

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

Exhibit B

LC2007-000441-001 DT

02/15/2008

COMMISSIONER EARTHA K. WASHINGTON

CLERK OF THE COURT  
S. Bindenagel  
Deputy

L V N V FUNDING

PAUL D GUGLIELMO

v.

LESLIE THOMPSON (001)  
JERALD THOMPSON (001)

JOHN D PARKER II

ESTRELLA MOUNTAIN JUSTICE  
COURT  
REMAND DESK-LCA-CCC

**RECORD APPEAL RULE / REMAND**

**Lower Court Case No. CC2006121828**

This appeal, previously assigned to Judge Margaret H. Downie, was reassigned to Commissioner Eartha K. Washington for determination.

This Court has jurisdiction over this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. § 12-124(A). The court has considered the record of the proceedings from the trial court, exhibits made of record, and the memoranda submitted.

On appeal Leslie and Jerald Thompson (appellants) list several points of error they believe the lower court committed related to this case. The only material issues in this appeal are whether the lower court erred as a matter of law when it granted LVNV Funding's (appellee) summary judgment motion against the appellants and whether it abused its discretion when it denied the appellants' summary judgment motion.

Rule 56(a) of the Arizona Rules of Civil Procedure allows a party to a lawsuit "to recover upon a claim, or cross-claim or to obtain declaratory judgment" by moving for a summary

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judgment in the party's favor. The rule allows a court to render a judgment when the pleadings, deposition, answer to interrogatories and admissions on file, together with any affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."<sup>1</sup> On appeal a grant for summary judgment will be reviewed de novo to determine "whether any genuine dispute of material fact exists and whether the trial court correctly applied the law."<sup>2</sup> Motions for summary judgments are properly granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense."<sup>3</sup> The facts will be viewed "in the light most favorable to the party against whom summary judgment was granted."<sup>4</sup> Therefore, in this case, the facts will be viewed in the light most favorable to the appellants.

On August 2, 2006, the appellee filed a complaint in the Estrella Mountain Justice Court against the appellants. The complaint alleged that the appellants owed a total of \$5400.91 in unpaid debt and interest arising from an extension of credit they received from an opened ended account with Sears. LVNV Funding stated in the complaint that the unpaid debt was owed to the company because it was the purchaser or assignee of Sears claim against the appellant. Several pleadings were filed in the case including a motion to dismiss and counterclaim (filed by the Thompsons). In the appellants' response to a motion for summary judgment and their own cross motion for summary judgment, they alleged that the statute of limitations had run on the appellee's ability to collect the debt because more than three years had elapsed since the debt was incurred. The appellee in its reply and response to the appellants' pleadings agreed that the debt had been incurred on March 21, 2001, but argued that statute of limitations had not run because the last payment of the account was made by the appellants on April 16, 2004. Both sides relied upon A.R.S. § 12-543 to support the limitation argument each advanced. Without oral argument on the motions for judgment, the lower court issued a ruling granting the appellee's motion and a denial of the appellants' motion on May 25, 2007.

The appellants' filed a notice of appeal on June 6, 2007. The matter was then brought before this court. The appellants' counterclaim was never decided upon by the lower court.

The appellants argue that the lower court erred as a matter of law when it failed to find that the statute of limitations barred the appellee's ability to pursue legal action in order to collect on the unpaid debt. A.R.S. §12-543 governs the time limit to pursue a claim of unpaid debt on an open account. The statute provides a three year statute of limitation on such actions. It states in part:

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<sup>1</sup> 16 A.R.S. Rule Civ.Proc. Rule 56(c).

<sup>2</sup> *Wolfinger v. Cheche*, 266 Ariz. 504, 506, 80 P.3d 783, 785 (2003).

<sup>3</sup> *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

<sup>4</sup> *Wolfinger v. Cheche*, 266 Ariz. 504, 506, 80 P.3d 783, 785 (2003).

