

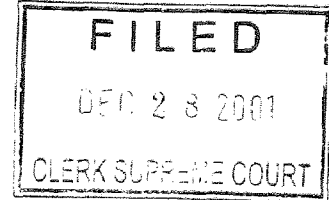
IN THE COURT OF APPEALS OF IOWA

No. 1-664 / 00-2004
Filed December 28, 2001

PAUL J. DUBACH,
Plaintiff-Appellant,

vs.

GEORGE H. WEITZEL and
THOMAS A. WELTER,
Defendants-Appellees.



Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

Paul Dubach appeals from a grant of summary judgment disposing of his case. He contends the trial court erred in (1) applying the five-year statute of limitations contained in Iowa Code section 614.1(4) (1999), rather than the twenty-year limitation period contained in section 614.1(6); and (2) finding the statute of limitations began to run on October 18, 1994, instead of March 8, 1995.

AFFIRMED.

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellant.

William G. Nicholson and Robert J. Legislador of White & Johnson, P.C., Cedar Rapids, for appellee-Weitzel.

Les V. Reddick of Kane, Norby & Reddick, P.C., Dubuque, for appellee-Welter.

Considered by Huitink, P.J., and Zimmer, and Vaitheswaran, JJ.

ZIMMER, J.

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I. Background Facts and Proceedings.

Prior to 1993, Paul Dubach, George Weitzel, and Thomas Welter were shareholders of Iowa Wisconsin Capital, Inc. (IWC), a small brokerage company which is no longer in business. In 1993, the former business partners became embroiled in litigation. First, Weitzel instituted suit against Dubach. Dubach then counterclaimed against Weitzel, Welter, and IWC. The lawsuit went to trial and on September 2, 1994, a jury returned a verdict in favor of Dubach against Weitzel in the amount of \$23,333.00, and against IWC in the amount of \$242,034.00. On September 6, the trial court entered judgment consistent with the verdicts and also entered a stay prohibiting the transfer of any assets from IWC. While Dubach has recovered the personal judgment against Weitzel, the judgment against IWC remains substantially unsatisfied.

Dubach contends that during trial both Weitzel and Welter testified IWC had an unencumbered certificate of deposit for \$100,000.00 at DUPACO Community Credit Union. In an attempt to recover his judgment against IWC, Dubach sought to execute on the CD and commenced garnishment proceedings. On October 18, 1994, DUPACO served an answer as garnishee to the

garnishment proceedings revealing the \$100,000.00 CD had been pledged as security for two \$50,000.00 promissory notes executed by the defendants to DUPACO on July 1, 1994.

Hearing on the garnishment proceeding was held March 1, 1995. On March 8, 1995, the court ruled that due to DUPACO's security interest, Dubach was unable to levy against the CD. Dubach appealed from the March 8, 1995 ruling quashing his garnishment action. His appeal was dismissed as untimely by an unreported decision of the Iowa Supreme Court.

Dubach subsequently filed a federal civil action in the United States District Court for the Northern District of Iowa against Weitzel, Welter, and IWC seeking damages based upon the encumbering of the \$100,000.00 CD. On January 8, 1997, the federal court dismissed Dubach's action finding it did not involve a federal claim.

On March 6, 2000, Dubach filed the present action against Weitzel and Welter on theories of misrepresentation and breach of fiduciary duty. In his petition Dubach claims the defendants "committed various acts to defeat and impair" his ability to satisfy his judgment against Iowa Wisconsin Capital. He seeks damages in compensation for his injuries and a judgment holding the defendants liable for the obligations of IWC. Both Weitzel and Welter filed motions for summary judgment.

On November 8, 2000, the district court granted the motions finding Dubach's claims were barred pursuant to Iowa Code section 614.1(4). The court determined the five-year statute of limitations was triggered on October 18, 1994, when Dubach discovered the CD was encumbered by DUPACO.

Dubach appeals. First, he contends the district court should have applied the twenty-year limitation period set forth in Iowa Code section 614.1(6) pertaining to actions founded on a judgment of a court of record, rather than the five-year limitation period found in section 614.1(4). He claims the twenty-year limitation period applies because he is ultimately seeking to recover an outstanding judgment against IWC. In the alternative, Dubach argues that if the five-year statute of limitations applies, the action did not accrue until the court entered its ruling denying Dubach's attempt to garnish the CD on March 8, 1995.

