDENT,

V.

ABDUL BENSAID AND CYNTHIA BROWN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 LUNDSTEN, J. Abdul Bensaid and Cynthia Brown appeal a judgment of the circuit court sanctioning Bensaid and Brown for their failure to comply with the court's scheduling order and the statutes governing civil procedure. Brown additionally appeals the court's judgment finding a partnership by estoppel between Brown and Bensaid. For the following reasons, we affirm.

Background

¶2 Bensaid and Brown are the sole members of "Nadia's LLC," a limited liability company that owns and operates Nadia's Restaurant on State Street in Madison. After purchasing the restaurant, Bensaid discussed possible renovations with representatives of Alexander Company. Bensaid met with David Vos, an architect with Alexander Company, at the restaurant in January of 1999. Between January and March, Bensaid met with Vos several more times. Brown was present at one of those meetings, but neither Brown nor Bensaid stated they were or were not operating as a partnership and neither disclosed that they were part of a limited liability company.

¶3 On March 19, 1999, Bensaid entered into a contract with Alexander Company for remodeling work. Bensaid was designated in the contract as both the owner and the owner's representative. Brown did not sign the contract. Brown did issue a check from her personal checking account to Alexander Company in the amount of $10,000 for the initial work at the restaurant. When Alexander Company asked Bensaid to provide proof of financial capability prior to completion of the renovations, it received a letter from Firstar Bank indicating that Brown was approved for a loan in the amount of $75,000, contingent on an appraisal of her home. Alexander Company was paid an additional $20,000 from a business account in the name of Nadia's LLC.

¶4 Alexander Company was not paid any additional amounts allegedly owed and, in September of 1999, it filed a complaint against Bensaid and Brown, asserting the following causes of action: breach of express contract, breach of implied contract to pay partnership debt, unjust enrichment, and promissory estoppel. Also in the complaint, Alexander Company, without using the label

"partnership by estoppel," alleged that based on its course of dealings with Bensaid and Brown, it was led to believe that the two were partners and assumed joint responsibility for payments.[1] Bensaid and Brown filed an answer and counterclaim alleging that Alexander Company failed to perform work required under the contract and failed to timely complete work, resulting in lost business profits.

¶5 Subsequently, Bensaid and Brown failed to timely disclose their list of expert witnesses and failed to timely respond to interrogatories and requests to produce documents. As a result, the court prohibited Bensaid and Brown from introducing any expert testimony either in support of their counterclaim or in defense of Alexander Company's claims. The circuit court concluded that, because of concessions by Bensaid and his counsel (that Bensaid was not qualified to testify to the reasonable and fair market value of services rendered), and in the absence of any other expert opinion testimony supporting Bensaid and Brown, Bensaid and Brown had "no factual basis for disputing the allegations of Alexander Company that the invoices submitted by them to Bensaid are fair and reasonable."

¶6 The circuit court alternatively ordered all matters within Alexander Company's complaint admitted, with the exception of those allegations relating to

[1] Bensaid and Brown do not argue that Alexander Company did not properly plead partnership by estoppel in the complaint and accordingly we need not address the issue. We note, however, that even if they had made such an argument, we liberally construe allegations in a complaint and accept them as true for purposes of determining whether a claim is stated. *See* ***Hermann v. Town of Delavan***, 215 Wis. 2d 370, 378, 572 N.W.2d 855 (1998). Here, Alexander Company asserted in the complaint that, based on its dealings with Brown and Bensaid, it was led to believe the two were partners and it performed construction work in reliance on that belief.

the existence of an implied partnership and subsequent partnership liability by Brown, on the basis of Bensaid and Brown's

> numerous and continued violations of the Wisconsin Rules of Civil Procedure including failure to provide responses or objections to interrogatories, failure to provide responses or objections to requests for production of documents, failure to seasonably supplement answers to questions posed during deposition, [and] failure to comply with the Court's Scheduling Order regarding deadlines for discovery and expert witness disclosure ….

