Rel: June 2, 2023

Corr: July 17, 2023

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

SC-2022-1047

Protective Life Insurance Company

v.

Andrew Chong Jenkins

Appeal from Jefferson Circuit Court
(CV-22-900993)

SELLERS, Justice.

Protective Life Insurance Company ("Protective") appeals from the judgment of the Jefferson Circuit Court dismissing its action against

Andrew Chong Jenkins pursuant to Rule 12(b)(6), Ala. R. Civ. P. We reverse and remand.

I. Facts

Jenkins was an executive employed by Protective at its corporate headquarters in Birmingham. During his employment, Jenkins elected to participate in Protective's deferred-compensation plan. That plan allowed Jenkins to receive bonuses and other performance incentives on a tax-deferred basis. During his employment, Jenkins had access to the funds in his deferred-compensation account. In October 2019, Jenkins gave notice to Protective that he was terminating his employment. A month after the notice's effective date, on November 15, 2019, $105,230 was entered into Protective's accounting system as the amount of deferred compensation owed to Jenkins. In reality, Protective owed Jenkins only $1,052.30. After Protective deducted taxes and withholdings, Jenkins was mistakenly overpaid by $73,752.64. Protective asserts that the reason for the two-digit mistake was a data-entry error.

On January 10, 2020, Protective's payroll department discovered the error and communicated this fact to Jenkins, ultimately sending him

a letter detailing the overpayment and asking him to repay the money. Jenkins did not return the money after receiving Protective's letter. On April 5, 2022, Protective commenced this action in the Jefferson Circuit Court, asserting claims of breach of contract, unjust enrichment, money paid by mistake, and account stated. Jenkins filed a motion to dismiss, arguing, among other things, that Protective's claims were barred under the two-year statute of limitations contained in § 6-2-38(m), Ala. Code 1975.[1] The circuit court granted the motion to dismiss, finding that the purpose of the action was to recover wages and, thus, that it was barred under § 6-2-38(m). Protective filed a motion to vacate. That motion was denied, and this appeal followed.

II. Standard of Review

> "This Court reviews a dismissal under Rule 12(b)(6)[, Ala. R. Civ. P.,] de novo. A dismissal for failure to state a claim upon which relief can be granted is warranted only when the allegations of the complaint, viewed most strongly in favor of the pleader, demonstrate that the pleader can prove no set of facts that would entitle the pleader to relief."

[1]In its entirety, § 6-2-38(m) provides: "All actions for the recovery of wages, overtime, damages, fees, or penalties accruing under laws respecting the payment of wages, overtime, damages, fees, and penalties must be brought within two years."

Cathedral of Faith Baptist Church, Inc. v. Moulton, [Ms. SC-2022-0447, Sept. 23, 2022] ___ So. 3d ___, ___ (Ala. 2022) (citation omitted).[2]

III. Analysis

Jenkins has not filed an appellate brief. "Where the appellant submits the cause on brief and no brief is filed by the appellee, the court considers the cause on its merits on the assumption that appellee is interested in having the judgment sustained." United Sec. Life Ins. Co. v. Dupree, 41 Ala. App. 601, 602-03, 146 So. 2d 91, 93 (1962) (citing Tri-City Gas Co. v. Britton, 230 Ala. 283, 160 So. 896 (1935)). For its part, Protective reasserts its argument that the circuit court erred in applying

[2]Protective cites our standard of review for a ruling on a motion to dismiss under Rule 12(b)(6), Ala. R. Civ. P. Under Rule 12(b), if "matters outside the pleading are presented to and not excluded by the [trial] court, the motion shall be treated as one for summary judgment[, pursuant to Rule 56(c), Ala. R. Civ. P.]" However, "this Court no longer assumes that a motion to dismiss must be converted to a motion for a summary judgment when a trial court fails to affirmatively state that it did not consider matters outside the pleadings in ruling upon such a motion." Borden v. Malone, 327 So. 3d 1105, 1111 (Ala. 2020). The record contains materials outside the pleadings, which were attached to Protective's response in opposition to Jenkins's motion to dismiss. However, the trial court's reasoning for granting the motion to dismiss was based solely upon the applicability of the statute of limitations in § 6-2-38(m), and the judgment does not indicate that the trial court considered matters outside the pleadings. Accordingly, as in Moulton, "we cannot say that the referenced materials converted the motion to dismiss to a motion for summary judgment." ___ So. 3d ___ n.2.