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*There shall be commenced and prosecuted within three years after the cause of action accrues, and not afterward, the following actions:*

*2. Upon stated or open accounts other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents, but no item of a stated or open account shall be barred so long as any item thereof has been incurred within three years immediately prior to the bringing of an action thereon.*

The parties argue in the appellate memorandum that the cause of action in this case accrued at different times. The appellants claim that the cause of action accrued on the credit card on March 21, 2001, when the debt was incurred by them. The appellee, on the other hand, argues that the cause of action did not accrue until after the last payment was made by the appellants in April of 2004. If the appellee is correct the filing of the complaint on August 2, 2006 was well within the three year statute of limitations. If however the appellants are correct about the date the debt incurred, then the statute of limitations would have expired on March 21, 2004.

The appellate court in *Cheatam v. Sahuaro Collection Service, Inc.* held that “[a] cause of action accrues whenever one person may sue another... [A] party’s failure to assert a cause of action does not mean that the cause of action has not accrued.”<sup>5</sup> In *Krumtum v. Burton*,<sup>6</sup> the Arizona Supreme Court addressed the accrual of causes of actions and the statute of limitations in A.R.S. § 12-543 cases specifically. In *Krumtum*, the Court found that the services provided by the plaintiff to the defendants had been furnished on an open account.<sup>7</sup> The Court defined an open account as “one where there are running or concurrent dealings between the parties, which are kept unclosed with the expectation of further transactions. \* \* \*” *Connor Livestock Co. v. Fisher*, 32 Ariz. 80, 85, 255 P. 996, 997 (1927).<sup>8</sup> The statute of limitations for an open account is three years.<sup>9</sup> The statute of limitations begins to run on an open account from the date of the last item.<sup>10</sup> The defendants in *Krumtum* had successfully plead the statute of limitations before the trial court in a motion for summary judgment. The plaintiff appealed to the trial court’s finding. On review, the Supreme held that because the statute of limitations had run on cause of action on the open account, the grant for summary judgment had been proper.<sup>11</sup> (“[T]he last item

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<sup>5</sup> 118 Ariz. 452, 454, 577 P.2d 738, 740 (App. 1978); see also *Healey v. Coury*, 162 Ariz. 349, 353, 783 P.2d 795, 799 (1989).

<sup>6</sup> 111 Ariz. 448, 532 P.2d 510 (1975).

<sup>7</sup> *Id.* at 451, 532 P.2d at 513.

<sup>8</sup> *Id.* at 450, 532 P.2d at 512.

<sup>9</sup> A.R.S. §12-543(2).

<sup>10</sup> *Krumtum*, 111 Ariz. at 451, 532 P.2d at 513.

<sup>11</sup> *Id.*

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charged on the open account was more than three years before the action was commenced and the statute of limitations having been pled is a bar to the suit.")<sup>12</sup>

In this case, the cause of action accrued on March 21, 2001, after the debt had been incurred by the appellants. The appellee had until March 21, 2004, at the latest to file a claim for the unpaid debt. Having filed the complaint in 2006, the appellee was well over the statutory period; therefore the lower court erred in granting summary judgment in its favor. The cross motion for summary judgment should have been granted, based on the expiration of the statute of limitations, in the appellants' favor.

The lower court made no ruling on the appellants' counterclaims when it ruled on the summary judgment motions filed by the parties. The appellant alleged several violations of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o, that they believed were committed by the appellee in its pursuit of obtaining payment.

IT THEREFORE ORDERED reversing the lower court's ruling for summary judgment in favor of the appellee and its denial of summary judgment against the appellants. The matter is remanded back to the Estrella Mountain Justice Court for all further appropriate proceedings consistent with this ruling; and for the continued litigation of the counterclaim filed by the appellant.

IT IS FURTHER ORDERED denying the appellants' requests for attorney's fees and costs in this case.

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<sup>12</sup> *Id.*