STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1307

Gary H. Newman,
Appellant,

vs.

Gary Newberg, et al.,
Respondents.

Filed August 19, 2008
Affirmed
Ross, Judge

Kandiyohi County District Court
File No. 34-CV-06-342

John E. Mack, 26 Main Street, P.O. Box 302, New London, MN 56273 (for appellant)

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Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Muehlberg, Judge.*

U N P U B L I S H E D O P I N I O N

ROSS, Judge

This appeal arises from a dispute between a former dairy farm consultant, Gary Newman, and dairy farmer clients, Gary and Julie Newberg, regarding the payment for

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

consultation services that Newman provided to the Newbergs from 1995 to 2000. The Newbergs paid Newman in 1996, but then they routinely told him that they lacked funds to pay, to which Newman responded, "Don't worry about it." But in 2004, Newman sent a letter to the Newbergs asking for payment for his services from 1995 to 2000. The Newbergs did not pay, and Newman sued for breach of contract. Before trial, the district court dismissed most of Newman's claims based on the statute of limitations, and during trial the court dismissed the remaining claims on substantive grounds. We affirm.

FACTS

Gary Newman provided veterinary consultation services to Gary and Julie Newberg from June 1995 to July 2000 to help them increase milk production on their dairy farm. The parties entered no written agreement, and Newman did not directly bill the Newbergs. Rather, he sent them a monthly client newsletter that included a general formula that could be used to calculate their own bill. The Newbergs made only two payments in 1996, each for $500. From 1996 to 2000, the Newbergs continually told Newman that they did not have the money to pay for his services. Each time Newman responded, "Don't worry about it."

Newman did not attempt to collect from the Newbergs until November 2004 when he prepared an itemized statement for services that dated back to June 1995. The principal sum for services on that statement was $33,875, plus interest through May 2006 at a rate of 12 percent annually, or $32,472.05. The Newbergs did not pay Newman, and he sued them in May 2006.

The Newbergs moved for summary judgment on the theory that Newman's claims were barred by the six-year statute of limitations and that the parties had never agreed to any interest obligation. The district court granted partial summary judgment, dismissing the claims on service charges incurred before March 2000 based on the statute of limitations, and dismissing any claim for interest. The only factual issue remaining for a bench trial was whether and to what extent the Newbergs were liable for the outstanding payment for Newman's services from March 2000 through July 2000.

Newman tried the case pro se to the court in January 2007. He called Gary and Julie Newberg to testify, but he did not testify himself. Gary Newberg agreed that Newman had provided veterinarian consultation services, but he disagreed with Newman about the amount owed. He did not testify to what amount he thought he owed. He testified that he did not agree with Newman's bill because Newman's cow totals, which were part of Newman's billing formula, were inaccurate. Newman offered two exhibits during Gary Newberg's testimony, but he elicited no testimony explaining them. Newman did not introduce any testimony or exhibits specifying the amount of money Newman believed he was owed or the amount that the Newbergs believed that they owed. Nor was any testimony given explaining Newman's general billing formula. Newman asked Gary Newberg several questions about whether Newman's repeated response—"Don't worry about it"—to the Newberg's statements that they could not pay was an agreement to defer payment. Newberg gave conflicting and contextually unclear affirmative and negative answers regarding whether the parties had arranged to defer payments.

Julie Newberg also testified that she and Gary Newberg owed Newman money for his services from March to July of 2000. But she also did not testify as to any specific amount owed. Newman rested his case after he questioned Julie Newberg.

The Newbergs then moved for judgment as a matter of law rather than present any evidence, on the basis that Newman had failed to prove damages. The Newbergs contended that because there was no evidence as to the date of the alleged agreement, the number of cattle served, the milk prices from March to July 2000, or the formula that Newman used to calculate his bill, the district court could not apply the formula and Newman had therefore failed to prove damages.

The district court reasoned that even if it applied a lenient standard to Newman as a pro se party, it could not overlook Newman's failure to provide the court with any evidence to determine his claim as to damages against the Newbergs. Because there had been no evidence introduced at trial regarding the amount of money the Newbergs owed Newman, including any evidence from Newman himself, the district court concluded that it could not calculate or award damages. In its dismissal order, the court noted that Newman also had failed to prove that he had a contract with the Newbergs covering the material terms or that the parties had entered any agreement for later, deferred payments. Newman had asserted during his opening statement that there had been a deferral agreement, but the district court explained that an opening statement is not evidence. The district court found that Newman's trial exhibits failed to include information proving Newman's fees and that there was no other evidence as to the amount. It held Newman

failed to prove he had a contract with the Newbergs and granted the Newbergs' motion for judgment as a matter of law.

Newman moved for a new trial under rule 60 of Minnesota Rules of Civil Procedure. He argued that the district court mistakenly concluded that the statute of limitations barred his pre-March 2000 claims and that he was not entitled to interest on the unpaid bill. The district court denied Newman's motion, and Newman appeals.

