

2016

Goldenwest Federal Credit Union, a Utah Corporation, Plaintiff and Appellant v. Kathleen Kenworthy, Defendant and Appellee

Utah Court of Appeals

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GOLDENWEST FEDERAL
CREDIT UNION, a Utah
Corporation,

V.

Defendant and Appellee

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURTS

JAN 08 2016

GOLDENWEST FEDERAL
CREDIT UNION, a Utah
Corporation,

Plaintiff and Appellant

v.

KATHLEEN KENWORTHY,

Defendant and Appellee

On Appeal from the Third Judicial District Court, Salt Lake County
Case No. 149905786, Judge Elizabeth Hruby-Mills

Attorney for Appellee

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JURISDICTION

This Court has jurisdiction over this matter pursuant to UTAH CODE ANN. § 78A-3-102(3)(j) and (4).

STATEMENT OF QUESTIONS PRESENTED

Issue #1

Whether the trial court erred in granting summary judgment, concluding this action was barred by Goldenwest's failure to timely commence this action under UTAH CODE ANN. § 78B-2-307.

Standard of Review

"An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. We review matters of statutory construction for correctness." Salt Lake City Corp. v. Haik, 334 P.3d 490, 494 2014 UT App 193, ¶ 8.

Issue #2

Whether a genuine issue of material facts exists concerning whether the agreement for Ms. Kenworthy to pay \$200 per month was a separate oral agreement or modification of the written contract between Ms. Kenworthy and Goldenwest.

Standard of Review

"The issue of whether a contract exists may present both questions of law and fact, depending on the nature of the claims raised. Thus, our standard of review for

this issue turns on whether the claim is one of fact or law, because a ruling on whether a contract exists may embody several subsidiary rulings. The trial court first finds the facts to which the law will be applied, and then it applies the law to those facts to reach a conclusion of law.” Cal Wadsworth Const. v. City of St. George, 865 P.2d 1373, 1375 (Utah App. 1993).

Issue #3

Whether the trial court erred in awarding attorney fees to Ms. Kenworthy, as the prevailing party under the contract.

Standard of Review

“Whether attorney fees are recoverable in an action is a question of law, which we review for correctness. ...the determination of which party prevailed in a civil action--and thus may be entitled to attorney fees--is reviewed for an abuse of discretion.” Federated Capital Corp. v. Haner, 351 P.3d 816, 819, 2015 UT App. 132, ¶ 9.

STATUTES, RULES & REGULATIONS

U.R.C.P. 78B-2-113. Effect of payment, acknowledgment, or promise to pay.

(1) An action for recovery of a debt may be brought within the applicable statute of limitations from the date:

- (a) the debt arose;
- (b) a written acknowledgment of the debt or a promise to pay is made by the debtor; or
- (c) a payment is made on the debt by the debtor.

U.R.C.P. 78B-2-307. Within four years.

An action may be brought within four years:

- (1) after the last charge is made or the last payment is received:
 - (a) upon a contract, obligation, or liability not founded upon an instrument in writing;
 - (b) on an open store account for any goods, wares, or merchandise; or
 - (c) on an open account for work, labor or services rendered, or materials furnished;
- (2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:
 - (a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;
 - (b) Subsection 25-6-5(1)(b); or
 - (c) Subsection 25-6-6(1); and
- (3) for relief not otherwise provided for by law.

U.R.C.P. 78B-2-309. Within six years -- Mesne profits of real property -- Instrument in writing.

An action may be brought within six years:

- (1) for the mesne profits of real property;
- (2) upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78B-2-311; and
- (3) to recover fire suppression costs or other damages caused by wildland fire.

STATEMENT OF THE CASE **PROCEDURAL HISTORY**

1. On May 13, 2014, Plaintiff, Goldenwest Federal Credit Union (“Goldenwest”), commenced this action by serving default Defendant, Kathleen Kenworthy (“Ms. Kenworthy”), with a 10-day Summons and Complaint, then filing the Complaint on May 15, 2014. [R. 168 Finding of Fact #10]
2. On December 22, 2014, the court entered a Ruling and Order granting Ms. Kenworthy’s Motion for Summary Judgment (the “Ruling”). [R. 168]
3. On February 24, 2015, Ms. Kenworthy moved for an award of attorney

fees, pursuant to the terms of her written agreement with Goldenwest. [R. 175-202]

4. On April 14, 2015, after Goldenwest, represented by prior counsel, failed to object to Ms. Kenworthy's Motion for Attorney Fees, the court entered an order awarding fees to Ms. Kenworthy. [R. 210-213]

5. Goldenwest filed its Notice of Appeal on May 11, 2015. [R. 214-217]

STATEMENT OF FACTS

The decision of the trial court was based on the following undisputed facts which are relevant to this appeal:

1. Goldenwest and Ms. Kenworthy entered into a loan agreement (the "Original Agreement") on April 24, 2006. [R. 167]

2. On May 9, 2008, the Parties orally agreed to Ms. Kenworthy's repayment of debt in the amount of \$200 per month. [R. 168]

