

STATE OF MINNESOTA  
IN COURT OF APPEALS  
APPELLATE COURT CASE NUMBER A09-1854

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Roland Retzlaff,

Appellant.

v.

Susan L. Nordin, the Personal Representative  
of the Estate of Lester L. Nordin,

Respondent

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**RESPONDENT'S BRIEF**

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## STATEMENT OF THE ISSUES

- I. Should the Trial Court's Judgment granting Respondent's Motion for Summary Judgment be upheld where a payment toward the Promissory Note was made within the time limitations found in Section 336.3-118(b)?

**Trial Court granted Respondent's Motion for Summary Judgment and found that the Promissory Note in question was enforceable, because a payment had been made on the outstanding balance due under the Promissory Note.**

Minn. Stat. §336.3-118(b)

- II. Should the Trial Court's decision to deny Respondent its reasonable attorneys' fees and costs be reversed where the Respondent successfully enforced the Promissory Note and the Promissory Note provides for the recovery of attorneys' fees and costs related to collection?

**While the Trial Court granted Respondent's Motion for Summary Judgment, it denied Respondent's request for an award of attorneys' fees and costs, because Respondent had not submitted evidence of the attorneys' fees and costs incurred by Respondent at the time of hearing on the Summary Judgment Motion.**

Agri Credit Corp. v. Liedman, 337 N.W.2d 384 (Minn. 1983)

## STATEMENT OF THE CASE

This appeal concerns a demand Promissory Note given by Appellant Roland Retzlaff to Lester Nordin and the applicability of the statute of limitations contained in Minn. Stat. §336.3-118(b). Under this statute, an action to enforce a demand Promissory Note is barred if no payment towards the principal or interest due under the Note has been made within the preceding ten years.

Retzlaff signed the Promissory Note in 1997, and he was at the time Lester Nordin's son-in-law. No payments were made on the Note until 2003, when Retzlaff's mother made a \$10,000.00 payment towards the outstanding balance due under the Note. This payment was accepted by Lester Nordin, the fact of the payment noted on the back of the Note, and Lester Nordin forgave the accrued and future interest due under the Note. In 2008, the Respondent, as Personal Representative of the Estate of Lester Nordin, made a demand of Respondent for payment of the remaining principal balance due under the Note of \$28,775. Respondent refused payment, solely on the grounds that because his mother, Edna Nordin, made the only payment toward the outstanding balance due under the Note, the remaining balance due under the Note was time-barred.

After this action was commenced in district court, both the Appellant and Respondent brought Cross Motions for Summary Judgment. The Trial Court granted Respondent's Motion for Summary Judgment, finding that the Promissory Note was enforceable and issued an Order on August 12, 2009. The Trial Court found that the

payment by Edna Nordin qualified as a “payment” within the meaning of Minn. Stat. §336.3-118(b), as it been made on behalf of Respondent and paid to Lester Nordin, the party entitled to enforce the Note. In its Order, the Trial Court directed that judgment be entered in favor of Respondent in the amount of \$28,775, the amount of the unpaid principal due under the Note. However, the Trial Court denied Respondent’s request for attorneys fees and costs, even though the Note specifically stated that such costs and fees were recoverable by Respondent. Respondent appeals the Trial Court’s denial of an award of attorney’s fees and costs.

#### **STATEMENT OF THE FACTS**

On December 31, 1997, Appellant Roland Retzlaff signed a Promissory Note payable to the order of Lester or Eleanor Nordin. (Appellant’s Appendix, at 20; hereinafter “A-\_\_”). The Promissory Note initially had a principal balance of \$38,775.00, and it stated that it accrued interest at the rate of seven percent per annum. Id. By signing the Promissory Note, Retzlaff granted his “consent that the time of payment may be extended without notice.” Id. Retzlaff also agreed that “the maker and all of the parties liable hereon agree to pay the cost of collection of this note, including a reasonable attorney fee.” Id. At the time the Retzlaff signed the Promissory Note, he was married to Susan Nordin, the daughter of Lester Nordin. (A-24). In 1998, shortly after signing the promissory note, Roland Retzlaff and Susan Nordin divorced, and as part of the dissolution, the parties agreed to assume the debts in their name. (A-34).

