COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP267 **Cir. Ct. No. 2009CV5649**

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

CURTIS P. JAHN,

PLAINTIFF-RESPONDENT,

V.

PAUL TESSMER, CAPITOL WAREHOUSING CORPORATION, WISCONSIN STORAGE AND TRANSPORTATION CORPORATION AND TESSMER INVESTMENTS, LLC,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

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

¶1 SHERMAN, J. Paul Tessmer, Capitol Warehousing Corporation, Wisconsin Storage and Transportation Corporation and Tessmer Investments, LLC, appeal an order of summary judgment in favor of Curtis Jahn on a breach of

contract claim Jahn brought against the appellants, as well as a judgment entered in favor of Jahn. We affirm.

BACKGROUND

¶2 In July 2002, Jahn sold his business, Capitol Warehousing Corporation, to Tessmer. Funding of the sale was done in part through two loans from Wisconsin Community Bank: (1) Loan No. 1325216036 (Loan 1) for $1,450,000 at an initial interest rate of 6.250% to be paid with a monthly payment in the amount of $10,676.98 until the final payment, which was due and payable on July 29, 2008; and (2) Loan No. 1325216037 (Loan 2) for $5,000,000 at an initial interest rate of 6.250% to be paid in 239 payments of $36,817.19 until due and payable on July 29, 2022.

¶3 As part of that sale, Jahn and Tessmer entered into a "Personal Goodwill Agreement," which provided for annual scheduled payments to Jahn of $100,000 per year for the year ending July 31, 2003 through the year ending July 31, 2007, $65,000 for the year ending July 31, 2008 through the year ending July 31, 2013, and $60,000 for the year ending July 31, 2014. The scheduled payments to Jahn under this agreement totaled $950,000. Tessmer later assigned this agreement and the financial obligations thereunder, to Wisconsin Storage, another of Tessmer's corporations. Performance and payment of the Personal Goodwill Agreement was guaranteed by Capitol, Tessmer Investments, another entity formed by Tessmer as part of the acquisition of Capitol, and Tessmer. Thus, all four appellants remained liable for any breach of the Personal Goodwill Agreement.

¶4 In addition to the Personal Goodwill Agreement, at the time of the sale, Jahn and Capitol entered into a "Performance Agreement," which provided

for annual scheduled payments to Jahn of $40,000 per year for the year July 31, 2003, through the year ending July 31, 2007, $75,000 for the year ending July 31, 2008, through the year ending July 31, 2012, $85,000 for the year ending July 31, 2013, and $90,000 for the year ending July 31, 2014. The scheduled payments to Jahn under this agreement totaled $750,000. As with the Personal Goodwill Agreement, all four appellants were liable for breach of the Performance Agreement.

¶5 Both the Personal Goodwill Agreement and the Performance Agreement contained a provision that provided that, in the event that Wisconsin Community Bank's covenants were not satisfied and Capitol was not able to make payments to Jahn under the Agreements, those payments would be deferred until such time as the payments were permitted by Wisconsin Community Bank. In addition, both Agreements provided language which limited Capitol's ability to refinance those loans without Jahn's consent. The Personal Goodwill Agreement provided, in pertinent part:

> Tessmer and [Capitol] hereby covenant and agree with and for the benefit of Jahn that in the event [Capitol] shall refinance more than Two Hundred Fifty Thousand and no/100 Dollars ($250,000.00) of the Wisconsin Community Bank debt, [Capitol] shall not consummate any such refinancing on terms which restrict, inhibit or preclude the timely payment to Jahn of the above-scheduled payments without first obtaining the written consent of Jahn.

The Performance Agreement similarly provided with respect to the Wisconsin Community Bank loans:

> [Capitol] hereby covenants and agrees with and for the benefit of Jahn that in the event it shall refinance more than Two Hundred Fifty Thousand and no/100 Dollars ($250,000.00) of its debt, it shall not consummate any such refinancing on terms which restrict, inhibit or preclude the

> timely payment to Jahn of the above-scheduled payments without first obtaining the written consent of Jahn.

¶6 The last payments Jahn received under the Agreements were for the year ending July 31, 2004. Jahn averred that Tessmer informed him that Capitol could not and would not make the scheduled payments required by the Agreements for any time after that time period because Capitol had failed to meet the performance covenants required under the Wisconsin Community Bank loans.