3. On May 9, 2008, Ms. Kenworthy paid Goldenwest \$200. [R. 168]

4. Ms. Kenworthy made no payments to Goldenwest after May 9, 2008. [R. 168]

5. The alleged debt at issue in the Complaint arose before May 12, 2008. [R. 168]

6. Goldenwest served Ms. Kenworthy with a Complaint for the present case on May 13, 2014, and filed the Complaint with this Court on May 15, 2014. [R. 168]

7. Ms. Kenworthy made the \$200 payment by credit card and a copy of the

credit card receipt was submitted without objection as Exhibit "A" to the Affidavit of Shanna Howell, filed with Goldenwest's Memorandum in Opposition to Motion for Summary Judgment. [R. 84-87, Affidavit ¶5]

SUMMARY OF ARGUMENT

After defaulting on her vehicle loan, Ms. Kenworthy orally agreed to modify her monthly payments from \$487.21 per month, due by the 15th day of each month; to \$200 per month, also due on or before the 15th day of the month. Ms. Kenworthy made the first modified payment on May 9, 2008. When Ms. Kenworthy failed to make her next scheduled payment on June 15, 2008, she breached the Contract and the cause of action accrued on June 16, 2008. Since Ms. Kenworthy's loan was formalized in a written agreement, Goldenwest had until June 16, 2014, to commence an action to enforce the Loan Agreement. By filing its lawsuit on May 13, 2014, Goldenwest timely commenced this action and the trial court's conclusion that the Complaint was untimely should be reversed.

Since the award of attorney fees is based upon a written agreement, if this Court reverses the trial court's ruling that the Complaint was untimely, the award of attorney fees to Kenworthy must also be reversed.

ARGUMENT

A. THE STATUTE OF LIMITATIONS DID NOT RUN BEFORE THIS ACTION WAS COMMENCED.

On April 24, 2006, the parties entered into the Original Agreement to finance

the purchase of a vehicle. The Original Agreement required Ms. Kenworthy to repay the loan in installments of \$487.21 per month by the 15th day of the month. Payments were made until February 15, 2008. On May 9, 2008, Ms. Kenworthy contacted Goldenwest to discuss her financial problems and inability to pay the monthly installments. At that time, the parties orally agreed to reduce Ms. Kenworthy's monthly payments to \$200, with the payments still due by the 15th day of the month.

In Utah, "Civil actions may be commenced . . . after the cause of action has accrued." UTAH CODE ANN. § 78B-2-102. A cause of action for breach of contract accrues when the contract is breached. Stillwell v. People's Bldg., Loan & Sav. Ass'n, 57 P. 14, 17 (Utah 1899) ("Before breach of contract no cause of action accrues.") A cause of action related to a debt does not accrue until a payment is due and owing, because it is only at that point, that a party may attempt to enforce the agreement. Butcher v. Gilroy, 744 P.2d 311,313 (Utah Ct. App. 1987) ("Ordinarily a cause of action for a debt begins to run when the debt is due and payable because at that time an action can be maintained to enforce it." (Internal quotation marks omitted); Fredericksen v. Knight Land Corp., 667 P.2d 34, 36 (Utah 1983). Utah appellate courts recognize that breach occurs in installment contracts when the installment is due. Moab Nat. Bank v. Keystone-Wallace Resources, 517 P.2d 1020, 30 Utah 2d 330 (Utah 1973). The proper application of this principal on similar facts is found in Farmers and Merchants Bank v. Templeton, 646 S.W.2d 920 (Tenn.App.

1982).

In Templeton, the Tennessee Court of Appeals was asked to apply its six (6) year statute of limitations for written contracts to default of payments of an installment note. In Templeton, three (3) installments were not fully paid, but an action was not brought until eight (8) years after the first installment was missed. In concluding the lawsuit was untimely as to the first two installments, the court stated, “[t]he determinative issue in this case is when did the cause of action accrue.” The court then held:

Furthermore, the cause of action accrues on each installment when it becomes due and the Statute begins to run from that moment on that installment. Further, suit may be brought in successive actions upon each default in an installment for the amount of that defaulted installment. Whether or not the note contains an acceleration clause, exercised or not, is of no moment to the defaulted installment. All the acceleration clause does is accelerate the due date of future installments to the date of the exercise of the right of acceleration. Therefore, the cause of action accrued on the 1972 and 1973 installments in December of each of those years. The accrual of the right of action for each of those installments occurred more than six years prior to the filing of this suit.

Id. at 923.

This is consistent with the common law rule that, “[i]n the case of an obligation payable in installments, the statute of limitations runs against each installment from the time it becomes due, that is, from the time when an action might be brought to recover it.” 51 Am Jur 2d, Limitation of Actions, § 133. Moreover, where an installment contract contains an acceleration clause, the cause of action does

not accrue as to installments, which are not due until those installments are accelerated. Id.