After the death of Lester Nordin's wife, Eleanor Nordin, Lester Nordin married Edna Nordin in 1999, who is also Roland Retzlaff's mother. (A-18). On June 10, 2003, Appellant Roland Retzlaff's mother, Edna Nordin, made a \$10,000.00 payment toward the outstanding balance due under the Promissory Note. (A-18, A-22). Lester Nordin accepted and deposited this payment and made the following notation on the back side of the Promissory Note: "Received June 10, 2002 [sic, 2003] payment on Note \$10,000 LLN. No interest to be paid-just balance of note."(A-21). Roland Retzlaff eventually became aware that a payment had been made on the Note. (A-50)

Lester Nordin died on August 19, 2008. (A-18). His daughter Susan Nordin was appointed as the Personal Representative of his estate. Id. A demand was made on Roland Retzlaff to pay the principal balance due under the Note on December 23, 2008. (A-18, A-23). The principal balance due under the Note, after applying the \$10,000 payment and forgiving interest, is \$28,775.00. Id. After Appellant Roland Retzlaff refused to make the payment, the Lester Nordin Estate commenced an action in District Court. Both parties brought Cross Motions for Summary Judgment, and the Trial Court granted Respondent's Motion for Summary Judgment and denied Appellant's Motion for Summary Judgment.

### **ARGUMENT**

A demand promissory note remains enforceable so long as a payment is made toward the balance due under the Note within 10 years preceding the collection action.

The Trial Court correctly determined that the significant payment of \$10,000 made by Edna Nordin to Lester Nordin was a qualifying payment and one that tolled that statute of limitations. Minnesota law has long recognized that loans between family members, especially demand notes, do not arise from the normal creditor-debtor relationship. And this is recognized in Minn. Stat. § 336.3-118(b), which contains an especially long limitations period. The purpose behind this statute and the limitations period contained therein is to determine if the creditor considered the debt is “real or forgiven,” not whether the debtor intended to repay the amount due. In this case, the payment accepted by Lester Nordin from his wife and Respondent’s mother indicates that Lester Nordin intended for the Note and underlying debt to remain enforceable. The Trial Court correctly determined that the Note remains enforceable, but it erred in denying Respondent the attorneys fees and costs it is entitled to recover as stated in the Note.

## **I. STANDARD OF REVIEW**

The Court of Appeals reviews de novo the appeal from summary judgment based on the application of a statute to undisputed facts. Look v. Pact Charter School, 763 N.W.2d 675, 677 (Minn. Ct. App. 2009). While the standard of review applied to an award of costs and attorneys fees is normally subject to an abuse of discretion standard, the construction and effect of an ambiguous contract is a question of law and one that is reviewed de novo. Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346 (Minn. 1993).

**II. THE TRIAL COURT CORRECTLY CONCLUDED THAT BECAUSE A PAYMENT HAD BEEN MADE TOWARD THE OUTSTANDING PRINCIPAL BALANCE DUE UNDER THE NOTE, COLLECTION OF THE AMOUNT DUE UNDER NOTE WAS NOT BARRED BY THE STATUTE OF LIMITATIONS CONTAINED IN MINN. STAT. §336.3-118(b).**

Prior to 1992, a demand promissory was enforceable for a period of six years from the date of execution. See 1992 Minn. Laws Ch. 565, § 14. Following the amendment and enactment of Minn. Stat. §336.3-118, the statute of limitations applicable to demand promissory notes was significantly modified. It now provides as follows:

Except as provided in subsection (d) or (e), if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce is barred if neither principal or interest of the note has been paid for a continuous period of ten years.

Minn. Stat. §336.3-118(b).

