

MISSOURI COURT OF APPEALS
EASTERN DISTRICT

APPEAL NO. ED 107613

DIGREGORIO FOOD PRODUCTS, INC.,
a Missouri Corporation

Plaintiff/Respondent,

vs.

JOHN RACANELLI
an individual

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI
CAUSE NO. 16SL-CC04484
HONORABLE THEA A. SHERRY, CIRCUIT JUDGE

BRIEF OF RESPONDENT
DIGREGORIO FOOD PRODUCTS, INC.

Ronald A. Caimi #31492
VOGLER & ASSOCIATES, LLC
Attorneys for Respondent/Plaintiff
11756 Borman Drive, Suite 200
St. Louis, Missouri 62146
314-567-7970
rcvoglaw@gmail.com

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JURISDICTIONAL STATEMENT

Respondent DiGregorio Food Products, Inc. (DiGregorio) filed a breach of contract action against an individual, Appellant John Racanelli (Racanelli) in the Circuit Court of St. Louis County, Missouri on December 5, 2016. (LF 43) Racanelli filed his Answer with an affirmative defense alleging that DiGregorio's lawsuit was filed beyond the applicable statute of limitations. (LF 49)

Racanelli made a statute of limitations argument in a Motion For Summary Judgement which the trial court, Hon. Ellen Sue Levy, denied on June 26, 2017.

The trial court, Hon. Thea A. Sherry, conducted a bench trial on January 14, 2019 and entered a judgment in favor of DiGregorio on January 22, 2019 in which it was specifically ruled that DiGregorio filed a timely lawsuit pursuant to the ten year statute found in RSMo 516.110(1) R.S.Mo.

No issue on appeal is within the exclusive jurisdiction of the Missouri Supreme Court. Jurisdiction in the Missouri Court of Appeals is proper pursuant to the Missouri Constitution Article V, Section 3 as this action does not involve a statute or treaty of the United States, the validity of a statute or provision of the Missouri Constitution, the construction of Missouri revenue laws, the title to any state office or the imposition of the death penalty. The Circuit Court of St. Louis County, Missouri is within the territorial jurisdiction of this Court of Appeals. Section 477.040 R.S.Mo.

LEGAL ISSUES FOR REVIEW

Appellant asserts the legal issue for review is : “Whether an unwritten “sale of goods” contract may be enforced more than six years after the plaintiff learned of its breach.”

Respondent asserts that a more accurate legal issue for review is whether Respondent’s detailed invoices contain all of the elements of a written promise to pay thereby requiring that the ten year statute of limitations applies to the facts presented at trial.

STANDARD OF REVIEW

Appellant asserts that only a de novo standard of review is appropriate here and that this Court, therefore, must review the trial court’s determination independently without deference to the court’s conclusions citing **DAN Joint Venture III v. Clark, 218 SW3d 455 (MoApp 2006)**. However that case specifically rules that “where a statute of limitations is asserted as a defense the suit may only be dismissed by a motion to dismiss where the Petition establishes on its face that the action is time barred.” **Id. at 458**. Appellant’s counsel made an oral motion to dismiss at the close of the evidence arguing for a five year statute of limitations . (Tr.132) The motion was denied by the trial court in its award (L.F. 80). Digregorio’s Petition (L.F. 43-48) did not establish on its face that the lawsuit was barred by statute of limitations and, in any case, Appellant’s counsel did not make that argument in his oral motion.

The standard of review of the findings of fact by the trial court should be that the

judgment of the trial court will be affirmed "unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." White v. Director of Revenue, 321 SW3d 298, 307-08 (MO banc 2010). Pearson v. Koster, 367 SW3d 36, 43-4 (MO banc 2012).

STATEMENT OF FACTS

DiGregorio is a Missouri Corporation and manufacturer/supplier of food supplies primarily selling to restaurants and Italian grocery stores. It sold food supplies to John Racanelli, an individual who operated several pizza restaurants in St. Louis, Missouri, in 2009 and 2010. The parties began doing business in the mid-1990's when Racanelli approached DiGregorio to purchase their food products for his pizza restaurants. (TR. 10-11).

