STATE OF VERMONT
WINDSOR COUNTY, SS

Thomas A. Kellogg Plaintiff v. William H. Oren Defendant	SUPERIOR COURT Docket No. 750-10-09 Wrcv

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above-matter came on for hearing on June 15, 2010. Plaintiff was present and represented by his attorney, Frank Berk, Esq. Defendant was present and represented by his attorney, Stephen Craddock, Esq. Based upon the evidence at hearing, the Court makes the following findings, conclusions and order:

Findings of Fact

Thomas Kellogg lives in Bethel, Vt. William Oren lives in Pittsfield, Vt. The parties have known one another for about 25 years. During that time, the parties have had many transactions between them involving at least the purchase of land and guns. Oren claims their transactions have been much more extensive and have involved purchase and sale of coins and jewelry.

Oren lived in a house owned by Kellogg for several years, which Oren attempted to buy. A dispute between the parties resulted in litigation over the lease/purchase arrangement between Kellogg and Oren in Oren v. Shushereba and Kellogg, Docket # 532-7-08 Wrcv.

Kellogg has brought this action against Oren, claiming he made a loan to Oren on or about November 26, 2007 in the amount of $5000 to buy a plastic molding machine. Oren admits he has bought plastic molding machines but denies he borrowed money from Kellogg for that purpose. Kellogg gave Oren a check for $5000 (Pl. Ex 1). There was nothing in the memo section of the check to indicate what the money was for. There was no document to support the loan except for an entry into Kellogg's checkbook register (Pl. Ex.3) made nearly a year later that stated the funds were a loan. No testimony was introduced about the interest rate or terms of repayment except that the loan was for a two month period.

Kellogg claims that despite demand for repayment, Oren has refused to repay the loan. Kellogg did not remember making any demand for repayment until filing suit. He did not bring a counterclaim against Oren in the earlier litigation for the loan repayment. No payments have been received from Oren on this claimed loan since suit was filed.

Oren contends that the $5000 delivered by Kellogg in November 2007 was in payment for seven (7) gold Krugerrands which Oren sold to Kellogg. Kellogg denies buying any Krugerrands from Oren and denies discussing them with him. Kellogg denies having any knowledge of Oren's involvement in the buying or selling of coins. There are no documents to support the sale of any Krugerrands to Kellogg. Oren claims to be an experienced coin dealer with many years in the coin business. He did establish that he had purchased ten Krugerrands from a coin broker in Kenmore, N.Y. for $5520 in March 2006 (Def. Ex. F).

Oren claims that Kellogg has a faulty memory and recites a time when Kellogg allegedly returned a bracelet he had bought from Oren and wanted the $300 purchase price returned to him. Oren agreed and refunded the money. Several months later, Kellogg allegedly asked for the money again. Rather than argue about it, Oren claims he paid another $300 to Kellogg.

If, as Oren claims, Kellogg has a faulty memory, it is difficult to understand why Oren would sell $5000 worth of Krugerrands to Kellogg with no bill of sale and no documentation whatsoever.

Kellogg received several checks from Oren (Def. Ex. B, C , D, & E) during the fall of 2007. These payments were for mortgage payments and taxes on the home Oren and Shushereba were trying to buy from Kellogg. Oren claims these payments show he had funds available to him and did not need a loan from Kellogg. Oren has also introduced evidence showing nearly $10,000 in available credit on his credit card (at an interest rate of 21.49%) (Def. Ex. A) during November 2007. Oren therefore claims there was no need to borrow money from Kellogg during that time.

In the case brought by Oren against Shushereba and Kellogg a stipulation was entered into by Oren, Kellogg and Shushereba in an attempt to resolve the case. This stipulation called for Shushereba to obtain financing to buy the Kellogg property and to pay $40,000 to Oren in release of his interests in the property. The agreement further called for Oren to pay $5000 to Kellogg plus interest from the $40,000 he was to receive from Shushereba. The stipulation does not say what the $5000 payment was to be for, nor is there any explanation of why the $5000 had to be paid first to Oren and then to Kellogg rather than to Kellogg directly from Shushereba's funds. Shushereba never got the financing and the settlement did not occur.

Oren claims the stipulation does not show evidence of any debt from Oren to Kellogg. Oren claims he agreed to pay the $5000 in the stipulation, not because he owed Kellogg any money, but because he felt it was the only way he was going to get any money from Shushereba.

