

NO. A10-674

State of Minnesota
In Court of Appeals

KEITH SODERBECK,

Respondent,

vs.

CENTER FOR DIAGNOSTIC IMAGING, INC.,

Appellant.

REPLY BRIEF OF APPELLANT

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LEGAL ARGUMENT

I. APPELLANT'S MOTION TO ENFORCE THE SETTLEMENT AGREEMENT WAS NOT AN ADMISSION THAT ITS PERFORMANCE WAS DUE AND OWING DURING THE TIME PERIOD OF RESPONDENT'S BREACH.

Respondent argues that Appellant's choice to seek enforcement of the settlement agreement represents an acknowledgement that Appellant's performance under the agreement (i.e. payment of \$150,000) was due and owing even during the time period of Respondent's repudiation of the agreement (i.e. refusal to accept payment of \$150,000). Respondent cites no case to support such an argument.

Seeking enforcement of the settlement agreement is seeking specific performance. Specific performance is defined as "the remedy of requiring exact performance of a contract in the specific form in which it was made, or according to the precise terms agreed upon." Black's Law Dictionary, 1138 (6th ed. 1990). In other words, the remedy is a court order that the contract be performed according to its terms. In this case, the district court's order granting enforcement of the settlement agreement states, "the Defendant is directed to make payment to the Plaintiff in accordance with the Agreement." (A.A. 40).¹ Therefore, specific performance requires future action. It does not determine the rights and obligations of the non-breaching party during the time interval between the breach and the order for specific performance.

Appellant agrees that seeking enforcement of the settlement agreement was an election of remedies. The election of remedies doctrine simply requires that a party adopt

¹ Appellant complied with the court's order and made payment to the Plaintiff on October 13, 2008. (A.A. 84.).

one of two or more coexisting and inconsistent remedies. The purpose of the doctrine is not to prevent recourse to a potential remedy but to prevent double redress for a single wrong. Christensen v. Eggen, 577 N.W. 2d 221, 224 (Minn. 1998). (“If inconsistent remedies are sought and it is doubtful which one will bring relief, a party may claim either or both alternatively until one remedy is pursued to a determinative conclusion.”).

Appellant also agrees that enforcement of the settlement agreement was an affirmance of the contract. As applied to contracts, the election of remedies doctrine requires an injured party to choose whether to affirm or disaffirm a contract. Loppe v. Steiner, 699 N.W. 2d 342, 349 (Minn. Ct. App. 2005). Once a party elects to cancel a contract, that party may not then recover damages based on a breach of contract. Covington v. Pritchett, 428 N.W. 2d 121, 124 (Minn. Ct. App. 1988). Similarly, if a party elects to cancel a contract, that party may not then sue for specific performance of the contract. Kosbau v. Dress, 400 N.W. 2d 106, 110 (Minn. Ct. App. 1987).

Affirmance of the contract does not retroactively create a duty on the non-breaching party to have performed under the contract during the time that the breaching party refused to perform under the contract. If it did, then it would produce the absurd result of making the non-breaching party liable for breach of contract unless he fully performed in the face of a repudiation. As applied to this case, CDI would be liable for breach of contract unless it paid the \$150,000 in the face of Mr. Soderbeck’s refusal to accept the \$150,000. Indeed, this absurdity is precisely what Mr. Soderbeck advocates. He states, “However, in the clarifying order, Judge Wheeler clearly indicated that interest

was awarded on the bases of damages because the Appellant defaulted on legal indebtedness that it acknowledged was due.” (Respondent’s Brief, at 12).

The rule governing the rights and obligations of the non-breaching party during the time interval between the breach and the order for specific performance is straightforward and reasonable: when a party repudiates his duties to perform under a valid and enforceable contract, the non-breaching party’s duties to perform are discharged. This is and always has been Minnesota law, as shown by the four cases discussed in Appellant’s initial Brief. See also, Associated Cinemas of America, Inc. v. World Amusement Co., 276 N.W. 7, 10 (Minn. 1937) (“Performance is excused when it is prevented or rendered impossible by the other party.”); MTS Co. v. Taiga Corp., 365 N.W. 2d 321, 327 (Minn. Ct. App. 1985) (“A rule in the law of contracts is that a party cannot raise to its advantage a breach of contract against another party when it has first breached the contract itself.”); Restatement (Second) of Contracts, §253(2) (1981) (“Where performances are to be exchanged under an exchange of promises, one party’s repudiation of a duty to render performance discharges the other party’s remaining duties to render performance.”); Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp., 693 F. 2d 748, 760 (8th Cir. 1982) (“A tender by one party is waived where the other party declares a repudiation of the contract or takes any position which would render tender a ‘vain and idle ceremony.’”).

In this case it is undisputed that payment of the \$150,000 settlement was impossible over a 4-½ year time interval because Respondent repudiated the settlement agreement, refused to accept payment, and challenged the settlement agreement in court.

Because Respondent's actions prevented Appellant from performing its promise to pay, no indebtedness was created and there was no "default in failing to pay money when due."

II. THE AMOUNT OF APPELLANT'S LIABILITY WAS UNASCERTAINABLE BECAUSE RESPONDENT CHALLENGED THE VALIDITY OF THE MEDIATED SETTLEMENT AGREEMENT.

