STATE OF MICHIGAN

COURT OF APPEALS

GARY R. LEIGH,

Plaintiff-Counterdefendant-Appellee,

v

RICHARD L. LAMBERT,

Defendant-Counterplaintiff-Appellant.

UNPUBLISHED
March 23, 2001

No. 214076
Wayne Circuit Court
LC No. 96-624274-CZ

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right the judgment entered pursuant to a jury verdict in favor of plaintiff. We affirm in part and remand for entry of an amended judgment.

This case involves a contract dispute arising out of an unsuccessful investment venture entered into by three parties: defendant, plaintiff, and Mitchell Jaworski, a named, but non-served and, therefore, dismissed defendant. In 1989, the three partners invested in a struggling company named ACU/CAM, which they believed could become profitable with the proper management. ACU/CAM went into bankruptcy proceedings shortly after the partners began investing time and loan money, but the partners continued working to turn the company around. The partners signed a loan participation agreement (LPA) that set forth the parties' rights and obligations with regard to one another and provided that each partner was responsible for one third of any losses sustained in the event that ACU/CAM could not repay the loans made by the participants to ACU/CAM. Plaintiff filed this action on April 26, 1996, seeking recovery from defendant of moneys plaintiff paid in excess of his contractually required one-third amount.

Defendant first argues that the trial court erred in denying his motions for summary disposition and directed verdict. Defendant brought both motions on the basis that plaintiff's action was barred by the statute of limitations. This Court reviews de novo the question whether the statute of limitations bars a cause of action. *McKiney v Clayman,* 237 Mich App 198, 201; 602 NW2d 612 (1999). The statute of limitations on a breach of contract claim is six years from the time the claim first accrues. MCL 600.5807(8); MSA 27A.5807(8); *Sparta v State Bank v Covell,* 197 Mich App 584, 587; 495 NW2d 817 (1992). A claim of breach of contract accrues

when the promisor fails to perform under the contract. *Cordova Chemical Co v Dep't of Natural Resources*, 212 Mich App 144, 153; 536 NW2d 860 (1995).

In his suit, plaintiff sought, pursuant to the parties' agreement, reimbursement for payments he made beyond his pro rata one-third amount on three loans that served as sources of funds loaned to ACU/CAM: (1) a promissory note for $125,000 executed to Republic Bank on September 29, 1989; (2) a promissory note for $175,000 executed to Arthur Hughett on October 6, 1989; and (3) a promissory note for $100,000 executed to Jerry Gitre on December 22, 1989. These loans are referenced in the parties' LPA as the "underlying loans."

The parties' LPA reads in pertinent part as follows:

> 3. Adjustment of Participation Where Repayments Required
>
> * * *
>
> [W]here (1) a Participant has provided more than one/third [sic] of the total funds for the ACU/CAM refinancing and (2) such Participant shall be required to repay a loan that was a source for his ACU/CAM contribution, then such Participant shall be entitled to require the other Participants to purchase part of his share of the ACU/CAM loan receivable. That repurchase shall be made at the full face amount of such part of the ACU/CAM loan receivable and shall be of a sufficient portion to generate the funds needed for the loan repayment, including interest.
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> * * *
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> 4. Equal Sharing of Losses from Transaction
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> All losses which may be sustained by Participants as a result of the nonpayment by ACU/CAM of its loan obligations shall be borne equally among Participants. At such time as it reasonably appears that the loan amounts owing from ACU/CAM to Participants is uncollectable, then any Participant may enforce the provisions of this paragraph requiring any equalization of the losses among Participants. If the ACU/CAM loans become uncollectible [sic], a Participant whose loss (in the form of principal and interest paid on underlying loans) is greater than one/third [sic] of the total loss suffered by all Participants is entitled to receive moneys from the other Participants until the losses of all Participants have been made equal through such adjusting payments. For purpose of applying this paragraph to require adjusting payments among Participants, the ACU/CAM loans may be regarded as uncollectible [sic] (1) if the ACU/CAM loans are more than 90 days past due and the effort to raise capital for ACU/CAM shall not have achieved success within five months from the date of this Agreement or (2) if Participants sooner reach agreement among themselves that the ACU/CAM loans are uncollectible.

