COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-694

JEANNE HOUSMAN

vs.

GEORGE O'CONOR & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Between August of 2013 and May of 2014, the plaintiff, Jeanne Housman, made several loans to the defendants, George O'Conor and Ledgewood Designs, LLC (Ledgewood) (together, the defendants) totaling $1.25 million. Each of the loans was evidenced by a contemporaneous writing, and repayment of the loans was due on various dates in 2014 and 2015. In August of 2015, the parties consolidated their agreements into a single "Equity/Loan Agreement" (2015 loan agreement).

The defendants did not repay the loans when due, and in 2018, Housman filed this suit to recover the amounts owed. A Superior Court judge ordered summary judgment in Housman's favor, and judgment (later amended) entered awarding her

[1] Ledgewood Design, LLC.

damages, interest, and attorney's fees; the defendants appeal from the amended judgment. They argue that summary judgment was inappropriate because (1) the defendants raised a triable issue as to whether the parties orally modified the loans so that repayment was not yet due, and (2) the 2015 loan agreement is unenforceable. Housman has cross-appealed, arguing that the judge abused his discretion by extending the defendants' deadline to file a notice of appeal. We affirm.

Background. Housman was an investor in Chime Media LLC (Chime), an entity that O'Conor managed. As a result of her involvement with Chime, Housman made six loans to the defendants totaling $1.25 million. The loans were originally documented by letter agreements that the parties prepared without the assistance of counsel. Each letter agreement included the principal amount, interest rate, and maturity date for the loan. The maturity dates generally were a year after each loan was made, although there was some variance in term. The earliest maturity date was June of 2014, and the latest was March of 2015.

As of August 13, 2015, the defendants had not repaid any of the loans, although all of them were then past due. On that date the parties entered into the 2015 loan agreement, which, among other things, restated the terms for each of the six loans. The 2015 loan agreement provided: (1) that the

defendants were jointly and severally liable to repay the loans; (2) the respective maturity dates and principal balances for each loan; (3) that each loan accrued interest at the rate of ten percent, compounded annually; and (4) that the defendants would pay collection costs, including reasonable attorney's fees, if they failed to make payment on the loans as demanded. The agreement also set forth and confirmed Housman's "12% Membership Interest" in Chime, and how that interest was acquired. Finally, the agreement also contained an integration clause that stated: "This [a]greement . . . constitutes the entire and exclusive agreement among the parties hereto with respect to the subject matter and shall supersede any prior understandings, agreements, or representations . . . . This [a]greement may be amended only by a written document executed by a duly authorized representative of each of the parties."

Housman did not demand repayment of the loans until several years later, in April of 2018. When the defendants failed to pay, Housman filed this action. In response to Housman's motion for summary judgment, the defendants argued that repayment was not yet due because the parties had orally modified the loan agreements, so that repayment was not required until the occurrence of a so-called "liquidity event." A Superior Court judge allowed the defendants an opportunity to conduct

additional discovery and to supplement the summary judgment record with evidence related to the alleged oral modification.

The judge then granted Housman's summary judgment motion. The judge concluded that neither the original letter agreements, nor the integrated 2015 loan agreement, made repayment of the loans contingent on a "liquidity event," and that the defendants' evidence did not raise a triable issue as to whether the parties had modified the maturity dates provided in the agreements.

Housman subsequently filed a motion for assessment of damages. A judge granted the motion and ordered that the defendants pay the $1,250,000 loan principal, $713,000 in interest, $73,310.99 in attorney's fees and costs, and $2,686.63 in expenses. Judgment entered, but no notice of entry of judgment was sent to the parties. On September 26, 2019, thirty-six days after entry of the judgment, the defendants filed a motion for extension of time to file a notice of appeal, along with a notice of appeal. A judge granted the motion, finding good cause to extend the defendants' deadline to notice their appeal. An amended judgment later entered, which clarified that the defendants' counterclaims were dismissed. The defendants filed a second notice of appeal and Housman noticed a cross appeal.

