

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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. 2009AP1149

Cir. Ct. No. 2008CV1059

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MICHAEL SABEE,

PLAINTIFF-RESPONDENT,

V.

AMALGAMATED INTERNATIONAL ENTERPRISES, LLC,

DEFENDANT-APPELLANT,

LOIS E. SABEE AND DRAPER PRODUCTS, INC.,

DEFENDANTS-CO-APPELLANTS.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Amalgamated International Enterprises, LLC, Draper Products, Inc., and Lois Sabee (Amalgamated) appeal a summary judgment declaring (1) Amalgamated is not entitled to postjudgment interest on a judgment it obtained by assignment, and (2) Lois may therefore not claim credit for postjudgment interest paid to Amalgamated. Amalgamated argues it is not bound by an agreement, made prior to the judgment's assignment, waiving postjudgment interest. We disagree and affirm.

BACKGROUND

¶2 Draper Products, Inc., purchased materials from Stuart Hansen while Michael Sabee was Draper's president. At the time, Michael owned one-third of Draper; his parents, Lois and Reinhart Sabee, owned the rest. The materials Draper purchased from Hansen were not for Draper, but for another company Michael owned. Draper fired Michael on January 18, 2002. Because neither Michael nor Draper had paid Hansen for the materials Michael had ordered, Hansen obtained a \$1,298,557.28 judgment against Draper on March 25, 2003.

¶3 Draper's dismissal of Michael as president precipitated an avalanche of litigation among the Sabee family and their various companies. Eventually, they submitted these disputes to mediation, and arrived at a settlement agreement on June 2, 2003. Pursuant to this agreement, Michael assumed responsibility for Hansen's \$1,298,557.28 judgment against Draper. The agreement also provided that Lois would partially assume one of Michael's debts. Moreover, any payments Draper made toward the Hansen judgment would reduce Lois's obligation to pay Michael's debt correspondingly.

¶4 The day after Michael completed the settlement agreement with Draper and Lois, he executed a separate agreement with Hansen to pay the judgment. Although the agreement acknowledged Michael's responsibility, pursuant to the settlement agreement, to pay the judgment and hold Draper harmless, it did not release Draper from liability. As relevant here, the agreement stated:

Sabee hereby assumes full responsibility to pay Hansen the sum of \$1,298,557.28 (the "Judgment Amount"), and reaffirms its intent to hold Draper harmless therefore.

The agreement then provided a payment schedule, according to which Michael would pay specified amounts "until paid in full." In the event of Michael's default, the agreement authorized Hansen to demand payment of "the entire Judgment Amount ... immediately," along with Hansen's costs of collection.

¶5 Michael made the agreed upon payments for approximately three years, paying a total of \$1,134,000—or \$164,557.28 shy of the judgment amount—before he stopped making payments. A little over a year after Michael's last payment, Hansen notified Michael of his default and demanded payment. At roughly the same time, Hansen also informed Draper that Michael had stopped making payments and demanded "full payment on the amount due" from Draper. Hansen's demand letter informed Draper "there was still an outstanding balance of \$164,557.28. In addition, Hansen ... is also owed all interest which has accrued." However, Hansen told Draper it would "waive any accrued interest and accept as payment in full the principal amount of \$164,557.28." Hansen also provided Draper with a record of the payments made, listing \$164,557.28 as the remaining balance.

¶6 Draper calculated that the remaining balance would be almost half a million dollars higher than Hansen reported had he charged Michael postjudgment interest. Draper apparently believed that while Hansen had declined to collect postjudgment interest, this interest had nevertheless accrued at the statutory rate of twelve percent from the day of the judgment. Rather than pay the balance Hansen requested, Draper arranged to have Hansen assign the judgment to Amalgamated, which would then—in Draper’s view—hold the right to charge Draper the uncollected postjudgment interest on the entire original judgment amount plus any unpaid principal. Amalgamated is a separate company Draper officers formed for the sole purpose of purchasing the judgment and funded with trusts run by Draper officers.

¶7 On October 18, 2007, Hansen assigned “all of his rights, title and interest as the judgment creditor of [the judgment against Draper] to Amalgamated” The assignment stated “the outstanding balance owing on this judgment is not less than \$164,575.28^[1] as of this date.”

¶8 On January 28, 2008, Michael, Lois, and Draper agreed that Amalgamated’s acquisition of the judgment would not reduce Lois’s debt to Michael, but that any payments Draper made to Amalgamated on the judgment would. The agreement reiterated that the balance of Lois’s debt to Michael was \$723,000, but it did not specify the balance of the judgment now held by Amalgamated. On May 12, 2008, Amalgamated informed Draper the balance due was nearly \$700,000—an amount that included postjudgment interest on the

¹ It appears the assignment drafter transposed the two numbers immediately to the left of the decimal point when stating the balance owing on the judgment was \$164,575.28. All other references to the balance Hansen reported listed the balances as \$164,557.28.

original balance—and demanded payment. Draper made a payment of \$450,000. Ostensibly, this would offset Lois’s obligation to Michael by that amount.

¶9 Michael sued, seeking a declaration Hansen had not assigned Amalgamated the right to retroactively charge postjudgment interest. He contended Lois was only entitled to offset her debt to him by \$164,557.28—the judgment balance when he defaulted—plus contract interest at the rate of five percent.

