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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001900-MR

NATALIE NOFFSINGER, EX REL. ADMINISTRATRIX OF THE ESTATE OF NAT B. NOFFSINGER — APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 15-CI-00346

NAT J. NOFFSINGER,
ANNA JEAN NOFFSINGER, and
NAT J. ENTERPRISES, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES, AND L. THOMPSON, JUDGES.

COMBS, JUDGE: Natalie Nofsinger,[1] administratrix of the Estate of Nat B. Nofsinger, appeals a judgment of the Logan Circuit Court entered on July 2, 2018.

[1] The Notice of Appeal utilizes the spelling of "Noffsinger." However, the briefs of the parties use "Nofsinger," the spelling that we have adopted in this opinion.

In so doing, the court entered a judgment notwithstanding a jury's verdict (JNOV). After our review, we affirm.

On December 30, 2015, Nat Bryant Nofsinger (Bryant Nofsinger) filed an action against Nat J. Enterprises, Inc., and its sole shareholders -- his parents, Nat J. Nofsinger and Anna Jean Nofsinger. Bryant Nofsinger alleged that in the 1990s, he had been asked by his parents "to invest his personal funds" into a resort owned by the corporation and of which he and his wife had become employees. According to Bryant Nofsinger, these injections of cash were expected to occur during the resort's off-season when working capital was low. In his civil action, Bryant Nofsinger sought to recover $84,532.54 as repayment of the funds that he allegedly "loaned" to the corporation between 1992 and April 30, 2000, plus interest, asking for a total of $509,643.17[2] in his complaint.

Nat J. Enterprises and the Nofsingers answered the complaint and denied the allegations. They also made affirmative defenses, including an assertion that the claim was filed outside the period of limitations.

Following discovery, Nat J. Enterprises and the Nofsingers filed a motion for summary judgment. They argued that the claim for breach of contract had been filed out of time and that they were entitled to judgment as a matter of law. In his response, Bryant Nofsinger argued that his cause of action was

[2] There was no documentation to substantiate this figure.

governed by the fifteen-year statute of limitations of KRS[3] 413.090(2) and that the cause of action did not accrue until December 31, 2000, **when he was first made aware** that Nat J. Enterprises did not intend to repay the loans that he made to the company. The motion for summary judgment was denied.

A jury trial was conducted on February 26 and 27, 2018. During the proceedings, Nat J. Enterprises and the Nofsingers moved for a directed verdict and renewed their motion at the close of all the evidence, arguing again that the claim was barred by the statute of limitations. The trial court denied the motions.

At trial, the evidence presented by Bryant Nofsinger to prove the terms of the parties' agreement included copies of letters written to Nat J. and Anna Jean Nofsinger by the corporation's accountant. The first exhibit was a copy of a letter dated May 21, 1999, that reflected little more than that a balance of $68,172.54 was owed by the corporation to Bryant Nofsinger as of December 31, 1998. The balance had been figured by merely adding up the value of deposit slips from 1992 through 1998. The second exhibit was a copy of a letter from the accountant dated April 22, 2000, that asked whether a total of $4,110.00 deposited by Bryant Nofsinger into the lodge checking account in February and March 2000 should be treated as a loan from Bryant Nofsinger. The third exhibit was a copy of a portion of a cumulative general account ledger that indicated a previous balance

[3] Kentucky Revised Statutes.

due to Bryant Nofsinger in the amount of $75,992.54; an additional sum due as of February 28, 2000, in the amount of $480.00; an additional sum due as of March 31, 2000, in the amount of $3,710.00; and a final additional sum due as of April 30, 2000, in the amount of $4,350.00 -- for a grand total balance due to Bryant Nofsinger in the amount of $84,532.54 as of July 31, 2000.

The jury found in favor of Bryant Nofsinger on his claim against Nat J. Enterprises. Pursuant to the court's instruction (that incorporated a deduction of a $0.32 error), it awarded him $84,532.22. The jury found specifically that Bryant Nofsinger had

> paid $84,532.22 to Nat J. Enterprises Inc.[,] under an agreement by Nat J. Enterprises to repay this money to Nat Bryant Nofsinger as expressed by its President, Nat J. NOFSINGER [sic] in the year 2000 and that the money has not been repaid.

