

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

LOYD R. SIMPSON,

Appellant-Respondent,

v.

STEPHAN C. SIMPSON,

Respondent-Appellant.

DOCKET NUMBER WD69810 Consolidated with WD69831

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

Date: October 6, 2009

Appeal from:
Buchanan County Circuit Court
The Honorable Weldon C. Judah, Judge

Appellate Judges:
Division One: Jame E. Welsh, Presiding Judge, Victor Howard and Alok Ahuja, Judges

Attorneys:
Todd H. Bartels, Esq., and Sharon Kennedy, Esq., St. Joseph, MO, for appellant.
Frederick H. Riesmeyer, II, Esq., and Matthew P. Clune, Esq., Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

LOYD R. SIMPSON

Appellant-Respondent,

v.

STEPHAN C. SIMPSON,

Respondent-Appellant.

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BUCHANAN COUNTY

In 1999, Loyd Simpson and his wife Patricia Simpson agreed to sell their lumber business for \$1,771,000.00 to their son Stephan Simpson and his then-wife, Cindy Simpson. In connection with the transaction the parties signed two promissory notes on July 15, 1999, with the payments on the second note to commence after the first note was paid in full (which occurred in May 2000).

In 2002, Stephan and Cindy Simpson divorced. In connection with the dissolution of their marriage, Stephan agreed to remove Cindy from the second note. On March 4, 2002, Stephan Simpson ("Son") and Loyd Simpson and Patricia Simpson (collectively, "Father") signed a third promissory note in the amount of \$847,711.69 (the "Note"), which the parties believed at that time to be the current unpaid balance on the second note. The second note was canceled on or about April 4, 2002.

After the Note's inception, Son made timely \$12,500.00 monthly payments to Father for an extended period. From July 2005 through August 2007, however, Son missed twenty-five installment payments. In September 2006, Father's counsel sent Son's counsel a letter declaring the Note to be in default due to Son's failure to make any payment since March 2006, and demanding immediate payment of the Note's entire remaining balance.

On January 31, 2007, Father filed suit against Son in Buchanan County Circuit Court, to collect the entire remaining unpaid balance on the Note. Son counterclaimed, alleging that, in light of his payments on the first and second notes, the \$847,711.69 balance stated in the Note did not correctly reflect the amount which remained owing from Son to Father for purchase of the lumber business, but was instead the product of mutual mistake.

The case was tried to the court on April 28, 2008. On May 14, 2008, the court issued its judgment. The court found in Father's favor on his breach of promissory note claim, and entered judgment in his favor for \$97,242.58, and attorneys fees and expenses of \$12,500.00. The court

rejected Son's counterclaims, based on its conclusion that Son "failed to establish by clear, cogent and convincing evidence that the sum calculated due under the Note was erroneous and the product of mutual mistake."

Both Father and Son appeal.

AFFIRMED IN PART, AND REVERSED AND REMANDED IN PART.

Opinion Holds:

Son's first and second Points Relied On are founded on his claim that the Note mistakenly states the remaining balance owed by Son to Father as of the time the Note was made, March 4, 2002. Although the face amount of the Note is \$847,711.69, Son contends that, "when all payments made by [Son] to [Father] [on the first two notes] were properly applied, the correct principal amount for the [] Note [] was \$812,719.17 and not the stated amount of \$847,711.69." As a result, Son claims that the remaining unpaid balance as of the time of trial was \$31,038.91, not the \$97,242.58 found by the trial court.

Given our standard of review, and the fact that the burden of proof was on Son to prove mutual mistake by clear and convincing evidence, we cannot overturn the trial court's judgment absent conclusive (or near-conclusive) evidence establishing Son's right to relief. Such evidence simply does not exist here. The fact that Father did not affirmatively controvert Son's evidence on Son's mutual mistake claim is not determinative. We accordingly reject Son's first and second Points Relied On.

Father cross-appeals the trial court's failure to award him all interest owing on the assumption that payments were made as specified in the Note. Under the plain language of the Note, Son was required to make a \$12,500.00 payment to Father on the first day of *every* month until the entire sum of the Note was paid. The Note does not give Son the right to prepay. Son does not dispute that he failed to faithfully execute his obligation to make \$12,500.00 payments to Father every month. Under the applicable "perfect tender in time" rule, the borrower is typically required to pay the full principal, the accrued interest, and the unaccrued interest that would be due during the life of the note in order to discharge his contractual obligation to the lender on the unmatured note. Son was not entitled to prepay the debt and thereby terminate the accrual of the 6% interest specified in the Note, and Father was entitled to recover the full amount of the unpaid principal and interest to which the plain terms of the Note entitled him. We accordingly reverse the damage award and remand for recalculation of the principal and interest remaining unpaid.

In his third Point, Son argues that the "trial court erred in its rulings that [Son] was in default [on the Note] and that [Father] was entitled to attorney's fees and expenses because . . . [Son] ha[d] actually paid more than the amount currently due on the Note, the original balance of the note was too high as a result of mutual mistake, and [Father] actually benefitted from, and was not damaged by, [Father]'s voluntary acceptance of these early and excess payments." As noted above, however, the Note unambiguously requires Son to pay Father \$12,500.00 every month until the indebtedness is paid in full. Further, the Note provided that "[i]n the event that [Son] fails to transmit to [Father], any of the installments which accrue and become payable . . . ,

[Father] may without further notice declare this Promissory Note in default. . . . [and] [i]n the event of default as set forth herein, [Son] agrees to pay any costs incurred by [Father] which are associated with the collection of this Promissory Note, including but not limited to, reasonable attorney's fees and expenses." Because Son admits he did not make all of the monthly \$12,500.00 payments the Note unambiguously requires, and unambiguously agreed to pay Father's attorneys fees and expenses in the event of such a default, the trial court was required to award Father his reasonable attorneys fees. For the same reason, we grant Father's motion seeking an award of his attorneys fees on appeal, and remand to the trial court to determine the appropriate amount of Father's recoverable appeal-related fees.

Before: Division One: Jame E. Welsh, Presiding Judge, Victor Howard and Alok Ahuja, Judges

Opinion by: Alok Ahuja, Judge

October 6, 2009

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.