1987

J. Douglas Jacobsen v. Mollie Kimball : Brief of Respondent

Utah Court of Appeals

Milo S. Marsden; Marsden, Orton & Cahoon; Attorney for Respondent.
Edward M. Garrett; Garrett & Sturdy; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

J. DOUGLAS JACOBSEN,	)	
	)	Case No. 870117-CA
Plaintiff/ Respondent,	)	Priority 13b
	)	
vs.	)	
	)	
MOLLIE KIMBALL,	)	
	)	
Defendant/ Appellant.	)	

Appeal From the Circuit Court, State of Utah
Salt Lake County, Salt Lake Department
HONORABLE MAURICE D. JONES

BRIEF OF RESPONDENT J. DOUGLAS JACOBSEN

Edward M. Garrett
GARRETT & STURDY
311 South State, Suite 320
Salt Lake City, Utah 84111
Attorney for Appellant

Milo S. Marsden, Jr.
MARSDEN, ORTON & CAHOON
68 South Main, 5th Floor
Salt Lake City, Utah 84101
Attorneys for Respondent

IN THE UTAH COURT OF APPEALS

J. DOUGLAS JACOBSEN,	)	
	)	Case No. 870117-CA
Plaintiff/	)	
Respondent,	)	Priority 13b
	)	
vs.	)	
	)	
MOLLIE KIMBALL,	)	
	)	
Defendant/	)	
Appellant.	)	

Appeal From the Circuit Court, State of Utah
Salt Lake County, Salt Lake Department
HONORABLE MAURICE D. JONES

BRIEF OF RESPONDENT J. DOUGLAS JACOBSEN

Edward M. Garrett
GARRETT & STURDY
311 South State, Suite 320
Salt Lake City, Utah 84111
Attorney for Appellant

Milo S. Marsden, Jr.
MARSDEN, ORTON & CAHOON
68 South Main, 5th Floor
Salt Lake City, Utah 84101
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITY:

JURISDICTION AND PROCEEDINGS BELOW

This is a contract action to recover $5,700 J. Douglas Jacobsen ("Jacobsen") loaned to Mollie Kimball ("Kimball") to purchase a Fiat car in February, 1981. The case was tried to the Honorable Maurice D. Jones in the Fifth Circuit Court, State of Utah, Salt Lake County, Salt Lake Department. The trial court's jurisdiction was based on Utah Code Ann. § 78-4-7 (1987), which provides circuit courts with civil jurisdiction if the sum claimed is less than $10,000. Jurisdiction in the Utah Court of Appeals is based on Utah Code Ann. § 78-2a-3(2)(c) (1987) granting the Court appellate jurisdiction over appeals from circuit courts.

ISSUES PRESENTED FOR REVIEW

1. What is the Utah Court of Appeals' standard of review in reviewing the trial court's Findings of Fact?

2. Are the trial court's findings clearly erroneous?

3. Did the trial court properly limit consideration of evidence of goods and services supplied to Jacobsen to the issue of Jacobsen's intent with respect to the $5,700?

4. Does the four-year statute of limitations bar Jacobsen's claim?

STATEMENT OF CASE

NATURE OF CASE

Jacobsen filed his Complaint March 27, 1985. Kimball

answered denying the loan, claiming the $5,700 was a gift, and claiming the statute of limitations barred Jacobsen's claim. The matter was tried without a jury before the Honorable Maurice D. Jones on September 23, 1986. After trial, the court wrote, "(B)ased upon Mrs. Kimball's testimony on cross-examination, the evidence preponderates in favor of the Plaintiff's claim--$5,700.00, interest and costs. Judgment as prayed."

On November 28, 1986, the court entered Findings of Fact Conclusions of Law, and Judgment. The Findings of Fact provide as follows:

1. On February 8, 1981, Plaintiff loaned Defendant $5,700 for her to purchase a 1979 Fiat car from Wayne Schilling.

2. Defendant told Plaintiff that she would pay him back the $5,700.

3. Defendant told Plaintiff that when she sold her old car, she would pay him the money from that sale and would get the rest of the $5,700 to him as she made it.