Procedurally, either Racanelli or an employee of his would call in an order to DiGregorio. The order was then filled from the DiGregorio warehouse. The next day DiGregorio would give its driver a written invoice, load the truck, deliver to a Racanelli restaurant, and get a signature from a Racanelli manager. (TR. 14-15)

Each invoice prepared by DeGregorio was copied to Racanelli. Each invoice contained the following information:

- Identification of DiGregorio as the seller;
- Identification of Racanelli as the buyer and specifically designating which Racanelli restaurant delivery was to be made to by location and address;
- Date the order was made;
- List of food sold;
- Unit and total price for food sold;

—Time payment was due;

—Signature of Racanelli's employee who accepted delivery.

All of the terms of the agreement are on the face of each written invoice:

The parties, the products sold and the cost, and the signature representing acceptance of product and payment terms, the affirmation of acceptance and inferred promise to pay. (TR. 17-19, 60).

DiGregorio presented evidence of invoices from 2009-2010 which were unpaid and the subject of its lawsuit.(L.F. 44-48). The total unpaid in 2010 was \$44,383.45. (L.F. 43).

Racanelli was the party identified in each written invoice and John DiGregorio testified that each written invoice represented a written promise to pay from the man he was selling to, John Racanelli. (TR. 57). DiGregio also testified that Racanelli acknowledged to him that he received the account statements he was sent . (TR. 44-1,7 and 46-1,2) and that they had a few conversations after the debt increased in which Racanelli confirmed that he would make payment. (TR. 59).

Racanelli confirmed that records of the Missouri Secretary of State established that he did not register a fictitious name for any of his pizza restaurants until 2014, long after the 2009-2010 debts had been incurred and the transactions for those debts carried out. (TR. 85-86). Racanelli testified that he employed managers to sign invoices from DiGregorio and other vendors. (TR. 86-88) and while he may not have actually seen DiGregorio invoices he did see employee prepared reports containing information about those sales. (TR.86). He also testified that, although the statements of account were sent to him (and his wife) at either

his home address or one of his pizza restaurants, he could not recall receiving them. (TR.87-88).

Racanelli testified that he was president of several corporations but did not know when they were incorporated but then said it was before 2009. (TR. 90). He offered no evidence supporting that. He testified he had tax documents sent to DiGregorio establishing his corporate status and checks showing sales taxes paid by corporations but offered no corroborating evidence.(TR. 100, 113). He testified that his corporations derived a benefit from the purchase of DiGregorio products but that he did not personally although he could not remember if his corporations, for which he acted as president, paid him a salary for 2009-2010. (TR.109). He had no evidence that his corporations paid DiGregorio for food purchased in 2009-2010. (TR.111). In short, it was Racanelli's testimony that he was not an individual making purchases for his various restaurants from DiGregorio in 2009-2010 but instead his corporations made those purchases. But the purchases were made. He offered no evidence of the existence of the corporations contemporaneous with the 2009-2010 invoices. No evidence of the corporations Racanelli mentioned appeared on those invoices as a party thereto.

PROCEDURAL HISTORY

Respondent adopts the procedural history presented in Appellant's brief.

POINTS RELIED ON

THE TRIAL COURT CORRECTLY FOUND THAT THE 10 YEAR STATUTE OF LIMITATIONS, RSMo 516.110 (1), APPLIED BECAUSE EACH OF RESPONDENT'S INVOICES REPRESENT A WRITTEN PROMISE TO PAY MONEY AS CONTEMPLATED IN THE STATUTE.

ARGUMENT

The trial court ruled that, based on credible evidence, the 10 year statute of limitations applied and so the Respondent's Petition was timely filed. In support the trial court found:

- All unpaid invoices were addressed to Racanelli at his various restaurants.
- The Secretary of State's office showed the restaurants owned by John Racanelli.
- Racanelli's testimony about corporate entities owning his restaurants was not credible.
- None of Racanelli's defenses were compelling or credible.

The Missouri Supreme Court, construing Rule 73.01, found that on appeal of a case tried by the court without a jury, among other things the Rule requires the "due regard shall be given to the opportunity of the trial court to have judged the credibility of the witness."

Murphy v. Carron, 536 SW2d 30, 31 (MO banc 1976). The testimony offered by John Racanelli regarding corporate ownership of his pizza restaurants goes to the issue of who was promising to pay for the food on each DiGregorio invoice - a corporation or John Racanelli, an individual.

