156/2

Bank of the State of MO

No 1216

John P. Morris
v
John M Wimer } promissary note of G.W. Call

St Louis

May 1840

State of Missouri County of St Louis Set.

Be it remembered that heretofore that is to say on the twenty second day of October in the year one thousand eight hundred and thirty nine, was filed in the Office of the Clerk of the Circuit Court within and for said County, a declaration which is in the words and figures following towit. In the Circuit Court November term 1839 Saint Louis County towit John P. Morris by Gamble his attorney, complains of John M. Wimer of a plea of trespass on the case, for that whereas heretofore towit on the twenty sixth day of June in the year eighteen hundred and thirty nine, at St Louis Mo. towit at the County aforesaid, one George W. Call by the name and description of G. W. Call made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised sixty days after the date thereof, to pay to the order of the said Defendant, negotiable and payable at the Bank of the State of Missouri, five hundred dollars for value recieved, without defalcation, and then and there delivered the same to the said Defendant, and the said defendant then and there endorsed and assigned the said promissory note to one Clayton Tiffin, who then and there endorsed and assigned the same to the said plaintiff, which said note and endorsements are now here to the Court shewn, and the said plaintiff infact says, that afterwards when the said promissory note became due and payable, towit on the twenty eighth day of August in the year eighteen hundred and thirty nine, at the County aforesaid, the same was presented and shewn at the Bank of the State of Missouri, for payment, and payment thereof was then and there demanded but the said George W Call would not nor would any person for him then and there pay the same, of which said premises, the said Defendant afterwards towit on the day and year last aforesaid at the County aforesaid had notice, whereby the said Defendant then and there became liable to pay to the said plaintiff, the said

Declaration

sum of money, in said promissory note specified, whenever he the said defendant should be thereunto afterwards requested, Nevertheless the said defendant although often requested, hath not paid, nor hath the said George McCall nor the said Clayton Taffin, paid to the said plaintiff, the said sum of money in said note specified, but hath wholly neglected and refused to pay the same to the damage of the plaintiff of one thousand dollars, & therefore he sues - H. R. Gamble atto. for plff. ~~Wherefore~~ Whereupon the Clerk of said Court issued a Summons which is in the words and figures following to wit - County of St Louis ss. The State of Missouri to the Sheriff of St Louis County, Greeting - We command you to summon John M. Wimer if he be found in your County, that he be and appear before the Judge of our Circuit Court on the first day of the next term thereof to be held at the City of St Louis, within and for the County of St Louis, on the third Monday of November next, there and there to answer unto John P. Morris of a plea of trespass on the case, to the damage of said plaintiff of one thousand dollars, and have you then there this writ. Witness John Ruland Clerk of our said Court with the seal thereof hereto affixed at office in the City of St Louis this twenty Second day of October in the year of our Lord eighteen hundred and thirty nine - John Ruland Clerk. Ex'd - Executed this writ in the County of St Louis by offering to read it, and the declaration to John M. Wimer on the 28° day of October 1839, all of which he refused to hear - Marshall Brocherton sheriff by Joseph W. McClurg D. Shff - And afterwards at the November term 1839 of said Circuit Court to wit on the second day of ~~November~~ December in the year last aforesaid, the following proceedings were had to wit - John P. Morris vs John M. Wimer assumpsit - Now at this day comes the said plaintiff by his attorney, and the said defendant, although demanded, comes not, but makes default, nor hath he pleaded to the action of said plaintiff, who thereby remains undefended against him, wherefore the said plaintiff ought to recover of the said defendant, and it being manifest to the Court from the in-

Summons

Shff's Return

Judgment

strument of writing on which this action is founded, that the said plaintiff has sustained damage by reason of the non performance of the promises and undertakings in his declaration mentioned, to the amount of five hundred and eight dollars. Therefore it is considered by the Court, that the said plaintiff recover of the said defendant, his damages aforesaid in form aforesaid, by the Court assessed, together with his Costs and Charges in this behalf expended, and have thereof execution. Whereupon the Clerk of said Court issued an execution

Execution which is in the words and figures following to wit. County of St Louis Set. The State of Missouri to the Sheriff of the County of St Louis Greeting. Whereas John P. Morris on the 2d day of December 1839, at our Circuit Court before our Judge thereof, recovered against John M. Wilmer the sum of five hundred and eight dollars for his damages by him sustained by reason of the non performance of the promises and undertakings in the declaration mentioned together with his costs and charges by him about his suit in that behalf expended. which to the said John P. Morris were adjudged as appears to us of record. These are therefore to Command you that of the goods and chattels, lands and tenements of the said John M. Wilmer in your bailiwick, you cause to be made the aforesaid damages and costs, that you have the same before the Judge of our said Court, on the third Monday of March next, to render to the said John P. Morris, the damages and costs aforesaid, and that you certify to our said Judge how you execute this writ. and have you then there this writ. Witness John Ruland Clerk of our said Court at St Louis the tenth day of December in the year of our Lord one thousand eight hundred and thirty nine. John Ruland

Sheriffs Return Clerk C.C. (Seal). upon which the sheriff endorsed his return in the words and figures following to wit. This writ is not satisfied for the reason that an appeal to the Supreme Court was taken by the defendant. Marshall Wotherton sheriff. And afterwards at the same Term to wit on the nineteenth day of February in the year 1840 the following further proceedings were had to wit. John P.

