COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP393 **Cir. Ct. No. 2008CV1415**

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

JON A. RUBENZER AND BRW DEVELOPMENT OF HUDSON, LLC, A WISCONSIN LIMITED LIABILITY COMPANY, BY JON A. RUBENZER, MANAGING PARTNER,

PLAINTIFFS-APPELLANTS,

V.

ASSOCIATED BANC-CORP, FORMERLY FIRST FEDERAL SAVINGS BANK LACROSSE-MADISON,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Jon Rubenzer appeals a summary judgment dismissing his tort claim against Associated Banc-Corp based on a statute of

limitations defense. Rubenzer argues summary judgment is inappropriate because there are disputed issues of material fact regarding Rubenzer's discovery of his claim. We agree, and therefore reverse and remand.

BACKGROUND

¶2 Jon Rubenzer, who lived in California, decided to partially fund a residential apartment complex in Wisconsin in 1999 at the request of his step-son, Stephen Bouton. Rubenzer and Bouton formed BRW Development of Hudson, LLC, along with Bouton's friend, Jeff Warren. Rubenzer was the majority shareholder and co-manager with Bouton and Warren. In addition to Rubenzer's investment, BRW borrowed funds from First Federal Savings Bank of LaCrosse-Madison, n/k/a Associated Banc-Corp (the Bank). The Bank selected River Valley Abstract & Title Company and its owner, Roger Bevers, as the Bank's agent to disburse construction funds and collect lien waivers from the subcontractors.

¶3 After the first project was successfully completed, BRW decided to construct another apartment complex. As it had done with the first, BRW hired Midwest Construction Services to act as the general contractor.[1] Midwest was co-owned by Bouton and Warren. BRW again received its project funding from Rubenzer and the Bank. Rubenzer invested approximately $350,000 and the Bank provided $2,800,000. BRW and the Bank entered into a Commercial Construction Loan Disbursement Agreement. Again, the Bank selected River Valley as its disbursing agent.

[1] Midwest was eventually replaced with Renton Homes, Inc., a successor to Midwest. For ease of discussion, we refer only to Midwest throughout this decision.

¶4 River Valley's role was to disburse funds directly to Midwest to cover construction-related costs as construction progressed. The disbursement agreement obligated River Valley to collect lien waivers from Midwest for any subcontractors or material providers who were to be paid more than $5,000 in the previous draw, before further funds could be disbursed. The disbursement agreement also expressly prohibited BRW and Midwest from bringing a direct cause of action against River Valley. Instead, their sole recourse was to proceed against the Bank.

¶5 River Valley issued the first funding draw for the second project on January 31, 2001. Rubenzer had limited involvement in the project and received only occasional updates from Bouton. Bouton called Rubenzer in late November 2002 and informed him that "subcontractors were seriously overdue for payment and that construction draws had been taken from the bank loan to pay those specific subs, however, the construction draws were not received by the appropriate parties." Bouton concluded that "something's wrong" and explained that the subcontractors' claims totaled in the hundreds of thousands of dollars.

¶6 Rubenzer flew to Wisconsin to investigate on December 8. Upon his arrival, Midwest's secretary gave him a list of unpaid subcontractors for whom bank draws totaling about $200,000 had been made. That same day, Deborah Preston from the Bank asked Midwest to fax copies of the lien waivers in BRW's possession. Rubenzer instructed the secretary not to do so because "if [Preston] didn't have what she should have had, I wasn't going to provide her with them. I didn't want to fill their file for them. We knew something was wrong. We didn't know what."

¶7 On December 10, Rubenzer met with Bevers at River Valley's office. Bevers explained how the draw process typically works, but also disclosed he had not collected all of the lien waivers on the current project. Bevers explained that "in this case, what happened was ... after a while, a familiarity can develop between the disbursing person or whatever and the person – or the contractor making the draw and sometimes you don't always do it." Rubenzer instructed Bevers not to disburse any more funds to Midwest and to instead pay the subcontractors directly.

¶8 Rubenzer hired attorney Hugh Gwin on December 11, 2002, to assist him. Gwin explained:

> Initially we tried to have a meeting between Mr. Warren, Mr. Bouton, Mr. Rubenzer, [and] myself. We had several conferences trying to figure out, you know, where the problems were, what – the extent of them, this sort of thing. Eventually cooperation broke down, primarily with Mr. Warren, and I advised Mr. Rubenzer that before any fingers could be pointed at anyone, we really needed to know what the financial situation was between BRW as the owner ... and Midwest … as the builder ….
>
> And at that time I advised him that I felt that we probably needed an accountant's services to go through the records.

Rubenzer suspected Warren was "up to no good," and on December 13, 2002, Gwin drafted a corporate resolution that dropped Warren as a managing partner of BRW. Gwin explained Warren was initially not asked to leave the company, however, "because we didn't know exactly what the problem was."

¶9 Gwin and Rubenzer met with a forensic accountant, Charles Ladd, on December 16. The engagement letter, dated December 18, 2002, stated the "examination is intended to detect the existence and nature of fraudulent activities, should any exist, and to identify and secure or document credible evidence." Ladd

issued two preliminary reports, the first on January 10, 2003. This report confirmed the likelihood that construction draw money had been misappropriated by Midwest.

