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No. 72605-6-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

DONALD F. WOLPH and TERESA A. WOLPH, husband and wife,

Appellants,

v.

LINDA JEAN SAPP, as Personal Representative of the Estate of Barbara
Priscilla Harrington, deceased,

Respondent.

REPLY BRIEF OF RESPONDENT

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I. REPLY

Respondent, Linda J. Sapp, as Personal Representative of the Estate of Barbara Priscilla Harrington, provides the following response to Appellants' Brief.

II. STATEMENT OF THE CASE

a. Facts of the Case

Barbara Priscilla Harrington passed away on January 1, 2012. A probate was started on March 28, 2012 (case #12-4-01718-0 KNT). The Last Will and Testament (executed October 11, 2000) was submitted to the court at that time (CP 36-39). A letter dated December, 2009 was attached to the will (CP 41-43). Respondent, Linda Sapp, was named as executor of the estate. (CP 32)

At the time of her passing, Ms. Harrington owned property located in King County, commonly known as 10810 S.E. 196th St, Renton, WA 98055-7404. A number of liens existed on the property, including a lien claimed by Petitioners. (CP 32)

Petitioners' lien is based on a Promissory Note dated October 8, 1984 (CP 45); Agreement Respecting Transfer of Title dated October 25, 1984 (CP 47); and Deed of Trust dated October 29, 1984, but notarized October 8, 1984 (CP 50-51).

The terms of the agreement are as follows:

- Ms. Harrington would pay \$15,000.00 to Petitioners;
- Ms. Harrington would receive a credit of \$5,000.00 towards the purchase if she does not sell, subdivide, convey, or alter the title for a period of 10 years;
- Ms. Harrington pays a \$3,500.00 down payment;
- Interest would be 12% APR; and
- A late charge of \$20.00 would be assessed if payment is not received by the 5th of the month. (CP 45)

Petitioner, Donald Wolph, later sent a letter, after the validity of the agreements were challenged, modifying the terms. This included that the \$5,000.00 credit would be given so long as Ms. Harrington did not sale the property. Further, he said he would not charge the \$20.00 late fee unless something should happen to him and the contract had to be turned over to a third person (CP 53).

Ms. Harrington made periodic payments until May, 2000, when she stopped. At this point, she had paid \$17,055.00 (CP 100). She stopped payment because she had been advised not to pay any further because the contract was paid in full (CP 55). She also prepared a letter in April, 2003 stating that Petitioner, Donald Wolph, was added to the property without paying anything. (CP 57).

In February, 2003, Ms. Harrington filed for bankruptcy relief

(Case #03-11672). Petitioners were listed as creditors in the case. No debts were reaffirmed. Ms. Harrington received a discharge in May, 2003(CP 62).

In January, 2007, Ms. Harrington was diagnosed with “Fairly progressive memory loss and functional loss.” Then in July, 2007, Ms. Harrington was diagnosed with Multi Infarct Dementia (CP 59).

On February 25, 2014, Petitioners filed a claim in the probate proceeding based on the agreements. Respondent rejected the claim and this lawsuit was commenced (CP 98-99). Petitioners have also provided an Amended Notice of Default dated March 19, 2014 and Notice of Trustee’s Sale dated June 19, 2014 set for September 26, 2014 (CP 125 - 145).

b. Procedural History

After the claim was denied in the probate matter, Petitioners filed this lawsuit. Respondent answered and counterclaimed to quiet title to the property. Respondent brought a motion for summary judgment which was granted by Honorable Judge Allred on September 19, 2014. An order was entered dismissing Petitioners claims and quieting title in Respondent (CP 210-211).

III. LEGAL AUTHORITY AND ARGUMENT

When reviewing a summary judgment motion, “the nonmoving

party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or consideration of its affidavits, at face value; after the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issues of fact.” *Pain Diagnostics and Rehabilitation Associates, P.S. v. Brockman*, 97 Wash.App. 691, 697, 988 P.2d 972, 975 (1999) (citing *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wash.2d 1, 13, 721 P.2d 1 (1986)). “The court should grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion.” *Id.* at 697.