After the verdict was announced, Bryant Nofsinger tendered to the trial court a proposed judgment that included an award of $249,009.92[4] in pre-judgment interest. Nat J. Enterprises objected to the proposed judgment. In an order entered April 2, 2018, the trial court scheduled a hearing to consider the issue of pre-judgment interest. In its order, the court observed as follows:

> Pursuant to KRS 360.040, a judgment based upon a written obligation will bear interest at the rate established

[4] We note that the sums of $84,532.00 and the $249,009.92 deemed as pre-judgment interest do not equal or approximate the amount of $509,643.17 initially sought in Bryant Nofsinger's complaint.

> in that document. In this case, the written documentation established no interest rate or any specific terms of payment. It is the Court's recollection that no written demand for payment was made by [Bryant Nofsinger] prior to the filing of the Complaint on December 30, 2015. A mere obligation to pay a liquidated amount of money by itself, and in the absence of a demand for payment or specific contractual obligation, should not give rise to a claim of interest. Once a demand for payment is made and denied, but later proved to be wrongfully denied, then prejudgment interest from the date of demand would be appropriate.

The hearing was conducted on April 17, 2018, during which the court granted Bryant Nofsinger's request to present testimony to establish the date upon which he had first demanded payment. At this hearing, Bryant Nofsinger testified that he began loaning money to the corporation in the early 1990s and that he first began demanding repayment of the accumulating debt in 1997. He explained that this debt was a portion of the same debt that was eventually acknowledged in the corporation's balance sheet in 2000 – the debt upon which the jury's $84,532.22 verdict was based. Nofsinger testified at the hearing that he had ongoing discussions with his parents regarding repayment of the loan.

In light of this testimony, the trial court found that the fifteen-year statute of limitations provided for in KRS 413.090(2) had been triggered in 1997 upon Bryant Nofsinger's acknowledgment that he made a demand for payment at that time. The trial court found that Bryant Nofsinger had given patently false testimony during the April 17 hearing concerning a separate matter and noted that

Nofsinger "may have lied about his 1997 demand for payment" as well. It concluded that whether true or not, Bryant Nofsinger would be held to his hearing testimony "as a matter of equity"; that the testimony established unequivocally that the action had been filed out of time; and that Bryant Nofsinger was barred from seeking relief. The trial court gave the parties an opportunity to file memoranda in response to its assessment of the situation.

In a memorandum filed on May 4, 2018, Bryant Nofsinger argued that the existence of the corporation's debt had been confirmed in writing in July 2000. He argued that interest should have begun to accrue as early as December 31, 2000, when he realized that the corporation did not intend to repay the loan, or alternatively from December 30, 2015, the date upon which the complaint had been filed. Another hearing was scheduled for June 29, 2018. Following that hearing, the trial court entered an order on July 2, 2018, in which it observed that there was "written evidence of the debt in the minutes of corporate records from December of 2000." (We have been unable to find that document among the exhibits introduced at trial.)

Nevertheless, the court concluded that the "corporate writing placed into evidence did not state the specific basis or nature of the claim, any terms of repayment or the consideration for it." Because of these omissions, the court concluded that the contract alleged by Bryant Nofsinger was "mostly oral and only

partly evidenced by writing." It concluded that the corporate record did not constitute a "written contract" within the meaning of the provisions of KRS 413.090(2) (the statute governing a written contract). Instead, the court held that the five-year statute of limitations provided for in KRS 413.120(1) (the statute pertaining to a contract not in writing, either express or implied) governed Nofsinger's claim against the corporation. The court concluded that the claim was time-barred and entered judgment notwithstanding the verdict (JNOV) in favor of Nat J. Enterprises.