Respondent cites Solid Gold Realty, Inc. v. Mondry, 399 N.W. 2d 681 (Minn. Ct. App. 1987) in support of his argument that Appellant's potential liability was readily ascertainable and therefore interest is owed. Solid Gold was a contract case where the plaintiff claimed common law prejudgment interest on an award of a sales commission pursuant to a real estate listing agreement. The plaintiff's claim for a sales commission was based on real estate sale prices and a commission rate that were known by the defendant. The Court of Appeals granted prejudgment interest from the date plaintiff made demand for payment because the defendant "could have determined the amount of his *potential* liability by reference to generally recognized standards such as market value." 399 N.W. 2d at 684.

Here, it is undisputed that the Mediated Settlement Agreement contained a liability that was ascertainable and liquidated. (i.e., \$150,000). Had the Respondent made a claim for this amount the rationale of the Solid Gold case would apply. However, he didn't do so. To the contrary, Respondent claimed the amount was inadequate and that he should be entitled to go forward with his medical malpractice lawsuit for an unspecified amount of damages. Common law prejudgment interest is not allowed in personal injury actions such as medical malpractice. Potter v. Hartzell Propeller, Inc., 189 N.W. 2d 499, 504

(Minn. 1971) (“In determining whether a plaintiff is entitled to interest on the verdict, we have distinguished between liquidated and unliquidated claims, allowing interest in unliquidated claims only where the damages were readily ascertainable by computation or reference to generally recognized standards such as market value and not where the amount of damages depended upon contingencies or upon jury discretion (as in actions for personal injury or injury to reputation).”).

The facts in Eide v. State Farm Mut. Auto. Ins. Co., 492 N.W. 2d 549 (Minn. Ct. App. 1992) are similar to those here. In Eide, an insured challenged the validity of her lawyer’s settlement of her uninsured motorist claim. The trial court ruled the settlement valid and enforceable after 6 years of additional litigation and a jury finding that the insured had ratified or accepted the settlement. The insured then claimed interest from the date of the settlement that she had challenged. In denying the claim of interest, the Minnesota Court of Appeals held: “The amount owed Eide [the insured] by State Farm did not become readily ascertainable until the trial court’s decision.” 492 N.W. 2d at 556.

III. APPELLANT’S RETENTION OF THE FUNDS IS NOT A LEGAL OR EQUITABLE BASIS FOR AWARDED INTEREST.

The use or retention of money, standing alone, does not create either a legal or equitable obligation to pay interest. There must also be an agreement to pay interest. Lund v. Larsen, 24 N.W. 2d 827, 829 (Minn. 1946) (“Interest in the strict sense of the term being compensation for the use of another’s money, liability for interest is purely contractual, with the consequence that a person is not chargeable with interest unless he

has agreed to pay it.”); Cady v. Bush, 166 N.W. 2d 358, 362 (Minn. 1969) (denying equitable relief to purchasers of commercial property and holding “nor is it within the province of equity to rewrite or abrogate contracts to protect parties from consequences which are attendant upon their voluntary abandonment of a contract, the consequences of which abandonment were reasonably foreseeable when the contractual obligations were assumed.”). No agreement to pay interest is present here. The Mediated Settlement Agreement contains no provision for the payment of interest.

Moreover, the sole cause of the 4-½ year delay in paying the settlement money was Respondent’s refusal to accept it and Respondent’s repudiation of the settlement agreement. As a result of Respondent’s actions, Appellant incurred additional and unnecessary litigation expenses in the amount of \$57,316.58. Respondent is not entitled to equitable relief when he has not acted equitably. Glodek v. Rowinski, 390 N.W. 2d 477, 482 (Minn. Ct. App. 1986) (“the payment of prejudgment interest cannot be required of an obligor when it is the obligee who has resisted payment of the debt.”).

Minn. R. Civ. Pro. 67.01 provides a mechanism for depositing money with the court. It does nothing more. It does not require a deposit. It does not say who is entitled to interest if the court orders deposit in a bank. It does not create a legal obligation to pay interest. Respondent argues that depositing the \$150,000 with the court would have “relieved the Appellant of any interest obligations.” (Respondent’s Brief, at 24). Respondent misses the point. Appellant had no legal obligation to pay interest. If it did, a deposit under Rule 67.01 wouldn’t have altered liability for interest at the statutory rate of 6%. Respondent cites Thompson v. Gasparro, 257 N.W. 2d 355 (Minn. 1977). In that

case interest was awarded because there was an underlying legal obligation to pay it: the promissory note contained a provision for interest and there had been a default in paying the promissory note when due. The award of interest was not based on Rule 67.01.

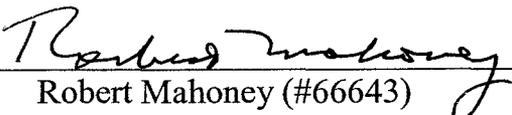
CONCLUSION

For the foregoing reasons, and for the reasons stated in its initial Appellate Brief, Appellant CDI respectfully requests that (1) the Court reverse the Judgments of March 26, 2009 and April 2, 2010 awarding interest to Respondent Mr. Soderbeck, (2) the Court hold that Respondent Mr. Soderbeck is not entitled to interest on the \$150,000 settlement, and (3) the Court grant such other relief as it deems just and appropriate.

Dated: June 21, 2010

Respectfully submitted,

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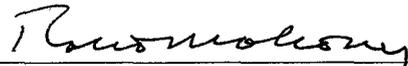
CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportionally-spaced 13-point Times New Roman font. The length of this Brief contains 1,673 words. This Brief was prepared using Microsoft Word 2000.

Dated: June 21, 2010

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