

FACTS

Plaintiff Walpole and Defendant Walls were joint owners of a small convenience store since 1989. In 1991, they entered into an oral agreement whereby the Defendant acquired the Plaintiff's ownership interest in the convenience store and they started a second business together which they incorporated as Yogurt Tree, Inc., ("Yogurt Tree") which was a small restaurant at the Outlets in Rehoboth. A condition of this agreement was that the Defendant would satisfy a second mortgage that the Plaintiff had placed on his residence when the first business had been started in 1989. Additionally, it was agreed that Yogurt Tree would be co-owned by Walpole and Walls, each owning fifty percent of the business. In order to obtain the equipment necessary to start Yogurt Tree, the Defendant signed two leases for equipment as a personal guaranty. The Plaintiff did not sign the leases in such a capacity due to credit problems that he was experiencing at the time.

Yogurt Tree eventually ran into financial difficulties and was dissolved in May of 1997. At that time, the Plaintiff and his brother started a new corporation, which promised to assume Yogurt Tree's debt, and continued the operation of the restaurant. However, the new corporation went out of business by the end of 1997. Therefore, it failed to complete the payments on the leases for the restaurant's equipment. The Defendant started making payments on the Yogurt Tree leases, as a personal guaranty on them, after he received notices in January of 1998 that payments were due. At that time, the Defendant contacted the Plaintiff to complain about the fact that he had to make the payments. He advised the Plaintiff that he would no longer make any payments on the

Plaintiff's second mortgage. The Defendant made his last payment on the Plaintiff's second mortgage on April 28, 1998. Plaintiff commenced making payments on the second mortgage in December 1998. In total, the Plaintiff made payments in the amount of \$22,179.86 to satisfy the balance due on the second mortgage, which was accomplished on January 4, 2002. Defendant has paid \$12,000.00 to satisfy one of the Yogurt Tree equipment leases. He is in the process of satisfying a balance due of \$9,376.70 on the other Yogurt Tree lease.

The current debt action was filed by the Plaintiff on October 28, 2001. He seeks reimbursement for the amounts he paid to satisfy the second mortgage on his residence. The Defendant contends that the Plaintiff's action is barred by the applicable statute of limitations. In the alternative, he is seeking setoff against the Plaintiff's claim for the amounts that he has paid on the Yogurt Tree leases.

DISCUSSION

I. Statute of Limitations

Section 8106 of Title 10 of the Delaware Code provides the statute of limitations for the Plaintiff's debt action. In relevant part, it provides that "no action to recover a debt not evidenced by a record or instrument under seal... shall be brought after the expiration of three years from accruing of the cause of such action". *See 10 Del.C. §8106*. The only statute of limitations issue in question with respect to the present action is the date that Plaintiff's cause of action accrued.

The Defendant stopped making payments on the Plaintiff's second mortgage on April 28, 1998, soon after he had advised the Plaintiff that he would no longer make the payments. It is the Defendant's contention that the Plaintiff's cause of action accrued as of that date. Therefore, the Plaintiff's debt action would be barred as of April 28, 2001, a full six months prior to the filing of the Plaintiff's complaint. The Defendant's contention is without merit.

In Delaware, limitations on lawsuits for breach of installment payment contracts accrue with respect to each installment only from the time the installment becomes due, unless the obligee has the option to declare the whole sum due and exercises that option, in which case the statute of limitations begins to run from the date of the exercise of the option. *Worrel v. Farmers Bank of the State of Delaware*, 430 A.2d 469, 476 (Del. Super. 1981); *see also* 51 Am Jur. 2d, Limitation of Actions, Sec. 166 at page 558. The Plaintiff had the option to declare the whole sum due from the Defendant on his second mortgage when the Defendant stopped making payments and indicated that he would make no further payments. *Manley v. Associates In Obstetrics and Gynecology*, 2001 WL 946489, at *7, Herlihy, J. (Del. Super.). However, the Plaintiff did not exercise that option. The Plaintiff commenced his payments on the second mortgage on December 2, 1998, and satisfied all final balances due on the mortgage on January 4, 2002. He filed the present action on October 28, 2001, well within the three-year statute of limitations for the payments on which he seeks reimbursement. Therefore, his debt action is not barred by the applicable statute of limitations.