D E C I S I O N

Gary Newman challenges the district court's statute-of-limitations dismissal and argues that the district court failed to make a reasonable effort at trial to determine damages. We first consider the district court's decision to grant partial summary judgment.

I

Newman contends that the district court erred when it granted partial summary judgment against him by rejecting his argument that equitable estoppel extended his time to file suit against the Newbergs. On appeal from an order granting summary judgment, this court considers whether there are any genuine issues of material fact and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We view the evidence in the light most favorable to the party against whom summary judgment was entered. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The statute of limitations is a harsh but strict mechanism designed to prevent one party who has a claim against another from waiting an unreasonable amount of time to

bring that claim. *Bachertz v. Hayes-Lucas Lumber, Co.*, 201 Minn. 171, 176, 275 N.W. 694, 697 (1937). "Its general purpose is to prescribe a period within which a right may be enforced, afterwards withholding a remedy for reasons of private justice and public policy." *Id.* (quotation omitted); *see also Bustad v. Bustad*, 263 Minn. 238, 244, 116 N.W.2d 552, 556 (1962) (stating that the salutary purpose of the statute of limitations is to discourage lawsuits based on stale claims). We are mindful that the application of the statute of limitations leads to what may appear to be an unfair consequence of barring Newman's claims against the Newbergs. Newman leniently told the Newbergs not to "worry about" the cost of his services. But we must apply the statute of limitations, and, in doing so, we agree that the district court properly barred Newman's pre-March 2000 claims and granted the Newbergs' motion for partial summary judgment.

This court reviews de novo a district court's construction and application of a statute of limitations. *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003). Because Newman's claim against the Newbergs is a contract claim, a six-year limitations period applies. Minn. Stat. § 541.05, subd. 1(1) (2006). The period begins to run when "the cause of action accrues or can be commenced." *Hughes v. Lund*, 603 N.W.2d 674, 677 (Minn. App. 1999). A cause of action accrues when a claim could be filed that would survive a motion to dismiss. *Noske*, 670 N.W.2d at 742. When a money obligation is due in installments, the general rule is that a cause of action arises on each installment and the statute of limitations runs against each installment when it becomes due. *Honn v. Nat'l Computer Sys., Inc.*, 311 N.W.2d 1, 2 (Minn. 1981). Six years before Newman filed this lawsuit in May 2006, in May 2000, Newman's March 2000 service invoice

became due. In this framework, the statute of limitations bars claims for Newman's services before March 2000.

Newman argues that equitable estoppel applies to prevent the statute from barring those claims because Gary Newberg allegedly made assurances that he would pay. Newman contends that these assurances tolled the statute of limitations. But he did not present this argument either in response to the Newbergs' motion for summary judgment or at trial, thereby waiving it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

We observe that Newman raised this issue after trial, but it does not appear that he could have established equitable estoppel even if he had raised it in a timely fashion. To prove estoppel, Newman had to show that the Newbergs made assurances or representations that the debt would be paid and that he reasonably relied on those assurances or representations to his detriment. *See Albachten v. Bradley*, 212 Minn. 359, 364, 3 N.W.2d 783, 786 (1942) (holding that a debtor will be estopped from asserting the statute of limitations if, prior to the expiration of the limitation period, the debtor makes a promise to pay and the creditor relies on that promise to his detriment). Gary Newberg denied acknowledging that he owed Newman any specific amount or that he would pay later. He testified that he repeatedly told Newman that they did not have the money to pay him and that Newman would respond, "Don't worry about it." Although after trial Newman pointed the district court to Gary Newberg's trial testimony acknowledging that he would defer paying, the district court's analysis indicates that it rejected the contention that this testimony proved that the Newbergs made assurance of future payments for the pre-March 2000 services. This finding was not inappropriate; the trial transcript reveals

various exchanges regarding this point and Gary Newberg's testimony is contradictory and confusing because of the argumentative form of Newman's questioning. And when Newman wrested Newberg's admission about deferring payment, he failed to establish whether Newberg admitted that the alleged agreement to defer payment regarded the pre-March 2000 services or the post-March 2000 services. Additionally, there was never any testimony as to what amount was to be deferred, and the Newbergs clearly did not agree to Newman's calculation. The district court's fact-finding after receiving all trial testimony was not clearly erroneous, and its pretrial grant of summary judgment on statute-of-limitations grounds is affirmed.

II

Having determined that the district court correctly applied the statute of limitations to bar Newman's pre-March 2000 claims against the Newbergs, we next address whether the district court erred when it granted the Newbergs' motion for judgment as a matter of law concerning Newman's March to July 2000 claims. We address the district court's determination that the parties never had a meeting of the minds regarding the material term of cost for Newman's services and that Newman had not proven his claim for damages.

