1964

Delbert M. Yergensen v. Emmett D. Ford and N. E. Ferguson : Brief of Appellant

Utah Supreme Court

Richards, Bird and Hart; Clarence J. Frost; Attorney for Appellant;
Ford R. Paulson; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

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DELBERT M. YERGENSEN,

Plaintiff and Appellant,

vs.

Case No. 10196

EMMETT D. FORD and N. E. FERGUSON, dba FORD & FERGUSON,

Defendants and Respondents.

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BRIEF OF APPELLANT

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Appeal from the Judgment of the Fourth District Court for Utah County, Honorable R. L. Tuckett, Judge,

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vs.	:	10196
EMMETT D. FORD and N. E. FERGUSON, dba FORD AND FERGUSON,	:	
Defendants and Respondents.	:	

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an action to renew a judgment against the defendants which the latter allege is outlawed by the Statute of Limitations.

DISPOSITION IN LOWER COURT

The case was originally submitted by Stipulation to the pre-trial judge for disposition. Judgment finally resulted from plaintiffs motion for summary judgment at which time a verdict and judgment was granted to defendant.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment and judgment in his favor.

STATEMENT OF FACTS

Plaintiff obtained judgment on September 15, 1949, on three notes executed by the defendants. On April 18, 1950 the defendants, in order to release

a lien on real estate entered into an acknowledgment of and agreement to pay the obligation and did make payment thereafter in the amount of $450.00, notations of said payments being made on the acknowledgment. (Tr. 4-6). This last payment was made on October 10, 1950. On February 5, 1958 an action was filed to renew the original judgment which was more than eight years after the judgment was obtained but less than eight years after the acknowledgment and payment. The defendant then raised the question of the Statute of Limitations as a defense.

At Pre-trial on October 14, 1960, the Court upon the stipulation of counsel agreed to decide the issue forthwith but gave counsel for defendant and respondent time to file a brief. No less than nine written requests and three personal visits were made to the Court ~~by~~ And the defendants counsel in an effort to get a decision. Finally three years and

eight months later the Court rendered a decision upon plaintiff's motion for summary judgment.

ARGUMENT

POINT I. THE COURT ERRED IN NOT HOLDING AS A MATTER OF LAW THAT THE STATUTE OF LIMITATIONS FOUND IN 78-12-22 WAS TOLLED BY A WRITTEN ACKNOWLEDGMENT AND PAYMENT ON THE JUDGMENT

The Utah Statute of Limitations relating to judgments is Section 78-12-22, UCA 1953, which is set out below.

"An action upon a judgment or decree of any Court of the United States or of any state or territory within the United States."

Appellant admits that there is a split of authority as to whether or not a judgment is taken without the Statute of Limitations by an acknowledgment and payment thereon. However, it does submit that its position is the strongest of the majority rule; strongest in that some jurisdictions allow the tolling with part

payment, others with written acknowledgment. In this instance we find both a written acknowledgment and substantial payments made over a period of five months. Appellant further contends that the majority opinion furthers the cause of justice and public policy more than the minority view expressed by the respondent.

The tolling of the Statute of Limitations by part payment and written acknowledgment was known at common law as it evidenced by Vol. 34, Am. Jur. Section 333, Page 262.

"The effect of part payment in taking a case out of the operation of the Statute of Limitations or in enlarging the time during which an action may be brought, is not derived from statutory provisions but results from the decision of the Courts. Although no provision was made either in the Act of James I or in Lord Tenterden Act with respect to the effects of part

payment on the ope ration of the Statute of Limitations, a judicial exception was engrafted thereon at an early date, to the effect that a part payment of a debt or obligation will take it out of the operation of the statute, and in the absence of a statutory modification or change this is the generally prevailing rule in this country."

It is therefore apparent that the absence of any statute in the State of Utah specifically encompassing judgments within this doctrine of limitations is not fatal to appellants position; that this rule prevailed at common law and prevails now in the majority of the States in the Union. Not that it hasn't been interpreted differently in various jurisdictions as a result of statutes and judicial decisions, but that the existence of this doctrine is justified in all jurisdictions except those containing express statutory enactments against it.

Appellant cites the annotations in 45 A LR 2d 970 as containing representative decisions from the different jurisdictions. Two of the many directly in point are cited below:

The California case of Wilson v. Walters (1944) 66 Cal. App. 2d 1, 151 P. 2685 contained in the ALR citation was an action to renew a judgment and concerned a series of payments together with a letter stating it was impossible to make payment on the matter. The Court held:

> "It is a question of law as to whether an acknowledgment in writing is sufficient to toll the statute." Sterling v. Title Insurance Co., 53 Cal. App. 2d 736, 740, 128 P. 2d 31, 34.