§ 6-2-38(m) to the action. We agree. Because the overpayment made in error to Jenkins cannot be considered "wages" for the purpose of § 6-2-38(m), and because § 6-2-38(m) applies only to actions "accruing under laws respecting the payment of wages, overtime, damages, fees, and penalties," the circuit court's judgment is due to be reversed.

The circuit court described Protective's action as, "at its core, a suit to recover wages … paid to [Jenkins] by mistake." In our view, however, the overpayment mistakenly paid to Jenkins cannot be fairly described as wages. Interpreting § 6-2-38(m), the Court of Civil Appeals adopted the definition of "wage" as:

> "'Payment for labor or services, usu[ally] based on time worked or quantity produced; specif[ically], compensation of any employee based on time worked or output of production● Wages include every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, bonuses, and the reasonable value of board, lodging payments in kind, tips, and any similar advantage received from the employer. An employer usu[ally] must withhold income taxes from wages….'"

Jefferson Cnty. v. Birchfield, 142 So. 3d 556, 566-67 (Ala. Civ. App. 2011) (quoting Black's Law Dictionary 1610 (8th ed. 2004)) (emphasis

omitted).[3] Simply put, the overpayment that Protective mistakenly paid to Jenkins in was neither "payment for labor or services" nor "remuneration." It was not based upon any action undertaken by Jenkins; rather, its sole basis is a data-entry error. Accordingly, Protective's action cannot be characterized or limited as being one for the recovery of wages, because the amount it seeks to recover is divorced from any amount it owed to Jenkins.

Protective also argues that the plain language of § 6-2-38(m) limits its application to actions to recover wages "accruing under laws respecting the payment of wages, overtime, damages, fees, and penalties." Because there is no statute, law, or regulation that controls a private employer's recovery of unearned money from a former employee, Protective argues that the statute has no application in this case.

[3]That the legislature would not have understood "wage" or "wages" to include payments made as a result of data-entry errors is made even more clear by "dictionaries of the proper vintage," Ex parte Tutt Real Estate, LLC, 334 So. 3d 1249, 1253 (Ala. 2021) (Mitchell, J., concurring specially); one dictionary published less than a decade after the predecessor to § 6-2-38(m) was originally enacted stressed that wages are "the compensation agreed upon" and the "specified sum for a given time of service or a fixed sum for a specified piece of work." Black's Law Dictionary 1750-51 (4th ed. 1951) (emphasis added). The overpayment mistakenly paid to Jenkins arose strictly from a data-entry error, not from an agreement or because it was a specified sum for his services.

Although we have not directly held that § 6-2-38(m) is applicable only to cases seeking to recover wages provided for by law, Protective correctly notes that Alabama's appellate courts have applied that statute only in such cases. See Jefferson Cnty. v. Birchfield, 142 So. 3d 556 (Ala. Civ. App. 2011); Jones v. Teel, 101 So. 3d 756 (Ala. Civ. App. 2012); Barnhart v. Ingalls, 275 So. 3d 1112 (Ala. 2018), overruled on other grounds by Ex parte Pinkard, [Ms. 1200658, May 27, 2022] ___ So. 3d ___ (Ala. 2022); and Nelson v. Megginson, 165 So. 3d 567 (Ala. 2014). Protective suggests that the selective application of § 6-2-38(m) to that situation implies that the statute is limited in application to actions seeking to recover wages accruing pursuant to a statute, law, or regulation. In our view, such a limitation finds support in the plain language of § 6-2-38(m); the statute applies to "actions for the recovery of wages … accruing under laws respecting the payment of wages, overtime, damages, fees, and penalties."[4] Here, because there was a data-entry error resulting in

[4]The statute's history supports this reading as well. The predecessor to § 6-2-38(m) was enacted following the enactment of the Federal Labor Standards Act of 1938 ("the FLSA"), which it explicitly referenced. See Caldwell v. Alabama Dry Dock & Shipbuilding Co., 161 F.2d 83 (5th Cir. 1947); see also Title 7, § 26(1), Ala. Code 1940 (as amended effective on July 6, 1943) (applying to "[a]ll suits and actions for the recovery of wages, overtime, damages, fees or penalties accruing

Jenkins's receiving sums he had not earned and was not entitled to, § 6-2-38(m) is inapplicable.

