

Court of Appeals, State of Michigan

ORDER

VELLA TRADER, personal representative of
ESTATE OF THELMA L. DEGOEDE,

V

COMERICA BANK,

Mark T. Boonstra
Presiding Judge

Pat M. Donofrio

Elizabeth L. Gleicher
Judges

Docket No. 317622

LC No. 2008-000191-CZ

The Court orders that the November 25, 2014 opinion is hereby VACATED, and a new opinion is attached.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 02 2014

Date


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

VELLA TRADER, personal representative of
ESTATE OF THELMA L. DEGOEDE,

UNPUBLISHED
December 2, 2014

Plaintiff-Appellant,

v

No. 317622
Kalamazoo Circuit Court
LC No. 2008-000191-CZ

COMERICA BANK,

Defendant-Appellee.

Before: BOONSTRA, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Plaintiff, Vella Trader, as personal representative of the estate of Thelma L. DeGoede, appeals as of right the trial court's opinion after a bench trial, finding that plaintiff was barred from seeking payment on three Certificates of Deposit (CDs) because the evidence suggested that any debt had already been paid. Because the trial court erred in applying Michigan's 20-year presumption of payment period and because the trial court clearly erred in finding that defendant proved its affirmative defense by a preponderance of the evidence, we reverse and remand.

I. BASIC FACTS

This is the second time this case has been to this Court. After the first bench trial, the trial court determined that plaintiff's claims were barred by the statute of limitations. But this Court in *Trader v Comerica Bank*, 293 Mich App 210; 809 NW2d 429 (2011), reversed, and a new trial was held. At the second trial, the parties stipulated to submitting the transcripts and evidence from the first trial, in addition to several other exhibits. No live testimony was heard.

The facts, for the most part, are not in dispute. It is what can be inferred from these known facts that the parties do not agree on. The relevant facts from the first trial were summarized in this Court's prior opinion, and it is included here:

On December 22, 1980, Industrial State Bank & Trust issued a CD payable to Thelma in the amount of \$10,000. The CD had a maturity date of June 22, 1981, and a stated interest rate of 15.673 percent, payable at maturity. The CD indicates that it is "Non-Transferable" and is "TYPE 20." The front of the CD contains the following language:

At maturity and upon presentation of this Certificate properly endorsed payment of this deposit will be made by Industrial State Bank & Trust Company. . . . Upon written notice, the Bank reserves the right to redeem this Certificate on the original or any subsequent maturity date and further reserves the right to change the interest rate payable for any renewal period. This Certificate is designated by type above with special provisions by type as set forth on the reverse of this Certificate.

The back of the certificate contains three boxes. The first box is titled, "CERTIFICATE DESCRIPTION BY TYPE" and lists four different types of certificates. A "Type 20" certificate is described as follows: "MONEY MARKET CERTIFICATE: The Certificate will be **automatically renewed** for a like period unless presented for payment. Renewal rates are based on the Treasury Bill Rates as defined by the Federal Deposit Insurance Corporation in effect the week of renewal. This Certificate is non-negotiable." The second box is titled "FINAL PAYMENT INFORMATION" and has blanks for payment information that have not been filled in. The third box is titled "Show Payment method" and also has blanks that have not been filled in. Underneath the last box are the words "Customer endorsement," and no endorsement has been made.

On June 26, 1981, Industrial State Bank & Trust issued a CD payable to Thelma in the amount of \$10,000. The CD had a maturity date of December 25, 1981, and a stated interest rate of 14.189 percent, payable at maturity. The remaining terms and conditions on the front and back of the certificate are identical to those contained on the CD issued on December 22, 1980, with one exception: the front of the CD does not state that it is nontransferable. There are no signatures or notations on the back of the certificate indicating final payment.

