Missouri Court of Appeals

Southern District

Division Two

DENNIS COX,	)	
	)	
Plaintiff/Appellant/Respondent,	)	
	)	
vs.	)	Nos. SD29740 & SD29768
	)	
RIPLEY COUNTY, MISSOURI,	)	
	)	
Defendant/Respondent/Cross-Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF RIPLEY COUNTY

Honorable Paul McGhee, Senior Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED WITH DIRECTIONS

Dennis Cox served a four-year term as Sheriff of Ripley County, Missouri, ending on December 31, 1996. Five years later, on December 31, 2001, he filed a petition claiming that the county undercompensated him by $7,803.30 each year of his term. Following a bench trial, the trial court entered a judgment awarding him that amount for his last year in office plus prejudgment interest beginning from January 1, 1997. Cox appeals (No. SD29740), claiming that the trial court erred in applying the section 516.120[1] five-year statute of limitation to bar his recovery for the first three years of his term because, first, the county waived that affirmative defense in failing to plead it and,

[1] All references to statutes are to RSMo 2000.

second, applying section 516.100, "the statute of limitation did not begin to run until [Cox] sustained the last item of damage, which was his last day in office." Ripley County cross-appeals (No. SD29768), contesting the prejudgment interest award in favor of Cox from January 1, 1997, claiming there was no evidence that Cox demanded payment, as required by section 408.020, for the award of prejudgment interest. Finding that the trial court properly applied the statute of limitation but erred in awarding prejudgment interest from January 1, 1997, rather than from the filing date of the petition, we reverse the award of prejudgment interest and remand for calculation of prejudgment interest from December 31, 2001. In all other respects, the judgment is affirmed.

Standard of Review

Review by this Court is governed by ***Murphy v. Carron***, 536 S.W.2d 30, 32 (Mo. banc 1976), which provides that a trial court's decision must be affirmed on appeal unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. ***Walton v. City of Berkeley***, 223 S.W.3d 126, 128 (Mo. banc 2007).

Analysis

Failure to Plead Statute of Limitation Was Not a Waiver

The county originally answered Cox's petition raising the section 516.130 three-year statute of limitation as an affirmative defense. The trial court dismissed Cox's petition on that basis, and Cox appealed that judgment to this Court. ***Cox v. Ripley County***, 233 S.W.3d 225 (Mo.App. 2007) ("***Cox I***"). In that appeal, Cox contended the trial court should have applied the section 516.120 five-year statute of limitation. ***Id.*** at 227. This Court agreed, reversed the dismissal, and remanded the case "for further proceedings." ***Id.*** at 231.

On remand, the only additional pleading or evidence before the trial court was the parties' Joint Stipulation of Facts in Lieu of Live Testimony. Finding that Cox's claim for payment of undercompensation for the first three years of his term, 1993 through 1995, was barred by section 516.120, the trial court entered judgment in favor of Cox for $7,803.30, "together with interest on that amount commencing January 1, 1997."

Cox contends that the trial court erred in holding that his damages were barred in part because Ripley County failed to plead the applicable statute of limitation, section 516.120, in its answer, did not amend its answer, and thereby waived this defense. In support, Cox cites ***Gibson v. Ransdell***, 188 S.W.2d 35 (Mo. 1945), ***Reed v. Rope***, 817 S.W.2d 503 (Mo.App. 1991), ***Tudor v. Tudor***, 617 S.W.2d 610 (Mo.App. 1981), and ***Rebel v. Big Tarkio Drainage Dist.***, 602 S.W.2d 787, 790 (Mo.App. 1980).[2] These cases do not assist Cox because our Supreme Court retreated from its previous position on waiver in ***Heins Implement Co. v. Mo. Highway & Transp. Comm'n***, 859 S.W.2d 681, 684 n.2 (Mo. banc 1993) (abrogated on other grounds by ***Southers v. City of Farmington***, 263 S.W.3d 603, 623 (Mo. banc 2008), as modified on denial of rehearing) and ***Green v. City of St. Louis***, 870 S.W.2d 794, 797 (Mo. banc 1994). An understanding of these cases requires that we first look at Rules 55.08 and 55.33(a).[3]

Rule 55.08 provides, in pertinent part: "In a pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances[.]" Rule 55.08 further provides that a statute of limitation is an affirmative defense. Under Rule 55.33(a), a defendant who fails to plead an affirmative defense in the answer may seek

[2] Cox also cites to *Livingston v. Webster Co. Bank*, 868 S.W.2d 154 (Mo.App. 1994), but that case does not address the waiver issue raised by Cox. Even if it implicitly has some bearing on that issue, we note that it was decided in the six-month period between the *Heins* and *Green* Supreme Court cases, discussed *infra*, without the benefit of *Green's* analysis of the import of *Heins*.

