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Frances O'Hair v. John S. Kounalis And George Kounalis : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

FRANCES O'HAIR,
Plaintiff-Appellant,

- vs. -

JOHN S. KOUNALIS and
GEORGE KOUNALIS,
Defendants-Respondents.

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT
OF THE THIRD DISTRICT COURT
FOR SALT LAKE COUNTY
Honorable Stewart M. Hansen, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

FRANCES O'HAIR,
Plaintiff-Appellant,

- vs. -

JOHN S. KOUNALIS and
GEORGE KOUNALIS,
Defendants-Respondents.

} Case No.
11445

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

Plaintiff seeks to recover loans made by her to defendants on oral agreements and not fully repaid.

DISPOSITION IN LOWER COURT

Defendant's motion for summary judgment of dismissal of plaintiff's complaint was granted on the sole ground that the statute of limitations had run.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the summary judgment and trial on the merits.

STATEMENT OF FACTS

Because this is an appeal from a summary judgment, the facts alleged by plaintiff in her pleadings and deposition will be set forth, even though some of them are denied by defendants.

Plaintiff was orphaned at age 14, and resided until age 18 at her parents home in Salt Lake City, Utah, with her older sister and a Mrs. Leone Small, who had been hired as housekeeper for the girls by their guardian. Mrs. Small was mother-in-law of defendant John Kounalis, hereafter referred to as "John." (Pltf. depos. p. 4, L. 17 - p. 5, L. 23) When plaintiff became 18, in 1962, the home was sold and she received \$11,000.00 as her share of her mother's estate. (Pltf. depos. p. 8, L. 4 - 14) Mrs. Small then returned to live at the home of John Kounalis, his wife and his younger, single brother, defendant George Kounalis, hereafter referred to as "George." During her four year association with Mrs. Small, plaintiff had become very close to the Kounalis clan and considered them as her "family." She even moved into an apartment next door to the Kounalis home when her parents home was sold. In July 1962, George was arrested and charged in Federal Court in San Diego, California with a felony. His attorney fee was \$3,500.00, of which he paid \$1,000.00. He also paid \$1,032.25 in October 1962, to recover his car, which had been confiscated, and paid \$100.00 in March 1963 to settle the fine imposed upon him by the court. (George depos. p. 5, L. 24 - p. 6, L. 4; p. 18, L. 2 - 8)

The \$3,632.24 balance was paid by money advanced by plaintiff, on oral agreements, during the period from October, 1962, through March, 1963. The transactions are best stated in plaintiff's own words in her deposition at page 11, lines 16-25:

"A. John was the one that first approached me on it. George apparently didn't have the money, and he was in difficulty. He asked me if I would consider loaning it to them — John did. It was a verbal agreement that it would be repaid back. He said that it might be five or six years, but that it would be repaid. He explained to me what the problem was. I said, 'Fine.' I happened to have the money and they happened to be like family. I was at their home for Christmas and Thanksgiving, and they were very nice people. And if your friends are in trouble, you try to help them; so I just gave them the money."

Plaintiff reiterated several times in her deposition that the loan was made only on John's promise that it would be repaid. (Pltf. depos. p. 29, L. 13-15; p. 31, L. 17; p. 32, L. 22-25)

George acknowledges that he received the subject money from John. (George depos. p. 17, L. 1-25) John acknowledges that he received the money from plaintiff and paid it on to George. (John depos. p. 6, L. 20-21) The defendants admit only that \$2,532.25 was advanced them by plaintiff. (John depos. p. 7, L. 8-9) They deny any loan, and claim plaintiff made them a gift of the money. (John depos. p. 12, L. 7-21)

During 1963 and into January, 1964, John let plaintiff obtain groceries at his store totalling \$726.00. He

never billed her for them, but did keep all of the tapes. (John depos. p. 13, L. 9-15; p. 14, L. 20-25) Plaintiff claims these were payments on the loan. (Pltf. depos. p. 34, L. 18; p. 35, L. 9) John claims the \$726.00 in groceries was his gift to plaintiff. (John depos. p. 18, L. 5-19)

In 1964 George paid plaintiff \$100.00, and in 1967 paid her \$50.00. Plaintiff claims these were payments on the loan (pltf. depos. p. 29, L. 21—p. 30, L. 6), George claims these payments were gifts. (George depos. p. 12, L. 17-19; p. 14, L. 1-12)

On October 27, 1968, plaintiff sued defendants on the debts. (R. 1) The filing was five and one-half years from the last loan made in March 1963. It was four years and seven months from the last payment, free groceries, made by John. It was one year from the last payment, \$50.00, made by George.