Here, the trial court appears to have become confused by the effect of the oral agreement to reduce monthly payments to \$200. The trial court's confusion appears to come from its misinterpretation of UTAH CODE ANN § 78B-2-113(1), which states:

An action for recovery of a debt may be brought within the applicable statute of limitations from the date:

- (a) the debt arose;
- (b) a written acknowledgment of the debt or a promise to pay is made by the debtor; or
- (c) a payment is made on the debt by the debtor.

On Page 4 of the Ruling [R. 170], the trial court states, “[t]he parties entered into the Original Agreement on April 24, 2006 and the statute of limitations began running as of that date under §78B-2-113(1)(a), when the ‘debt arose’”. The trial court's failure to properly interpret the meaning of the term “debt arose” is the basis of the trial court's misapplication of the statute of limitations. By saying the “debt” arose on April 24, 2006 – the date Ms. Kenworthy signed the note, the trial court equated “debt arose” with “obligation begins.” Goldenwest equates the term “debt arose” with “performance due.”

Because of its erroneous interpretation of section §78B-2-113(1)(a), the trial court misapplied this section by concluding the debt arose under §78B-2-113(1)(a) on April 24, 2006, and renewed with each monthly payment until February 15, 2008, when Ms. Kenworthy missed her first payment. [R. 169] The trial court does not

explain whether it chose to run the statute on February 15, 2008 (the due date of the first missed payment), or the day after the January 2008 payment. Either way, the court appears to have concluded the six (6) year limitation period ended no later than February 15, 2014, and since this action commenced on May 13, 2014, it was late. Moreover, the court interpreted the term “debt arose” to mean the entire remaining balance of the loan, and not the amount of an overdue installment. Therefore, the court effectively accelerated the entire debt in January or February of 2008 and ran the statute on the full unpaid balance. [R. 169-170]

Goldenwest takes exception with this conclusion because it neglects to properly analyze that this was an installment agreement and several installments are within the six (6) year statute of limitations because of the oral agreement modifying the monthly payment.

1. The modification cured the breach.

When Ms. Kenworthy missed her installment payment on February 15, 2008, she was in breach as to that payment. She similarly defaulted on her March 15 and April 15, 2008, payments. Therefore, when she and Goldenwest agreed to reduce her monthly payment in May 2008 and she paid \$200 on May 9, 2008, she was not in breach of the May payment. However, that was her last payment and she subsequently missed all other installments. Those installments either came due on the 15th day of each succeeding month or if/when Goldenwest accelerated the debt.

However, the trial court had no evidence and made no finding that the debt was accelerated before May 14, 2008 (six years before this action was filed.) Indeed, the trial court concluded, from the undisputed facts, that Ms. Kenworthy's payments would be \$200 per month until the loan was fully paid. [R. 168, ¶2] From that finding, it is clear that the debt was not accelerated and the revised payment arrangement cured Ms. Kenworthy's prior breach by allowing her to pay the balance in monthly installments of \$200. Thus, until Ms. Kenworthy breached her payment on June 15, 2008, Goldenwest had no cause of action. Accordingly, the only remaining question for this Court is the effect, if any, of the oral agreement on the statute of limitations.

2. The modification did not remove the written agreement from the statute of limitations for a written contract.

From Goldenwest's perspective, its agreement to reduce the monthly payment to \$200, together with Ms. Kenworthy's payment of \$200 on May 9, 2008; was a modification of the contract, which cured her prior breach and tolled the statute of limitations until June 16, 2018, the day after Ms. Kenworthy missed her next scheduled payment.

In its ruling, the trial court did not decide whether the agreement to pay \$200 was a separate oral agreement or a modification of a written agreement because the court concluded that either way, it was governed by the four (4) year statute of limitations found in UTAH CODE ANN. § 78B -2-307(1)(a). The court stated:

If [the payment reduction was] a new oral agreement, the renewal provision would toll a four-year limitations period from May 9, 2008, when "the debt arose". If the Parties' agreement made an oral modification of the material terms to the written Original Agreement, the four-year statute of limitations for oral agreement would begin May 9, 2008.

[R. 170-171].

Generally, determining whether an oral agreement is a modification of a written agreement or a new contract is a question of fact. Ron Shepherd Ins. v. Shields, 882 P.2d 650, 655 (Utah 1994). However, when the facts are undisputed, questions of fact become questions of law. Coalville City v. Lundgren, 930 P.2d 1206, 1209 (Utah App. 1997) ("Generally, whether a breach is material is a question of fact to be decided by the jury, unless the facts are undisputed; then it is a question of law for the court.")

Since the facts surrounding the agreement to reduce the payment are not in dispute, whether the agreement was a modification to the Original Agreement or separate oral agreement is a question of law which this Court can decide. Cal Wadsworth Const. v. City of St. George, 865 P.2d 1373, 1375 (Utah App. 1993). Thus, Goldenwest assigns error to the conclusion that a narrow oral modification of a written agreement, which can be proven without resort to parol evidence, is subject to the four (4) year statute for oral agreements.

3. The agreement to reduce the payment was a modification.

As the moving party who bore the burden of establishing the elements and

supporting evidence of an issue on which she bore the burden of proof¹, Ms.

