IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC00-1263
Lower Tribunal No.: 4D99-1067

ROBERT T. MOSHER,

Petitioner,

v.

STEPHEN J. ANDERSON,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

This cause is within the discretionary jurisdiction of the Florida Supreme Court to review a decision of the Fourth District Court of Appeal rendered on May 3, 2000, which certified a conflict with a decision of another district court of appeal. Fla. R. App. P. 9.030 (a) (2) (A) (vi). The Petitioner, Robert T. Mosher, is the Appellee in the lower tribunal and shall be referred to as "Mosher" or "creditor." The Respondent, Stephen J. Anderson, is the Appellant in the lower tribunal and shall be referred to as "Anderson" or "debtor."

The lower tribunal shall be referred to as the "district court below." The citations to the Record below shall be denoted as (R. ___).

STATEMENT OF THE CASE AND FACTS

This appeal emanates from proceedings in garnishment in the Circuit Court for Broward County, Florida. On September 30, 1993, Mosher obtained a final summary judgment in the amount of $77,732.03 against Anderson Development Corp., a Florida corporation. In November of 1995, in an effort to collect the judgment debt, Mosher initiated garnishment proceedings and secured a writ of garnishment directed to the debtor, Stephen J. Anderson, who was believed to be indebted to Anderson Development Corp. for repayment of an oral loan in the amount of $67,308.00. (R. 25-30). In his amended answer to the writ, Anderson asserted as an affirmative defense that collection of the debt was barred by the applicable statute of limitations. (R. 74-76, 266-268).

On September 4, 1998, Mosher filed his motion for summary judgment in the garnishment proceedings. In support of his motion, Mosher filed the depositions of the debtor, Stephen J. Anderson (R. 138-182), and his brother, Michael Ryan Anderson (R. 183-261). The uncontroverted facts showed that on October 19, 1988, Anderson Development Company loaned Anderson a sum in excess of $67,000.00. (R. 144, 236). At the time of the loan, the debtor and his brother were the only shareholders of Anderson Development Company. (R. 145, 189-190, 252). The proceeds of the loan were evidenced by a check. (R. 178-179). The loan was oral in nature and the parties never discussed or agreed upon an interest rate or the terms for

repayment. (R. 155, 156, 237). At the time of the commencement of the proceedings in garnishment in November of 1996, the debt had not been paid and no demand for payment had been made by Anderson Development Corporation. (R. 158, 252).

Based upon the proofs submitted, the trial court granted Mosher's motion for summary judgment (R. 99) and entered a final judgment in garnishment against the debtor. (R. 115).

The debtor appealed the final judgment to the Fourth District Court of Appeal. After receipt of the parties' briefs, the district court reversed the judgment of the trial court. Anderson v. Mosher, 25 Fla. L. Weekly D1082 (Fla. 4th DCA May 3, 2000). In its opinion, the district court held that the statute of limitations applicable to this oral loan "payable on demand" had commenced to run on the date the loan was made, i.e. October 19, 1988, and was barred by the four year statute of limitations. Id. In so holding, the district court rejected Mosher's contention that the statute of limitations does not commence to run on an obligation payable on demand until an express demand for payment has been made. Id. The district court went on to certify its decision as being directly in conflict with the decision of the Second District Court of Appeal in Mason v. Yarmus, 483 So. 2d 832 (Fla. 2d DCA 1986), which held that the four year statute of limitations applicable to oral loans payable on demand does not commence to run until a demand for payment is made.

Mosher filed a timely Notice to Invoke Discretionary Jurisdiction of this Court on June 1, 2000. By order dated June 21, 2000, this Court postponed its decision on jurisdiction and directed Mosher to file this initial brief on the merits.

