1972

Carl T. Evans v. Pickett Bros. Farms, A Partnership, and Jess W. Pickett, Otherwise Known As J. W. Pickett : Brief of Appellant

Utah Supreme Court

TABLE OF CONTENTS

PAGE

NATURE OF CASE 1
DISPOSITION IN LOWER COUR 1
RELIEF SOUGHT ON APPEAL 2
STATEMENT OF FACTS 2
ARGUMENT 3

POINT I
STATUTE OF LIMITATIONS APPLICABLE IS TITLE 78-12-25 UTAH CODE ANNOTATED, 1953 3

POINT II
THE TRIAL COURT ERRED IN APPLYING 78-12-23, UTAH CODE ANNOTATED, 1953, TO EXHIBIT 1 10

POINT III
APPLICABLE STATUTE OF LIMITATIONS HAD RUN BEFORE FILING THE COMPLAINT 10

POINT IV
THERE IS NO EVIDENCE TO JUSTIFY A FINDING OF OF OUT OF THE STATE EXCEPT THE PERIOD FROM 2 JANUARY, 1962, TO 1 APRIL, 1962 11

AUTHORITIES CITED

Cases Cited:

Whitehill vs. Lowe, 10 Utah 419 & 427, 37 P. 589 6
Woolf vs. Gray, 48 Utah 239, 158 P. 788 6
O'Donnel vs. Parker, 48 Utah 478, 160 P. 1192 6
Jeremy Fuel & Grain Company vs.
Denver & Rio Grande R. Co. 60 Utah 153, 207 P. 155 7
Last Chance Ranch Company vs. Erickson,
82 Utah 475, 25 P. 2d 952 ..... 7, 8
Petty & Riddle, Inc. vs. Lunt, 104 Utah 130,
138 P. 2d 648 ..... 8, 11
Juab County Department of Public Welfare vs.
Summers, et al., 19 Utah 2d 49, 426 P. 2d 1 9
Strand vs. Union Pacific Railroad Company,
6 Utah 2d 279, 312 P. 2d 561 9

Statutes Cited:

Utah Code Annotated 1953, 78-12-23 ..... 2, 4, 5, 10, 12
Utah Code Annotated 1953, 78-12-25 ..... 3, 10

In the Supreme Court of the State of Utah

CARL T. EVANS,
Plaintiff and Respondent,

vs.

PICKETT BROS. FARMS, a Partnership, and JESS W. PICKETT, otherwise known as J. W. Pickett,
Defendants and Appellants

Case No. 12616

BRIEF OF APPELLANT

NATURE OF CASE

This is a case based upon an old agreement for leveling land, with a disagreement on final price, and failure to pay the matter in full, based on either party's interpretation. The statute of limitations is the primary question involved.

DISPOSITION IN LOWER COURT

The matter was tried before the lower court on the 10th of May, 1971, without a jury, the Honorable J. Harlan Burns presiding, and was completed in a matter of approximately two hours. Thereafter, the Honorable J. Harlan Burns took the matter under advisement, and on

the 9th of June, 1971, rendered a memorandum decision in which he found that Exhibit No. 1 changed the contract from an oral contract to a sufficiently written agreement for Title 78-12-23, Utah Code Annotated, 1953 to be applicable thereto. This item coupled with payment on a later date, or a tender of payment on a later date, was interpreted by the Court as extending the matter past the time of filing the complaint under the six-year statute of limitations, and judgment for the plaintiff was awarded.

RELIEF SOUGHT ON APPEAL

The defendants and appellants desire that the decision be reversed, and that the complaint be dismissed with prejudice.

STATEMENT OF FACTS

During 1959 there was a negotiation between Jess W. Picket, representing himself and a brother as Pickett Bros. Farms, a partnership, and the plaintiff. The exact dates of the negotiation are not certain. As a result of the negotiation, an oral agreement was entered into whereby approximately 40 acres of land was to be leveled by Mr. Evans for Pickett Bros. Farms with Agricultural Stabilization and Conservation Service (A.S.C.S.) participation as to part of the payment, and Soil Conservation Service to provide the engineering. The necessary applications were made by Mr. Pickett to A.S.C.S. for their participation, The leveling was performed in a more or less satisfactory manner, plaintiff contending that it was strictly in accordance with the contract of $10.00 an hour, the defendants contending that an estimate of approximately $2100.00 was the agreed price