Bryant Nofsinger died on July 12, 2018, and Natalie Nofsinger, Administratrix of the Estate of Nat B. Nofsinger, was substituted as plaintiff. By order entered on December 10, 2018, the court denied the estate's motion to alter, amend, or vacate the court's JNOV. This appeal followed.

CR[5] 50.02 provides that where a verdict is returned, the trial court has discretion to direct the entry of judgment. Upon post-verdict review, if a court determines that the plaintiff failed to prove his claim, entry of JNOV is appropriate. *Savage v. Three Rivers Medical Center*, 390 S.W.3d 104, 111-12 (Ky. 2012). "JNOV is the means by which a trial court may retroactively grant the relief that should have come in the form of a directed verdict." *Id.* at 112. Whether a claim is barred by the statute of limitations is a legal question that we

[5] Kentucky Rules of Civil Procedure.

review *de novo*. *Ragland v. DiGiuro*, 352 S.W.3d 908, 912 (Ky. App. 2010).

As noted earlier, in Kentucky, "[a]n action upon a recognizance, bond, or written contract" must be commenced within fifteen years. KRS 413.090(2). However, the limitations period is five years for "[a]n action upon a contract not in writing, express or implied." KRS 413.120(1). Throughout these proceedings, Nat J. Enterprises relied upon the defense of the statute of limitations. Ultimately, JNOV was entered based upon the trial court's conclusion that the complaint was filed outside the five-year period of limitations provided by KRS 413.120(1).

On appeal, the Nofsinger estate (the Estate) argues that the trial court erred by concluding that the claim against Nat J. Enterprises was governed by a five-year period of limitations. The Estate contends that the obligation to Bryant Nofsinger was expressed in writings admitted as trial exhibits 1, 2, and 3 (copies of the two letters written by the accountant (exhibits 1 and 2) and the partial account ledger (exhibit 3)) -- and that together these writings constitute a "written agreement" which may be enforced within fifteen years pursuant to the provisions of KRS 413.090(2).

We must determine whether the trial court erred by concluding that the cause of action alleged by Bryant Nofsinger is governed by the five-year period of limitations for unwritten contracts -- or if he is instead entitled to the benefit of the fifteen-year period of limitations for written contracts. However, prior to

making that determination, we must address and decide **when the cause of action accrued**. "It is a cardinal principle in the construction of statutes of limitation, which has been recognized from the beginning, that the statute does not begin to run against the plaintiff until his cause of action accrues." *Chatterson v. City of Louisville*, 145 Ky. 485, 140 S.W. 647, 648 (1911).

In its brief, the Estate rejects the trial court's conclusion that the cause of action accrued upon Bryant Nofsinger's demand for repayment in 1997. It contends that the claim arose instead on April 30, 2000, when the corporation's accountant acknowledged the loan from Bryant Nofsinger of $400 in February 2000 and $3,710 in March 2000. In the alternative, the Estate argues that the cause of action accrued either on December 31, 2000, when he first became aware that the corporation would dispute the legality of the loans, or on March 23, 2001, when the corporation's position with respect to its intention not to repay the alleged loans was reiterated. Finally, as yet another alternative, it also argues that the period of limitations was tolled until 2006, when Bryant Nofsinger stopped working for the corporation.

A contract action accrues when the time for performance is reached or the contract is breached. RONALD W. EADES, KY. L. OF DAMAGES § 12:14 (2014 ed.); *see also Finley v. Thomas*, 269 Ky. 422, 107 S.W.2d 287 (1937). A contract is breached when a party fails to perform any of its material terms. The material

terms of a loan contract are generally: the amount loaned, the loan maturity date, the interest rate, and the terms of repayment. The documents that Bryant Nofsinger relied upon at trial indicate only that specific sums of money were loaned by him to the corporation from 1992 through March 1998; again in February, March, and April 2000; and that the balance due to him from the corporation as of July 31, 2000, was $84,532.54. There is no allegation (and the record does not reflect) that a time for repayment of the loans was ever established. In light of Bryant Nofsinger's testimony, it appears that the parties' agreement constituted a continuing contract for performance. Infusions of cash were made as needed during the resort's off-season. According to the accountant's ledger, the parties' agreement was fully performed by **April 30, 2000**. Because there was no agreement concerning the terms of repayment, Bryant Nofsinger was **immediately entitled** to commence an action to recover the amount of the loans at that time.

