[Cite as *N. Frozen Foods, Inc. v. Farro*, 2019-Ohio-5344.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

NORTHERN FROZEN FOODS, INC., :

Plaintiff-Appellant, :

Nos. 108269 and 108466

v. :

ROSS C. FARRO, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: December 26, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CV-18-892326 and CV-18-905385

Appearances:

Brouse McDowell L.P.A., Clair E. Dickinson, and Kyle A Shelton; Weltman Weinberg & Reis Co., L.P.A., Donald A. Mausar, and Roy J. Shechter, *for appellant.*

Climaco Wilcox Peca & Garofoli Co., L.P.A., John R. Climaco, and Scott D. Simpkins; Michael L. Climaco, *for appellees.*

RAYMOND C. HEADEN, J.:

{¶ 1} Plaintiff-appellant Northern Frozen Foods, Inc. d.b.a. Northern Haserot ("Northern") appeals from the trial court's granting of summary judgment

in favor of defendants-appellees Ross C. Farro ("Farro"), CFC Management Company, Inc. d.b.a. TGI Friday's, CRO Management, L.L.C. d.b.a. TGI Friday's, Buon Pranzo, L.P. d.b.a. TGI Friday's, Lakeview I, Ltd. d.b.a. TGI Friday's, John R. Climaco, Michael L. Climaco, Cleveland Restaurant Operation, Inc., Cleveland Restaurant Operation, L.P. d.b.a. TGI Friday's, Cleveland Restaurant Operation, L.P., II d.b.a. TGI Friday's, Cleveland Restaurant Operation, L.P., III d.b.a. TGI Friday's, BP Green, L.L.C. d.b.a. TGI Fridays, BP Brooklyn, L.L.C. d.b.a. TGI Fridays, BP Stow, L.L.C. d.b.a. TGI Fridays, and BP Elyria, L.L.C. d.b.a. TGI Fridays (collectively, "Defendants"). For the reasons that follow, we reverse.

Procedural and Substantive History

{¶ 2} Northern is a distributor of food and other supplies for the restaurant industry. Certain defendants are restaurant entities operating multiple TGI Fridays restaurants located throughout Northeast Ohio. Farro is an owner of defendant entities. From 1995 until the shortly before the inception of this case, Northern was Defendants' supplier, ultimately selling Defendants approximately $4 million of product annually.

{¶ 3} In 2009, Defendants began to struggle financially and fell behind on their payments to Northern. According to Northern, it did not immediately object to Defendants' overdue balance because of the duration and nature of their relationship. Northern instead agreed to extend Defendants' credit terms from the initial 30-day period to 60 days, then 75 days, and ultimately more than 85 days.

{¶ 4} According to Northern, its president Douglas Kern ("Kern") contacted Farro in 2011 and attempted to secure Defendants' agreement that they would reduce the days outstanding on their account to 85 days by February 1, 2012. By May 2012, however, Defendants had an outstanding balance of over $1.8 million that was over 120-days delinquent. On May 21, 2012, Kern sent an email to Defendants' CEO regarding the debt and proposed a new payment plan, wherein Defendants would pay $500,000 within two weeks and pay off the remaining balance over the next two years. Kern also demanded some form of security for the payment plan, due to the amount of outstanding debt.

{¶ 5} On May 29, 2012, Farro responded to Kern in a letter stating that the company was "not financially able to agree to [the] payment terms." Farro reiterated a proposed payment plan that Defendants reasonably believed the company could afford, wherein Defendants would pay the entire outstanding balance over a period of three years, plus 4 percent interest annually, as follows:

> 7/1/12 through 12/1/12 principal payments @ $15,000 a month
> 1/1/13 through 6/1/13 principal payments @ $30,000 a month
> 7/1/13 through 6/1/14 principal payments @ 60,000 a month
> 7/1/14 through 6/1/15 principal payments @ $75,000 a month

Defendants initially complied with this payment plan, but beginning in 2013 failed to increase their monthly payment as outlined, instead continuing to pay $15,000 per month through July 2014. In 2015, Defendants reduced their monthly payment amount to $5,000. In total, Defendants paid Northern $405,000 during those years. Northern repeatedly contacted Defendants to demand adequate payments or

revisions to the payment plan, but Northern did not initiate litigation until 2017, allegedly believing Farro's promise that Defendants would pay their debt in full.