based upon whatever oral agreement had gone before them. The work was done in October and November of 1959, and was completed November 29, 1959. Thereafter, on 14 December, 1959, the defendant, J. W. Pickett signed for Pickett Bros. Farms by himself and dated said document 14 December, 1959, a purchase order for conservation materials on forms provided by the A.S.C. A copy of this document has been entered in evidence as Exhibit 1. The Agricultural Stabilization and Conservation Service paid $1,000. On April 25, 1969, the defendants paid $100; on 3 September, 1961, $300.00, the check for which is marked Exhibit 2, and another check also marked Exhibit 2 was tendered on 2 January, 1962, in the amount of $700 with a statement on the back, "Full and Final Payment." This check was never cashed by the plaintiff. It appears that there are two Exhibits 1 and two Exhibits 2, the check for $100.00 being one Exhibit 1, and the A.S.C. order being the other Exhibit 1; the check for $300.00 being one exhibit 2, and the check for $700.00 being the other exhibit 2. The trial court treated these items as follows: Plaintiff's Exhibit 1, A.S.C. order of 14 December, 1959; Plaintiff's Exhibit 2, the check for $300.00 dated 2 September, 1961; Plaintiff's Exhibit 3, the check for $700.00 dated 2 January, 1962 that was not cashed. The complaint was filed on October 11, 1967, commencing this action.

ARGUMENT

POINT I

STATUTE OF LIMITATIONS APPLICABLE IS TITLE 78-12-25 UTAH CODE ANNOTATED, 1953.

The trial court ruled that Exhibit 1, being the pay-

ment order of the Agricultural Stabilization and Conservation Service dated 14 December, 1959, constituted a sufficient document in writing to be a contract and to invoke the six-year statute of limitations, to-wit, 78-12-23, Utah Code Annotated, 1953, rather than the four-year state of limitations contended by the defendants. The defendant had plead both of these statutes as a bar to the action. The Court, in applying this statute then ruled that the tender of the last check for $700.00, to-wit, Exhibit 3, also made the six-year application to this check, extended it a sufficient period of time so that the finding by the Court of the absence of Mr. Pickett from the state of Utah from January 2, 1962, to April 1, 1962, and other periods on which the Court did not elaborate, commenced running on the statute on 3 September, 1961, when the last payment was made, and that the absences thereafter held the statute sufficiently to have the filing of October 11, 1967, within the six-year period which the Court contended was the proper application under Title 78-12-23, Utah Code Annotated, 1953, and that Exhibit 1 also made this a six-year statute.

Under these conditions, the primary question is whether there was an oral agreement or a written agreemen. To commence with, the Court, in Finding No. 2, made a finding that the contract made during October of 1959 was orally negotiated, and that it was orally agreed that the plaintiff would be paid by said defendants the sum of $10.00 per hour for the time plaintiff spent in operating his land-leveling equipment, and performing said land-leveling, a portion of which would be paid by the Agricultural Stabilization and Conservation Service, and the balance would be paid by the defendant. The Court further found in Finding No. 3 that pursuant to the oral negotiations the plaintiff did the

work between November 1, 1959, and November 29, 1959. This is verified in the transcript on Page 41, commencing with Line 2, and ending on Line 6. Also, the pleadings, which have not been amended in any way, show that this was an oral agreement. While in Paragraph 3 of the complaint a written agreement is plead, the attachment to the complaint shows that this was the item that is Exhibit 1 and was the payment order of the Agricultural Stabilization and Conservation Service. The answer of the defendants filed in personum pleads an oral contract. The supplemental answer of the defendants pleads an oral agreement, and pleads both the six-year and four-year statute of limitations, as well as tender and refusal. The plaintiff's reply to supplemental answer of the defendants admitted and alleged an oral agreement on or about the 1st of November, 1959. None of these pleadings are amended, nor at the conclusion of the trial was any motion made to amend the pleading in conformity with the trial, or the findings, and the findings find the oral agreement prior to the 29th of November, 1959, and the completion by that date.

Under these conditions, the next question is whether or not there was any written agreement pertaining to the A.S.C. payment order signed by Mr. Pickett on 13 December, 1959. This actually amounts to nothing but or an order to pay. A check is a statement to the bank to pay. This is a statement to the A.S.C. to pay, and payment was made thereon, just exactly the same as if it had been a check. Was this a sufficient item in writing to change the oral agreement from the four-year to the six-year statute of limitations? The State of Utah in the Supreme Court thereof has many times ruled that items of this nature are not sufficient items in writing to make this change. Paragraph (2) of Title 78-12-23, Utah Code Annotated, 1953, reads as follows:

"An action upon any contract, obligation or liability founded upon an instrument in writing, except those mentioned in the preceding section."