“On appeal from summary judgment, we engage in the same inquiry as the trial court. We review the motion for summary judgment *de novo*, and treat all facts and inferences therefrom in a light most favorable to the nonmoving party. If there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, we uphold summary judgment.” *Green v. A.P.C. (American Pharmaceutical Co.)*, 136 Wash.2d 87, 94, 960 P.2d 912, 915 (1998).

a. Contract Interpretation/Forbearance

Looking at the contract and communications between Ms. Harrington and Petitioners, nothing is provided that there is supposed to

be any “forbearance” to collect on the contract before Ms. Harrington passes or moves. In fact, the extrinsic evidence only shows an intent for the contract to be repaid around 1992 (CP 47-48), well before 2000, when payments stopped (CP 126-145). It also shows that Ms. Harrington disputed owing anything beyond 2000 (CP 55-57).

Turning to the original contract (CP 47-48) nothing exists showing a forbearance agreement. First, in a letter prepared by Petitioner Donald Wolph he states “I have no plans to invoke this item but it must be included to ensure timely payments if something happens to me and the contract must be turned over to someone else.” (CP 53). The mention of timely payments, which were supposed to be monthly, indicates that the intention of the parties was for the contract to be paid within 96 months (CP 47). The fact that he is not going to charge late fees does not indicate an agreement of forbearance. It proves that he would not charge Ms. Harrington late fees.

Next, the contract states specifically that interest is to be included from the date of acceptance until paid in full. This was to be for 96 months and computed monthly at \$105.31 (CP 47). No language is included in the contract indicating any forbearance.

Last, Petitioners rely on the Declaration of Donald Wolph (CP 182-183) and Exhibit F (CP 196) as evidence that Petitioners would not

foreclose, creating a forbearance agreement. The declaration, at face value, does not show any intent to forebear only to make sure she did not use the property to “sell, sublet, subdivide, convey, or alter the title” (CP 182). Exhibit F is more telling in that it shows the Petitioners wanted enforcement provisions if payments were not made. The fact that Petitioners would not actually enforce the late fees is their choice. Even if they did, Ms. Harrington would have an argument to show he could not. This does not amount to forbearance only that a portion is unenforceable.

Forbearance Agreements generally are bargained for contracts. Petitioners would like the court to believe that it was an agreed upon forbearance but provide zero evidence to support that such an agreement was reached between themselves and Ms. Harrington. This attempt to show generosity to allow her to stay, when there is disdain in the relationship (CP 57 – “He paid nothing for property.” “I had to agree to pay him \$10,000”), would create a nice one sided provision where Petitioners can accrue interest while Ms. Harrington is alive, then collect at the end.

The only disputed evidence presented by Petitioners of an agreed forbearance is in a letter prepared by Mr. Wolph in January, 2012 (see Petitioners’ Brief page 12), after Ms. Harrington has passed away (CP

207-208). This letter does not create any evidence that an agreement was actually reached for Petitioners to forbear collection against the property until Ms. Harrington passed away. Any statements he provides are hearsay as to what Ms. Harrington supposedly agreed.

Petitioners make further statements to try and show intent of forbearance, none of which are supported by evidence of an agreement between the parties.

First, Petitioners claim they allowed Ms. Harrington to live “rent free” for eleven years and exercised their right to collect at the “earliest time after her death.” (Petitioners Brief page 13). This statement at face value, and not part of the record in the original summary judgment, is, again, not evidence of an actual agreement to forbear. It is a statement by Mr. Wolph without any extrinsic evidence to support the claim. Looking at the “earliest time,” the “Amended Notice of Default” is signed and dated March 19, 2014, over two years after Ms. Harrington passed away (CP 125-129). Petitioners are trying to create an illusion of a generous son but really just trying to give reason to sustain a disputed claim.