Kenworthy offered no law or analysis to explain when an oral agreement is a modification of a separate agreement. While there are Utah cases which state such a difference exists², there is no case law in Utah explaining the method for making this determination. Regardless, it is clear from existing Utah precedent that the reduction of the payment was a modification.

Utah courts have long recognized that oral modifications are enforceable, particularly where performance has occurred. Bamberger Co. v. Certified Productions, Inc., 48 P.2d 489, 88 Utah 194 (Utah 1935), R.T. Nielson Co. v. Cook, 40 P.3d 1119, 2002 UT 11 (Utah 2002). Ms. Kenworthy performed her obligation for May 2008 by paying \$200 on May 9, 2008. Her next payment was then due on June 15, 2008.

In Fisher v. Fisher, 907 P.2d 1172 (Utah App. 1995), this Court stated:

It is settled that the parties to a contract may modify all or any portion of that contract. Moreover, a condition precedent to enforcement of a modified contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness.

Id. at 1177 (Internal quotations and citations omitted). The Court then held that the parties had a meeting of the minds and orally modified a written escrow agreement where they “narrowly modified” a single term of the

¹ Orvis v. Johnson, 2008 UT 2, 177 P.3d 600, ¶ 17.

² Ron Shepherd Ins., *supra*

contract—the due date of annual payments; and through their conduct, observed that modification. Here, Goldenwest and Ms. Kenworthy narrowly modified the Original Agreement by reducing the amount of the monthly payment. Their minds met when Ms. Kenworthy paid and Goldenwest accepted the \$200 payment on May 9, 2008.

Fisher further requires that any modification meet the requirements of the statute of frauds³:

The general rule is that any modification of a contract that is within the statute of frauds must also comply with the statute of frauds. When a contract is required to be in writing, the same requirement applies with equal force to any alteration or modification thereof. Under the Utah Statute of Frauds, the original escrow agreement was required to be in writing. Thus, at first blush, the oral modification seems to violate the statute of frauds. However, a recognized and accepted exception to the statute of frauds provides if a party has changed his position by performing an oral modification so that it would be inequitable to permit the other party to found a claim upon the original agreement the modified agreement should be held valid. Thus, where there is evidence of part performance under the modified agreement, and where it would be inequitable to permit a party to repudiate the oral modification and seek enforcement of the written contract, the oral agreement may be removed from the statute of frauds and enforced.

Id. at 1176-1177 (Internal quotations and citations omitted). Ms. Kenworthy fully performed the modified agreement by making her \$200 payment on May 9, 2008. Thereafter, as long as she continued to make her monthly \$200 payments, it would have been inequitable for Goldenwest to pursue an action

³ UTAH CODE ANN. § 25-5-4(1)(a) provides that a contract which by its terms cannot be performed within one year must be in writing.

against her for the full amount of any monthly payment – \$487.21.

4. The oral modification did not being the case within the statute of limitations for an oral agreement.

The trial court relied upon Strand v. Union Pacific Railroad /Co., 6 Utah 2d 279, 282, 312; P.2d 561, 563 (Utah 1957) for the proposition that oral terms of a written contract require application of the statute of limitation for oral agreements. [R. 171] In Strand, a contractor and railroad company verbally agreed to materially change several terms of their construction agreement. These included:

the railroad would make an adjustment including insurance and expenses so that [the contractor] would not lose a dime; that although the contract specified July 1, 1944, as the completion date, the railroad would extend the time to December, 1944, 'by Christmas'; that all costs and expenses from the beginning to the end of the job would be paid so that [the contractor] would be reimbursed for his losses; and that the railroad would pay for capital expenditures and depreciation on equipment in connection with the job.

Id. at 562.

However, in Strand, all of the evidence of the altered terms was parol, and the contract was a construction contract, which was not subject to the written requirements of statute of frauds. Therefore, Strand is inapplicable because: 1) the terms of the modification here can be proven without resort to parol evidence; and 2) this contract and oral modification are within the statute of frauds.

Strand is a construction case which adopts a rule from a Texas construction case, holding that contracts which are partly oral and partly written are governed by

the statute of limitations for oral agreements. However, Texas courts have recognized that if the oral portion of the agreement is within the statute of frauds, the contract is governed by the statute of limitations for written agreements.

In Texas Western Railway Co. v. Gentry, 1888, 69 Tex. 625, 8 S.W. 98, 101, the Texas Supreme Court concluded the resolution of a board of directors signed by the officers, "is a memorandum in writing as required by the statute of frauds, and that as such, it can be lawfully enforced." Id. Further,

[i]f a resolution duly entered and signed can be a writing under the statutes of frauds, it must be a contract in writing within the meaning of the statute of limitations, where it shows upon its face that it is intended as the final acceptance of a previous agreement.

Id. Therefore, where an agreement is governed by the statute of frauds and the evidence of the terms of the agreement are sufficient to meet the requirement of the statute of frauds, the written nature of the agreement is established and the oral nature of any evidence is not determinative of the treatment of the contract, for purposes of the statute of limitations.