II. Scope of Review.

A claim, which is barred by the applicable statute of limitations, may be properly disposed of by summary judgment. *Stahl v. Preston Mut. Ins. Ass'n*, 517 N.W.2d 201, 202 (Iowa 1994). Our review of a grant or denial of summary judgment is for errors of law. Iowa R. App. P. 4; *Gabrilson v. Flynn*, 554 N.W.2d 267, 270 (Iowa 1996). We review summary judgment motions to determine the existence of any genuine issue of material fact and whether the law was correctly applied. *Hegg v. Hawkeye Tri-County REC*, 512 N.W.2d 558, 559 (Iowa 1994). The burden rests on the movant to establish the right to summary judgment. *Enochs v. City of Des Moines*, 314 N.W.2d 378, 380 (Iowa 1982). We review the record in the light most favorable to the party opposing summary judgment. *Smith v. CRST Int'l, Inc.*, 553 N.W.2d 890, 893 (Iowa 1996); *Hill v. McCartney*, 590 N.W.2d 52, 55 (Iowa Ct. App. 1998).

III. Applicable Statute of Limitations.

Dubach contends the trial court misapplied the five-year statute of limitations period set forth in Iowa Code section 614.1(4). That subsection

applies to actions founded upon unwritten contracts, injuries to property, fraud, and "all other actions not otherwise provided for" in the section. See Iowa Code § 614.1(4). Dubach insists the court should apply the twenty-year statute of limitations for actions founded on a judgment of a court of record as set forth in Iowa Code section 614.1(6).

When disagreement arises as to which of the several periods of limitation contained in Iowa Code section 614.1 apply in a particular case, our determination must focus on the actual nature of the cause of action. *Scott v. City of Sioux City*, 432 N.W.2d 144, 147 (Iowa 1988). We must determine, as best we can, which type of cause of action described in the statute most nearly characterizes the action pending before the court. *Id.*

In this appeal, Dubach would have us characterize his action against the defendants as an attempt to execute on a judgment. Typical examples of actions within the ambit of section 614.1(6) include executing on real estate to satisfy a judgment, or suing to collect on unpaid child support. See *Tri-State Refining v. Opdahl*, 481 N.W.2d 710 (Iowa Ct. App. 1991); *Holleman v. Stafford*, 584 N.W.2d 242, 246 (Iowa 1998). In theory, a claim against IWC specifically seeking the outstanding judgment of \$267,034.00 plus interest owed to Dubach according to the original jury verdict would fit within this scheme. However, this was not the case presented to the trial court.

While it may be correct that Dubach's inability to collect the judgment owed him by IWC motivated the instant action, his petition seeks a new judgment for further compensatory and punitive damages based on certain "actions" of the defendants. Specifically, the petition alleges the defendants misrepresented the

status of a company asset, breached certain fiduciary duties, and committed various acts to "defeat and impair" Dubach's ability to satisfy his judgment against IWC. Based on the allegations stated in Dubach's petition, we conclude the trial court properly characterized the action as falling under the five-year statute of limitations set forth in section 614.1(4), rather than the twenty years allowed by 614.1(6).

IV. Commencement of Limitations Period.

Application of the appropriate statutory period to a particular case requires the determination of when the claim accrued. Iowa Code § 614.1. Dubach contends the district court erred in finding the applicable five-year statute of limitations began to run on October 18, 1994, when he learned the CD at issue was subject to a security interest held by the credit union. He argues the statute of limitations period should not begin to run until March 8, 1995, when the court ruled he had no right to levy against the CD.

A cause of action accrues when the aggrieved party has a right to institute and maintain a suit. *Sandbulte v. Farm Bureau Mut. Ins. Co.*, 343 N.W.2d 457, 462 (Iowa 1984) (citations omitted). Such a right exists when events develop to a point where the injured party is entitled to a legal remedy. *Id.* Generally, a plaintiff's cause of action accrues at the moment he suffers injury. Application of the discovery doctrine creates a more malleable timeframe in which the parties may operate. The discovery rule provides that the accrual date may be extended until the plaintiff has in fact discovered that he has suffered injury or by the exercise of reasonable diligence should have discovered it. *Sandbulte*, 343 N.W.2d at 462.

In its ruling, the trial court stated: "The plaintiff discovered that the certificate of deposit was encumbered on October 18, 1994. Plaintiff's cause of action therefore ran on October 18, 1999." We agree with this conclusion. Dubach's interests were injured on July 1, 1994, when Weitzel and Welter encumbered the CD held by the credit union. He was notified of the credit union's superior claim on the CD no later than October 18, 1994. At that point in time Dubach knew, or should have known of his injuries, and the five-year statute of limitations began to run. Therefore Dubach's petition, filed March 6, 2000, was properly dismissed as untimely. We affirm the district court's grant of summary judgment.

AFFIRMED.