1972

Chester Reese v. Garth Van Tassell : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

CHESTER REESE,
Plaintiff-Respondent,
vs.
GARTH VAN TASSELL,
Defendant-Appellant.

Case No. 12741

BRIEF OF RESPONDENT

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

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TABLE OF CONTENTS

STATUTES CITED

CASES CITED

TABLE OF CONTENTS (Continued)

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NATURE OF THE CASE

This case involves an action to recover money loaned by Plaintiff-Respondent to Defendant-Appellant.

DISPOSITION IN THE LOWER COURT

The Lower Court granted the motion of Plaintiff-Respondent for Summary Judgment.

NATURE OF RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks a reversal of the Summary Judgment rendered by the Lower Court.

STATEMENT OF FACTS

Plaintiff-Respondent (hereinafter referred to as "Reese") and Defendant-Appellant (hereinafter referred to as "Van Tassell") were personal friends by reason of the long relationship as co-employees of Western Union Telegraph Company.

In 1965 Van Tassell decided to start a new cattle business and declared that he needed funds to assist him. Van Tassell approached Reese and asked Reese to loan him money to enable him to get the business started. As the business operation progressed, Van Tassell made further requests for funds from Reese. Reese responded by loaning Van Tassell various sums of money. On some of these occasions, Reese himself had to borrow the money in order to make the loan to Van Tassell.

On March 5, 1965, Reese loaned Van Tassell the sum of $1,438.89 (R. 11, para. 2). Van Tassell promised to repay said amount together with interest at the rate of 1% per month on the unpaid balance (ibid.). On June 23, 1967, Reese loaned Van Tassell an additional $500.00 (R. 11, para. 3). At said time, Van Tassell promised to repay said money together with interest at the rate of 1% per month on the unpaid balance (ibid.). On March 17, 1967, Reese loaned Van Tassell an additional $3,000 (R. 11, para. 4). Van Tassell agreed to repay Reese said amount, together with interest at the rate of 5% per annum (ibid.). On March 15, 1967, Reese made another loan to Van Tassell in the amount of $2,000 (R. 11, para. 5). Van Tassell promised to repay said amount together with interest at the rate of 5% per annum (ibid.).

There is no dispute as to the facts since the District Court excluded Van Tassell's affidavit on the basis of Rule 6(d), Utah Rules of Civil Procedure. The affidavit was not filed or served until the moment of the hearing on November 10, 1971 (R. 13). Thus, the facts above stated are undisputed. However, even if Van Tassell's affidavit were considered, there is still no genuine issue as to any material fact.

A comparison of the affidavits of Reese and Van Tassell (the only evidence submitted) establishes that there is no dispute over the fact that the funds were loaned in the amounts above specified and that Van Tassell promised to repay the same (compare R. 13 with R. 11). Further comparison of these affidavits reveals that there are only two differences in the facts: (1) The time when repayment was to be made; and (2) An allegation of a partial payment as to the loan of March 5, 1965. However, as will be established in this brief, these differences in the factual version are insufficient to create an issue of fact.

ARGUMENT

POINT I

THERE IS NO DISPUTE OVER ANY MATERIAL FACT WITH REGARD TO ISSUES RAISED BY THE PARTIES TO THIS ACTION.

Van Tassell argues that summary judgment should not have been granted because there exists a genuine dispute on two issues: (a) No demand for payment was ever made; and (b) there has been a partial repayment of the loan of March 5, 1965.

The first issue is unfounded. Van Tassell admits that a demand was made. In paragraph 6 of his affidavit (R. 13-14) Van Tassell states:

> "The plaintiff never made any demand upon me for payment of the entire amounts owed and the first *I knew of his desire to have me repay {sic} upon receipt of a letter from attorney Robert MacDonald.*" (emphasis added).

Certainly a demand letter from Reese's attorney is a sufficient demand. Had the affidavit been submitted in accordance with Rule 6(d), Utah Rules of Civil Procedure, so as to give Reese an opportunity to respond to this statement, the letter itself would have been produced. The letter was a specific demand for payment of all loans. Moreover, in response to that letter, Van Tassell presented a promissory note. The note is referred to by Van Tassell in paragraph 4 of his affidavit (R. 13-14). The note altered the terms of the demand from Reese's attorney and thus was not accepted. Van Tassell later made a payment on the note (referred to in paragraph 5 of his affidavit) (R. 13-14) which was returned. Since the fact of a demand is admitted by Van Tassell himself, the argument concerning the failure of demand is inappropriate.

The argument concerning the failure of demand is an example of a rather unusual attempt to raise a fictitious issue at a point in time where there is no opportunity to reveal a lack of substance in the issue. There is no mention in any of the pleadings which would in any manner suggest that Van Tassell claimed no demand had been made. Thus, the claim is outside the scope of the pleadings. The first mention of the

failure of the demand was in Van Tassell's counter-affidavit which was notified or presented until the time of the hearing on November 10, 1971.