In that case in discussing the essentials of an acknowledgment, it is stated:

> "The essentials of a sufficient acknowledgment have been frequently stated and were well expressed in Southern Pacific Co. v. Prosser, 898, 122 Cal. App. 413 at page 415, 52 P. 836, 837, 55 P 145 as follows:

'The distinct and unqualified admission of an existing debt, contained in a writing, signed by the party to be charged, and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract and to interrupt the running of the Statute of Limitations against the same. From such an acknowledgment the law implies a promise to pay.' "

---'Applying the rule it will be seen that the defendant's letter definitely and unqualifiedly admits the debt and that there is no intimation in it of an intent to refuse payment. Therefore, the effect of the correspondence was to waive so much of the period of limitations as had theretofore run in favor of the defendants. From the date of the letter it becomes manifest that the action was brought in time." Vassere v. Jorger, 10 Cal. 2d 689, 692, 76 P. 2d 656; Southern Pacific Company v. Prosser, Supra."

In the instant case we have an agreement signed by Emmett D. Ford on the 18th day of April, 1950, which is much stronger than a mere letter acknowledging the debt as existed in the above California case. This agreement together with payments

made during 1950 and 1951 in the amount of at least $450.00 appear to be sufficient to invoke the rule of the above case which is in the California jurisdiction and which jurisdiction has a statute similar to that of ours in Utah.

A similar finding was reached by the Montana Court in the case of Dodge v. Simon (1942), 113 Montana 536, 129 P. 2d 224. It was recognized by the Court that the Statute of Limitations upon a decree quieting title to real estate, having the effect of a judgment, was tolled by an acknowledgment of the existence of the judgment unsatisfied made in open court, the court stating, with reference to its application of the majority rule respecting the tolling of a statute upon judgment for the recovery of money, that it could see no reason why the rule should not be applied to judgment for recovery of possession of real property, as well.

Quoting from the court directly:

"While there is divergency of views of the question, the cases holding that a statute limiting the time of effectiveness of a judgment may be tolled by acknowledgment of a judgment seem to establish the majority rule, and which we follow. While the cases cited in the annotations above referred to deal with judgments for the recovery of money, we can see no reason why the rule should not be applied to judgment for recovery of possession of real property." (emphasis added)

POINT II. THE COURT ERRED IN NOT FINDING THAT SECTION 78-12-44 UCA EXTENDED THE PERIOD DURING WHICH A NEW ACTION COULD BE FILED ON THE ORIGINAL JUDGMENT.

Section 78-12-44, U.C.A., 1953, represents a statute which the appellant alleges was either not considered or was misconstrued.

"Section 78-12-44. In any case founded on contract, when any part of the principal or interest shall have been paid or an acknowledgment of an existing liability debt or claim, or any promise to pay the same shall have been made, an action may be brought within the period prescribed for the same after such payment acknowledgment or promise; but such acknowledgment

> or promise must be in writing signed by the party to be charged thereby. When a right of action is barred by the provision of any statute, it shall be unavailable either as a cause of action or ground of defense."

Appellant submits that the crucial wording of the statute as it relates to this case are the first six words, "In any case founded on contract." (emphasis added) A forced and strained interpretation is certainly necessary to arrive at the conclusion that these words do not include a definite contract in the form of promissory notes which were reduced to judgment. The better reasoning leads one to the easily managable and satisfying determination of the Iowa Court, "that where a contract is enforced by judgment, although it enters into and becomes a part of the judgment, that judgment is not the obligation of the contract but is the authorized power under which those antecedent obligations are to be enforced." Spratt v. Reid (Iowa) 3 G. Greene 489 - 56 Am Dec. 549

A simple reading of the above statute is sufficient to see that judgments per se are not excluded.

But if it be construed that Section 78-12-44 is limited strictly to contracts in their basic form, still many of our courts hold that a judgment can properly be called a contract. 30 A Am Jur, Sec 5, P. 161.

"The decisions are not in accord as to the statutes of a judgment as a contract. If a judgment can properly be considered a contract it is only in a recondite and remote sense of the term or in the ordinary sense of an agreement reached between persons to the terms of which their mutual assent has been given because usually the defendant has not volunarily assented. However, there are cases in which a judgment is called a contract or a contract of record, or a contract of the highest nature, or a specialty.

Occasionally it has been said that a judgment is in the nature of a contract or that the liability under a judgment is contractual in nature. Since a promise to pay a judgment is implied in law it is sometime regarded as raising an implied contract.

Thus it appears that in some senses and for some purposes a judgment is treated and considered as a contract. This is particularly true with reference to actions and remedies on contracts including the remedy of attachment or garnishment.[11]

CONCLUSION

Appellant bases its arguments on the two theories set out above. First that the common law allowed the tolling of the Statute of Limitations on obligations by part payment or acknowledgment or by both. That there exists no specific statutory exclusion of judgments and that the law of the State of Utah would follow the majority of courts in the United States by

including judgments in the doctrine. That the respondent by signing an acknowledgment and paying $450.00 it acknowledged the original agreement and thereby waived whatever part of the Statute of Limitations that had run.

Second, a specified statute 78-12-44, UCA 1953, extends the time during which an action may be brought on any case founded on contract. Appellant alleges that promissory notes reduced to judgment are "founded on contract" (emphasis added)

Respectfully submitted,

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