¶7 In June 2006, Wisconsin Community Bank filed suit against Capitol, alleging Capitol was in default on the loans at issue here. That lawsuit was later dismissed upon the agreement that Wisconsin Community Bank would be paid in full by May 15, 2007.[1]

¶8 To satisfy the dismissal agreement, Capitol sought a lender to replace Wisconsin Community Bank as the lender for the loans at issue. Tessmer averred that Jahn recommended to him that he inquire with Bank of Sun Prairie regarding that bank replacing Wisconsin Community Bank as the lender for the loans. Bank of Sun Prairie ultimately agreed to assume the loans at issue, and in August 2007, an "Assignment Agreement" was signed by Bank of Sun Prairie, Wisconsin Community Bank, Capitol, and all guarantors of the loan from Bank of Sun Prairie. That same day, but apparently after the assignment agreement was actually signed, Capitol and Bank of Sun Prairie executed two "Commercial Debt Modification Agreement[s]," which modified the terms of Loans 1 and 2. The modification agreement for Loan 1 specified that the balance due on the original note was $1,294,496.99; increased the interest rate to a fixed rate of 8.867% for

[1] The dismissal agreement originally provided for a full payment date of January 15, 2007. However, that date was later extended to May 15, 2007.

three years; modified the monthly payment to be based on a 300-month amortization; set the monthly principal and interest payment at $10,862 beginning on September 7, 2007; and changed the maturity date for the loan to August 7, 2010. The modification agreement for Loan 2 specified that the balance due on the original note was $4,496,859.45; increased the interest rate to a fixed rate of 8.867% for three years, after which the rate would be adjusted on a quarterly basis to the then Wall Street Journal prime plus 0.617%; modified the monthly payment so it was based on a 300-month amortization from the date of modification; set the monthly principal and interest payment at $37,731; and changed the maturity date for the loan to July 29, 2032.

¶9 Jahn filed suit against the appellants in November 2009, alleging breach of the Personal Goodwill and Performance Agreements. Jahn maintained that the appellants breached those Agreements by refinancing the Wisconsin Community Bank loans in a manner which adversely affected his rights under the Agreement without his written approval. The appellants argued the loan assumptions by Bank of Sun Prairie and the loan modifications did not constitute a "refinance" under the terms of the Agreements, and that even if they did, Jahn had either waived the requirement that his written approval be obtained for the refinance, or was equitably estopped from requiring his approval. Jahn moved for partial summary judgment on the issue of whether the loan assumptions by Bank of Sun Prairie were refinances of the Wisconsin Community Bank loans that restricted, inhibited, or precluded timely payment to Jahn under the Personal Goodwill and Performance Agreements, and thus constituted a breach of the Agreements because his written consent was not obtained. The circuit court determined that they constituted a breach and entered summary judgment in Jahn's

favor. An order of judgment was subsequently entered in Jahn's favor for amounts due to Jahn under the Agreements. The appellants appeal.

DISCUSSION

¶10 The appellants contend that the circuit court erred in granting summary judgment in Jahn's favor on the issue of whether they breached the Personal Goodwill and Performance Agreements by refinancing more than $250,000 of the Wisconsin Community Bank loans without first receiving Jahn's written consent.

¶11 The grant or denial of a motion for summary judgment is a matter of law that this court reviews de novo. ***Wegner v. West Bend Mut. Ins. Co.***, 2007 WI App 18, ¶11, 298 Wis. 2d 420, 728 N.W.2d 30. A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2009-10).[2] We construe all facts and reasonable inferences from the facts in the nonmoving party's favor. ***Strozinsky v. School Dist. of Brown Deer***, 2000 WI 97, ¶32, 237 Wis. 2d 19, 614 N.W.2d 443.

¶12 The appellants' argument is threefold. First, the appellants assert that the assumption of the Wisconsin Community Bank loans by Bank of Sun Prairie did not constitute a refinance of those loans that restricted, inhibited or precluded timely payment to Jahn under the Agreements. Second, the appellants assert that even if the loan assumptions were refinances, a material issue of fact

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

remained as to whether Jahn waived his right to approve the refinances. Third, the appellants assert that even if the loan assumptions were refinances of those loans, a material issue of fact remained as to whether Jahn is estopped from asserting his right to approve refinancing of the loans. We address each of the appellants' assertions below.

