

STATE OF MICHIGAN
COURT OF APPEALS

RANDALL G. SMITH and BETTY L. SMITH,

Plaintiffs-Appellees,

v

JIM MADDEN & ASSOCIATES, INC.,

Defendant-Appellant.

UNPUBLISHED

July 11, 1997

No. 195061

Kalamazoo Circuit Court

LC No. 95-000145 CK

Before: Gage, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right a trial court judgment in favor of plaintiffs in the amount of \$15,975.22. The judgment represents the amount due on a promissory note executed by defendant in favor of plaintiffs on May 21, 1981. We reverse and remand.

Plaintiff Betty Smith ("plaintiff" herein) was employed by defendant insurance company, Jim Madden & Associates, Inc., for many years as the office manager and bookkeeper. Plaintiff claims that she loaned a total of \$31,500 of her and co-plaintiff Randall Smith's personal funds to defendant during the course of her employment. The first loan, evidenced by a promissory note, was made on May 21, 1981, in the amount of \$10,000, plus interest. The loan was made for purposes of paying insurance companies for premiums that defendant was responsible for collecting from its clients. Plaintiff testified that she made a second loan to defendant sometime before 1990, referred to as the "credit card loan" because she advanced \$10,000 from her credit cards to lend to defendant to pay outstanding accounts with the insurance companies. According to plaintiff, she made a third \$10,000 loan to defendant on October 31, 1990, known as the "tax loan" because the funds were used to pay defendant's federal payroll taxes. Plaintiff also believed that she made a fourth loan to defendant of \$1,500 in July 1992.

At trial, plaintiff sought only payment for the original \$10,000 promissory note plus accrued interest because all of the other loans had been paid in full (except perhaps \$300 on the credit card loan). Plaintiff also sought damages of \$7,900 for lease payments that she allegedly made on her company car that were never reimbursed, and \$2,995 for alleged unpaid wages. The trial court found in favor of plaintiffs on the promissory note in the amount of \$15,975.22. The court refused to award

prejudgment interest on that amount; however, postjudgment interest was awarded at the statutory rate. The court ruled in favor of defendant with respect to plaintiffs' claims for unpaid wages and unreimbursed car lease payments.

I

Defendant first claims that the trial court erred when it found that the doctrine of equitable estoppel tolled the six-year statute of limitations for the 1981 promissory note. The trial court's application of the doctrine of equitable estoppel is a question of law. Questions of law are reviewed de novo on appeal. *Shurlow v Bonthuis*, 218 Mich App 142, 148; 553 NW2d 366 (1996).

An action on a promissory note is subject to the six-year statute of limitations period governing breach of contract actions set forth in MCL 600.5807(8); MSA 27A.5807(8). *FDIC v Garbutt*, 142 Mich App 462, 468; 370 NW2d 387 (1985). The promissory note at issue in this case was issued on May 21, 1981, and was payable on demand. For statute of limitations purposes, accrual begins to run when the payee, by his own act, can make the demand payable. *Smith v Dep't of Treasury*, 163 Mich App 179, 185; 414 NW2d 374 (1987). Suit may be brought on a demand note immediately after delivery; thus, the statute of limitations begins to run from the day of delivery. *Taylor v Rugenstein*, 245 Mich 152, 154; 222 NW 107 (1928). Therefore, without consideration of any tolling of the limitations period, the statute of limitations in this case began to run on May 21, 1981, and expired on or about May 21, 1987. Plaintiffs filed their complaint on January 18, 1995.