When the counter-affidavit which first alleged the failure of demand was presented to Reese and to the Court, counsel for Reese moved that it be stricken as untimely since it was not filed within the limits prescribed by Rule 6(d), Utah Rules of Civil Procedure. The Court did not consider the affidavit and it is not part of the record in this case. However, even if the affidavit were considered, it does not raise a genuine issue as to whether or not a demand was made since it specifically admits a demand.

The complete lack of merit to the claim of the failure of demand for payment is demonstrated by Van Tassell's claim that the loans were not to be payable on demand. In paragraph 3 of his affidavit, Van Tassell asserts that the loans were due and payable "as my ability to do so dictated". Thus, Van Tassell denies a demand was necessary.

Nowhere in Van Tassell's affidavit does he state that he did *not* have the ability to repay between March 15, 1967, and the date of the demand or suit. The reason for the absence of such an assertion is that Van Tassell had the ability to pay for more than three years.

Having asserted the due date was "as my ability to do so dictated", and having failed to deny having the ability to pay, Van Tassell's affidavit raises no issue of fact and offers no reason whatsoever against the granting of a summary judgment in this matter.

It should further be noted that Count II of the Complaint in this section asserts a claim for unjust enrichment. Therefore, even if there were a dispute as to whether or not a demand had been made, it would not preclude summary judgment since a demand is not required in an unjust enrichment action.

A claim for unjust enrichment is stated by asserting only that the defendant has and retains money which in justice and equity belong to another. *Baugh v. Darley,* 112 Utah 1, 184 P.2d 335 (1947); *Hull v. Flinders,* 83 Utah 158, 27 P.2d 56 (1933); *Restatement, Restitution,* §5. A demand for payment need not be asserted. *Dell v. Kugel,* 109 S.E. 532 (Ga. 1963).

The only other claim under Point I of Van Tassell's Brief is a brief sentence suggesting that Van Tassell had made a partial payment with regard to the loan of March 5, 1965. This claim also amounts to nothing more than an attempt to create an issue which does not exist. The assertion of partial payment is obviously an afterthought in order to delay a judgment in this matter. Van Tassell never mentioned any partial payment in his Answer to the Complaint. Thus, the feeble assertion of payment is not within the scope of the pleadings and is not raised as a defense to this action and should therefore not be considered.

Rule 8(c), Utah Rules of Civil Procedure, specifically provides that if "payment" is relied upon as a defense, it must be affirmatively pleaded. Where the failure to plead deprives the opposing party of the opportunity to respond to the defense, it is properly excluded from the court's consideration. *F.M.A. Financial Corp. v. Build, Inc.,* 17 Utah 2d. 80, 404

P. 2d. 670 (1965). Rule 12(h), Utah Rules of Civil Procedure, specifically provide that a party waives all defenses which he does not present by motion or answer. Since payment was not pleaded, and proper objection was made to the admission of this evidence, the defense was waived and should not be a part of this case. *Id.*

The actual fact is that Van Tassell has never made any payment whatsoever to anyone on any of the obligations stated in the Complaint. The lack of substance to the assertion of payment is apparent from the manner in which the assertion is made. The affidavit makes a flat statement of payment, but no attempt is made to state when the payment was made, the amount of the payment, to whom it was made, or any other facts and circumstances surrounding the alleged payment. The affidavit states only that he has paid the money to the Western Union Credit Union. Perhaps the payment was made on another obligation, but in any event Van Tassell has completely failed to meet his burden of proving any defense if he, in reality, has one. If a payment had actually been made, it would be a simple matter to state the amount, the date, or any other facts to vertify its existence. A party must submit evidence in support of his claims on a motion for summary judgment; an unfounded allegation will not suffice. *Menlove v. Salt Lake County,* 18 Utah 2d 203, 418 P.2d 227 (1966); *Leininger v. Stearns-Roger Mfg. Co.,* 17 Utah 2d 37, 404 P.2d 33 (1965); *Dupler v. Yates,* 10 Utah 2d 251, 351 P.2d 624 (1960).

Van Tassell has the burden of proof in establishing a payment. *Bell v. Jones,* 100 Utah 87, 110 P. 2d 327 (1941). A brief assertion that he paid an unspecified amount to a credit

union certainly does not meet his burden. Van Tassell is merely attempting to prevent a summary judgment by an empty charge of an unspecified payment, which assertion is made at such an untimely period in the proceedings so that no opportunity is given to examine the charge.

It should be noted that during the oral argument on the summary judgment, counsel for Van Tassell did not even mention any claim of payment.

To the extent the Court may choose to accept the claim of payment, it should be noted that it applies only to the loan of March 5, 1965 and does not affect the summary judgment on the remaining obligations.

The case of *O'Hair v. Kounalis,* 23 Utah 2d. 355, 463 P. 2d. 799 (1970) cited by Van Tassell is not in point. In that case there were serious factual disputes as to whether certain advances constituted loans and whether the parties intended repayment. Those issues are admitted by Van Tassell in his affidavit leaving no factual disputes as to material issues in this case.

