IN THE COURT OF APPEALS OF IOWA

No. 6-335 / 95-1483

RICHARD J. CUTLER,

Plaintiff-Appellant,

vs.

CREDITOR'S MULTI-SYSTEMS, INC.,

Defendant-Appellee.

FILED
NOV 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

Richard Cutler appeals a district court ruling granting summary judgment in favor of Creditor's Multi-Systems, Inc. on Cutler's contract action for recovery of collections. **REVERSED AND REMANDED.**

John H. Neiman of Neiman, Stone, McCormick & Wendl, P.C., West Des Moines, for appellant.

David A. Morse of Garten & Wanek, Des Moines, for appellee.

Heard by Sackett, C.J., and Habhab and Vogel, JJ.

SACKETT, C.J.

The question on appeal is whether the trial court correctly determined on a motion for summary judgment that the statute of limitations had run on a suit brought against a collection firm, defendant-appellee Creditor's Multi-Systems, Inc. We reverse the granting of dismissal on summary judgment and remand. We do not retain jurisdiction.

Plaintiff Richard J. Cutler brought this suit against defendant contending defendant had collected monies for Cutty's Inc. that was not paid over to Cutty's. Plaintiff was given a written assignment of Cutty's interest in the monies sued for following Cutty's filing of bankruptcy.

Cutty's rights, if any, against defendant arose when Cutty's placed accounts with it for collection. Cutty's actually placed the accounts for collection with Bob Holley, but acknowledgment of the accounts being placed came from defendant. On July 27, 1988, Cutty's received a written agreement from defendant outlining the terms and responsibilities of both Cutty's and defendant with reference to collection of accounts. The agreement was signed on behalf of defendant. There is no evidence anyone on Cutty's behalf signed the agreement.

Cutty's placed substantial accounts with defendant in 1987 and 1988 and received money collected by defendant. A disagreement ensued and Cutty's contended that defendant had failed to pay to them all money collected for Cutty's,

less collection fees. Cutty's received checks from defendant at least through September 2, 1988. On April 13, 1989, Cutty's demanded defendant pay them $47,995.46.

On June 2, 1993, plaintiff filed a petition against defendant claiming defendant owed him $47,995.46 on the claims against defendant assigned to him by Cutty's. Defendant filed a motion for summary judgment. The district court dismissed plaintiff's petition on summary judgment finding the statute of limitations for an oral contract is five years and the breach occurred five years before suit was brought. The court further found there were no affidavits filed in resistance to the motion for summary judgment.

Plaintiff appeals contending, among other things, Cutty's account with defendant was an open account and less than five years had passed since the last payment or credit before suit was brought.

The burden of proving the account rests with plaintiff. *Team Central v. Team Co., Inc.*, 271 N.W.2d 914, 920 (Iowa 1978); *National Food Products Corp. v. Schakel*, 171 N.W.2d 858, 859 (Iowa 1969).

Defendant has not specifically addressed plaintiff's claim this was an open account, but suggested at oral argument error was not preserved. Error was preserved as plaintiff advanced this was an open account in response to the motion for summary judgment.

Defendant contends the motion for summary judgment was not properly resisted because no affidavits were filed. We disagree. The pleadings show plaintiff is suing on an open account and the last payment or credit was not more than five years prior to the date the petition was filed. Defendant's motion was filed contending the case was based on an oral contract. Defendant did not challenge plaintiff's claim of an open account.

Iowa Code section 614.5 provides:

> When there is a continuous, open, current account, the cause of action shall be deemed to have accrued on the date of the last item therein, as proved on the trial.

The fact there was a written document prepared by defendant setting forth the terms of collection does not dictate that there cannot be a suit on an open account. *See McIntire v. Muller*, 522 N.W.2d 329, 330-31 (Iowa App. 1994). The statute had not run on an open account when the suit was brought.

We reverse and remand.

REVERSED AND REMANDED.