The trial court refused to apply the statute of limitations to bar plaintiffs' claim on three grounds. First, the trial court invoked the doctrine of equitable estoppel. In support of its ruling, the court cited *Lothian v Detroit*, 414 Mich 160; 324 NW2d 9 (1982). In *Lothian*, our Supreme Court held that in order to justify the application of estoppel, one must establish that there has been a false representation or concealment of material fact, coupled with an expectation that the other party will rely upon this conduct, and knowledge of the actual facts on the part of the representing or concealing party. *Id.* at 177. Our Supreme Court further stated that it has been reluctant to recognize an estoppel in the absence of conduct clearly designed to induce the plaintiff from bringing action within the applicable statutory period. *Id.* The Court held that equitable estoppel could not be applied in that case to bar the statute of limitation because there was no evidence that the defendant's conduct was designed to induce, or in fact did induce, the plaintiff's delay in bringing action. *Id.* at 179. In *Lumber Village v Siegler*, 135 Mich App 685, 697-698; 355 NW2d 654 (1984), this Court interpreted *Lothian* as requiring that a false representation or a concealment of material fact must be present before the doctrine of equitable estoppel may be invoked. This Court noted several factors that may be considered in applying estoppel, including: concealment of a cause of action, misrepresentation as to the statutory time in which an action may be brought, inducement not to bring the action, a promise to pay or settle the claim, a fiduciary relationship, or special knowledge on the part of the defendant. *Id.* at 697, citing *Bohlinger v DAIIE*, 120 Mich App 269, 275; 327 NW2d 466 (1982).

Plaintiff testified that a year or two after the note was executed, she and defendant's owner, Jim Madden, "mutually" agreed that the note and interest would be used for her retirement. At no time did

plaintiff claim that it was Madden's idea to use the note for her retirement. According to plaintiff, she and Madden regularly discussed her use of the note proceeds for her retirement over the next several years leading up to her retirement. Plaintiff denied that it was her intent to use the note for retirement when it was initially signed. However, plaintiff was impeached by her deposition testimony in which she indicated that she always planned to use the note for retirement:

Q: At the time of [sic] the note was signed in '81 were you thinking in terms of repayment of this note becoming a source of retirement income?

A: Yes.

Q: Did you communicate that to Mr. Madden?

A: Oh, we probably discussed it. I can't say for sure.

Plaintiff further testified that Madden never did anything to prevent her from asking for payment on the note, but she did not demand payment earlier because she was waiting for her retirement.

The evidence does not reveal any false representation or concealment of a material fact on the part of defendant as required by *Lothian, supra* at 177-179. The evidence does not support the position that Madden intentionally encouraged plaintiff to use the note for her retirement in order to induce plaintiff not to demand payment on the note during the statutory period. Moreover, there is no indication that Madden used his position as plaintiff's employer to induce her not to demand payment at an earlier time. Nor is there any evidence that Madden engaged in any of the other types of wrongful conduct listed above. *Lumber Village, supra*. In light of our Supreme Court's reluctance to recognize an estoppel in the absence of conduct clearly designed to induce inaction on the part of the plaintiff, we do not believe that estoppel was merited in this case.

Although the court erred in applying equitable estoppel, the court also held that the statute of limitations should not apply because defendant had made partial payment of the 1981 note. A payment is equivalent to a new promise to pay on an obligation and extends the statute of limitations. *Alpena FOC v Durecki*, 195 Mich App 635, 638; 491 NW2d 864 (1992). Partial payment on a note after it matures serves to revive the statute of limitations, and a cause of action begins to accrue on that date. *Id.*; see also *FDIC v Garbutt*, 142 Mich App 462, 468; 370 NW2d 387 (1985). In the case of a demand note, it matures, and a cause of action accrues, upon delivery. *Taylor, supra*. Therefore, if defendant made payment on the promissory note after it was delivered, the statute of limitations was revived and began to run from that date. Even payments made after the expiration of the original six-year statute of limitations operate as an acknowledgment of the obligation and waives the defense of the statute of limitations. *Alpena, supra* at 636-637.

