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 REPLY BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

The type style utilized for this Reply Brief is 14 point proportionately spaced Times New Roman.

PREFACE

In this reply brief, the Petitioner continues to be denominated as the "creditor" and the Respondent is the "debtor". Citations to the Petitioner's Initial Brief on the Merits are denoted as "I. B." and citations to the Respondent's Answer Brief on the Merits are denoted as "A. B." Citations to the Appendix to the Reply Brief on the Merits are denoted as "App. to R. B."

ARGUMENT

Reply to Point I. A.

The debtor correctly points out that other than the decisions certified to be in direct conflict here, no other Florida cases have directly addressed the issue framed by the district court below. The debtor argues, nevertheless, that the district court's holding below was consistent with other Florida precedent relating to actions on oral loans; however, neither Johnson v. Harrison Hardware Furniture Co., 160 So. 878 (Fla. 1935) nor DeSouza v. DeSouza, 708 So. 2d 993 (Fla. 4th DCA 1998), are particularly instructive or helpful. The Johnson decision predates the enactment of Section 95.031(1), Florida Statutes, and does not state specifically when the statute there was deemed to have commenced to run. The DeSouza decision does not even mention the limitations statute. The holding there discharged the debtor's obligation to pay based upon the creditor's failure to make a timely demand. There is no indication from the opinion of how the limitations period would have been applied had the creditor made a "timely" demand for payment.

The debtor also cites authority from other jurisdictions which have set the accrual of a cause of action on an oral loan at the time the loan is made. A.B. at 5. The debtor's reliance on these cases overlooks the fact that the Florida limitations statute expressly provides that a cause of action in Florida accrues when the last

element of the cause of action occurs. §95.031(1), Fla. Stat. (1995). The district court below has properly characterized the instant loan as one payable on demand. Clearly, one of the elements of a cause of action for breach of an oral loan payable on demand is the making of a demand. Until a demand has been made, the debtor could not be considered in breach and a cause of action could not have accrued under the Florida limitations statute. Mason v. Yarmus, 483 So. 2d 832 (Fla. 2d DCA 1986).

The case of Birnholz v. Steisel, 394 So. 2d 523 (Fla. 3rd DCA 1981), is not applicable. There, the district court relied principally upon Florida case law governing *quantum meruit* claims for services rendered and "universally accepted doctrine" when it concluded that the statute of limitations on an attorney's fee claim had commenced to run when the services were completed, not when the first demand for payment was made. Id. at 524. The case is distinguishable for several reasons. First, the court was concerned with protecting the public from stale claims for fees and properly put the burden on the attorney to pursue such claims in a timely fashion. In fact, the Birnholz court even noted its concern that the running of the limitations period could be delayed *ad infinitum*, and the principles governing limitations statutes could be substantially frustrated, by any attorney who merely fails to render a bill to the client. Id. at 524. Thus, there are public policy concerns underlying the Birnholz decision that are not present here. In fact, it appears that the legislature had little concern regarding the timing of claims with respect to demand notes since the

limitations statute does not limit the time within which a demand for payment can be made. § 95.031(1) Fla. Stat. (1995). See Ruhl v. Perry, 390 So. 2d 353 (Fla. 1980) (suit on demand note initiated 16 years after date was not barred).

Second, recovery in *quantum meruit* does not require that the plaintiff make a demand for payment. Rather, the creditor/attorney's entitlement accrues upon the completion of the services. Such suits usually involve unliquidated claims and it is the debtor/client who is prejudiced by delays in the determination of the amount owed. However, if there was a contract between the parties which conditioned the payment of fees on the occurrence of some future event after the completion of services such as the receipt of settlement proceeds or the sale of property, then an action for recovery of fees would accrue only upon the failure of the debtor to pay once the condition has occurred. Here, it is clear that the debtor was not in breach of the oral contract until an express demand for payment was made and he failed or refused to pay.

Reply to Point I. B.

The debtor misconstrues the holding in Mason v. Yarmus, 483 So. 2d 832 (Fla. 2d DCA 1986). Contrary to the debtor's assertions, A. B. at 9, the district court in Mason did not "base" its decision on provisions of the Uniform Commercial Code and limitations statute governing the accrual of causes of action on notes payable on demand. In fact, it is clear from the opinion that the district court understood that those statutory provisions were not applicable to oral obligations. The decision, rather, was grounded in the general principle that an action on a contract accrues upon breach. The court rejected the debtor's position (and the so-called "majority view") that the action accrued on the making of the loan, finding instead that at the time of the loan the debtor was not in breach. Mason, 483 So. 2d at 833. A breach could not occur, and the limitations statute would not commence to run, until a demand for payment was made and the debtor failed to pay. Id. The district court found the statutory provisions governing accrual of actions on notes payable on demand to be in accord and concluded that there was no reason "in principle or policy" to treat oral loans payable on demand differently from demand notes. Id.

By so holding, the court in Mason did not violate the principles of statutory construction cited in the debtor's Answer Brief. Moreover, the debtor's reliance on those rules is misplaced since neither the Mason court nor the creditor here have

argued that Section 95.031(1), Florida Statutes, should be deemed to apply to oral obligations payable on demand or where no time for payment is stipulated.

Section 95.031(1) was amended in 1975 to provide definition to the accrual of causes of action on instruments payable on demand. The legislative history of this amendment states that at the time there had been "confusion" as to when the last element was deemed to occur and that the act was intended "to clarify this area by defining the last element as <u>the first written demand for payment</u>." App. to R. B. at 1-4; *Staff of Senate Judiciary-Civil Committee, Florida Legislature, 1975 Sess., Staff Analysis of S.B. 954, An Act Relating to Limitations of Actions* (emphasis in original). Since at that time there was no Florida statutory or case law on the issue of the accrual of causes of action on oral loans, there was no legislative need to "clarify" the issue. In any event, it cannot be presumed, as a matter of law, that the failure of the legislature to address the issue presented here requires a holding consistent with that of the district court below.

The debtor contends that the <u>Mason</u> decision "has the effect of extending the statute of limitations indefinitely, and clearly frustrates [its] purpose . . ." A. B. at 8. Presumably, the same could be said about the statutory provisions relating to the accrual of actions on demand notes where, as previously noted, no outside time is fixed for the making of the demand. §95.031(1), Fla. Stat. (1991); I. B. at 11. Nonetheless, a construction of the limitations statute that places accrual of actions on

oral loans payable on demand or without repayment terms is more consistent with the nature of the transaction between the parties than one that places accrual on the date of the loan.

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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 September, 2000.

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