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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2200**

Paul W. Bottum,
Respondent,

vs.

James R. Jundt, et al.,
Appellants,

Acuo Technoloties, L. L. C., et al.,
Defendants.

**Filed November 10, 2008
Reversed and remanded
Peterson, Judge**

Hennepin County District Court
File No. 27-CV-06-11210

Andrew D. Parker, Anthony G. Edwards, Parker Rosen L.L.C., 300 1st Avenue North,
Suite 200, Minneapolis, MN 55401 (for respondent)

David F. Herr, Shanna Sadeh, William Z. Pentelovitch, Maslon Edelman Borman &
Brand, L.L.P., 3300 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN
55402 (for appellants)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and
Peterson, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

Appellant challenges the district court's determination that respondent's claim for an unpaid bonus was not barred by the statute of limitations, arguing that Minn. Stat. § 541.17(5) (2006) prohibited the district court from finding that certain oral statements were sufficient to toll and restart the limitations period. We reverse and remand.

FACTS

Appellant Jundt Associates, Inc. (JAI) is a privately owned investment firm located in Minnetonka. In August 1999, JAI hired respondent Paul Bottum as a research analyst, for which he was paid a base salary of \$100,000 per year and a \$35,000 end-of-year bonus. Bottum was promoted to a portfolio-manager position in early 2000, for which he received a salary that fluctuated over the next few years from a high of \$400,000 to a low of \$150,000. Consistent with JAI's apparent custom of using oral agreements to conduct business, Bottum neither received a written offer of employment nor entered into a written employment contract. Bottum had no written compensation agreement and no writing that memorialized any of the multiple changes to his salary.

As a portfolio manager, Bottum was responsible for directing Southways, one of JAI's hedge funds. The fund's profitability depended on the skill with which it was managed. In early 2000, JAI's then-owner, James Jundt, promised Bottum a \$1 million bonus for any year in which Southways outperformed the Standard & Poor's 500 stock-market index (S&P 500). This promise was never memorialized in writing, and there were no witnesses to the conversation during which Jundt made the promise. However,

JAI has a long history of entering into transactions of similar magnitude based on oral promises.

In September 2000, JAI underwent a change of management and ownership when James Jundt, who owned 95% of JAI's stock, gifted all of his shares to his son Marcus Jundt. Although James Jundt continued to serve on JAI's board of directors, there is no evidence that he controlled or directed JAI's finances after transferring his ownership interest to Marcus Jundt. During the summer before this transition, Marcus Jundt reassured Bottum that his father's promise of a bonus would be honored.

Southways outperformed the S&P 500 during the 2000 calendar year. Consequently, Bottum approached Marcus Jundt in early 2001 to discuss payment of his \$1 million bonus. According to Bottum, Marcus Jundt acknowledged that the bonus was owed but said that JAI's lack of liquidity prevented full payment. There were no witnesses to this conversation, but JAI paid Bottum a \$175,000 bonus in February 2001, which Bottum claims was a partial payment of the \$1 million bonus. JAI's financial records do not reflect an outstanding \$825,000 obligation to Bottum. If JAI owed an additional \$825,000 to Bottum, generally accepted accounting principles would require a liability of that amount to be reflected in JAI's audited financial statements. And although a document prepared by JAI's Chief Financial Officer notes the \$175,000 bonus, none of the records prepared in the ordinary course of JAI's business indicates that any further amount is owed.

In 2002, Bottum asked James Jundt about his still-unpaid bonus. Because he no longer controlled JAI, James Jundt directed Bottum to speak to Marcus Jundt. When

Bottum approached Marcus Jundt, he was reassured that he would get his bonus, but Marcus Jundt told Bottum that he could not bring the money needed to pay the bonus into JAI at that time because Jundt's wife was seeking a settlement in their anticipated divorce. Marcus Jundt's divorce proceedings began in January 2003.