Here, the final expression of the agreement reducing payments to \$200 is the receipt for Ms. Kenworthy's credit card payment, reflecting her agreement to pay the reduced amount. More importantly, all of the terms can be ascertained by reference to written documents: 1) the amount of original obligation and interest rate are in writing; 2) the amount of the reduced payment is reflected in the written receipt; and 3) the adjusted repayment term can be ascertained through calculation, using the

outstanding balance; interest rate; and the new installment amount. There are no modified terms which must be proven by parol. Accordingly, rather than applying the four (4) year statute for oral agreements, the correct application of Strand is to keep this case within the six (6) year statute for written contracts. This is true because:

a written promise to pay without naming the amount may be construed as founded on a written instrument where an objective standard for determining the price is provided in the instrument, even though the amount must be ascertained by evidence [from elsewhere].

Id. at 563.

B. ATTORNEY FEES

On February 24, 2015, Ms. Kenworthy filed a motion for an award of attorney fees, as the prevailing party under the reciprocal fee provision in UTAH CODE ANN. § 78B-5-826. Under prior counsel, Goldenwest did not object to that motion. The court awarded fees pursuant in its Order entered on April 14, 2015. Since Goldenwest did not object to the entry of fees before the trial court, it did not preserve the ability to challenge the amount of fees on appeal. However, the award of fees was based on Ms. Kenworthy being the prevailing party under the reciprocal fee provision in UTAH CODE ANN. § 78B-5-826. If this Court reverses the decision of the trial court, Ms. Kenworthy will no longer be a prevailing party and there will be no legal basis for her to receive fees. For that reason, Goldenwest requests that the award of attorney fees be reversed. Watkins v. Ford, 239 P.3d 526, 2010 UT App 243 (Utah App. 2010) (Reversing reciprocal award of fees and awarding fees under contract for trial and

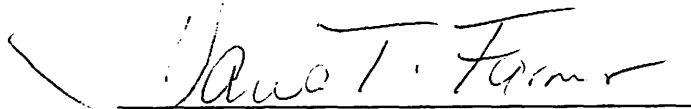
appeal.) Goldenwest further requests that the issue of expenses, including attorney fees for this appeal, be evaluated by the trial court when a final order is entered. General Const. & Development, Inc. v. Peterson Plumbing Supply, 248 P.3d 972, 974, 2011 UT 1, ¶ 13.

CONCLUSION

For the foregoing reasons, Goldenwest asks this Court to reverse the trial court's grant of summary judgment and conclude the statute of limitations for written agreements, pursuant to UTAH CODE ANN. § 78B-3-309, governs the time for filing this action; that the reduction of the payment amount is a modification to the Original Agreement; and reverse the award of attorney fees to Ms. Kenworthy.

RESPECTFULLY SUBMITTED this 8th day of January, 2016.

SMITH/KNOWLES, P.C.

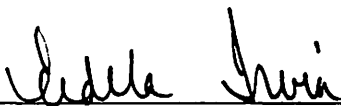
A handwritten signature in black ink, appearing to read "Dana T. Farmer", is written over a horizontal line.

Dana T. Farmer
Attorney for Appellant
Goldenwest Federal Credit Union

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies and one (1) searchable CD of the foregoing APPELLANT'S OPENING BRIEF were mailed by first-class mail with postage fully prepaid this 8th day of January, 2016, to the following:

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Paralegal

ADDENDUM #1

(Ruling on Defendant's Motion for Summary Judgment)

DEC 22 2014

By _____
SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

GOLDENWEST FEDERAL CREDIT
UNION,

Plaintiff,

v.

KATHLEEN F. KENWORTHY,

Defendant.

**RULING ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

Case No. 149905786

Judge Elizabeth Hruby-Mills

DATE: December 22, 2014

This matter is before the Court on Defendant's Motion for Summary Judgment dated August 8, 2014. Plaintiff filed an Opposition to the Motion dated August 22, 2014, and Defendant filed a Reply Memorandum dated August 29, 2014. Court held oral argument on this Motion on November 7, 2014. Plaintiff seeks damages against Defendant for an alleged breach of contract. Defendant requests entry of summary judgment based on the expiration of the applicable statute of limitations. The Court grants Defendant's Motion for Summary Judgment and enters the following order.

FINDINGS OF FACT

1. Plaintiff Goldenwest Federal Credit Union and Defendant Kathleen Kenworthy (collectively "Parties") entered into a loan agreement ("Original Agreement") on April 24, 2006. Complaint ¶ 5; Answer.

