COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-2828

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

FIRSTAR TRUST COMPANY, AS TRUSTEE,

PLAINTIFF-RESPONDENT,

V.

RICHARD D. GEBHARDT,

DEFENDANT-APPELLANT,

WILLIAM SOMMER,

DEFENDANT-CO-APPELLANT,

VALLEY TRUST COMPANY, AS TRUSTEE,

INTERVENOR-DEFENDANT.

FIRSTAR TRUST COMPANY, AS TRUSTEE,

PLAINTIFF-RESPONDENT,

V.

RICHARD D. GEBHARDT AND
ENTERPRISE REALTY GROUP,

A/K/A ENTERPRISE REALTY, INC.,
A WISCONSIN PARTNERSHIP,
F/K/A CGI INVESTMENT PARTNERSHIP,
A WISCONSIN PARTNERSHIP,

DEFENDANTS-APPELLANTS,

OTTO C. GEBHARDT, R & B WAGNER, INC.,
A WISCONSIN CORPORATION,

DEFENDANT,

WILLIAM SOMMER,

DEFENDANT-CO-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Cane, JJ.

PER CURIAM. Richard D. Gebhardt and William Sommer appeal from judgments entered in favor of Firstar Trust Company against Gebhardt and Sommer to pay as guarantors for a defaulted loan and to pay attorneys' fees. Gebhardt and Sommer also challenge an order dismissing their counterclaims against Firstar and an order rejecting Gebhardt's "impairment of collateral defense." They claim jointly: (1) the trial court erred in ruling that they were estopped from asserting, and had waived the defense, that their guarantee had been discharged by payment; (2) the trial court erred in dismissing their counterclaims; and (3) the trial court erred in ruling that Firstar was entitled to recover attorneys' fees from them as guarantors. In addition, Gebhardt claims the trial court erred in

holding that he may not claim the defense of impairment of collateral as a matter of law. Because the law of the case holds that the trial court did not err in dismissing the counterclaim and in ruling that they were estopped from asserting the defense of discharge, because the trial court did not err in precluding Gebhardt from asserting an impairment of collateral argument, and because the trial court did not err in awarding attorneys' fees, we affirm. Further, because Firstar is entitled to recover attorneys' fees incurred in this appeal, we remand to the trial court for a determination of what Firstar reasonably incurred in defending this appeal and direct the trial court to award that amount to Firstar.

I. BACKGROUND

In 1985, Monarch Rolling, Inc. obtained a $2 million industrial revenue bond financed through the City of Milwaukee. The money was used to buy specialized equipment and make improvements to a building Monarch leased. The bond was purchased by Firstar Bank, with Firstar Trust as the trustee. Gebhardt was president and treasurer of Monarch and Sommer was vice-president. In those capacities, each signed a loan agreement and promissory note. Moreover, the loan was personally guaranteed by Gebhardt and Sommer. The guarantee provided: "The Guarantors hereby absolutely and unconditionally guarantee to the Municipality and its assigns all obligations of the Borrower under the Loan Agreement and the Note for so long as this Guarantee is in effect."

In the summer of 1987, Monarch and Bank One discussed having Bank One purchase the bond in order to reduce the interest rate. In July 1987, Bank One wrote a commitment letter to Monarch agreeing to purchase the bond and to reduce the interest rate on the loan. Bank One required Gebhardt and Sommer's Guarantee as security and made the Guarantee a specific condition of

the commitment to purchase. On August 31, 1987, Bank One presented a cashier's check to Firstar. This date was significant because it allowed Monarch to avoid prepayment penalties. Bank One stated that the check was tendered with the intent to purchase the bond. Firstar, however, commenced action to cancel the bond, believing the check to represent prepayment of the loan. On September 1, however, Monarch wrote Firstar stating that the presentment of funds was not intended to discharge or cancel the bond.

We concluded in an earlier appeal in this case that Bank One's tender represented a purchase, rather than prepayment. *See* ***Firstar Trust Co. v. Gebhardt***, No. 93-2197, unpublished slip op. (Ct. App. Sept. 13, 1994). Gebhardt and Sommer were precluded from participating directly in that appeal because they were still involved in proceedings in the trial court.

