

MISSOURI COURT OF APPEALS

EASTERN DISTRICT

APPEAL NO. ED 107613

DI GREGORIO 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
THE HONORABLE THEA A. SHERRY, CIRCUIT JUDGE**

**BRIEF OF APPELLANT
JOHN RACANELLI**

Peter J. Dunne #31482
Henry F. Luepke #38782
PITZER SNODGRASS, P.C.
Attorneys for Defendant/Appellant
100 South Fourth Street, Suite 400
St. Louis, Missouri 63102-1821
(314) 421-5545
(314) 421-3144 (Fax)
Email: dunne@pspclaw.com
Email: luepke@pspclaw.com

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STANDARD OF REVIEW	2
STATEMENT OF FACTS.....	2
PROCEDURAL HISTORY	4
POINT RELIED ON.....	6
ARGUMENT.....	7
I. THE TRIAL COURT ERRED IN REJECTING RACANELLI’S STATUTE OF LIMITATIONS DEFENSE.....	7
A. The Ten-Year Statute contained in § 516.110(1) R.S.Mo. does not apply because the action below is not an action to enforce a written promise to pay money.	8
B. Di Gregorio’s claims for “suit on account” and “account stated” are barred by the Five-Year Statute of limitations contained in § 516.120(1) R.S.Mo.	11
C. Di Gregorio’s claim is also barred by the Four-Year Statute contained in § 400.2-725 R.S.Mo. because Di Gregorio’s claims for “suit on account” and for “account stated” both seek to collect money for the sale of goods.	13
CONCLUSION.....	14
CERTIFICATE OF COMPLIANCE	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

Cases

<i>Austin v. Pickett</i> , 87 S.W.3d 343 (Mo. App. 2002)	6, 7
<i>Berlin v. Pickett</i> , 221 S.W.3d 406 (Mo. App. W.D. 2006).....	11
<i>Capital One Bank v. Creed</i> , 220 S.W.3d 874 (Mo. App. 2007).....	9, 11
<i>Cyrus v. Lake Reg'l Health Sys.</i> , 501 S.W.3d 565 (Mo. App. S.D. 2016)	2
<i>D.A.N. J.V., III v. Clark</i> , 218 S.W.3d 455 (Mo. App. W.D. 2006).....	2
<i>Honigmann v. C&L Restaurant Corp.</i> , 962 S.W.2d 458 (Mo. App. E.D. 1998).....	11
<i>Pearson v. Koster</i> , 367 S.W.3d 36 (Mo. 2012).....	2
<i>Rolwing v. Nestle Holding, Inc.</i> , 437 S.W.3d 180 (Mo. 2014).....	6, 7, 8, 10, 11
<i>Schwartz v. Fein</i> , 471 S.W.2d 679 (Mo. App. E.D. 1971)	11

Statutes

§ 400.2-725(1) R.S.Mo.	5
§ 516.110(1) R.S.Mo.	5, 6, 7, 8, 9, 11
§ 516.120 R.S.Mo.	4, 11
§ 516.210 R.S.Mo.	5
Mo Rev. Stat. § 400.2-102	6, 8, 13
Mo. Rev. Stat. § 400.2-725	5, 6, 7, 13, 14
Mo. Rev. Stat. § 516.100	11, 12
Mo. Rev. Stat. § 516.120(1).....	6, 7, 8, 11, 12, 13
Mo. Rev. Stat. § 516.110	8, 11
R.S.Mo. § 477.040	1

Rules

Rule 55.03	15
Rule 84.06(b)	15

Other

1 AM JUR 2D Accounts & Accounting § 8 (2005)	6, 7
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JURISDICTIONAL STATEMENT

Respondent Di Gregorio Food Products, Inc. filed this breach-of-contract action in the Circuit Court for St. Louis County, Missouri. Appellant John Racanelli denied the alleged contract and alleged that Di Gregorio filed its claim too late, after expiration of the period of time prescribed by the statutes of limitations applicable to this action. The trial court, the Honorable Judge Thea A. Sherry, held a bench trial on January 14, 2019, and entered judgment against Racanelli on January 22, 2019. Racanelli filed his Notice of Appeal on February 8, 2019.

None of the issues on appeal are within the exclusive jurisdiction of the Missouri Supreme Court. Jurisdiction is proper in the Court of Appeals pursuant to Article V, Section 3 of the Missouri Constitution because this action does not involve the validity of a treaty or statute of the United States, the validity of a statute or provision of the Constitution of this State, the construction of the revenue laws of this State, the title to any state office or the imposition of the death penalty. The Circuit Court for St. Louis County is within the territorial jurisdiction of this Court. Mo. Rev. Stat. § 477.040.