[3] All rule references are to Missouri Court Rules (2010).

leave to amend the answer to include such a defense. Rule 55.33(a) further provides that leave to amend a pleading "shall be freely given when justice so requires." "The factors the trial court should consider in determining whether to permit amendment of an answer include: (1) the hardship to the moving party if the request is denied; (2) the reasons for failure to include the matter in a designated pleading; and (3) the injustice or prejudice caused the opposing party if the request is granted." ***Id.*** at 797 (citing ***Stewart v. Sturms***, 784 S.W.2d 257, 262 (Mo.App. 1989)).

It is in this context that the Supreme Court in ***Green*** stated:

> Before 1993, *Rule 55.08* was generally interpreted to mean that a failure to plead an affirmative defense results in a waiver of the defense. *Detling v. Edelbrock***,** 671 S.W.2d 265, 271 (Mo. banc 1984). In *Heins Implement Co. v. Missouri Highway & Transportation Commission*, 859 S.W.2d 681 (Mo. banc 1993), this Court retreated from its previous interpretation of *Rule 55.08*. After *Heins*, issues not raised in the answer are simply not raised in the lawsuit. *Heins*, 859 S.W.2d at 684 n.2. The affirmative defense of collateral estoppel is not, therefore, deemed waived, per se, in the present case.

Green, 870 S.W.2d at 797. ***Heins*** noted that "Rule 55.08 does not contain language indicating waiver[.]" ***Id.*** at 684 n.2.

In ***Green***, the appellant claimed that the respondent city waived an affirmative defense of collateral estoppel when it failed to raise the defense in its answer. There, the respondent raised the defense in a motion for summary judgment, which the trial court sustained. The Supreme Court, finding that the record was "insufficient to determine whether summary judgment should have been entered on the ground of collateral estoppel[,]" reversed the grant of summary judgment and remanded "to enable the trial court to apply the factors set forth in ***Stewart v. Sturms*** [784 S.W.2d at 262] so as to determine whether summary judgment is proper." ***Green***, 870 S.W.2d at 798.

Although decided a year before ***Heins*** and ***Green***, the Western District of our Court applied the principles later announced in those cases in ***Rose v. City of Riverside***, 827 S.W.2d 737, 739 (Mo.App. 1992). In ***Rose***, the appellant claimed that the respondent's affirmative defense of the statute of limitation was waived, in that the respondent failed to plead the defense in its answer, although it was raised in the respondent's motion for summary judgment. ***Id.*** at 739. The Western District found that the statute of limitation should apply and that summary judgment was appropriately ordered, in that the "[a]ppellants were well aware the defense existed since the respondent raised it in its motion for summary judgment[,]" and that denial of the respondent's motion to amend its answer would be an abuse of the trial court's discretion. ***Id.***

Here, it is obvious that Cox was well aware that the county was asserting a statute of limitation defense and, more particularly, that the five-year statute of limitation was applicable, as he asserted such a claim in ***Cox I***, and this Court decided in that appeal that he was correct. ***Cox I***, 233 S.W.3d at 231. While better practice may have dictated the county's amendment of its answer, there is no doubt that the three ***Stewart v. Sturms*** factors as cited by the Supreme Court in ***Green*** all favor the county in this case. Any trial court denial of a motion to amend county's answer would have been an abuse of discretion. Therefore, the county's failure to amend its answer to specifically plead section 516.120 did not waive that statute of limitation affirmative defense. ***Green***, 870 S.W.2d at 797; ***Heins***, 859 S.W.2d at 684 n.2. Cox's first point is denied.

Cox's Actions for Unpaid Annual Compensation Accrued Annually

The trial court found that section 57.317 provides that a "county sheriff shall receive an annual salary[,]" and, although Cox was paid on a monthly basis at the end of the month, "he was not entitled to his entire annual salary until the end of the year." This factual finding and legal conclusion are not challenged on appeal. Rather, Cox claims in his second point that the trial court erred in finding that his claim for undercompensation for the years 1993, 1994, and 1995 were barred by application of the section 516.120 statute of limitation, in that the trial court failed to apply section 516.100, which provides that the statute of limitation would not begin to run until Cox sustained the last item of damage, which, he contends, was his last day in office.