On July 13, 1982, Industrial State Bank & Trust issued a CD payable to Thelma in the amount of \$10,000. The CD had a maturity date of January 11, 1983, and a stated interest rate of 13.098 percent, payable at maturity. The terms and conditions on the front of the certificate are identical to those of the first two, with two exceptions: First, along with the term "NON-TRANSFERABLE" on the front, the CD also states that it is "Non-Negotiable." Second, instead of stating that the reverse side of the certificate states provisions regarding the types of certificates, the certificate states, "This Certificate is designated by type and the description and provisions thereof are set forth on separate literature." Accordingly, the back of the certificate is somewhat different from the other two. The first box is titled "CERTIFICATE TYPE KEY" but does not contain language describing the certificate types; it does not contain language discussing the renewability of type 20 money market certificates. As with the other two CDs, the back of this certificate also contains the boxes for final payment information and payment method and also an area for customer endorsement. Similarly, there are no signatures or notations on the back indicating that final payment was made.

Thelma died on May 6, 2005. At that time, both plaintiff and Thelma's son, John DeGoede [John III¹], were aware that that Thelma had a safety deposit box and that the box contained CDs. According to plaintiff, Thelma told her in 2004 that the safety deposit box contained three CDs, one for each of Thelma's three children with John DeGoede. Thelma told plaintiff at that time that she had recently attempted to present the CDs for payment but that defendant had refused to pay. Between 45 and 60 days after Thelma's death, John [III] retrieved the CDs from Thelma's safety deposit box.

John [III] presented the CDs to Comerica Bank for payment. Comerica Bank denied the request to redeem the CDs because the bank had no record of the CDs.

[*Trader*, 293 Mich App at 211-214.]

At that first trial, Susan Schmidt, Senior Vice President and Quality Director of Comerica Bank, testified for defendant. Schmidt testified that she is familiar with defendant's record-keeping practices. She testified that defendant is legally obligated to report to the United States government on 1099 forms all interest that it pays on its customers' accounts. Schmidt indicated that when defendant acquires a bank, like it did with Industrial State Bank & Trust (ISB) in 1982, it eventually converts the account numbers of the acquired bank into defendant's unified indexing system. According to Schmidt, defendant converted the account numbers of ISB into Comerica's unified account-number system in 1986. Also, Schmidt testified that at the time of the conversion, defendant did not require its customers to present their CDs in order to be redeemed.

At trial, defendant presented its 1099 interest-reporting records from 1985 through 2003. During this period, the records captured all interest paid on demand-deposit accounts. And because a CD is considered a time-deposit account, the existence of any CD should have been tracked on these records. Schmidt, however, testified that for 1985, the records failed to show *any* time-deposit accounts under Thelma's name.² Further, while there were other time-deposit

¹ Thelma was married to John DeGoede, and the two of them had three children during their marriage. John DeGoede III is one of the children. Because the husband and father, John, is referenced during the second trial, there was a need to differentiate between the two Johns. Hence, "John" will refer to the father/husband, and "John III" will refer to the son.

² Even though the CDs were jointly owned by Thelma and John, the "primary" owner was Thelma. As a result, only Thelma's social security number appeared on the CDs. Schmidt explained that because the CDs only had Thelma's social security number, they would have appeared under records for Thelma, not John.

accounts that appeared on Thelma's records from 1986 onward, there was no reference to any of the three CDs at issue.³

As noted previously, the trial court at the first trial determined that plaintiff's claims were barred by the statute of limitations. *Trader*, 293 Mich App at 214. But this Court reversed, holding that, because the CDs all automatically renewed, any claim did not accrue until a demand for payment had been made. *Id.* at 218-219. Thus, the period of limitations started to run only after John III demanded payment after Thelma's death in 2005. *Id.* at 219. Consequently, the suit was filed within six years of that demand, and the trial court erred in precluding the claim on the basis of the statute of limitations. *Id.*

At the retrial, the parties stipulated to rely on the record of the prior trial, while supplementing with additional exhibits. The primary new piece of evidence was a copy of the Michigan Inheritance Tax Form in relation to the death of Thelma's husband, John, in 1992. Robert Soltis, who was plaintiff's attorney at the first trial,⁴ was the appointed personal representative of John's estate. Consequently, it was his responsibility to file the Inheritance Tax Form in order to close out the estate. Of note, the tax form required a listing of all accounts or property jointly held between John and his spouse, Thelma. In order to fill out the tax form, Soltis asked Thelma for this information. Notably, Thelma, while supplying this information, listed five other CDs that she owned jointly with John, but she did not supply any information regarding the three CDs at issue.