Defendant maintains that, pursuant to ¶ 3 of the LPA, plaintiff's claim accrued in October 1989, when plaintiff made a payment on the Republic Bank loan, and defendant did not contribute.

Defendant contends that the "underlying loans" and the "ACU/CAM loans" are one and the same, and that defendant's default on the Republic Bank loan constituted a breach of the parties' agreement. Accordingly, argues defendant, plaintiff's claim accrued when that breach occurred. Plaintiff contends that, pursuant to ¶ 4 of the LPA, his claim did not accrue until the ACU/CAM loans became uncollectable and defendant failed to reimburse plaintiff for losses he sustained in excess of his pro rata one-third amount. Plaintiff further argues that because defendant presented no evidence at trial with regard to whether or when the ACU/CAM loans became uncollectable, he did not carry his burden of establishing that plaintiff's action was barred by the statute of limitations.

We agree with plaintiff that the LPA distinguishes between the underlying loans and the loans made to ACU/CAM. Defendant's breach of his obligation to repay underlying loans did not trigger the statute of limitations under the parties' LPA. Rather, plaintiff's claim accrued when defendant failed to reimburse plaintiff for losses he incurred beyond his pro rata share when the ACU/CAM loans became uncollectable. As noted above, the LPA provides that, unless otherwise determined by the parties, the ACU/CAM loans would be deemed uncollectable "if the ACU/CAM loans are more than 90 days past due and the effort to raise capital for ACU/CAM shall not have achieved success within five months from the date of this Agreement." It is undisputed that the parties did not otherwise determine that the ACU/CAM loans were uncollectable, and it also is undisputed that the efforts to raise capital for ACU/CAM did not achieve success within five months of the date of the LPA. However, the LPA does not include the terms under which the parties made the loans to ACU/CAM, nor did defendant introduce evidence to show, pursuant to the terms under which the parties made their loans to ACU/CAM, the date on which those loans were past due.

The burden of establishing that a claim is barred by a statute of limitations is normally on the party asserting the defense. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 74; 577 NW2d 150 (1998). Defendant presented no evidence to show that the ACU/CAM loans, not the underlying loans, were ninety days past due earlier than April 26, 1990, which was six years prior to the filing of plaintiff's action. Because defendant did not meet his burden of showing that the statute of limitations on plaintiff's claim had expired by the time plaintiff filed suit, the circuit court did not err in denying his motions for summary disposition and directed verdict.

Defendant next argues that the trial court improperly denied defendant's motion for disqualification on the basis of personal bias or prejudice. We disagree. Defendant sought and obtained review de novo of the motion for disqualification by the chief judge in the circuit court. The chief judge also denied the motion. When reviewing a decision on a motion to disqualify a judge, this Court reviews the lower court's findings of fact for an abuse of discretion, but reviews de novo the application of the facts to the law. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 728; 591 NW2d 676 (1998).

A party that challenges a judge on the basis of bias must overcome a heavy presumption of judicial impartiality. *Schellenberg v Rochester, Michigan, Lodge No 2225 of the Benevolent and Protective Order of Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998). Absent actual

personal bias or prejudice against a party or a party's attorney, a judge will not be disqualified. MCR 2.003(B)(1); *Schellenberg, supra.*

> Opinions formed by a judge on the basis of facts introduced or events occurring during the course of the current proceedings, or of prior proceedings, do not constitute bias or partiality unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Likewise, judicial remarks during the course of a trial that are "critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." [*Id.*, citing *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996).]

Defendant has not overcome the heavy presumption of judicial impartiality. While the trial court in this case made remarks that could fairly be described as critical, disapproving, and even hostile to defendant or his attorney, neither the court's comments nor its rulings displayed a deep-seated favoritism or antagonism that would make fair judgment impossible. The trial court and chief judge properly denied the motion for disqualification.