Another issue raised in this litigation concerns Kellogg's claims he lent Oren two 30 phase converters, one of 5 horse power and another of 7.5 horse power. Kellogg claims that despite demand for return of the converters, Oren has refused to return them. Oren claims these converters were a gift to him by Kellogg in 2002. Kellogg did not ask for the converters back until 2009. Oren had given Kellogg a Harley Davidson rocking horse at another time. Kellogg says Oren can have it back if he wants it.

The parties have agreed to return converters and hobby horse respectively. The parties agree those issues have been resolved and need not be decided by the Court.

Conclusions of Law

This case involves a very poorly documented transaction of some nature between these parties. It is not disputed that $5000 was provided by Kellogg to Oren in November 2007. Kellogg claims the money was a loan and Oren claims the money was in payment for seven Krugerrands. Neither party bothered to document the transaction.

The burden of proof to establish the elements for the claim for relief rests with Plaintiff. *Thurston v. Leno*, 124 Vt. 298 (1964); *Shanks v. Lavalee*, 118 Vt. 433 (1955). The burden is satisfied by proof by a preponderance of the evidence. *Livanovitch v. Livanovitch*, 99 Vt. 327 (1926). Given the paucity of supporting documentation, and the parties' contrary explanations for the transaction, the resolution of this dispute largely turns on the issue of credibility.

The finder of fact is best positioned to determine weight of evidence, credibility and demeanor of witnesses, and persuasive effect of testimony. *Benson v. Muscari*, 172 Vt. 1 (2001). Although urged to do so by Plaintiff's counsel, the Court is not considering issues of credibility as determined in the earlier action involving these parties. Rather, the determination is made solely on the testimony and evidence in this case.

Applying that standard, the Court finds the Plaintiff to be more credible in his description of this transaction as a loan for which there was an expectation of repayment. There are two pieces of written material providing some support for Plaintiff's position: the check register and the stipulation for the Oren case. Admittedly, the check register entry was after-the-fact and self serving. However, the stipulation credibly appears to be an acknowledgement of a debt by Oren to Kellogg, especially having in mind that Oren was the Plaintiff in that litigation.

In addition, Oren's explanations are not credible. Oren claims that Kellogg has a faulty memory, but at the same time, Oren, despite his lengthy experience in the coin business, made no documentation of any transaction concerning the sale of expensive coins to Kellogg, be it a description of them, a sales receipt, or other similar record. This lack of documentation is noteworthy given the specificity of the documentation when Oren purchased the coins himself.

That Oren had paid Kellogg other monies or had credit available through his credit card does not persuade the Court that a loan did not take place. The payment of money for one purpose does not mean money is not needed by way of a loan for another purpose. The availability of credit at a very high interest rate does not mean monies might not be sought on more favorable terms.

In short, the Court finds that Kellogg has carried his burden of proving by a preponderance of the evidence that this was a loan. Kellogg is therefore entitled to a judgment for the principal amount of the loan.

It is the general rule that prejudgment interest is available as of right in cases in which the debt is liquidated or capable of ready ascertainment. *Herbert v. Town of Mendon*, 159 Vt. 255 (1992). In the absence of proof of a contract provision relating to interest, the general rule is that interest begins to run on the date the debt became payable, *Vermont Structural Steel Corp. v. Brickman*, 131 Vt. 144 (1973), and in the absence of other evidence a debt becomes payable when payment is demanded or when suit is brought (which is a judicial demand for payment). *VanVelsor v. Dzewaltowski*, 136 Vt. 103 (1978). Here, Kellogg has not satisfied his burden of showing the terms of the loan with respect to interest, and he did not make any demand for repayment until this suit was filed. Accordingly, prejudgment interest is to run from the date suit was brought. *Vermont Structural Steel Corp. v. Brickman*, 131 Vt. 144 (1973).

As a result, Plaintiff is entitled to judgment against Defendant in the amount of $5000, plus interest from the date suit was brought, plus costs. Plaintiff's attorney shall submit a form of judgment to the court within five days from the date of this decision. Any objections to the form of the judgment shall be filed within five days thereafter.

Dated at Woodstock, Vermont this 17th day of June, 2010.

Harold E. Eaton, Jr.
Superior Court Judge