

1996

Nelden C. Nielsen and Mary Y. Nielsen v. Philip Warren : Reply Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 960088-CA

IN THE UTAH COURT OF APPEALS

NELDEN C. NIELSEN)	
and)	
MARY Y. NIELSEN,)	
Plaintiffs and Appellants,)	Case No. 960088-CA
)	
vs.)	Argument Priority (15)
)	
PHILIP WARREN,)	
)	
Defendant and Appellee.)	

REPLY BRIEF OF APPELLANTS

Appeal from an Order of Dismissal
and Judgment by the Second Judicial
District Court of Davis County, State of Utah.
THE HONORABLE JON M. MEMMOTT,
DISTRICT COURT JUDGE

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COURT OF APPEALS

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does not arise out of contract, but is independent of it."
Vortt Exploration Co., Inc. v. Chevron U.S.A., Inc., 787
S.W.2d 942, 944 (Tex. 1990).

The essential elements of a loan are an advance of money with a promise to repay. Absent the promise to pay, the transfer is a gift. However, in the instant case the trial court found that there was no gift. (Tr. 387-389). If the transaction was a loan, any action for its enforcement must be based on the contract or promise to pay. In the instant case there was an actual contract to pay -- not one implied in equity. The obligation was admitted in written contract form and even acknowledged in writing under oath. (Addenda 1-4 to Appellants' Brief; Tr. 203-204, 223).

The trial court misapplied the holding in Yergensen v. Ford, 420 P.2d 696 (1965), and misinterpreted the express language of the holding. First, the holding was that a judgment is not a contract, and second, the limitation in an action on a judgment is not tolled by provisions of a statute tolling limitations in an action founded on contract. Consequently, because Yergensen was an action on a judgment, it was not controlled by U.C.A. 1953, 78-12-44, but the statute tolling actions on a judgment. Neither the facts of

Yergensen, nor its holding, apply to the instant case.

POINT II: IN EQUITY CASES OF QUANTUM MERUIT THE FACTS AND THE LAW MAY BE REVIEWED ON APPEAL.

The trial court's characterization of plaintiff's cause as a case in equity, sounding in quantum meruit, permits the appeal court to weigh the facts as well as review the law. Crimmins v. Simonds, 636 P.2d 478 (Utah 1981). If the facts clearly preponderate against the trial court's findings, those findings may be reviewed on appeal. Jensen v. Brown, 639 P.2d 150 (Utah 1981).

POINT III: PLAINTIFFS' FILING OF THEIR AMENDED COMPLAINT RELATED BACK TO THE DATE OF THE ORIGINAL PLEADING.

Rule 15(c), Utah Rules of Civil Procedure, provides for a relating back to the original pleading date for an amended complaint if "the claim...asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth...in the original pleading...." There was only one "transaction" plead in both the original complaint and the amended complaint -- defendant's unpaid loan from plaintiffs. That was the sole transaction involved in the instant case.

CONCLUSION

The preponderance of both the written and oral evidence establishes clearly a loan by plaintiffs to

defendant, founded upon contract. Consequently, the limitation applicable to the plaintiffs' action was tolled twice in writings signed by the defendant; therefore, U.C.A. 1953, 78-12-44 and 78-12-23 are the proper statutes of limitation applicable to the determination of plaintiffs' timely filing. The trial court's dismissal of the amended complaint and judgment should be reversed.

Dated this 31st day of May, 1996.



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CERTIFICATE OF SERVICE

This is to certify that four copies of the foregoing ARGUMENT PRIORITY (15) were hand carried this 31st day of May, 1996, to Brad C. Smith at 2605 Washington Blvd., Suite 300, Ogden, Utah 84401.



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