¶7 Accordingly, at trial, the circuit court only permitted testimony regarding the existence of an implied partnership. The court then concluded that Brown, by her actions, represented herself as a partner of Bensaid such that Alexander Company reasonably believed a partnership existed and was induced to extend credit because of that belief. Total judgment was entered in favor of Alexander Company in the amount of $69,485.67. Bensaid and Brown appeal.[2]

Discussion

¶8 Bensaid and Brown argue that the circuit court erroneously exercised its discretion in rendering a default judgment against them as to the amount of damages and against Bensaid as to liability. Brown also argues that the circuit court erred in concluding that, when extending credit, Alexander Company

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[2] Although the circuit court never specifically stated that it was striking Bensaid and Brown's answer to the complaint, resulting in a default judgment, this is effectively the result of the court's decision to prohibit Bensaid and Brown from denying all allegations in the complaint except those relating to partnership by estoppel. Additionally, although the court never specifically stated that it was dismissing Bensaid and Brown's counterclaim, this is again effectively the result of the court's actions. For simplicity, we will refer to the court's actions as rendering a default judgment and dismissing the counterclaim.

reasonably relied on any act by Brown suggesting a partnership. We first consider Brown's arguments regarding the court's finding of an implied partnership.

Partnership by Estoppel

¶9 Under the Uniform Partnership Act, a partnership is defined as "an association of 2 or more persons to carry on as coowners a business for profit." WIS. STAT. § 178.03(1) (1997-98).[3] Partnership by estoppel results when "a person, by words spoken or written or by conduct, represents himself or herself, or consents to another representing him or her to anyone, as a partner … with one or more persons not actual partners." WIS. STAT. § 178.13(1). Such person is liable to anyone to whom such representation is made who has, on the faith of that representation, given credit to the apparent partnership or detrimentally changed his or her position. *See* § 178.13(1); ***Wisconsin Tel. Co. v. Lehmann***, 274 Wis. 331, 335, 80 N.W.2d 267 (1957).

¶10 "A party claiming partnership by statutory estoppel must prove the elements of estoppel." ***Tralmer Sales & Servs., Inc. v. Erickson***, 186 Wis. 2d 549, 565, 521 N.W.2d 182 (Ct. App. 1994). The elements of estoppel are as follows: action or non-action on the part of one against whom estoppel is asserted, which induces reasonable reliance thereon by the other, and which is to his or her detriment. ***Milas v. Labor Ass'n of Wisconsin, Inc.***, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997). We will not set aside the circuit court's findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2). However, whether estoppel

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

results from established facts is a question of law that we review *de novo*. ***Milas***, 214 Wis. 2d at 8; *see* WIS JI—CIVIL 3074.

¶11 Brown argues only that Alexander Company failed to prove reliance on her conduct in extending credit and, even if it did rely on such conduct, its reliance was unreasonable. In so arguing, Brown suggests that because Alexander Company extended credit, as that term is used in WIS. STAT. § 178.13,[4] when it executed the contract, we must "focus on events that occurred prior to its executing the contract and beginning work." Brown then suggests that the only activity that occurred prior to the signing of the contract, and prior to Alexander Company beginning work, was Brown's presence at one meeting with Vos where Brown and Bensaid used the word "we" in discussing what services they desired from Alexander Company.

¶12 We first note that nothing in WIS. STAT. § 178.13 suggests that credit is "given" when a contract for services between two parties is entered into. Rather, it is axiomatic that credit for construction work is extended when services are performed prior to payment.

¶13 Vos testified that during a meeting at Vos's office in February of 1999, Brown and Bensaid, in discussing the project, used phrases such as "We

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[4] WISCONSIN STAT. § 178.13(1) provides, in part:

> When a person, by words spoken or written or by conduct, represents himself or herself, or consents to another representing him or her to anyone, as a partner in an existing partnership or with one or more persons not actual partners, he or she is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership ….

were going to do this" and "We are going to do that." This led Vos to believe that Brown and Bensaid were partners in a joint venture. Vos also testified that, prior to starting work, Alexander Company asked Bensaid for proof of his financial capability. Because Bensaid was eager for Alexander Company to begin work, Vos agreed that if Alexander Company received a check, it would be willing to work up to the amount of the check until proof of financial capability was obtained.

¶14 Shortly thereafter, Brown wrote a check to Alexander Company for $10,000 from her personal account. On cross-examination, Vos asserted that Alexander Company did not begin work until the check was received, but also conceded it was possible work began prior to receipt of the $10,000 check "if [Bensaid and Brown] ... told us the check was coming."

¶15 Subsequently, Alexander Company received a letter from Brown's bank indicating that Brown was approved for a $75,000 loan, contingent on a home appraisal. Vos testified that the letter was provided in response to Alexander Company's request for proof of financial capability.

