COURT OF APPEALS
DECISION
DATED AND RELEASED

August 31, 1995

No. 95-0506-FT

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

WILBERT HERRLING,

Plaintiff-Appellant,

v.

CYRIL TILSEN, and
ARTHUR HOHLSTEIN,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. Wilbert Herrling appeals from summary judgment dismissing his suit against Cyril Tilsen.[1] Herrling argues that the

[1] The circuit court also entered summary judgment for Herrling against the estate of Arthur Hohlstein. That order is not appealed.

circuit court incorrectly applied the law of novation when it found that Tilsen was no longer liable on a promissory note executed between the parties in 1983. Because we find that a valid novation occurred, we affirm the order.[2]

STANDARD OF REVIEW

Construction of a contract is a question of law, ***Lambert v. Wrensch***, 135 Wis.2d 105, 115, 399 N.W.2d 369, 373-74 (1987), and we determine questions of law independent of the circuit court. ***Ball v. District No. 4, Area Bd. of Vocational, Technical & Adult Educ.***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

BACKGROUND

In 1983, Cyril Tilsen and Arthur Hohlstein, and H-T Corporation (a company jointly owned by them) entered into an agreement with Wilbert Herrling. Tilsen, Hohlstein and H-T agreed to acquire the assets of a business formerly run by Herrling, and to lease property owned by Herrling. Their agreement was evidenced by an Installment Sale and Security Agreement and a Sale Agreement, as well as a promissory note. By the promissory note, Tilsen, Hohlstein and H-T agreed to pay Herrling $51,600 plus interest, with the unpaid principal balance due on October 1, 1993.

In 1986, Tilsen desired to leave H-T. He approached Hohlstein. Between themselves, they agreed that Hohlstein would take over H-T's liabilities, and in exchange, Tilsen would transfer all his H-T stock to Hohlstein. Tilsen and Hohlstein approached Herrling, and after various negotiations, the parties wrote the following agreement:

WHEREAS, Tilsen is divesting himself of any interest whatsoever in H-T Corporation effective upon execution of this

[2] This is an expedited appeal under RULE 809.17, STATS.

agreement by all parties and wishes to be released from liability under said note and lease, and

WHEREAS, Herrling, Hohlstein and H-T Corporation have reached agreement on certain amendments to the above-mentioned note and lease and have incorporated said amendments into the note and lease ...

NOW THEREFORE, in consideration of the mutual promises of the parties and other good and valuable consideration, it is agreed as follows:

1. Herrling agrees that upon execution of this agreement by all parties, and upon the execution of the amended note and amended lease, copies of which are attached ..., Tilsen shall be released from all liability on the promissory note ... and from any liability under the terms of the lease ....

....

3. Tilsen agrees to assign and transfer to Hohlstein ... shares of stock of H-T Corproation [sic] stock in his name, so that Hohlstein shall thereafter be the sole shareholder of H-T Corporation, and shall also deliver to Hohlstein his resignation as an officer and director of said corporation effective as of the date of the full execution of this agreement by all parties.

Herrling, Hohlstein, H-T, and Tilsen all signed the agreement on November 6, 1986. The amended promissory note referred to by the agreement was never signed. By its terms, the amended note was to be signed by H-T and by Hohlstein, who were to pay the sum of $51,600 to Wilbert Herrling and his wife, Adeline Herrling. However, no provision was made for Tilsen's signature, and Tilsen later testified that he had never seen the promissory note before it was made an exhibit in litigation.

The amended note made provisions for payment of certain amounts in a certain manner, for a new rate of interest, for the payment of principal in addition to interest, and contained various other provisions by which it differed from the 1983 note. Hohlstein made the required payments to Herrling in the manner specified by the amended note, and Herrling looked only to Hohlstein for payment of amounts past due. Neither Hohlstein nor Herrling communicated further with Tilsen, who appears to have moved to California. In 1994, after Holstein had defaulted, Herrling commenced this suit, contending that Tilsen remains liable under the original 1983 note.

ANALYSIS

Herrling argues that under the agreement quoted above, Tilsen was to be released from liability "upon execution of this agreement ... and *upon the execution of the amended note* ...." (Emphasis supplied.) Because the note was never executed, Herrling argues that Tilsen was never released from liability. We disagree. Herrling's argument elevates form over substance.

Under Wisconsin law, a promissory note does not constitute the debt itself, it is merely evidence of it. ***Mortgage Assocs. v. Monona Shores***, 47 Wis.2d 171, 180, 177 N.W.2d 340, 347 (1970). Thus, failure to sign the note is not fatal where, as here, the note and other evidence memorialize the debt. Stated otherwise, the parties may become bound by the terms of a contract, even though they do not sign it, where their intention to do so is otherwise indicated. ***Consolidated Papers, Inc. v. Dorr-Oliver, Inc.***, 153 Wis.2d 589, 599, 451 N.W.2d 456, 461 (Ct. App. 1989) (contract binding where buyer signified assent by issuing purchase order).

By his signature on the November 6, 1986, agreement, Herrling consented that "Tilsen shall be released from all liability on the promissory note ...." Thereafter, his course of dealing with Hohlstein only, even when amounts became past due, indicates his intent to remain bound by the agreement.

Herrling argues that ***Navine v. Peltier***, 48 Wis.2d 588, 180 N.W.2d 613 (1970), mandates a contrary result. We disagree. As stated in ***Navine,*** "The issue ... is whether *the actions of the parties* constituted a novation ...." ***Id***. at 592,

180 N.W.2d at 614 (emphasis supplied). Stated otherwise, whether the parties' actions constitute a novation is a question of fact. ***Id***. at 596, 180 N.W.2d at 616. At least two major factors distinguish these cases on their facts.

First, unlike in ***Navine***, Herrling agreed in writing (by the November 6, 1986, agreement) to relieve the alleged obligor of his obligation. Second, unlike in ***Navine***, where one year passed without demand on the alleged obligor, Herrling permitted many years to go by before he attempted to collect from the alleged obligor (1986 to 1993). Because the actions here, unlike those in ***Navine***, indicate that the substituted note was a novation, ***Navine*** does not control.

Herrling also argues that any possible novation is invalid because it is unsupported by consideration. We reject this argument also. Under the novation, Herrling received accelerated payments of principal. We reject Herrling's argument that he would "ultimately" have received these payments under the 1983 note as well. It is beyond need of citation that the current and future value of money differ and that an obligation to pay in the future is not the same as accelerated payment in hand.

By the Court.—Judgment affirmed.

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