Plaintiff testified that in December 1992, before her retirement, she and Madden agreed that defendant would pay the original note in monthly installments of \$1,000 for two years upon her retirement. According to plaintiff she received one \$1,000 installment in January 1993 and a

second in March 1993. Plaintiff presented a copy of a check from defendant dated January 15, 1993, in the amount of \$1,000. In addition, the January 15, 1993, payment appears as the last entry on the general ledger detail. Madden admitted that payments were made to plaintiff after her retirement, but he claimed that the note had been paid and that any payments made to her after her retirement were “gifts.” Based upon plaintiff’s testimony and the documentary evidence presented, the trial court did not err in concluding that the January 15, 1993, payment was a partial payment on the original note and, thus, revived the statute of limitations for purposes of this case.

The court also held that the statute of limitations did not apply to bar plaintiffs’ claim because exhibit D, the general ledger detail, served as a written acknowledgement of the existing debt. However, we need not address the written acknowledgment issue because the court properly found that the statute of limitations was revived by defendant’s partial payment.

II

Next, defendant argues that the trial court erred when it found that exhibit D, the general ledger detail, accurately showed the amount owed on the promissory note. This Court reviews a trial court’s findings of fact in a bench trial under the clearly erroneous standard. MCR 2.613(C); *Hofmann v Auto Club Ins Ass’n*, 211 Mich App 55, 98; 535 NW2d 529 (1995). The clearly erroneous standard also applies to a finding with regard to the amount of damages. *Id.* at 98-99. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.* at 99.

Defendant claims that the court erred in finding that the general ledger detail reflected the amount owed to plaintiff in light of the deficiencies present on the face of the document and plaintiff’s conflicting testimony. Defendant first claims that the general ledger detail was not reliable because it indicates that the account was opened in 1982, but does not include the opening balance for January 1, 1982, or the detail for any transaction occurring between January 1, 1982, and January 31, 1990. Instead the record begins with the transfer of a balance on January 31, 1990, of \$5,817.31. It is undisputed that the \$10,000 note was executed in 1981; therefore, defendant claims that the transfer should represent the amount due on the note minus payments made prior to January 31, 1990. Plaintiff could not explain how the transfer balance was computed; however, plaintiff maintained that no payments were made on the note before 1993. Plaintiff explained that the credit card loan was actually made before January 1, 1990, but was not added to the general ledger until October 31, 1990, when Jim Madden II corrected the entries. Therefore, plaintiff claimed that payments made by defendant on her credit cards before October 31, 1990, appeared to be reducing the balance on the original note, but were in fact being applied to the credit card loan.

Defendant also challenges the accuracy of the \$10,000 transactions dated October 31, 1991, that appear on the general ledger detail. The net result of those transactions was to increase the amount owed on the account by \$20,000. Plaintiff claimed that the first \$10,000 entry “BLS NOTE” was the late addition of the credit card loan. Plaintiff testified that the second entry “INTERNAL REV SERV” represented the \$10,000 check sent to the Internal Revenue Service, while the next entry “BLS NOTE

FOR IRS” represented her \$10,000 deposit into defendant’s account for purposes of making the IRS loan. Plaintiff could not explain the remaining three entries, but believed that they were corrective entries. Therefore, plaintiff claimed that the net \$20,000 increase included \$10,000 for the credit card loan and \$10,000 for the tax loan. The general ledger detail also indicates an additional advance to defendant of \$1,500 on July 22, 1992.

Defendant also claims that the general ledger detail was incorrect because it does not contain payments plaintiff claims to have received. It should be noted that defendant repaid the credit card companies directly, so plaintiffs did not receive any direct payment for that loan. Plaintiff testified that the credit card loan was paid in full; however, she later claimed that there was a remaining unpaid credit card balance of \$300. Therefore, according to her testimony, plaintiff was entitled to direct repayment of principal in the amount of \$21,500 (\$10,000 for the 1981 note, \$10,000 for the IRS loan, and \$1,500 for the miscellaneous loan) plus interest on the 1981 note. Only two payments directly to plaintiffs appear on the general ledger detail. The first is \$5,000 paid on June 11, 1991, which plaintiff testified to receiving. A payment for \$5,000 is also listed in lower right-hand corner of plaintiff’s personal accounting. Plaintiff testified that payment on her personal accounting was dated August 1991 instead of June, because she used the date that she updated the record, not the date that payment was actually received. The only other payment to plaintiffs appearing on the general ledger detail is the \$1,000 payment on January 1, 1993, which plaintiff also admitted to receiving, but does not appear on her personal accounting.

