

LEXSEE 104 FED APPX 936



Analysis

As of: Sep 07, 2007

**C&W ASSET ACQUISITION LLC, Plaintiff-Appellant, versus DONALD KNOX,
Defendant-Appellee.**

No. 03-11147 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

104 Fed. Appx. 936; 2004 U.S. App. LEXIS 13620

July 1, 2004, Filed

NOTICE: [**1] RULES OF THE FIFTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Texas, Amarillo Division. (2:02-CV-351).
C&W Asset Acquisition v. Knox, 2003 U.S. Dist. LEXIS 14642 (N.D. Tex., Aug. 25, 2003)

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff corporation, who acquired notes written by defendant promisor, appealed a judgment of the United States District Court for the Northern District of Texas, Amarillo Division, which granted summary judgment, sua sponte in favor of the promisor, finding that the corporation's action to collect on a matured promissory note was time-barred.

OVERVIEW: The corporation, who acquired notes from the Federal Deposit Insurance Corporation that the promisor made to a bank, commenced an action against the promisor to recover on the notes. The district court, sua sponte, granted summary judgment to the promisor.

The corporation appealed, arguing that the district court erred in granting summary. The court held that when the corporation moved for summary judgment against the promisor, the promisor filed a surreply, but did not file a cross-motion for summary judgment. Thus, the district court's grant of summary judgment to the promisor, without giving the required 10-day notice of its intent to the parties, was error. However, the error was harmless because assuming there was an acknowledgement in August 1996, the corporation's claim was barred by the statute of limitations. The preamble to a March 1999 financial statement did not qualify as an acknowledgment. There was no showing of an unequivocal intent by the promisor to pay the alleged obligation. The promisor's partial payment did not toll the statute of limitations because under Texas law that partial payment of a debt does not constitute an acknowledgment.

OUTCOME: The court affirmed the judgment of the district court.

CORE TERMS: acknowledgment, summary judgment, notice, sua sponte, notice of appeal, financial statement, genuine, issue of material fact, promissory note, partial payments, statute of limitations, new trial, nonmovant's, tolling provision, inextricably, entwined, harmless, payment of a debt, new matter, jurisdiction to review, final judgment, entry of judgment, harmless error, cause

of action, promise to pay, unequivocal, appealable, favorable, assignee, justness

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Civil Procedure > Appeals > Reviewability > Notice of Appeal

[HN1] A notice of appeal shall designate the judgment, order, or part thereof appealed from. Fed. R. App. P. 3(c). However, a policy of liberal construction of notices of appeals prevails in situations where the intent to appeal an unmentioned or unlabeled ruling is apparent and there is no prejudice to the adverse party. The intent to appeal must be clear, or the appeal must involve issues inextricably entwined with issues that have been properly raised. When the appellant notices the appeal of a specified judgment only or a part thereof, an appellate court has no jurisdiction to review other judgments or issues which are not expressly referred to and which are not impliedly intended for appeal.

Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

Civil Procedure > Appeals > Reviewability > General Overview

[HN2] An appeal of the denial of a Fed. R. Civ. P. 59(a) motion for a new trial is not separately appealable because the motion merely restates the attack on the merits of the final judgment. Thus, in the context of Rule 59(a), unless a new matter arises after entry of judgment, it is from the final judgment that the appeal should be taken.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

[HN3] An appellate court reviews the grant of summary

judgment de novo. A summary judgment motion is properly granted only when, viewing the evidence in the light most favorable to the nonmovant, the record indicates 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. Fed. R. Civ. P. 56(c). An appellate court draws all inferences in the light most favorable to the nonmovant.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants

Civil Procedure > Summary Judgment > Time Limitations

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

[HN4] A district court may grant summary judgment, sua sponte, but the district court must provide adequate notice and an opportunity to respond akin to that required by Fed. R. Civ. P. 56(c). If the court fails to provide such notice, a circuit court will reverse the grant unless the error is harmless. The failure to provide notice is harmless error when the nonmovant has no additional evidence or if all of the nonmovant's additional evidence is reviewed by the appellate court and none of the evidence presents a genuine issue of material fact.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Rem Actions > True in Rem Actions

Governments > Legislation > Statutes of Limitations > Time Limitations

[HN5] Under Texas law, a suit on a debt that is not commenced within four years of the time that the cause of action accrues is barred. Tex. Civ. Prac. & Rem. Code § 16.004(a)(3). Texas law also provides, however, that limitations may be avoided by a written acknowledgment under certain constraints.

Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview

Governments > Legislation > Statutes of Limitations > Pleading & Proof

[HN6] See Tex. Civ. Prac. & Rem. Code § 16.065.

Governments > Legislation > Statutes of Limitations > Pleading & Proof

[HN7] An acknowledgment under Texas law must: (1) be in writing and signed by the party to be charged; (2) contain an unequivocal acknowledgment of the justness or the existence of the particular obligation; and (3) refer to the obligation and express a willingness to honor that obligation. Under Texas law, an acknowledgment operates as a new obligation rather than merely as a revival of prior debt.

Contracts Law > Contract Conditions & Provisions > Conditions Precedent

[HN8] Under Texas law, if the expression of a willingness to pay is coupled with conditions, it devolves upon a plaintiff to prove that the named conditions have taken place.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Affirmative Defenses

[HN9] Under Texas law that partial payment of a debt does not constitute an acknowledgment.

JUDGES: Before SMITH, DEMOSS, and STEWART, Circuit Judges.

OPINION

[*937] PER CURIAM: *

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Plaintiff C&W Asset Acquisition, LLC ("C&W") appeals the district court's grant of summary judgment, *sua sponte*, in favor of defendant Donald Knox ("Knox"), finding no genuine issue of material fact that C&W's action to collect on a matured promissory note was time-barred. Specifically, the district court held that C&W, as an assignee of the Federal Deposit Insurance Corporation ("FDIC"), cannot benefit from the tolling provision in 28 U.S.C. § 2415 [**2] for partial payments made after an assignment. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The following facts are undisputed. Knox executed a promissory note in the principal amount of \$ 125,000.00

and a second promissory note in the principal amount of \$ 27,281.00. Both notes were payable to the First State Bank of Vega, Texas. First State Bank was declared insolvent, and the FDIC commenced receivership of the bank on April 1, 1993. The notes matured on May 31, 1993, and July 15, 1993, respectively, while in the hands of the FDIC. The FDIC sold the notes on August 4, 1994. On July 27, 1999, the notes were ultimately acquired by C&W through a series of assignments from the FDIC.

On October 15, 2002, C&W filed this action against Knox to recover on the amounts due on both promissory notes. C&W moved the district court for summary judgment on the notes sued upon and Knox defended on the basis that the suit was barred by the statute of limitations and laches. On August 25, 2003, the district court denied C&W's motion for summary judgment. At the same time, without prior notice to the parties, the district court *sua sponte* granted summary judgment in [**3] favor of Knox.

C&W moved the district court for a new trial on the grounds that the district court erred in failing to notify C&W of the district court's intent to grant summary judgment *sua sponte* and that the issue fully briefed on C&W's motion for summary judgment was not dispositive of the entire case. With its motion for a new trial, C&W proffered evidence which it alleged constituted a reaffirmation agreement. The district court denied the motion, and C&W timely appealed.

APPELLATE JURISDICTION

As an initial matter, we reject Knox's contention that the failure of C&W's notice of appeal to identify the district court's denial of its motion for a new trial, results in our lacking appellate jurisdiction. [HN1] Generally, a notice of appeal "shall designate the judgment, order, or part thereof appealed from." Fed. R. App. P. 3(c) (2004). However, a policy of liberal construction of notices of appeals prevails in situations where the intent to appeal an unmentioned or unlabeled ruling is apparent and there is no prejudice to the adverse party. In re Hinsley, 201 F.3d 638, 641 (5th Cir. 2000). The intent to appeal must be clear, [**4] or the appeal must involve issues inextricably entwined with issues that have been properly raised. NCNB Tex. Nat'l Bank v. Johnson, 11 F.3d 1260, 1269 (5th Cir. 1994). When the appellant "notices the appeal of a specified judgment only or a part thereof, this court has no jurisdiction to review other judgments or issues which are not expressly referred to [*938] and

which are not impliedly intended for appeal." *Warfield v. Fidelity and Deposit Co.*, 904 F.2d 322, 325 (5th Cir. 1990).