Under these conditions, this is not an action on a contract founded on an instrument in writing. At no place had Mr. Evans, the plaintiff, signed this document, nor was it intended or ever used for anything but an order to pay, nor does it in any way change the terms of the oral agreement admitted by both parties. There are many cases of the Supreme Court of the State of Utah that have interpreted items of this nature all to be nothing that changed the oral contract. One of these cases is Whitehill vs. Lowe, found in 10 Utah 419 and 427, and at 37 P. 589. In this case the plaintiff contended that through two verbal agreements he had an interest in a written agreement. The Court held that the four-year statute applied and was in effect.

In the case of Woolf vs. Gray, 48 Utah 239, 158 P. 788, there was a cause of action for goods and merchandise on an account stated. In this matter a partner of the concern which had run the account for goods and merchandise had confessed judgment and judgment had been granted against the partner. In this case the Supreme Court of the State of Utah held that even though the partner had confessed judgment and the judgment had been entered, this was not sufficient to extend the four-year statute of limitations against the other partner who had not confessed judgment, and in no way effected his liability and that the four-year statute of limitation applied.

In the case of O'Donnell vs. Parker, 48 Utah 578, 160 P. 1192, the defendant owed an open account to the plaintiff. The defendant had taken bankruptcy and even

though outlawed, had listed the amount of the open account in one of the schedules to be barred by the bankruptcy. However, thereafter the bankruptcy failed. The question there was whether or not the listing in the bankruptcy over a sworn signature of the defendant was sufficient to extend the four-year statute of limitations, or to take it out of the four-year statute of limitations and make the six-year statute of limitations apply, and the Court held "No", that it had nothing to do with the matter and that it did not extend any statute of limitations and did not make the six-year statute apply. This is very similar to the case at bar. An order to pay has been interpreted by the trial court as taking it outside of the four-year statute and making it into the six-year statute so that the six-year statute would apply. Certainly, this is no greater acknowledgment of debt than the listing of the same in a bankruptcy proceeding.

In the matter of Jeremy Fuel & Grain Company vs. Denver & Rio Grande R. Co. found in 60 Utah 153 and in 207 P. 155, this is an action to recover 35c a ton on excess freight charges on coal that had been shipped out of Carbon County to various places. The total involved was $58,962.80. The question was on an item of this nature on which a bill of lading had been issued on each car, did the four-year statute of limitations apply on the open account, or did a statutory provision apply that provided for double damages. The Court held that the four-year statute of limitations applied even though there had been a Rio Grande bill of lading on each car, and the double damages were not allowed. The six-year question was not gone into on that case. However, it was compared to a statute that would have given double damages.

In the case of Last Chance Ranch Company vs

Erickson found in 82 Utah 475, 25 P. 2nd 952, the defendant had conveyed real property to the plaintiff and had agreed orally to assign stock in a farm loan association to the plaintiff at once. The same oral agreement was reiterated one year and three months after conveyance of the real property. The Court held that the four-year statute of limitations applied, and that it was not, at the time of the action, necessary to transfer the stock in the farm loan assocation.

In the matter of Petty & Riddle, Inc. vs. Lunt, 104 Utah 130, 138 P. 2d 648, in which the judgment of the lower court was reversed upon a presentation by the firm of Morris & Matheson, Attorneys at Law, Cedar City, Utah, representing the appellant. The plaintiff corporation brought an action against the stockholders for the contribution toward payment of taxes due and unpaid when corporate assets or surplus was divided among stockholders.

The trial court instructed the jury to bring in a verdict in favor of the plaintiff corporation for $238.86 on the first cause of action and $530.55 on the second cause of action, on the theory that when stockholders divided the assets of the corporation there was an implied contract to pay the debts. The opposing counsel for the plaintiff is one of the attorneys who took this action to the Supreme Court for the stockholder, and the Supreme Court held that the stockholder had no responsibility toward either the individuals that had previously owned stock in the corporation or the corporation itself for corporate debts after the four-year statute of limitations had run, on the theory that there was an implied oral contract to pay those bills and that the four-year statute was applicable. The taxes in question were paid on April 15, 1935, by the corporation and

the action against the stockholder Lunt was commenced on the 11th of May, 1940. The cause of action arose when the corporation became aware that the taxes in question were still unpaid, and from that time until the action was commenced was more than four years, and therefore it was barred by the four-year statute of limitations.

