

2016

**GREG TORGERSON, Plaintiff and Appellant, v. JOSH TALBOT, TEX
R. OLSEN, ESTATE OF BRET KOUNS, Defendants and Appellees. :
Brief of Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GREG TORGERSON,)	
)	PUBLIC
Plaintiff and Appellant,)	
v.)	Case No. 20160759
)	
JOSH TALBOT, TEX R. OLSEN,)	
ESTATE OF BRET KOUNS,)	
)	
Defendants and Appellees.)	

BRIEF OF APPELLANT

Appeal from a Judgment of the Sixth District Court
In and For Sevier County, State of Utah
Honorable Wallace A. Lee

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Cases:

In Re Estate of Sharp, 537 P.2d 1034, 1037 (Ut.1975). Found on pages 9, 10.

Miller v. Weaver, 2003 UT 12 (Ut.2003). Found on page 3

Rules and Statutes:

Utah Code Ann. § 75-1-302. Found on page 3

Utah Code Ann. § 75-3-704. Found on page 4

Utah Code Ann. § 75-3-804. Found on page 4, 7 & 9

Utah Code Ann. § 78A-4-103. Found on page 3

Utah Code Ann. § 78B-6-404. Found on page 5

Utah Code Ann. § 78B-6-410. Found on page 5

Statement of Jurisdiction

This Court has jurisdiction under Utah Code Ann. § 78A-4-103 to review the District Court's decision dismissing Appellant's Declaratory Judgment Act Complaint.

Issues Presented for Review

1. Did the District Court err as a matter of law in determining that Appellant's Declaratory Judgment Act Complaint was time barred and dismissing the action?

Standard of Review

A district court's legal conclusions are given no deference by the appellate court and said conclusions are reviewed *de novo*. *Miller v. Weaver*, 2003 UT 12 (Ut.2003).

Preservation of the Issues

The issues raised in Appellant's brief were preserved in Appellant's Memorandum Opposing Defendants' Motion to Dismiss Plaintiff's Complaint and at the July 11, 2016 hearing on Appellees' Motion to Dismiss Plaintiff's Complaint.

Determinative Statutes, Rules, and Ordinances

Utah Code Ann. § 75-1-302:

(1) To the full extent permitted by the Constitution of Utah, the court has jurisdiction over all subject matter relating to: (a) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; (b) protection of minors and incapacitated persons; and (c) trusts. (2) The court has full power to make orders, judgments, and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

Utah Code Ann. § 75-3-704:

A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court, but may invoke the jurisdiction of the court in proceedings authorized by this code to resolve questions concerning the estate or its administration.

Utah Code Ann. § 75-3-804:

(1) Claims against a decedent's estate may be presented as follows: (a) The claimant may deliver or mail to the personal representative, or the personal representative's attorney of record, a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on either the receipt of the written statement of claim by the personal representative or the personal representative's attorney of record, or the filing of the claim with the court, whichever occurs first. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made. (b) The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction to obtain payment of the claim against the estate, but the commencement of the proceeding must occur within the time

limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of the decedent's death. (2) If a claim is presented under Subsection (1)(a), no proceeding thereon may be commenced more than 60 days after the personal representative has mailed a notice of disallowance; but, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the 60-day period, or to avoid injustice the court, on petition, may order an extension of the 60-day period, but in no event may the extension run beyond the applicable statute of limitations.

Utah Code Ann. § 78B-6-404:

The court may refuse to render or enter a declaratory judgment or decree where a judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Utah Code Ann. § 78B-6-410:

Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may petition the court for a declaratory judgment: (1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; (2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or (3) to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

Statement of the Case

Appellant filed his Declaratory Judgment Act Complaint on March 24, 2016. The Complaint was filed in direct response to a petition filed by Appellee Estate of Bret Kouns to lease certain real property to Appellee Josh Talbot, which was filed on March 16, 2016 in Sixth Circuit District Court Case No. 153600021.¹ On April 19, 2016, the District Court for the Sixth District Court, State of Utah, Sevier County issued judgment permitting Appellee Kouns Estate to lease the real property in question. The judgment was a default judgment in that Appellant was not present at the April 18, 2016 hearing held by the District Court. It does not appear from the record that the Declaratory Judgment Act Complaint was ruled upon at the April 18, 2016 hearing.

Appellant immediately filed a motion for relief from the default judgment under Rule 60 of the Utah Rules of Civil Procedure. The motion was fully briefed by the parties and a hearing was held before the Honorable Wallace A. Lee on July 11, 2016. The July 11, 2016 was a combined hearing on both Appellant's Rule 60 Motion and Appellees' Motion to Dismiss the Declaratory Judgment Act Complaint. The District Court issued its combined decision denying Appellant's motion to vacate and granting Appellees' motion to dismiss on August 15, 2016.

¹ Sixth Circuit District Court Case No. 153600021 is a probate case involving the same parties that are in this appeal. The Sixth Circuit District Court combined the probate case with this case and rendered a combined decision on both matters. The probate case has been assigned Appellate No. 20160758.

As to the Declaratory Judgment Act Complaint, the District Court held that Appellant's Complaint should be dismissed because the claims set forth therein were time barred by Utah Code Ann. § 75-3-804(2), which requires a claimant in a probate matter to commence an action to enforce the claim within sixty (60) days after the claim has been denied by the probate estate.

Appellant timely appealed the District Court's decision to this Court.

Statement of Facts

The following facts are relevant to this appeal:

1. Bret Kouns passed away on June 10, 2015.²
2. Prior to his passing, Mr. Kouns entered into a series of agreements with Appellant, which gave Appellant certain leasehold and ownership rights to real property owned by Mr. Kouns at that time of his passing.
3. On June 19, 2015, Appellee Estate of Bret Kouns filed an Application for Informal Probate of Will and Appointment of Personal Representative.
4. Appellant filed a claim against the Appellee Kouns Estate on October 7, 2015 asserting a leasehold/ownership interest in property owned by the Appellee Kouns Estate.
5. Appellant's claim was filed *pro se*;
6. Appellee Kouns Estate filed a denial of Appellant's claim on October 9, 2015.