The 1992 Amendment had the effect of expanding the six year limitations period to a period ranging from 10 years to slightly less than 16 years. The Official Comment that accompanies Section 336.3-118(b) explains this change and the purpose behind the two limitation periods it contains:

Subsection (a) and (b) apply to notes. If the note is payable at a definite time, a six-year limitations period starts at the due date of the note, subject to prior acceleration. If the note is payable on demand, there are two limitations periods. Although a note payable on demand could theoretically be called a day after it was issued, the normal expectation of the parties is that the note will remain outstanding until there is some reason to call it. If the law provides that the limitations period does not start until demand is made, the cause of action to enforce it may never be barred. On the other hand, if the limitations period starts when demand for payment may be made, i.e. at any time after the note was issued,

the payee of the note on which interest or portions of principal are being paid could lose the right to enforce the note even though it was treated as a continuing obligation by the parties. Some demand notes are not enforced because the payee has forgiven the debt. This is particularly true in family and other noncommercial transactions. A demand note found after the death of the payee may be presented for payment many years after it was issued. The maker may be a relative and it may be difficult to determine whether the note represents a real or a forgiven debt. Subsection (b) is designed to bar notes that no longer represent a claim to payment and to require reasonably prompt action to enforce notes on which there is default. If a demand for payment is made to the maker, a six-year limitations period starts to run when demand is made. The second sentence of subsection (b) bars an action to enforce a demand note if no demand has been made on the note and no payment of interest or principal has been made for a continuous period of 10 years. This covers the case of a note that does not bear interest or a case in which interest due on the note has not been paid. This kind of case is likely to be a family transaction in which a failure to demand payment may indicate that the holder did not intend to enforce the obligation but neglected to destroy the note. A limitations period that bars stale claims in this kind of case is appropriate if the period is relatively long. (emphasis added)

Minn. Stat. §336.3-118, comment 2 (emphasis added).

As the Official Comment to this Section indicates, the purpose behind the statute of limitations found in Section 336.3-118(b) is to distinguish forgiven debts that have not been formally canceled from debts that are intended to remain enforceable. The focus, then, is on the intent of the creditor, and not on the debtor's intent to repay the debt.

Where before the creditor of a demand promissory note needed to commence a collection action within 6 years of the execution of the note, the revised Section 336.3-118(b) now permits a creditor who receives no payment to potentially bring an action nearly 16 years after the note is executed (assuming the creditor demands payment just before expiration

of the 10 year limitation period). The Legislature, then, presumably expanded the limitations period because the prior 6 year period was insufficiently short.

This is consistent with earlier case law, which recognized that the typical creditor-debtor relationship does not exist where demand promissory notes between family members are concerned. See, e.g., Andrews v. Andrews, 212 N.W. 408, 410 (Minn. 1927) (promissory note entered into between brothers did not specify time of payment, and collection of debt could extend past statute of limitations period); In re Fallon's Estate, 124 N.W. 994, 996 (Minn. 1910) (recovery of amount due permitted after 23 years where parties relationship was “something more than the ordinary one of debtor and creditor, and the parties contemplated indefinite delay in demand for the money”); Portner v. Wilfahrt, 88 N.W. 418 (Minn. 1901) (sum payable on demand by son to parents not barred by the statute of limitations).

Appellant's reliance on cases predating the enactment and adoption of the Uniform Commercial Code and the specific statute in question-Minn. Stat. §336.3-118—is misplaced. For example, in Bernloehr v. Fredrickson, 7 N.W.2d 328 (Minn. 1942), one party signed a note as the maker, and another party signed the promissory note as an accommodation party. Id. at 328. The promissory note in question had a fixed repayment date, and it was subject to a six year statute of limitations. Id. at 328-329. The holding of Bernloehr and other related cases is quite narrow. These cases simply hold that “a part payment upon a promissory note by one of two joint makers before the statute of

limitations has run will not prevent the running of the statute of limitations as to the other maker.” *Id.* at 329. The requirement of part payment rests “upon the theory that it amounts to a voluntary acknowledgment of the existence of the debt from which a promise to pay the balance is implied.” *Id.* Section 336.3-118(b) is not concerned with whether the *debtor* acknowledges the debt, but whether the *creditor* considers the debt valid. Thus, unlike like other statutes of limitation, the time for repayment and the period of limitations applicable to a demand note is largely determined by the actions of the creditor.