The Newbergs moved for judgment as a matter of law under rule 50.01, but the district court appropriately analyzed and decided the motion as if it had been brought properly, under rule 41.02(b), though it also inadvertently referred to rule 50.01. By its terms rule 50.01 is reserved for motions asserted "during a trial by jury," and allows the district court to grant the motion only if no reasonable jury could find in favor of the

nonmoving party. Minn. R. Civ. P. 50.01(a). A rule-50.01 judgment as a matter of law is appropriate only if the evidence predominates so overwhelmingly that the court would be obliged to set aside a contrary verdict as manifestly against the weight of the evidence. *Midland Nat'l Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). But in cases tried to the court, a defendant may bring a motion to dismiss under rule 41.02(b), which allows the district court to first weigh the plaintiff's evidence and find facts upon which it will determine whether dismissal is appropriate as a matter of law. The district court here found facts, and, based on those findings, rendered judgment against Newman, following the appropriate rule-41.02(b) framework. When reviewing a dismissal under rule 41.02, we will reverse only when the district court abused its discretion. *Bonhiver v. Fugelso, Porter, Simich & Whiteman, Inc.*, 355 N.W.2d 138, 144 (Minn. 1984).

Newman's trial presentation focused on the existence and nature of the alleged contract and of the Newbergs' duty to pay. The district court found that Newman had provided services to the Newbergs, who admitted they owed some amount of money to Newman, but Newman never asked them to testify to the amount. The district court considered that the Newbergs disputed the amount that Newman claimed they owed to him. Although they had an idea of how one might calculate damages, they never accepted the formula as calculated by Newman or admitted to any specific sum that the alleged oral agreement required them to pay to Newman. The district court found that Newman failed to prove he had a contract with the Newbergs and that Newman did not, during the presentation of his case at trial, provide any evidence explaining the specific basis for the amount he claimed. The court highlighted that Newman failed to testify or

offer any other evidence of the amount due under any agreement. Based on this reasoning, the district court granted judgment as a matter of law because it concluded that Newman had proven neither the establishment of a contract nor particular damages for breach.

The district court's conclusions are supported by the evidence. Newman argues that the district court erred by granting the Newbergs' motion for judgment as a matter of law because the district court could have concluded that a contract exists and computed the amount the Newbergs owed based on the formula Newman sent to his clients. Our review of the trial record leads us to a different conclusion. Newman presented no trial evidence from which the district court could reasonably estimate, let alone determine, any specific contract term or damages amount. A service contract's essential terms include amount of payment. *Poser v. Abel*, 510 N.W.2d 224, 228 (Minn. App. 1994), *review denied* (Minn. Feb. 24, 1994); *see Ryan v. Ryan*, 292 Minn. 52, 55, 193 N.W.2d 295, 297 (1971) (requiring "meeting of minds on the essential terms of the agreement" to form a contract); *see also Druar v. Ellerbe & Co.*, 222 Minn. 383, 395, 24 N.W.2d 820, 826 (1946) (stating that when essential terms of contract are vague, no contract exists). Although various equitable theories of recovery of some amount might have been available, Newman never raised any with the district court. And the party claiming damages has the burden of proving the amount of the damages. *Bonhiver v. Graff*, 311 Minn. 111, 132, 248 N.W.2d 291, 304 (1976).

Newman failed to meet this burden of proof. Gary Newberg testified that he had no specific agreement with Newman, although he acknowledged that Newman provided

services to him in 2000 and that he received Newman's monthly newsletter with the formula that Newman asserted as the means to calculate his monthly fees. Gary Newberg did not testify that he agreed with the calculation of the formula. He testified that he did not pay Newman, that he told Newman he could not pay, and that Newman told him not to worry about it. Gary Newberg testified also that he disagreed with the amount that Newman alleged that he owed, and no witness testified as to what that alleged amount was or ought to be. Newman never introduced evidence regarding what amount he claimed as damages, including the formula he sent to his clients. He introduced two documents as evidence, but he failed to state what the exhibits were or what they explained. These exhibits could not sufficiently illuminate the district court in determining any specific amount of damages under the alleged contract.

Although Newman's counsel on appeal correctly argues that the district court could have inquired of the parties and might have assisted Newman to develop a record of some amount the Newbergs may have believed they owed, we disagree that the court was obligated to do so. We cannot agree with Newman's argument that the district court should have been more active in assisting him to establish his case. The district court must remain impartial, even when presiding over a trial in which one party chooses to represent himself pro se. *See* Minn. Code Jud. Conduct Canon 3A(5) ("A judge shall perform judicial duties without bias or prejudice."); *see also Heinsch v. Lot 27*, 399 N.W.2d 107, 109 (Minn. App. 1987) (noting that pro se litigants face the same standard as represented parties). It was incumbent on Newman to prove his case, with or without an attorney. Although the Newbergs agreed that Newman had provided consultation

services and that they felt they owed money for those services, Newman offered no evidence to allow the district court to determine damages for the post-March 2000 services. This is a troublesome issue because the Newbergs admitted owing some amount, and we do not easily reach our holding. But the lack of evidence that the parties came to terms regarding the cost for Newman's services supports the district court's factual determination that they never had a meeting of the minds as to a material term. Because Newman failed to meet his burden under his contract theory, the district court did not abuse its discretion when it concluded that there was no evidentiary basis to support Newman's claims and granted the Newbergs' motion for judgment as a matter of law.

Affirmed.