STATE OF MICHIGAN

COURT OF APPEALS

MARY A. NOBLE, STANLEY T. KEAGLE and BARBARA A. JOHNSON,

Plaintiffs-Appellants,

v

JOSLIN ENTERPRISES, INC.

Defendant,

and

JOSEPH L. STEVENS and LINDA D. KEELER,

Defendants-Appellees.

UNPUBLISHED
June 27, 2006

No. 266665
Calhoun Circuit Court
LC No. 05-618-CZ

Before: O'Connell, P.J., Murphy, and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition under MCR 2.116(C)(10) to defendants. We affirm.

I

The material facts are not in dispute. Plaintiffs' father, Stanley Keagle, now deceased, agreed to sell real property to defendant Joseph Stevens and Linda Keeler and his business (a tavern, "Stan's Place") located upon the property to defendant Joslin Enterprises, Inc. (Joslin). The sale of the tavern and the real property were memorialized in separate, but interrelated, agreements. Keagle, Stevens and Keeler executed a August 19, 1986 Sales Agreement for the tavern. The Sales Agreement was executed by Keagle as seller, and Stevens and Keeler, on behalf of Joslin, in their respective capacities as corporate president and secretary. Keeler and Stevens also signed the Sales Agreement in their individual capacities, as guarantors of a $93,000.00 promissory note (Note).

The Sales Agreement provided for graduated payments of the balance, as evidenced by the Note and a Security Agreement, and further required that the "entire balance of principal and

interest shall be due on or before seven (7) years from the date of closing." Closing occurred on March 10, 1987 at which, the parties entered into a Land Contract for the real property where Keagle's tavern was situated. The Land Contract was executed by Keagle, and Stevens and Keeler, individually. The Land Contract, like the Sales Agreement, provided for graduated payments with the entire balance of the Land Contract due 7 years from the date of closing "on or before March 10, 1994." The Land Contract further provided that "[d]efault in the terms of either instrument [Land Contract or the Security Agreement] shall be default of both instruments."

Keagle and Joslin arranged for payments to be made through a collection agent, Contract Service Center. Each year, the collection agent issued Joslin, a payment coupon book for each monthly payment. The coupons identified Joslin as the payor. The collection agent forwarded both the payments and annual statements of account activity to Keagle or Keagle's son. The account activity statements also identified Joslin as the payor.

The Land Contract was paid in full as agreed. However, the tavern balance was not paid in full on March 10, 1994. No action was taken by Keagle demanding full payment. Joslin via Stevens continued to send payments to the collection agent after the 1994 due date. In 1996, Joslin sold the tavern and transferred the liquor license to Maynard Adams. As Adams made payments to Joslin, Joslin in turn sent payments to the collection agent. Adams defaulted, and Joslin recovered the tavern. Joslin resold the tavern to Patty Ambroso, who also defaulted. Subsequently, the tavern ceased doing business. Ambroso is the current holder of the liquor license.

Keagle died on May 19, 1997. Joslin continued to send payments to the collection agent after Keagle's death. Sometime in 1999, Joslin was "dissolved" as a corporation,[1] but Joslin continued to make coupon payments through 1999 and February 2000. Stevens had always sent payments written on Joslin corporate checks through January 2000 until Joslin ran out of corporate checks. Eventually, Stevens closed the Joslin bank account. In January 2000 and possibly February 2000, Stevens sent payments to the collection agent with personal checks. The checks were written on Stevens' individual account established for Joslin business. All checks were made out to the collection agent. Stevens did not send in a payment for March 2000. Approximately $39,599.89 exclusive of interest remains due on the Note.

No collection proceedings were initiated between March 2000 and February 2005. In the interim, plaintiff Mary Noble was appointed personal representative of Keagle's estate and plaintiffs were assigned Keagle's rights and interests under the Note.

