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

Utah Supreme Court

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In the Supreme Court of the State of Utah

DELBERT M. YERGENSEN,
Plaintiff and Appellant,

vs.

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

CASE NO. ~~10198~~ 10196

BRIEF OF RESPONDENT

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

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DELBERT M. YERGENSEN,
Plaintiff and Appellant,

vs.

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

CASE NO. 10198

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

Respondent adopts appellant's statement.

DISPOSITION IN LOWER COURT

Respondent adopts appellant's statement.

RELIEF SOUGHT ON APPEAL

Respondent adopts appellant's statement.

STATEMENT OF FACTS

Appellant's statement of facts is substantially correct. Respondent would add, however, that the record indicates service of process only upon defendant Emmett D. Ford, and the entire action, including this appeal, pertains only to this defendant personally.

Respondent would also add that the compromise agreement entered into on April 18, 1950, (Tr. 4-6) was an agreement by defendant Emmett D. Ford to pay only a portion of the judgment, and that the original judgment was entered on September 7, 1949.

STATEMENT OF POINTS

POINT I

AN ACTION BASED ON A PRIOR JUDGMENT, WHICH IS COMMENCED MORE THAN EIGHT (8) YEARS AFTER ENTRY OF THE PRIOR JUDGMENT, IS BARRED BY THE STATUTE OF LIMITATIONS.

POINT II

THE STATUTE OF LIMITATIONS AS IT PERTAINS TO AN ACTION BASED ON A PRIOR JUDGMENT, IS NOT TOLLED BY AN ACKNOWLEDGMENT OF, OR PAYMENTS ON, SAID JUDGMENT.

ARGUMENT

POINT I

AN ACTION BASED ON A PRIOR JUDGMENT, WHICH IS COMMENCED MORE THAN EIGHT (8)

YEARS AFTER ENTRY OF THE PRIOR JUDGMENT, IS BARRED BY THE STATUTE OF LIMITATIONS.

The present action, to renew a judgment was commenced on February 5, 1958. This was almost 8 years and 5 months from the date of entry of the original judgment (September 7, 1949). The pertinent Utah Statute is as follows:

> 78-12-22 "Within eight years: an action upon a judgment or decree of any Court of the United States or of any state or territory within the United States."

The conclusiveness of this statute is supplemented by other statutory provisions.

Rule 69, Utah Rules of Civil Procedure, provides in part as follows:

> "(a) Process to enforce a judgment shall be by a writ of execution unless the court otherwise directs, which may issue at any time within eight years after the entry of judgment . . ."
> (Emphasis ours.)

Title 78-22-1, Utah Code Annotated, 1953, referring to judgment liens against real property, concludes as follows:

> "The lien shall continue for eight years unless the judgment is previously satisfied or unless the enforcement of the judgment is stayed on appeal by the execution of a sufficient undertaking as provided by law, in which case the lien of the judgment ceases."
> (Emphasis ours)

Also, in Youngdale v. Burton, 102 Utah 169, 128 P2d 1053, a case somewhat similar to the case at bar, the issue

before the court was whether a writ of execution, based on a prior judgment could issue after the expiration of eight years from entry of the judgment. The court said:

> "A money judgment forms the basis for but two legal proceedings: (a) A suit thereon, brought within eight years, wherein it forms the basis or chose in action for a new judgment, or (b) Some form of proceedings in execution for collection. Subdivision (a) is disposed of by Section 104-2-21, the eight-year statute of limitations."

POINT II

THE STATUTE OF LIMITATIONS AS IT PERTAINS TO AN ACTION BASED ON A PRIOR JUDGMENT, IS NOT TOLLED BY AN ACKNOWLEDGMENT OF, OR PAYMENTS ON, SAID JUDGMENT.

Appellant contends that an acknowledgment of, or payment on a prior judgment, should have the effect of tolling the statute of limitations, so that a new action, based on the judgment, might properly be filed within eight years after such acknowledgment or payment. In this connection, appellant cites Title 78-12-44, Utah Code Annotated, 1953, which provides that in a case founded on contract, the statute of limitations may be tolled by payment or acknowledgment, and urges that a "judgment" is a "contract" and therefore subject to the provisions of this statute.