4. Defendant put an ad in the newspaper to sell her old car and sold it within a couple of months.

5. Based upon Defendant's own testimony, the evidence preponderates in favor of Plaintiff's claim.

On December 5, 1986, Kimball filed a Motion For New Trial, and a Motion To Stay Judgment and Amend Findings of Fact. The court denied Kimball's Motion For New Trial and Motion to Stay Proceedings and Amend Findings of Fact, and amended its original

Judgment to provide for interest on the $5,700 from November 28, 1986.

Kimball filed her Notice of Appeal March 24, 1987. The $300 cost bond required by Rule 6 of the Rules of the Court of Appeals has not yet been filed.

STATEMENT OF RELEVANT FACTS

Loan or Gift Facts. Jacobsen's home was at 1050 Wood Avenue, Salt Lake City, Utah (Tr. 21, lines 15,16) where he lived with his daughter, Sallee. Kimball's home was at #475 Loren Von Drive, Salt Lake City, Utah (Tr. 34, line 15) where she lived with her children (Tr. 38, lines 7,8).

On February 8, 1981, Kimball called Jacobsen at his home and asked him to come up to her house and go look at a car. She had seen the car advertised for sale in the newspaper (Tr. 21, lines 20-25). Jacobsen drove to Kimball's house and they got in her old Fiat and drove to Wayne Schillings' place (Tr. 22. lines 6-7). They looked at the car, drove the car, and left. Jacobsen asked Kimball if she wanted the car. She said that she did not have the money, and Jacobsen told Kimball that he could probably loan her the money (Tr. 22, line 10).

They returned to Wayne Schilling's place and paid him $100 to hold the car. They then drove to Jacobsen's home where Jacobsen had his daughter, Sallee, write a $5,700 check payable to Wayne Schilling (Tr. 22, line 15). Jacobsen delivered the check to Kimball as a loan (Tr. 26. lines 2-5). They then drove to Wayne Schilling's place and picked up the new Fiat and then

drove both Fiats back to Kimball's house (Tr. 22. lines 15-16).

Kimball told Jacobsen that she would sell the old Fiat and apply the proceeds on the loan (Tr. 22, lines 23-25).

Kimball said: "I think when we first set up this, that I would pay him for the car whatever I got out of the green (old Fiat) car. I may have made the statement that I would, when I got more money, I would pay the rest of it . . ." (Tr. 52, lines 22-25 and Tr. 53., line 1).

Kimball also said: "I told him (Jacobsen) when I sold my car, I would give him that money and that I would get the rest of it to him as I made it." (Tr. 53, lines 5-6.)

Expenses, Services and Property Facts. Jacobsen and Kimball were never married to each other. Jacobsen did live with Kimball when she would let him (Tr. 27, lines 2-20). Jacobsen worked for Buehner Construction Company and was often out of town. He was home on weekends for a day and a half a week frequently during 1979 through 1985 (Tr. 27, lines 14-15). He was gone for three months while working on a project in California.

(a) Expenses and Services

Kimball paid the expenses on her house where she resided with her children. She had three children with her part of the time and two children with her the other time. She paid her house payment, utilities, upkeep and repair of appliances. Jacobsen paid the expenses on his house where he resided with his daughter, Sallee. He paid his house

payment, utilities, upkeep and repair of appliances.

Jacobsen did live at Kimball's house when home on weekends when she would let him. Jacobsen did do physical work around Kimball's house and did fix her cars.

(b) Trailer Sale Proceeds

Jacobsen gave Kimball $8,000, money from a trailer he sold, to put in an account for him when he needed it (Tr. 29, line 11). It was a weekend, and he was heading out of town at the time (Tr. 30., line 2). It was his money (Tr. 29, line 24). She returned it to him.

(c) Bronze Statue

Jacobsen never did give a bronze statue to Kimball (Tr. 30, line 11). He did take it to her house and put it on her piano.

