

STATE OF MICHIGAN
COURT OF APPEALS

FISHER SAND AND GRAVEL COMPANY,

Plaintiff-Appellant,

v

NEAL A. SWEEBE, INC.,

Defendant-Appellee.

FOR PUBLICATION

June 7, 2011

No. 297156

Midland Circuit Court

LC No. 09-005960-CK

Advance Sheets Version

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent.

This appears to be a case of first impression in Michigan. The majority concludes that the payment on an open account that relates to the sale of goods is subject to the four-year limitations period in the Uniform Commercial Code (UCC), MCL 440.2725(1). I disagree with the majority, for two reasons. First, the current state of the law in Michigan requires a different conclusion. Second, the UCC does not abrogate common-law jurisprudence in Michigan concerning open accounts.

I. CURRENT STATE OF THE LAW

The current state of the law in Michigan is as follows: Payment on an open account triggers a new obligation, separate and distinct from an underlying agreement. See, e.g., *Collateral Liquidation, Inc v Palm*, 296 Mich 702, 704; 296 NW 846 (1941), and *Bonga v Bloomer*, 14 Mich App 315, 319; 165 NW2d 487 (1968). The Revised Judicature Act provides a limitations period of six years for “actions to recover damages or sums due for breach of contract.” MCL 600.5807(8). Until such time as the Supreme Court reverses these decisions, this Court is required to follow the decisions. *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006).

II. THE UCC CANNOT IMPLICITLY ABROGATE MICHIGAN’S OPEN-ACCOUNT JURISPRUDENCE

The majority concludes that the UCC *implicitly abrogates* Michigan’s jurisprudence concerning open accounts.¹ I disagree. There exists no affirmative provision of the UCC or other Michigan legislation that exhibits a legislative intent to abrogate Michigan’s jurisprudence concerning open accounts. More importantly, with respect to the repeal of statutes, our Supreme Court has rejected the notion of repeal by implication. In *Valentine v Redford Twp Supervisor*, 371 Mich 138, 144; 123 NW2d 227 (1963), the Court, quoting *People v Buckley*, 302 Mich 12, 22; 4 NW2d 448 (1942), stated:

“Repeal by implication is not permitted if it can be avoided by any reasonable construction of the statutes. *Couvelis v. Michigan Bell Telephone Co.*, 281 Mich 223 [274 NW 771 (1937)]; *People v. Hanrahan*, 75 Mich 611 (4 LRA 751) [42 NW 1124 (1889)]. If by any reasonable construction 2 statutes can be reconciled and a purpose found to be served by each, both must stand, *Garfield Township v. A.B. Klise Lumber Co.*, 219 Mich 31 [188 NW 459 (1922)]; *Edwards v. Auditor General*, 161 Mich 639 [126 NW 853 (1910)]; *People v. Harrison*, 194 Mich 363 [160 NW 623 (1916)]. The duty of the courts is to reconcile statutes if possible and to enforce them, *Board of Control of the Michigan State Prison v. Auditor General*, 197 Mich 377 [163 NW 921 (1917)]. The courts will regard all statutes on the same general subject as part of 1 system and later statutes should be construed as supplementary to those preceding them, *Wayne County v. Auditor General*, 250 Mich 227 [229 NW 911 (1930)]. See, also, *Rathbun v. State of Michigan*, 284 Mich 521 [280 NW 35 (1938)].”

Section 1103 of Article 1 of the UCC expressly provides that, “[u]nless displaced by the particular provisions of this act, *the principles of law and equity . . . shall supplement its provisions.*” MCL 440.1103 (emphasis added).

There exists no language in UCC Article 2 that can be interpreted to abrogate Michigan’s common-law jurisprudence concerning open accounts. To prevail in the present case, defendant is required to demonstrate that a particular provision of the UCC displaces plaintiff’s claim for an open account. Defendant has not done so, and therefore plaintiff’s cause of action is subject to the six-year period of limitations. See *Gen Motors, LLC v Comerica Bank*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No. 291236), pp 4-6 (UCC did not displace the plaintiff’s unjust-enrichment claim).

In *Moorman Mfg Co of California, Inc v Hall*, 113 Or App 30, 34; 830 P2d 606 (1992), Judge Rossman, in a partial dissent, explained the issue as follows:

¹ The majority also indicates that MCL 440.2725 conflicts with MCL 600.5807(8). *Ante* at 3. I find no conflict in these two statutes. Differing statutes of limitations do not a conflict make.

The statement of an account, or an “account stated,” is an agreement to pay a fixed amount that is due as a result of previous transactions in which a debtor-creditor relationship was created. *See EIMCO-BSP Ser. v. Valley Inland Pac. Constructors*, 626 F.2d 669, 671 (9th Cir. 1980). When the parties themselves agree upon a sum that the debtor owes and promises to pay to the creditor, that promise creates an *independent* contract between the parties; the new contract is enforceable in its own right, “even though the antecedent debt has been barred by [the] statute of limitations or has been discharged in bankruptcy.” *Corbin on Contracts* § 1304, 237 (1962 & 1991 Supp.); *see also Meridianal Co. v. Moeck*, 121 Or. 133, 253 P. 525 (1927).

For the reasons stated above, I concur with Judge Rossman’s astute analysis.

III. CONCLUSION

While I conclude that the majority position is not unreasonable, I am constrained to follow the aforementioned Michigan Supreme Court decision. Because an open account triggers a new obligation, separate and distinct from an underlying agreement, the Revised Judicature Act provides a limitations period of six years for “actions to recover damages or sums due for breach of contract.” MCL 600.5807(8).

I would reverse the decision of the trial court.

/s/ Peter D. O’Connell