2. On May 9, 2008, the Parties orally agreed to Defendant's repayment of debt in the amount of \$200 per month. Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Opposition"), Statement of Additional Facts ¶ 3; Reply Memorandum in Support of Defendant's Motion for Summary Judgment on Plaintiff's Claims ("Reply"), Argument Section III.
3. On May 9, 2008, Defendant paid Plaintiff \$200. Opposition, Statement of Additional Facts ¶ 4.
4. Defendant made no payments to Plaintiff after May 9, 2008. Memorandum in Support of Defendant's Motion for Summary Judgment on Plaintiff's Claims ("Motion"), ¶ 3; Opposition, ¶ 3.
5. The alleged debt at issue in the Complaint arose before May 12, 2008. Complaint ¶ 3.
6. On March 2, 2011, Plaintiff filed a complaint against Defendant ("Previous Case").
Goldenwest Federal Credit Union v. Kathleen Kenworthy, case no. 110905153 DC (Third District Court, Salt Lake County, State of Utah) (2011).
7. On March 25, 2011, in the Previous Case, Defendant filed an Answer and Counterclaim ("2011 Counterclaim") against Plaintiff. *Id.*
8. In the 2011 Counterclaim, Defendant denied any default of the Original Agreement and denied owing a debt to Plaintiff. *Id.*
9. The Court dismissed the Previous Case on January 11, 2012 for lack of prosecution. *Id.*
10. Plaintiff served Defendant with a Complaint for the present case on May 13, 2014 and filed the Complaint with this Court on May 15, 2014.

STANDARD OF REVIEW

Summary Judgment is appropriate only when there is “no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” URCP 56(c). On a motion for summary judgment, the court views the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Morra v. Grand County*, 2010 UT 21, ¶ 12, 230 P.3d 1022, 1026 (Utah 2010).

CONCLUSIONS OF LAW

Defendant moves for summary judgment claiming that Plaintiff’s claim is barred by the running of the statute of limitations covering the agreement between the Parties. An action may be brought within six years “upon any contract, obligation, or liability founded upon an instrument in writing.” Utah Code Ann. (1953) § 78B-2-309. The Parties entered into a written loan agreement, the Original Agreement, on April 24, 2006 initially tolling Plaintiff’s limitation to bring a cause of action on that instrument. The statute of limitations for recovery of a debt may nonetheless be started or revived “from the date: (a) the debt arose; (b) a written acknowledgment of the debt or a promise to pay is made by the debtor; or (c) a payment is made on the debt by the debtor.” Utah Code Ann. (1953) § 78B-2-113(1). If an action is barred by provision of the statute of limitations, “it shall be unavailable ... as a cause of action.” Utah Code Ann. (1953) § 78B-2-113(2). The actions of the Parties in this case did renew a limitations period, but not after May 12, 2008. Because Plaintiff served and filed the Complaint after May 12,

2014 and the statute of limitations had run, Plaintiff is barred by the statute of limitations and has no present cause of action against Defendant.

- 1. The six year statute of limitations has run in this case and the Parties' actions did not renew the tolling under § 78B-2-113(1)(a) or (1)(c).**

The Parties' entered into the Original Agreement on April 24, 2006 and the statute of limitations began running as of that date under § 78B-2-113(1)(a), when the "debt arose." Utah Code Ann. (1953) § 78B-2-113. As a result of § 78B-2-113(1)(c), which renews the limitations period upon payment on the debt, the statute of limitations restarted on each successive payment made by Defendant. Plaintiff alleges that on February 15, 2008, Defendant failed to make the monthly payment on the Original Agreement, ending the renewal of the statute of limitations for payment on the debt. Even if Defendant's payment of \$200 to Plaintiff on May 9, 2008 constituted payment on the debt under the Original Agreement, the six-year statute of limitations had run before Plaintiff served the Complaint in this case.

- 2. The Parties' actions did not renew the statute of limitations by written acknowledgement of the debt or promise to pay under § 78B-2-113(1)(b).**

The limitations period for bringing a cause of action on a written instrument can be renewed by "a written acknowledgment of the debt or a promise to pay ... by the debtor." Utah Code Ann. (1953) § 78B-2-113(1)(b). Either a written acknowledgment or a promise to pay is sufficient to renew the limitation period under this provision and both are not required. *Beck v. Dutchman Coal. Mines Co.*, 2 Utah 2d 104, 108, 269 P.2d 867, 869 (Utah 1954).

On May 9, 2008, the parties agreed orally that Defendant would pay \$200 per month toward the debt owed to Plaintiff on the Original Agreement and Defendant tendered \$200 the same day. Whether this was a wholly new oral agreement as Defendant suggests or a modification to the Original Agreement as the Plaintiff suggests, the result is the same. If a new oral agreement, the renewal provision would toll a four-year limitations period from May 9, 2008, when “the debt arose.” Utah Code Ann. (1953) § 78B-2-113(1)(a); Utah Code Ann (1953) § 78B-2-307(1)(a) (“An action may be brought within four years after the last charge is made or the last payment received upon a contract, obligation, or liability not founded upon an instrument in writing”). If the Parties’ agreement made an oral modification of material terms to the written Original Agreement, the four-year statute of limitations for oral agreements would begin May 9, 2008. *Strand v. Union P.C. R. Co.*, 6 Utah 2d 279, 282, 312 P.2d 561, 563 (Utah 1957) (“where a specific material term of the contract in writing is subsequently changed orally, the statute of limitations applicable to oral contracts applies”). In either case, the statute of limitations had run before Plaintiff initiated this case and Plaintiff has no cause of action against Defendant. Even if the Court were to apply a six-year statute of limitations, that period tolls on May 9, 2008, “from the date ... a promise to pay is made by the debtor.” Utah Code Ann. (1953) § 78B-2-113(1)(b).