(d) Silver

Jacobsen was heading out of town. There was nobody at his house. He asked Kimball to keep the silver for him (Tr. 30, line 11). She said she would. It was his silver (Tr. 51, line 8). She returned it to him.

(e) Boat

Kimball loaned her son $800 to buy a boat (Tr. 51, lines 18-20). Later, Kimball's son got in financial problems and was selling the boat (Tr. 51, lines 22-23). Jacobsen bought the boat for $400 (Tr. 51, line 25; Tr. 52, line 2).

Statute of Limitation Facts. On February 8, 1981,

Jacobsen told Kimball that he could probably loan her $5,700 to buy a car (Tr. 22, line 10).

Jacobsen had his daughter, Sallee, write a $5,700 check payable to Wayne Schilling (Tr. 22, line 15), and Jacobsen delivered the check to Kimball as a loan (Tr. 26. lines 2-5). Kimball told Jacobsen she was obligated to give him the money from the other car (when sold) and she told him she would (Tr. 40, line 22). They then picked up the new Fiat and drove both cars back to Kimball's house (Tr. 22. lines 15-16).

Kimball told Jacobsen that she would sell the old Fiat and apply the proceeds on the loan (Tr. 22, lines 23-25). In her deposition and at trial, Kimball said: "I think when we first set up this, that I would pay him for the car whatever I got out of the green (old Fiat) car. I may have made the statement that I would, when I got more money, I would pay the rest of it . . .." (Tr. 52, lines 22-25 and Tr. 53., line 1.) Kimball also said: "I told him (Jacobsen) when I sold my car, I would give him that money and that I would get the rest of it to him as I made it." (Tr. 53, lines 5-6.)

The old Fiat was sold in "two, two and one-half, maybe three months" (Tr. 22, line 25). Kimball put an ad in the newspaper after she got the new Fiat. She doesn't have a date on the sale (Tr. 41, line 3). In Kimball's deposition, she said she put an ad in the paper and tried to sell the old Fiat, within a couple of months (Tr. 52, lines 15-17). At trial, she guessed it would be a month or less (Tr. 41, line 7).

Kimball got $2,800 from the old Fiat sale (Tr. 40, line 25). Jacobsen told her to put the money in an account (Tr. 22, line 25), and that "when I need it, I'll get it." (Tr. 23, line 1.) Jacobsen told Kimball he would let her know when he needed it (Tr. 28, line 2). Kimball told him she would put (the money) in a special account, add to it, and pay him back (Tr. 24, lines 1-3).

Following Plaintiff Jacobsen's presentation of its case in chief, Defendant Kimball moved to dismiss on the basis of the statute of limitations. The trial court Judge, Maurice D. Jones, denied the motion and stated that the evidence was that the payments were to start at the time the old Fiat was sold, which was after March 27, 1981 (Tr. 33, lines 12-16).

Jacobsen mentioned the matter to Kimball about once every six months (Tr. 28, line 8). In August, 1981, Jacobsen, Kimball and Jacobsen's daughter, Sallee, were driving to a wedding reception. Sallee asked Kimball about the money (Tr. 24, line 25). Kimball said that she "had it in a personal account and that she would pay it back in one lump sum." (Tr. 25, lines 1-2.) The money sat in the account and Jacobsen waited to be paid (Tr. 25, line 6). In 1983, Kimball told Jacobsen she wanted to break off the relationship, and that as far as she was concerned, he'd been compensated for the car (Tr. 43, lines 18-25). She severed the relationship in August, 1984 (Tr. 43, line 11). Jacobsen filed his complaint to recover the $5,700 loan March 27, 1985. Jacobsen has never received any payment on the $5,700 (Tr.

25, line 8).

SUMMARY OF ARGUMENT

The trial court correctly found that Jacobsen loaned Kimball $5,700. The court made five factual findings which supported its conclusion that the $5,700 payment was a loan. There is substantial evidence to support the court's findings. Further, under Utah Rule of Civil Procedure 52(a), the court's rulings should not be overturned unless they are clearly erroneous. Specifically, the court's findings that Kimball's own testimony preponderates in favor of finding the payment a loan, and the court's finding that the sale of Kimball's old car took place after March 27, 1981 were not clearly erroneous.

