[Cite as *Duz v. Advance Materials Prods. Inc.*, 2024-Ohio-316.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

VLADIMIR DUZ Appellee v. ADVANCE MATERIALS PRODUCTS, INC., d.b.a., ADMA PRODUCTS, INC., et al. Appellants	C.A. No. 30267 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2018-05-2190

DECISION AND JOURNAL ENTRY

Dated: January 31, 2024

CARR, Judge.

{¶1} Defendants-Appellants Advance Materials Products, Inc., dba ADMA Products, Inc. ("ADMA"), Dr. Vladimir Moxson, and Sophia Moxson appeal the judgment of the Summit County Court of Common Pleas. This Court reverses and remands the matter for proceedings consistent with this decision.

I.

{¶2} While many issues were litigated in this matter in the trial court, essentially only one is before us in this appeal, and that issue concerns a promissory note and the statute of limitations.

{¶3} Plaintiff-Appellee Dr. Vladimir Duz began working for ADMA and Dr. Moxson providing consulting services while Dr. Duz was still living in Ukraine. The trial court found that

Dr. Duz and his family left their home and relocated to Hudson, OH at the request of Dr. Moxson in order to continue employment with ADMA. Dr. Duz continued working for ADMA until 2017.

{¶4} On May 23, 2002, Dr. Moxson as the President of ADMA entered into a promissory note in favor of Dr. Duz. The promissory note provides as follows:

> PROMISSORY NOTE – INSTALLMENT
>
> Twinsburg, OH 5/23/02
>
> FOR VALUE RECEIVED (for service as a material sourcing representative in Ukraine for the period beginning in 1997 through May 6, 2002) we the undersigned, jointly and severally, promise to pay to the order of Vladimir A. Duz, Twinsburg, Ohio, the sum of One Hundred Seventy Five Thousand Dollars ($175,000.00) with interest on any unpaid balance from May 15, 2002 at the rate of 5% percent per annum, and payable in 18 equal successive monthly installments of $10,000 Dollars in lawful money of the United States of America, commencing on the day of each and every month thereafter until paid except the final installment which shall be the balance due on this note. If any installment be not paid when due, the undersigned promise to pay collection charges of $.10 per dollar of each overdue installment, or the actual cost of collection, whichever is greater and the entire amount owing and unpaid hereunder shall at the election of the holder hereof forthwith become due and payable, and notice of such election is hereby waived. The undersigned promises to pay all reasonable attorney's fees incurred by the holder hereof in enforcing any right or remedy hereunder. All sums remaining unpaid on the installment shall thereafter bear interest at the rate of 1.0 percent per month. The undersigned authorizes the holder to date and complete this note in accordance with the terms of the loan evidenced hereby, to accept additional co-makers, to release co-makers, to change or extend dates of payment and to grant indulgences all without notice or affecting the obligations of the undersigned, and hereby waives;
>
> a. Presentment, demand, protest, notice of dishonor and the notice of nonpayment;
>
> b. The right, if any, to the benefit, or to direct the application of, any security hypothecated to the holder, until all indebtedness of the maker to the holder, howsoever arising shall have been paid;
>
> c. The right to require the holder to proceed against the maker, or to pursue any other remedy in the holder's power;
>
> And agrees that the holder may proceed against any of the undersigned, directly and independently of the maker and that the cessation of the liability of the maker for any reason other than full payment, or any extension, forebearance, change of rate of interest, acceptance, release, substitution of security, or any impairment or suspension of the holder's remedies or rights against the maker, shall not in anywise

> affect the liability of any of the undersigned hereunder. All obligations of the makers if more than one, shall be joint and several.

{¶5} The trial court concluded that Dr. Duz did not demand payment under the promissory note until after the commencement of the litigation. Formal demand for payment was made via correspondence dated December 13, 2018. The trial court found Dr. Duz's testimony to be credible that he did not enforce the note initially over concerns related to his Visa status and its ties to his employment with ADMA and later because ADMA was experiencing financial difficulties.

{¶6} Dr. Duz initiated the litigation in May 2018, after he left employment with ADMA. His initial multi-count complaint did not include allegations related to the promissory note, and instead, dealt with other issues related to the non-payment of wages and contributions of retirement benefits.