The case of Juab County Department of Public Welfare vs. Summers, et al., 19 Utah 2d 49, 426 P.2d 1, relied upon by the Honorable J. Harlan Burns in his memorandum decision in the instant case was not at point. There, there was a Public Welfare lien agreement which was held to be under the six-year statute. This was a specific pledge agreement made on a statutory form, and on which thereafter money was paid by the Juab County Department of Public Welfare, and it is identical with a mortgage. It is not in point in the instant case.

The case of Strand vs. Union Pacific Railroad Company, 6 Utah 2d 279, 312 P.2d 561, also relied on by the Honorable J. Harlan Burns in his memorandum decision, is against the findings in the memorandum decision. In this case there was a written agreement on 10 December, 1943. Due to difficulties and various other things, in September, 1944 an oral agreement took place which entirely changed the written agreement. The Court held that they changed the written agreement and plans and specifications to such an extent that a new plan had to be drawn. The specifications were not rewritten, but oral agreements for the changes in the specifications were relied on under the circumstances, and the contract became an oral one, and any claim arising under such a contract is governed by the four-year statute of limitations. The action was brought under such conditions that it was within the six-year period from the original contract, but not with-

in the four-year period from the oral contract.

The conclusion from all these cases is that in the instant case Exhibit 1 is nothing more than an acknowledgment and an order to pay, and was not the agreement required by Title 78-12-23, Utah Code Annotated 1953, and as a result, Title 78-12-25, Utah Code Annotated, 1953, should be applicable to this situation.

POINT II

THE TRIAL COURT ERRED IN APPLYING 78-12-23, UTAH CODE ANNOTATED, 1953, TO EXHIBIT 1.

In pursuance of this, a re-reading of the authorities in Point I shows that all these items again point out that the contract was an oral contract; that exhibit 1 is not a contract, but an order to pay after the work was done, and that under these conditions 78-12-23, Utah Code Annotated, 1953, does not apply.

POINT III

APPLICABLE STATUTE OF LIMITATIONS HAD RUN BEFORE FILING THE COMPLAINT.

The four-year statute of limitations had entirely run before the filing of the complaint, regardless of any item of being out of the State. The latest interpretation that could in any way be given to this matter under the four-year statute would be four years from the last payment or acknowledgment. This came on or about the 2nd of January, 1962, according to the testimony of Mr. Evans on Page 64, commencing at Line 26 of the transcript. Four years from that time would be the 2nd of January, 1966. The instant case was not filed until the 11th of October, 1967. There is no item later than the

2nd of January, 1962, that could in any way be called an acknokledgement, and under these conditions, the statute of limitation had run before the filing of the complaint.

POINT IV

THERE IS NO EVIDENCE TO JUSTIFY A FINDING OF OUT OF THE STATE EXCEPT THE PERIOD FROM 2 JANUARY, 1962 TO I APRIL, 1962.

In Findings of Facts drawn by plaintiff's counsel, who is the same counsel who supported the four-year statute of limitations in the Petty & Riddle vs. Lunt case cited above, in Paragraph 7 the Court found in the last lines thereof to the effect that the partners were outside of the State of Utah, namely, from January 2, 1962, to April 1, 1962. In Paragraph 9 the Court found as follows: "that the running of said six year statute of limitations was tolled from January 2, 1962, to April 1, 1962, when both partners were outside of the State of Utah, and the running of said six year State of Limitations was further tolled by both of said partners being out of state of Utah for other substantial periods as shown by the evidence herein." A complete review of the transcript finds mention in Mr. Pickett's testimony of three additional weeks that he was out of the State. There is no other evidence whatsoever to support any finding that the defendant was out of the State other than the period of 2 January, 1962, to 1 April, 1962, during the period that we are concerned about.

CONCLUSION

Inasmuch as the findings pertaining to the defend-

ant being out of the State are not supported by evidence, there is no substantiation for the finding that the six-year statute has been tolled by the absence of the defendant from September of 1961 on, inasmuch as Exhibit 1 is nothing but an order to pay and is not a contract, as required by the terms of U.C.A. for the six-year statute in Title 78-12-23, Utah Code Annotated 1953. The four-year statute was applicable. The statute of limitations was tolled, and the complaint was filed after the statute of limitations had run, and the matter should be dismissed with prejudice.

Respectfully submitted,
PATRICK H. FENTON

Attorney for Defendants
and Appellants,
13 West Hoover Avenue
Cedar City, Utah 84720