

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of SHAMAYA D. KASSAB, a/k/a
SAM KASSAB, a/k/a SHAMAYA DAOUD
KASSAB, Deceased.

BURT S. KASSAB and AKRAM KASSAB, Co-
Personal Representatives of the Estate of
SHAMAYA D. KASSAB, Deceased,

Petitioners-Appellants,

v

JOHNI G. SEMMA and JULIANA A. SEMMA,

Respondents-Appellees.

UNPUBLISHED
July 6, 2006

No. 259597
Oakland Probate Court
LC No. 02-283832-CZ

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

Petitioners appeal from the trial court's order that (1) granted respondents' motion for summary disposition, and (2) denied their request that respondents be required to submit to an examination in court pursuant to MCL 700.1205(1). We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion

I. Facts

This action arises from two loans that the decedent, Shamaya Kassab, allegedly made to respondents. Evidence showed that respondent Johni Semma attempted to obtain a \$300,000 mortgage from First State Bank of East Detroit, but the bank refused to approve the loan. The decedent offered to guarantee the loan, but the bank refused to approve any loan involving Semma. Thereafter, the decedent obtained a personal loan from First State Bank for \$250,000, and gave the money to respondents. Petitioners allege that the decedent also obtained a separate \$38,000 personal loan from First State Bank and, again, gave the money to respondents. Petitioners allege that respondents accepted the money as two separate loans from the decedent. From approximately April 2000 until the decedent's death in May 2001, respondents made monthly payments directly to First State Bank in the amount of the decedent's loan obligation to the bank, but stopped making payments after the decedent died.

Petitioners, as co-personal representatives for Shamaya Kassab's estate, filed this action and alleged that the decedent loaned respondents \$250,000 and \$38,000 in separate transactions, and that respondents were liable for repayment of those loans. Petitioners' complaint included a request that respondents be required to submit to an examination in court pursuant to MCL 700.1205(1).

After the trial court allowed respondents to amend their answer and affirmative defenses to include the statute of frauds, respondents moved for summary disposition based on the statute of frauds. The trial court initially denied respondents' motion and ordered respondents to appear for an examination in court. Respondents thereafter filed a motion for reconsideration, which the trial court granted, explaining that it was unaware that respondents had previously been deposed. The trial court also granted respondents' motion for summary disposition on the grounds that petitioners' action involved an alleged oral promise to repay the debt of another that was unenforceable under MCL 566.132(1)(b).

On appeal, petitioners argue that the trial court erred in finding that their claims for repayment of the two loans allegedly made by the decedent to respondents fall within the statute of frauds. We agree.

II. Standard of Review

The trial court granted summary disposition to respondents under MCR 2.116(C)(7), on the grounds that the claim is barred by the statute of frauds. This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).¹ Whether the statute of frauds applies also presents a question of law that we review de novo. *In re Handelsman*, 266 Mich App 433, 435; 702 NW2d 641 (2005).

III. Statute of Frauds

The trial court ruled that because the alleged agreement was not in writing, respondents were entitled to judgment as a matter of law under MCL 566.132(1)(b), which provides:

¹ As this Court explained in *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995):

A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff.

In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

(b) A special promise to answer for the debt, default, or misdoings of another person.

MCL 566.132(1)(b) only applies to collateral promises for debts already owed. *Manuel v Gill*, 270 Mich App 355, 376; ___ NW2d ___ (2006). Here, petitioners argue that their claims involve original promises, not collateral ones. An original promise need not comply with the statute of frauds. *Schier, Deneweth & Parfitt, PC v Bennett*, 206 Mich App 281, 283; 520 NW2d 705 (1994).

The basis of petitioners' claim is not that respondents are liable for the decedent's debt to First State Bank but, rather, that respondents are liable for their original promise to the decedent to repay two loans that the decedent made directly to respondents. Petitioners' argument that their claims involve independent loan transactions between the decedent and respondents is supported by evidence that First State Bank refused to deal with Johni Semma and refused to involve him in the decedent's loan transaction with the bank. Evidence also showed that the decedent then independently transferred the loan proceeds he received from the bank to respondents. Because respondents' promises to repay the decedent were original, direct promises, not collateral ones, they do not fall within the statute of frauds.

Respondents characterize their promise as one to repay the decedent's debt to First State Bank. As explained, however, that is not the basis for petitioners' claims. If it were, however, the statute of frauds only requires a writing if a third party's alleged agreement is with the original creditor. A promise to pay a debt made directly to the debtor for consideration is not within the statute of frauds. *Pratt v Bates*, 40 Mich 37, 39-40 (1879). Such a promise is not a promise to pay the debt "of another." Thus, any alleged promise by respondents to the decedent to repay the decedent's debt to First State Bank would not be unenforceable under MCL 566.132(1)(b).

For these reasons, the trial court erred in granting respondents' motion for summary disposition.

