COURT OF APPEALS
DECISION
DATED AND RELEASED

February 4, 1997

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. 96-1569

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

ASSET RECOVERY & MANAGEMENT CORPORATION,

Plaintiff-Respondent,

v.

MICHAEL G. PLOURDE, JANET L. PLOURDE,

Defendants-Third Party Plaintiffs,

LAWRENCE J. PLOURDE and ARLENE A. PLOURDE,

Defendants-Third Party Plaintiffs-Appellants.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed*.

Before LaRocque, Myse and Carlson, JJ.

PER CURIAM. Lawrence and Arlene Plourde appeal a summary judgment foreclosing on a mortgage and declaring them personally liable for a debt to Asset Recovery & Management (ARM). The Plourdes argue that outstanding issues of material fact exist as to each of their three affirmative defenses: statute of limitations; accord and satisfaction; and superseding cause, and that ARM violated the implied provision in every contract to act in good faith. We reject these arguments and affirm the summary judgment.

Lawrence and Arlene Plourde, along with Michael and Janet Plourde, borrowed $198,000 and secured that debt by a mortgage. Full payment was to be made by June 1, 1988. In 1986, Lawrence and Arlene entered into a land contract with Michael and Janet. Under the terms of the land contract, Michael and Janet agreed to make the payments on the note. In 1990, Lawrence and Arlene commenced a foreclosure action against Michael and Janet alleging their failure to make payments pursuant to the land contract. After Lawrence was appointed receiver in March 1990, he made a payment on the note. The parties later agreed to a settlement where Lawrence and Arlene signed a warranty deed in full satisfaction of the land contract and, in return, Michael and Janet assumed responsibility for payment of any sums due on the note. In July 1995, ARM commenced this foreclosure action and secured a default judgment against Michael and Janet and a summary judgment against Lawrence and Arlene.

ARM's action against Lawrence and Arlene was not barred by the statute of limitations. The statute of limitations runs from the date of a partial payment on an obligation. *See* ***Cornell Univ. v. Roth***, 149 Wis.2d 745, 748-49, 439 N.W.2d 154, 156 (Ct. App. 1989). The question of fact identified by the Plourdes, whether Lawrence acted in his capacity as a receiver when he made the payment, is not a question of material fact. A creditor may reasonably expect that additional payments are forthcoming after receiving a partial payment from any of the debtors or from a receiver.

The Plourdes cite ***City of Milwaukee v. Firemen Relief Ass'n***, 34 Wis.2d 350, 358, 149 N.W.2d 589, 593 (1967), for the proposition that there must be an express acknowledgement of an intent to renew a debt. That case dealt with renewal of a "debt once barred." Here, the statute of limitations would not have expired until June 1, 1994, six years from the date the note was due. The payment made by Lawrence in 1990 was not a renewal of a debt previously

barred by the statute of limitations, but merely a payment on a debt that was not barred by the statute of limitations at the time payment was made. Since there was no other reason for the Plourdes or the receiver to pay money to ARM, the payment constitutes recognition of the debt before the statute of limitations expired and has the effect of tolling or interrupting the statute of limitations. *See* ***Estate of Hocking***, 3 Wis.2d 79, 86, 87 N.W.2d 811, 815 (1958).

The trial court properly rejected the Plourdes' affirmative defense of accord and satisfaction. Accord and satisfaction reflects an agreement to discharge an existing disputed claim. ***Flambeau Prods. Corp. v. Honeywell Info. Sys., Inc.***, 116 Wis.2d 95, 112, 341 N.W.2d 655, 664 (1984). The elements of a contract, offer, acceptance and consideration must be present. ***Id***. The Plourdes' settlement of their land contract dispute did not include an agreement by ARM or its predecessors to release any of the borrowers from their obligation to pay the note. For the obligor to be released from liability, the obligee must agree to the release. ***Brooks v. Hayes***, 133 Wis.2d 228, 243, 395 N.W.2d 167, 174 (1986). Because the record contains no evidence that ARM or its predecessors were parties to the agreement between the Plourdes, the trial court properly concluded that accord and satisfaction did not apply.

The trial court also properly rejected the defense of superseding cause. Superseding cause is a tort doctrine. It is inapplicable in a contract action. In addition, there are no facts in this case that would give rise to the doctrine.

Finally, the record contains no evidence to support the Plourdes' assertion that ARM or its predecessors breached their implied duty to act in good faith. The Plourdes again allude to the participation of ARM's predecessor in the land contract action. The record contains no evidence of any lending institution's agreement to the settlement. An agreement between two debtors cannot extinguish the rights of a creditor. Therefore, the record contains no evidence of bad faith by ARM or its predecessors.

By the Court.—Judgment affirmed.

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