{¶7} In February 2019, Dr. Duz file a motion for leave to file an amended complaint to include a claim related to the promissory note. ADMA, Dr. Moxson, and Ms. Moxson opposed the motion asserting it was outside the statute of limitations provided by R.C. 2305.06 and that the amendment was untimely. The trial court granted Dr. Duz leave to file an amended complaint.

{¶8} Dr. Duz's amended complaint included a count alleging that ADMA and Dr. Moxson breached the terms of the promissory note. ADMA, Dr. Moxson, and Ms. Moxson then filed a motion to dismiss pursuant to Civ.R. 12(B)(6). Therein, they alleged that the promissory note was a note payable at a definite time and that it was therefore subject to the six-year statute of limitations contained in R.C. 1303.16(A). Thus, ADMA, Dr. Moxson, and Ms. Moxson argued that the count alleging the breach of the promissory note should be dismissed. Dr. Duz opposed the motion arguing that the promissory note gave Dr. Duz the power to change or extend the dates of payment. Ultimately, the trial court denied the motion to dismiss. In so doing, the trial court

concluded that the parties could not contract away their right to raise the affirmative defense of the statute of limitations but nonetheless determined the amended complaint did not conclusively establish, on its face, that the claim was barred by the statute of limitations.

{¶9} The matter proceeded to a bench trial. Prior to opening statements, the parties discussed the trial court's recent ruling on the motion to dismiss as well as the lack of an answer by ADMA, Dr. Moxson, and Ms. Moxson. The following exchange occurred:

> [Counsel for ADMA, Dr. Moxson, and Ms. Moxson:] As you know, last night motions – we had a pending motion to dismiss before the Court that were ruled on last night. Because of that, we have not been able to file an answer to the amended complaint and the additional claims that were brought as part of that.
>
> I was wondering how the Court would like to handle that?
>
> [Trial Court:] Well, do you have a suggestion?
>
> [Counsel for Dr. Duz:] Your Honor, on behalf of the plaintiffs, we will assume that that they would deny the amended complaint and accept it as a blanket denial for purposes of today's trial.
>
> [Counsel ADMA, Dr. Moxson, and Ms. Moxson:] Thank you []. We would agree with that. That was going to be our proposal.

{¶10} During trial, the statute of limitations was mentioned twice in ADMA's, Dr. Moxson's, and Ms. Moxson's opening statement. Therein, counsel stated that "[w]e believe that this promissory note is beyond the statute – beyond the statute of limitations, and my clients will provide background on this promissory note." Near the end of the opening statement, counsel also stated that "the note is outside of the statute of limitations." There were no objections to the references to the statute of limitations during opening statement nor has either side pointed to evidence that was adduced related to the statute of limitations issue that was objected to.

{¶11} At the end of trial, instead of closing arguments, the trial court asked both parties to submit closing trial briefs. Dr. Duz's closing trial brief was filed first. Therein Dr. Duz maintained that the statute of limitations defense was waived. ADMA's, Dr. Moxson's, and Ms.

Moxson's closing trial brief included an argument that the claim pertaining to the promissory note was barred by the statute of limitations. They also asserted that they had not waived the defense as it was tried expressly and implicitly by the parties, was raised in a motion to dismiss, was raised before trial, and was the subject of a great deal of testimony.

{¶12} In its judgment entry, the trial court concluded that ADMA renewed its defenses during trial. The trial court incorporated its prior ruling on the statute of limitations issue. In addition, the trial court found that the promissory note included a clause that allowed Dr. Duz "to 'change or extend dates of payment' [] and Dr. Duz enacted that clause when he elected not to collect on the promissory note while he was employed with ADMA." The trial court, inter alia, found in favor of Dr. Duz on the breach of the promissory note claim and also awarded him attorney fees.

{¶13} ADMA, Dr. Moxson, and Ms. Moxson have appealed, raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED IN HOLDING THAT THE STATUTE OF LIMITATIONS DID NOT BAR DR. DUZ'S BREACH-OF-PROMISSORY NOTE CLAIM WHERE IT IS UNDISPUTED THAT THE PROMISSORY NOTE WAS ENTERED INTO OVER 20 YEARS AGO AND DR. DUZ NEVER SOUGHT PAYMENT ON THE NOTE, OR EVEN MENTIONED THE NOTE, IN THE 16 YEARS BETWEEN THE DATE THE NOTE ALLEGEDLY CAME INTO EXISTENCE AND THE DATE DR. DUZ FILED HIS AMENDED COMPLAINT CONTAINING THIS CAUSE OF ACTION.

{¶14} ADMA, Dr. Moxson, and Ms. Moxson argue that the trial court erred in determining that the statute of limitations did not bar Dr. Duz's claim concerning breach of the promissory note. Dr. Duz has argued in opposition that ADMA, Dr. Moxson, and Ms. Moxson

waived the affirmative defense and that the trial court correctly dealt with the breach of promissory note claim.

Waiver and the Statute of Limitations Defense

{¶15} Civ.R. 8(C) provides in relevant part that, "[i]n pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." "Failure to set forth an affirmative defense, other than those listed in Civil Rule 12(B), acts as a waiver if the defense was not raised in the pleadings or in an amendment to the pleadings." *Matrix Acquisitions, L.L.C. v. Manley*, 9th Dist. Summit No. 27191, 2014-Ohio-2860, ¶ 9, citing *Jim's Steak House, Inc. v. Cleveland*, 81 Ohio St.3d 18, 20 (1998).

{¶16} "Although failure to adhere to this requirement exposes the party to forfeiture of the defense, [i]n the real world * * * failure to plead an affirmative defense will rarely result in [forfeiture] because of the protection of Civ.R. 15(A)." (Internal quotations and citations omitted.) *Radio Parts Co. v. Invacare Corp.*, 178 Ohio App.3d 198, 2008-Ohio-4777, ¶ 9 (9th Dist.). "Civ.R. 15(A) allows for amendment of pleadings by leave of court or by written consent of the other party after a responsive pleading has been made." *Id.* at ¶ 10. "A party may seek leave to amend at any time, including, under certain circumstances, after trial." *Id.*, citing Civ.R. 15(B).

{¶17} In addition, Civ.R. 15(B) provides that:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any

> party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

{¶18} Thus, "Civ.R. 15(B) treats issues that were not raised in the pleadings as if they were so raised, as long as they were tried with the express or implied consent of the parties and substantial prejudice will not arise as a result." *McCartney v. Universal Electric Power, Corp.*, 9th Dist. Summit No. 21643, 2004-Ohio-959, ¶ 7. "Various factors to be considered in determining whether the parties impliedly consented to litigate an issue include: whether they recognized that an unpleaded issue entered the case; whether the opposing party had a fair opportunity to address the tendered issue or would offer additional evidence if the case were to be tried on a different theory; and, whether the witnesses were subjected to extensive cross-examination on the issue." *State ex rel. Evans v. Bainbridge Twp. Trustees*, 5 Ohio St.3d 41 (1983), paragraph one of the syllabus. "[I]mplied consent is not established merely because evidence bearing directly on an unpleaded issue was introduced without objection; it must appear that the parties understood the evidence was aimed at the unpleaded issue." *Id.* at paragraph two of the syllabus. "Whether an unpleaded issue is tried by implied consent is to be determined by the trial court, whose finding will not be disturbed, absent showing of an abuse of discretion." *Id.* at paragraph three of the syllabus.

{¶19} While the trial court did not specifically state that it found that the affirmative defense of statute of limitations was tried via implied consent, it did conclude that ADMA, Dr. Moxson, and Ms. Moxson "renewed their defenses during the trial." Presuming that the trial court determined that the defense was tried by implied consent, we cannot say that the trial court abused

its discretion in its determination. As noted above, the statute of limitations defense was raised twice during opening statements without objection. Additionally, testimony related to the statute of limitations issue was adduced at the trial, both on direct and cross-examination. Dr. Duz did not object to the consideration of the statute of limitations defense until he submitted his closing trial brief, over two weeks after the trial testimony concluded. *See Ulrich v. Mercedes-Benz USA, L.L.C.*, 9th Dist. Summit No. 24740, 2010-Ohio-348, ¶ 22 (considering delay in objecting to consideration of a claim as a factor weighing in favor of its consideration). Moreover, ADMA, Dr. Moxson, and Ms. Moxson had raised the issue of the statute of limitations in a motion to dismiss and the totality of the circumstances at trial could evidence that it was reasonable to conclude that Dr. Duz understood the issue was, at the very least, potentially before the trial court. *See State ex rel. Evans* at paragraph two of the syllabus. Overall, this Court cannot say that ADMA, Dr. Moxson, and Ms. Moxson waived the statute of limitations issue by failing to plead in an answer based upon the specific facts of this case.

Statute of Limitations

{¶20} While in the proceedings below there appeared to be debate about whether the note was a demand note or a note payable at a definite time, on appeal, Dr. Duz appears to concede that the note was a note payable at a definite time, and thus, subject to a six-year statute of limitations. *See* R.C. 1303.16(A). R.C. 1303.16(A) provides that, "[e]xcept as provided in division (E) of this section, an action to enforce the obligation of a party to pay a note payable at a definite time shall be brought within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date."

{¶21} The note, quoted in its entirety above, indicates that Dr. Duz is entitled to receive the sum of $175,000, payable in 18 equal successive monthly installments. It further states that

there will be interest on any unpaid balance from May 15, 2002. The payments are to commence on an unspecified date of "each and every month thereafter * * *." Given that the note reflects it being drafted in May 2002, presumably payment was to start at some date in June at the latest. Given that, payment should have been completed no later than sometime in November 2003. In light of the agreed six-year statute of limitations, when Dr. Duz made a formal demand for payment in 2018 and added the cause of action related to the promissory note in 2019, the statute of limitations had long since run.

{¶22} Dr. Duz asserts that the claim was not barred by the statute of limitations because the note authorizes him to "to change or extend dates of payment and to grant indulgences all without notice or affecting the obligations of the undersigned" and he extended the dates of payment by not demanding payment until December 2018. While this argument is understandable in light of the confusing language in the promissory note, we cannot say that language allows the statute of limitations to be evaded. It has been observed that "[a] clause providing for extension at the option of the holder need not contain a time limit. The holder already possesses the right to delay payment by holding the instrument and not making a demand on the obligor for payment." 22 *Williston on Contracts*, Section 60:8 (4th Ed.). "However, the right to extend the time to pay has limits. For example, if the obligor tenders proper payment, the holder cannot refuse it. Another limit would be the statute of limitations." *Id.*

{¶23} Accordingly, we conclude that the trial court erred in finding that the claim was not barred by the statute of limitations.

{¶24} ADMA's, Dr. Moxson's, and Ms. Moxson's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO DR. DUZ FOR COLLECTING ON A PROMISSORY NOTE THAT WAS UNENFORCEABLE UNDER THE RELEVANT STATUTE OF LIMITATIONS.

{¶25} ADMA, Dr. Moxson, and Ms. Moxson argue in their second assignment of error that the trial court erred in awarding attorney fees pursuant to the promissory note because it was unenforceable as the claim was barred by the statute of limitations.

{¶26} "The decision whether to award attorney fees and how much rests within the trial court's discretion." *Woodside Mgt. Co. v. Bruex*, 9th Dist. Summit No. 29179, 2020-Ohio-4039, ¶ 137. "However, the issue of whether a statute or contract provides for an award of attorney fees requires interpretation of the statute or contract, which is reviewed de novo." *Id.* The trial court based its award of attorney fees on a provision in the note which reads: "The undersigned promises to pay all reasonable attorney's fees incurred by the holder hereof in enforcing any right or remedy hereunder." Here, Dr. Duz did not incur any attorney fees in the process of enforcing a right or remedy as his claim was barred by the statute of limitations. Accordingly, the award of attorney fees was not supported by the language of the note.

{¶27} ADMA's, Dr. Moxson's, and Ms. Moxson's second assignment of error is sustained.

III.

{¶28} ADMA's, Dr. Moxson's, and Ms. Moxson's assignments of error are sustained. The judgment of the Summit County Court of Common Pleas is reversed, and the matter is remanded for proceedings consistent with this decision.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

HENSAL, P. J.
STEVENSON, J.
CONCUR.

APPEARANCES:

NATHAN A. LEBER and SEAN L. MCGRANE, Attorneys at Law, for Appellants.

SHAMS H. HIRJI, Attorney at Law, for Appellants.

JACK MORRISON, JR. and SCOTT MULLANEY, Attorneys at Law, for Appellee.