In September 2003, Bottum and James Jundt attended a conference in New York City. While there, Bottum again inquired about the bonus for 2000. According to Bottum, James Jundt reaffirmed that Bottum would be paid "after Marcus Jundt's divorce proceedings. . . had ended." The district court issued a judgment dissolving the Jundts' marriage on April 5, 2005. Since that time, however, the Jundts' divorce has come before this court twice. *Jundt v. Jundt*, Nos. A05-693, A05-955 (Minn. App. Apr. 11, 2006); *Jundt v. Jundt*, No. A06-1573 (Minn. App. July 17, 2007). And the district court's online docket shows hearings in the divorce proceeding still scheduled in the future.

Bottum's employment was terminated in May 2005.¹ On May 10, 2006, Bottum filed this action to recover the unpaid \$825,000 balance on his 2000 bonus and asserting other claims that are not relevant to this appeal. JAI moved for partial summary judgment,² arguing that Bottum's breach-of-contract claim based on nonpayment of his

¹ In April 2005, Bottum's salary at JAI was transferred to Accuo Technologies, a separate limited-liability company controlled by James Jundt. In addition to his employment as a portfolio manager for JAI, Bottum had been Accuo's president for several years before his termination. Bottum voluntarily dismissed his claims against Accuo, and the district court did not find a separate date for Bottum's termination from JAI. The record therefore suggests that, by transferring Bottum's salary to Accuo, JAI transferred his entire employment.

² James and Marcus Jundt, who were both named individually as defendants, also moved for partial summary judgment on the issue of personal liability. The district court granted their motion, finding that Bottum failed to produce evidence sufficient to pierce JAI's

2000 bonus was barred by Minn. Stat. § 541.17(5) (2006), which requires an action to recover willfully unpaid wages, including bonuses, to be brought within three years. The district court concluded that the limitations period “started to run several times but restarted each and every time. . . the Jundts acknowledged the debt [to Bottum] and promised to pay it in the future.” Consequently, the district court denied JAI’s motion because whether any such acknowledgements had occurred was a disputed question of material fact.

A bench trial was held, and the district court found Bottum to be more credible than the Jundts. Despite both Jundts’ insistent denials, the district court found that “James Jundt promised Bottum a one million dollar bonus for any year that [Southways] surpassed the S&P 500 . . . [and] that this promise was reaffirmed on numerous occasions leading up to Bottum’s termination.” Based on its finding that James Jundt “reiterated” this promise in September 2003, the district court concluded that Bottum brought his claim within the applicable three-year limitations period. This appeal followed.

D E C I S I O N

JAI challenges the district court’s conclusion that Bottum’s claim was brought before the applicable three-year statute of limitations expired. The construction and application of a statute of limitations presents a question of law, which we review de novo. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d. 711, 716 (Minn. 2008).

corporate veil. Bottum’s appeal from summary judgment (A07-2129) was consolidated with this appeal, but it was dismissed at Bottum’s request in an order dated February 5, 2008.

The statute of limitation starts to run against a cause of action “from the moment the cause of action accrues or can be commenced.” *Hughes v. Lund*, 603 N.W.2d 674, 677 (Minn. App. 1999). For a breach-of-contract action, this occurs when the contract’s terms are breached. *Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379, 387-88 (Minn. App. 2003). When the claimed breach is an employer’s failure to pay agreed-upon compensation, the limitations period begins as soon as the compensation is due but not paid. *See Levin v. C.O.M.B. Co.*, 441 N.W.2d 801, 803-04 (Minn. 1989) (noting that accrual of cause of action for employer’s failure to pay commission occurred when payment was due). If the failure to pay is willful, the statute of limitations requires the employee to bring a claim to recover the unpaid compensation within three years. Minn. Stat. § 541.07(5).³

Bottum’s claim accrued on March 1, 2001, when his \$1 million bonus was due and JAI failed to pay \$825,000 of it. Running from this date, the three-year limitations period would have expired in early March 2004—approximately 15 months before Bottum commenced this action. Therefore, unless the statute of limitations was tolled, Bottum’s claim is time-barred under Minn. Stat. § 541.17(5). It is Bottum’s burden to show otherwise. *See Mercer v. Andersen*, 715 N.W.2d 114, 120 (Minn. App. 2006) (plaintiff has the burden to show that limitations period should be tolled). Following trial, the district court concluded that Bottum met this burden based on its finding that James Jundt

³ Although the district court did not make a specific finding on willfulness, it applied the three-year limitations period to Bottum’s claim, and JAI concedes that the three-year limitations period applies.

orally reaffirmed the promise in September 2003.⁴ JAI argues that the district court erred by relying on any oral statements in reaching this conclusion.