Our holding is consistent with a line of cases interpreting a similar Georgia statute, Ga. Code Ann. § 9-3-22, which provides, in relevant part, that "all actions for the recovery of wages, overtime, or damages and penalties accruing under laws respecting the payment of wages and overtime shall be brought within two years after the right of action has accrued." That statute is "materially identical" to § 6-2-38(m). Musick v. Goodyear Tire & Rubber Co., 81 F.3d 136, 139 (11th Cir. 1996). As stated by the United States Court of Appeals for the Fifth Circuit, "Georgia courts have stated that [the predecessor to Ga. Code Ann. § 9-3-22] applies only to rights which arise under legislative enactment and which would not exist except for some act of the legislature …." McMillian v. City of Rockmart, 653 F.2d 907, 910 (5th Cir. Unit B Aug. 1981). And, although that statement arose in the context of § 9-3-22's first clause,

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under laws respecting the payment of wages, overtime, damages, fees and penalties, and specifically under the Act of Congress known as the Fair Labor Standards Act of 1938 …."). However, its limitation to actions under the FLSA was held to be unconstitutional in Caldwell. 161 F.2d at 86. Eventually, the reference to the FLSA was removed from the statute, and § 6-2-38(m) assumed its current form.

which provides a 20-year statute of limitations, the Supreme Court of Georgia has similarly held with respect to the statute's second clause, which is "materially identical" to § 6-2-38(m), that § 9-3-22 applied when it was "undisputed that [the plaintiff's] compensation … is determined by state law, [a] Local Law, and [a] Supplemental [County] Ordinance, and that [the plaintiff's] claims for back pay [were] rooted in the interpretation of these laws …." Cowen v. Clayton Cnty., 306 Ga. 698, 699, 832 S.E. 2d 819, 822 (2019) (footnote omitted). In essence, these cases explicitly state, with regard to the Georgia statute, what Alabama courts have implicitly held regarding § 6-2-38(m). Thus, an action based on a data-entry error causing an overpayment of the balance of a deferred-compensation account to an employee is not an action to recover wages accruing under any law so as to implicate the two-year statute of limitations in § 6-2-38(m).

Finally, although the circuit court's judgment was limited to the applicability of § 6-2-38(m), we briefly address the other grounds raised in Jenkins's motion to dismiss. First, Jenkins cited Auburn University v. International Business Machines, Corp., 716 F. Supp. 2d 1114, 1118 (M.D. Ala. 2010), for the proposition that Protective's unjust-enrichment

claim was based on a tortious action and, thus, was barred by the two-year statute of limitations in § 6-2-38(l).[5] In that case, the federal District Court for the Middle District of Alabama noted that, for the purpose of determining whether an unjust-enrichment claim was subject to the statute of limitations in § 6-2-38(l), some unjust-enrichment claims "clearly arise from tort injuries," while others "clearly arise from contract injuries." Id. Whether Protective's unjust-enrichment claim falls into either category requires a factual inquiry, and, therefore, Protective's allegations in its complaint were sufficient to survive Jenkins's motion to dismiss insofar as it was premised on the applicability of § 6-2-38(l) to Protective's unjust-enrichment claim. See Moulton, ___ So. 3d at ___.

Additionally, Jenkins alleged that Protective had failed to sufficiently plead its claims of breach of contract, money paid by mistake, and account stated. We conclude that, in viewing the complaint in a manner most favorable to Protective, the complaint contained and stated a "'provable set of facts … upon which relief could be granted'" based

[5]Although Jenkins did not specifically invoke § 6-2-38(l) in his motion to dismiss, he cited to Auburn University, which relied upon that statute. Section 6-2-38(l) provides that "[a]ll actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years."

