[Cite as *Davidson v. Davidson*, 2005-Ohio-6414.]

IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY

JOHN C. DAVIDSON

PLAINTIFF-APPELLANT **CASE NO. 17-05-12**

v.

NED O. DAVIDSON, ET AL. **O P I N I O N**

DEFENDANTS-APPELLEES

CHARACTER OF PROCEEDINGS: **Civil Appeal from Common Pleas Court**

JUDGMENT: **Judgment Affirmed in Part, Reversed in Part and Cause Remanded**

DATE OF JUDGMENT ENTRY: **December 5, 2005**

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ROGERS, J.

{¶1} Plaintiff-Appellant, John C. Davidson ("Appellant"), appeals a judgment of the Shelby County Court of Common Pleas, granting Defendant-Appellee's, Ned O. Davidson ("Appellee"), co-executor of the estate of Carl S. Davidson ("Carl's Estate"), motion to dismiss, under Civ.R. 12(B)(6) and Civ.R. 12(F).[1] On appeal, Appellant asserts that the trial court erred when it dismissed his complaint for failure to state a claim under Civ.R. 12(B)(6). Additionally, Appellant asserts that the trial court erred when it dismissed his complaint pursuant to Civ.R. 12(B)(6), because the trial court should have converted the case for consideration under Civ.R. 56 as a motion for summary judgment. Finding that the Appellant has set forth facts which, if proven, would allow him to recover with respect to accrued interest payments on the promissory note, we reverse that portion of the trial court's judgment and remand the matter for further proceedings consistent with this opinion. However, the judgment is affirmed in all other respects.

{¶2} In November of 2004, Appellant instituted a civil action and commenced litigation against his two brothers, Appellee and Steven C. Davidson

[1] Steven C. Davidson, who is the other co-executor of the Estate, is not an appellee in the case sub judice. By order of the Probate Court filed December 20, 2004, the Probate Court determined that by reason of Appellee, Ned O. Davison, being the sole residuary beneficiary of the Estate, the defense of the case sub judice would be permanently assigned to him. The Probate Court also ordered Appellee to obtain legal counsel separate and independent from legal counsel representing the Co-Executors in their administration of the Estate.

("Steven"), as co-executors of Carl's Estate. In Count One of his complaint, Appellant alleged that he filed a valid claim against Carl's Estate, which was rejected, and that Appellant needed to commence an action within two months of such rejection under R.C. 2117.12. In Count Two, Appellant alleged that he has a valid claim against Carl's Estate in the amount of $28,203.68, together with interest, arising out of a one-half (1/2) interest in a "promissory note." The "promissory note" was a handwritten document, attached to the complaint, allegedly executed on or about January 6, 1986, by the parents of Appellant and Co-executors, Carl S. Davidson ("Carl") and Ruth M. Davidson ("Ruth"). Also, in Count Two, Appellant alleged that no payments had been made on the "promissory note" and that he was entitled to receive one-half of the balance due on the "promissory note." In Count Three, Appellant alleged that the denial of his claim against Carl's Estate resulted in Appellee's unjust enrichment. Finally, in Count Four, Appellant alleged that co-executors must act in unison to properly reject a claim against an estate, and that Steven's failure to reject his claim resulted in a de facto acceptance of Appellant's claim against Carl's Estate.

{¶3} The handwritten document, which was signed on or around January of 1986, memorializes an agreement between Ruth and Carl. According to the document, Ruth used funds deposited in two bank accounts, which were payable on death to Appellant and Steven, to pay off a loan on a parcel of real estate

purchased from the estate of Anne E. Davidson. In total, Ruth expended $54,407.36. Both Ruth and Carl agreed that the interest rate on the loan for the first year would be eight-percent and that the interest rate would be negotiated at a rate similar to that offered by the Peoples Savings Loan. The document also stated that the first interest payment was to be paid to Ruth from the Davidson Farm funds and principal payments could be made as Carl desires. The document then explicitly states in its fourth and fifth paragraphs, respectively:

> **In case of death of Ruth M. Davidson all payments should be made to John C. Davidson and Steve C. Davidson.**
>
> **This document is not recorded, so do not enter it as an asset or debit in the Estate of Carl S. Davidson or Ruth M. Davidson.**

{¶4} In January of 2005, based on the language in the fifth paragraph, Appellee filed a motion to dismiss under Civ.R. 12(B)(6) and Civ.R. 12(F), asserting that those provisions in the document itself, which Appellant believed to be a promissory note, expressly prohibited Appellant's action. Appellant responded with a memorandum contra, which alleged that the promissory note attempted to shield the promissory note from the Ohio State Department of Taxation.