Plaintiff argues, in the alternative, that Defendant acknowledged the debt in a March 25, 2011 Answer and Counterclaim in a separate case between the parties on the same issues.¹ Interpreting ‘acknowledgement of the debt’, the Supreme Court of Utah explained that:

No set phrase or particular form of language is required; anything that will indicate that the party making the acknowledgment admits that he is still liable on the claim, that he is still bound for its

¹ *Goldenwest Federal Credit Union v. Kathleen Kenworthy*, case no. 110905153 DC (Third District Court, Salt Lake County, State of Utah) (2011).

satisfaction, that he is still held for its liquidation and payment, is sufficient to revive the debt or claim.

Beck v. Dutchman Coal. Mines Co., 2 Utah 2d 104, 108, 269 P.2d 867, 869 (Utah 1954), quoting *Elder v. Dyer*, 26 Kan. 604, 610 (Kan. 1881), (overruled on a separate issue by *Bernard v. Davidson*, 112 Kan. 31, 209 P. 668 (Kan. 1922)).

An “acknowledgment necessary to start the statute anew must be more than a hint, a reference, or a discussion of an old debt; it must amount to a clear recognition of the claim and liability as presently existing.” *Salt Lake Transfer Co. v. Shurtliff*, 83 Utah 488, 30 P.2d 733, 737 (Utah 1934), quoting *In re Gilman, Son and Co.*, 57 F.2d 294, 296 (S.D.N.Y. 1932).

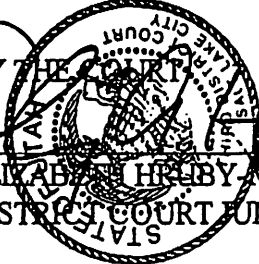
In the 2011 Counterclaim, Defendant admitted entering into the Original Agreement on April 24, 2006, but denied any outstanding debt obligation to Plaintiff. *Goldenwest v. Kenworthy*, case no. 110905153 DC (Third District Court, Salt Lake County, State of Utah) (2011), Answer and Counterclaim. The 2011 Counterclaim presented no clear recognition of the debt owed to Plaintiff and no corresponding liability. Because the 2011 Counterclaim does not admit liability on Plaintiff’s claim, Defendant’s pleading is not an acknowledgment of the debt necessary to revive the statute of limitations under § 78B-2-113(1)(b).

CONCLUSION

The applicable statute of limitations had run prior to Plaintiff initiating the present action. The actions of the Parties did not renew the statute of limitations necessary to protect Plaintiff's cause of action and Plaintiff's claim is barred by § 78B-2-113(2) and § 78B-2-309(2) (six year statute of limitations). Defendant's Motion for Summary Judgment is hereby GRANTED. .

Dated this 22 day of December 2014.

BY THE COURT
ELIZABETH HILBY MILLS
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 149905786 by the method and on the date specified.

MAIL: TIMOTHY W BLACKBURN 372 24TH ST STE 400 OGDEN, UT 84401

MAIL: PETER A KLC 4725 S HOLLADAY BLVD #110 SALT LAKE CITY UT 84117

12/22/2014

/s/ SUSAN M PURDY

Date: _____

Deputy Court Clerk

ADDENDUM #2

**(Affidavit of Shanna Howell in Support of Plaintiff's
Response to Defendant's Motion for Summary Judgment)**

VAN COTT, BAGLEY, CORNWALL & McCARTHY
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Email: tblackburn@vancott.com

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

SALT LAKE DEPARTMENT STATE OF UTAH

GOLDENWEST FEDERAL CREDIT
UNION, a Utah corporation

Plaintiffs,

vs.

KATHLEEN KENWORTHY

Defendants.

KATHLEEN KENWORTHY,

Counterclaim Plaintiff

vs.

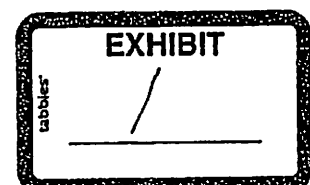
GOLDENWEST FEDERAL CREDIT
UNION, a Corporation

Counterclaim Defendant

AFFIDAVIT OF SHANNA
HOWELL IN SUPPORT OF
PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Case No. 149905786
Judge Collections

STATE OF UTAH)
 : ss
COUNTY OF WEBER)



SHANNA HOWELL, first being sworn, deposes and says:

