SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

HAROLD WEISBERG, Plaintiff, v. DIMONDSTEIN BOOK COMPANY, INC., Defendant	Index No. 1845-1977 OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Defendant has given notice that upon the complaint and the affirmation of its attorney, Mr. Harry M. Schaps, it will move to dismiss all three causes of action in the complaint on the ground that they are barred by the statute of limitations. For the reasons set forth below, plaintiff opposes any such motion and maintains that the causes of action set forth in the complaint are not barred by the statute of limitations.

I. PLAINTIFF'S COMPLAINT STATES A VALID CAUSE OF ACTION UPON AN ACCOUNT STATED

As a first cause of action plaintiff alleges that on June 6, 1966, and dates subsequent thereto, defendant became indebted to plaintiff on an account for goods sold and delivered to defendant; that on or about May 17, 1971, defendant requested that plaintiff

furnish a "current statement of account"; that on or about July 18, 1971, plaintiff mailed an itemized statement of account to defendant; that defendant received said statement of account and accepted and retained it without ever making any objection to it.

The affirmation made by defendant's attorney concedes that this cause of action is within the statute of limitations if the statement of account mailed to defendant on July 18, 1971, constitutes an account stated; that is, if the statement of account represents a settlement by the parties of a previously unliquidated debt. Defendant argues, however, that plaintiff has not shown that the statement of account "represents an unliquidated amount which was later agreed upon by the parties," and thus has not established a cause of action for an account stated which would commence the running of the statute of limitations from the date of the mailing of the statement of account on July 18, 1971.

In making this argument, defendant overlooks the allegation in paragraph five of the complaint that: "On or about May 17, 1971, Dimondstein requested that plaintiff furnish a current statement of account." Obviously, if the amount owed by Dimondstein was a liquidated debt, then there was no need for Dimondstein to request a "current statement of account." "An 'account current' is the antithesis of an 'account stated,' and is an account not stated, but running, open, and unsettled and in which no balance has been agreed on or struck." Ralph V. Rogers, "Accounts and Accounting," 1 New York Jurisprudence 145, citing Watson v.

Gillespie, 205 AD 613, 200 N.Y.S. 191, aff'd 237 N.Y. 522, 143 N.E. 727.

While a mere rendering of an account does not make it an "account stated,"

> . . . where an account is rendered showing a balance, the party receiving it must, within a reasonable time, examine it and object, if he disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake, or other equitable considerations are shown." Steingart Associates, Inc. v. Sandler, 280 N.Y.S. 2d 1012 (1967), citing Lockwood v. Thorne, 11 N.Y. 170; Bailey v. Robinson Mfg. Co., Sup., 60 N.Y.S. 2d 225, aff'd 270 App. Div. 986, 62 N.Y.S. 2d 667.

The complaint in this case alleges that plaintiff mailed defendant a statement of account in response to defendant's request for a "current statement of account," and that the statement was received and retained by defendant without making any objection thereto. Under the authorities cited above, defendant's failure to object to the statement of account within a reasonable time transformed it into an account stated. This created a new obligation and a new cause of action. The statute of limitations on the new cause of action, for an account stated, commenced to run on July 18, 1971, the date on which the statement was rendered, and had not yet expired when this action was brought.

The two authorities cited by defendant, Frucht v. Garcia, 44 M2d 52, 252 N.Y.S. 2d 825, and Siepka v. Bogulski, 164 Misc. 831, 299 N.Y.S. 1018, are not on point. Both cases involve an original agreement among the parties for payment of a fixed sum and the

the statements of account rendered at later dates merely reiterated the sum of indebtedness liquidated by the original agreement of the parties. This differs materially from the facts of this case, where there was no liquidated sum upon which the parties had reached agreement at the time the statement of account was rendered.

II. DEFENDANT'S MAY 17, 1971, REQUEST FOR A CURRENT STATEMENT OF ACCOUNT CONSTITUTES AN ACKNOWLEDGMENT OF INDEBTEDNESS FROM WHICH THE STATUTE OF LIMITATIONS RUNS ANEW

It is a general rule that a new promise to pay a debt, or an unqualified acknowledgment of a debt from which a promise to pay may be implied, will take a case out of the statute of limitations. 51 ALR 2d 331, "Limitation of Actions as Applied to Account Stated," §10. In New York such an acknowledgment or promise must be contained in a writing signed by the party owing the obligation. General Obligations Law, §17-101. But a written acknowledgment will start the statute of limitations running anew even if it is not accompanied by an express promise to pay and need contain nothing more than "a clear recognition of the claim as one presently existing." Lincoln-Alliance Bank & Trust Co. v. Fisher, 286 N.Y.S. 723.

By postcard dated May 17, 1971 defendant wrote plaintiff: "May we please have a current statement of our account. Dimondstein Acc'ts Payable." (Plaintiff's Exhibit 3) This constitutes an acknowledgment and an implied

promise to pay the amount of indebtedness. The contractual obligation thus created is subject to the six-year period of limitations provided for in CPLR §213(2). Because this suit was filed prior to May 17, 1977, the statute of limitations has not run on this cause of action.