SUMMARY OF ARGUMENT

Any action to enforce a contractual obligation not founded on a written instrument must be commenced within four years of the date that the cause of action accrues. Since the parties to the loan transaction (i.e. Anderson Development Corporation and the debtor) did not stipulate to a date on which the loan was to be repaid, the obligation was payable on demand. The district court below improperly concluded that a cause of action to collect an oral loan payable on demand accrued (and the limitations period had commenced to run) on the date that the loan was made. Its decision rejected the analysis adopted by the Second District Court of Appeal in Mason v. Yarmus, 483 So. 2d 832 (Fla. 2d DCA 1986), which held that such a cause of action does not accrue until a demand for payment is made. The Mason court saw no reason not to treat oral demand obligations any differently from written demand obligations, where causes of action accrue upon the making of a written demand.

The decision below is inconsistent with the express wording of the limitations statute which provides that a cause of action accrues when the last element of the cause of action occurs. As the district court noted in Mason, with respect to oral loans

payable on demand, in the absence of a demand and a failure of the debtor to pay, there is no breach; in the absence of a breach, there is no cause of action; and in the absence of a cause of action, the limitations period does not commence to run. Id. at 834. The holding in Mason is wholly consistent with general contract principles and the express wording of the limitations statute and its holding should be approved by this Court.

Moreover, the decision below improperly makes time of the essence to a transaction in which the parties had set no time for performance. Time could only become essential to the issue of payment upon an express demand for payment by the creditor.

Finally, the district court has improperly construed oral loans payable on demand by using case law governing the performance of oral contracts where the making of a demand by one party is an express and indispensable condition to the other party's performance. Here, the making of a demand was not essential to the ability of the debtor to pay the sum owed and, accordingly, the creditor was not under a duty to make a demand within a reasonable period of time.

ARGUMENT

I. A CAUSE OF ACTION ON AN ORAL LOAN PAYABLE ON DEMAND DOES NOT ACCRUE, AND THE STATUTE OF LIMITATIONS DOES NOT COMMENCE TO RUN, UNTIL AN EXPRESS DEMAND FOR PAYMENT IS MADE.

The district court below held that the period of limitations on enforcement of an oral loan, payable on demand, "begins to run when the loan is made, not when demand for payment is made . . ." Anderson v. Mosher, 25 Fla. L. Weekly D1082 (Fla. 4th DCA May 3, 2000). By so holding, the district court's decision directly conflicts with the decision of the Second District Court of Appeal in Mason v. Yarmus, 483 So. 2d 832 (Fla. 2d DCA 1986), which held that a cause of action on an oral obligation payable on demand accrues upon the making of a demand for payment. Id. at 833. For the reasons stated herein, the Mason decision presents a better-reasoned and more practical construction of the limitations statute applicable to oral loans payable on demand.

A. A Cause of Action Accrues Upon the Occurrence of the Last Element of the Cause of Action.

Since the contractual obligation here was not founded on a written instrument, the applicable limitations period was four years. § 95.11 (3) (k), Fla. Stat. (1995). The Florida limitations statute provides that "the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues." § 95.031, Fla. Stat. (1995). A cause of action accrues "when the last element

constituting the cause of action occurs." § 95.031 (1), Fla. Stat. (1995). Thus, any legal or equitable action with respect to the oral contract in this case must have been commenced within four years of the occurrence of the last element of the cause of action. The limitations statute is silent as to when a cause of action on an oral loan payable on demand is deemed to accrue. Nonetheless, it is generally recognized that a cause of action on a contract accrues, and the statute of limitations commences to run, upon the occurrence of a breach of the contract. State Farm Mutual Automobile Insurance Company v. Lee, 678 So. 2d 818 (Fla. 1996).

B. The Last Element of a Cause of Action on an Oral Loan Payable on Demand Occurs When the Debtor Fails to Pay After a Demand for Payment Is Made.

