Tmilchol v. Titiml, 7 ROP Intrm. 251 (Tr. Div. 1998)

BECHESERRAK TMILCHOL,
Plaintiff,

v.

RUDIMCH TITML,
Defendant.

TMILCHOL BECHESERRAK,
Plaintiff,

v.

RUDIMCH TITIML,
Defendant.

CIVIL, ACTION NOS. 109-96 and 252-93 (Consolidated)

Supreme Court, Trial Division
Republic of Palau

Issued: July 31, 1998

Counsel for Plaintiff: David F. Shadel

Counsel for Defendant: William R. Ridpath

BEFORE: R. BARRIE MICHELSEN, Associate Justice.

These cases were tried on a consolidated basis on July 28, 1998. The Plaintiff continues his efforts to clean up old retail accounts. *See Kulas v. Becheserrak* , 7 ROP Intrm. 76 (1998); *Tmilchol v. Ngirchomlei*, 7 ROP Intrm. 66 (1998). The first of these consolidated cases was filed on May 10, 1993. It asked for judgment against Defendant in the amount of $42,248.23, including principal and pre-filing accrued interest. The applicable statute of limitations would, as a general rule, limit recovery to those items or accounts for which some payment had been made during the six years prior to the date of filing. 14 PNC § 407. Plaintiff must therefore show that a payment ⊥252 was made after May 10, 1987. Plaintiff filed a second case on March 15, 1996 after further review of records found additional amounts allegedly due. The second complaint asked for judgment for an additional $7,889.

In both cases, Plaintiff presents the same alternative theories of recovery: goods sold and delivered, quantum meruit, open account, and account stated. At the time of the pre-trial conference, plaintiff added another theory: acknowledgment of the debt. The first two, not seriously pressed at trial, can be quickly rejected: goods sold and delivered, and quantum meruit. Plaintiffs records are too ragged to meet his burden of proof on those theories. The best set of

numbers admitted into evidence was Plaintiff's counsel's summary sheets, prepared by his office, which tried to make sense out of the original records. However, when asked to match specific numbers from receipts in evidence to his summary sheets, counsel admitted that he could not. Plaintiff made no effort to show the specific value of any goods delivered, nor their value on a quantum meruit basis. A number of invoices were stipulated into evidence, but the signatures of the persons acknowledging receipts were not identified, and most are obviously not the name of the Defendant.[1] The invoices admitted into evidence total less than $16,000.

Another theory of Plaintiff is that of "open account." An open account is "an unpaid or unsettled account, an account with a balance which has not been ascertained, which is kept open in anticipation of future transactions." It is a "type of credit extended by a seller to buyer which permits buyer to make purchases without a note or security and is based on an evaluation of the buyer's credit." *Black's Law Dictionary* 1090 (6th ed. 1990). Under this approach, Plaintiff would still have to prove each item due in the account. *Western Sales Trading Co. v. Asanuma Enterprises* 5 ROP Intrm. 27 (1994). The introduction into evidence of the two ledger sheets, and some receipts with the problems noted earlier, fails to provide satisfactory proof of any item in the account, particularly since there was little or no foundation laid as to the trustworthiness of these records. This evidence does not meet Plaintiff's burden of proof.[2]

Plaintiff alternatively argues that there was an "account stated." He characterizes the collection letter sent by his attorney Mr. ⊥253 Shadel dated January 12, 1992 as an "account stated" with respect to Civil Action 535-93, and Mr. Shadel's letter of January 8, 1996 as an "account stated" with respect to Civil Action 109-96. Both letters were admitted into evidence.

An "account stated" is "a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor." *Restatement (Second) of Contracts* § 282 (1982). *See also Western Sales Trading Co.* , 5 ROP Intrm. 27. It is "in the nature of a computation rather than of compromise of the debt . . ." *Restatement (Second) of Contracts* §

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[1] Apparently Defendant's major complaint about the account is the casualness with which Plaintiff allowed any employee of Defendant to charge items, even though Defendant never agreed to such an arrangement.

