

1968

Frances O'Hair v. John S. Kounalis And George Kounalis : Respondents' 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.

RESPONDENTS' BRIEF

Appeal from the Judgment of the District Court
for Salt Lake County,

Honorable Stewart M. Hanson, Judge.

JAMES A. McPHERSON
15 East Fourth South
Salt Lake City, Utah
Attorney for Respondents

SAMUEL KING
Boston Building
Salt Lake City, Utah
Attorney for Appellant

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Clerk Supreme Court

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IN THE SUPREME COURT
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FRANCES O'HAIR,

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vs.

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GEORGE KOUNALIS,

Defendants-Respondents.

} Case No.
11445

RESPONDENTS' BRIEF

STATEMENT OF THE CASE

This is an action brought by the plaintiff to recover money allegedly loaned to both defendants more than five and one-half years (5½) before the action was commenced. [R. 1]

DISPOSITION IN THE LOWER COURT

The trial judge granted the defendants' motion for summary judgment based upon the deposition of the parties [R. 7]; and also entered an order denying plaintiff's motion to set aside the said judgment [R. 10]

RELIEF SOUGHT ON APPEAL

The defendants ask that the judgment of the trial judge be affirmed.

STATEMENT OF FACTS

The plaintiff's parents died when she was fourteen (14) years of age and her aunt was appointed her legal guardian. The aunt hired Mrs. Leone Small, who was the defendant John S. Kounalis' mother-in-law to stay with her. The aunt moved out, but Mrs. Small stayed on with the plaintiff and her sister for about four (4) years and until they graduated from high school in 1962. [Dep. Pl. pp. 4-5] During this time, Mrs. Small and John Kounalis' family were the closest thing to a real family the plaintiff had. [Dep. JK p. 4]

The plaintiff and her sister each shared equally in the family estate consisting of some cash assets; a home which sold for \$21,000.00 and some inheritance from their grandfather's estate. [Dep. Pl. p. 7, 38] The plaintiff's share amounted to over \$11,000.00 which she received just after she turned eighteen (18) in January, 1962. [Dep. Pl. p. 8] By August of 1963, she had spent the entire inheritance. [Dep. Pl. p. 35-36] During this time, the defendant, John Kounalis, advised her not to spend the money but rather to invest it. John stated she seemed to have an obsession to get rid of her money and refused to consider investments. [Dep. JK p. 16]

After the plaintiff turned eighteen (18), she began to date George Kounalis who at that time was unmarried. [Dep. GK p. 15 L. 25; p. 16 L. 1] George testified that these dates averaged about once a week over ten months from Oct. 1962 through July 1963. He stated the plaintiff would call him seeking out the date. [Dep. GK pp.

10-11] John Kounalis stated the plaintiff was very much **in love with George**. [Dep. JK p. 22]; and the plaintiff herself admitted she liked George and wanted to help him out any way she could. [Dep. Pl. pp. 13-14]

Sometime in 1962, George Kounalis became involved in criminal litigation in California. The attorney's fees and other costs of defending this action became important. George Kounalis sold some of his stock to raise about \$2,500.00 to pay said expenses [Dep. GK pp. 8-9] At the time he was employed for Univac at Sperry Rand in Salt Lake City, Utah. [Dep. GK p. 6] John testified that George's nine (9) brothers and sisters could have raised the remaining money to defend this action had it been necessary to do so. [Dep. JK pp. 9-10]

However at about this same time, the plaintiff became aware of the circumstances and went directly to John Kounalis offering to give him money to help George. She conditioned the payment on the promise that John would not tell George where the money was coming from. [Dep. JK p. 17 L. 6-10; p. 5 L. 18-23] John stated the money was given as a gift because the plaintiff thought quite a bit of George. [Dep. JK p. 12 L. 15-21] At least two (2) checks were then written out to John and deposited by John in his private bank account. John would then write checks of a similar amount made out to George. [Dep. JK pp. 6-7] John stated that he never discussed with George anything about the plaintiff being the one who made the advances; and he did not know how George found out about it. [Dep. JK pp. 22-23]

George testified that it was not until about March of 1963 that he first learned that the plaintiff had advanced the money. [Dep. GK p. 10] This was after the money had been given to John and also after John had given the money to George. George further testified that when he talked to the plaintiff about this matter she said it was a gift and she didn't want to be repaid. [Dep. GK p. 16] George did remember receiving a check from John in November, 1962 for about \$500.00 and one in January, 1963 for about \$1,500.00. [Dep. GK p. 7] He sold some of the stocks after the first loan was received in November, 1962; and of the \$2,500.00 received from the sale, he sent \$1,000.00 to his attorney as a retainer and paid John back \$920.00. [Dep. GK p. 9]

The plaintiff's testimony agrees with these statements made by both John and George. She testified that all monies were given to John and she never had any contact with George. [Dep. Pl. pp. 12, 20-21] She stated she could have given the money to George but he never asked for it. [Dep. Pl. P. 13] She further stated that she had no personal knowledge that George ever received the money she gave to John; nor did she have any personal knowledge that George knew she was the one advancing the money. [Dep. Pl. pp. 21, 24] She stated unequivocally that George Kounalis never did tell her the money would be repaid. [Dep. Pl. p. 29] The plaintiff admits that there were no written agreements pertaining to these transactions but rather all of the understandings were verbal. [Dep. Pl. p. 17]