Plaintiff admitted to receiving additional payments which were not reflected on the general ledger detail. Plaintiff testified without reservation that she borrowed \$8,000 from Madden in August 1992 to purchase a camper, and credited that amount against what she was owed from defendant on the tax loan. Plaintiff later testified that the amount of the credit was actually \$7,700 because she made a couple of payments on the camper. The credit for \$7,700 in August 1992 is also reflected in plaintiff’s personal accounting. In a letter dated September 11, 1994, plaintiff again acknowledged that defendant had been credited for \$8,000 for buying plaintiff’s camper. Plaintiff also testified that she received payment of \$10,000 in April 1992, which is also reflected in her personal accounting. Finally, plaintiff admitted that she received a \$1,000 payment on the original note in March 1993. That payment does not appear on plaintiff’s personal accounting. That payment is also absent from the general ledger detail, despite the fact that the closing date for the account was not until March 31, 1993.

Plaintiff’s personal accounting shows a balance of \$13,405. The top portion of the accounting shows a total due for car lease payments of \$7,985 (\$5,225 for 1989 and 1990 plus \$2,760 for 1991 and 1992). The bottom left figures includes \$2,995 for unpaid wages, \$10,000 principal for the 1981 note, a total of \$5,125 in interest on the 1981 note, and the \$10,000 tax loan. The sum of those numbers, \$36,105, minus the payments showing on the lower right column of \$5,000, \$10,000 and \$7,700, equals plaintiff’s \$13,405 balance. If the car lease and unpaid wages are deducted from the balance, the remaining balance on the loans as of June 1992 was only \$2,425 (\$13,405-\$10,980). Further deduction of the \$5,125 in interest on the 1981 note results in a negative balance due. Moreover, plaintiff’s accounting does not include the two \$1,000 payments that were made in 1992. Plaintiff maintained that the balance was accurate, but did not include all of the interest that was owed.

Plaintiff also admitted that she wrote a letter to Jim Madden dated August 1, 1993, in which she claimed that the total due and owing was \$10,800. The letter expressly included in that total the car lease payments, the unpaid wages, and the interest owing on the original note. Plaintiff contradicted herself by first testifying that she only included interest on the note because the principal was implicit, but then testifying that she only included the principal. When defense counsel pointed out that just the car lease payments (\$7,985) and the unpaid wages (\$2,995) plaintiff was seeking at trial exceeded the balance due in her letter, plaintiff stated that she “figured wrong.” Plaintiff wrote a second letter to Madden on September 11, 1994. That letter claimed that the total due was \$13,000, but does not clarify how that number was calculated. Plaintiff admitted that the amounts claimed in the letters were not completely accurate because she did not have any of the records in front of her when she wrote the letters. Plaintiff maintained that she never thought that she would have to sue defendant.

In rendering its findings of fact, the trial court stated that it was “very difficult to determine what the beginning balance relates to. Credit card monies already advanced? The initial note? Or just what?” With regard to the \$10,000 transactions that appeared on October 31, 1990, the court noted for the record that they appeared to be a series of corrective entries. The court stated that he believed that the general ledger detail substantiated plaintiff’s testimony with respect to the amounts of money that she advanced to the business. The trial court concluded that the general ledger detail best reflected the ongoing series of transactions between the parties. Therefore, the court awarded plaintiff the amount showing as the ending balance of \$16,975.22 minus the payment of \$1,000 received by plaintiff in March 1993, for a final award of \$15,975.22.