A valid acknowledgement of an existing debt tolls and restarts the limitations period. *Windschitl v. Windschitl*, 579 N.W.2d 499, 501 (Minn. App. 1998). When a defendant acknowledges an existing past-due debt and promises to pay it in the future, the new promise effectively renews the broken one. *See Reconstruction Fin. Corp. v. Osven*, 207 Minn. 146, 148-49, 290 N.W. 230, 231 (Minn. 1940) (stating that acknowledgement of debt places old debt “on the footing of one contracted at the time of such acknowledgment”). This doctrine serves both the debtor’s and creditor’s interests: the creditor receives payment on a debt that would otherwise be unenforceable, and the debtor bolsters his financial credibility by honoring contractual promises despite no legal obligation to do so. 51 Am. Jur. 2d, *Limitation on Actions* § 301.

⁴ The district court also found that the Jundts acknowledged the debt to Bottum on specific occasions in 2001 and 2002, and found generally that the promise to pay Bottum’s bonus “was reaffirmed on numerous occasions leading up to [his] termination.” Most of these occasions are legally irrelevant. Bottum commenced this action on May 10, 2006. This date falls within the three-year window set by Minn. Stat. § 541.07(5), only if the limitations period restarted on or after May 9, 2003. Only acknowledgements that occurred on or after May 9, 2003, could affect whether Bottum commenced this action before the limitations period expired.

Bottum asserts that the Jundts’ most recent acknowledgements were made in 2004. In support of this, however, he cites the district court’s summary-judgment order, which assumed that Bottum’s allegations about those acknowledgments were true for purposes of the motion being decided. Following trial, the district court made specific findings about acknowledgments that were too early to possibly make Bottum’s claim timely; it did not make findings about an acknowledgement that occurred in 2004.

But in order to toll the limitations period, an acknowledgment and promise to repay must generally be embodied in a signed writing. Minn. Stat. § 541.17. Section 541.17 states:

No acknowledgment or promise shall be evidence of a new or continuing contract sufficient to take the case out of the operation of this chapter unless the same is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of a payment of principal or interest.

JAI argues that the district court erroneously ignored this signed-writing requirement when it concluded that James Jundt's oral promise was sufficient to restart the limitations period. On this record, we cannot determine whether JAI is correct.

Minnesota case law recognizes at least two situations in which a debtor's oral representations may toll and restart a statute of limitations, notwithstanding Minn. Stat. § 541.17's requirements. First, the parties may orally agree to waive or modify a contractual term requiring the debt to be paid by a certain date. *See, e.g., In re Estate of Giguere*, 366 N.W.2d 345, 347 (Minn. App. 1985) (oral agreement to delay enforcement of past-due promissory note). By postponing the date on which performance is due, the parties effectively postpone the date when a claim based on the debtor's failure to perform accrues. *See Wolff v. Rhude & Fryberger, Inc.*, 275 Minn. 52, 55, 145 N.W.2d 299, 301 (1966) (holding that breach-of-contract claim does not accrue until the breached obligation's conditions precedent occur). And a modification or waiver that affects only the manner of performance does not need to be in writing. *Giguere*, 366 N.W.2d at 347.

Second, a debtor's oral representations may equitably estop the debtor from raising a statute-of-limitations defense. *Albachten v. Bradley*, 212 Minn. 359, 362-65, 3 N.W.2d 783, 785-86 (1942). Essentially, a debtor who lulls a creditor into a false sense of security with an oral promise to repay the debt cannot take advantage of section 541.17 after the limitations period has expired. *See id.* at 362-65, 785-86 (explaining equitable concerns underlying estoppel). In *Albachten*, the supreme court explained:

The commonest illustration of this doctrine is where one who has induced his creditor to forbear to bring action upon an enforceable claim by promise of payment or by a promise not to plead the Statute of Limitations as a defense, even though such forbearance was not requested as consideration for the promise, and though the new promise (because not in writing or for other reasons) was not binding as such, has not been allowed later to set up the Statute after the creditor relying upon the debtor's promise has refrained from bringing action until the statutory period has expired.