Insofar as her dealings with John Kounalis were concerned, the plaintiff stated she made advances to John in October, 1962, and January, 1963. [Dep. Pl. pp. 9-10] She states in one part of her deposition that John Kounalis said the money would be repaid in five or six (5 or 6) years. [Dep. Pl. p. 11] However, when asked later in the deposition to state again what she remembered about this initial conversation, she changed her testimony and remarked that John said it might be two, three or four (2, 3 or 4) years. [Dep. Pl. p. 18]

The plaintiff stated that by the summer of 1963, she had gone through her entire inheritance and was in need of help. [Dep. Pl. pp. 34-36] She went to John Kounalis who owned a small neighborhood grocery store called the Liberty Park Market and asked for some food. [Dep. Pl. p. 34] John told her she could have anything she wanted. [Dep. JK p. 18] This was a common practice with the defendant, John Kounalis, insofar as other members of his family were concerned; and many of them had received help in the past. The plaintiff continued to receive assistance until about January, 1964, when she moved from the neighborhood. [Dep. Pl. pp. 36, 40] From January, 1964, until the complaint was filed in August, 1968, the plaintiff never contacted the defendant John Kounalis in any way either concerning the loan or otherwise. [Dep. Pl. p. 36-37; Dep. JK p. 15 L. 1-3] The plaintiff stated that she considered the receipt of groceries to be partial payment on the monies advanced to John Kounalis; however John denies that there was any

conversation to this effect. [Dep. JK p. 18]

The plaintiff further testified that George Kounalis gave her \$100.00 about this same period of time she was receiving groceries from John. On page 9 of her brief, the plaintiff states the time of year in 1964 when this \$100.00 was paid is not clear. However in her deposition the plaintiff said it was while she was still living in the apartment on 5th East Street in Salt Lake City, Utah [Dep. Pl. p. 41]; and she stated to her own counsel that she left this apartment sometime in either January or February, 1964. [Dep. Pl. p. 40] Consequently the \$100.00 payment was received prior to or during January or February of 1964 and not after that period of time.

Based upon the foregoing statement of facts and the other information gained from reading the depositions of the parties, the trial judge, Stewart M. Hanson, granted the defendants' motion for summary judgment. This motion was based upon the defenses raised in the answer of the defendants—specifically the statute of limitations as found in §78-12-25 UCA-1953 and the statute of frauds found in §25-5-4 UCA-1953. [R. 2]

POINT I

THE DEFENDANT, GEORGE KOUNALIS, CANNOT BE HELD LIABLE FOR THE DEBT OF JOHN KOUNALIS BECAUSE THERE WAS NO WRITTEN AGREEMENT TO BECOME LIABLE AS REQUIRED BY §25-5-4 (2) UCA-1953.

Section 25-5-4 (2) UCA-1953 states as follows:

“25-5-4. Certain Agreements Void Unless Written and Subscribed. — In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith: . . . (2) Every promise to answer for the debt, default, or miscarriage of another . . .”

The plaintiff stated that all transactions with the defendants were verbal. [Dep. Pl. p. 17] She further stated that George Kounalis had never told her the money she gave to John would be repaid. [Dep. Pl. p. 29] All of her dealings were with John Kounalis; and nowhere did she ever state that John had told her he had been asked by George to get the money from the plaintiff. [Dep. Pl. pp. 12, 13, 20, 21] Under these circumstances it is clear that the only person who would be liable—if indeed anyone is liable—would be the defendant, John Kounalis.

For these reasons the court was correct in dismissing George Kounalis from the lawsuit.

POINT II

THE DEFENDANT, JOHN KOUNALIS, HAD NO LEGAL LIABILITY TO REPAY THE PLAINTIFF FOR MONIES ADVANCED BECAUSE ANY CLAIM WHICH THE PLAINTIFF MIGHT HAVE HAD WAS BARRED BY §78-12-25 UCA-1953.

Section 78-12-1 UCA-1953 provides that civil actions can be commenced only within the periods prescribed in Chapter 12 and after the cause of action shall have accrued. The pertinent section of Chapter 12 which applies to the instant case is §78-12-25 which reads as follows:

“78-12-25. *Within Four (4) Years.* (1) An action upon a contract, obligation or liability not founded upon an instrument in writing; . . . provided that action in all of the foregoing cases may be commenced at any time within four (4) years after the last charge is made or the last payment is received.”

The plaintiff testified that the loans were made to John Kounalis in October of 1962 and January of 1963. [Dep. Pl. pp. 9-10] The instant action was commenced in August of 1968 or more than five and one-half (5½) years after the last amount was given to John Kounalis. It follows the complaint should be dismissed pursuant to §78-12-25 unless the plaintiff can come within the provisions of §78-12-44 UCA-1953.