Next, Petitioners claim that the letter prepared by Mr. Wolph (CP 53) is the “context” of the contract (see Petitioners’ Brief pages 13-14). It does not show that forbearance is a part of the contract. All it shows is that Petitioners wanted timely payments and that if Ms. Harrington did

anything with the property within ten years, she would have to pay an additional \$5,000.00. Again, his one sided position without anything from Ms. Harrington that this was the actual intent.

If anything, the evidence shows the opposite. First, Ms. Harrington stopped paying in 2000. This is supported by the undisputed evidence of payments made (CP 100-124). Ms. Harrington also provided a statement that she was advised to stop making payments because she had paid in full (CP 55). She even provided a statement in April, 2003, after her bankruptcy was filed (CP 94) that she was forced to have to pay Petitioners (CP 57) indicating she disputes owing anything. Why would she agree to forbear payment if the evidence shows her position is that she has paid everything and that Petitioners forced her to pay them to begin with?

Finally, Ms. Harrington filed bankruptcy and did not reaffirm the debt per bankruptcy requirements. This requires that Ms. Harrington actually “sign” a document which is accepted by the court (CP 63 – “h”) (see “Bankruptcy” below).

The contract between Ms. Harrington and Petitioners is straightforward and clear. Specifically, that Ms. Harrington would repay a loan over 96 months. To understand if any additional intentions of the parties exist, extrinsic evidence is to be examined. Based on the evidence

provided, nothing shows that Ms. Harrington and Petitioners intended, or agreed, to forbear repayment of the loan until she passed away.

The evidence shows the opposite: Ms. Harrington made payments for a number of years then stopped through advice of her attorney; she made multiple statements that she had paid in full; and she filed bankruptcy and did not “reaffirm” the debt. Even the disputed language of “Don agreed to take...” would indicate that he had been paid (CP 41) (see Statute of Limitations/Acknowledgment below).

b. Bankruptcy

Petitioners argue that the debt owed by Ms. Harrington was not discharged in bankruptcy. In order for a debt to not be discharged it must fall under an exception pursuant to 11 U.S.C. section 523 or the debt must be reaffirmed by signed agreement of the parties pursuant to 11 U.S.C. section 524 (c). Neither of these situations occurred.

A “Reaffirmation Agreement” is a document signed by the debtor in bankruptcy where he or she is giving up “discharge protections.” (CP 63 – “h”). The “Statement of Intentions” is an election to the court and applicable creditors of what the Debtor would like to do with the collateral. To understand, the Federal Bankruptcy Court explains:

“The distinguishing feature of a Chapter 7 proceeding for the individual debtor is the discharge: after surrendering his

non-exempt property for the benefit of his creditors, the debtor is discharged from what remains of most of the debts he owed as of the date the bankruptcy petition was filed. *See* 1 Robert E. Ginsberg & Robert D. Martin, GINSBERG & MARTIN ON BANKRUPTCY § 12.01, at 12-4 (4th ed. rev.1998). Section 524(c) of the bankruptcy code embodies a significant exception to this principle, in that it permits the debtor to voluntarily reaffirm a pre-petition debt. As we indicated at the outset, if he cannot afford to redeem the collateral, the debtor can simply surrender the property; and by virtue of the discharge he will bear no personal liability to his creditor. But, as the bankruptcy court explained, if the debtor elects to reaffirm the debt, he “[will] be bound as if he had never gone through bankruptcy, and the creditor [will] have a right not only to pursue its collateral, but to pursue the debtor for any deficiency on its loan balance after credit for the value of the collateral.” *Matter of Turner*, 156 F.3d 713, 717 C.A.7 (Ill.),1998. (citing *In re Turner*, 208 B.R. 434, 438 (Bankr.C.D.Ill.1997).

11 U.S.C. section 524 (c) provides the requirements necessary for

a dischargeable debt to be reaffirmed. These requirements include, but not limited to: made before the granting of the discharge and filed with the court. *11 U.S.C. sections 524 (c) (1) and (3)*.