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE WAS A GENUINE ISSUE OF FACT AS TO WHETHER THE STATUTE OF LIMITATIONS HAD RUN, WHEN PLAINTIFF BROUGHT SUIT SIX YEARS AFTER THE LOANS WERE MADE, BUT LESS THAN FOUR YEARS AFTER THEY WERE IN DEFAULT

On plaintiff's motion to set aside the summary judgment, the trial court was asked as to the basis of its ruling, so that arguments could be to the point. The court replied that its ruling was based solely on the statute of limitations. (R. 5-6) This appeal concerns itself solely with that issue.

Plaintiff's loans were made in a period from October 1962 through March 1963. (Pltf. depos. p. 9, L. 13-25; p. 10, L. 2-3) The loans were on oral contract. The applicable statute of limitations is four years (78-12-25(1) PCA, 1953). Plaintiff did not expect repayment for about five years. (Pltf. depos. p. 11, L. 16-20; p. 18, L. 3-4; p. 28, L. 16-18; p. 29, L. 13-15)

The issue of law is whether the statute of limitations begins to run when a contract is made, or when a contract is in default. The issue of fact is to determine the point in time when the loans were in default. If this point was within four years of the commencement of the lawsuit, then the statute of limitations has not run.

Holloway v. Wetzel, 86 U. 387, 45 P.2d 565, concerns a written contract with the issue before the court whether the statute of limitations begins to run on the date of the contract or the date of default. The court stated, at 86 U. 391, "This action was commenced August 22, 1933. The note sued upon is alleged to have become due December 12, 1925. It would be barred if no payments, acknowledgments or new promises were made, six years thereafter, being December 12, 1931." The case lacks discussion, but clearly states that the date of default is the date on which the statute begins to run. It could be argued, that if the date of execution of the contract automatically commenced the period of limitations, that no creditor or mortgagee could safely make a written contract running more than six years. Certainly on a long term mortgage, if payments are missed at say the eighth year, the statute then begins to run,

and this is not because payments have tolled the statute, but because until there is an actual default, the statute hasn't begun to run at all.

Open account and implied contract cases must be distinguished. In these, the rule is that a short time for payment is implied and then the statute starts to run. *Morris v. Russell*, 120 U. 545, 236 P.2d 451. This rule is based on the assumption that the contract is in default about a month from its execution. In the case at bar, the point at which the loans were in default is not clear. This is precisely the point which should have precluded the summary judgment. It is analogous, in a sense, to cases of misuse of funds by a corporation, or of fraud, where the statute does not begin to run when the improper payment is made, but from the date of discovery, which is analogous to default. *Petty & Riddle, Inc. vs. Lunt*, 104 U. 130, 138 P.2d 648. In *Crofoot v. Thatcher and Josselyn*, 19 U. 212, 57 P. 171, a demand note for a subscription in corporate stock was given. Eight years later, the corporation having failed, demand was made by the corporate receiver on the note. On refusal of the demand, suit was filed. The court held that the debt was not in default, and the statute had not run, until after demand had been made, and denied a defense of the statute of limitations.

The general rule is stated in 34 Am Jur, Limitation of Actions, §113, P. 91:

“Accrual of cause of action. In General. It is of the essence of statutes of limitations that time begins to run under them as to causes of action only after the right to prosecute them to

a successful conclusion has fully accrued. . . . As the rule is otherwise expressed, a right of action accrues whenever such a breach of duty or contract has occurred or such a wrong has been sustained, as will give a right to bring and sustain a suit. Conversely, the right to commence an action arises the moment the cause of action accrues. In the absence of a statute to the contrary, the test in each case is whether the party asserting the claim is entitled to maintain an action to enforce it, for no limitation commences to run against any demand until the obligation or demand is due and payable, in the sense that it is defined sufficiently to be capable of enforcement."