Discussion. The defendants' core argument is that they provided sufficient evidence at the summary judgment stage to raise a triable issue as to whether the parties orally modified the payment terms in the loan agreements, so that repayment of the loans was not due until a "liquidity event" occurred. In support, they cite what they claim is "mountains of evidence" of communications between Housman and the defendants. As part of their argument, the defendants attack the 2015 loan agreement, claiming that it is invalid for lack of consideration. The defendants also argue, as a result, that there is no basis for Housman to recover attorney's fees, and alternatively, that the attorney's fees awarded were excessive given the nature of this case. We are not persuaded by any of the defendants' arguments.[2]

[2] The judge did not abuse her discretion in extending the defendants' deadline to file a notice of appeal by six days. See Karen Constr. Co., Inc. v. Lizotte, 396 Mass. 143, 146 (1985) (orders extending time under Mass. R. A. P. 4 are reviewed for abuse of discretion). Where the defendants demonstrated that their delay in appealing was attributable, at least in part, to the court's failure to send out notices that judgment had entered, and also that they had checked the docket on several occasions, the judge was within her discretion to conclude that the defendants had shown excusable neglect. See, e.g., Standard Register Co., Inc. v. Bolton-Emerson, Inc., 35 Mass. App. Ct. 570, 571-572 (1993) (reversing order denying motion to extend time to file notice of appeal where defendants' delay was attributable to clerk's office misdating judgment). We disagree with Housman's argument that the judge lacked discretion to extend the appeal period under the circumstances, and that the defendants instead were chargeable because although they did not receive notice, they were obligated to check the trial court docket on a daily basis.

We review a judge's decision granting summary judgment de novo. See G4S Tech. LLC v. Massachusetts Tech. Park Corp., 479 Mass. 721, 730 (2018). "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law" (citations omitted). Id.

1. Enforceability of the 2015 loan agreement. In pursuing their argument that the parties orally modified the maturity dates of the loan, the defendants first challenge the 2015 loan agreement as unenforceable because it lacked consideration. The defendants urge that the 2015 loan agreement merely recites "past consideration," because it "simply memorializes" preexisting obligations. If the defendants are correct, they would thereby avoid the 2015 loan agreement's integration clause (as well as the attorney's fees provision).

We have no difficulty concluding, however, that the 2015 loan agreement is enforceable. The recitation in the 2015 loan agreement that it was entered into "for good and valuable consideration" -- to which the defendants of course, agreed and affixed their signatures -- is itself prima facie evidence of consideration. See Finegan v. Prudential Ins. Co. of Am., 300 Mass. 147, 152 (1938) (party who did not introduce evidence of circumstances surrounding execution of promissory note failed to

rebut prima facie showing of adequate consideration created by recital in agreement).

There is also consideration in Housman's implied agreement to forbear as to the loans that had already come due. "[A]n agreement to forbear to sue may be implied when the circumstances are such as to lead to the reasonable conclusion that the new [consideration by the borrower] was given to induce the creditor to forbear, and that [the creditor] did in fact forbear to enforce h[er] claim by proceedings at law." Merrimac Chem. Co. v. Moore, 279 Mass. 147, 155 (1932). As of August of 2015, the defendants' loans totaling $1.25 million, plus interest, were already due and payable. Housman did not demand repayment and instead, entered into an agreement that more fully expressed the parties' relationship and obligations. Although the 2015 loan agreement does not contain an express promise to forbear, it is undisputed that Housman not only was forbearing, but continued to forbear for several years after the agreement was signed. This is sufficient to find an implied agreement to forbear. See Atlas Shoe Co. v. Bloom, 209 Mass. 563, 568 (1911) (implied promise to forbear "followed by an actual forbearance for a reasonable time, even if no time was named, there would have been a sufficient consideration to support the guaranty, notwithstanding . . . that no money was paid to the defendant, nor any promise made to him of any money consideration").

Housman's consideration is not obviated merely because she reserved, in the agreement, an unrestricted right to demand repayment of the loans in the future. Where it is undisputed that Housman did forbear for some period after signing the 2015 loan agreement, that forbearance was sufficient consideration. Id.