The trial court, having had the opportunity to consider Racanelli's testimony, found it not to be credible. He failed to corroborate any of his testimony regarding the establishment of corporate entities or sales tax liability. He did not register the fictitious names of his restaurants until after the debt accrued. There is sufficient evidence supporting the trial court's determination that his testimony was neither compelling nor credible and, on review, that finding should not be altered. The Court of Appeals recognizes, in reviewing the decision of a trial court, that the trial court "is in a better position to determine the factual issues than the appellate court reviewing the record on appeal." **Pearson v. Koster, 367 SW3d 36, 43 (MO banc 2012).**

Regarding questions of law, specifically what statute of limitations applies, the Respondent believes each invoice offered as evidence at trial represents a separate and complete promise to pay money by John Racanelli to DiGregorio. A written contract must contain certain essential elements:

1) Competent Parties:

The parties here were Digregorio, a corporation, and Racanelli, an individual.

No credible evidence was offered at trial to prove otherwise or that either lacked capacity to contract for the purchase and sale of the food products. Both parties admitted the sale and purchase of food between them.

2) Subject matter

This was the food products identified in each invoice.

3) Legal consideration

In exchange for the money quoted for the food on the invoice, DiGregario sold its food products. No dispute as to adequacy of consideration arose at trial.

4) Mutuality of agreement

This is defined as a meeting of the minds. Each invoice listed food products and their list price. Each invoice was signed by an employee of Racanelli signifying acceptance .

4) Mutuality of obligation

DiGregorio was obligated to deliver the food products in a usable condition and Racanelli was obligated to pay the agreed price. Those promises are obvious from each invoice.

Building Erection v. Plastic Sales and Mfg., 163 SW3d 472, 476 (MoApp 2005).

The invoices each separately contain the essential elements of a contract.

So what remains for the Court of Appeals to determine or affirm is whether the invoices contain a promise to pay money by the individual, John Racanelli.

The amount a defendant agrees to pay can be proven by the use of extrinsic evidence. **Hughes Development Company v. Omega Realty Company, 951 SW2d 615, 616 (MO banc 1997).**

Each invoice contains an amount of the food items sold . No extrinsic proof is necessary.

However, the promise to pay must arise by the writing itself and cannot be proven with extrinsic evidence. **Capital One Bank v. Creed, 220 SW3d 874, 878 (Mo App 2007).**

Appellant argues that the invoices contain no written promise to pay money by John Racanelli or anyone else. In fact, there is a clear promise to pay money evidenced by the signature on each invoice. John DiGregorio testified that each invoice, being the customary way he does business in his industry, is prepared specifically in response to an order placed by an employee of John Racanelli. (TR. 13-15 and 15-19). He testified that John Racanaelli's name appears on each invoice because that is who he did business with for the sale and purchase of food products for use in Racanelli's pizza restaurants. (TR.10-13)and that each represented a

promise by John Racanelli to pay the quoted price on the invoice (TR. 71) . He testified that when he sold foods to a buyer identified on each invoice as Racanelli Delmar, Racanelli Fenton, etc, he was selling to John Racanelli food to be delivered to the location named because John Racanelli owned those restaurants. (TR.23-24) . He testified that the signatures on each invoice were an employee of John Racanelli which indicated a completed delivery and acceptance and promise to pay by John Racanelli. (TR. 25). He testified that, when the outstanding balance became too large, he sought collection from John Racanelli or his wife and no one else (TR.29-30) and that John Racanelli confirmed that payment would be made (TR.31).

The record contains no objection from Appellant to any of this this testimony at trial.

John Racanelli confirmed that he had operated pizza restaurants for over thirty years but that they were operated under “corporate entities”. (TR.78). The trial court found there was no credible evidence to support the corporate entities (L.F. 80) and the record shows Racanelli offered no corroborating evidence of these corporate entities. (Tr. 110, 111, 112, 113). Racanelli was unsure of when his alleged corporations were created and of exactly when they allegedly operated Racanelli’s Pizza restaurant locations (Tr.82). He testified he could not remember if he specifically placed food orders with DiGregorio . (TR.83). He could not remember when a fictitious name was registered for Racanelli’s Pizza. (TR. 84). Secretary of State records established it was not until 2014, four years after the debt at issue was incurred. (L.F. 48, p.18).