If the statute of limitations begins to run when the cause of action accrues, when does the cause accrue? In addition to *Crofoot v. Thatcher and Joselyn*, supra, other Utah cases bearing on the point are *State Tax Comm. v. Spanish Fork*, 99 U. 177, 100 P.2d 575, "The question is then, when did the cause of action accrue? The general rule is that it accrues at the time it becomes remedial in the courts, that is when the claim is in such condition that the courts can proceed and give judgment if the claim is established . . . 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." *Wilson vs. Weber Co.*, 100 U. 141, 111 P.2d 147 (Suit against government for refund of taxes, with statute requiring claim to be made before lawsuit can be filed and holding that cause of action accrues not when there is a liability, but only when liability is in such a position that suit can be filed); *Last Clear Chance Ranch Co. v. Erickson*, 82 U. 475, 25 P.2d 952 (Contract

for conveyance of stock "forthwith." Question of fact as to time meant by "forthwith," and statute starts to run from such time.)

1 Am Jur 2d, Actions §89, p. 618 states, "Thus, in the case of a contract calling for the payment of money, there can be no action at law commenced for the recovery of the money before it becomes payable in accordance with the terms of the contract."

An action for payment of money on an oral contract, if commenced prematurely, will be dismissed, because the cause of action has not accrued. *Bowers v. Bowers*, 99 S.W. 2d 334 (Texas); *Werber v. Atkinson*, 84 A. 2d 111 (D.C., 1951).

In sum, plaintiff had a claim against defendants as of the date of the loans. She did not have a cause of action until the claim was overdue. Determination of the time when the claim was due is a question of fact. The question itself is rather limited, because defendants deny the existence of a loan at all, so can't state a time when payment was due. The only testimony is plaintiff's, to the effect that she did not expect full repayment for up to five years, and that she had received payment during the interim in part, as she had requested it, by free groceries from John during 1963 and 1964, and cash payments by George during 1964 and 1967. It would be a great hardship on plaintiff, and a dangerous construction of the statute of limitations, to rule that a party not expecting full payment on a claim for a number of years, and receiving partial payments as demanded

during that time, is subject to the statute of limitations from the date of the contract.

POINT II

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO DEFENDANT, GEORGE KOUNALIS, BECAUSE THERE WAS AN ISSUE OF FACT AS TO WHETHER MONIES HE PAID TO PLAINTIFF IN 1964 AND 1967 TOLLED THE STATUTE OF LIMITATIONS.

George admits that he paid to plaintiff, by check, \$100.00 in 1964 (the time of year is not clear in the depositions of the parties), and \$50.00 in 1967. (George depos. p. 12, L. 18-19) He admits that he made the payments because, "I felt a little obligated" (George depos. p. 13, L. 8; p. 14, L. 7-8; p. 14, L. 25—p. 15, L. 3), that he would have repaid his brother John for the money if John had pressed him, but that he knew the true source of the money was plaintiff. (George depos. p. 16, L. 9-15)

Plaintiff claims these payments to be payments on her loan to George. (Pltf. depos. p. 18, L. 15-20; p. 27, L. 14-19)

78-12-25(1), UCA, 1953, provides a four year limitation on an oral contract, but 78-12-44, UCA, 1953, provides that payment of "any part of principal or interest . . ." restarts the limitation period. *Holloway v. Wetzer*, 86 U. 387, 45 P. 2d 565; *Crompton v. Jenson*, 78 U. 55, 1 P. 2d 242.

In light of the foregoing facts and law, it is difficult to understand how the trial court, other than by inadvertence, could have included George in a summary judgment based on the statute of limitations, when George admits payments within four years and admits that they were made from a sense of obligation on the loan.

POINT III

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE UNRESOLVED ISSUES OF FACT WHICH WOULD DETERMINE THE RESULT OF THE CASE.

Points I and II of this brief state unresolved issues. Rule 56(e) URCP provides:

“MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days from the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that *there is no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.” (emphasis added)

Utah law is well settled that a summary judgment shall be granted only if there is no genuine issue as to any material facts, and in weighing facts, the party

against whom the summary judgment is sought, has the benefit of having the evidence considered in the light most favorable to him. *Morris v. Farnsworth Motel*, 123 U. 289, 259 P. 2d 297; *Whitman v. W. T. Grant Co.*, 16 U. 2d 81, 395 P. 2d 918; *Young v. Felornia*, 121 U. 646, 244 P. 2d 862.

As to John, there is one issue, to wit: whether there is an issue of fact as to when the loans were in default and the statute of limitations began to run, in consideration of plaintiff's testimony that she did not consider payment due for a number of years.

As to George, there is the same issue, and a second issue, to wit: whether payments he made within four year of filing of the complaint were gifts or payment on the loan.

These issues could not be determined as a matter of law because they involve factual disputes.

Respectfully submitted,

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