With respect to the applicability of a statute of this kind to judgments, the following language points out the general problem and its solution in the courts of various states:

"With respect to judgments, in each instance the decisions seem to turn upon the determination of the question whether the obligation is a contract. Thus, in some jurisdictions, on the theory that a judgment is a contract, it is held that a part payment on a judgment has the same effect to interrupt the running of the statute as it does in the case of other contractual obligations. In other jurisdictions, it is held that a judgment is not a contract within the meaning of limitations statutes and that an action thereon is not ex contractu. Decisions, therefore, which adhere to this doctrine hold that a part-payment of a judgment does not remove the bar of the statute or raise a new promise, such as will start it running anew. In these jurisdictions, it is held that a cause of action becomes merged in the judgment rendered in an action to recover thereon, and upon the entry of the judgment, becomes changed in form and its original character wholly extinguished." (34 Am. Jur., Limitation of Actions, p. 264, Sec. 335)

Since the statutes involved seem to be the controlling factor, an analysis of the pertinent Utah statutes should be helpful:

The Utah statute referred to herein (78-12-44) was originally enacted in 1872. It has not been changed or amended since its original passage. This section was taken verbatim from Kansas, it being originally enacted by that State as Kansas General Statutes, 1868, Page 634, Section 24 (O'Donnell v. Parker, 160 Pac. 1192, Utah). This statute has likewise never been changed or amended by the State of Kansas since its original enactment.

It is significant to note that Kansas is among those states in which it has been held that an acknowledgment

of a judgment or a partial payment thereon does not operate to start the statute running anew from the time of the acknowledgment or payment. (Harper v. Daniels, 1914, CA 8th Kan., 211 Fed. 57; Sharp v. Sharp 1941, 154 Kan. 175, 117 P2d 561). In the case of Sharp v. Sharp, Supra, the Kansas Court very carefully analyzes a statute identical to our Title 78-12-44, for the purpose of determining whether a judgment can be interpreted as being a "contract" within the meaning of that statute. The Court concluded that a judgment was not a contract within the meaning of that statute, and held that part payment made on a prior judgment did not toll the statute of limitations on a subsequent suit based on that prior judgment.

Our present Section 78-12-44 is the result of the repeal of the former section and the passing of a new statute in 1951. The newly enacted statute was identical with the former one. Had there been any legislative intent to extend the period of limitation on a judgment by the making of part payments, or by the written acknowledgment of the debt, or by court authority, such intent would have been voiced by the legislature at that time. The fact that the legislature has been silent on this question since the original enactment of this statute in 1872 would appear to indicate an intention on the part of the legislature that the word "contract" in the statute not be interpreted to mean "judgment".

Such an implication of legislative intent was reached by the Supreme Court of New Jersey in La Salle Extension University v. Barr (1941) 19 NJ Misc. 387, 20 A2d 609. In that case, an action was filed based on a prior judgment. The statute of limitations in New Jersey for such actions

is 20 years, and the case was filed more than 20 years after the original judgment had been entered. In reviewing the statute the court says:

> "In New Jersey on the other hand, the statute makes no provision that payment or acknowledgement of an indebtedness within 20 years shall be exception to the presumption of payment after 20 years.
>
> The fact is that the New Jersey statute by implication seems to say exactly the opposite" (by not mentioning any means by which the limitations on a judgment might be tolled in a statutory section following immediately upon one providing that the statute running upon certain contracts might be tolled by payment made thereon within the period of limitation.)

As stated by appellant, there is a division of authority in the cases which have been decided on this point of law. However, the better reasoned cases support respondent's contention herein.

In La Salle Extension University v. Barr, Supra, the court, in discussing this conflict in decisions states:

> "The conflict in the decisions as to whether the running of the statute of limitations is suspended in the case of judgments by payments on account thereof, is due to the difference of opinion as to whether a judgment is a contract within the rule that payment on account of a contract tolls the statute. The better reasoned cases seem to be those holding that a judgment is not a contract."

The court's decision in that case, as stated above, was that a part payment on a judgment did not toll the statute.

In the case of Giordano v. Wolcott, 134 A2d 593, N.J., the New Jersey Court in a recent decision (1957) affirms

the holding of the La Salle Extension University case, stating:

> "Moreover, the result accords with the salutary policy of suppressing the effect of matter dehors the record purporting to extend the life of a judgment which would appear dead to one consulting the record in the course of a title examination. We are not persuaded by decisions in other jurisdictions giving a different effect to statutes they are construing."

In the case of Mutual Trust & Deposit Company v. Boone, 267 SW 2d 751, (Ky. 1954,) the Kentucky Supreme Court affirmed a decision of the lower court that the statutory period of limitations on a judgment is not extended by the judgment debtor's promise to pay the judgment. In that case, the court carefully reviewed the historical development of the statutes of limitation and the statutory provision for the tolling of the statute of limitations on contractual obligation by part payment or a new promise to pay. The court concludes as follows:

> "We also note that in the Re-Statement of the Law of Contracts, Volume I, Section 86, it is stated that a promise to pay a debt created by contract other than a judgment is binding. The exclusion of judgments from the re-statement of the rule as to contracts becomes significant when it is noted that in the Re-Statement of the Law of Judgments there is no reference to renewal of a judgment by a promise to pay.
>
> Since we have found no Kentucky case which has gone so far as to hold that a promise to pay a judgment tolled the running of the statute of limitations, and since our examination of the general authorities has not convinced us that the Kentucky rules should be extended, we are of the opinion that the trial judge

properly held that a promise to pay the judgment in this case did not extend the statutory period of limitation."

Some of the foregoing cases have analyzed in great detail the question of whether a judgment constitutes a contract. In addition to the analyses of these various courts, we wish to add our own comment that a contract is ordinarily not a matter of public record, and the tolling of the statute of limitations as provided in 78-12-44 would appear to have no significant effect except upon the parties to the contract. A judgment, on the other hand, is a public record, not only in the county in which it is originally entered, but in any county where it might subsequently be docketed. It becomes a lien upon all the real property of the judgment debtor in the county where it is originally entered and in any subsequent county where it is docketed. The official record of such judgment is relied upon by members of the Bar, by abstractors and by title insurance companies to determine whether any judgment liens on real property are in effect. A holding that part- payments or promises to pay have the effect of tolling the eight-year statute of limitations would create a dilemma with respect to the validity of titles to real property, inasmuch as events entirely outside the official record would have a substantial effect on the validity of a judgment lien.

It is axiomatic that a judgment is not enhanced or made stronger by payment or a promise to pay. A payment or promise to pay cannot change the character or enforceablity of the judgment. Why, then, should they

change the applicable statute of limitations, as contended by appellant?

But, even if we accept appellant's contention that such change is brought about by a payment or promise to pay, this case is clearly distinguishable from the cases cited by appellant, because in this case the agreement, and subsequent payments, were not based on a payment of the judgment, but of a compromise amount, presumably arrived at by negotiation between the parties. Thus, in effect, appellant abandoned the judgment in favor of a written agreement. Yet, more than eight years later, he seeks by this action to resurrect that judgment. Ample remedies for the enforcement of the judgment were available to him, including the filing of the present action prior to September 7, 1957. He availed himself of none of those remedies after 1951, and he should not now be allowed to breathe new life into a dead judgment.

CONCLUSION

Respondent contends that the clear intent of the Utah Legislature, as evidenced by the statutes in point, is that an action based on a prior judgment must be commenced within eight years from entry thereof. There is no Utah case authority to the contrary. The better reasoned cases from other jurisdictions hold that the Statute of Limitations pertaining to judgments is not tolled by payments or promises to pay. A serious dilemma as respects titles to real property would result if the contentions of appellant

were upheld. Based on the facts and the law, respondent urges that the decision of the trial court be affirmed.

Respectfully submitted,

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