{¶ 6} In the meantime, Defendants had stopped buying products from Northern; the last invoice for the sale of any goods from Northern to Defendants was dated June 15, 2012.

{¶ 7} On July 3, 2017, Northern filed a complaint ("First Lawsuit") against CFC Management Company, Inc., CRO Management, L.L.C., Buon Pranzo, L.P., and Lakeview I, Ltd. alleging four counts of breach of contract. On October 30, 2017, these defendants filed their answer to Northern's complaint and filed a motion for summary judgment alleging that Northern's claims were barred by the four-year statute of limitations for the sale of goods under Ohio's version of the Uniform Commercial Code ("UCC") codified in R.C. 1302.98.

{¶ 8} On November 27, 2017, Northern voluntarily dismissed the first lawsuit. On January 31, 2018, Northern initiated a second action ("Second Lawsuit") against the same defendants, alleging the same four counts of breach of contract, as well as an additional claim for unjust enrichment. Northern also alleged a separate count against Ross C. Farro ("Farro"), requesting that the court pierce the corporate veil of the defendant entities and hold Farro personally liable for any damages awarded in the case.

{¶ 9} On October 15, 2018, Northern initiated a third action ("Third Lawsuit") alleging the same claims against a different group of defendants: John R. Climaco, Michael L. Climaco, Cleveland Restaurant Operation, Inc., Cleveland

Restaurant Operation, L.P., Cleveland Restaurant Operation, L.P., II, Cleveland Restaurant Operation, L.P., III, BP Green, L.L.C., BP Brooklyn, L.L.C., BP Stow, L.L.C., and BP Elyria, L.L.C. (collectively, "Climaco Defendants").[1]

{¶ 10} On November 2, 2018, Defendants moved for summary judgment, arguing again that Northern's breach of contract and unjust enrichment claims were barred by the statute of limitations set forth in R.C. 1302.98. Defendants also argued that Northern's piercing the corporate veil claim should fail as a matter of law because it is not an independent cause of action, but depends on Northern's time-barred claims. On December 3, 2018, Northern filed a brief in opposition to Defendants' motion for summary judgment.

{¶ 11} On February 13, 2019, the trial court granted Defendants' motion for summary judgment. The trial court stated in its opinion that:

> The Court is satisfied that Plaintiff's claims are subject to the four-year statute of limitations codified at § 1302.98, and that Ohio law does not permit tolling the limitations period under the circumstances in this case. The Court is further satisfied that there is no genuine issue of material fact with respect to the issue of when Plaintiff's cause of action accrued. Plaintiff's claims are time barred.
>
> Plaintiff's remaining arguments likewise fail. The Court finds that Plaintiff's equitable estoppel tolling argument is not supported by relevant case law (*see, e.g., Beck* [*v. Trane Co.*, 1st Dist. Hamilton Nos. C-890610 and C-890623, 1990 Ohio App. LEXIS 5614, (Dec. 19, 1990)], *supra*) or by the undisputed facts. In addition, Plaintiff has conceded that its unjust enrichment claim fails because the parties' relationship was indisputably governed by a series of express written contracts. Moreover, even if the Court were to construe Plaintiff's veil-piercing argument as a distinct, cognizable claim, that claim vanishes with the grant of summary judgment on statute of limitations grounds.

---

[1] The Second and Third Lawsuits have been consolidated in this appeal.

> Finally, the Court agrees with Defendants that Plaintiff has fully abandoned any claim that Count Five of the Complaint alleges common law fraud as opposed to, as Plaintiff had earlier put it, "part of the claim to pierce the corporate veil" and "toll the statute of limitations."

(Defendants' motion at 5, n.1, citing Plaintiff's April 13, 2018 reply brief at 12.)

{¶ 12} Northern appeals, presenting three assignments of error for our review.

Legal Analysis

{¶ 13} In Northern's first assignment of error, it argues that the trial court erred by granting summary judgment to Defendants on Northern's breach of contract claim based on its determination that the statute of limitations was not reset by the statutory and common law doctrine of partial payment. In its second assignment of error, Northern argues that summary judgment was inappropriate because there is a genuine issue of material fact as to whether equitable estoppel bars Defendants from asserting the statute of limitations as a defense. In its third assignment of error, Northern argues that the trial court incorrectly granted summary judgment in favor of Farro on Northern's attempt to pierce the corporate veil.

{¶ 14} We review the trial court's summary judgment de novo, applying the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under Civ.R. 56(C), summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after

construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. Civ.R. 56(C).

Statute of Limitations

{¶ 15} All parties agree that the claims in the underlying action are subject to the four-year statute of limitations laid out in R.C. 1302.98. The statute provides, in relevant part:

> (A) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (B) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. * * *
>
> (D) This section does not alter sections 2305.15 and 2305.16 of the Revised Code on tolling of the statute of limitations, nor does it apply to causes of action which have accrued before July 1, 1962.

The parties disagree as to whether and how this statute of limitations is impacted by the partial payment rule codified in R.C. 2305.08.

{¶ 16} In its first assignment of error, Northern argues that the trial court erred by granting summary judgment in favor of Defendants and holding that the four-year statute of limitations described in R.C. 1302.98 had run, and was not tolled by the provisions of R.C. 2305.08.

{¶ 17} R.C. 2305.08 codifies the partial payment rule, providing:

> If payment has been made upon any demand founded on a contract, or a written acknowledgement thereof, or a promise to pay it has been made and signed by the party to be charged, an action may be brought

> thereon within the time limited by sections 2305.06 and 2305.07 of the Revised Code, after such payment, acknowledgement, or promise.

According to Northern, the partial payment rule applies to establish when its cause of action accrued, rather than to suspend or toll an already running statute of limitations. Northern concedes that R.C. 1302.98 provides a four-year statute of limitations for breach of contract claims arising out of the sale of goods. Further, it acknowledges that the cause of action generally accrues when the breach occurs — in this case, when Defendants failed to make timely payments. Northern goes on to argue, though, that its cause of action "re-accrued" following Defendants' acknowledgment and promise to pay the debt, and then again after each partial payment. Thus, according to Northern, because their final payment from Defendants was made in April 2016, the four-year statute of limitations does not expire until April 2020. By filing the underlying complaint in this case in July 2017, according to this logic, Northern's claims would not be time-barred.

{¶ 18} In response, Defendants argue that because the terms of their agreement with Northern provided that payment for goods was due on delivery, any breach of contract would have occurred when Defendants accepted goods without providing payment. *Internatl. Periodical Distrib. v. Bizmart, Inc.*, 8th Dist. Cuyahoga No. 77787, 2001 Ohio App. LEXIS 362, 10 (Feb. 1, 2001), citing R.C. 1302.55 (UCC 2-511) and 1302.65 (UCC 2-607). Further, because Defendants and Northern had agreed to a 30-day credit term, the cause of action accrued at the latest 30 days after the date of the last unpaid invoice. Here, the last invoice for

product sold to Defendants from Northern was dated June 15, 2012. Therefore, according to Defendants, Northern was required to file their complaint on or before July 15, 2016.

{¶ 19} Defendants also argue that the partial payment rule in R.C. 2305.08 does not apply to this case because Northern's claims are exclusively governed by the four-year statute of limitations found in R.C. 1302.98. This argument is based on the plain language of R.C. 2305.08, which explicitly applies to the statutes of limitations set forth in R.C. 2305.06 and 2305.07 for written and oral contracts. These statutes, in turn, explicitly exclude the four-year statute of limitations in R.C. 1302.98 from their application. R.C. 2305.06 states:

> Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within eight years after the cause of action accrued.

Similarly, R.C. 2305.07 provides an identical exception for contracts not in writing.

{¶ 20} The Ohio Supreme Court, in the context of an ejectment action on a note and mortgage, has held that R.C. 2305.08 "is restricted in its effect to the 15-year limitation in Section 11221 [now the 8-year limitation in R.C. 2305.06] and the 6-year limitation in Section 11222 [now R.C. 2305.07], and there is no implication that it is intended to be applicable to any other." *Eastwood v. Capel*, 164 Ohio St. 506, 508, 132 N.E.2d 202 (1956). Similarly, in the context of a promissory note secured by a mortgage, this court has held that the more specific statute of limitations in R.C. 1303.16 controls over that found in R.C. 2305.06. *Mohammad*

v. Awadallah, 8th Dist. Cuyahoga No. 97590, 2012-Ohio-3455, ¶ 18, citing *Brisk v. Draf Indus., Inc.*, 10th Dist. Franklin No. 11AP-233, 2012-Ohio-1311, ¶ 20, citing *J & A Inc. v. Francis*, 6th Dist. Huron No. H-03-006, 2004-Ohio-1039, ¶ 18.

{¶ 21} Although we recognize that none of these cases dealt with a contract for the sale of goods, we find that the arguments presented by Northern relating to contracts for the sale of goods are similarly governed by a specific statute of limitations — that found in R.C. 1302.98 — and, therefore, the more general statutes of limitations for written and unwritten contracts in R.C. 2305.06 and 2305.07 do not apply. This is further supported by the official comment to R.C. 1302.98. The comment clarifies that this statute, analogous to § 2-725 of the UCC, "takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practice."

{¶ 22} Northern also argues that the common law applies to reset the statute of limitations on its breach of contract claim. Specifically, it argues that the common law partial payment rule existed long before the adoption of R.C. 2305.08 and in the absence of a clear intention by the legislature to abrogate this rule, the common law rule should be preserved. We disagree.

{¶ 23} R.C. 1301.03 provides that common law principles can supplement R.C. Chapter 1302. R.C. 1301.33, though, limits this by permitting the use of common law principles only when they are not "displaced" by the UCC. *NCS Healthcare, Inc. v. Fifth Third Bank*, 8th Dist. Cuyahoga No. 85198, 2005-Ohio-

3125, ¶ 45. Thus, the UCC provides the exclusive remedy where the dispute is governed by its statutory provisions. *Id.*, citing *Olympic Title Ins. Co. v. Fifth Third Bank*, 2d Dist. Montgomery No. 20145, 2004-Ohio-4795, ¶ 31. We therefore reject Northern's common law argument. For these reasons, we decline to interpret the partial payment rule codified in R.C. 2305.08 as applying to the statute of limitations in R.C. 1302.98. Northern's first assignment of error is overruled.

Equitable Estoppel

{¶ 24} In Northern's second assignment of error, it argues that the trial court incorrectly granted summary judgment in favor of Defendants because there is a genuine issue of material fact regarding its equitable estoppel claim. We agree.

{¶ 25} "The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice." *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145, 555 N.E.2d 630 (1990), citing *Heckler v. Community Health Servs.*, 467 U.S. 51, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984); *Lex Mayers Chevrolet Co. v. Buckeye Fin. Co.*, 107 Ohio App. 235, 153 N.E.2d 454 (10th Dist.1958), *aff'd*, 169 Ohio St. 181, 158 N.E.2d 360 (1959). The party claiming estoppel "'must demonstrate: (1) that the defendant made a factual misrepresentation; (2) that is misleading; (3) that induces actual reliance which is reasonable and in good faith; and (4) which causes detriment to the relying party.'" *Clark v. Univ. Hosps. of Cleveland*, 8th Dist. Cuyahoga No. 78854, 2001 Ohio App. LEXIS 3832, 14-15 (Aug. 30, 2001), quoting *Livingston v. Diocese of Cleveland*, 126 Ohio App.3d 299, 710 N.E.2d 330 (8th Dist.1998).

{¶ 26} In its opinion granting summary judgment in favor of defendants, the trial court in this case limited its analysis of Northern's equitable estoppel argument to a single sentence:

> The Court finds that Plaintiff's equitable estoppel tolling argument is not supported by relevant case law (*see, e.g., Beck*, [1st Dist. Hamilton Nos. C-890610 and C-890623, 1990 Ohio App. LEXIS 5614, at 6,] *supra*) or by the undisputed facts.