2. Alleged oral modification of maturity dates. While the 2015 loan agreement was valid, we must still confront the defendants' core argument that evidence "of the conduct of the parties and the attendant circumstances" was sufficient to create a triable issue of fact as to whether the 2015 loan agreement was modified by an oral agreement, such that no repayment was required until the occurrence of some (undefined) "liquidity event."[3]

We begin by observing that the 2015 loan agreement is expressly an integrated agreement, which states that any subsequent modifications must be in writing. This is, of course, powerful evidence that the parties intended no oral

[3] In their brief (and at oral argument), the defendants seem to contend that the parties' "true understanding" has always been that the loans "would not be due until a [l]iquidity [e]vent." Any argument that the integrated 2015 loan agreement did not reflect the parties' mutual understanding at the time the agreement was signed, and that the defendants should therefore be able to offer parol evidence to vary the terms of the agreement, fails as a matter of law. See Cambridgeport Sav. Bank v. Boersner, 413 Mass. 432, 440 (1992).

modifications. Under our case law, however, it is not conclusive; "our case law delineates narrow exceptions in which an oral modification may survive despite a provision that an agreement may only be amended by a writing." Sea Breeze Estates, LLC v. Jarema, 94 Mass. App. Ct. 210, 217 (2018). Such "an agreement to modify a contract may be express, or may be inferred from the attendant circumstances and conduct of the parties." Id. In either case, "[t]he evidence of a subsequent oral modification must be of sufficient force to overcome the presumption that the integrated and complete agreement, which requires written consent to modification, expresses the intent of the parties." Cambridgeport Sav. Bank v. Boersner, 413 Mass. 432, 439 n.10 (1992). See Wells Fargo Bus. Credit v. Environamics Corp., 77 Mass. App. Ct. 812, 817 (2010) ("the parol evidence must be of sufficient strength to present an ambiguity between the actual conduct of the parties and the contract").

To meet the evidentiary burden described in the cases, courts have required "a party asserting that an oral modification occurred . . . [to] present evidence that the parties reached an agreement as to its terms." Sea Breeze Estates, LLC, 94 Mass. App. Ct. at 217. Moreover, neither "speculative assertions" in an affidavit, nor evidence of conduct consistent with the terms of the alleged modification,

are sufficient to raise a triable issue where such evidence does not specifically reference and describe the alleged agreement to modify the contract. Wells Fargo Bus. Credit, 77 Mass. App. Ct. at 817.

Our decision in Sea Breeze Estates, LLC, 94 Mass. App. Ct. 210, is illustrative. There we affirmed a summary judgment in favor of a plaintiff on its claim that the defendant had breached a contract by failing to make required monthly payments. Id. at 211. We rejected the defendant's argument that there was a triable issue as to whether its payment obligations had been orally modified, concluding that the defendant's evidence of the purported modification was insufficient as a matter of law to raise a triable inference of an oral modification. Id. at 217-218. In particular, the defendant had "not identified any communication, testimony, or exhibit in the record demonstrating that the parties expressly agreed to any identified terms [of a modification], let alone 'material' terms." Id. at 218.

Here, as in Sea Breeze Estates, LLC, the defendants' evidence presented at summary judgment fell well short of what is required to overcome an express integration clause. The defendants' evidence essentially fell into two categories: (1) an affidavit from O'Conor which stated, for example, that "Housman and I expressed our mutual agreement, orally, as well

as through our conduct and the attendant circumstances, to the modification of the written terms of Housman's investment" and that "[Housman] knew, full well, . . . that the written terms of our agreement were modified so that Ledgewood and I were not obligated to return Housman's investment, with interest, unless and until there was a [t]riggering [e]vent or bankruptcy at Chime;" and (2) emails between O'Conor and Housman in which Housman refers to herself as an "investor" or "partner" in Chime, and is shown to be involved in the operation of the company.

None of these summary judgment submissions, however, suffice to overcome the presumption in the case law, or to permit an inference of an oral modification where "the parties reached an agreement as to its terms." Sea Breeze Estates, LLC, 94 Mass. App. Ct. at 217. O'Conor's affidavit contains only conclusions as to what was "agreed," but no specifics as to when Housman agreed, or to the details of her alleged "agreement." Indeed, neither O'Conor's affidavit nor the emails refer to any conversations between O'Conor and Housman where they explicitly discuss modifying the terms of the 2015 loan agreement. The emails do not reference Housman's loans at all. Perhaps most saliently, the defendants do not even define the most critical new term for which they argue -- when will the loans now be due? The defendants claim that the "agreement" is that the loans

would be due upon a "liquidity event" (or bankruptcy), but nowhere do the defendants define the term "liquidity event." There can be no "agreement" to modified terms, where the parties cannot identify those modified terms. Moreover, evidence that Housman was interested in Chime's success, participated in its operations, and did not demand repayment of the loans for some period, is not inconsistent with the terms of the 2015 loan agreement, nor is it evidence sufficient to permit an inference of agreement to new and different repayment terms.

