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STATE OF WASHINGTON

No. 38190-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION II

WILLIAM CHUNG,
Appellant,
v.
JOSEPH OH & HAE Y. OH
Respondents

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
HONORABLE KITTY ANN VANDOORNINCK

APPELLANT'S REPLY BRIEF

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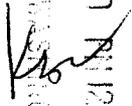
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I. REPLY

A. CHUNG'S COMPLAINT AND AMENDED COMPLAINT DID STATE A VALID CAUSE OF ACTION, BUT THE TRIAL COURT ERRONEOUSLY DISMISSED THE CASE BASED ON CR 12(b)(6).

1. Chung Did State a Valid Claim on the Complaint and the Amended Complaint.

Oh is mischaracterizing the complaint by stating that "Oh paid Chung \$20,000 on January 21, 2003 by way of a check." Respondent's Brief, P. 8. Chung's complaint states that "Defendant Joseph Oh then issued a check for \$20,000 to Plaintiff for the indebtedness." CP 7, LL 6-7. Moreover, the complaint plainly states that the \$20,000 check remains unpaid. CP 7, L 10.

Chung's amended complaint does further explain that Oh asked Chung not to deposit the check, and as a result, Chung could not deposit the check initially. CP 76. The \$20,000 check could not be deposited later because the check was over 180 days old. CP 76. Chung asked Oh numerous times for payment of the debt, but Oh refused. CP 76. Chung's attorney also made several demand to pay the \$20,000 check, but Oh refused. CP 61-62, 69-74.

2. Chung's Complaint and Amended Complaint Stated Factual Basis for a Claim Based on RCW 62A.3-118, which was Brought to Attention of the Trial Court.

Oh's assertion that Chung has not brought attention of the trial court of RCW 62A.3-118 is incorrect. Through Motion for Reconsideration, Chung clearly pointed out that RCW 62A.3-118(b) sets six or ten years as the time limit for unaccepted check. CP 117-131. Moreover, Chung's attorney correctly pointed out to the trial judge at the hearing for Oh's motion for attorney's fees:

MR. PARK: Your honor, are you specifically saying that RCW 62A.3-118 do not apply in this case?

THE COURT: I'm indicating the complaint was filed without reasonable basis. That's what I'm indicating...

Verbatim Transcript of Proceeding (September 5, 2008), P. 8, LL 8-12. However, the trial court failed to consider RCW 62A.3-118 during the motion for reconsideration and Oh's motion for attorney's fees and costs.

3. **The Standard of Dismissal Under CR 12(b)(6) is "Beyond Reasonable Doubt That No Facts Exist That Would Justify Recovery."**

As Oh acknowledged, a complaint may be dismissed by a trial court under CR 12(b)(6) if it fails to state a claim upon which relief can be granted. *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *aff'd*, 113 Wn.2d 148, 776 P.2d 963 (1989). See also, *Halvorson v. Birchfield Boiler, Inc.*, 76 Wn.2d 759, 458 P.2d 897 (1969) (dismissal proper if there is no rule of law giving plaintiff

a right of action).

“Court should dismiss a claim under CR 12(b)(6) only if it appears beyond reasonable doubt that no facts exist that would justify recovery. “Under this rule, plaintiff’s allegations are presumed to be true”, and “a court may consider hypothetical facts not part of the formal record.” CR 12(b)(6) motion should be granted “sparingly and with care”, and “only in the unusual case in which plaintiff includes allegations that show on the complaint that there is some insuperable bar to relief.”” *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). In *Cutler*, the court granted CR 12(b)(6) motion to dismiss the five causes of action because they are pre-empted by federal statutes, ERISA. *Id.*

4. **In Applying the Standard of Dismissal Under CR 12(b)(6), Chung’s Complaints Do Satisfy Non-Dismissal Threshold.**

Assuming the facts stated on the Chung’s complaints are true, i.e.: 1) Oh became indebted to Chung on or about January 21, 2003; 2) Oh issued a \$20,000 check to Chung on January 21, 2003, for the indebtedness; 3) Oh asked Chung to not deposit the check until Oh authorizes; 4) based such request, the check was not deposited by Chung; 5) after 180 days, Chung’s attempt to deposit

the check was prevented by the bank; 6) Chung asked Oh numerous times to pay the check , including demand by Chung's attorney, but Oh refused; and 7) the \$20,000 check remains unpaid, the question is whether Chung is entitled to relief under RCW 62A.3-118 or contract theory.

