

Hubbard v. Hubbard, No. 499-7-08 Rdcv (Cohen, J., Dec. 18, 2008)

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**STATE OF VERMONT  
RUTLAND COUNTY**

<b>EDWARD HUBBARD</b>	)	<b>Rutland Superior Court</b>
	)	<b>Docket No. 499-7-08 Rdcv</b>
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>THEODORE HUBBARD</b>	)	
	)	
<b>Defendant</b>	)	

**DECISION ON DEFENDANT’S MOTION TO DISMISS**

This matter is before the Court on Defendant’s Motion to Dismiss pursuant to V.R.C.P. 12(b)(6), filed September 29, 2008.

Plaintiff, Edward Hubbard is represented by Gary R. Kupferer, Esq. Defendant, Theodore Hubbard is represented by R. Joseph O’Rourke, Esq.

**Background**

On July 26, 1985, defendant, Theodore Hubbard executed and delivered to Madeline Hubbard a Promissory Note in the principal amount of \$42,022.06. The Promissory Note was signed in the presence of two attesting witnesses. The Note called for payment on the unpaid principal at a rate of 12.5% per annum. Principal and interest were to be paid in equal consecutive monthly installments commencing on July 26, 1985 and continuing until November 26, 1998, at which time the entire principal indebtedness and all accrued interest were due and payable. The Note appears to fulfill the

requirements of a negotiable instrument.<sup>1</sup>

On May 7, 1986, Madeline Hubbard executed a Note Assignment which assigned the Promissory Note to plaintiff, Edward Hubbard.

On July 3, 2008, plaintiff filed this action on the Promissory Note, alleging that demand was made, and the Note had not been paid according to its tenor and effect and default existed for a period exceeding 30 days.

On September 29, 2008, defendant filed a Motion to Dismiss pursuant to V.R.C.P. 12(b)(6), on the grounds that the action is barred by the statute of limitations of six years set forth in 9A V.S.A. § 3-118(a). Defendant argues that the last installment was due on November 26, 1998; therefore, the statute of limitations ran on November 26, 2004.

Plaintiff filed his Memorandum in Opposition on October 3, 2008. Plaintiff contends that the proper statute of limitations is fourteen years from the date the action accrued, according to 12 V.S.A. § 508.

Defendant filed a Reply Memorandum on October 10, 2008. A hearing was held on November 4, 2008. Plaintiff filed a Supplemental Memorandum in Opposition on November 12, 2008. Defendant filed a Supplemental Reply Memorandum on November 26, 2008.

### **Discussion**

Motion to dismiss for failure to state a claim upon which relief can be granted should not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief; in reviewing the disposition of a Rule 12(b)(6) motion to dismiss, the court assumes that all factual allegations pleaded in the complaint

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<sup>1</sup> While the parties have not analyzed whether the Promissory Note is a negotiable instrument, in arguing that competing statutes of limitation apply they agree that it is a negotiable instrument.

are true, and the court accepts as true all reasonable inferences that may be derived from plaintiff's pleadings and assumes that all contravening assertions in defendant's pleadings are false. *Richards v. Town of Norwich*, 169 Vt. 44, 48-49 (1999) (internal citations omitted).

The Court may properly dismiss a complaint pursuant to V.R.C.P. 12(b)(6) when it is apparent on the face of the complaint, including attachments, that the action is barred by the statute of limitations. *Fortier v. Byrnes*, 165 Vt. 189, 193 (1996) (citing *Aldahonda-Rivera v. Parke Davis & Co.*, 882 F.2d 590, 592 (1st Cir.1989); 5A C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* § 1357, at 351-54 (1990); V.R.C.P. 9(f) (averments of time and place material for testing the sufficiency of a complaint)).

Although a defendant may properly raise a statute of limitations defense in a motion to dismiss pursuant to V.R.C.P. 12(b)(6), dismissal is only appropriate: (1) where viewing the facts and circumstances in a light most favorable to the plaintiff, there are no facts and circumstances that would entitle the plaintiff the relief; or (2) where no factual questions relating to the tolling of the statute of limitations remain for a jury to decide. *The Lodge at Bolton Valley Condominium Association v. Hamilton*, 2006 VT 41, ¶ 4, 180 Vt. 497 (mem.).

The only issue before the Court is whether the applicable statute of limitations is set forth in 9A V.S.A. § 3-118(a) or 12 V.S.A. § 508.

Article 3 of the Uniform Commercial Code applies to negotiable instruments. 9A V.S.A. § 3-102(a).

9A V.S.A. § 3-118(a) sets forth a statute of limitation of six years:

[A]n action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six

years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.

12 V.S.A. § 508 states: “An action brought on a promissory note signed in the presence of an attesting witness shall be commenced within fourteen years after the cause of action accrues, and not after.”

12 V.S.A. § 464 states: “The provisions of this chapter [Title 12, chapter 23] shall not affect an action otherwise specially limited by law.”

The limitations period for the UCC, codified in Title 9A, is “otherwise specially limited” and therefore unaffected by 12 V.S.A. § 508. See *Pike v. Chuck’s Willoughby Pub, Inc.*, 2006 VT 54, ¶ 11, 180 Vt. 25 (holding Dram Shop Act contains its own limitations provision and is not codified in Title, 12, Chapter 23, therefore, an action under the Dram Shop statute is “otherwise specially limited” and removed from the operation of the minority tolling provision by 12 V.S.A. § 464); see also *Parent v. Beeman*, 138 Vt. 607, 610 (1980) (holding wrongful death statute, contained in Title 14, was “otherwise specially limited” under 12 V.S.A. § 464 and the tolling provision codified in Title 12, Chapter 23 was inapplicable).

The Court need not apply any rules of statutory construction as 12 V.S.A. § 464 dictates that 9A V.S.A. § 3-118(a) contains the applicable statute of limitations. Furthermore, the Court finds *Fleet National Bank v. Liberty*, 845 A.2d 1183 (Me. 2004) unpersuasive, as the Supreme Judicial Court of Maine, in reaching their decision, did not address any Maine statute similar to 12 V.S.A. § 464.

The appropriate statute of limitations is six years under 9A V.S.A. § 3-118(a). The last installment on the Promissory Note was due on November 26, 1998; therefore the statute of limitations ran on November 26, 2004.

**ORDER**

Defendant's Motion to Dismiss, filed September 29, 2008 is GRANTED.

Dated at Rutland, Vermont this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

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Hon. William Cohen  
Superior Court Judge