Statutes of limitation serve two purposes, “the repose of the defendant and the fair and effective administration of justice.” Dalton v. Dow Chemical Co., 158 N.W.2d 580, 584 n.2 (Minn. 1968). Neither legitimate goal is undermined by the Trial Court’s decision and its application of Section 336.3-118(b) to the undisputed facts. First, by entering into a demand promissory note, Retzlaff was aware that demand for payment could be delayed significantly. Presumably, when his mother Edna Nordin married Lester Nordin, he had reasonable expectation that the period of collection may be further prolonged, especially after being informed that his mother had made a payment toward the outstanding balance due under the note. A statute of limitations seeks to avoid situations in which a claim is made after an unreasonable lapse of time, which has permitted the defendant to believe no claim exist. Bachertz v. Hayes-Lucas Lumber Co.,

275 N.W. 694, 697 (Minn. 1937). The demand for payment made by Respondent in 2008 occurred four and a half years after the payment had been made.

Second, the goal of assuring the fair and effective administration of justice remains intact. The parties signed a written promissory note. There is no dispute on the part of Respondent that the note was signed, and that the balance remains unpaid. In enacting Minn. Stat. §336.3-118(b), the Legislature determined that a lengthy limitations period was appropriate, and that it was not contrary to the fair and effective administration of justice. A demand for payment made within 5 ½ years of the last payment, and within eleven years of the date the Note was executed is well within the time frames provided for in Minn. Stat. §336.3-118. Lester Nordin not only accepted payment, but he noted the fact of payment on the Note and unilaterally amended the terms of the Note. If the purpose of Minn. Stat. §336.3-118 is to ascertain whether the debt was considered “real or forgiven,” then Lester Nordin’s actions indicate that the debt was to be repaid. This is in contrast to the decision relied upon by Appellant, Estate of Hart v. Hart, 2007 WL 4444236 (Ohio App. 10 Dist.), 4 UCC Rep.Serv.2s 885 (Ohio App. 2007).

Estate of Hart v. Hart, an unpublished Ohio Court of Appeals decision, shares some similarities with the present case, but it is not on point. In that case, the party entitled to enforce the promissory note forgave portions of the interest due under the note. There was no payment by a third party; in fact, there was no payment, no delivery, and no acceptance. There simply was no indication that the creditor intended to be repaid. And,

in fact, it appears that the forgiveness of debt occurred some years before death. The Estate of Hart decision is a common-sense decision, and it is intended to avoid a situation in which “Creditors could circumvent the operation of the limitation period by forgiving a small portion of the amount not yet due under a demand note every ten years, thereby unilaterally reviving the debt at precisely the time when the statute would otherwise extinguish it.” Id. In 2003, Lester Nordin accepted a sizeable payment from his wife Edna Nordin in partial satisfaction of Respondent’s debt. He could have accepted the payment and forgiven or destroyed the Note, or he could have accepted payment and simply made no reference to the Note. He did neither. Lester Nordin, through his conduct, treated the payment from Edna Nordin as a payment toward the balance due under the Note and he applied the payment to the Note.