"'upon [a] cognizable theory of law.'" Seals v. City of Columbia, 575 So. 2d 1061 (Ala. 1991) (quoting Fontenot v. Bramlett, 470 So. 2d 669, 671 (Ala. 1985)). Under our standard of review, that is sufficient to defeat a motion to dismiss under Rule 12(b)(6). See Moulton, ___ So. 3d at ___.

IV. Conclusion

For the aforementioned reasons, the statute of limitations contained in § 6-3-38(m) is inapplicable to this case. Accordingly, the circuit court's judgment is reversed, and this cause is remanded for further proceedings.

REVERSED AND REMANDED.

Wise, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur.

Cook, J., concurs in part and concurs in the result, with opinion.

Shaw, J., concurs in the result.

Parker, C.J., dissents, with opinion.

COOK, Justice (concurring in part and concurring in the result).

I concur fully in the main opinion except as to its reasoning regarding the issue of the statute of limitations applicable to Protective Life Insurance Company's unjust-enrichment claim. As noted by Chief Justice Parker in his dissent, it appears that the question of which statute of limitations applies to unjust-enrichment claims remains not definitely decided by our Court. I am thus not yet ready to embrace the reasoning of Auburn University v. International Business Machines, Corp., 716 F. Supp. 2d 1114 (M.D. Ala. 2010). As Chief Justice Parker suggests in his dissent, I encourage future parties to raise and brief this issue in appropriate cases.

PARKER, Chief Justice (dissenting).

The main opinion assumes for purposes of its analysis that unjust-enrichment claims may be governed by either the two-year catchall statute of limitations or the six-year contract statute of limitations, depending on whether the claim arises out of "'tort injuries'" or "'contract injuries,'" ___ So. 3d at ___ (citation omitted). It appears that the question of what statute of limitations applies to unjust-enrichment claims remains not clearly decided by our Court. See Ex parte Abbott Lab'ys, 342 So. 3d 186, 194 n.7 (Ala. 2021) ("This Court has not decided whether the applicable limitations period for an unjust-enrichment claim is two years or six years."); Snider v. Morgan, 113 So. 3d 643, 655 (Ala. 2012) ("[T]here is a distinct absence of authority definitively stating the statute of limitations applicable to an unjust-enrichment claim."). In my view, given the statutes' language and the nature of an unjust-enrichment claim, only the catchall statute can apply.

The general statute of limitations regarding breach-of-contract claims provides: "The following must be commenced within six years: ... Actions upon any simple contract or speciality not specifically enumerated in this section." § 6-2-34(9), Ala. Code 1975. The terms

"simple contract" and "speciality," now archaic, have been used in the statute since its 1852 original. See § 2477, Ala. Code 1852. At that time, a "simple contract" was "one the evidence of which is merely oral, or in writing not under seal, nor of record." 2 John Bouvier, A Law Dictionary 399 (1839); see Black's Law Dictionary 410 (11th ed. 2019) (defining a "simple contract" as either an "informal contract" or a "parol contract"); id. at 407 (defining an "informal contract" as "[a] contract other than one under seal, a recognizance, or a negotiable instrument; specif[ically], that derives its force not from the observance of formalities but because of the presence in the transaction of certain elements that are usu[ally] present when people make promises with binding intent -- namely mutual assent and consideration (or a device other than consideration). ... An informal contract may be made with or without a writing. Most modern contracts are informal."); id. (defining a "parol contract" as, "[a]t common law, a contract not under seal, although it could be in writing"). In essence, a "simple contract" is a contract formed without a seal or other legally prescribed formalities. "[S]peciality" appears to have been an alternate spelling of "specialty." See Bryan Garner, Garner's Dictionary of Legal Usage 835 (3d ed. 2011). In 1852, a "specialty" was "a writing sealed and

delivered, containing some agreement." Bouvier, supra, at 407; see Black's Law Dictionary 410 (defining a "specialty contract" as a "contract under seal"); id. at 405 (defining a "contract under seal" as "[a] formal contract that requires no consideration and has the seal of the signer attached"). That is, a "speciality" is a contract that is formed with the formality of a seal. By referencing "simple contract[s]" and "specialit[ies]," the statute covers all claims based on contracts that are not enumerated elsewhere in § 6-2-34.