¶16 The circuit court necessarily found that Alexander Company performed under the contract in reliance on Brown's course of conduct, including the meeting at Vos's office, the $10,000 check from Brown, and the subsequent letter from Brown's bank. We cannot conclude that this finding was clearly erroneous.

¶17 Brown next argues that it was unreasonable for Alexander Company to rely on the letter from the bank because it was not a letter of credit nor a guarantee of anything, in that it made clear any proceeds would be Brown's to use at her discretion. It cannot be denied, however, that the letter was provided

precisely for the purpose of inducing Alexander Company into continuing the renovations. We conclude that it would not have been unreasonable for Alexander Company to believe that Brown intended to use the loan to pay for the renovations, as her conduct in providing the letter implied. Accordingly, we affirm the circuit court's decision holding Brown liable under the contract based on the doctrine of partnership by estoppel.

Sanctions

¶18 We consider next Bensaid and Brown's argument that the court erred in rendering a default judgment as a sanction.

¶19 A circuit court has both statutory authority, pursuant to WIS. STAT. §§ 805.03,[5] 802.10(7),[6] and 804.12(2)(a) and (4),[7] and inherent authority, ***Johnson***

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[5] WISCONSIN STAT. § 805.03 provides, in relevant part:

> For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a).

[6] WISCONSIN STAT. § 802.10(7) states: "Violations of a scheduling or pretrial order are subject to ss. 802.05, 804.12 and 805.03."

[7] WISCONSIN STAT. § 804.12 states, in part:

> (2) FAILURE TO COMPLY WITH ORDER. (a) If a party … fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> ….

(continued)

v. Allis Chalmers Corp., 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991), to sanction a party for failure to comply with procedural statutes or rules and for failure to obey court orders. The court's "'broad discretion' in the matter of sanctioning parties for violating scheduling orders 'is absolutely essential to the court's ability to efficiently and effectively administer its calendar.'" ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553 (quoting ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 310, 470 N.W.2d 873 (1991)).

¶20 WISCONSIN STAT. § 805.03 permits a court to sanction a party in any just fashion, including in any manner set forth in WIS. STAT. § 804.12(2)(a), for a party's failure to "comply with the statutes governing procedure in civil actions or to obey any order of court." Under WIS. STAT. § 802.10(7), any violation of a scheduling or pretrial order is also subject to the sanctions set forth in § 804.12. And, under § 804.12(4), a court may sanction a party under one of the methods set forth in § 804.12(2)(a)3 for the party's failure to answer interrogatories. Subsection 3 of § 804.12(2)(a) provides that the court may strike out pleadings or

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> 3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
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> ….
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> (4) FAILURE OF PARTY TO … SERVE ANSWERS TO INTERROGATORIES …. If a party … fails … (b) to serve answers or objections to interrogatories submitted under s. 804.08, after proper service of the interrogatories, or (c) to serve a written response to a request for inspection submitted under s. 804.09, after proper service of the request, … the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under sub. (2)(a) 1., 2. and 3.

parts thereof, dismiss the action or proceeding or any part thereof, or render judgment by default against the disobedient party.

¶21 To grant default judgment or dismissal as a sanction, the circuit court must find that the non-complying party's conduct is without a clear and justifiable excuse, and it must conclude that the noncompliance was either egregious or in bad faith. *See* ***Smith v. Golde***, 224 Wis. 2d 518, 526, 592 N.W.2d 287 (Ct. App. 1999); ***Trispel v. Haefer***, 89 Wis. 2d 725, 732, 279 N.W.2d 242 (1979); ***Sentry Ins.***, 2001 WI App 203 at ¶20.

¶22 We examine the circuit court's decision to grant a default judgment under the erroneous exercise of discretion standard. *See* ***Kerans v. Manion Outdoors Co.***, 167 Wis. 2d 122, 130, 482 N.W.2d 110 (Ct. App. 1992). A discretionary decision will be sustained if the circuit court: (1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶23 Here, Bensaid and Brown do not argue that the circuit court erred when it prohibited them from introducing the testimony of any expert witness because of their failure to timely disclose the names of witnesses. Therefore, we do not consider whether the circuit court properly excluded any expert testimony. We agree with the circuit court that, based on Bensaid's admission of liability at his deposition and his counsel's appropriate concession that Bensaid was not competent to testify to the fair market value of services rendered, Bensaid and Brown had no factual basis for disputing the allegations in the complaint.