The court properly limited the admissibility of certain testimony and evidence, and the statute of limitations is not a bar. Payments on the loan were to start when Kimball sold the old Fiat. The court properly found the sale took place after March 27, 1981. It was not until August, 1983, that Kimball told Jacobsen that she was not going to pay him back. He filed suit March 27, 1985.

ARGUMENT

POINT I: THIS COURT SHOULD NOT OVERTURN THE TRIAL COURT'S FINDINGS OF FACT UNLESS THEY ARE "CLEARLY ERRONEOUS."

This Court's review of a trial court's findings of fact is governed by Rule 52(a) of the Utah Rules of Civil Procedure. Lemon v. Coates, 735 P.2d 58, 60 (Utah 1987); Ashton v. Ashton,

733 P.2d 147, 149-50 (Utah 1987); Salt Lake City School District v. Galbraith & Green, Inc., 740 P.2d 284, 285 (Utah Ct. App. 1987). Rule 52(a) was amended effective January 1, 1987 to provide as follows:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court . . ..

(Emphasis added)

Appellant Kimball's contention that a different standard of review at present applies in equity cases is erroneous. In Ashton, the Utah Supreme Court noted that since July 1, 1985, Article VIII of the Utah Constitution has not made a distinction between equity cases and cases at law. 733 P.2d at 150 n.1.

POINT II. THE TRIAL COURT'S FINDINGS OF FACT ARE NOT CLEARLY ERRONEOUS.

The Utah Supreme Court has recently given lower courts guidance in applying the Rule 52(a) "clearly erroneous" standard. In State v. Walker, 64 Utah Adv. Rep. 10, 10-11 (Aug. 25, 1987),

the court notes that the language of Utah's Rule 52(a) is similar to that of the Federal Rules of Civil Procedure. The court continues:

> The definition of "clearly erroneous" in the federal rules comes from United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948):
>
> > A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.
>
> Further clarification is offered by Wright & Miller:
>
> > The appellate court . . . does not consider and weigh the evidence de novo. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law.
>
> Thus, the content of Rule 52(a)'s "clearly erroneous" standard, imported from the federal rule, requires that if the findings . . . are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings . . . will be set aside.
>
> Although we have applied the new Rule 52(a) since its effective date, see, e.g., Ashton v. Ashton, 733 P.2d 147 (Utah 1987); Lemon v. Coates, 735 P.2d 58 (Utah 1987), we have not examined the impact of drawing from the federal rules in the promulgation of our new Rule 52. Therefore, we disavow language in our earlier cases describing or implying a standard under new Rule 52(a) which differs in any significant respect from the standard of review applied in this case.

Id. (Emphasis added)

In this case, the weight of evidence supports the trial court's findings. First, the court found that the parties

intended the $5,700 payment as a loan. The weight of evidence supports this finding. Four witnesses testified at trial. The clear testimony of three of the four, including Kimball herself, was that the payment was not a gift, but a loan. On direct examination Kimball testified as follows:

> Q. Did you make any suggestion to him [Jacobsen] that you would pay it [the $5,700] back?
>
> A. Yes. I told him I felt obligated to give him the money from the other car, and I told him I would.

(Tr. at 40.) Similarly, on cross-examination, Kimball testified the payment was not a gift:

> Q. Do you also recall saying in your deposition, quote, "I think when we first set up this, that I would pay him for the car whatever I got out of the green car. I may have made the statement that I would, when I got more money, I would pay the rest of it, never [sic] putting it into a special account"?
>
> A. I believe so. There was a lot said about the car.
>
> Q. Do you recall me asking you, did you ever tell Doug, Mr. Jacobsen, that you would pay him back the 5,700, and answering, "I told him when I told [sic] my car, I would give him that money and that I would get the rest of it to him as I made it."
>
> A. Yes. I think so.