Bank One formally purchased the bond on April 1, 1988. Over the next four years, Monarch made payments as scheduled. In 1990, Monarch borrowed $345,000 from Sommer and in 1991, it borrowed $275,000 from Sommer's retirement plan. Valley Trust is the trustee for Sommer's retirement plan. In February 1992, Monarch defaulted on its loan payments. Monarch surrendered its collateral, which Firstar sold for $750,000, leaving $260,023.81 outstanding on the loan.

Firstar commenced a lawsuit to collect the outstanding amount from Gebhardt and Sommer as guarantors. They raised three defenses: (1) the guarantee was discharged on August 31, 1987, when the loan was paid in full; (2) Bank One impaired the collateral; and (3) the sale of collateral did not occur in a commercially reasonable manner. They also counterclaimed on the basis that they had their own security interests in the Monarch collateral which had been

sold by Firstar. Valley Trust intervened in the action in order to make the same counterclaim. Gebhardt and Valley Trust contended that the August 31, 1997 tender constituted prepayment and, therefore, erased Firstar's security interest in the collateral, making Gebhardt and Valley Trust's security interest first priority.

Firstar moved for summary judgment, which was granted. The order for judgment stated that the defendants were estopped from asserting and had waived their right to assert the defenses, that the Guarantee was discharged or otherwise invalid, and that the commercial reasonableness defense and impairment of collateral defense raised questions of fact to be determined at trial.

Valley Trust appealed directly from this judgment, which resulted in the first opinion of this court. We affirmed the trial court's dismissal of the counterclaim. Meanwhile, trial court proceedings continued between Firstar, Gebhardt and Sommer. Trial was set for October 28, 1996. Before trial, Firstar filed a motion in limine arguing that, as a matter of law, the defendants could not assert an impairment of collateral defense. The trial court granted the motion. On the date of trial, the defendants orally withdrew their commercially unreasonable sale of collateral defense. As a result, there was nothing left to try. Only one issue remained: whether Gebhardt and Sommer were obligated to pay Firstar's attorneys' fees. The trial court ruled that the Loan Agreement and Guarantee required payment of reasonable attorneys' fees and the trial court determined the amount to be $139,060.97. Judgment was entered. Gebhardt and Sommer now appeal.

II. DISCUSSION

We review a decision to grant summary judgment *de novo*. *See* ***Grosskopf Oil, Inc. v. Winter***, 156 Wis.2d 575, 579-80, 457 N.W.2d 514, 517 (Ct. App. 1990). This same standard is employed in reviewing a decision to award attorneys' fees. *See* ***Community Care Org. v. Evelyn O.***, 214 Wis.2d 434, 437, 571 N.W.2d 700, 702 (Ct. App. 1997). Finally, a motion in limine is reviewed under a discretionary standard and will not be reversed if the trial court made a reasonable decision based on the pertinent facts and applicable law. *See* ***General Accident Ins. Co. v. Schoendorf & Sorgi***, 202 Wis.2d 98, 107-08, 549 N.W.2d 429, 433-34 (1996).

A. Discharge by Prepayment and Estoppel.

Both Gebhardt and Sommer argue that the trial court erred in dismissing their counterclaims and in holding that the August 31, 1987 transaction did not operate to discharge the guarantee. They both argue that the August 31, 1987 tender constituted prepayment, which discharged the loan in full and, therefore, discharged the guarantee. They argue that even if this transaction was reversed later and became a purchase rather than prepayment, that would not revive the guarantee. We reject their claims.

In the appeal by Valley Trust, we considered these same issues. Although Gebhardt and Sommer were not party to the appeal, their claims are the same as was Valley Trust's: i.e., that the August 31, 1987 tender constituted a prepayment, thereby discharging the loan and guarantee which, in turn, voided Firstar's security interest. We rejected this argument when we concluded that the transaction was not prepayment, but rather constituted Bank One's purchase of the bond. This is the law of the case.

The law of the case doctrine provides that:

> "[W]henever legal propositions are laid down upon an appeal to this court, they become the law of the case upon all future trials or appeals[.]" … "[A] litigant 'is concluded by the mandate of this court as to all matters actually presented or which might consistently with legal rules have been presented to this court upon appeal.'"

State ex rel. Lisbon Town Fire Ins. Co. v. Crosby, 240 Wis. 157, 160, 2 N.W.2d 700, 701 (1942) (citations omitted). Thus, for the reasons set forth in our Valley Trust opinion, we conclude the trial court did not err in dismissing the counterclaims and reject Gebhardt and Sommer's claim that the loan was discharged when Bank One tendered the check on August 31, 1987.[1]

Further, we are not persuaded by Gebhardt's claim that his counterclaim was somehow "broader" than Sommer's and Valley Trust's. Even if this is true, however, that argument was never presented to the trial court and, therefore, we will not consider it for the first time on appeal. *See* ***State v. Waste Management of Wisconsin, Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

[1] Both Gebhardt and Sommer argue that the law of the case doctrine should not be applied here because this court did not have the benefit of their argument in deciding the Valley Trust appeal. We disagree. Gebhardt and Sommer's contentions and arguments regarding the nature of the August 31, 1987 transaction do not alter our original conclusion that the transaction was a purchase rather than prepayment. Moreover, this is an unusual case where three parties essentially aligned in interest on an issue appealed at separate times. Because both appeals involve the same issue based on the same facts, however, we conclude that applying the law of the case doctrine is appropriate.

B. Impairment of Collateral.

Gebhardt also claims that the trial court erred in granting Firstar's motion in limine ruling that, as a matter of law, he cannot assert this defense. We are not persuaded.

The guarantee unequivocally waives any impairment of collateral defense. It provides:

> Neither the Municipality nor its assigns shall be required to prosecute collection or seek to enforce or resort to any remedies with respect to any security interests securing the Bond prior to resort hereto and the Guarantors' obligations hereunder shall in no way be impaired by reason of any failure or delay to do or take any action or the invalidity, unenforceability, loss of or change in priority, or reduction in or loss of value of any such security interests.

Thus, Gebhardt waived any right to assert this defense and the trial court did not err in precluding him, as a matter of law, from asserting it.

C. Attorneys' Fees.

Last, both Gebhardt and Sommer contend that they are not required to pay Firstar's attorneys' fees for prosecuting this action to collect on the guarantee. We disagree. The plain language of the loan and the guarantee reveals that Gebhardt and Sommer are obligated to pay Firstar's attorneys' fees in prosecuting this action. The pertinent portion of the loan provides:

> [Monarch] hereby agrees and covenants that in the event of any Event of Default, [Monarch] shall pay all reasonable costs and expenses, including attorneys' fees, incurred by the Municipality and the Trustee in collecting monies due and owing or in obtaining performance or observation of its obligation under this Loan Agreement, the Note, the Security Agreement or the Trust Indenture.

The guarantee broadly states:

> The Guarantors hereby absolutely and unconditionally guarantee … all obligations of [Monarch] under the Loan Agreement and the Note for so long as this Guarantee is in effect.

Gebhardt and Sommer argue that because the loan does not reference the guarantee and because the guarantee does not specifically include the term "attorneys' fees," they are not obligated to pay. We disagree. The obligations of the borrower include attorneys' fees, and Gebhardt and Sommer guaranteed all the obligations of the borrower. This necessarily includes attorneys' fees. Accordingly, the trial court did not err in ordering Gebhardt and Sommer to pay Firstar their attorneys' fees.

Further, payment of attorneys' fees also includes fees incurred in this appeal. We, therefore, remand this matter to the trial court with instructions to determine the reasonable amount of costs and attorneys' fees associated with defending against this appeal. The judgment should be amended to reflect that additional amount found by the trial court.

By the Court.—Judgments affirmed and cause remanded with directions.

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