In Mason v. Yarmus, 483 So. 2d 832 (Fla. 2d DCA 1986), the district court affirmed the trial court's finding that an action on an oral loan payable on demand was not barred by the statute of limitations based on the following reasoning:

> We agree with the trial court that the cause of action in this case did not accrue, and the statute of limitations on the obligation did not begin, until there had been a demand for payment and a failure by the debtor to pay. Although it appears that there is no Florida case law in point, we see no difference in principle or policy between this situation and the provisions of the Uniform Commercial Code, section 673.122, Florida Statutes (1983), which was enacted in 1977 as an amendment to prior law, that a cause of action on a note accrues as provided in section 95.031(1), which provides that the cause of action accrues upon written demand . . . Indeed, the 1977 amendment appears to have made the statute consistent with the principle that a cause of action on a contract accrues upon breach of the contract . . . There was no breach in this case of the

> oral contract to pay the debt until the creditor had made demand for payment and the debtor did not pay.

Mason, 483 So. 2d at 833 (citations omitted).

The district court in Mason correctly concluded that there is no reason that principles governing the accrual of a cause of action on a note payable on demand under the Uniform Commercial Code should not be applied to similar types of oral obligations. First, there was no other Florida case law that directly addressed the issue at the time. Id. Second, the holding is consistent with common law principles that a cause of action on a contract does not accrue until there has been a breach. State Farm Mutual Automobile Insurance Company v. Lee, 678 So. 2d 818 (Fla. 1996). As noted by the court in Mason:

> At [the time the loan was made] there was no obligation by the debtor to pay and, therefore, no breach by the debtor of the obligation and, therefore, no accrual of a cause of action against the debtor.

Mason, 483 So. 2d at 833.

Under the Uniform Commercial Code in effect at the time of the instant loan transaction, an instrument "in which no time for payment is stated" was deemed to be "payable upon demand." § 673.108, Fla. Stat. (1991). Section 673.108 was repealed in 1992 and was replaced by Section 673.1081, Florida Statutes, which provides that a "promise or order is 'payable upon demand' if it . . . does not state any time of payment." § 673.1081 (1) (b) Fla. Stat. (1995).

In addition, Chapter 95, Florida Statutes, governing limitations of actions, provided that "[f]or the purposes of this chapter, the last element constituting a cause of action on an obligation or liability founded on a negotiable or nonnegotiable note payable on demand or after date with no specific maturity date specified in the note . . . is the first written demand for payment . . ." § 95.031 (1), Fla. Stat. (1995)(emphasis added). This section has been the law of Florida governing the accrual of causes of action on notes payable on demand or without maturity date since 1975. Ruhl v. Perry, 390 So. 2d 353, 356 (Fla. 1980).

Although these provisions of the Uniform Commercial Code do not expressly apply to oral loans, there is no reason to reject the reasoning of the district court in Mason that oral and written loan transactions without repayment terms should be treated consistently. In fact, in Bannoura v. Bannoura, 655 So. 2d 1187(Fla. 4th DCA 1995), the district court below held that a loan obligation evidenced only by a canceled check, presumably for the loan proceeds, was payable on demand under Section 673.1081(1)(b), Florida Statutes (1993). Id. at 1188. Thus, it appears that the district court below previously has relied on provisions of the Uniform Commercial Code governing negotiable instruments in construing oral obligations without repayment terms.

The district court below misconstrued its holding in Fleming v. Burbach Radio, Inc., 377 So. 2d 723 (Fla. 4th DCA 1979), when it concluded that it had already held

that the time for performance relative to negotiable instruments under the Uniform Commercial Code was not applicable to oral contracts without repayment terms. Anderson, 25 Fla. L. Weekly at D1083. In Fleming, the district court never addressed the issue of whether the provisions of the Uniform Commercial Code governing payment on negotiable instruments where no time for repayment is stated could be analogized to oral loans lacking such terms because the trial court had found that the plaintiffs failed to prove either the existence or the non-existence of express terms for repayment. Id. at 724. Thus, the district court found that the trial court had correctly rejected the plaintiffs' claim that the loans were due on demand. Id.

Here, there is no dispute that the oral loan lacked any terms for repayment. Accordingly, the oral loan was payable on demand and its collection should not be barred in the absence of proof that a demand was made more than four years prior to the initiation of the garnishment proceedings.