Id. at 364, 3 N.W.2d at 786 (emphasis omitted). The promise need not expressly refer to the statute of limitations. *Id.* at 362-65, 3 N.W.2d at 785-86. But it must lead the creditor to reasonably delay bringing an action on the debt until after the action is time-barred. *See id.* (requiring reasonable, detrimental reliance concerning the matter to which the relied-upon promise relates).

The district court's findings and conclusion are inadequate to allow us to properly analyze whether either of these bases for tolling the statute of limitations applies. The district court found:

129. That Bottum claims that in September, 2003, while on business in New York City, James Jundt reaffirmed that Bottum would be paid the allegedly unpaid balance of \$825,000 owed on the bonus allegedly earned in 2000. He

also claim[s] James Jundt affirmed that if Southways outperformed the S&P 500 in 2003, as it appeared might be the case, he would receive a \$1 million bonus for 2003.

...

131. That in Bottums's description of his September, 2003, conversation with James Jundt, he testified that he had not been told a specific month or year in which any bonus allegedly due to him would be paid, instead being told that it would be after Marcus Jundt's divorce proceedings (which had started in 2003) had ended.

The district court concluded:

164. That the Court concludes that Plaintiff's claims are not barred by the applicable three year statute of limitations. In a finding *supra*, the Court found that James Jundt reiterated the promise of the bonuses in September 2003. Because this case was filed in May 2006, it was filed within the three year window and accordingly, Bottum is not barred by statute from seeking his bonus from the years 2000 and 2003.

We cannot determine from these findings whether JAI and Bottum agreed to waive or modify JAI's contractual obligation to pay the \$825,000 balance of Bottum's bonus. Whether a contract term has been modified or waived depends on the parties' intent. *Warrick v. Graffiti, Inc.*, 550 N.W.2d 303, 307 (Minn. App. 1996), *review denied* (Minn. Sept. 20, 1996). Without express findings regarding the parties' intent, we are unwilling to assume that the district court found that the parties orally agreed to modify the date when JAI's performance was due. Without something more than James Jundt's "reiteration," we cannot determine whether the parties agreed to postpone JAI's contractual obligation to pay the outstanding balance. Also, the district court made no

findings with respect to the terms of a modified agreement. Even if we were to construe the district court's findings as implying that the parties agreed to postpone JAI's obligation to pay Bottum until after the conclusion of Marcus Jundt's divorce proceedings, without additional findings, we have no basis for holding, as Bottum suggests, that the parties meant the issuance of a "final" dissolution decree, but not any proceedings on direct appeal or following a remand, to be the conclusion of the proceeding.

Similarly, we cannot determine whether JAI is estopped from asserting the statute of limitations. The district court made no findings as to whether Bottum failed to bring his claim within the limitations period because he relied on James Jundt's promise and, if so, whether Bottum's reliance was reasonable. As JAI correctly points out, in September 2003, James Jundt had transferred ownership of JAI to Marcus Jundt and had previously directed Bottum to speak with Marcus Jundt about the unpaid \$825,000. Although this does not, as JAI suggests, conclusively establish that Bottum's reliance was unreasonable, the scope of James Jundt's actual or apparent authority to make promises on behalf of JAI is a factor that the district court would need to address in an estoppel analysis.⁵

Because the district court's findings are inadequate to support its conclusion that Marcus or James Jundt's oral representations to Bottum tolled and reset the statute of limitations and we are unable to determine whether the district court reached this

⁵ The record is unclear regarding the scope of James Jundt's authority to act on behalf of JAI after transferring ownership to his son. After the transfer, James Jundt was an employee of JAI, but he was employed in an executive capacity.

conclusion based on a contract-modification or estoppel theory, we reverse and remand so that the district court can address the elements of either or both of these tolling theories.

Reversed and remanded.