A. Prohibited Refinancing of Loans

¶13 The Personal Goodwill Agreement and the Performance Agreement contained nearly identical provisions which provided that Capitol would not "refinance" more than $250,000 of the Wisconsin Community Bank debt[3] "on terms which restrict[ed], inhibit[ed], or preclud[ed] the timely payment" to Jahn under those Agreements without first obtaining Jahn's written consent. The appellants contend that the assumption of the Wisconsin Community Bank loans by Bank of Sun Prairie was not a refinance of those loans, and even if it was, the terms of the refinancing did not restrict, inhibit, or preclude timely payment to Jahn under the Agreements.

1. Refinancing

¶14 The parties dispute what constituted a "refinance" under the Agreements and whether the loan transactions at issue were refinances of the Wisconsin Community Bank loans. These present questions of contract interpretation. The interpretation of a contract is a question of law which we

[3] The parties do not dispute that any refinancing in this case was more than $250,000 of the debt at issue.

review independently of the circuit court. ***BV/B1, LLC v. InvestorsBank***, 2010 WI App 152, ¶19, 330 Wis. 2d 462, 792 N.W.2d 622.

¶15 When construing a contract, "our goal 'is to ascertain the true intentions of the parties as expressed by the contractual language.'" ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476 (quoted source omitted). The best indication of the parties' intent is the language of the contracts themselves, which we construe according to their plain and ordinary meaning. ***Id.*** "If the contract [language] is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence." ***Id.*** When, however, the terms language of the contract is susceptible to more than one reasonable interpretation, the language is ambiguous and the court may look beyond the face of the contract and consider extrinsic evidence to resolve the parties' intent. ***Id.*** Whether a contract is ambiguous or unambiguous presents a question of law, which we decide independently of the circuit court. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App.1987).

¶16 The appellants argue that the term "refinance" is "inherent[ly] ambig[uous]" because it is not defined by the Agreements and can be defined multiple ways. They argue that to ascertain the meaning of the term, this court must look to the phrase "on terms which restrict, inhibit, or preclude the timely payment of Jahn of the above-scheduled payments." The appellants argue that this phrase modifies the term "refinance," and that whether a transaction constitutes a refinance depends on whether or not the terms of the loan transaction restrict, inhibit, or preclude timely payment to Jahn. According to the appellants, the transactions at issue here is not a refinance because, overall, it did not make it less

likely that Jahn would be paid under the Agreements than he would have had the loans stayed with Wisconsin Community Bank.

¶17 Jahn, in contrast, argues that the term "refinance" is plain and unambiguous, and that applying the plain meaning of the term to the facts at hand, it is clear that the loan transactions were refinances as that term is used in the Agreements. We agree with Jahn.

¶18 A term is not ambiguous merely because it is not defined in the contract. *See* ***United States Fire Ins. Co. v. Ace Baking Co.***, 164 Wis. 2d 499, 503, 476 N.W.2d 280 (Ct. App. 1991). Nor is a term ambiguous merely because the term has more than one dictionary definition. ***Ho-Chunk Nation v. Wisconsin Dept. of Revenue***, 2009 WI 48, ¶24, 317 Wis. 2d 553, 766 N.W.2d 738. If only one meaning of the term comports with what a business person would reasonably expect, the term is not ambiguous. ***United States Fire Ins. Co.,*** 164 Wis. 2d at 503. We conclude that here the term refinance is not susceptible to more than one reasonable interpretation in the context of the parties' agreements here.

¶19 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1908 (1993) defines "refinance" as "to renew or reorganize the financing of," to "provide capital for afresh," and to "provide for (an outstanding indebtedness) by making another loan or a larger loan on fresh terms." "Refinanc[e]" is similarly defined by BLACK'S LAW DICTIONARY 1394 (9th ed. 2004) as "[a]n exchange of an old debt for a new debt, as by negotiating a different interest rate or term or by repaying the existing loan with money acquired from a new loan." The plain meaning of "refinance" is clear: a debt is refinanced when it is replaced or exchanged for a new debt on new terms. We reject the appellants' assertion that whether or not refinances took place depends on whether or not the transactions

restricted, inhibited, or precluded timely payment to Jahn under the Agreements. Whether the transactions did or did not has no effect on whether the transactions were refinances. Instead, a refinance was one of the three separate requirements which must have been met in order for written consent from Jahn to be required for a transaction affecting the loans: (1) a refinance, (2) of an amount more than $250,000 of the loan value; and (3) the terms of which restricted, inhibited, or precluded timely payment to Jahn of amounts owing under the Agreements.