¶24 Bensaid and Brown argue on appeal that there still existed a defense to the claim even without expert testimony because expert testimony is not

required to "assess whether, for instance, remodeling of a lavatory was or was not part of the contract or whether a contracted completion date was met." While this may be true, expert testimony would certainly have been required to ascertain the amount of damages suffered by Bensaid and Brown for Alexander Company's alleged failure to abide by the contract terms or to ascertain the amount of lost business profits due to a delayed completion date. We could affirm the circuit court's judgment on this basis alone. Nevertheless, we consider the court's alternative basis.

¶25 The circuit court ordered, in the alternative, that all matters within the complaint were deemed admitted based on Bensaid and Brown's failure to provide responses to interrogatories, failure to provide responses to requests to produce documents, failure to seasonably supplement answers to questions posed during deposition, and failure to comply with the court's scheduling order regarding discovery deadlines. We first note that the court acted within the confines of WIS. STAT. §§ 805.03 and 802.10(7) in defaulting Bensaid and Brown and dismissing their counterclaim for their failure to comply with the statutes governing procedure in civil actions and for their failure to comply with a scheduling order. *Cf.* ***Mucek v. Nationwide Communications, Inc.***, 2002 WI App 60, No. 00-3039, ¶¶ 31-36, ___ Wis. 2d ____, ___ N.W.2d ___ (approving circuit court's exercise of discretion in refusing to allow defendant to withdraw admissions based on defendant's failure to comply with discovery).[8]

[8] Bensaid and Brown suggest that a scheduling order is not the type of order that, if not complied with, may become the basis for sanctions under WIS. STAT. § 804.12(2). Bensaid and Brown have failed to consider WIS. STAT. § 802.10(7), which specifically allows for the sanctions set forth in § 804.12 when a party fails to comply with a court's scheduling order.

¶26 Bensaid and Brown argue that the court erroneously exercised its discretion in rendering a default judgment because Bensaid and Brown's failures were neither egregious nor made in bad faith. We disagree.

¶27 The circuit court implicitly found that Bensaid and Brown acted egregiously or in bad faith. The timeline of events provides a reasonable basis for the court's implicit finding. *See* ***Sentry Ins.***, 2001 WI App 203 at ¶22. The circuit court's scheduling order stated that Bensaid and Brown were to disclose expert witnesses, including reports containing the expert witnesses' opinions, by December 15, 2000, and all discovery was to be complete by January 1, 2001, to allow the parties time to prepare for the January 29, 2001, trial date. Bensaid and Brown did not provide a witness disclosure list until January 10, 2001. No witnesses were identified as expert witnesses and no opinions of the witnesses were included.

¶28 In their answer to the complaint, Bensaid and Brown denied owing Alexander Company damages in the amount of $76,065. However, during his deposition, Bensaid admitted he owed Alexander Company some money, but when asked he could not state how much, nor did he answer the question as to which items of costs he disputed. Alexander Company thereafter served interrogatories and requests to produce requesting that Bensaid and Brown state the factual basis for every allegation in the complaint that was denied, and produce any documents relied on for the denial. Bensaid and Brown did not respond to Alexander Company's interrogatories or requests to produce documents until January 26, 2001, just three days before the trial date.

¶29 "Pretrial discovery is designed to formulate, define and narrow the issues to be tried, increase the chances for settlement, and give each party

opportunity to fully inform himself of the facts of the case and the evidence which may come out at trial." ***State ex rel. Dudek v. Circuit Court***, 34 Wis. 2d 559, 576, 150 N.W.2d 387 (1967). By failing to provide a timely list of expert witnesses, including a report of their opinions, and by failing to answer interrogatories and requests to produce documents designed to ascertain the answers to questions which Bensaid failed to answer during his deposition and which went to the heart of this case (that is, what amount of money was owed Alexander Company), Bensaid and Brown effectively denied Alexander Company the opportunity to adequately prepare for trial. The circuit court could reasonably conclude this conduct was egregious. Additionally, the statement by counsel for Bensaid and Brown that "this is something that slipped through the cracks" does not qualify as a clear and justifiable excuse for the failures.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.