Cox contends that Ripley County owed him "a continuing duty" during his four-year term as sheriff and had a statutory obligation to pay him pursuant to section 57.317, but failed to pay the correct salary for his entire term. Cox argues that, pursuant to section 516.100, he did not sustain his last item of damage until his final day in office, December 31, 1996, and because he filed his claim within five years of that date, no part of his claim should be limited. Cox further contends that Ripley County's breach of a statutory duty is analogous to the breach of contractual duties discussed in ***Sabine v. O.W. Leonard***, 322 S.W.2d 831 (Mo. 1959), and ***Reed v. Rope***, 817 S.W.2d 503 (Mo.App. 1991). Cox implies that the decisions in ***Sabine*** and ***Reed*** support his interpretation that section 516.100 abrogated previous "case law that provided a cause of action accrued when each installment or payment became due."

Specifically, Cox cites the following language in ***Sabine*** as support:

> [I]n suits upon contract where there is "more than one item of damage" (installment) "the cause of action shall not be deemed to accrue" . . . until

> the last item of damage is sustained (last installment becomes due) so that all damages (installments) "may be recovered, and full and complete relief obtained" in one action.

Sabine, 322 S.W.2d at 838.

Cox further contends that the decision rendered in ***Reed*** follows the same rationale; thus, because Ripley County "had a statutory obligation to pay [Cox] pursuant to [section 57.317]," and failed to pay Cox accordingly for his entire four-year term, Cox's cause of action did not accrue until his last day in office.

> In determining whether an applicable statute of limitation bars recovery, it is necessary to establish when that cause of action accrued. The standards for making that determination have been provided by the general assembly in § 516.100 which reads as follows:
>
> > Civil actions, other than those for the recovery of real property, can only be commenced within the following sections, after the causes of action shall have accrued; provided, that for the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

Jepson v. Stubbs, 555 S.W.2d 307, 311 (Mo. banc 1977). Section 516.100 establishes a "capable of ascertainment" test. ***Id.*** "The triggering event of the applicable statute of limitations is when damage is sustained and becomes capable of ascertainment." ***Business Men's Assur. Co. of America v. Graham***, 984 S.W.2d 501, 507 (Mo. banc 1999). The phrase "capable of ascertainment" "refers to the fact of damage, rather than to the exact amount of damage." ***Id.*** "Damage resulting from an actionable wrong is capable of ascertainment when 'the evidence [is] such to place a reasonably prudent person on notice of a potentially actionable injury.'" ***Gaydos v. Imhoff***, 245 S.W.3d 303, 307 (Mo.App. 2008) (quoting ***Business Men's Assur. Co. of America***, 984 SW.2d at

507). "Missouri's 'capable of ascertainment' language recognizes that the limitations period does not commence from technical breach but from the existence of a practical remedy." ***Verbrugge v. ABC Seamless Steel Siding, Inc.***, 157 S.W.3d 298, 302 (Mo.App. 2005). "Although the 'ascertainment' of when there is more than one item of damages under section 516.100 has created confusion, we believe its purpose was to prevent a party from having to file suit before there could be a practical determination of the extent of damages." ***Id.*** at 303.

> The cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered and full and complete relief obtained. Section 516.100. In other words, the statute of limitations begins to run when the plaintiff's right to sue arises or when the plaintiff could first successfully maintain his cause of action. *Lane v. Non-Teacher School Employee Retirement System of Missouri*, 174 S.W.3d 626, 634 (Mo.App. W.D.2005). This is an objective test to be decided as a matter of law. *Id.* "Under this test, a cause of action accrues when the damage can be discovered, not when it is actually discovered." *Id.* A plaintiff's ignorance of his cause of action will not prevent the statute from running. *Id.* Section 516.100's phrase "capable of ascertainment" refers to the fact of damage but does not mandate the plaintiff know the precise amount of that damage. *Id.* "'[T]he requirement that damages be sustained and capable of ascertainment does not change the tenet that when an injury is complete as a legal injury, the period of limitations commences at once.'" *Id.*, *citing Vandenheuvel v. Sowell*, 886 S.W.2d 100, 102 (Mo.App.W.D.1994).

State ex rel. Gasconade Cnty. v. Jost, 291 S.W.3d 800, 804 (Mo.App. 2009).

Here, the trial court found that, "[a]lthough the county apparently paid [Cox] at the end of each month, he was not entitled to his entire annual salary until the end of the year." Section 57.317 provides that a county sheriff shall receive an annual salary. Nothing in that statute makes receipt of the annual salary contingent upon serving a full term as sheriff. Likewise, nothing in that statute provides that the annual salary is a partial installment of the total salary payable during a sheriff's term. Therefore, any

injury Cox suffered in failing to receive the full amount of the statutory annual salary was complete at the end of the last day of each year during his term, regardless of whether or not he remained in office or received any additional salary for any future service during his term. Because his partial-payment-of-annual-salary injury was complete at the end of the last day of each year, his cause of action for recovery of his full annual salary accrued on that day, and the statute of limitation began to run on that day. S***ee id.*** While Cox's installment-contract analogy, and the cases supporting it, may be applicable to the monthly installments paid by the county toward Cox's annual salary, a determination we need not reach, it does not apply to the statutorily mandated annual salary because it is not an installment payment of any greater statutory or contractual obligation of the county. Cox's cause of action and the five-year statute of limitation began to run on December 31, 1993, for the first year of his term, on December 31, 1994, for the second year of his term, on December 31, 1995, for the third year of his term, and on December 31, 1996, for the fourth year of his term. Cox asserted his claim on December 31, 2001. Thus his underpaid annual salary for 1996 is the only injury that is not barred by the section 516.120 five-year statute of limitation. Cox's second point is denied.

Cox Entitled to Prejudgment Interest Only From Date Petition Was Filed

Ripley County claims, in its cross-appeal (No. SD29768), that the trial court erred in holding that Cox was entitled to prejudgment interest from December 31, 1996, the last day of his last year in office, as there was no evidence that Cox made any demand for payment prior to filing his petition, and the trial court's award misapplies section 408.020. We agree.

Section 408.020 provides that interest at the rate of nine percent per annum is allowed as legal interest when no rate of interest is agreed upon for liquidated damages after demand for payment is asserted. ***Hawk Isolutions Group, Inc. v. Morris***, 288 S.W.3d 758, 762 (Mo.App. 2009). A claim is "liquidated" when the amount is "fixed and determined or readily determinable, but it is sufficient if the amount due is ascertainable by computation or by a recognized standard." ***Id.*** "Interest will be allowed from the time of demand." ***Midwest Division-OPRMC, LLC v. Dept. of Social Servs., Div. of Med. Servs.***, 241 S.W.3d 371, 384 (Mo.App. 2007). From the evidence before the trial court and this Court, Cox made no demand prior to filing his underlying petition on December 31, 2001. Where, as here, the plaintiff has not included in a petition a specific request for prejudgment interest, the date of the filing of the lawsuit will substitute for the date of demand. ***Id.***

Cox agrees that section 408.020 is applicable here, but relies on ***State ex rel. Evans v. Brown Builders Elec. Co., Inc.***, 254 S.W.3d 31 (Mo. banc 2008), for his contention that statutorily mandated wages are an exception to the demand requirement under the statute. While ***Evans*** considered wages mandated by the prevailing-wage statute, ***id.*** at 34, its decision allowing prejudgment interest for those wages as of their due date was premised upon the existence of an underlying written contract requiring payment of the prevailing wage. ***Id.*** at 36. Under the explicit provisions of section 408.020, amounts due pursuant to a written contract accrue interest from the date due under the terms of the written contract without any demand being required. Section 408.020; ***Sebree v. Rosen***, 374 S.W.2d 132, 141 (Mo. 1964). But in the absence of a written contract, section 408.020 requires a demand for payment to trigger the

commencement of prejudgment interest on a claim. Section 408.020; ***Chouteau Auto Mart, Inc. v. First Bank of Missouri***, 148 S.W.3d 17, 27 (Mo.App. 2004). Thus, ***Evans*** provides no support for Cox's contention. The county's point is granted.

Decision

The trial court's judgment as to prejudgment interest is reversed, and the cause is remanded to the trial court with instructions that prejudgment interest should be calculated from December 31, 2001, to the date that judgment was rendered, April 2, 2008. In all other respects, the judgment is affirmed.

Gary W. Lynch, Presiding Judge

Scott, C.J., and Rahmeyer, J., concur.
Division II
Filed July 27, 2010
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