During closing argument, defendant maintained that the CDs at issue had been paid already. Defendant first relied on the premise that because a 20-year presumption of payment exists and because over 30 years had lapsed from when the CDs initially were issued to when they were presented in 2005 for redemption, plaintiff had to rebut the presumption of payment with clear and convincing evidence. Defendant further argued that Thelma's omission of any reference to these three CDs was tantamount to an admission that the CDs had already been redeemed. Defendant finally argued that when looking at the evidence as a whole, a reasonable inference is that after the first CD (CD 1) matured, it was rolled over into a second CD (CD 2), which was rolled over into a third CD (CD 3) after it matured, which was rolled over into a fourth CD (CD 4) after it matured. This final CD was documented as Exhibit L and had a listed principal value of \$13,158. Thus, defendant argued that the same \$10,000 was used to fund all of the CDs. The proffered reason that the last CD had an amount of \$13,158 instead of \$10,000 was because defendant must have agreed to pay John all the interest that was due from the prior

³ The 1099 records for Thelma's deceased husband, John, also were admitted, and they likewise did not reflect that any interest was paid on any of the three CDs.

⁴ Because of his involvement with this tax form, and his potential to be a witness, he was replaced as counsel for the second trial.

CDs.⁵ Defendant asserted that the extra \$3,158 reflected nearly exactly the amount of interest that would have accrued on the prior three CDs up until that point.

Plaintiff argued that Michigan does not have a 20-year presumption that CDs have been paid. Such a presumption has applied to mortgages, but not instruments like CDs. Second, plaintiff maintained that there were other explanations for Thelma failing to include the three CDs when reporting to Soltis, including that Thelma considered the CDs as the property of her children. Finally, plaintiff argued that defendant's theory on CD 1 being rolled over into CD 2 being rolled over into CD 3 being rolled over into CD 4 is not supported by "common sense," "logic[.]" or "math[.]" Plaintiff maintained that because the CDs all renewed automatically, there was no purpose in taking the extra step to roll over the CDs into new ones. Also, according to plaintiff, the interest calculations that defendant offered were incorrect because if defendant's theory were true, the interest accrued up until the issuance of CD 4 would have been \$2,992.31, not \$3,158.

After the conclusion of the trial, the court found that plaintiff failed to prove that defendant breached any contract by failing to pay on the CDs that were presented in 2005. The trial court first ruled that Michigan's 20-year presumption of payment in the context of mortgages applies in the instant context. Thus, in order to overcome the presumption, plaintiff had to show by clear and convincing evidence that defendant failed to make a payment on the CDs, but she failed to do so.

Alternatively, the trial court also found that even if the presumption of payment is inapplicable in Michigan in the context of CDs, defendant provided "adequate evidence" to prove its affirmative defense that the CDs already were paid. The only fact that the court noted as being relied on in making this conclusion was that Thelma failed to report the existence of these CDs to Soltis when she was asked to supply information related to all property that was jointly owned by her and her husband. Such an omission was evidence that the CDs already were redeemed or that they already had been "recategorized" as one or more of the other five CDs that Thelma provided to Soltis. Consequently, the court found that any joint deposit accounts owned by Thelma and John at the time of John's death were subsequently paid and closed before Thelma died.