¶20 In the present case, the Wisconsin Community Bank loans were replaced with new loans from Bank of Sun Prairie, with terms that ultimately differed from the terms that governed the Wisconsin Community Bank loans. Those changes in terms included an increase to the loans' interest rates, an extension of the maturity dates, and an increase in the monthly amounts owing on those loans. The loan transactions at issue here were thus plainly replacements of old debts for new debts on new terms—the definition of refinance.

¶21 The appellants also argue that the Wisconsin Community Bank Loans were not refinanced because any and all modifications to the terms of the loan took place after the documents assigning the loans to Bank of Sun Prairie were executed. Relying on a Maryland appellate court case, the appellants argue that any assignment of indebtedness by one financial entity to another without any modification of the assigned loans terms and without the issuance of any new notes or mortgages, is not a refinance. *See* ***Springhill Lake Investors Ltd. P'ship v. Prince George's County***, 114 Md. App. 420, 690 A.2d 535 (1997). They claim that in the present case, no terms of the loans were modified by the actual loan assignment agreements and no new notes or mortgages were prepared by Bank of Sun Prairie; thus the assumption of the loans by Bank of Sun Prairie did not constitute a refinance of those loans. The appellants' argument puts form over

substance. The refinancing of a loan is the process of replacing one debt with another. The appellants have pointed to no legal authority for the proposition that all terms governing a refinancing must be set forth in one document. To the contrary, a refinancing may entail the execution of multiple agreements. *See, e.g.*, ***S.T. Edwards & Co. v. Shawano Milk Products Co.***, 211 Wis. 378, 380-81, 247 N.W. 465 (1933) (the terms of a contract may be determined from several writings). Although the actual loan assignment in this case did not modify the terms of the loans, documents that did modify the loans were executed contemporaneously with the loan assignment and thus are properly considered in examining the loan transactions at issue.

¶22 In summary, the undisputed facts are that the Wisconsin Community Bank loans were replaced by new loans issued by Bank of Sun Prairie, with new terms. We conclude that this constituted a refinance of the Wisconsin Community Bank loans.

2. Restrict, Inhibit, or Preclude Payments to Jahn

¶23 The appellants also argue that any refinancing in this case did not restrict, inhibit, or preclude payment to Jahn under the Agreements because any changes made to the loans "preserved Jahn's financial interest because it enabled Capitol to continue as a company and pay Jahn in the future." This argument does not address the correct question. The question is not whether the refinancing as a whole was better for Jahn's long-term financial interest; rather the inquiry is whether any terms of the refinancing restricted, inhibited, or precluded payments to Jahn under the Agreements.

¶24 The circuit court concluded it was undisputed that the increase in the loans' interest rates and monthly payments required the appellants "to allocate

more of their already limited funds towards satisfying their debt," which in turn "restricted, inhibited and precluded the [appellants'] ability to make *timely* payments to Jahn, because they had less money left over to make payments to him after paying the bank." (Emphasis added.) The court further concluded it was undisputed that the extension of the loans' maturity dates meant that the appellants would be paying off their debt for a longer period of time, which also affected the appellants' ability to make timely payments to Jahn. We agree with the circuit court. It is undisputed that the terms of the refinancing increased the amounts owing on the loans and the length of time the loans would be paid, which meant that fewer funds would be available to pay Jahn under the Agreements. We therefore conclude that there is no issue of material fact as to whether the refinancing terms restricted, inhibited or precluded payment to Jahn.

B. Waiver

¶25 The appellants contend that even if Bank of Sun Prairie's assumption of the Wisconsin Community Bank loans was a refinance of that debt on terms which restricted, inhibited, or precluded the timely payment to Jahn under the Agreements, an issue of material fact exists as to whether Jahn, through his conduct, waived "his right to approve [] the loan assumption." It is undisputed that Jahn did not give his written consent as required by the agreements.

¶26 Waiver is "the 'voluntary and intentional relinquishment of a known right.'" ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 9, 571 N.W.2d 656 (1997) (quoted source omitted). Intent to relinquish is an essential element of waiver. ***Id.*** Actual intent, however, may be inferred as a matter of law from the actions of the waiving party. ***Id.*** The waiving party must act intentionally and with knowledge of the material facts. ***Nugent v. Slaght***, 2001 WI App 282, ¶12,

249 Wis. 2d 220, 638 N.W.2d 594. "When material facts surrounding waiver are without dispute, an issue of law is presented." ***Shannon v. Shannon***, 145 Wis. 2d 763, 776, 429 N.W.2d 525 (Ct. App. 1988).