Bryant Nofsinger's action against Nat J. Enterprises was commenced **on December 30, 2015**. The last relevant entry in the corporate ledger simply recorded a balance due to Bryant Nofsinger of $4,350.00. The entry recorded on July 31, 2000, indicated that the amount was due and payable as of April 30, 2000. **Consequently, the claim for breach of contract accrued on April 30, 2000**. Bryant Nofsinger presented writings as evidence of his agreement with the corporation, arguing that they were sufficient as a matter of law to constitute a

written contract entitling him to the benefit of the fifteen-year limitation period. Nonetheless, the action to enforce the contract that these writings constituted was time-barred because even the fifteen-year limitation period had expired by December 30, 2015.

The Estate contends that the cause of action accrued either on December 31, 2000, when Bryant Nofsinger became aware that the corporation would dispute the legality of the loans, or on March 23, 2001, when the corporation's position with respect to the alleged loans was reiterated. At the center of this argument is a document purporting to release an account payable "created [by Bryant Nofsinger] . . . on the records of [Nat J. Enterprises, Inc.] in the amount of $84,532.54 . . . ." It is dated December 31, 2000. According to the testimony of Bryant Nofsinger, this release was produced by the corporation and presented to him within the fifteen-year period of limitations. Although Bryant Nofsinger refused to execute the release, the Estate argues that the document's mere existence constitutes an "admission of the justice of the debt" sufficient to toll the statute of limitations. For this proposition, the Estate relies on language taken from the Court's opinion in *Louisa v. Horton*, 263 Ky. 739, 93 S.W.2d 620 (1935).

In *Louisa*, the Court observed that a promise to pay made before a debt is barred serves to suspend the running of the period of limitations or to

prolong it. The Court explained that "[t]he promise to pay must be clear, absolute, and unconditional, and proven to have been made within the time prescribed by the statute." *Louisa*, 93 S.W.2d at 623. It also noted that "[a]n unqualified acknowledgment of a debt as a subsisting demand is sufficient to prolong the statutory limitation . . . ." *Id.*

The disputed release relied upon by the Estate provided that an account payable in the amount of $84,532.54 was created by Bryant Nofsinger "by marking on deposit slips the notation 'personal loans'" and explained that the parties' agreement was made "in order to deal with said account." However, the language of the document denied the authenticity of a loan from Bryant Nofsinger to Nat J. Enterprises. The document did not represent the corporation's acknowledgement of a legitimate debt, nor did it contain a promise to pay it. Consequently, this document did not toll or extend the period of limitations.

Finally, the Estate argues that the period of limitations was tolled until at least 2006, when Bryant Nofsinger stopped working full-time for the corporation. It contends that where there is an ongoing business relationship between the debtor and creditor, the period of limitations does not begin to run until the relationship has ended. We disagree with this proposition.

The Estate cites the case of *McGrew's Ex'r v. Congleton*, 139 Ky. 515, 102 S.W. 1185, 1187-88 (1907), in support of it position. In *Congleton*, the

Court explained that a period of limitations will not begin to run with respect to claims between a principal and agent until the relationship between them ends. However, the Court noted that the rule does not apply to every instance of agency. Instead, it applies only where the relationship of the parties is one of trust and confidence. There was no such relationship between Bryant Nofsinger and the corporation; Bryant was simply an employee. The relationship between the parties did not exemplify trust and/or confidence. The rule has no application under these circumstances.

We are persuaded that the trial court did not err by concluding that Bryant Nofsinger failed to prove his claim as a matter of law. Consequently, we AFFIRM the judgment of the Logan Circuit Court setting aside the jury verdict by entry of its JNOV.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
Joe W. Hendricks, Jr. Russellville, Kentucky	R. Brandon Knoth Eddyville, Kentucky