Although the trial court did not rely on MCL 566.132(1)(a), respondents cited this statute below as additional support for their argument that petitioners' action was barred by the statute of frauds. MCL 566.132(1)(a) requires a writing for any agreement that cannot, by its terms, be performed within one year from the making of the agreement. We agree with petitioners that this statute does not preclude enforcement of the alleged oral agreement between the decedent and respondents. The statute is not applicable if there is any possibility that an oral contract may be completed within a year, even if the parties clearly intended that the agreement extend longer

than a year and, in fact, it was extended for more than a year. *Hill v Gen Motors Acceptance Corp*, 207 Mich App 504, 509-510; 525 NW2d 905 (1994). Because it would have been possible for respondents to repay the loans within a year, MCL 566.132(1)(a) does not apply.²

IV. Gift

Respondents also claim that the decedent never intended for them to repay any amounts owing after the decedent's death, and instead intended that any remaining indebtedness would be forgiven as a gift. The trial court never reached this issue. Though respondents presented evidence in support of their position below, petitioners presented evidence that respondent Johni Semma continued to acknowledge his indebtedness to the decedent after his death. Because a genuine issue of fact exists regarding the nature of the alleged agreement, summary disposition on this issue was not warranted. MCR 2.116(C)(10); *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

We find no merit to petitioners' argument that MCL 700.6101(1) requires that evidence of the decedent's intent to forgive the loans at the time of his death be in writing. The statute merely indicates that written instruments that contain provisions for nonprobate transfer on death are nontestamentary. It does not address the enforceability of the agreement alleged here.

V. MCL 700.1205(1)

Petitioners also argue that the trial court erred when it denied their request to have respondents submit to an examination by the court pursuant to MCL 700.1205(1), which provides, in relevant part:

(1) The court may order a person to appear before the court and be examined upon the matter of a complaint that is filed with the court under oath by a fiduciary, beneficiary, creditor, or another interested person of a decedent's or ward's trust or estate alleging any of the following:

(a) The person is suspected of having, or has knowledge that another may have, concealed, embezzled, conveyed away, or disposed of the trustee's, decedent's, or ward's property. . . .

Because the statute states that a court "may" order an examination, clearly the decision whether to conduct an examination is discretionary. *Mollett v City of Taylor*, 197 Mich App 328, 339; 494 NW2d 832 (1992). In their complaint, petitioners asked that respondents be required to appear before the court and be examined about the two alleged loans for \$288,000. The trial court originally granted petitioners' request, but then subsequently reversed its decision on rehearing, explaining that it was not aware that respondents had already been deposed.

² In light of our decision, we need not address petitioners' alternative claim that they should be allowed to proceed under a common-law assumpsit theory to avoid the statute of frauds.

As the trial court observed, petitioners were able to depose both respondents and, therefore, they had the opportunity to examine both respondents concerning the matters alleged in their complaint. In their request below, petitioners failed to show why further examination before the court was necessary. Under these circumstances, the trial court did not abuse its discretion in denying petitioners' request for an examination pursuant to MCL 700.1205(1). On appeal, petitioners argue that a court examination was necessary because several Oriental rugs and a ledger book documenting the decedent's various loans were also missing after his death. Because petitioners did not refer to these matters in either their complaint or request for an examination below, they do not provide a basis for us to conclude that the trial court abused its discretion when it denied petitioners' request for an examination. If petitioners desire to amend their complaint to refer to these additional matters, or believe that further examination is necessary and can offer support for their position explaining the need for additional examination in court, they are free to file an appropriate motion in the trial court on remand. We express no opinion on the merits of any motion that might be filed.

VI. Amendment of Pleadings

Petitioners further assert that the trial court abused its discretion by allowing respondents to amend their answer and affirmative defenses to raise the statute of frauds and to allege that the decedent intended that any loan be forgiven upon his death. We review the trial court's decision for an abuse of discretion. *Doyle v Hutzler Hosp*, 241 Mich App 206, 211-212; 615 NW2d 759 (2000).

MCR 2.111(F)(3) provides that affirmative defenses must be included "in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." See also *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000). MCR 2.118 is broadly construed to allow amendments. *Doyle, supra* at 215. Under MCR 2.118(A)(2), a trial court should freely grant leave to amend "when justice so requires."

A motion to amend ordinarily should be granted in the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment. *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision. *Id.* at 656-657. [*Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9-10; 614 NW2d 169 (2000).]

Respondents requested the amendment after they retained new counsel. Petitioners argue that the amendment was untimely because respondents should have known early in the case that the statute of frauds was an issue. But, because leave to amend should be freely given, this argument carries weight only if petitioners would be prejudiced by the amendment. Prejudice sufficient to deny leave to amend must prevent the opposing party from having a fair trial. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 493; 618 NW2d 1 (2000). "The prejudice must stem from the fact that the new allegations are offered late and not from the fact that they might cause the [opposing party] to lose on the merits." *Id.* Petitioners have not shown that they were prejudiced by the amendment. The amendment was made well before the trial

court heard respondents' motion for summary disposition and before discovery was completed. Under the circumstances, the trial court did not abuse its discretion in allowing respondents to amend their answer and affirmative defenses.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Henry William Saad

/s/ Donald S. Owens