{¶5} In February of 2005, the trial court granted Appellee's motion to dismiss on all counts. The trial court found that based upon the fifth paragraph of the handwritten document that Appellant was not entitled to the relief, which he

requested. Specifically, the trial court found that the fifth paragraph of the handwritten document was indivisible and nonseverable from the handwritten document and that the fifth paragraph was not void, illegal, or contrary to public policy. Further, the trial court found that the fifth paragraph in the handwritten document created a condition subsequent that relieved liability under the handwritten document and expressly precluded each of the Appellant's claims.

{¶6} It is from this judgment that Appellant appeals, presenting the following assignments of error for our review:

Assignment of Error No. I

> **It was an error for the trial court to dismiss the complaint of the plaintiff-appellant to Rule 12(B) of the Ohio Civil Rules of Procedure, as the complaint presented elements of the claim with sufficient particularity that reasonable notice was provided (sic) the opposing party.**

Assignment of Error No. II

> **It was an error for the trial court to dismiss the complaint of the plaintiff-appellant pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure, whereas the trial court's decision should have been properly considered after a Rule 56 motion for Summary Judgment.**

Assignment of Error No. I

{¶7} In his first assignment of error, Appellant asserts that the trial court erred in granting Appellee's motion to dismiss, under Civ.R. 12(B)(6), because Appellant's complaint presented elements of the claim with sufficient particularity

and reasonable notice was provided to Appellee. We agree in part and disagree in part.

Standard of Review

{¶8} An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review. See *Cincinnati v. Beretta U.S.A. Corp*., 95 Ohio St.3d 416, 2002-Ohio-2480, at ¶ 4-5. In reviewing whether a motion to dismiss should be granted, we accept as true all factual allegations in the complaint. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. However, "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *Schumacher v. Amalgamated Leasing, Inc.*, 156 Ohio App.3d 393, 2004-Ohio-1203, at ¶ 5, citing *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144-45. "In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ.R.12(B)(6)), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus, following *Conley v. Gibson* (1957), 355 U.S. 41.

Count One

{¶9} In the case sub judice, Appellant filed a complaint asserting four counts. Count One provided that Appellant was required to commence an action

within two months of receiving the rejection from Appellee, under R.C. 2117.12. Otherwise, Count One only alleged facts. Thus, since Appellant satisfied the requirements of R.C. 2117.12 and Count One does not allege more than facts, we sustain Count One of Appellant's complaint.

Counts Two, Three, and Four

{¶10} Counts Two, Three, and Four involve the handwritten document, which was attached to the complaint. Appellant asserted that the handwritten document was a promissory note executed by his parents. Upon review and under the standard of review of Civ.R. 12(B)(6), we are willing to construe the hand written document as a promissory note, because the document contains a written promise of Carl to pay either Ruth or Appellant and Steve the definite sum of $54,407.36, plus eight percent interest per annum. See Black's Law Dictionary (8th Ed. 2004) 1089; *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, at ¶ 10. As an initial matter, we note that a promissory note is considered a contract as a matter of law. See *Edward A. Kemmler Memorial Found. v. 691/733 East Dublin-Granville Road Co.* (1992), 62 Ohio St.3d 494, 498-500.

{¶11} Ohio law provides that "contracts must be given a just and reasonable construction in order to carry out the presumed intent of the parties." *E.S. Preston Associates, Inc. v. Preston* (1986), 24 Ohio St.3d 7, 9-10. It is well recognized that "[c]ontracts are to be interpreted so as to carry out the intent of the

parties, as that intent is evidenced by the contractual language." *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 247, para. one of the syllabus. A court may not rewrite an agreement simply because it believes the agreement could have or should have been written more fairly, absent evidence that the contract is in violation of public policy, or that a party was led to enter the agreement as a result of incompetency, fraud, duress, or undue influence. *Ervin v. Garner* (1971), 25 Ohio St.2d 231, 239-40; *Emerick v. Armstrong* (1824), 1 Ohio 513, 513, 519; see, *Knapp v. Knapp* (1986), 24 Ohio St.3d 141, 148 (Celebrezze, C.J., dissenting).