Defendant next argues that the jury award of $150,000 in favor of plaintiff was against the great weight of the evidence because the award was in excess of one-third of the losses sustained by the parties as a result of ACU/CAM's demise. We agree. Damages recoverable for breach of contract are those that arise naturally from the breach or those that were in contemplation of the parties at the time the contract was made. *Harris v Citizens Ins Co,* 141 Mich App 110, 112; 366 NW2d 11 (1983).

Here, the plain language of the LPA shows that the participants were each responsible for one-third of the losses or risks involved in the ACU/CAM venture. Although plaintiff's counsel stated several times during closing argument that defendant owed a one-third share of the losses under the LPA, he then argued that "it's only fair" to have defendant shoulder one-half of the losses, given that the third participant in the venture was allegedly uncollectable. Plaintiff maintained that defendant's actions in repaying fifty percent of one of the underlying loans showed that the intent of the agreement was that if one of the parties became insolvent, the other two would be obligated to each repay fifty percent of the outstanding loans. However, the LPA does not provide for a greater than one-third obligation, and nowhere does it address the effect of one participant becoming insolvent. Further, the LPA provides that the parties' agreement cannot be modified, except in a writing signed by all the parties. The jury award in this case is contrary to the plain language of the parties' agreement. Plaintiff argued, and the trial evidence showed, that defendant's one-third share of losses suffered as a result of ACU/CAM's demise amounted to $93,821.42. Accordingly, we remand for entry of an amended judgment that awards damages in that amount.

Defendant next argues that plaintiff's counsel's misconduct deprived defendant of a fair trial. We review this issue de novo under the standard articulated in *Reetz v Kinsman Marine Transit,* 416 Mich 97, 102-103; 330 NW2d 638 (1982):

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact

> error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [Footnotes omitted.]

Here, plaintiff's counsel asked defendant what the source of his recent income was that enabled him to pay off some of the underlying debts. Responding to defense objection, plaintiff's counsel stated to the judge, in front of the jury, that he believed defendant had just gained "a couple million bucks." The judge allowed the questioning to continue and the jury learned that defendant had recently received $1.6 million, plus a consulting contract worth $750,000, from another investment venture with plaintiff.

Lawyers may vigorously advocate for their client; however, lawyers may not attempt to divert the jury's attention by inflaming prejudices and passions. *Bd of County Rd Comm'rs of Wayne Co v GLS LeasCo,* 394 Mich 126, 131, 138; 229 NW2d 797 (1975). When conduct reflects a "studied purpose to prejudice the jury and divert the jurors' attention from the merits of the case," a new trial is necessary. *Kern v St Luke's Hosp,* 404 Mich 339, 354; 273 NW2d 75 (1978). Stated differently, when the Court cannot conclude that the verdict was unaffected by prejudicial conduct, a new trial is required. *Badalamenti v William Beaumont Hosp,* 237 Mich App 278, 292-293; 602 NW2d 854 (1999).

Defendant's financial status was not relevant to this contract dispute. Defendant did not "open the door" to questions about the source and level of his income simply by testifying that he paid money to Gitre and Hughett, in order to defend against plaintiff's assessment of damages. It was error for the court to allow this testimony because it was wholly irrelevant and had no tendency to make the existence of any significant fact more or less probable. MRE 401. Further, instead of responding to defendant's objection, plaintiff's counsel improperly testified to the jury when he said that defendant had recently received "a couple million bucks."

However, because these errors were harmless, a new trial is not required. Given the extensive testimony in the trial, these two connected errors were not so prejudicial that they likely influenced the jury's decision. No further reference to this information was made, either during examination of other witnesses or in closing arguments. Plaintiff's counsel's remark did not likely "divert the jury's attention by inflaming prejudices and passions," *Bd of County Rd Comm'rs of Wayne Co, supra,* nor was it evidence of a "studied purpose to prejudice the jury and divert the jurors' attention from the merits of the case." *Kern, supra.* We conclude that the outcome of the trial was unaffected by plaintiff's counsel's misconduct; accordingly, a new trial is not warranted.

In view of our resolution of the preceding issues, we need not address defendant's final issue on appeal.

Affirmed in part and remanded for entry of an amended judgment consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Brian K. Zahra