II. ANALYSIS

A. 20-YEAR PRESUMPTION OF PAYMENT

⁵ Schmidt testified that if John had come into the bank and stated that he never had received any interest on any of the earlier CDs, it would have been up to the discretion of the bank manager whether to pay that interest. Schmidt surmised that the bank manager acquiesced to John's request, and that is why all of the prior interest was rolled over into the principal of the CD 4. Schmidt also explained that whichever spouse comes into the bank to purchase the CD is the person whose name gets listed as "primary" on the CD. This would explain why John's name would be listed first on that CD 4, instead of Thelma's.

Plaintiff first argues that the trial court “change[d] Michigan common law by adopting a new common law rule applying a 20-year presumption of payment.” At the outset, it should be clear that the trial court did not change any existing common law, nor did it adopt any new common law. Decisions of the circuit court have zero precedential value and therefore cannot be construed as having any effect on Michigan’s common law. See MCR 7.215(C)(2); *Defrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012); *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009) (collectively, only published opinions of this Court and opinions and orders of the Supreme Court have precedential value).

Instead, the trial court simply attempted to *apply* existing common law to the facts in this case. The court acknowledged that Michigan case law has previously only applied a 20-year presumption of payment in the context of mortgages and has not addressed how, or if, this would apply to CDs. As a result, the court considered if this case law should be applied to CDs as well. Looking to other jurisdictions for guidance, see *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006) (noting that decisions from foreign jurisdictions can be persuasive authority), the trial court ruled that it was appropriate to apply the 20-year presumptive period to CDs.

The trial court had the *authority* to apply established common law to the circumstances in the instant case. But the question of whether the trial court *properly applied the law* is a separate question. However, we need not address whether Michigan’s 20-year presumption of payment period for debts owed on mortgages, *Mich Ins Co v Brown*, 11 Mich 265, 272 (1863); *Abbott v Godfroy’s Heirs*, 1 Mich 179, 183-185 (1849), applies in the context of CDs because we note that such periods only start to run after a debt matures. See *Curtis v Goodenow*, 24 Mich 18, 20, 22 (1871) (noting that 20-year period started only after the debt matured, which in that case was six years after the mortgage was executed). Thus, even assuming that the presumption applies to the CDs, because these CDs in the instant case all automatically renewed, see *Trader*, 293 Mich App at 216-217, there is no final maturity date from which any 20-year period can start.

B. TRIAL COURT FINDING THAT CDs WERE PAID

Plaintiff also argues that the trial court erred in finding that the CDs had already been paid by the time John III tried to redeem them in 2005. The trial court’s findings of fact after a bench trial are reviewed for clear error. *Butler v Wayne Co*, 289 Mich App 664, 671; 798 NW2d 37 (2010). Clear error exists if, after reviewing the entire record, the reviewing court is left with a definite and firm conviction that a mistake was made. *Hannay v Dep’t of Transp*, 299 Mich App 261, 271; 829 NW2d 883 (2013).

In response to plaintiff’s claim for breach of contract, defendant raised the affirmative defense that any debt owed on the CDs had already been paid. Consequently, defendant had the burden of proving this affirmative defense. *Rasheed v Chrysler Corp*, 445 Mich 109, 131-132; 517 NW2d 19 (1994); *Lima Twp v Bateson*, 302 Mich App 483, 495; 838 NW2d 898 (2013). Being an affirmative defense, defendant had the burden of establishing it by a preponderance of the evidence. *Thomas Canning Co v Pere Marquette Railway Co*, 211 Mich 326, 332; 178 NW 851 (1920); see also *Stein v Home-Owners Ins Co*, 303 Mich App 382, 390-391; 843 NW2d 780 (2013); *In re Moss*, 301 Mich App 76, 84; 836 NW2d 182 (2013).

In its opinion, the trial court found that defendant provided “adequate evidence” that

any deposits associated with the certificates of deposit either (a) had already been repaid to [Thelma] or [John] or both of them; or (b) had already been recategorized as one or more of the Comerica Bank certificates that were listed in [the Inheritance Tax Form].