LEGAL ISSUE FOR REVIEW

Whether an unwritten “sale-of-goods” contract may be enforced more than six years after the plaintiff learned of its breach?

STANDARD OF REVIEW

The question of whether or not a claim is barred by a statute of limitations is a question of law, subject to *de novo* review. *Cyrus v. Lake Reg’l Health Sys.*, 501 S.W.3d 565, 567 (Mo. App. S.D. 2016); *D.A.N. J.V., III v. Clark*, 218 S.W.3d 455, 457 (Mo. App. W.D. 2006). Under this *de novo* standard of review, “the appellate court reviews the trial court's determination independently, without deference to that court's conclusions.” *Pearson v. Koster*, 367 S.W.3d 36, 43-44 (Mo. 2012).

STATEMENT OF FACTS

Appellant John Racanelli (“Racanelli”) was an operator of pizza restaurants located in St. Louis City and County in 2009 and 2010. (Petition, R. 0001; Tr. 11:6-11, 12:3-13). Respondent Di Gregorio Food Products, Inc. (“Di Gregorio”) is a food distribution business and was one of Racanelli’s ingredient suppliers during that time period. (Petition, R. 0001; Tr. 8:22-25, 9:1-19).

The process for ordering goods during their business relationship was as follows. Racanelli’s placed its orders orally. (Tr. p. 13:23-25, 14:1-2, 79:20-22). A worker at a Racanelli’s restaurant would call the Di Gregorio supplier location and, over the telephone, would order food ingredients for Di Gregorio to deliver to

the restaurant the next day. Then, the next day, a driver for Di Gregorio would deliver those ingredients, and, at that time, would provide two copies of an invoice on which was listed each of the items delivered. A worker at the Racanelli's store would then keep one of the copies of the invoice and sign and return the other copy to the Di Gregorio driver. (Tr. 14:10-25, 15:1-5, 28:7-11). The signature on the invoices evidenced the fact that the listed items had been delivered. (R. Tr. 25:3-6).

In this lawsuit, Di Gregorio seeks payment for the goods listed on a series of invoices ("Invoices") dated in 2009 and 2010. (Invoices, R. 0001 – 0076; Tr. 26-27). John Racanelli did not personally receive any of these Invoices. (Tr. 98:7-18). Nor did John Racanelli sign any of the Invoices, either personally or through an agent. None of Invoices mention his name anywhere. (Invoices, R. 0001-0076; Tr. 33:17-19). No one knows the names of any of those persons who signed the Invoices. (Tr. 19:2-7, 34:13-17). John Racanelli did not personally receive or consume the goods listed on the Invoices. (Tr. 108:13-16). John Racanelli personally made no promise to pay for the goods listed on the Invoices. (Tr. 97:24-25, 98:1-2, 108:24-25, 109:1-2, 129:9-14). There exists no written promise to pay money, either by John Racanelli or by anyone else. (Tr. 33:9-16; 57:4-10).

Payment was not made for the goods listed on these Invoices. (Tr. 29:4-7). In 2010, Di Gregorio called and spoke with John Racanelli's wife seeking such

payment, but to no avail. Payment was refused. (Tr. 29:5-13). As of 2010, Di Gregorio knew that John Racanelli had refused to pay for and would not pay for any of the items listed on these Invoices. (Tr. 29:4-7, 61:3-6). The parties' business relationship ended in 2010. (Tr. 31:15-19).

Di Gregorio then waited more than six (6) years before filing suit to recover any amounts from John Racanelli. Di Gregorio did not file his claims below until December 5, 2016. (Petition, R0001).

PROCEDURAL HISTORY

Di Gregorio commenced this action on December 5, 2016, in the Circuit Court for St. Louis County, Missouri. The Circuit Court assigned the following cause number: 16SL-CC04484. In its Petition, Di Gregorio named Racanelli in his individual capacity, *i.e.*, "John Racanelli, an individual, d/b/a Racanelli's Cucina Pizza Express, Racanelli's Cucina, Racanelli's Delmar, Racanelli's Kirkwood, Racanelli's Fenton, and Racanelli's New York Pizzeria." John Racanelli is the sole Defendant named in the Petition. (Petition, R0001).