He testified that he may not have seen the invoices offered by Appellant but that he had reports which referred to food purchased from DiGregorio. He testified that he never

as an individual promised to pay for food purchased from DiGregorio (TR.92) but that his unproven corporations did (Tr.88). He also testified that he “personally” never did business under the names which appear on the invoices: Racanelli’s-Kirkwood, Racanelli’s Delmar, etc. but that his unproven corporate entities did.

The trial court ruled that he failed to establish either compelling or credible evidence of corporate existence or operation of Racanelli Pizza restaurants. As argued above, the trial court was in the best position to judge the credibility of John Racanelli and found it lacking. The appellate court should give the trial court’s factual findings due regard. **Murphy at 31.**

The invoices contain a promise to pay the stated price for foods sold and delivered by DiGregorio and accepted by Racanelli. The records establish these facts and the trial court so found. Racanelli testified that “my companies bought food from [DiGregorio].” (Tr. 79). But the trial court found no credible evidence of the existence of those companies as a corporate entity. He admitted the food products purchased from DiGregorio was sold in his Racanelli’s Pizza Restaurants but under corporate control. (TR. 80). But the trial court found no credible evidence of corporations. There is only one inference that can logically be drawn from the invoices: that John Racanelli promised to pay for the food ordered and accepted at his restaurants. His managers, who signed the invoices, would not have made that promise. No corporation has been established by the evidence which would have made that promise. The promise made by John Racanelli is the only logical inference that can be made. The appellate court must “consider the evidence in light most favorable to plaintiff and accord them the benefit of supporting inferences fairly and reasonably deducible from the evidence as well as inferences that may be reasonably drawn.” **Black v. Kansas City Southern Railway. Co.,**

436 SW2d 19, 23 (MO banc, 1968). The only inference that can be drawn from the face of the invoices is that John Racanelli, established to be the owner of the various pizza restaurants where DiGregorio sold and delivered its product, promised to pay the prices quoted for the product. The promise to pay money in the writing “need not be stated in express terms so long as the language of the writing, by fair implication, is open to the construction that it contains such a promise.” **Collins v. Narup, 57 SW3d 872-74 (MoApp 2001).** The writing in the DiGregorio invoices can be construed no other logical way but that John Racanelli promised payment for the food products purchased for his restaurants.

CONCLUSION

The overwhelming evidence presented at the trial of this matter was that John Racanelli, an individual, operated several pizza restaurants and purchased, either personally or through employees, food products for resale in those restaurants from DiGregorio Food Products, Inc. In 2009 - 2010, Racanelli continued making those purchases as established by written invoices setting out the parties, DiGregorio and Racanelli, the products and their cost, the terms of sale and payment, the delivery by DiGregorio and acceptance by Racanelli, and a promise by John Racanelli to pay for the items delivered. He was the only party established by competent evidence to be the owner of the restaurants. For those reasons, the Respondent respectfully requests that the Court of Appeals affirm the trial court’s finding that the 10 year statute of limitations for a lawsuit filed on a written contract for a promise to pay money, RSMo 516.110(1), applies and that Respondent/Plaintiff therefore filed it’s lawsuit in a timely manner .

Respectfully submitted,

/s/ Ronald A. Caimi

Ronald A. Caimi #31492
Vogler & Associates, LLC
Attorney For Respondent
11756 Borman Drive, Suite 200
St. Louis, MO 63146
314-567-7970
rcvoglaw@gmail.com

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CERTIFICATE OF COMPLIANCE

Counsel for Respondent DiGregorio Food Products, Inc. states:

1. The undersigned affirms that Respondent's Brief complies fully with requirements of Rule 55.03.
2. The undersigned affirms that Respondent's Brief complies with word limitations contained in Rule 84.06 (b) and that it contains 2,924 words.

/S/ Ronald A. Caimi

Ronald A. Caimi #31492
Vogler & Associates, LLC
Attorney For Respondent

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Respondent was filed electronically with the Clerk of the Court this 16 day of October, 2019 to be served by operation of the electronic filing system upon:

Peter J. Dunne and Henry F. Luepke, Attornies for Appellant, Pitzer Snodgrass, PC , 100 South Fourth Street, Suite 400, St. Louis, Missouri 63102.

/s/ Ronald A. Caimi
Ronald A. Caimi #31492
Vogler & Associates, LLC
Attorney for Respondent