Morris vs John M Weimer - Motion and affidavit to set aside judgment by default filed - which motion and affidavit are in the records and figures following to wit - In St Louis Circuit Court Nov Term 1839 Jno P. Morris vs Jno. M. Weimer ass. on promissory note - And the Said defendant by his atty, comes here into Court, & moves to set aside the judgment, by default, in Said Case, for the reasons set forth in the following affidavit - Magenis & Blair p.d. State of Missouri County of St Louis ss. Be it remembered that John M. Weimer this day personally appeared before the undersigned & being duly Sworn, on his oath States Shortly after the Service of the Summons in the above case, he saw George W. Call the maker of the note upon which this action is founded & for whose accommodation this affiant has endorsed the Same, & the Said Call told affiant, he would attend to the whole business himself & gave such repeated assurances to that effect, that this affiant relied on him entirely, and supposed that Said Call had attended to the business - But for that Circumstance affiant says he would have made a defence to the action against him - Affiant further says that Since the rendition of the judgt against him, he has been informed & believes that there was no legal consideration given by the said plaintiff to the said Call for a large part of the Sum Specified in said note, and that an usurious interest, at the rate of 72 per cent, per annum, was exacted on the Same All which affiant believes, if said judgt by default is opened, and a trial had, he will be able to show to the Court - Jno M. Weimer Sworn & Subscribed before me this 19th Feby 1840. James J Purdy Justice of the Peace St Louis County - And afterwards on the twenty sixth day of February in the year and at the Term aforesaid, the following further proceedings were had to wit John P. Morris vs John M. Weimer Now at this day come the parties aforesaid by their respective attornies, and thereupon the said motion of said defendant to set aside the judgment by default, heretofore entered in this cause, is by them submitted to the Court which being seen and heard, and by the Court here fully understood, It is considered that the Same be over-ruled - And afterwards on the twenty Seventh day of February in the year and at the term aforesaid, the follow

Affidavit & Motion to set aside Judgment.

Motion over-ruled -

Appeal -ing further proceedings were had to wit - John P. Morris vs John M. Wimer - Now at this day comes the said defendant, and prays an appeal to the Supreme Court from the judgment herein rendered against him, and files his affidavit therefore as required by law, whereupon the appeal is granted and the said John M. Wimer as principal acknowledges himself to owe the said plaintiff the sum of Seven hundred dollars, and Archibald E. Orme & John Cole as his Securities, acknowledge themselves each to owe the said plaintiff the sum of Seven hundred dollars to be levied of their respective goods and chattels, lands and tenements, yet upon condition that if said defendant shall prosecute his appeal now taken, with due diligence to a decision in the Supreme Court; and if his appeal shall be dismissed, or the judgment of this Court be affirmed, he shall pay whatever of debt, damages and costs have been recovered against him, by the judgment of this Court together with the interest that may grow due thereon, and shall otherwise perform the judgment of the Court, and shall moreover pay the damages and costs that may be adjudged against him in the Supreme Court, upon his appeal, then this recognizance to be void, otherwise of full force - The affidavit above referred to is in the words and figures following to wit - John P. Morris vs John M. Wimer - In St Louis Circuit Court Nov. Term 1839 - John M. Wimer the above named defendant this day appeared in open Court, & being duly Sworn, on his oath states that his appeal in the above named Case is not made for the purpose of vexation & delay, but because affiant believes he is aggrieved by the decision of the Court - Jno. M. Wimer - Sworn to & Subscribed in open Court Feby 27th 1840 - Jno. Ruland Clerk - And afterwards on the twenty ninth day of February in the year and at the Term aforesaid, the following further proceedings were had to wit - John P. Morris vs John M. Wimer Bill of Exceptions filed - Which Bill of Exceptions is in the words and figures following to wit - Jno. P. Morris vs Jno. M. Wimer - Bill of Exceptions - Be it remembered that on the day of February 1840, the defendant by his Counsel, moved the Court to set aside the Judgment by default rendered against him in the above Case, upon the grounds set forth in the