The testimony of Jacobsen and of Jacobsen's daughter, Sallee, is to the same effect. For instance, on direct examination, Jacobsen testifies the payment was a loan:

> Q. --1981? All right. What next happened?
>
> A. I drove up to her house and we got in her old Fiat and we went down to Wayne Chilling's, she drove the

car, or we both drove it, I mean, and then she--then we left, and I said, do you want it or not, it's a pretty good deal. She goes, oh, I ain't got the money, and I says, well I can probably loan you the money, and I says, and then we headed out of Wayne, made a U-turn when she said, yeah, I want it. We come back and wrote Wayne a hundred dollar check to hold it for him until we got back.

Q. And then what did you do?

A. Went home, got the check from Sallee, gave it to Molly, went back to Wayne's, got the car, drove both Fiats to her house.

. . .

Q. Well, [what happened next] with regards to the car.

A. To the car?

Q. Un huh.

A. Well, she said the--the older Fiat, she'd sell it for the payment on the newer one, and then when she did sell it, she said that I--I sold the car, and I said well, put it in an account and when I need it, I'll get it.

(Tr. at 23-23). The trial court's finding that the evidence preponderates in favor of Jacobsen's claim is not clearly erroneous.

Second, the trial court found that Kimball's old car was sold "within a couple of months" after the purchase of the new car. Similarly, in open court in ruling on Kimball's motion to dismiss based on the statute of limitations, the trial court found: "The evidence at this point is that the payments were to start at the time the other car was sold, that's the way I understood the plaintiff's version of this, and so that would take it beyond the March 27th date. That is the ground upon

which I will deny your motion to dismiss." These findings are not clearly erroneous. Jacobsen testified that the sale of Kimball's old car, the proceeds of which were to be the first payment to Jacobsen, did not take place until some two to three months after the February 8th $5,700 loan (Tr. at 23-23). Kimball testified that she guessed the sale could have taken place within a month or less (Tr. at 41). The court resolved this conflicting testimony in favor of Jacobsen, and the court's resolution is not clearly erroneous, especially considering Rule 52(a)'s direction that due regard be given the opportunity of the trial judge to judge the credibility of witnesses.

POINT III. THE TRIAL COURT PROPERLY LIMITED CONSIDERATION OF EVIDENCE OF GOODS AND SERVICES SUPPLIED TO JACOBSEN TO THE ISSUE OF JACOBSEN'S INTENT WITH RESPECT TO THE $5,700.

The court's limitation on the admission of "goods and services evidence" is not in error for a number of reasons. First, Kimball never formally offered the evidence for any purpose other than "gift motivation." At the beginning of the trial, the court questioned Kimball with respect to the subject evidence (Tr. at 7-8). In that exchange, the court indicated a tentative ruling, should Jacobsen object to the admission of the evidence as "an offset." However, Kimball never attempted to so introduce the evidence. Having failed to urge its admissability as an offset at trial, Kimball cannot claim the court erred in failing to consider the evidence on the question of offset.

Second, assuming the tentative exchange with the court was

sufficient to properly raise the issue, the court properly refused to consider the evidence on the question of offset. In Utah Dept. of Trans. v. Jones, 694 P.2d 1031, 1034 (Utah 1984), the Utah Supreme Court noted that a trial court's rulings with respect to the admission of evidence should not be overturned absent abuse of discretion. In this case, the trial judge's ground for limiting the admission of this evidence was Kimball's failure to plead offset as an affirmative defense. While the Utah Rules of Civil Procedure, and the Utah Rules of Evidence provide liberal standards for curing the variance between pleading and proof, there is authority in Utah for excluding evidence for failure to plead. See Youngren v. John W. Lloyd Construction Co., 22 Utah 2d 207, 450 P.2d 985, 986-87 (Utah 1969); F.M.A. Financial Corp. v. Build, Inc., 17 Utah 2d 80, 404 P.2d 670, 672 (Utah 1965). In this case, Kimball made no attempt, at any time before, or after trial to amend her pleadings. Nor were there any special circumstances which might justify such a failure. Under such circumstances, the court's ruling cannot be considered an abuse of discretion.