It should be noted that the limitations statute governing notes payable on demand does not require that the demand must be given within any specified period of time, and Florida courts have not construed the statute to require that the demand be made within a reasonable period of time. In Ruhl v. Perry, 390 So. 2d 353 (Fla. 1980), this Court sustained a judgment on a note payable "on demand after two years from date" where the first demand was made sixteen years after the loan was made. Similarly, in Smith v. Branch, 391 So. 2d 797 (Fla. 2d DCA 1980), sixteen years had

elapsed between the date of the loan and the initiation of an action to collect a demand note. In each case, challenges based upon a five years limitations period were overruled upon findings that the cause of action had not accrued until a written demand was made which, in each case, was upon the filing of the complaint. Ruhl, 390 So. 2d at 365-357; Smith, 391 So. 2d at 798.

Thus, the only thing that the trial court needed to determine in assessing the debtor's statute of limitation defense was whether a demand for payment had been made more than four years prior to the initiation of the garnishment proceedings. Since no demand had ever been made, the trial court correctly entered summary judgment in the absence of any other defense to payment of the debt.

C. The Decision Below Improperly Makes Time of the Essence to the Parties' Performance Where the Contract Itself Fails to Provide for a Time for Payment and the Creditor Has Made No Demand for Payment.

In the instant loan transaction, time was not of the essence to the debtor's obligation to repay the loan. The parties had not agreed upon a time for repayment. (R. 155, 156, 237). The debt could have been paid at any time in the future. Thus, it was not possible for the debtor to have been in breach on the date that the obligation was incurred. Mason v. Yarmus, 482 So. 2d 832 (Fla. 2d DCA 1986). By setting the accrual of the cause of action for breach of an oral obligation on the date the obligation is incurred, the district court below imposed upon the parties terms that are

clearly inconsistent with the transaction: namely that repayment had to occur immediately and that the debtor's failure to do so placed him in breach of the oral contract as soon as he received the loan proceeds.

Florida law is clear that time is of the essence with respect to performance of a contract where (i) there is an express understanding between the parties regarding the time for performance, (ii) there exist other circumstances evidencing the need to treat time as an essential part of the contract, or (iii) a party who is not in default makes an express demand upon the other party for performance within a stated time, and the time provided for the other party to perform must be reasonable. Blaustein v. Weiss, 409 So. 2d 103, 105 (Fla. 4th DCA 1982).

Here, there was no express time for repayment and no other circumstance that requires a finding that time was of the essence to the debtor's performance. The debtor could not have been in breach until he defaulted on the obligation, which could only have occurred upon his failure to pay the debt within a reasonable time following an express demand for the same. In the absence of a breach, there was no cause of action against the debtor and the statute of limitations had not commenced to run. Mason, 483 So. 2d at 833.

D. Case Law Governing the Performance of an Oral Contract Where Some Notice or Demand by One Party Is an Express and Essential Condition to the Other Party's Performance Is Not Applicable to Oral Loans Without Repayment Terms.

In concluding that collection of the oral loan here was barred, the district court below relied principally upon the holdings in Stoudenmire v. Florida Loan Company, Inc., 117 So. 2d 500 (Fla. 1st DCA 1960) and DeSouza v. DeSouza, 708 So. 2d 993 (Fla. 4th DCA 1998). See Anderson v. Mosher, 25 Fla. L. Weekly D1082, D1082-D1083 (Fla. 4th DCA May 3, 2000). In Stoudemire, the district court was asked to consider whether the statute of limitations barred a buyer from suing a seller for breach of an oral contract which obligated the seller to repurchase from the buyer or to resell for his account, within a stated time after notice, stock which the seller had previously sold to the buyer. There, the buyer had waited six years and eight months after the agreement before making a demand on the seller for performance. The district court held that the buyer's right to demand a repurchase of the stock expired three years after the oral contract was entered into. Stoudenmire, 117 So. 2d at 503. In so holding, the district court found that buyer's demand to repurchase was not made within a "reasonable time," which the court fixed in analogy to the then-applicable three year statute of limitations. Id.