III. THE STATUTE OF LIMITATIONS HAS NOT RUN ON PLAINTIFF'S SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT

Plaintiff's second cause of action alleges breach of contract: first, by failing to pay the $3,962.71 owed according to the statement of account; second, by failing to pay an additional $2,475.00 not reflected on the statement of account because defendant did not inform plaintiff that it had received a shipment of 1,000 books which had first been mistakenly delivered to another book wholesaler.

Defendant asserts, without elaboration, that the breach of contract claim "is certainly time-barred by the applicable sections governing the statute of limitations above set forth." (Affirmation of Harry M. Schaps, ¶8) Apparently this is a reference to defendant's argument that the relevant dates upon which the statute of limitations began to run were the dates of sale, which occurred from June 6, 1966 through August, 1970. (Affirmation of Harry M. Schaps, ¶4.)

What this argument ignores is Dimondstein's written acknowledgment of the debt it owed plaintiff. This debt included both the $3,962.71 reflected on the statement of account and the $2,475.00

omitted from the statement because Dimondstein concealed the delivery to it of one shipment of 1,000 books. Dimondstein's acknowledgment of this debt created a contractual obligation which Dimondstein has breached. Because the acknowledgment occurred on May 17, 1971, the second cause of action is within the six-year statute of limitations provided by CPLR §213(2).

IV. THE STATUTE OF LIMITATIONS HAS NOT RUN ON PLAINTIFF'S THIRD CAUSE OF ACTION, FOR FRAUD

Plaintiff's third cause of action alleges fraud in the concealment of the fact that defendant had received a shipment of 1,000 books originally misdelivered to Bookazine in New York City. Defendant argues that this action is barred by the statute of limitations because plaintiff did not bring suit on it within the time limits provided by CPLR 203(f) and CPLR 213(8).

Defendant's argument that plaintiff's action in fraud is barred by the statute of limitations rests on its assumption that the wrong complained of by plaintiff commenced on August 17, 1968, the date on which Bookazine delivered the shipment of 1,000 books to defendant. Plaintiff contends that the wrong commenced on July 18, 1971, when plaintiff mailed defendant the statement of account requested by defendant, and defendant failed to perform its obligation to advise plaintiff that the statement of account was incomplete and therefore inaccurate, thereby actively conceal-

ing the fact that defendant owed plaintiff an additional $2,475.00. Thus, even assuming that a cause of action in fraud accrues when the fraud commences rather that at the time it is discovered, the statute had not run on fraud at the time this suit was filed.

V. DEFENDANT SHOULD BE ESTOPPED FROM RAISING THE DEFENSE OF STATUTE OF LIMITATIONS IN THIS CASE

In enacting General Obligations Law §17-103, clarifying the effect of a promise to waive or extend the statute of limitations, the Legislature provided that this section "does not affect the power of the court to find that by reason of the party to be charged it is inequitable to permit him to interpose the defense of the statute of limitation." The doctrine of equitable estoppel was espoused by the United States Supreme Court in Glus v. Brooklyn East. Term., 359 U.S. 231, 232-233 (1959), which declared: "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations."

The doctrine of equitable estoppel is particularly apropos in this case. In May, 1971, defendant mailed plaintiff a request for a "current statement of account," thus acknowledging that it owed plaintiff and, in effect, promising to pay what was due. When

plaintiff complied with defendant's request by mailing it a statement of account on July 18, 1971, defendant did not respond, even though it was legally obligated to advise plaintiff of any objection it had to the accuracy of the statement of account. This led plaintiff to believe that defendant did not dispute the amount owed and would pay it. It kept plaintiff from trying to obtain a lawyer at this time, something he would have done had he known that defendant was going to contest what it owed him. This also allowed defendant to conceal the fact that it owed plaintiff $2,475.00 more than was reflected on the statement of account.

As late as May, 1973, defendant acknowledged that it owed plaintiff money and assured him that he would be paid. (See attached affidavit of Harold Weisberg, ¶¶7, 8.) Yet defendant did not pay plaintiff or get back in touch with him about the matter as it had promised. Because plaintiff was deceived by these assurance, he delayed still longer in seeking to obtain legal counsel. In fact, had it not been for these deceitful assurances, he would have turned his case over to a New York lawyer at the time he was in New York on other business in May, 1973. (See Weisberg affidavit, ¶8) Subsequently, when plaintiff determined that he would have to sue defendant, he could not afford to pay a lawyer a retainer and thus could not obtain counsel to represent him. By this time plaintiff and his wife had been reduced to living on food stamps. The failure of defendant to pay its debts contributed to this deplorable situation.

It is clear from these facts that defendant will be the bene-

ficiary of its own wrongdoing if it is allowed to raise the defense of statute of limitations to the causes of action set forth in plaintiff's complaint. The conscience of the court should not allow yet another outrage to be perpetrated on plaintiff. Defendant should be estopped from asserting the statute of limitations as a defense in this cause.

WHEREFORE, plaintiff respectfully requests the court to deny defendant's motion to dismiss the causes of action stated in plaintiff's complaint and to estop the defendant from asserting the bar of limitations herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of May, 1977, mailed a copy of the foregoing Opposition to Defendant's Motion to Dismiss by Express Mail to Levine, Kirshon & Schaps, attorneys for the defendant, 1501 Broadway, New York, N. Y. 10036.

James H. Lesar

JAMES H. LESAR