On January 20, 2017, after service of process, Racanelli filed his Answer and Affirmative Defenses. As his first Affirmative Defense, Racanelli claimed that Di Gregorio's cause of action against him was time-barred under the five-year statute of limitations contained in § 516.120 R.S.Mo. (Answer - Dec. 29, 2016 - Docket for 16SL-CC04484). With his Answer and Affirmative Defenses, on

January 20, 2017, Racanelli also filed a Motion for Summary Judgment. In support of his Motion, Racanelli argued that Di Gregorio's claims were time-barred, not only by the five-year statute contained in § 516.210 R.S.Mo., but also by the four-year statute applicable to "transactions in goods", contained in § 400.2-725(1) R.S.Mo. (Motion and Memo. for SJ – Jan. 20, 2017 – and Reply Memo. for SJ – March 8, 2017 – Docket for 16SL-CC04484). The trial court rejected both of Racanelli's statute-of-limitations defenses and denied his Motion for Summary Judgment. (Order – June 26, 2017 – Docket for 16SL-CC04484).

A bench trial was held on January 14, 2019, and, on January 22, 2019, the trial court entered judgment against Racanelli. In its judgment, the trial court again rejected Racanelli's statute-of-limitations defenses and specifically held that Di Gregorio's cause of action was governed by Missouri's 10-year statute of limitations, contained in § 516.110(1) R.S.Mo. (Judgment – Jan. 22, 2019 – Docket for 16SL-CC04484). Racanelli filed his Notice of Appeal on February 8, 2019.

POINT RELIED ON

**THE TRIAL COURT ERRED IN REJECTING RACANELLI'S
STATUTE OF LIMITATIONS DEFENSES**

Austin v. Pickett, 87 S.W.3d 343 (Mo. App. 2002)

1 AM.JUR.2D Accounts & Accounting § 8 (2005)

- A. The Ten-Year Statute contained § 516.110(1) R.S.Mo. does not apply because the action below is not an action to enforce a written promise to pay money.**

Rolwing v. Nestle Holding, Inc., 437 S.W.3d 180 (Mo. 2014)

Capital One Bank v. Creed, 220 S.W.3d 874 (Mo. App. 2007)

Mo. Rev. Stat. § 516.110(1)

Mo. Rev. Stat. § 516.120(1)

- B. Di Gregorio's claims for "suit on account" and "account stated" are barred by the Five-Year Statute of limitations contained in § 516.120(1) R.S.Mo.**

Mo. Rev. Stat. § 516.120(1)

- C. Di Gregorio's claim is also barred by the Four-Year Statute contained in § 400.2-725 R.S.Mo. because Di Gregorio's claims for "suit on account" and for "account stated" both seek to collect money for the sale of goods.**

Mo. Rev. Stat. § 400.2-102

Mo. Rev. Stat. § 400.2-725

ARGUMENT

I. THE TRIAL COURT ERRED IN REJECTING RACANELLI'S STATUTE OF LIMITATIONS DEFENSE.

Di Gregorio's cause of action below is styled as a "Suit on Account" (Count I) and as an "Account Stated" (Count II). (Petition, R0001). Claims for "Suit on Account" and "Account Stated" are based in contract. *Austin v. Pickett*, 87 S.W.3d 343, 347 (Mo. App. 2002); see 1 AM.JUR.2D Accounts & Accounting § 8 (2005). Such claims are governed by one of three Missouri statutes of limitations, applicable to contract actions:

- The 10-Year Statute, Mo. Rev. Stat. § 516.110(1);
- The 5-Year Statute, Mo. Rev. Stat. § 516.120(1); or
- The 4-Year Statute, Mo. Rev. Stat. § 400.2-725.

The 5-Year Statute is the general statute governing "[a]ll actions upon contracts, obligations or liabilities, express or implied." The 10-Year Statute and the 4-Year Statute are exceptions to the 5-Year Statute. The 10-Year Statute is used as an exception only if the action sued upon is one to enforce a "writing ... for the payment of money or property." Mo. Rev. Stat. § 516.110(1); *Rolwing v. Nestle Holding, Inc.*, 437 S.W.3d 180, 183 (Mo. 2014). The 4-Year Statute is applied as an exception to the 5-Year Statute where the contract sued upon is a contract "for the sale of goods", whether or not in writing. See Mo Rev. Stat. §

400.2-102 (Article 2 of the Uniform Commercial Code as adopted in Missouri applies to “transactions in goods”).

A. The 10-Year Statute contained in § 516.110(1) R.S.Mo. does not apply because the action below is not an action to enforce a written promise to pay money.

As stated above, the 10-Year Statute set forth in § 516.110 is an exception to the 5-Year Statute set forth in § 516.120(1). Section 516.120(1) requires that “[a]ll actions upon contracts, obligations or liabilities, express or implied” shall be brought “[w]ithin five years ... *except* those mentioned in [the 10-Year Statute].” Mo. Rev. Stat. § 516.120(1) (emphasis added).