{¶12} In Count Two, Appellant alleges that he is entitled to the sum of $28,203.68 together with interest on the promissory note. Appellant also alleges that no payments have been made on the note since 1990 and by the terms of the note, "[he] is entitled to receive one-half of the balance due on the note." Since Appellant has alleged two avenues for recovery, under Count Two, we shall discuss them separately. We begin with the claim for $28,203.68 together with interest on the promissory note.

{¶13} Appellant included with his complaint a copy of the promissory note and a schedule of payments made on the note. According to the schedule, as of February 2, 1990, the balance due on the note was $56,407.36. The schedule shows that four payments were made, one each year, from 1987 to 1990. The schedule also shows that these payments were interest only payments at an interest

rate of eight percent. Therefore, Appellant's claim for $28,203.68 plus interest represents one-half of the principal due on the promissory note as of 1990 including interest owed on the principal.

{¶14} We agree with the trial court that the promissory note itself cannot be enforced against Carl's Estate. The fifth paragraph of the promissory note explicitly states that "[t]his document is not recorded, so do not enter it as an asset or debit in the Estate of Carl S. Davidson * * *. " Therefore, when Carl passed away, any further obligation under the promissory note was extinguished. Specifically, we read the fifth paragraph as a valid contract provision forgiving any debt that is left payable under the promissory note at the time of Carl's death. See *Twyman v. Wood* (1939), 61 Ohio App. 229. As a result, the trial court was correct in concluding that the unaccrued payments under the promissory note at the time of Carl's death were forgiven and cannot be enforced against Carl's Estate.

{¶15} Nevertheless, we do not agree with the trial court's broad exclusion of Appellant's claims based upon the fifth paragraph of the promissory note. Specifically, when we look at the terms of the promissory note, we first note that the funds used to pay off the loan creating the promissory note came from two of Ruth's payable on death accounts, which were payable to Appellant and Steven. Thus, when Ruth died, the funds used to pay off the loan creating the promissory

note would have been paid to Appellant and Steven, if the funds had not been used to pay off the loan or for some other purpose. Also, the fourth paragraph provides that all payments on the note should be made to Appellant and Steven, after Ruth passed away.

{¶16} Carl made payments to Ruth up until the time she passed away. However, after Ruth passed away, in 1990, Appellant alleges that Carl stopped making payments. Thus, there are accrued payments on the note from 1990 until Carl's death, which were never paid. Looking to the terms of the promissory note, we notice that it is silent on the enforcement of these accrued payments. Under the maxim, *expression unius est exclusion alterius*, or the expression of one thing implies exclusion of the other, since the promissory note specifically expresses the exclusion of the promissory note from Carl's Estate, it implies that the accrued promissory note payments, prior to Carl's death, should be enforced against Carl's Estate.

{¶17} As a result, Carl and Ruth could have intended these accrued interest payments to be enforced against Carl's Estate. Therefore, while we agree with the trial court's determination with regards to the interest and principal to be paid on the note after Carl died, we believe that Appellant has stated a cause of action based on the accrued payments, which Carl never paid. As a result, Appellant has set forth facts, which if proven, would allow him to recover under Count Two.

{¶18} In Count Three, Appellant alleged that Appellee's denial of his claim resulted in Appellee's unjust enrichment. Under the Last Will and Testament of Carl S. Davidson, Appellee received the real property that Ruth loaned money to purchase creating the promissory note. Appellant asserts that when Appellee denied his claim, Appellee was unjustly enriched with a share of the assets that Appellant was supposed to receive as evidenced by the promissory note. We disagree.

{¶19} Appellant's claim that Appellee was unjustly enriched is legally insufficient, since the promissory note is an express contract between Carl and Ruth, with Appellant as a third-party beneficiary. Ohio law does not recognize an equitable claim for unjust enrichment, as a matter of law, when an express contract covers the same subject matter. *Ullman v. May* (1947) 147 Ohio St. 468, 479. "Unjust enrichment is an equitable doctrine to justify a quasi-contractual remedy that operates in the absence of an express contract or a contract implied in fact to prevent a party from retaining money or benefits that in justice and equity belong to another." *Turner v. Langenbrunner,* 11th Dist. No. CA2003-10-099, 2004-Ohio-2814, at ¶ 38, citing *Univ. Hosps. of Cleveland, Inc. v. Lynch,* 96 Ohio St.3d 118, 2002-Ohio-3748, at ¶ 60. As stated above, since the promissory note includes how it is to be enforced, the equitable doctrine of unjust enrichment does

not apply, because Appellant could recover based upon the terms of the promissory note.