At best Petitioners can argue that the “Statement of Intentions” was an acknowledgement of the debt. However this is not sufficient enough to put personal liability on Ms. Harrington. This requires a signed reaffirmation agreement entered with the court. Nothing was entered (CP 94-96).

Last, Petitioners point out she was represented by an attorney so she knew what she was doing. (see Petitioners’ Brief page 13). If anything, the attorney would have understood bankruptcy practices and informed her that unless a reaffirmation agreement is signed, the debt would be discharged. She knew what she was doing and that was to not sign a reaffirmation agreement she claimed she no longer owed on multiple occasions.

It should be noted that because the discharge applied, the denial of Ms. Harrington’s estate of the claim of Petitioners was proper as it is a personal claim that cannot be collected upon. Making the claim was actually in violation of the bankruptcy discharge (CP 62).

c. Statute of Limitations/Acknowledgement of Debt

RCW 4.16.040 states, “The following actions shall be commenced within six years:

(1) An action upon a contract in writing, or liability express or implied arising out of a written agreement.

(2) An action upon an account receivable. For purposes of this section, an account receivable is any obligation for payment incurred in the ordinary course of the claimant's business or profession, whether arising from one or more transactions and whether or not earned by performance.

(3) An action for the rents and profits or for the use and occupation of real estate.”

The last payment made by Ms. Harrington was 2000. She then filed bankruptcy in 2003 and did not reaffirm the debt. Then in two separate writings she stated she was not going to pay any further and that Petitioners forced her to pay him the money (CP 55-57). The six year statute of limitations has run to collect on a written contract.

One can restart the statute of limitations if the debt is acknowledged. To establish an acknowledgement of debt one must do so “in writing; recognize the existence of the debt; be communicated to the creditor or to another person with intent that it be communicated to the creditor; and not indicate an intent not to pay. *Jewell v. Long*, 74 Wash. App. 854, 857, 876 P.2d 473, 474 (1994).

Petitioners would like the court to believe that the trial court

“strained” the law and facts to grant summary judgment (see Petitioners’ Brief page 15). This is far from the truth as the evidence supports the court’s decision.

The entire issue rest on the statement “Don agreed to take \$13,000 (or \$17,000 –writing not clear) for his portion as King County went against 2 lots.” (underline added) (CP 41). The criteria to acknowledge the debt, resetting the statute of limitations, are not met.

First, the intent that it be communicated to the creditor does not exist. It only states that Petitioners received funds tied with King County going against two lots. It does not provide any reference to the original loan that this lawsuit is based on. Nor does the original loan make any reference to a King County issue. It does not indicate any intention for it to be communicated to Petitioners that they be paid; such as “Petitioners were not paid in full and they should be.” It cannot even be stated that any money is still owed.

Next, the statement provided by Ms. Harrington does not recognize the existence of a debt being owed. It indicates that payment was in fact made. It states Petitioners “agreed to take” indicating that the money had already been paid. This does not indicate that she is still going to pay or that she still owes. Add the extrinsic evidence that Ms. Harrington paid over \$17,000.00 (CP 100-124), it would be concluded

that Ms. Harrington was stating that the money was paid. Petitioners would like to argue that alternative interpretations exist but no extrinsic evidence is provided that would support their position.

The last requirement is that the statement indicates no intention to pay. This statement does not indicate intent to pay or intent not to pay. It is a statement about something that happened in her life. On two other occasions, Ms. Harrington specifically stated intent not to pay (CP 55-57). Filing bankruptcy and not filing a reaffirmation agreement is also pretty strong indication of intent not to pay as well.

Petitioners' summary of the letter is spot on when they state, "the document at issue is not a contract, but a voluntarily written letter containing the details of Harrington's life and family." (Petitioners' Brief page 20). Ms. Harrington is describing what has happened in her life. She is not saying "I still owe petitioners" or "petitioners need to be paid still." She is making a general statement regarding an event that happened. She is not communicating to Petitioners, or anyone else, that the debt is still due and owing.