In order to qualify for this exception under § 516.110(1) R.S.Mo., Di Gregorio must show that its cause of action meets all of the requirements and conditions set forth in the 10-Year Statute, § 516.110 R.S.Mo. Specifically, Di Gregorio must show that its claims below are an effort to enforce a written promise by John Racanelli to pay money to Di Gregorio. The 10-Year Statute applies only to “written promises to pay money” to the plaintiff. § 516.110 R.S.Mo. In the absence of the defendant’s written promise to pay money, the 10-Year Statute does not apply. *Rolwing v. Nestle Holdings, Inc.*, 437 S.W.3d 180, 183 (Mo. 2014) (“the 10-year statute of limitations applies when a plaintiff files suit to enforce a written promise to pay money.”).

In the case at bar, Racanelli gave no written promise to pay money to Di Gregorio, and Di Gregorio has no evidence and has presented no evidence to show any such promise. A written promise from Racanelli to pay to money to Di Gregorio does not exist. Therefore, by its express terms and under Supreme Court case law, the 10-Year Statute does not apply. *Id.*

Rather than produce a signed or other written contract for the payment of money, Di Gregorio, at trial, instead relied upon the written Invoices attached to and referenced in the Petition. (R. 0001- 0076). These Invoices do not constitute a written promise to pay money. “[I]n order to constitute a promise to pay money within the meaning of § 516.110(1), the writing must contain a promise to pay money and the promise or obligation to pay the money must arise from the writing itself and may not be shown by extrinsic evidence.” *Capital One Bank v. Creed*, 220 S.W.3d 874, 878 (Mo. App. 2007) (emphasis added) (citations omitted) (holding that “the ten-year statute is not applicable”). The Invoices contain no written promise – either by John Racanelli or by anyone else – to pay money to Di Gregorio. John Di Gregorio himself confirmed this fact at trial. From the witness stand, John Di Gregorio testified as follows:

Q: Do any of these invoices indicate anyone promises to pay the debts, or for the products delivered in these invoices?

A: No.

(Tr. 33: 9-16).

Di Gregorio's testimony conclusively establishes that the Invoices do not contain a "written promise to pay money". Since there is no "written promise to pay money", the 10-Year Statute does not apply. *Rolwing*, 437 S.W.3d at 183.

Di Grigorio's testimony aligns with the evidence that Racanelli presented on this point. John Racanelli likewise testified that he made no written promise to pay money to Di Gregorio:

Q: Did you ever tell John Di Gregorio that you had received those [invoices] and you agreed personally to pay them?

A: No.

(Tr. 98: 15-18).

Yet, there is more. In addition to conceding that the subject Invoices contain no written promise to pay money, John Di Gregorio further admitted at trial that he has no written contract *at all*:

Q: Does Di Gregorio have a written contract with John Racanelli?

A: No.

(Tr. 57: 4-6).

Since Di Gregorio has no written contract with John Racanelli, he has no written contract for the payment of money from John Racanelli. Absent any written promise for the payment of money, the Ten-Year Statute does not apply,

and the trial court erred. Mo. Rev. Stat. § 516.110(1); *Rolwing*, 437 S.W.3d at 183; *Capital One Bank*, 220 S.W.3d at 878. This Court should so rule. The trial court's judgment should be reversed.

B. Di Gregorio's claims for "suit on account" and "account stated" are barred by the Five-Year Statute contained in § 516.120(1) R.S.Mo.

Section 516.120 is the general statute of limitations that governs contract actions. It is a 5-Year Statute. It applies to "all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited." Mo. Rev. Stat. § 516.120(1). *See Berlin v. Pickett*, 221 S.W.3d 406, 412 (Mo. App. W.D. 2006) (applying 5-Year Statute to claim for "suit on account"); *Honigmann v. C&L Restaurant Corp.*, 962 S.W.2d 458, 459 (Mo. App. E.D. 1998) (applying 5-Year Statute to claim for "account stated"); *Schwartz v. Fein*, 471 S.W.2d 679, 681 (Mo. App. E.D. 1971) (applying 5-Year Statute to claim for account stated).

Since there is no written promise from John Racanelli to pay any money to Di Gregorio, the claims at issue are governed by the 5-Year Statute. *Id.* Accordingly, in its *de novo* review, the Court should find that Di Gregorio's claims are time-barred unless these claims were filed "[w]ithin five years" of the time they accrued. *Id.* Claims such as these that sound in contract accrue "when the damage

resulting [from the breach] is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.” Mo. Rev. Stat. § 516.100.