Although the findings of the court in a bench trial are entitled to a great deal of deference, this Court holds that the trial court clearly erred in finding that the general ledger detail accurately reflected the amount owed, and in relying on that document in determining plaintiff’s award. First, there is a serious question concerning the opening/transferred balance of the account; even the court admitted that it was difficult to determine what the transferred balance of \$5,817.31 referred to. Without knowing the basis of the opening/transferred balance, the value of the running balance is significantly diminished. Even assuming, based on plaintiff’s testimony, that the account correctly reflected the amount plaintiff advanced to defendant, the court ignored significant inconsistencies between the general ledger detail, plaintiff’s testimony and plaintiff’s personal record with respect to the payments that were made and the balance that was owed on the note.

For example, plaintiff testified that defendant was credited \$7,700 in August 1992, and that she also received a payment for \$10,000 in or about April 1992. Both of these payments also appeared on plaintiff’s personal accounting. However, neither the \$7,700 credit nor the \$10,000 payment appears on the general ledger detail. While the court deducted the \$1,000 payment plaintiff admittedly received in March 1993 from the remaining balance showing on the general ledger detail in reaching the amount of the judgment, the court simply disregarded the other two payments plaintiff unambiguously testified to receiving. Moreover, it was clear error for the court to award principal on the note of \$15,975.22, when plaintiff was claiming principal on the note of no more than \$10,000. Plaintiff sued for payment on the original 1981 note, as well as the car lease payments and unpaid wages. Plaintiff testified that no interest on the note was ever included in the general ledger detail. Therefore, there is no explanation for

why the closing balance was \$16,975.22, almost \$7,000 more than the original note. Because the court specified that it was not awarding plaintiffs any prejudgment interest, lease payments, or unpaid wages, there was no reasonable basis upon which the court could award plaintiff principal on the note in the amount of \$15,975.22.

III

Finally, defendant claims that plaintiffs failed to prove by a preponderance of the evidence that they were owed money on the 1981 promissory note. When reviewing the sufficiency of the evidence in a civil action, this Court must view the evidence in the light most favorable to the plaintiff, and give the plaintiff the benefit of every reasonable inference which can be drawn from the evidence. If, after reviewing the evidence, reasonable people could differ, the question is properly left to the trier of fact. *Mull v Equitable Life Assurance Society*, 196 Mich App 411, 421; 493 NW2d 447 (1992).

Plaintiffs utterly failed to reconcile their numbers in this case. Plaintiff testified that she lent a total of \$31,500 to defendant over the years. Ten thousand dollars of that was the credit card loan, which defendant repaid directly to the credit card companies except for \$300. Therefore, the total balance owed to plaintiff can be reduced by \$9,700, for a new balance of \$21,800. Plaintiff testified that she received a payment of \$5,000 on June 11, 1991, which lowered the balance to \$16,800. Plaintiff also testified that she gave defendant credit for \$7,700 in August 1992 because she borrowed that amount from Madden's personal funds for the purchase of a camper, bringing the balance owed to plaintiff down to \$9,100. Plaintiff also testified that she received a \$10,000 payment in April 1992 and two \$1,000 payments in 1993, which result in a negative balance.

The above calculations do not include the payment of any interest upon the note. However, we agree with the trial court that there is no legitimate basis upon which the interest may be calculated. First, it is not clear what the interest rate was at any given time. According to plaintiff, the original interest rate was 12½%, but was increased at some point in the 1980s to 15%. On the note, the 12½% is crossed-out and replaced with 15%. Plaintiff further testified that the interest rate was then lowered to 10% in 1989; however, that decrease is not reflected on the note. Second, even if the interest rate could be established, the running principal balance on the note to which it would be applied cannot be established.

While the general ledger detail and plaintiff's personal accounting show amounts owing to plaintiffs, they cannot be considered reliable for the reasons discussed previously. Plaintiffs had the burden of presenting evidence from which a trier of fact could reasonably conclude that there was some amount owing on the 1981 promissory note. Viewing the evidence in a light most favorable to plaintiffs, we do not believe that plaintiffs have sustained that burden.

Reversed and remanded to the trial court for entry of judgment for defendant.

/s/ Hilda R. Gage

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald