

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 23, 1996

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.

NOTICE

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

No. 95-3481

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

WATERFORD BANK,

Plaintiff-Respondent,

v.

KEVIN J. KIMBALL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Racine County:
DENNIS J. FLYNN, Judge. *Reversed and cause remanded.*

Before Anderson, P.J., Nettlesheim and Snyder, JJ.

PER CURIAM. Kevin J. Kimball appeals from a judgment awarding the Waterford Bank \$47,334 in principal and interest deemed to be owing on a promissory note as of August 1, 1995. The judgment also awarded additional interest, attorney's fees and costs for a total award of \$49,465. Judgment was entered pursuant to the bank's motion for summary judgment. Because we conclude that factual issues exist in the summary judgment record, we reverse the judgment and remand the matter for further proceedings.

When reviewing a grant of summary judgment, we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. *Coopman v. State Farm Fire & Casualty Co.*, 179 Wis.2d 548, 555, 508 N.W.2d 610, 612 (Ct. App. 1993). We first examine the pleadings to determine whether a claim has been stated and whether a material issue of fact is presented. *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476 (1980). If the pleadings set forth a claim for relief and a material issue of fact, our inquiry shifts to the moving party's affidavits or other proof to determine whether a prima facie case for summary judgment has been presented. *Id.* at 338, 294 N.W.2d at 476-77. If the moving party has made a prima facie case, the affidavits or other proof of the opposing party must be examined to determine whether there exist disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn sufficient to entitle the opposing party to trial. *Id.* at 338, 294 N.W.2d at 477.

Based upon these standards, we conclude that the trial court erred in granting summary judgment to the bank. In its complaint, the bank alleged that Kimball executed a promissory note for the principal sum of \$49,787 on June 10, 1994, promising to pay eleven installments of \$1700 each commencing on July 10, 1994, plus a final payment of the unpaid balance and interest on June 10, 1995. The bank further alleged that Kimball was in default on the loan and that as of March 11, 1995, he owed the bank \$45,504. In his answer, Kimball admitted executing the note, but denied that the loan was in default, denied any indebtedness to the bank, and denied owing the bank \$45,504.

The pleadings thus stated a claim and gave rise to an issue of fact. We therefore examine the materials submitted by the parties in support of and in opposition to the motion for summary judgment.

The bank's sole evidentiary proof consisted of an affidavit of its vice president, attesting that the allegations of the complaint were true and that as of August 1, 1995, Kimball owed the bank \$47,334 in principal and interest. In opposition, Kimball submitted his own affidavit, alleging that the \$49,787 note which is the subject of this action was a renewal of a loan originally made to him by the bank in 1989. He alleged that the original balance of the loan was \$76,547 and attached a list of payments totaling \$88,146, which he alleged he had made since signing the original note. He attached cancelled checks and a

receipt for a wire transfer which he alleged reflected some of those payments and stated that the remaining payments were electronically debited by the bank from his accounts and those of his wife. He further alleged that he had sought to have discrepancies in this account and others reconciled by the bank, but to no avail.

Even accepting the bank's argument that loans and payments preceding June 10, 1994, could not be considered in determining whether Kimball was in default on the June 10, 1994 note, Kimball's affidavit in opposition to the bank's motion for summary judgment gave rise to an issue of fact as to the amount of Kimball's indebtedness. While the bank argues that the cancelled checks and wire transfer receipt attached by Kimball to his affidavit all pre-date the execution of the June 10, 1994 note, a review of the cancelled checks indicates that three of them were dated between September and December 1994.

At the time this complaint was filed on March 20, 1995, Kimball should have made payments of \$15,300 pursuant to the June 10, 1994 note. The three checks discussed above totaled \$4834. Kimball's attached list of payments also showed additional payments of \$1700 each on July 12, 1994, and February 6, 1995, for a total of \$8234.

Based on this record, a material issue of fact exists as to the amount of Kimball's indebtedness on the note. Most significantly, the record provides no basis for this court to conclude that Kimball owed the bank principal and interest in the amount of \$47,334 as of August 1, 1995. Consequently, summary judgment was unwarranted and the matter must be remanded for further proceedings.

By the Court. — Judgment reversed and cause remanded.

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