1. I am employed by Plaintiff, Goldenwest Federal Credit Union, in the Collections Department.
2. I have personal knowledge of the facts contained in this affidavit.
3. If I were called to testify, I could testify as to the facts contained in this affidavit.
4. In the Collection Notes attached as an exhibit to this affidavit, I am identified as "User 500". My notes regarding my interaction with Defendant/Counterclaim Plaintiff Kathleen Kenworthy, are recorded on the Collection Notes as User 500.
5. On May 8, 2009, Defendant/Counterclaim Plaintiff Kathleen Kenworthy, made a \$200 payment over the telephone, using her VISA Card No. XXXXXXXXXXXXX3346. A copy of the receipt for said \$200.00 payment made on May 8, 2009, is attached hereto, marked as Exhibit "A". Also attached is a copy of the Collection Notes entered on May 9, 2008, noting that Kathleen Kenworthy stated that she would call "next month and do the same". At that time, I informed her that her payments would stay due on the 15th day of each month.
6. Defendant Kathleen Kenworthy's next payment was due June 15, 2009. Kathleen Kenworthy did not make the June 15, 2009 payment.
7. Defendant/ Counterclaim Plaintiff Kathleen Kenworthy called Plaintiff on June 10, 2008 and said "towing place has now taken possession of her wrecked vehicle. I told her it was wrecked and we didn't want it. She said she could have sold it, but we wouldn't

release the title to her, so she said this is lender liability and she won't pay us and will get an attorney." See Collection Notes marked as Exhibit "B", attached, entry dated June 10, 2008.

Shanna Howell
SHANNA HOWELL

SUBSCRIBED AND SWORN to before me by Shanna Howell, this 22nd day of
August, 2014.

Karla M Brown
Notary Public



4827-4217-1420, v. 1

1744869

GOLDENWEST FCU
147 26TH ST
OGDEN, UT 84401

881.621.4550

GOLDENWEST FCU
147 26TH ST
OGDEN, UT 84401

881.621.4550

MERCHANT : 8667 475818111112 881
EXP NO. : 150021 002 55215162
DATE : 05/09/00 10:30
ACCT NO. : XXXXXXXXXX3346
TYPE : VISA
AUTH NO. : 000066

CASH ADV \$ 200.00

ID# 15956895

EXP DATE: 2-4-10

ADDRESS: 14139 SENIOR BLVD RD

DRAPER, UT 84020

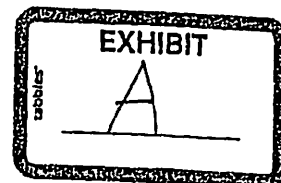
By phone
SIGNATURE

AGREE TO PAY ABOVE TOTAL AMOUNT
ACCORDING TO CARD ISSUER AGREEMENT
(MERCHANT AGREEMENT IF CREDIT VOUCHER)

PLEASE INPRINT CARD

SIGNATURE COMPARED BY: SOD SH

COPY-MERCHANT BOTTOM COPY-CUSTOMER



to give to jennifer for legal

07/07/2008 12:13p User 124 Loan 01

What is being done to collect on repo def?

06/10/2008 3:43p User 500 Loan 01

cont --has agreed to send ea mo to us with cuna we can send them \$100 ea mo that will help with pmts to them also --this was not what she wanted to hear was all our fault she cld have sold this wrecked vehilcle for \$4000 and pd on her loan -she was mad and ended our conversation

06/10/2008 3:40p User 500 Loan 01

kathleen called upset as towing place has now taken poss of her wrecked vehcile she wanted to know why we didnt tld her because was wrecked and we didnt want it --sd she she cld of sold it but we wouldnt release the title to her so she sd this is lender liability and she wont pay us will get an atty --i explaind cuna insur pmt to her tld her this in insurance on our loss not hers and she is still liable for full amt of loan --tld her we cld split the \$200 she

05/10/2008 11:19p User 904 Loan 01

Payment of 200.00 made on 05/09/08 toward a 487.21 payment due on 02/15/08. Loan delinquent for 85 days.

05/09/2008 11:58a User 500 Loan 01

kathleen called back wntat to know if she can now sell/dispose of vehicle as still is tow yard --to help on bal owing --i discussed this with jennifer sd now that she has made arrangements on bal she can dispose of this

05/09/2008 10:48a User 500 Loan 01

ran visa thru for the \$200 ---posted pmt --mailed receipt we can bring acct currant after 3 good faith pmts

05/09/2008 10:13a User 500 Loan 01

i called kathleen --made pmt arrangements for \$200 mo on this repo dif --best for now may be able to do more later --she will be changing jobs next month as her co is closing her dept down --will get back to me with new poe info ----she wanted to make her 1st \$200 pmt 2day with her visa --sd will call me next mo and do same --pmts will stay due on the 15th of mo

05/09/2008 11:18p User 904 Loan 01

Payment of 17,549.60 made on 05/08/08 toward a 487.21 payment due on 02/15/08. Loan delinquent for 84 days.

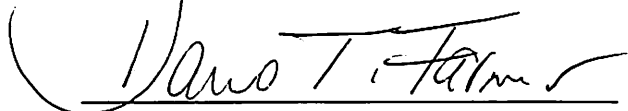


CERTIFICATE OF COMPLIANCE
(Pursuant to Rule 24(f)(1)(C))

I hereby certify that Appellant's Brief is compliant with the type-volume limitations of Rule 24, *Utah Rules of Appellate Procedure*. Appellant's Brief contains 4,360 words.

Respectfully submitted this 8th day of January, 2016.

SMITH KNOWLES, P.C.



DANA T. FARMER

Attorney for Goldenwest Fed. Credit Union