C&W's notice of appeal was both clear and inextricably entwined with the merits. The record shows that C&W filed their motion for a new trial under Rule 59(a). Our court has previously reasoned that [HN2] an appeal of the denial of a Rule 59(a) motion for a new trial is not separately appealable because "[the motion] merely restates the attack on the merits of the final judgment." *Government Fin. Servs. One Ltd. Partnership v. Peyton Place*, 62 F.3d 767, 774 (5th Cir. 1995). Thus, in the context of Rule 59(a), unless a new matter arises after entry of judgment, "it is from the final judgment that the appeal should be taken." *Id.* We first recognize that C&W [**5] is not appealing a new matter arising after the entry of judgment, which would be cognizable under Rule 60(b). Instead, C&W's appeal from the district court's denial of summary judgment, as well as its motion for a new trial, are based on pre-judgment errors. Therefore, we must find C&W's appeal of the district court's denial of summary judgment is inextricably entwined with the district court's order denying a Rule 59(a) motion. Moreover, C&W's notice of appeal expressly referenced an appealable "judgment" by the district court. Because the notice of appeal does not expressly mention a single part of the order, there is an inference that C&W had the intent to appeal from the order as a whole. Finding no prejudice to Knox, we therefore have jurisdiction to review the question of the district court's *sua sponte* grant of summary judgment.

STANDARD OF REVIEW

[HN3] This court reviews the grant of summary judgment *de novo*. *Flock v. Scripto-Tokai Corp.*, 319 F.3d 231, 236 (5th Cir. 2003). A summary judgment motion is properly granted only when, viewing the evidence in the light most favorable to the nonmovant, the record indicates that there is "no genuine issue as to any [**6] material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). We draw all inferences in the light most favorable to the nonmovant. *Herman v. Holiday*, 238 F.3d 660, 664 (5th Cir. 2001).

DISCUSSION

On appeal, C&W argues that the district court erred

in granting summary judgment without notice to the parties of its intent, and such error was not harmless. C&W also argues that the district court erred in concluding that § 2415 does not extend the statute of limitations when a debtor makes partial payments following an assignment of the promissory note once owned by the FDIC. We address each in turn.

I. Failure to Provide Notice

C&W moved for summary judgment against Knox. In response, Knox filed a sur-reply, but did not file a cross-motion for summary judgment. The district court granted summary judgment, *sua sponte*, in favor of Knox without giving the required ten-day notice of its intent to the parties. This was error.

[HN4] A district court may grant summary judgment, *sua sponte*, but [**7] [the district court] must provide adequate notice and an opportunity to respond akin to that required by FED. R. CIV. P. 56(c). *Mannesman Demag Corp. v. M/V Concert Express*, 225 F.3d 587, 595 (5th Cir. 2000). If the court fails to provide such notice, we will reverse the grant unless the error is [**939] harmless. *Id.* The failure to provide notice is harmless error "when the nonmovant has *no* additional evidence *or* if all of the nonmovant's additional evidence is reviewed by the appellate court and none of the evidence presents a genuine issue of material fact." *Love v. Nat'l Med. Enters.*, 230 F.3d 765, 771, *reh'g en banc denied*, 239 F.3d 367 (5th Cir. 2000). For the following reasons, we find the district court's error harmless.

C&W contends that the district court's error precluded C&W from tendering evidence that would demonstrate that Knox reaffirmed or acknowledged his obligation. C&W asserts two arguments alleging that Knox acknowledged his debt. C&W first asserts that Knox acknowledged his obligation in August 1996, by a writing which refers to the "debt I owe you." C&W also [**8] asserts that Knox's submission of a financial statement on March 10, 1999, constituted a reaffirmation of his obligation and that Knox's partial payment of a debt constitutes an acknowledgment. Based on these two acknowledgments and the partial payment, C&W contends that a genuine issue of material fact exists as to whether Knox acknowledged his obligation within four years of the date this action commenced. We cannot agree.