This latter section extends the time to bring suit to four (4) years after: (1) any part of the principal or interest shall have been paid, or (2) an acknowledgment of an existing liability shall have been made, or (3) a promise to pay the existing liability shall have been made. Subsections (2) and (3) require a writing signed by the party to be charged thereby; and consequently these two (2) subsections would not apply to the instant case where all transactions were verbal. [Dep. Pl. p. 17]

Whether subsection (1) of 78-12-44 applies depends on the time and nature of the transactions. Plaintiff alleges the defendant, John Kounalis, made a payment on account by letting the plaintiff charge groceries at his store; and also because the defendant, George Kounalis, paid \$100.00 and \$50.00 to the plaintiff. Since the gro-

ceries were taken during 1963 and January and February, 1964, and since the \$100.00 was paid during this same period of time [Dep. Pl. pp. 40-41]; it is obvious each transaction was more than four (4) years prior to the date the instant action was filed; and therefore would not be of any help to the plaintiff in extending the statute. And both the plaintiff and John stated affirmatively that they had absolutely no contact with each other since February, 1964. [Dep. Pl. p. 37 L. 8-10; Dep. JK p. 15 L. 1-3]

Nor can the \$50.00 payment by George Kounalis in 1967 be construed as a part payment under §78-12-44. Since George had no legal liability to repay the plaintiff as shown under POINT I, *supra*, it follows any payments he made were merely gratuitous and would be made as a stranger to the contract between the plaintiff and John Kounalis and therefore could not affect the statute of limitations defense raised by John Kounalis.

The plaintiff does not contend that George acted as the agent of John in paying the \$50.00. Rather the plaintiff seeks to hold George Kounalis liable personally in this lawsuit because he received the benefit of some of the money and she attempts to construe the \$50.00 payment to extend the statute of limitations as to George. This point might have some merit if George were liable in some way; but it is obvious in the instant case he is not liable except perhaps morally if he feels so inclined. His defense under the statute of frauds [§25-5-4 (2) UCA-1953] negates his legal liability and there is no way it can be

created by payment of \$50.00 some five (5) years after the monies were given to his brother without his knowledge. Furthermore, it is clear that all the plaintiff's dealings were with John and she had no meeting of the mind with George. Nowhere in the deposition of the parties is there any suggestion that John and George were ever in a joint venture and that John had acted as George's agent in getting the money from the plaintiff. In fact, the plaintiff herself admitted that she had no personal knowledge that George even knew that John had gone to the plaintiff for the money. [Dep. Pl. pp. 21, 24] ; and George claims that the first he learned of the plaintiff's participation was in March, 1963, after the loans had already been made. [Dep. GK p. 10]

The final attempt which the plaintiff makes to overcome the statute of limitations defense is by saying that the debt was not to be repaid for several years and therefore the "cause of action" contemplated by §78-12-1 did not exist for several years. From this, she reasons that the statute of limitations did not begin to run for several years. The problem with this position is that the plaintiff changed her story so many times the trial judge did not have any credible, convincing, evidence to determine when the repayment was to be made if at all, and the plaintiff herself admits as much in her brief. When the plaintiff first stated her recollection of the initial conversation with John Kounalis, she stated affirmatively that John had said the money would be repaid in five or six years. [Dep. Pl. p. 11] However, when she was asked later in

the deposition to state again what she remembered about this initial conversation, she changed her testimony and remarked that John said it might be two, three or four years. [Dep. Pl. p. 18] Under these circumstances, the trial judge was certainly entitled to find that there was no agreement as to time of repayment. In such a situation the law holds that the loan was due when made and plaintiff could have made a demand for repayment at that time. [*Lindsey v. Hamlet*, 235 Ala. 335, 170 So 234 (1938)] Since the plaintiff could demand payment at any time after the loans were made, the statute of limitations would begin to run from the same time according to plaintiff's own authorities and since the complaint was not filed until more than five and one-half (5½) years later, it is clear the trial judge acted properly in dismissing the action.

It would not work any real hardship on the defendants to apply the above stated rule of law and find that the loans were due when made; or upon the demand of the plaintiff. The trial judge had before him the depositions of the parties which showed that George Kounalis owned stock which could have been sold to pay this indebtedness and that he in fact did sell some of the stock and repaid John approximately \$1,000.00 in November of 1962. [Dep. GK p. 9] The trial judge could also have found that the defendant, John Kounalis, operated a grocery store and had the ability to repay the money. He also had the statement of the defendants to the effect that the other brothers and sisters in the family could have raised the money to pay George's court costs had it not been for the in-

tervention of the plaintiff. [Dep. JK pp. 9-10] Under these circumstances, it is clear there would be no genuine issue of fact to be tried and the summary judgment was properly granted.

SUMMARY

For the reasons set forth hereinabove, the defendants submit that there is no genuine issue of fact to be tried and that the ruling of the trial judge should be affirmed.

RESPECTFULLY SUBMITTED

JAMES A. McINTOSH
Attorney for Respondents
15 East 400 South
Salt Lake City, Utah