In contrast, "unjust enrichment is not a legal claim sounding in either tort or contract -- it is an equitable claim for relief." Reclaimant Corp. v. Deutsch, 332 Conn. 590, 613, 211 A.3d 976, 990 (2019). More specifically, in modern doctrinal terms, unjust enrichment is a quasi-contractual theory of relief. See Welch v. Montgomery Eye Physicians, P.C., 891 So. 2d 837, 842-43 (Ala. 2004). "A quasi-contract is not actually a contract." Black's Law Dictionary 409. Instead, it "is a legal remedy imposed by a court." Morgenroth & Assocs., Inc. v. Town of Tilton, 121 N.H. 511, 514, 431 A.2d 770, 772 (1981). Indeed, quasi-contractual theories such as unjust enrichment are mutually exclusive with recovery under an express contract. See Brannan & Guy, P.C. v. City of

Montgomery, 828 So. 2d 914, 921 (Ala. 2002) (plurality opinion) ("When an express contract exists, an argument based on a quantum meruit recovery in regard to an implied contract fails."). Further, quasi-contractual theories are distinct from implied-in-fact contracts:

> "Implied contracts must be distinguished from quasi-contracts .... Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice."

Restatement (First) of Contracts § 5 cmt. a (Am. L. Inst. 1932). As Professor Corbin observed, in quasi-contractual cases "it would be better not to use the word 'contract' at all." 1 Arthur Corbin, Corbin on Contracts § 19 (1963).

Therefore, an unjust-enrichment claim is not an "[a]ction[] upon [a] simple contract or speciality," § 6-2-34(9). Instead, it is a noncontractual theory of recovery that is governed by the catchall statute of limitations: "All actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section [§ 6-2-38] must be brought within two years." § 6-2-38(l). Other states' courts have similarly applied their catchall statutes of limitations to unjust-enrichment claims. Hughes v. Shipp, 324 So. 3d 286, 291 (Miss. 2021);

Loengard v. Santa Fe Indus., Inc., 70 N.Y.2d 262, 266-67, 514 N.E.2d 113 (1987).

The main opinion appears to adopt, for purposes of addressing appellee Andrew Chong Jenkins's argument below, the framework that a federal court applied in Auburn University v. International Business Machines, Corp., 716 F. Supp. 2d 1114 (M.D. Ala. 2010). In that case, the court was working in a jurisprudential vacuum because of the absence of a prior decision from this Court on the correct statute of limitations for unjust-enrichment claims. Id. at 1117-18.[6] That court concluded that

> "some unjust-enrichment claims, such as claims for enrichment flowing from a breach of the corporate fiduciary duties of loyalty and due care, clearly arise from tort injuries, while other unjust-enrichment claims, such as claims for enrichment flowing from the rendering of substantial performance on a merely technically invalid contract, clearly arise from contract injuries."

Id. at 1118. That conclusion was incorrect, for the reasons I have explained. In addition, it was flawed because (1) it conflated the equitable cause of action of unjust enrichment with tort causes of action, such as breach of fiduciary duty; (2) it assumed that a "technically invalid

[6]Instead of working in the dark, the court might have been well advised to certify the issue to our Court under Rule 18, Ala. R. App. P.

contract" is somehow different from simply the absence of a contract; and (3) it assumed that "contract injuries" can occur in the absence of a contract.

Accordingly, my view is that unjust-enrichment claims are always governed not by the six-year statute of limitations for "simple contract[s]" and "specialit[ies]" but by the two-year catchall statute of limitations for noncontractual and otherwise nonenumerated claims. Until this Court decides this question, I encourage future parties to carefully address it.

Finally, although I do not dissent from the main opinion's discussion of the unjust-enrichment claim because the opinion merely adopts arguendo Jenkins's Auburn framework, I dissent from reversing the judgment because Jenkins correctly argued below that the action should be dismissed based on lack of personal jurisdiction and other grounds.