Affidavit

Bill of Exceptions

affidavit filed herein – which motion and affidavit are as follows – In St Louis Circuit Court Nov Term 1839. Jno. P. Morris vs Jno. M. Wimer ass. on promissory note – And the said defendant by his atty comes here into Court & moves to set aside the judgt by default in said case for the reasons set forth in the following affidavit – Magenis & Blair p. d –
State of Missouri County of St Louis ss – Be it remembered that John M. Wimer this day personally appeared before the undersigned & being duly sworn, on his oath states, Shortly after the service of the Summons in the above case, he saw George W. Ball the maker of the note upon which this action is founded & for whose accommodation this affiant has endorsed the same & the said Ball told affiant he would attend to the whole business himself & gave such repeated assurances to that effect that this affiant relied on him entirely & supposed that said Ball had attended to the business; But for that circumstance affiant says he would have made a defence to the action, against him – Affiant further says that since the rendition of the judgment against him, he has been informed and believes that there was no legal consideration given by the said plaintiff to the said Ball for a large part of the sum specified in said note, and that an usurious interest at the rate of 72 per cent per annum was exacted on the same – All which affiant believes, if said judgt. by default is opened, and a Trial had, he will be able to show to the Court – Jno. M. Wimer – Sworn & Subscribed before me this 19th Feby 1840 – James S. Purdy Justice of the peace St Louis County – But the Court, upon consideration of said motion overruled the same, and refused to set aside said judgment by default, to which the defendant excepts, and prays that this his bill of exceptions, may be signed sealed and recorded, and it is accordingly done – L E Lawless (Seal) –

State of Missouri
County of St Louis } Set I John Ruland Clerk of the Circuit Court within and for said County, certify the foregoing to be a full, true and correct Transcript of the Record and proceedings in the case of John P. Morris against John M. Wimer, as the same remains in my Office –

In Testimony whereof I have hereto set my hand, and affixed the Seal of Said Court at Office in the City of St Louis this fourteenth day of April one thousand eight hundred and forty -

W. Ruland Clerk

No 24. 46

Supreme Court - 3rd Jud: Dist:
May Term 1840.

John P. Morris

1216 vs } Transcript

John M. Weimer, Appellant

1216

Fee $2.73 pd by Appellant
Magruder & Blair Atty

Filed May 1. 1840.
W. Ruland Clerk
S. C.

John M Weimer } Appeal from the Circuit Court of
vs } St Louis county.
John P Morris

John P Morris brought his action in the Circuit court of St Louis county against John M. Weimer. That court gave judgment for Morris; to reverse which Weimer appeals to this court. The judgment was taken by default and there was a motion to set it aside which was overruled.

The bill of exceptions shows that Weimer swore that shortly after the service of the summons in the case he saw George W. Ball the maker of the note ~~the maker of the note~~ on which the action was founded, and for whose accommodation the defendant Weimer indorsed the same, and the said ~~Weimer~~ Ball told Weimer that he would attend to the whole business himself, and gave such repeated assurances to that effect, that he Weimer relied on him entirely, and supposed that said Ball had attended to it, and but for that circumstance Weimer said he would have made a defence to the action. Weimer further stated in his affidavit that since the rendition of the judgment against him, he has been informed and believes that there was no legal consideration given ~~by~~ the said plaintiff to said Ball for a large part of the sum specified in said note, and that an usurious interest at the rate of seventy two per cent was exacted on the same. All which he believes, he can if permitted prove

to the court

Had Weimer pleaded to this cause and diligently made such defence as he could, and then, after judgment rendered against him, disclosed this evidence, declaring that he ~~could not by using due diligence~~ had not been able by using due diligence to discover the same before trial, it might have been good reason why a new trial should have been granted to him. But after having by the most gross negligence suffered a judgment by default to go against himself, he comes in to claim that indulgence which can be shown only to the diligent. The judgment of the Circuit is affirmed

George Tompkins

Concur

W. B. Napton

Weimer
vs opinion
Morris

Filed May 24 1841
J W Roland clerk

John P. Weimer

John M Winner Appellant

vs

John Pettorris Appellee

This was an action of Assumpsit in the Circuit Court of St Louis County by Morris as endorsee of a negotiable promissory note against Winner as endorser.

The process being served on Winner there was a judgment by default on the 2 Decr 1839. On the 19th Febry 1840 a motion was made to set aside the judgment on an affidavit filed which being overruled Winner filed his bill of exceptions and prayed an appeal.

The affidavit states that soon after he (Winner) was served with process he saw Cole the maker of the note and for whose accommodation the deft endorsed it, and was told by Cole that he would attend to the whole business himself and the defendant relied on the assurances of Cole, but for which he would have made a defence to the action – That after the rendition of the judgment against him he was informed and believed that there was no legal consideration given by said plaintiff to said Cole for a large part of the sum specified in the note and that an usurious interest at the rate of 72 per cent per annum was exacted on the same ale which the affiant believed he would be able to show to the Court

The error assigned is that the Court refused to set aside the judgment by default.

The decision of the Court below was correct

1 Because the affidavit ~~discloses~~ swears to no defence to the action.

2 Because there was no diligence in making a defence Lecompte & Wife vs Wash 5 Mo Rep 557

3° That the motion was not made in time being after damages were assessed Revised Code 460 Sec 31

A R Gamble
for Appellee

John A Wimer

vs

John P Morris

appellees Brief