[2] I have dealt with the merits of Plaintiff's case without discussing Defendant's affirmative defense of the statute of limitations. However, I hold that Defendant has a valid statute of limitations defense with respect to the first three causes of action discussed above. All of the debts occurred, and all of the Defendant's payments were made, more than six years before suit was filed. This would place the debts outside the time period allowed by 14 PNC § 407. However, Plaintiff argues that Defendant's wife made some payments, one as late as November 1987. Plaintiff therefore suggests he filed suit within the six year period, at least with respect to the first complaint. However, these payments were made because collectors for Plaintiff approached Defendant's wife in his absence, represented to her that her husband owed money, and wanted her to make payments. She did, but when she informed her husband about these payments, he told her not to pay, since the exact amount was being disputed. Aside from the payments she made without Defendant's knowledge, she had no involvement in the transactions at issue here. Plaintiff could not have reasonably considered her as Defendant's agent in this transaction. My conclusion is that the statute of limitations expired for these causes of action.

282 cmt. a. It "operates as an admission of its contents for evidentiary purposes. It also operates as a promise to pay." *Restatement (Second) of Contracts* § 282 cmt. c. As a new promise to pay, it can be considered an acknowledgement of debt, and such an acknowledgement restarts the statute of limitations. *Kulas*, 7 ROP Intrm. at 78-79.

It is the second sentence of the Restatement section that Plaintiff relies upon here. "A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent." However, Mr. Shadel's letters were not "statements of account." A "statement of account" is a periodic report issued by a "creditor to a customer setting forth the amounts billed, credits given and balance due." *Black's Law Dictionary*, 1408 (6th ed. 1990). Each of the Restatement illustrations of "accounts stated" involve periodic, itemized statements. Other examples of detailed "statements of account" are found in *Nilsson, Robbin, et al. v. Louisiana Hrdrolec* , 854 F.2d 1538 (9th Cir. 1988); *First Commodity Traders v. Heinold Commodities* , 766 F.2d 1007 (7th Cir. 1985); *Nants v. F.I.D.C.* , 864 F.Supp. 1211 (S.D. Fla.1994); *First Union Discount Brokerage Services v. Milos* , 744 F. Supp. 1145 (S.D. Fla. 1990); and *Barwick Pacific Carpet Co. v. Kam Hawaii Construct. Co.*, 630 P.2d 638 (Haw. Ct. App. 1981).

Mr. Shadel's letters are not a computation of a debt, and do not set "forth the amounts billed, credits given and balance due." Both letters refer to a "debt apparently owed by you," and that it "appears that the amount of the debt is" $40,020.10 and $7,500 respectively. [Emphasis added.] The letter is simply the usual demand letter sent to a debtor by a creditor's lawyer. I am not convinced that a standard form demand letter from creditor's counsel can ever quality as a "statement of account" as that expression is used in the Restatement. None of Plaintiff's cited cases involve letters from lawyers. But even if a letter from Plaintiff's counsel might fit the definition in some circumstances, these particular letters, which provide no breakdown of charges, credits, and debits, and that further qualify their assertions by using the words "apparently" and "appears," cannot be classified as statements of account.

Plaintiff's last theory is "acknowledgement of the debt." Defendant conceded that in January 1992, he acknowledged a debt of $15,000 in a meeting with Plaintiffs then-counsel, Mr. Olkeriil. Therefore the Restatement rule recently utilized in *Kulas* applies here as well. "An unqualified admission that a debt is owing operates as a promise to pay it for the purpose of the rule . . ." *Restatement (Second) of Contracts* § 282, cmt. d. Consequently, Defendant owes $15,000 in principal to Plaintiff.

This leaves the issue of prejudgment interest to resolve. First, no interest is due for the period before January 1992, since Defendant only acknowledged the sum of $15,000 as of that date. In Palau, pre-⊥254-judgment interest is permitted "as damages in a contract case where the amount owed is fixed by the contract or can be determined with reasonable certainty." *A.J.J. Enterprises v. Renguul* , 3 ROP Intrm. 29 (1991); *accord Ngirausui v. Baiei* , 4 ROP Intrm. 140 (1994). Normally, 9% per annum interest will apply. *ROP v. Akiwo* 6 ROP Intrm. 297 (Tr. Div. 1996). This rate is computed on a simple interest basis. *NECO v. Rdialul* 2 ROP Intrm. 211 (1991). Although Plaintiff asserts that he is entitled to a 12% per annum rate, this interest charge was, as far as the evidence showed, a unilateral decision of Plaintiff, not part of any contract, and

certainly not acknowledged by Defendant. Plaintiff is therefore entitled to pre judgment interest, computed as simple interest, at the rate of 9% per annum. The interest will the due from January 15, 1992. Judgment will therefore issue in conformance with this opinion.