The evidence of record establishes that, by no later than 2010, Di Gregorio was capable of ascertaining the alleged breach and, in fact, had actual knowledge of the last item of damage sought in the trial court below. Racanelli had “pretty much cut us off” by 2009. Di Gregorio knew as of “2009/2010” that his “company was not being paid for foods delivered to any of [Racanelli’s] three restaurants.” (Tr. 29:4-7). The Invoices at issue are all dated in 2009 and 2010. (Invoices, R. 0001 – 0076). Di Gregorio knew “as of the end of 2010” that none of these Invoices would be paid. (Tr. 60:13-15; 61:3-6). Di Gregorio ended its business relationship with John Racanelli “[b]asically in 2010.” (Tr. 31:15-19).

Thus, by 2010 at the latest, Di Gregorio knew that it had sustained all of the items of damages it sought to recover at the trial below. Under § 516.100, Di Gregorio’s cause of action therefore accrued in 2010, at the very latest. Mo. Rev. Stat. § 516.100. The time for filing the cause of action expired five (5) years later, in 2015. Mo. Rev. Stat. § 516.120(1). Di Gregorio did not file its claims against John Racanelli until December 5, 2016, over a year too late. (Petition, R. 0001). Di Gregorio’s claims against John Racanelli are time-barred under the 5-Year

Statute. The trial court's judgment must therefore be reversed. Mo. Rev. Stat. § 516.120(1)

C. Di Gregorio's claim is also barred by the Four-Year Statute contained in § 400.2-725 R.S.Mo. because Di Gregorio's claims for "suit on account" and "account stated" seek to collect money for the sale of goods.

Missouri has adopted Article 2 of the Uniform Commercial Code. Article 2 "applies to transactions in goods." Mo. Rev. Stat. § 400.2-102. In particular, Article 2 governs contracts for the sale of goods. Included within Article 2 is another statute of limitations, the 4-Year Statute. The 4-Year Statute, like the 10-Year Statute, is an exception to the 5-Year Statute. The 4-Year Statute applies where the contract at issue is a contract for the sale of goods. Mo. Rev. Stat. § 400.2-725.

If the Court does not apply the 5-Year Statute as suggested above, then it should apply the 4-Year Statute, with the same result. Di Gregorio's cause of action for an account stated is an action to enforce a contract for the sale of goods, *i.e.* the food ingredients listed in the subject Invoices. This cause of action is governed by Article 2 of the U.C.C., as adopted in Missouri. The U.C.C.'s 4-Year Statute of Limitations applies to Di Gregorio's sale of food ingredients to the Racanelli restaurants. Under this 4-Year Statute, the time for filing the claims below expired, at the latest, in 2014. Di Gregorio did not file his claims until more

than two years later, on December 5, 2016. Consequently, as a matter of law, Di Gregorio's claims are time-barred under § 400.2-725 R.S.Mo. The trial court erred, and its judgment should be reversed.

CONCLUSION

For the foregoing reasons, the trial court erred in entering judgment in favor of Plaintiff Di Gregorio, and this Court should reverse and enter judgment for Racanelli.



Peter J. Dunne #31482
Henry F. Luepke #38782
PITZER SNODGRASS, P.C.
Attorneys for Defendant/Appellant
100 South Fourth Street, Suite 400
St. Louis, Missouri 63102-1821
(314) 421-5545
(314) 421-3144 (Fax)
Email: dunne@pspclaw.com
Email: luepke@pspclaw.com

CERTIFICATE OF COMPLIANCE

COME NOW counsel for Appellant John Racanelli and for its Certificate of Compliance, state as follows:

1. The undersigned do hereby certify that Appellant’s Brief includes the information required by Rule 55.03.
2. The undersigned do hereby certify that Appellant’s Brief complies with the limitations contained in Rule 84.06(b), and contains 2,904 words.
3. Microsoft Word 2010 was used to prepare Appellant’s Brief.



Peter J. Dunne #31482
Henry F. Luepke #38782
PITZER SNODGRASS, P.C.
Attorneys for Defendants/Appellants
100 South Fourth Street, Suite 400
St. Louis, Missouri 63102-1821
(314) 421-5545
(314) 421-3144 (Fax)
Email: dunne@pspclaw.com
Email: Luepke@pspclaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Clerk of the Court this 16th day of September 2019 to be served by operation of the Court's electronic filing system upon the following:

Vincent D. Vogler #25030
The Vogler Law Firm, P.C.
Attorneys for Plaintiff/Respondent
Two City Place Drive, Suite 150
P.O. Box 419037
St. Louis, MO 63141-9037
(314) 567-7970
(314) 567-5053 (fax)
Email:
voglaw@earthlink.net