² Citation to the record for facts related to the probate case (District Court Case No. 153600021 & Appellate No. 20160758) can be found in Appellate Case No. 20160758, which is incorporated herein by reference.

7. Appellee Kouns Estate filed a Petition for Court Approval of Agriculture Lease and Option to Sell Estate Property (hereinafter “Petition”) on March 10, 2016 seeking to lease and sell property in which Appellant claims an interest to Appellee Josh Talbot;
8. Appellant filed a Complaint for Declaratory Judgment on March 24, 2016 seeking a declaration from the District Court that Appellant had a leasehold/ownership interest in the real property that was the subject of the Petition. (Record on Appeal (“ROA”), #1-14);
9. Appellees filed a Motion to Dismiss Plaintiff’s Complaint on March 31, 2016. (ROA #31-35);
10. The District Court held the hearing on April 18, 2016 and granted a default judgment on the Petition in favor of Appellee Kouns Estate.
11. The Default Judgment was entered by the District Court on April 19, 2016;
12. The Default Judgment did not address Appellees’ Motion to Dismiss Plaintiff’s Complaint, but the decision effectively rendered the Declaratory Judgment Act Complaint moot;
13. Appellant filed a Rule 60 Motion to Vacate the Default Judgment on April 19, 2016;
14. A combined hearing was held on Appellant’s Rule 60 motion to vacate the default judgment and on Appellees’ motion to dismiss the Declaratory Judgment Act Complaint on July 11, 2016. (ROA #184));

15. The District Court issued its combined decision denying Appellant's Rule 60 motion and granting Appellees' Motion to Dismiss on August 15, 2016. (ROA #185-209);

16. Appellant timely appealed the District Court's decision. (ROA #210-211).

Summary of Argument

In its decision granting Appellees' Motion to Dismiss, the District Court held that the claims set forth in Appellant's Declaratory Judgment Act case were time barred under Utah Code Ann. § 75-3-804(2) because Appellant had failed to prosecute his alleged claims against the Estate of Bret Kouns within sixty (60) days after the Estate had denied said claims. The claims in the Declaratory Judgment Act Complaint were identical to the claims made by Appellant against the Estate in the probate action.

The District Court's conclusion was in error. Appellant's claims are claims for specific performance. He is asserting that he has a right to continue leasing the property and, thereafter, purchase the same. "The term 'claim' found in [the Probate Code] does not include a claim for specific performance. . . ." *In Re Estate of Sharp*, 537 P.2d 1034, 1037 (Ut.1975). Appellant's claims cannot, therefore, be time barred by the Probate Code.

Argument

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT CONCLUDED THAT APPELLANT'S CLAIMS WERE TIME BARRED BY THE PROBATE CODE.

The District Court concluded that Appellant's Declaratory Judgment Act claims were time barred by the Probate Code because he did not bring them within sixty (60) days after the Estate of Bret Kouns denied said claims. Appellant's Declaratory Judgment Act claims were identical to the claims he made against the Estate in the probate case.

Appellant's Declaratory Judgment Act claims were not time barred by the Probate Code. While Probate Code does require the timely commencement of an action to enforce a claim, the claims being asserted by Appellants are not subject to this requirement. "The term 'claim' found in [the Probate Code] does not include a claim for specific performance, but refers to debts or demands against the decedent which might have been enforced in his lifetime, by personal actions for the recovery of money; and upon which only a money judgment could have been rendered." *In Re Estate of Sharp*, 537 at 1037.

Appellant's claims are for specific performance in that he is seeking to force the Kouns Estate to honor his right to continue to lease and, ultimately, purchase the real property in question. In short, Appellant is seeking to force the Kouns Estate to honor the wishes of Mr. Kouns and sell the subject property to Appellant. Appellant's *pro se* "claims" filed in the probate case do not, by virtue of the filing, transform the claims for

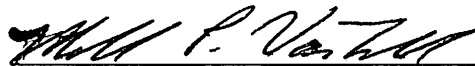
specific performance into claims subject to the time requirements set forth in the Probate Code.

The sole basis for the District Court's conclusion that Appellant's Declaratory Judgment Act claims should be dismissed was that Appellant's claim were time barred by the provisions of the Probate Code. As set forth herein, Appellant's claims for specific performance are not subject to the time requirements of the Probate Code. Accordingly, Appellant's claim are not time barred and his Declaratory Judgment Act Complaint should not have been dismissed.

Conclusion

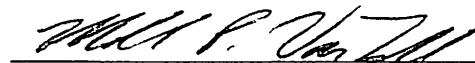
For the reasons to be set forth herein, the District Court's decision should be reversed and the case remanded to allow Appellant to prosecute his Declaratory Judgment Act Complaint.

Respectfully submitted by,


Michael P. Van Tassell
Attorney for Plaintiff/Appellant

Certificate of Compliance With Rule 24(f)(1)

I, Michael P. Van Tassell, certify that this document, Brief of Appellant, complies with the Court's type-volume limitations and contains 2,494 words according to the word processing software used to prepare this document.

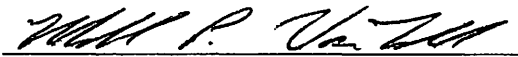

Michael P. Van Tassell

No Addendum

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of Plaintiff/Appellant's Brief was served on the attorney of the Defendant/Appellee by placing two copies in the U.S. Mail, first-class, postage prepaid, this 1st day of March, 2017, at the address listed below.

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