Assuming the August 1996 writing is an

acknowledgment, C&W's claim is barred by the statute of limitations. [HN5] Under Texas law, a suit on a debt that is not commenced within four years of the time that the cause of action accrues is barred. *In re Vineyard Bay Development Co., Inc.*, 132 F.3d 269, 271 (5th Cir. 1998); see also *Tex. Civ. Prac. & Rem. Code* § 16.004(a)(3). Texas law also provides, however, that limitations may be avoided by a written acknowledgment under certain constraints:

[HN6] An acknowledgment of the justness of a claim that appears to be barred by limitations is not admissible in evidence to defeat the law of limitations if made after the time the claim is due unless the acknowledgment is [**9] in writing and signed by the party to be charged.

Tex. Civ. Prac. & Rem. Code § 16.065. [HN7] An acknowledgment under Texas law must: (1) be in writing and signed by the party to be charged; (2) contain an unequivocal acknowledgment of the justness or the existence of the particular obligation; and (3) refer to the obligation and express a willingness to honor that obligation. *Stine v. Stewart*, 80 S.W.3d 586, 591, 45 *Tex. Sup. Ct. J.* 966 (Tex. 2002). Under Texas law, an acknowledgment operates as a new obligation rather than merely as a revival of prior debt. *In re Vineyard*, 132 F.3d at 271.

As applied here, assuming the August 1996 letter is an acknowledgment of a new obligation, the four-year statute of limitations began running in August 1996. Because C&W commenced this action on October 15, 2002, two years after the statute of limitations expired, thus the cause of action on the obligation is time barred.

The March 10, 1999, financial statement is a conditional agreement whose condition has not been triggered. [HN8] Under Texas law, "if the expression of a willingness to pay is coupled with conditions, it devolves upon the plaintiff [**10] to prove that the named conditions have taken place." *Luck v. Riggs Optical Co. Consolidated*, 149 S.W.2d 204, 206 (Tex. Civ. App. -- Fort Worth 1941). The preamble to the March 10, 1999, financial statement which states a purpose "of procuring credit from time to time . . ." does not qualify as an acknowledgment. For the condition that triggers a

payment obligation to occur, C&W must demonstrate that Knox received credit from their company. The record does not show that C&W or its predecessors extended credit to Knox, thus no genuine issue of material fact exists to show [*940] that the financial statement of March 10, 1999, is an acknowledgment of debt. Moreover, there is no showing of an unequivocal intent by Knox to pay the alleged obligation. The financial statement has no explicit or implicit expression of a willingness to pay the obligation; at most, the financial document is merely information provided to a potential lender.

We are not persuaded by C&W's reliance on *Mercantile Nat'l Bank at Dallas v. Acoustics, Inc.*, 589 S.W.2d 773 (Tex. App. -- Eastland 1979) to support its acknowledgment argument. In *Mercantile*, the court held that an unqualified [**11] acknowledgment of an existing debt implies a promise to pay, and as a corollary, from any written acknowledgment that the debt is subsisting will be implied a promise to pay the debt notwithstanding an express promise. *Id.* at 775-76. In its analysis, the *Mercantile* court determined that the debtor's listing of certain notes payable as liabilities on its balance sheets constituted an acknowledgment. *Id.* In the case sub judice, the current facts are distinguishable from *Mercantile*. Here, the financial statements were conditioned upon the extension of credit, whereas in *Mercantile* there were no conditions contained in the balanced sheets. Thus, we do not find *Mercantile* to be controlling.

Furthermore, we reject C&W's partial payment argument; it is well-established [HN9] under Texas law that partial payment of a debt does not constitute an acknowledgment. See *Gabriel v. Alhabbal*, 618 S.W.2d 894, 897 (Tex. Civ. App. -- Houston [1st Dist.] 1981). Reference to account numbers does not change this result. See *Stine*, 80 S.W.3d at 591.

For the aforementioned reasons, C&W has not shown a genuine issue of material fact to [**12] demonstrate that Knox acknowledged his debt, and therefore, we find the district court's denial of notice to be harmless error.

II. Tolling Provision

C&W also argues that as an assignee of the FDIC it is entitled to benefit from the tolling provision in 28 U.S.C. § 2415 for partial payments made after the

assignment. After a careful and complete review of the arguments and the record we must reject C&W's challenge. For the reasons thoroughly addressed by the district court, we affirm.

For the aforementioned reasons, we affirm the district court's *sua sponte* grant of summary judgment. AFFIRM.

CONCLUSION