RCW 62A.3-118 does unequivocally state six years or ten years as the time limits for claiming an unaccepted draft. Moreover, a check is simple contract and Chung's claim is not time barred.

B. ANY ORAL AGREEMENT BETWEEN CHUNG AND OH AS TO REPAYMENT OF \$20,000 WAS REDUCED TO WRITING – THE \$20,000 CHECK.

Oh argues that "any loan agreement or other contract that would obligate Oh to pay Chung any monies was at least partly in oral in nature". Respondent's Brief, P. 9. If Oh's premises hold, then any promissory note or check issued for exchange of good or service would require additional documents to evidence monetary obligation of the maker or drawer of the promissory note or check to payee. This is clearly false as the underlying purposes and policies of the Uniform Commercial Code are: (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through

custom, usage and agreement of the parties; and (c) to make uniform the law among the various jurisdictions. RCW 62A.1-102. If additional document or agreement is needed to further explain a check or promissory note, the very purpose of having a negotiable instrument would be defeated.

Any oral agreement between Oh and Chung as to Oh's indebtedness to Chung for \$20,000 cash paid by Chung on Oh's behalf to Chuck Park was reduced in writing, and the oral agreement was reduced to the \$20,000.00 check, which was signed by Oh. The \$20,000.00 check issued by Oh to Chung clearly shows in writing that Oh is indebted to Chung in the amount of \$20,000, and no parole evidence is required to explain or construct the obligation of Oh to Chung.

RCW 62A.3-104 (a), (c), (e), and (f) clearly define that a check is a negotiable instrument:

(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

(b) "Instrument" means a negotiable instrument.

(c) An order that meets all of the requirements of subsection (a), except subsection (a)(1), and otherwise falls within the definition of "check" in subsection (f) is a negotiable instrument and a check.

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this Article.

(e) An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either.

(f) "Check" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank, or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as "money order."

"Negotiable instrument" is also defined as:

"[A] written instrument and signed unconditional promise or order to pay a specified sum of money on demand or at a definite time payable to order or bearer. U.C.C. 3-104(1). To be a negotiable instrument within meaning of Article 3,

an instrument must be in writing signed by the maker or drawer...

Black's Law Dictionary, Sixth Edition (1990)(underline added).

Therefore, the \$20,000 check is a written instrument, subject to the statute of limitation of ten years, as permitted by RCW 62A.3-118(c). And this Court must naturally deny Oh's claim that RCW 62A.3-305 provides Oh to bring forth statute of limitation defense for oral agreement, when RCW 62A.3-118(c) is clear that "an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within six years after dishonor of the draft or ten years after the date of the draft, whichever period expires first." (underline added).

C. NATIONAL BANK OF COMMERCE OF SEATTLE V. PRESTON REPRESENTS A CASE THAT IS IN APPLICABLE IN THE PRESENT CASE.

Oh, once again, claims that *National Bank of Commerce v. Preston*, 16 Wn.App. 678, 558 P.2d 1372 (1977), represents a case that an issuer of a check to a holder requires parole evidence to establish indebtedness of the issuer to the holder. The *Preston*, court stated that the checks with notation of "loan", written by the issuer/drawer, which were subsequently cashed by the payee, do not possess the essential promise by the payee to repay the drawer/issuer, and do not create an obligation by the payee to pay back the drawer/issuer. Here, the check was issued by Oh, but

Chung was unable to cash it due to Oh's request and the time limit imposed by bank in cashing the check. The check is the clear, conclusive, and written evidence that Oh, the drawer/issuer, promised to pay Chung, the payee, the sum of \$20,000. There is no other evidence required to prove Oh's obligation to Chung.

D. THE BURDEN IS ON OH TO ESTABLISH THAT THE \$20,000 CHECK WAS ISSUED WITHOUT CONSIDERATION, I.E., THAT THE CHECK WAS FOR A LOAN FROM OH TO CHUNG, AND NOT FOR REPAYMENT OF THE DEBT.