In DeSouza v. DeSouza, 708 So. 2d 993 (Fla. 4th DCA 1998), the district court followed the holding in Stoudenmire and held that a creditor's right to recover on a

series of oral loans was barred by the four year statute of limitations because the first written demand for repayment was not made within four years (i.e. a period analogous to the applicable limitations period) from the date that the obligations were incurred. Id. at 993-994.[1]

The district court below found the holdings in Stoudenmire and DeSouza to be consistent with the "majority view" of those jurisdictions which have passed on the issue of when a statute of limitation on an oral obligation payable on demand is deemed to accrue. Anderson, 25 Fla. L. Weekly at D1082; see Annot., 14 A.L.R. 4th 1385 (1981). However, neither of these Florida opinions expressly holds that a cause of action on an oral loan payable on demand accrues on the date the loan is made. Rather, in each case, the plaintiff's failure to make a demand upon the defendant within a reasonable period of time fixed by an analogy to the applicable statute of limitations precluded the plaintiff's recovery. It appears to be entirely consistent with these opinions to assume that had the plaintiffs made "timely" demands and commenced their actions within the limitations period measured from the date of demand, the actions would not have been barred.

Moreover, the Fourth District Court's reliance on Stoudenmire with respect to oral loans without repayment terms is misplaced. The Stoudenmire decision related

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[1] The district court's opinion in DeSouza makes no mention of the previous decision of the Second District Court in Mason, which also conflicts with DeSouza.

to the timeliness of the buyer's demand for the seller's performance under an oral contract which expressly required that notice be given as a condition to the seller's obligation to perform. The holding effectively discharged the seller's obligation to perform because the buyer failed to perform within a reasonable time analogized to the statute of limitations.

What the district court below failed to recognize is that the stock repurchase agreement in Stoudenmire was very different from the oral loans here and in DeSouza. Under the stock agreement, the buyer was in control of the timing of the repurchase transaction. He had the option to either demand or not demand that the seller perform. There could have been any number of considerations that could have governed the buyer's decision as to when, or if, the repurchase should occur. Thus, it was reasonable for the Stoudenmire court to imply a reasonable time for the buyer to make his demand because the seller should not have been required to wonder, for an indefinite period of time, whether or when the buyer would exercise his rights under the contract. This is particularly true given the potential adverse effect that an unlimited repurchase option could have had on the marketability or value of the stock.

In loan transactions, however, no similar consideration need be given to the debtor's duty to pay the debt owed. A demand is not indispensable to the payment of the debt; the amount due could be paid at any time, even in the absence of a demand. In fact, where no time for payment is stipulated, it makes little sense to put the burden

on the creditor to make a demand within a reasonable period of time because any delay in making a demand inures solely to the benefit of the debtor. Certainly, the debtor here could have eliminated any potential adverse effect occasioned by the absence of a demand for payment by doing nothing more than repaying the obligation. Conversely, to bar recovery in the absence of a demand substantially prejudices the creditor who, having given value already, has done nothing more than forbear in collection of an obligation that the parties clearly agreed would have no fixed date for repayment.

CONCLUSION

For all of the foregoing reasons, this Court should take jurisdiction of this cause upon the certification by the district court below of the noted conflict between its decision and a decision of another district court of appeal. Within that exercise of jurisdiction, this Court should reverse the decision of the district court below and reinstate the final judgment in garnishment; disapprove the holding in DeSouza v. DeSouza, 708 So. 2d 993 (Fla. 4th DCA 1999), and adopt the holding of Mason v. Yarmus, 483 So. 2d 832 (Fla. 2d DCA 1986), as controlling of the issue as to when the statute of limitations begins to run on an oral loan payable on demand; and award such other and further relief as may be just and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail to William J. McPharlin, Esq., 3015 North Ocean Boulevard, Suite 122, Fort Lauderdale, Florida 33308 this ____ day of July, 2000.

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