¶10 The circuit court granted summary judgment in favor of Michael. It concluded Amalgamated was not entitled to postjudgment interest because it was bound by Hansen’s waiver of this interest. It also concluded the only interest due was interest at the legal default rate of five percent for Michael’s breach of the agreement. It calculated that Draper should therefore have only paid Amalgamated \$176,706.34, and Lois was due an offset against her obligation to Michael in this amount, rather than the \$450,000 she claimed she was due.

DISCUSSION

¶11 Whether a circuit court properly granted summary judgment is a question of law we review independently. *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 536, 563 N.W.2d 472 (1997). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).²

² References to the Wisconsin Statutes are to the 2007-08 version.

¶12 The only issue in this appeal is whether the judgment assignment entitled Amalgamated to collect postjudgment interest on the original amount of the judgment. Amalgamated argues it did because while Hansen may have agreed Michael did not need to pay postjudgment interest, the judgment was ultimately against Draper, with whom Hansen had no such agreement. It also contends that even if the agreement bound Amalgamated and Draper, the interest waiver depended on Michael's timely payment. Because Michael breached the agreement, Amalgamated asserts he is not entitled to the agreement's benefit of postjudgment interest waiver. We disagree with both arguments.

¶13 It is beside the point that Draper was not directly a party to Michael's agreement with Hansen to pay the judgment. What is important is that Michael in fact reduced the judgment balance to \$164,557.28. Hansen could have charged Michael interest. *See* WIS. STAT. § 815.05(8). But Amalgamated cites no authority that he was not also free to agree to waive this right. Generally, parties are free to contract as they see fit unless the contract imposes obligations contrary to the public policy of the state. *Northern States Power Co. v. National Gas Co.*, 2000 WI App 30, 232 Wis. 2d 541, 545, 606 N.W.2d 613 (Ct. App. 1999). Hansen did just that. His agreement with Michael acknowledged Michael would "pay Hansen the sum of \$1,298,557.28"—the amount of the judgment's principal—to satisfy the judgment against Draper.

¶14 It is undisputed that Hansen in fact applied all of Michael's payment to principal. Hansen reported "the balance currently due and owing [when Michael defaulted was] \$164,557.28," and in its brief to the circuit court, Amalgamated conceded "that at the time Hansen assigned the Judgment to Amalgamated, the amount of \$164,557.28 remained due and owing on the principal amount of the Judgment." Indeed, the only way the judgment could have

a principal balance of \$164,557.28 was if Hansen had not been charging Michael postjudgment interest. Regardless of how he paid the judgment, the salient point is that Michael discharged all but \$164,557.28 of the original balance.

¶15 Thus, Amalgamated’s argument ignores what it was assigned. It clearly was not assigned the entire \$1,298,557.28 judgment. It is axiomatic that Amalgamated may not charge interest on a debt it did not own. Rather, the assignment entitled Amalgamated only to assume the rights and privileges Hansen himself had vis-à-vis Draper. “It is fundamental that by an assignment the assignee of a nonnegotiable chose in action obtains nothing more than the assignor had” *Gould v. Jackson*, 257 Wis. 110, 112, 42 N.W.2d 489 (1950). In other words, the assignee “stands exactly in the shoes of his assignor. He succeeds to all of his rights and privileges, but acquires no greater right than his assignor had in the thing assigned.” *Id.* at 113.

¶16 Here, Hansen applied Michael’s \$1,134,000 in payments to the judgment’s principal, waiving his right to collect postjudgment interest on that amount—either from Michael or from Draper. That left a balance of \$164,557.28. This is what Hansen was entitled to collect, and it is therefore also what Amalgamated was entitled to collect.

¶17 We also disagree with Amalgamated’s argument that Michael’s breach of his agreement with Hansen entitled it to charge postjudgment interest as if the agreement had never been executed. First, Amalgamated’s concession that \$164,557.28 was due on the principal when Hansen assigned the judgment contradicts this argument. As noted above, this could only be the principal balance if postjudgment interest had not been charged. The breach occurred before the assignment, so if Amalgamated were correct that the remedy for

Michael's breach was to retroactively apply interest on the entire judgment, the balance at assignment would have been much higher. Second, the agreement nowhere states that Hansen would charge Michael postjudgment interest in the event of default. To the contrary, the agreement specifies that if Michael defaulted, "the entire Judgment Amount shall, at the option of Hansen, be immediately due and payable," as well as "Hansen's reasonable attorneys' fees, together with all court costs and other expenses incurred or paid by Hansen in connection [with collecting the balance]."

¶18 Hansen was entitled to collect interest when Michael breached his contractual obligations, but only at the default rate of five percent per year, and only on the balance then remaining. His repayment agreement with Michael was a contract in which Michael agreed to pay the judgment in a specified manner. However, the contract did not specify the interest rate Hansen would charge if Michael failed to make the required payments. WISCONSIN STAT. § 138.04 provides that unless contracting parties agree in writing to another rate, "[t]he rate of interest upon the loan or forbearance of any money, goods or things in action shall be \$5 upon the \$100 for one year" Therefore, when Michael defaulted on his contractual obligation to pay Hansen, Hansen was entitled to interest on the balance remaining at the legal rate of five percent. As Hansen's assignee, Amalgamated was also entitled to this interest.

CONCLUSION

¶19 When Hansen assigned the judgment to Amalgamated, Amalgamated obtained exactly what Hansen had: a judgment against Draper with a principal balance of \$164,557.28 and interest accruing at the legal rate of five percent. The circuit court properly declared Amalgamated could not collect

postjudgment interest on the original judgment amount and that the correct amount of Lois's setoff from her obligation to Michael is \$176,706.34.

By the Court.—Judgment affirmed.

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