POINT II

THERE IS NO GENUINE ISSUE OF FACT WITH REGARD TO THE CLAIM OF THE BAR OF THE STATUTE OF LIMITATIONS.

Point II of Van Tassell's Brief asserts the defense of the statute of limitations. However, it is apparent that Van Tassell is confused as to the applicability of the statute. In his Brief, Van Tassell states:

> "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 *Plaintiff-Respondent is precluded from any action against 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.*" (emphasis added).

Reese is aware of no law which requires that a demand be made within the limitation period. On the contrary, it is the demand which *starts* the limitation period in most instances; the limitation period usually commences to run at the date of demand. *Esponda v. Ogden State Bank,* 75 Utah 117, 283 Pac. 729 (1929); *Stevens v. Rogers,* 16 Utah 105, 51 Pac. 261 (1897). It seems from Van Tassell's Brief that he is laboring under the false impression that the statute of limitations begins to run from the date the loan is made and that the claim is barred if no demand is made within the subsequent four year period. This is obviously not in accordance with law. *Ibid.* If the statutes begins to run on the date the obligation was incurred, it would be impossible to make an enforceable loan in excess of four years. The law is clear that the statute runs only when a cause of action is created and not from the date of the obligation. *Id.*

Before considering the claim of the statute of limitations in detail, it should be noted that the claim involves only the loan made on March 5, 1965. The other loans were all made within the four year period immediately preceeding the commencement of this action (March 4, 1971) and therefore could not possibly be barred by the statute.

As to the single loan involved, no evidence was presented by Van Tassell in support of his claim of the bar of the statute. The counter-affidavit presented by plaintiff was untimely and excluded by the Court. Thus, there is no evidence to support the claim. Since Van Tassell has the burden of proving this defense, the defense must fail. The untimely filing of the affidavit left Reese no opportunity to show that the statute did not apply. On a motion for summary judgment a party must submit evidence in support of his claims; unsupported allegations are insufficient.

> ". . . The whole purpose of summary judgment would be defeated if a case could be forced to trial by a mere assertion that an issue exists." *Leininger v. Stearns-Rogers Mfg. Co.,* 17 Utah 2d. 37, 404 P.2d 33 (1965). See also cases cited on p. 7, *supra.*

However, even if Van Tassell's affidavit were considered by the Court, and even if it had been timely filed, the statute of limitations defense would not apply since the affidavit itself rebutts the defense. Pursuant to a demand by Reese's attorney, Van Tassell's executed and delivered a promissory note acknowledging the entire debt (R. 13, para. 4). A payment was later tendered on the note, several months after it was due, thereby further acknowledging the debt. The law is clear that an acknowledgment of a debt renews the limitation period. *Utah Code Annotated,* §78-12-44 (1953); *Beck v. Dutchman Coalition Mines Co.,* 2 Utah 2d. 104, 269 P. 2d. 867 (1954). The execution of the note and check reaffirmed the debt and the statute of limitations is no longer applicable even if it had been applicable in the first instance.

Taking the evidence from the viewpoint most favorable to Van Tassell, the statute of limitations claim must fail. In paragraph 2 of his affidavit, Van Tassell states that he made some payments on the loan of March 5, 1965. The statute upon which Van Tassell relies specifically states that the limitation period commences to run ". . . after . . . the last payment is received." *Utah Code Annotated,* §78-12-25, 44 (1953). Depending on when these alleged payments were made, the statute would run from the date of the last payment. Having chosen not to state the date of the payment, he cannot rely on speculation to support a defense which he must prove.

In summary, the affidavit of Van Tassell, if considered at all, offers no evidence that there is a valid defense of the statute of limitations. Since no facts were asserted in support of the defense, a summary judgment is proper.

CONCLUSION

Van Tassell's affidavit was not timely filed and upon motion of Reese was excluded by the trial court. Having been excluded in accordance with Rule 6(d), Utah Rules of Civil Procedure, there are no factual issues and the summary judgment should be granted.

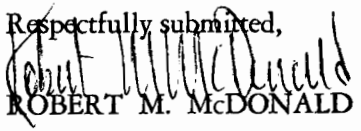
Even if the affidavit were considered, it raises no factual issue. Van Tassell's affidavit acknowledges the making of the loans, the obligation to repay, and differs only on the question of when the amounts were due and contains a feeble claim of partial payment. As to the conditions under which the amounts would be due, there was no evidence that these conditions did not in fact exist. Thus, no dispute was created. As to the

alleged partial payment, the claim is outside the pleadings in the case and is accompanied by an apparent intentional omission of any details.

As to the claim of the statute of limitations, a matter which Van Tassell himself must submit evidence on, there is an apparent absence of any evidence in support of the claim.

On the basis of the evidence before the Court, it is respectfully submitted that a summary judgment was proper in this matter and that the same should be upheld.

Respectfully submitted,



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