COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-975

LINDA A. HARRISON

vs.

ROBERT H. CUCURULL.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury-waived trial, a judge of the Superior Court found that Robert H. Cucurull had breached an implied contract with Linda A. Harrison, and awarded Harrison $217,546.43 in damages and prejudgment interest. On appeal from that judgment, Cucurull contends that (1) the judge erred in finding a valid contract; (2) in any event, the applicable statute of limitations bars Harrison's claim; and (3) the judge prejudicially erred in admitting handwritten notes from Harrison. For the reasons that follow, we affirm.

Discussion. "We review the trial judge's findings of fact, including all reasonable inferences that are supported by the evidence, for clear error." Aggregate Indus. -- Northeast Region, Inc. v. Hugo Key & Sons, Inc., 90 Mass. App. Ct. 146, 149 (2016), citing Twin Fires Inv., LLC v. Morgan Stanley Dean

Witter & Co., 445 Mass. 411, 420 (2005). See Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996). However, the judge's conclusions of law are reviewed de novo. Aggregate Indus. -- Northeast Region, Inc., supra, citing Martin v. Simmons Prop., LLC, 467 Mass. 1, 8 (2014).

Prior to trial, Cucurull successfully moved to dismiss the claims involving events that occurred prior to a bank's 1992 foreclosure of Harrison's home.[1] There is no appeal from this dismissal. Therefore, we confine our review to the judge's determination that, after the foreclosure on Harrison's home, Cucurull entered into a subsequent agreement to repay a prior outstanding loan she made to Cucurull and his brother.

"In the absence of an express agreement, an implied contract may be inferred from (1) the conduct of the parties and (2) the relationship of the parties." Vita v. Berman, DeValerio & Pease, LLP, 81 Mass. App. Ct. 748, 754 (2012), quoting T.F. v. B.L., 442 Mass. 522, 526-527 (2004). Accordingly, the judge's finding of a contract here required proof that there was a benefit to Cucurull, that Harrison expected Cucurull to pay for

[1] The dismissal was based on the fact that the events in question were time barred under the statute of limitations. The trial judge never stated that she overruled the motion judge on this issue, see Riley v. Presnell, 409 Mass. 239, 242 (1991) (trial court retains power to revisit any previously decided issue in case until entry of final judgment), and Harrison does not challenge this dismissal on appeal.

that benefit, and that Cucurull expected, or a reasonable person should have expected, to pay for that benefit. See T.F., supra at 527.

The judge credited Harrison's testimony in full and only partially credited Cucurull's testimony. She found that in 1989 Harrison took out a mortgage on her home in the amount of $154,400, in order to help fund a towing company that Cucurull and his brother, Roderick, coowned.[2] In turn, the two brothers agreed to assume the mortgage payments on Harrison's home. They were to make these payments directly to the bank. However, they failed to make sufficient payments, and in 1992 the bank foreclosed on Harrison's home.

Subsequent to this foreclosure, Harrison contends that Cucurull entered into another agreement to repay the remaining balance on the loan via monthly payments directly to her in the amount of $550 (second agreement). At the time of this second agreement, the towing business still existed and Cucurull, who was the only officer of the company -- he was identified in the company's articles of dissolution filed in November 1998 as the president, treasurer, clerk, and director -- and responsible for keeping the business afloat.

[2] Harrison initially gave the money to Roderick, but within a couple of months, agreed that, given Roderick's medical struggles, the money should be in Cucurull's possession. Roderick died around 2002.

Cucurull does not dispute that he made substantial payments to Harrison to the tune of over $51,000 dollars.[3] Rather, he contends that Harrison's claim fails because he made these payments to help Harrison and his brother, and not for his own benefit. Cucurull's challenge to attaining a benefit from this agreement is belied by his own testimony, in which he stated that he made these payments to "help . . . Rod's Towing" -- a business the judge reasonably found he coowned. On this evidence, a reasonable inference can be drawn that, as coowner of Rod's Towing, Cucurull had just as much to gain from the success and elimination of business debt as his brother. See O'Brien v. Pearson, 449 Mass. 377, 384 (2007) (plaintiff's version of events provided minimal necessary factual support for reasonable inference). Accordingly, we discern no error of law or fact in the judge's finding of an agreement and, therefore, the "judge's findings must stand." Touher v. Essex, 87 Mass. App. Ct. 837, 843 (2015) (affirming trial judge's finding regarding existence of implied agreement).[4]

[3] The parties do not dispute that in total Harrison received payments in the amount of $51,700, with a remaining balance of $102,700.

[4] We also see no merit to Cucurull's assertion that the claim for an "implied agreement" was waived. Harrison fulfilled her obligation to preserve the question whether an agreement existed by properly pleading a claim for breach of an agreement and subsequently arguing at trial that an agreement existed. See Massachusetts Cash Register v. Comtrex Sys. Corp., 901 F. Supp.

We turn now to Cucurull's further contention that Harrison's claim is barred by the six-year statute of limitations imposed by G. L. c. 260, § 2. "Massachusetts courts have long held that a party may toll or take an indebtedness out of the operation of the applicable statute of limitations by making a partial payment on a debt." Zelby Holdings, Inc. v. VideogeniX, Inc., 92 Mass. App. Ct. 86, 88 (2017). "The longstanding rationale for this rule is simple: the partial payment serves as 'an acknowledgment that an indebtedness exists and, from the payment, the law implies a new promise to pay the balance.'" Id., quoting Provident Inst. for Sav. v. Merrill, 311 Mass. 168, 171 (1942).

While the record is unclear as to when in the 1990s Cucurull commenced his payments to Harrison, there is evidence coming from Cucurull himself that he made a substantial number of payments to Harrison and, more importantly, that he made these until July 2008; this evidence corroborated Harrsion's testimony, and supported the judge's finding, that Curcurull's last payment to Harrison was on July 20, 2008. Furthermore, based on the partial payment doctrine, Cucurull's July 2008 payment to Harrison tolled the statute of limitations of the second agreement to July 20, 2014. Accordingly, the statute of

404, 415 (D. Mass. 1995) (agreement may be "express or implied, in writing or oral").

limitations on this agreement had not run when on June 30, 2014, Harrison filed her complaint.

Finally, Cucurull asserts that the judge prejudicially erred in admitting in evidence handwritten notes from Harrison recording each of Cucurull's payments. While we agree that the notes were erroneously admitted, the error was harmless given that the primary purpose of the notes seemed to have been to establish that Cucurull made these payments (which he does not contest), and that the last payment was on July 20, 2008 (which he admitted). The erroneous admission of evidence does not create prejudicial error if the evidence is merely duplicative. See Commonwealth v. LaPlante, 416 Mass. 433, 442-443 (1993). Given Cucurull's admissions, we have "substantial confidence that the error would not have made a material difference." Mason v. Coleman, 447 Mass. 177, 188 (2006), quoting DeJesus v. Yogel, 404 Mass. 44, 49 (1989).

Judgment affirmed.

By the Court (Maldonado, Singh & Wendlandt, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: November 27, 2019.

[5] The panelists are listed in order of seniority.