Plaintiffs filed a complaint for breach of the promissory note and for claim and delivery

[1] There is no evidence of formal dissolution proceedings in the record. We express no opinion to the legal status of Joslin.

of secured assets. Stevens answered, denying any personal liability and asserting the statute of limitations as an affirmative defense. Keeler denied any knowledge of the status of the Note. Following discovery, the trial court granted Stevens' motion for summary disposition, concluding that the evidence did not clearly establish that Stevens was personally re-affirming his previous status as guarantor, given the absence of clear and explicit evidence that Stevens acknowledged and revived the obligation. Accordingly, the trial court granted Stevens' motion for summary disposition, dismissed plaintiffs' complaint against Keeler, and entered a default judgment in the amount of $39,599.89 plus interest against Joslin. Plaintiffs' motion for reconsideration was denied. This appeal ensued.

II

This Court reviews a trial court's decision on a motion for summary disposition de novo. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Questions regarding whether a claim is barred by a limitation period, and the legal effect of a contract clause, are also reviewed de novo on appeal. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, a defendant is entitled to summary disposition under MCR 2.116(C)(7) if the plaintiff's claim is barred by an applicable limitations period. *Timko v Oakwood Custom Coating Inc*, 244 Mich App 234, 238; 625 NW2d 101 (2001).

III

Plaintiffs contend that the payments made by Joslin also revived Stevens' promise to guaranty the debt. We disagree.

Generally, a period of limitation begins to run at the time a claim accrues. MCL 600.5827. Under MCL 600.5827, a claim generally accrues when the wrong is done. *Boyle v Gen Motors Corp*, 468 Mich 226, 231; 661 NW2d 557 (2003). The period of limitation on a breach of contract action is six years. MCL 600.5807(8).

Here, there is no real dispute that Joslin, by continuing to make payments past the maturity date of the Sales Agreement and in accordance with the coupon payment schedule, created a new promise to pay on the Note and extended the application of the statute of limitations in the absence of any showing that the payment was not intended by Joslin to imply a new promise to pay:

> A partial payment made on a debt after the debt matures serves to revive the statute of limitations. A new cause of action accrues on the date of payment. However, in order for the statute of limitations to be revived in such a way, the partial payment must be accompanied by a recognition of the entire debt and an indication of an intention to pay same. [*Yeiter v Knights of St Casimir Aid Soc'y*, 461 Mich 493, 497; 607 NW2d 68 (2000) (citations omitted).]

The *Yeiter* Court rejected the proposition "that a partial payment on a debt begins the limitation period anew *only* if "accompanied by a recognition of the entire debt and an indication of an intention to pay same,"" stating that "the opposite is true--a partial payment restarts the running of the limitation period *unless* it is accompanied by a declaration or circumstance that rebuts the implication that *the debtor* by partial payment admits the full obligation." *Id.* (emphasis added).

Here, because Joslin's payments were unaccompanied by a declaration or circumstance to rebut the implication that Joslin admitted the full obligation, Joslin clearly was barred from asserting the statute of limitations defense. The question before this Court is whether a guarantor's obligation is also revived so as to toll the statute limitations..

In *Mainzinger v Mohr*, 41 Mich 685; 3 NW 183 (1879), relied on by plaintiffs, the debtor and his surety went to the creditor together for the purpose of making a payment past the note's maturity date, where the payment came from the debtor's funds. *Id.* at 686-687. The Supreme Court rejected the surety's argument that the debtor's payment did not revive his obligation as surety, concluding that from the standpoint of the creditor, the fact that both the surety and debtor came for the express purpose of making the payment and cooperated in the payment, the creditor could reasonably understand the payment to be a joint payment binding the surety under the statute of limitations, unless the surety indicated otherwise. *Id.* at 668-689.

Maizinger is inapposite. Here, there is no basis for plaintiffs to reasonably conclude that the payments constituted a joint payment. All payments were made in accordance with the coupon book issued to Joslin and the account activity statements sent to plaintiffs credited the payments to "Joslin." Nor do we find, as dispositive, plaintiffs' emphasis on the fact that Stevens made one or two payments with personal checks. Plaintiffs provide no evidence to indicate that they relied on Stevens' personal checks to reasonably conclude Stevens intended to renew his obligation as guarantor of the Note. Rather, the record shows plaintiffs had no basis to know that Stevens paid with personal checks until after this litigation ensued.

Further, plaintiffs ignore the principles of law articulated in *Maizinger*:

> So at the common law a new promise to pay a debt barred by the statute might be inferred from a mere recognition of the existence of a just demand; and when this rule was so changed as to require an express promise in writing, it was wisely provided that one joint debtor should not have it in his power to keep alive or revive a debt against another by a payment in which the other did not participate. A payment under this statute is equivalent to a new promise; and *as one cannot make the express promise for the other, neither can he make for him the indirect promise which a payment implies.* [*Mainzinger, supra* at 687 (emphasis added).]

Plaintiffs contend that Stevens participated in the payment because Stevens' personally made all payments and he was the remaining shareholder in Joslin as of 1999 or 2000. There is no real dispute that Stevens participated in the payments given his unique role as sole shareholder in the corporation; however, plaintiffs' argument ignores the settled principle that

"[a] corporation must ordinarily be respected as a distinct entity, even where one individual is the sole shareholder, in the absence of a subversion of justice or other overriding public policy. *Ross v Auto Club Group*, 269 Mich App 356, 361; 711 NW2d 787 (2006).

In addition, MCL 600.5825, "the joint obligor statute," relied on by Stevens, provides in relevant part:

> (2) If there are 2 or more joint obligors or joint executors or joint administrators of any obligor, no one of them shall lose the benefit of the provisions of this chapter so as to be chargeable because of any acknowledgment or promise made or signed by any of the others.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996). Nothing will be read "into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the language of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002), rev'd on other grounds 470 Mich 679 (2004).

MCL 600.5825(3) plainly provides that payment by one of two or more joint contractors does not toll running statute of limitations as to the other obligor based on the payment of a co-obligor. Further, given the absence of any evidence in the record showing that the payments were made for Stevens, or on his behalf, or with the use of his personal funds, we conclude Joslin's corporate payment is distinct from Stevens' obligation and role as guarantor. See *Patterson v Collier*, 113 Mich 12, 13; 71 NW 327 (1897) (concluding that statute of limitations was tolled to the defendant shareholders, as it was not shown that the corporate payments were made for them or upon their behalf or by the use of their funds, or that the defendants intended to give the company authority to extend the note beyond the statutory period). In sum, Stevens' right to claim the benefit of the statute of limitations was not affected by any payment or promise made by Joslin, the maker of the debt. See e.g. *Constock v Horton*, 235 Mich 282, 288-289; 209 NW 179 (1926) (payments made by one partner on notes to the partnership signed individually by the three partners tolled the statute of limitations as to him).

In a related claim, plaintiffs contend that Stevens never revoked his guaranty. We disagree. A party's intent to revoke a guaranty must be "in clear and unequivocal language which could not reasonably be misunderstood." *American Steel & Wire Co v Richardson*, 191 Mich 549, 553-554; 158 NW 34 (1916). "The test is not what [the party] meditated, but what [the party] declared." *Id*. at 554.

Here, there is no real dispute that Stevens never sent written notice revoking his guaranty. However, Stevens submitted evidence establishing that he gave a "clear and unequivocal" oral statement of his intent to not be personally liable for the Note. *Id*. at 553-554. The record

evidence shows that Stevens and Keagle's son had multiple contacts during which Stevens informed plaintiffs "when they pay me, I will make a payment. If the business don't pay me, I can't pay you."

Stevens' statement is not cloaked in legal terminology; however, "the communication [is] distinct and definite," id. at 554, to the extent that it cannot not be reasonably misunderstood as an intent to renew his personal obligation as guarantor of the debt. Because Stevens' statement was sufficient to put plaintiffs on notice that liability for the debt remained with Joslin, and plaintiffs fail to provide any authority for the proposition that a revocation must be writing, we reject plaintiffs' assertion that Stevens failed to revoke his guaranty. Accordingly, it is irrelevant whether he expressly acknowledged or affirmed the guaranty. "An express denial that a contract is continuing cannot be treated as an acknowledgment that it is continuing." *Hebinger v Ross*, 175 Mich 241, 247; 141 NW 629 (1913).

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kurtis T. Wilder