Although not contained in plaintiff's statement of the questions presented, she mentions that "adequate evidence" is not a recognized standard and certainly is not a "preponderance of the evidence." We agree that "adequate evidence" is not a recognized evidentiary standard, let alone the proper standard of "preponderance of the evidence." However, we do not believe that the court was using the term "adequate" to represent a standard of proof. Rather, it was meant in its literal sense, that defendant adequately proved its affirmative defense, i.e., it did so with a preponderance of the evidence. It is presumed that the trial court knows the law. *People v Gaines*, ___ Mich App ___; ___ NW2d ___ (Docket No. 310367, issued August 5, 2014), slip op, p 7 n 8. Regardless, because we are remanding for other reasons, the trial court is to ensure that it use the correct standard.

At trial, defendant argued that Thelma's silence or omission to Soltis was an "admission" that the three CDs had been paid already. To the extent that the trial court agreed that the omission was equivalent to a tacit admission that the CDs had been paid, the trial court erred. The law with regard to when one's silence can be treated as an admission is as follows:

Silence, when the assertion of another person would naturally call for a dissent if it were untrue, may be equivalent to an assent to the assertion. This, however, fixes the party, by adoption, with the other person's assertion, and thus it ceases to be a question of conduct evidence, and involves a genuine admission in express words. [*People v Solmonson*, 261 Mich App 657, 665; 683 NW2d 761 (2004) (quotation marks omitted).]

In other words, the admissibility of a tacit admission under MRE 801(d)(2)(B) requires "a statement . . . which the party has manifested an adoption or belief in its truth." *Id.* at 666. And a "statement" is either an oral or written assertion, or nonverbal conduct of a person intended as an assertion. *Id.* In *Solmonson*, the defendant's silence did not constitute an adoptive admission because there was no evidence of any assertion that the defendant adopted as his own statement. *Id.* at 666-667. Likewise, here, there was no initial assertion that was made to Thelma, so any "silence" (i.e., omission) cannot be construed as an admission of any assertion. The evidence shows that the purported "assertion" was a request from Soltis to provide information related to all of the joint property she owned with her deceased husband. This is not an assertion of a fact, which could be assented to or dissented to; it is merely a request or command. For example, if Soltis had found the CDs and said to her, "These old CDs already have been redeemed," and Thelma said nothing to contradict that statement, then her silence could be viewed as an admission of Soltis's factual assertion. However, that is not what happened here. As such, Thelma failing to include those CDs in her disclosure to Soltis was not an *admission* that they had been redeemed already, but it nonetheless could be deemed *evidence*.

But from this evidence, there are a number of reasonable inferences that could be drawn, with none more likely than the others: (1) Thelma did not mention the CDs to Soltis because she knew they had been redeemed, (2) with the CDs being locked in a safe deposit box for

presumably a long time, Thelma simply forgot about their existence, or (3) she thought and considered that the CDs were her children's. With multiple inferences able to be drawn, with none clearly more probable than the others, Thelma omitting the CDs in her report to Soltis, *by itself*, is insufficient to meet the preponderance of the evidence standard. In other words, by relying solely on this single piece of evidence, we are left with a definite and firm conviction that the trial court erred in finding that the CDs had been redeemed or "recategorized." Accordingly, we reverse the trial court's finding and remand for further proceedings.

III. CONCLUSION

We reverse the trial court's determination that Michigan's 20-year presumption of payment period was applicable for the instant case. And, we reverse the trial court's finding that the CDs had already been redeemed or "recategorized" because the trial court clearly erred in solely relying on Thelma's failure to list the three CDs in the report of her joint property to Soltis.

We remand for the trial court to reconvene the trial. The trial court in its discretion may allow the parties to submit additional evidence. Then, based on all the evidence submitted, the trial court shall conduct further fact finding with respect to each party and supply sufficient reasons for any fact found. Finally, the court is to determine if defendant met its burden of proving its affirmative defense by a preponderance of the evidence, and if not, the court is to determine if plaintiff proved her claim by a preponderance of the evidence.

We do not retain jurisdiction. No costs, as neither party prevailed in full. MCR 7.219.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher