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Chester Reese v. Garth Van Tassell : Appellant's Brief On Appeal

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

CHESTER REESE,
Plaintiff-Respondent,

vs.

GARTH VAN TASSELL,
Defendant-Appellant.

Case No.
12741

APPELLANT'S BRIEF ON APPEAL

Appeal from a Summary Judgment of the Third
District Court, Honorable Stewart M. Hanson,

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APPELLANT'S BRIEF ON APPEAL

NATURE OF THE CASE

This case involves a suit on an oral contract for the repayment of monies loaned.

DISPOSITION IN LOWER COURT

The Third Judicial District Court, the Honorable Stewart M. Hanson, presiding, granted Plaintiff's Motion for Summary Judgment against the Defendant.

NATURE OF RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks to have the Order of the lower Court reversed for the reason that Summary Judgment was improperly granted because several material issues of fact remain for determination at the time of trial.

STATEMENT OF FACTS

Because Summary Judgment was granted in this case on the basis of Plaintiff's Affidavit and Defendant's Counter Affidavit without further evidence having been taken by the Court, this Appeal must of necessity be limited to the facts stated in those Affidavits. There is little contention over the fact that the Defendant made certain loans to the Plaintiff. \$14,038.39 was loaned on March 5, 1965. \$500.00 was loaned on June 23, 1967; \$3,000.00 was loaned on March 17, 1967 and \$2,000.00 was loaned on March 15, 1967. The Affidavit and Counter Affidavit raised the issue as to the repayment schedule of the various loans; the Plaintiff having sworn under oath that the amounts were payable upon demand and the Defendant having sworn under oath that the amounts were to be repaid according to the Defendant's ability. The Defendant further indicated in his Affidavit that no demand for repayment had ever been made upon him by the Plaintiff while the Plaintiff's Affidavit indicated that demand had been made "as of this date" which would be October 28, 1971, the date of the Affidavit.

Plaintiff made a Motion for Summary Judgment on October 28, 1971 and filed with his motion the Affidavit

of Chester Reese, the Plaintiff. On November 10, 1971, the motion came on for hearing and said Motion was granted pursuant to Judge Honson's Order dated December 10, 1971.

STATEMENT OF POINTS AND ARGUMENT

POINT I.

IT WAS IMPROPER FOR THE LOWER COURT TO GRANT SUMMARY JUDGMENT WHEN THERE EXISTED A CLEAR AND MATERIAL ISSUE OF FACT WITH RESPECT TO THE OBLIGATION BETWEEN THE PLAINTIFF AND THE DEFENDANT.

ARGUMENT

The Plaintiff-Respondent in this action stated under oath that the amounts loaned to the Defendant-Appellant were payable on demand. Defendant-Appellant stated under oath that no demand had ever been made upon him for repayment. If Plaintiff-Respondent is to be believed, and the oral agreement between Plaintiff-Respondent and Defendant-Appellant did in fact provide for repayment upon demand, then that fact must be proved by Plaintiff-Respondent before Plaintiff-Respondent is entitled to Judgment against Defendant-Appellant. The Defendant-Appellant in his Affidavit further indicated that some repayment had been made with respect to the loans secured from the Western Union Employees Credit Union on

March 5, 1965. Nothing before the Court indicates what amount has been repaid and the Plaintiff-Respondent is precluded from taking Judgment against Defendant-Appellant until he has proved and the Court has found that there has been no repayment. In Plaintiff-Respondent's Complaint, the allegation is made that the agreement between the Plaintiff-Respondent and Defendant-Appellant was such that if there was a default on the part of the Defendant-Appellant, the entire unpaid balance would become due and payable. The Complaint further alleges that the Plaintiff-Respondent declared the entire balance due and owing. This allegation contradicts Plaintiff-Respondent's Affidavit wherein he indicates that the monies were due and payable upon demand and that proper demand had been made. The Defendant-Appellant in this case has simply been allowed to obtain a Judgment without proving his case. This Court's attitude with respect to the granting of Motions for Summary Judgment was made clear in a case having facts similar to the one at bar. In *O'hair vs. Kounalis*, 23 Utah 2d 355, 463 P. 2d 799 (1970), this Court held that the Plaintiff in that case was entitled to a trial on the merits to determine if there were a loan, that the parties intend payment to be made at a future time, and if there were not a definite date established, what would constitute a reasonable time under the facts and circumstances of the case. Furthermore, this Court has on numerous occasions expressed the attitude that since the granting of a Motion for Summary Judgment denies the right to a trial and denies a party the right to have all of the evidence con-

sidered by the Court, the party against whom the Judgment has been granted is entitled to have all of the facts presented and all of the inferences fairly arising therefrom considered in the light most favorable to him. *Young vs. The Texas Company*, 8 Utah 2d 206, 331 P. 2d 1099 (1958); *Abdulkadir vs. Western Pacific Railroad Company*, 7 Utah 2d 53, 318 P. 2d 399 (1957); *Brandt vs. Springville Banking Company*, 10 Utah 2d 315, 353 P. 2d 460 (1960); *Burnham vs. Bankers Life and Casualty Company*, 24 Utah 2d 277, 470 P. 2d 261 (1970) (Summary Judgment is inappropriate where there are disputed issues of material fact); *Disabled American Veterans, Utah State Department vs. Hendrixson*, 9 Utah 2d 152, 340 P. 2d 416; *Housley vs. Anaconda Company*, 19 Utah 2d 124, 427 P. 2d 390 (1967) (Summary Judgment is a drastic remedy and should be granted with reluctance); *Controlled Receivables, Inc. vs. Harman*, 17 Utah 2d 420, 413 P. 2d 807 (1966); *Tangren vs. Ingalls*, 12 Utah 2d 388, 367 P. 2d 179 (1961) (Sustaining of Summary Motions without affording party opportunity to present his evidence is a stringent measure which Court should be reluctant to grant); *Green vs. Garn vs. Jensen*, 11 Utah 2d 375, 359 P. 2d 1050 (1961); *Richards vs. Anderson*, 19 Utah 2d 17, 337 P. 2d 59 (1959); *Carr vs. Bradshaw Chevrolet Company*, 23 Utah 2d 415, 464 P. 2d 580 (1970).

POINT II.

DEFENDANT-APPELLANT RAISED THE
ISSUE OF THE STATUTE OF LIMITA-

TIONS AS A BAR AGAINST PLAINTIFF-RESPONDENT'S ACTION AND HAS THE RIGHT TO PROVE THE EXISTENCE OF SAID DEFENSE.

Defendant-Appellant in his answer asserted as a defense the Statute of Limitations and on the face of the record before this Court, the Plaintiff-Respondent is precluded from bringing this action against the Defendant-Appellant. Section 78-12-1 Utah Code Ann. (1953) states:

Civil actions can be commenced only within the periods described in this chapter, after the cause of action shall have accrued, except where in special cases, a different limitation is prescribed by statute.

Section 78-12-25 Utah Code Ann. (1953) states within four years:

(1) An action upon a contract, obligation or liability not founded upon an instrument in writing; also on an open account for goods, wares and merchandise, and for any articles charged in a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charges made or the last payment is received.

In the case at bar, Plaintiff-Respondent indicates in his Affidavit that certain amounts were loaned to the Defendant-Appellant on certain dates but does not indicate that any payments were made or that the obligations

were reduced in any way by the Defendant-Appellant. Defendant-Appellant in his Affidavit indicates that no demand was ever made by the Plaintiff-Respondent upon the Defendant-Appellant for payment and that fact is partially controverted by Plaintiff-Respondent's Affidavit which indicates only that demand had been made as of the date of the Affidavit, October 28, 1971. Since the four year period was up with regard to the March 5, 1965 loan on March 5, 1969 and the four year period was up on the remaining obligations as of June 23, 1971 at the very latest, then the Plaintiff-Respondent is precluded from any action against the Defendant-Appellant at all unless it is proved that demand was made prior to March 5, 1969 on one note and prior to June 23, 1971 on the other notes. No such proof exists before the Court at this time and the lower Court made no finding with respect to whether or not the Statute of Limitations had run.

The statement by Defendant-Appellant in his Affidavit that no demand had been made upon him clearly raises the issue of the Statute of Limitations for the purposes of the Motion for Summary Judgment and argument with respect to the Statute of Limitations was heard by the lower Court from both party's attorneys.

This Court, in the case of *O'hair vs. Kounalis, infra*, dealt with the specific question of whether or not a series of promises was within the Statute of Limitations. This Court said:

A cause of action or a right of action arises the moment an action may be maintained to enforce

it and the Statute of Limitations is then set in motion. 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.

The Court went on further to say:

In the instant action, Plaintiff is entitled to a trial on the merits to determine if there were a loan, that the parties intend payment to be made at a future time, and if there were not a definite date established, what constitutes a reasonable time under the facts and circumstances?

In the case at bar, the issue of the running of the Statute of Limitations has been properly and appropriately and timely raised by the Defendant-Appellant and the Plaintiff-Respondent should be made to prove his case by proving there are facts to warrant the filing of the action against Defendant-Appellant.

CONCLUSION

This Court should reverse the action of the Third Judicial District Court in granting Plaintiff-Respondent's Motion for Summary Judgment for the reason that there exist several material issues of fact not resolved by the trial court and for the further reason that there exist defenses by the Defendant-Appellant which Defendant-Appellant should be given the opportunity to prove.

Respectfully submitted,

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