In *Beck*, the First District declined to apply equitable estoppel to a similar case involving a contract for the sale of goods because it could find no Ohio authority for such an application and interpreted R.C. 1302.98 as precluding such an application. As laid out in our analysis of the interaction between R.C. 1302.98 and 2305.08, we decline to interpret the statute of limitations in R.C. 1302.98 as having any interaction with the partial payment rule. We do not, however, find that the clear statutory language of R.C. 1302.98 or 2305.08 suggests that a party is precluded from asserting the doctrine of equitable estoppel to prevent application of an otherwise legitimate statute of limitations defense.

{¶ 27} Further, since *Beck* was decided, Ohio courts have repeatedly found that equitable estoppel can be applied to prevent the application of the statute of limitations. *Walworth v. BP Oil Co.*, 112 Ohio App.3d 340, 348, 678 N.E.2d 959 (8th Dist.1996); *Clark*; *Kordel v. Occhipinti*, 11th Dist. Lake No. 2007-L-163, 2008-Ohio-6770, ¶ 11; *Schrader v. Gillette*, 48 Ohio App.3d 181, 549 N.E.2d 218 (11th Dist.1988), citing *Wright v. Lorain*, 70 Ohio App. 337, 342-343, 46 N.E.2d 325 (1942). In the context of a statute-of-limitations defense, a plaintiff asserting

equitable estoppel "must show either 'an affirmative statement that the statutory period to bring an action was larger than it actually was[,]' 'promises to make a better settlement of the claim if plaintiff did not bring the threatened suit,' or 'similar representations or conduct' on defendant's part." *Clark* at 15, quoting *Livingston*.

{¶ 28} Generally, the applicability of equitable estoppel is an issue to be determined by the trier of fact. *Id*., citing *Helman v. EPL Prolong, Inc.*, 139 Ohio App.3d 231, 246, 743 N.E.2d 484 (7th Dist.2000). After a review of the record, we find a genuine issue of material fact with respect to Northern's equitable estoppel argument. Northern asserted that Defendants made a written promise to pay their debt, made repeated payments pursuant to a payment plan, repeatedly assured Northern that the debt would be paid, represented that if Northern filed suit it would force Defendants into bankruptcy, and represented that Northern was unlikely to obtain a favorable settlement from litigation and therefore should refrain from initiating legal action. Defendants do not dispute the existence of a payment plan or that they made repeated payments pursuant to this plan. Defendants do dispute Northern's assertion that Farro made other representations regarding Defendants' debt, but they do so while explicitly acknowledging that this creates an issue best resolved by the trier of fact. We agree.

{¶ 29} Further, whether Northern relied on any alleged misrepresentations by Defendants to their detriment is a question for the trier of fact. The record reflects a decades-long mutually beneficial relationship between the parties that evolved over time and culminated in the sale of millions of dollars' worth of food and

products. The nature of the parties' relationship would likely aid the trier of fact in determining whether Northern's reliance on Defendants' conduct was reasonable and in good faith so as to support an equitable estoppel argument or, as characterized by Defendants, merely optimistic and therefore insufficient to satisfy the requisite legal standard.

{¶ 30} For these reasons, we find that the trial court erred in granting summary judgment in favor of Defendants where there is a genuine issue of material fact as to whether Northern was estopped from pursuing its claims within the four-year statute of limitations. Therefore, Northern's second assignment of error is sustained.

{¶ 31} In Northern's third assignment of error, it argues that the trial court erred in granting summary judgment on its piercing the corporate veil claim. The trial court held that Northern was not entitled to pursue this claim against Farro because it is not an independent cause of action and therefore could not survive summary judgment on Northern's other claims against Defendants. Because we find that the trial court erroneously granted summary judgment on Northern's breach of contract claims, Northern's third assignment of error is sustained.

{¶ 32} Judgment reversed and remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

RAYMOND C. HEADEN, JUDGE

ANITA LASTER MAYS, P.J., and
EILEEN A. GALLAGHER, J., CONCUR