Looking at the cases cited by Petitioners, each involves actions or events with specific enough facts to support a conclusion that a debt was owed. These facts distinguish them from this case. In *Cannavina*, an offer of land was presented to "call it even for which I owe you."

Cannavina v. Poston, 13 Wn. 2d 182, 199 123 P.2d 787, 791 (1942). The offer of property for a debt still owing is clearly recognized. In *Jewell*, a new deed of trust was provided replacing a prior deed of trust, relating to the original debt owing. *Jewell v. Long*, 74 Wash. App. 854, 876 P.2d 473, (1994). No other purpose existed to give the new deed of trust if the money was no longer owed. In *Fetty*, letters were sent requesting itemization of a debt. This is an acknowledgment because they understood they owed something, but did not know how much. *Fetty v. Wenger*, 110 WN. App. 598, 36 P.3d 1123 (Ct. Appt. Div I 2001). In this matter, the statement “agreed to take” does not indicate that money is still owing. At best it only describes an event in her life.

Last, Even if this is seen as an acknowledgement, Ms. Harrington lacked sufficient mental capacity. In 2007, she was diagnosed as having rapid memory loss followed with a diagnosis of multi infarct dementia.

The trial court made the right determination when finding that this is not an acknowledgment of debt.

d. Statute of Limitations – RCW 11.40

RCW 11.40.051 states:

“(1) Whether or not notice is provided under RCW 11.40.020, a person having a claim against the decedent is forever barred from making a claim or commencing an action against the decedent, if the claim or action is not already barred by an otherwise applicable statute of

limitations, unless the creditor presents the claim in the manner provided in RCW 11.40.070 within the following time limitations:

...

(c) If notice was not provided under this chapter or chapter 11.42 RCW, the creditor must present the claim within twenty-four months after the decedent's date of death.

(2) An otherwise applicable statute of limitations applies without regard to the tolling provisions of RCW 4.16.190.

(3) This bar is effective as to claims against both the decedent's probate and nonprobate assets.

Petitioners filed their claim on February 25, 2014, more than twenty-five months after Ms. Harrington passed (CP 98-99). Petitioners had two years to file a claim or to bring their own cause of action against Ms. Harrington's estate. They failed to do so and are not entitled to make a claim against the estate.

Petitioners argue that 11.40.135 applies in that they can realize on the secured item, which is true. However, this argument relates back to RCW 4.16.040 (see above). Since the debt was not acknowledged, restarting the statute of limitations, the six year period has run from 2000 and they are barred from pursuing the secured item as well (see Quiet Title below).

e. Quiet Title

RCW 7.28.300 states, "The record owner of real estate may

maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.”

Respondent filed a counter-claim to quiet title in the property. As no payments were made on the balance since 2000, RCW 4.16.040 would bar any further action to collect. RCW 7.28.300 then bars any right to foreclose under a deed of trust. Therefore, title was properly quieted in the estate of Barbara Harrington.

IV. CONCLUSION

Petitioners failed to provide any extrinsic evidence that would indicate an agreement to forbear repayment of the loan. The letter prepared by Ms. Harrington in 2011 does not meet the criteria to acknowledge the debt, restarting the statute of limitations. Therefore, summary judgment was appropriate and the trial court’s ruling should be confirmed.

DATED this 9th day of March, 2015.

HANIS IRVINE PROTHERO, PLLC

A handwritten signature in black ink, appearing to read "Brian J. Hanis", written over a horizontal line.

Brian J. Hanis, WSBA #35367
Attorney for Respondent, Linda Sapp,
As Personal Representative of the Estate of
Barbara Priscilla Harrington

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2015, copies of the following document:

1. Respondent's Reply Brief was served on counsel at the following address, via first class mail, postage prepaid:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of March, 2015, at Kent, Washington.


Brian J. Hanis

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