¶10 Between June 2003 and November 2005, Rubenzer filed three actions against various parties, but voluntarily dismissed all three. In September 2006, he filed a fourth action, this time also naming Bevers and River Valley. That case was dismissed on June 30, 2008, based on the contract language prohibiting direct actions against Bevers or River Valley. Rubenzer commenced the present action against the Bank on December 15, 2008.[2] Rubenzer alleged both contract and tort claims. The circuit court granted the Bank summary judgment dismissing the claims because it concluded the statutes of limitations for both contract and tort claims had run.

¶11 Rubenzer now appeals. He concedes his contract claims have expired. However, Rubenzer argues the circuit court erroneously determined the tort six-year statute of limitations commenced on December 10, 2002.

DISCUSSION

¶12 Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.[3] All facts and reasonable inferences must be viewed in the light most favorable to the nonmoving party. ***Lambrecht v. Estate of***

[2] BRW was also a named plaintiff. However, Rubenzer subsequently dissolved BRW.

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

Kaczmarczyk, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751. Similarly, any doubts regarding whether a factual issue exists must be resolved against the moving party. ***Schmidt v. Northern States Power Co.***, 2006 WI App 201, ¶16, 296 Wis. 2d 813, 724 N.W.2d 354.

¶13 "[A] cause of action accrues [for limitations purposes] when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it." ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis. 2d 302, 315, 533 N.W.2d 780 (1995). However, with tort claims, the discovery rule tolls the statute of limitations "until the plaintiff discovers or with reasonable diligence should have discovered that he or she has suffered actual damage due to wrongs committed by a particular, identified person." ***Id.***

¶14 The circuit court concluded there was no genuine issue of material fact that Rubenzer knew or reasonably should have known "the nature of the injury, the cause of the injury and the defendant's part in that cause" as of December 10, 2002. The court based its decision on two allegedly undisputed facts: Rubenzer discovered during his meeting with Bevers on December 10, 2002, that (1) "the Bank had disbursed funds to the general contractor without obtaining lien waivers for previous draws," and (2) that "some of the unpaid subcontractors had filed liens."

¶15 However, the record does not support the court's observation that "Rubenzer testified in his deposition that he was informed in November 2002 that subcontractors had filed liens after not being paid …." The court apparently borrowed that information from an assertion in the Bank's summary judgment brief, which cited an answer to interrogatories. On appeal, the Bank does not

provide any record support for the court's reliance on Rubenzer's deposition. Instead, the Bank argues that the court's finding was a reasonable inference from two answers to interrogatories.

¶16 The Bank's argument must be rejected; it fails to apply the proper summary judgment standard. Whether the court could have reasonably concluded anything from an interrogatory answer (that it did not purport to rely on) is the wrong question. As long as more than one conclusion could reasonably be drawn, summary judgment was improper. We must assume the inference most favorable to Rubenzer as the nonmoving party. *See* ***Lambrecht***, 241 Wis. 2d 804, ¶23.

¶17 Therefore, we must assume that after Rubenzer's December 10, 2002 meeting with Bevers, he did not yet know whether the lack of some lien waivers caused him any actual damages. Based on the existing record, Rubenzer did not know which waivers had not been collected. Therefore, he did not know whether waivers had been collected from any, some, or all of the unpaid subcontractors. Moreover, the record indicates that eight days later when Rubenzer met with Ladd, the forensic accountant, Rubenzer provided two lien waivers he received from Midwest that he believed contained forged signatures. If Rubenzer was correct, then any liens might have resulted from Midwest's fraudulent waivers, rather than Bevers' failure to collect waivers.

¶18 Further, we must assume that because Rubenzer was unaware that any liens had been filed on December 10, or how long the subcontractors had remained unpaid, he did not know whether the subcontractors were in the process of being paid, albeit belatedly; whether the draw money was still available in a bank account, but simply had not been paid; or whether the funds had, in fact, been lost or stolen. While $200,000 is not trivial, it represented less than 8% of

the Bank-provided funds, and the failure to pay the subcontractors could, at that early point, just as well have been the result of incompetence as it was theft.

¶19 Certainly, Rubenzer had ample reason for alarm and cause to investigate further. But then, that is precisely what he did. Rubenzer promptly hired an attorney, and then a forensic accountant, to help him determine what had happened. The question here is when the cause of action should have been discovered in the exercise of reasonable diligence. *See* ***Pritzlaff***, 194 Wis. 2d at 315. The Bank's position, however, appears to be that once a due diligence duty arises, the limitations period is triggered. That, of course, would turn the discovery rule on its head. Indeed, based on the current state of the record, had Rubenzer come into court on December 10, 2002, his complaint would likely not have survived a motion to dismiss.

¶20 "In many cases ... the record on summary judgment will not be sufficient to determine as a matter of law the point at which the plaintiff discovered or reasonably should have discovered the existence of a claim against the defendant." ***Schmidt***, 296 Wis. 2d 813, ¶16. This too is such a case. Given that Rubenzer missed the purported filing deadline by less than a week, reasonable inferences support a conclusion that Rubenzer filed his case before the statute of limitations expired. Summary judgment, therefore, was inappropriate on the current evidentiary record.

By the Court.—Judgment reversed and cause remanded.

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