Oh admitted that he issued the \$20,000 check to Chung on January 21, 2003: "In answer to paragraph 3.2 of the Complaint, Defendants admit that, on January 21, 2003, Defendant Joseph Oh tendered a check of the same date to Plaintiff in the amount of \$20,000..." CP 25, LL 5-8. However, Oh now attempts to cast a doubt that the \$20,000 check may represent an un-cashed loan from Oh to Chung. Respondent's Brief, P. 13, Footnote 7. In other words, Oh attempts argue that Oh did not receive any consideration for issuing the check to Chung. However, Washington court is clear that Oh carries burden of proof that there was no consideration. *West & Wheeler v. Longtin*, 204 P. 183, 118 Wash. 575 (1922) (the burden is not on the payee, suing on a check, to show consideration, though he alleges that check was given for consideration, in view of Rem.Code 1915, §§ 3415, 3575); *Lee v. Swanson*, 69 P.2d 824, 190 Wash. 580 (1937) (the defense of want of consideration is affirmative, and the burden of proof thereof is on defendant, since, under Negotiable Instrument Law, a note imports a consideration); *Gleason v. Brown*, 224 P. 930, 129

Wash. 196 (1924); *Building Materials, Inc., of Grays Harbor v. Electric Equipment & Engineering Co.*, 7 P.2d 601, 166 Wash. 573 (1932)(check in due form which drawer admitted was delivered was presumptively based upon valuable consideration).

Moreover, Washington court defined sufficiency of consideration for a negotiable instrument as, “[A]ny act which benefits the promisor or results to the loss or prejudice of the promise is sufficient consideration to support a note.” *Harris v. Johnson*, 134 P. 1048, 75 Wash. 291 (1913). Here, Chung provided \$20,000 to Oh’s designee (Chuck Park) at that request of Oh, thus suffering detriment of foregoing \$20,000, while Oh benefited in the amount \$20,000 (for either lending \$20,000 to Chuck Park or satisfying his obligation to Chuck Park). As such, there was sufficient consideration running from Chung to Oh in receiving the \$20,000 check.

E. CHUNG’S CLAIM IS NOT FRIVOLOUS AND IS BASED ON WELL-GROUNDED IN FACT AND WARRANTED BY EXISTING LAW.

Chung’s claim is clearly based on statute and caselaw. The statute of limitations for an unpaid check is six or ten years under RCW 62A.3-118, and six years based on the contract theory of an unpaid check, which numerous other jurisdictions have adopted. Chung brought the current action within six years after the check was issued by Oh, and the trial court erroneously and incompetently ruled that Chung’s claim is time- barred and thus frivolous. Given the statute and numerous cases from Washington and other jurisdictions, this Court must find that Chung’s claim is supported by at least two rational theories on the law and facts:

RCW 62A.3-118 and the simple contract theory of the check issued by Oh. As such, the trial court's ruling for attorney's fees and costs based on CR 11 and RCW 4.84.185 must be overturned.

II. CONCLUSION

Based on foregoing reasons, this Court should overturn the trial court's judgment and find for Chung for \$20,000, and award the statutory interest, attorney's fees and costs.

DATED this 10 day of APRIL, 2009, at
Federal Way, Washington.



Karl Park WSBA #27132
Attorney for Appellant Chung

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WILLIAM CHUNG,

Appellant,

v.

JOSEPH OH,
HAE Y. OH, husband and wife, in their
marital

Respondent.

Case No.: 38190-7-II

DECLARATION OF SERVICE

Re: APPELLANT'S REPLY BRIEF

I, Karl Park (name), of Federal Way, Washington (address), in the State of Washington, who is a non-party of more than 18 years of age and who is competent to be a witness for the purpose of verifying service in this action, declare that I personally served **Mr. Mark B. Anderson**, attorney for Defendants/Respondent, by delivering to him a true and correct copy of the following documents in the above-entitled action:

1) Appellant's Reply Brief

at: Smith Alling Lane, 1102 Broadway Plaza #403, Tacoma, WA 98402

1 (address) at the hour of 12:30 AM/PM on APRIL 10, 2009 (date), by
2 handing the documents to Receptionist (recipient's name), a
3 receptionist for the attorney.

4 I certify under penalty of perjury under the laws of the State of Washington that
5 the foregoing is true and correct.

6 DATED this 10th day of APRIL, 2009, at Tacoma, WA

8 Signature:

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Karl Park

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