By the same reasoning, the judge properly dismissed the defendants' counterclaims, all of which are premised on the theory that there was an enforceable oral agreement that the loans would not become due until a liquidity event. Summary judgment was properly granted as to Housman's complaint claiming a breach of contract.

3. Trial level attorney's fees. The judge awarded Housman $73,310.99 in attorney's fees pursuant to the provision in the 2015 loan agreement that allowed recovery of "all costs of collection, including reasonable attorney's fees." See E. Amanti & Sons, Inc. v. R.C. Griffin, Inc., 53 Mass. App. Ct. 245, 258 (2001) (attorney's fees available to prevailing party where "a statute or a contract or other agreement provides"). The defendants challenge this fee award, but rather than pointing to any error in the judge's analysis, they reiterate

the arguments they made below -- specifically, that Housman's fees were too high for a simple collection case and that her counsel engaged in improper block billing and duplicative work.

"We review the judge's award of attorney's fees and costs for abuse of discretion. The judge's decision will be reversed only if it is clearly erroneous" (citations omitted). WHTR Real Estate Ltd. Partnership v. Venture Distrib., Inc., 63 Mass. App. Ct. 229, 235 (2005). Where the award of reasonable attorney's fees is based upon a contractual agreement, as in this case, "courts typically analyze a variety of factors, including 'ability and reputation of the attorney, the demand for his services by others, the amount and importance of the matter involved, the time spent, the prices usually charged for similar services by other attorneys in the same neighborhood, the amount of money or the value of the property affected by the controversy, and the results secured.'" Id. at 236, quoting Northern Assocs., Inc. v. Kiley, 57 Mass. App. Ct. 874, 882 n.17 (2003).

The transcript of the hearing on Housman's motion for assessment of damages demonstrates that, despite the defendants' failure to appear at the hearing, the judge considered the arguments in the defendants' written opposition to Housman's motion. The judge also considered appropriate factors in assessing the fee request, including the reasonableness of

Housman's counsel's hourly rate, the amount in controversy, the nature of the case, and the time spent on discovery and motion practice. On this record, we are satisfied that "the judge was mindful of the appropriate factors," and given her broad discretion in calculating fees, we discern no error. Berman v. Linnane, 434 Mass. 301, 303 (2001) (when assessing reasonableness of fee award, "[n]o one factor is determinative, and a factor-by-factor analysis, although helpful, is not required"). See WHTR Real Estate Ltd. Partnership, 63 Mass. App. Ct. at 237 ("omission from the judge's memorandum and order of explicit findings as to a fair market hourly rate and the exact number of hours reasonably spent on the case is not abuse of discretion or clear error" as specific findings are not required).

4. Appellate attorney's fees. Finally, we allow Housman's request for appellate attorney's fees, in part. We award fees for time spent addressing the defendants' arguments as to the merits of the judge's summary judgment decision, but we decline to award fees that Housman incurred to pursue her unsuccessful cross appeal challenging the timeliness of the defendants' notice of appeal. See Stagecoach Transp., Inc. v. Shuttle, Inc., 50 Mass. App. Ct. 812, 823 (2001) (awarding appellate attorney's fees for successfully opposing appeal, but not for unsuccessful cross appeal). Accordingly, Housman is directed to

file a submission detailing and supporting the attorney's fees and costs sought consistent with the procedures outlined in Fabre v. Walton, 441 Mass. 9, 10-11 (2004). See Beal Bank, SSB v. Eurich, 448 Mass. 9, 13 (2006) (procedures outlined in Fabre, supra, apply to requests for appellate fees and expenses based on contract).

Amended judgment affirmed.

Order allowing motion to extend time to file notice of appeal affirmed.

By the Court (Sullivan, Massing & Englander, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: May 3, 2021.

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