Finally, an error committed was harmless. The evidence excluded went only to the value of the goods and services rendered to Jacobsen. Kimball neither pled nor attempted to prove any liability for such goods and services, either by way of contract or some equitable doctrine. Kimball's evidence, therefore, was insufficient to have any legal effect.

Kimball commends to the court the case of Marvin v. Marvin,

557 P.2d 106, 134 Cal. Rptr, 815 (1976) (enbanc), for its analysis of property rights between parties who live together, though unmarried. Based on this case, Kimball urges her debt be discharged on some subtle concept of fair division of property. Marvin, however, rejects any division of property not based on principles of express or implied contract, 557 P.2d at 110, 116, 122-23, and Kimball has not pled such. Further, to the extent Kimball attempts to assert causes of action based on express contract, implied contract, or domestic relations, she should be barred for having failed to present such claims below. See Berger v. Minnesota Mutual Life Insurance Co. 723 P.2d 388, 392 (Utah 1980); General Appliance Corp. v. Haws, Inc., 30 Utah 2d 238, 516 P.2d 346, 348 (1973).

POINT IV. THE STATUTE OF LIMITATIONS DOES NOT BAR JACOBSEN'S CLAIMS.

Under Utah Code Ann. § 78-12-1 (1987), civil actions may be commenced only "after the cause of action has accrued . . .." In this case, the trial judge found that Kimball's repayment obligation with respect to the loan was not to start until she sold her car. The judge further found that Kimball did not sell her car until after March 27, 1981. Under such circumstances, a complaint filed March 27, 1985 is within the statute of limitations prescribed in Utah Code Ann. § 78-12-25 (1987).

Kimball, however, contends that there was no agreement as to the time of repayment. To the extent the court finds there was no such agreement, this case is controlled by O'Hair v. Kounalis, 23 Utah 2d 355, 463 P.2d 799 (1970). In that case, O'Hair

brought suit to recover the unpaid portions of a series of loans, and the defendants pleaded the statute of limitations (§ 78-12-25). The trial court granted summary judgment and the Utah Supreme Court reversed. The evidence, the court noted, revealed the following:

> According to plaintiff's version of the contract it was the intention of the parties that repayment was to be in the future. Respondents emphasized that plaintiff in her deposition states in one place that repayment was to be in five or six years and in another that it would be three, four, or five years; respondents therefore conclude there is no way to determine when repayment was to be made.

Id. at 800.

The court then quotes Grayson v. Crawford, 189 Okl. 546, 119 P.2d 42, 45-46 (1941) for the following rule which the court finds applicable to O'Hair:

> [A] reasonable time for performance is allowed, when the evidence indicates that the cause of action did not accrue at the time the money was loaned, and the parties, although they did not fix a definite date, intended that payment was to be made at a future time. Under such circumstances, the statute of limitations does not begin to run until a reasonable time has elapsed. What is a reasonable time is a question to be determined from consideration of all the facts and circumstances in the case in which the question arises.

O'Hair, 463 P.2d at 800-01.

In this case, as in O'Hair, there is some uncertainty in the evidence as to when the loan was to be repaid. If the parties did not fix a definite date for repayment, then a reasonable time is allowed. Jacobsen loaned Kimball the $5,700 on February 8th.

A reasonable time would certainly allow her at least two months before her debt became due and payable.

CONCLUSION

The Court of Appeals should sustain Judge Maurice D. Jones's judgment and findings.

RESPECTFULLY SUBMITTED this 28TH day of September, 1987.

Milo S. Marsden, Jr.
MARSDEN, ORTON & CAHOON
Attorneys for Respondent

MAILING CERTIFICATE

I certify that I mailed three copies of the foregoing BRIEF OF RESPONDENT J. DOUGLAS JACOBSEN to Edward M. Garrett, 311 South State, Suite 320, Salt Lake City, Utah 84111, this 28th day of September, 1987, postage prepaid.

Gail Jessen