Although Retzlaff claims that he did not authorize the payment by his mother made on his behalf, he did “consent that the time of payment may be extended without notice” when signing the note. (A-4). There is no denying that the effect of the payment by Edna Nordin was to extend the time for the time for payment, and consequently, the statute of limitations. In signing the note, Retzlaff agreed that such an outcome as possible. In Currie State Bank v. Schmitz, 628 N.W.2d 205 (Minn. Ct. App. 2001), the guarantor of a promissory note sought to avoid liability under the theory that he had not consented to the extension of the due date of a promissory note. The promissory note at issue in Currie stated that “[e]ach Borrower, endorser and guarantor . . . consents to any

extensions and renewals hereof without notice.” 628 N.W.2d at 209. Respondent likewise agreed that the promissory note could be extended, which the receipt of payment effectively accomplishes. In this case, Respondent’s obligation for the principal balance due under the note was reduced by \$10,000 by the payment from his mother and the accrued and outstanding interest was forgiven.

**III. THE TRIAL COURT’S DECISION TO DENY RESPONDENT THE ATTORNEYS’ FEES AND COSTS INCURRED IN COLLECTION OF THE NOTE SHOULD BE REVERSED, BECAUSE THE RESPONDENT SUCCESSFULLY ENFORCED THE NOTE AND BECAUSE THE NOTE PROVIDES FOR THE AWARD OF ATTORNEYS’ FEES AND COSTS.**

The Promissory Note provides the recover of attorneys’ fees and costs incurred in enforcing and collecting the Note. It states, in relevant part, “[The] maker and all other parties liable hereon agree to pay the cost of collection of this note, including a reasonable attorney fee.” Respondent commenced a collection action after its demand for payment was refused by Appellant Roland Retzlaff. Respondent succeeded in the collection and was by all measures the prevailing party. Respondent should have been awarded its attorneys’ fees and costs and afforded the opportunity to submit a statement of it fees and costs subject to the Trial Court’s review and approval.

Trial Court denied Respondent’s claim for attorneys’ fees and costs, with little explanation, simply noting that “[b]ecause the Court has not been presented with evidence of what those fees and costs are, it is inappropriate for it to speculate as to these amounts and therefore Plaintiff’s request is **DENIED**.” It is well established that a party is entitled to an award of attorneys’ fees and costs if the contract entered into between the parties provides for the recovery of such expenses. Such costs and fees would include the fees

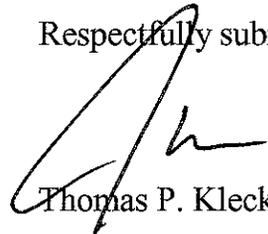
and costs incurred up to and including the hearing on the motion for summary judgment. Agri Credit Corp. v. Liedman, 337 N.W.2d 384 (Minn. 1983). Normally, an award or denial of attorneys fees is subject to an abuse of discretion standard. Northfield Care Center, Inc. v. Anderson, 707 N.W.2d 731, 735 (Minn. Ct. App. 2006). In this case, however, the Trial Court's decision should be reviewed de novo, as it involved the effect and application of terms contained in an unambiguous contract. See Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346 (Minn. 1993). The Trial Court should have awarded Respondent the attorneys fees and costs it incurred, and it should have permitted Respondent to make such a claim pursuant to Minn. R. Gen. Prac. 119.01, et. seq.

### **CONCLUSION**

A demand promissory note is enforceable if a timely payment or demand for payment is made. Section 336.3-118(b) is concerned with the creditor's intent, and it is the creditor's conduct that largely determines whether a claim is barred. When Roland Retzlaff signed the demand promissory note, he was subject to repaying the debt in one day or slightly less than 16 years. In this case, five and a half years after the note was signed, Lester Nordin accepted a \$10,000 payment. He then recorded the payment, and modified the payment terms of the note. All indications are that Lester Nordin intended for the note to remain enforceable. Edna Nordin's payment was sufficient to toll the limitations period, and the Trial Court's decision granting Respondent summary judgment should be upheld. The Trial Court's decision to deny Respondent attorney's fees and

costs should be reversed, and Respondent should be afforded the opportunity to recover such expenses as is permitted under the terms of the promissory note.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'TK', is written over the text 'Respectfully submitted,'.

Thomas P. Klecker