¶27 The appellants argue that a factual dispute exists regarding whether Jahn knew that Bank of Sun Prairie would be assuming the Wisconsin Community Bank loans.[4] The appellants argue that this factual dispute "goes to the issue of whether Jahn intentionally and voluntarily waived his right to consent to the loan assumption."

¶28 Assuming for the purposes of summary judgment that Jahn was aware that the Wisconsin Community Bank loans would be assumed by Bank of Sun Prairie, the appellants have not pointed to any facts from which it could be inferred that mere knowledge that the loan would be assumed amounted to a waiver by Jahn of the requirement that his written approval be obtained for the refinancing of the loans. Nor have they pointed to any legal authority for that proposition. Accordingly, we conclude that there exists no material issue of fact as to whether Jahn waived the requirement that his consent be obtained.

C. Equitable Estoppel

¶29 Finally, the appellants contend that an issue of material fact exists as to whether Jahn is equitably estopped from relying on the restriction that no refinancing of the loans take place without first obtaining Jahn's written consent.

[4] The appellants aver that Tessmer verbally informed Jahn that Bank of Sun Prairie would be assuming the loans. Jahn, however, disputes that.

¶30 Equitable estoppel may be applied when the action or inaction of a party induces reliance by another to that other person's detriment. ***Nugent***, 249 Wis. 2d 220, ¶19. Equitable estoppel requires proof of the following elements: (1) an action or inaction (2) on the part of one against whom estoppel is asserted (3) that induces reasonable reliance by another (4) which is to his or her detriment. ***Milas***, 214 Wis. 2d at 11. The party asserting equitable estoppel must prove these elements by clear and convincing evidence. ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 680, 273 N.W.2d 279 (1979).

¶31 The appellants maintain that Tessmer informed Jahn that the loans were being assumed by Bank of Sun Prairie, and that Jahn did not thereafter discuss the loan assumption by Bank of Sun Prairie with Tessmer. Jahn disputes that he was ever informed of the assumption. The appellants argue that the factual dispute as to whether Jahn was aware of the loan assumption precludes summary judgment on the issue of equitable estoppel because "if the court concludes that Tessmer did tell Jahn that the [Bank of Sun Prairie] was assuming the [l]oans from [Wisconsin Community Bank], then the court needs to determine whether Jahn's non-responsiveness (i.e. silence) to Tessmer induced Tessmer to reasonably rely thereon to his detriment."

¶32 Assuming for purposes of summary judgment that Tessmer had informed Jahn of the loan assumption, the appellants have not pointed us to any facts in the summary judgment submissions that Tessmer actually believed that giving Jahn this information relieved Tessmer of his obligation to obtain Jahn's written consent and, therefore, that Tessmer relied on the absence of communication from Jahn regarding the loan assumption to proceed with the loan assumption without obtaining Jahn's written consent. Nor have the appellants pointed to any facts that such reliance by Tessmer would have been reasonable,

and no reasonable inferences can be drawn to support reasonable reliance by Tessmer. In his affidavit, Tessmer averred that Jahn was aware of the loan assignment "because [Tessmer] told him that it was occurring." There are no facts which indicate *when* Tessmer informed Jahn of the loan assumption—it could have been weeks before the refinance of the loans took place, or as it was taking place. Nor are there any facts that indicate whether Jahn was aware of the details of the refinance, or whether the refinancing was acceptable to Jahn when Jahn was informed of it by Tessmer. For example, Tessmer did not aver that Jahn, in any manner, indicated his approval. Accordingly, we conclude that the court properly dismissed the appellants' equitable estoppel defense on summary judgment.

CONCLUSION

¶33 For the reasons discussed above, we conclude that the loan transactions at issue here refinanced the Wisconsin Community Bank Loans 1 and 2, and that the terms of that refinancing restricted, inhibited, or precluded payments to Jahn under the Agreements. We further conclude that there existed no material issue of fact on the issues of waiver or estoppel. Accordingly, we conclude that summary judgment was proper in favor of Jahn, and therefore affirm.

By the Court.—Judgment and order affirmed.

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