{¶20} Further, Appellant did not properly plead any operative facts which would allow a claim for unjust enrichment. Three elements must be pled in order to establish a claim for unjust enrichment: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *Hambelton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183. In his complaint, Appellant did not plead the three elements required to establish an unjust enrichment claim, and as a result, the trial court properly dismissed Count Three from the proceedings.

{¶21} In Count Four, Appellant alleged that since Appellee and Steven did not act in unison in rejecting Appellant's claim, Appellant's claim was not properly rejected, and as a result, Appellant's claim was been accepted de facto. We disagree.

{¶22} In *Harrold v. Romick*, this Court held that when one co-administrator rejects a claim against an estate and the other co-administrator accepts a claim, the claim is considered rejected by both. (1934), 17 Ohio Law Abs. 467, 467-68. Specifically, this Court stated, "[a]s the allowance of the claim by [one co-administrator] was not concurred in by her co-administrator, such

action of [the accepting co-administrator] was ineffective to allow the claim and the claim stood on the same legal basis as if it had been disallowed by both administrators." Id. at 468.

{¶23} In the case sub judice, Steven did not sign the rejection of Appellant's claim. Only Appellee, as Co-Executor, signed the rejection. Steven's failure to sign the rejection can either be construed as an acceptance of or a rejection of Appellant's claim. Following our precedent in *Romick*, regardless of whether Steven's failure is considered an acceptance or a rejection of Appellant's claim, the claim is considered rejected. As a result, Appellant has not set forth facts, which if proven, would allow him to recover under Count Four.

{¶24} Based on the above, we are satisfied that, taking the allegations in the complaint as true, Appellant has set forth facts which, if proven, would allow him to recover under Count Two for the accrued payments on the promissory note, which were never paid after Ruth's death and before Carl's death. We also sustain Count One, because it is completely factual in nature. Additionally, based on the above, we are satisfied that, taking the allegations in the complaint as true, Appellant has not set forth facts which if proven, would allow him to recover under Count Two for the unaccrued interest payments and principal remaining on the promissory note, under Count Three's unjust enrichment claim, or Count Four's de facto acceptance claim.

{¶25} Accordingly, the trial court erred in dismissing Appellant's complaint pursuant to Civ.R. 12(B)(6) on the issue of the accrued interest payments. Specifically, we sustain Appellant's assignment of error as to Count One in its entirety and Count Two with respect to the accrued payments. And, we overrule Appellant's assignment of error as to Count Two with respect to the interest and principal payments which were to be paid after Carl's death, and Counts Three and Four in their entirety.

Assignment of Error No. II

{¶26} In his second assignment of error, Appellant asserts that the trial court erred when it dismissed Appellant's complaint under Civ.R. 12(B)(6) instead of properly deciding the case under Civ.R. 56. However, we note that the trial court did not advise the parties of any intent to convert the motion, nor did the court allow the submission of the additional evidentiary materials that could have been properly considered pursuant to Civ.R. 56.

Civil Rule 12(B) provides in part:

> When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

{¶27} In the case sub judice, it does not appear that the court considered any matters outside of the pleadings in rendering its opinion. Therefore, it did not err in failing to convert the motion to dismiss to a motion for summary judgment. Accordingly, we overrule the second assignment of error.

{¶28} Having found no error prejudicial to Appellant in the trial court's dismissal under Civ.R. 12(B)(6) on Count Two, with respect to the principal and unaccrued interest payments after Carl's death, Count Three, and Count Four, and Appellant's second assignment of error, but having found error prejudicial to Appellant on Count One and Count Two, with respect to the accrued interest payments, we affirm in part, reverse in part, and remand the matter for further proceedings consistent with this opinion.

Judgment Affirmed in Part and Reversed in Part and Cause Remanded.

BRYANT, J., concurs in Judgment Only.
SHAW, J., concurs.

/jlr