II. Plaintiff's Claim, Setoff and Recoupment

It is clear from the evidence presented at trial that the Defendant breached his agreement with the Plaintiff when he stopped making payments on the Plaintiff's second mortgage. Therefore, the Plaintiff is entitled to damages in the amount of \$22,179.86, the total amount that he paid to satisfy the balance due on the mortgage. However, the Defendant contends that he is entitled to setoff against any amounts due to the Plaintiff for the amounts that he paid on the Yogurt Tree leases.

The Defendant's request for a "setoff" is actually a request for "recoupment" as it arises out of the same oral contract or transaction that is the subject of the Plaintiff's cause of action. A "setoff" is a counter demand which a defendant has against a plaintiff arising out of a transaction that is independent or extrinsic of the plaintiff's cause of action. *Trader v. Wilson*, 2002 WL 499888, at *4 at FN 7, Bradley, J. (Del. Super.); *Gray v. Hitchens Brothers*, 1989 WL 848982, at *1, DiSabatino, J. (Del. Com. Pl.). A "recoupment," on the other hand, is a right possessed by a defendant to have a deduction from the amount of a plaintiff's damages because the plaintiff has not complied with cross-obligations or independent covenants arising out of the same contract. *Gray v. Hitchens Brothers*, 1989 WL 848982, at *1, DiSabatino, J. (Del. Com. Pl.). "Thus, the difference between the two terms is that recoupment arises 'out of the same contract [or transaction]', whereas setoff arises out of a separate or extrinsic transaction." *Id.*

"Recoupment is the right of the defendant, in the same action, to claim damages from the plaintiff, either because the plaintiff has not complied with some cross-obligation of the contract on which he sues, or because he has violated some duty which

the law imposed on him in making or performance of the contract.” *Tilden v. E.A. Stevenson & Co.*, 130 A. 236, 237 (Del. Super. 1925). “The doctrine of recoupment was recognized and allowed at common law, and was and is applied to actions whether founded in contract or in tort, but it is limited as a defense to defeating the plaintiff’s action in whole or in part. The doctrine is recognized by the courts of this state.” *Id.*

I find that the Defendant has a valid claim for recoupment from Plaintiff with respect to the sum due to the Plaintiff as a result of Defendant’s non-payment of Plaintiff’s second mortgage. The agreement into which Walpole and Walls entered in 1991 for the sale of Plaintiff’s ownership in the convenience store and the establishment of Yogurt Tree not only provided that the Defendant would satisfy the Plaintiff’s second mortgage on his residence, but, that the two of them would co-own the Yogurt Tree restaurant business and, therefore, each be responsible for one-half of any necessary amounts personally expensed on behalf of the business. Given this arrangement, the Plaintiff is obligated to pay one-half of Yogurt Tree’s debt on which Defendant is personally liable, which is the balance due for the two leases. Therefore, Defendant is entitled to recoupment for one-half the \$21,376.70 that he paid on the leases. When this amount is deducted from the total damages that Defendant owes Plaintiff for his refusal to satisfy Plaintiff’s second mortgage on his home, the total sum due from Defendant to the Plaintiff is \$11, 491.51, plus interest at the legal rate from January 4, 2002, and court costs.

CONCLUSION

As a result of the Court's finding of fact, which is based upon the entire record, including all direct and circumstantial evidence and the inferences therefrom, and the Court's above-referenced conclusions of law, it is ordered that judgment be entered on behalf of Plaintiff Edward G. Walpole against Defendant James J. Walls in the amount of \$11,491.51 plus interest at the legal rate from January 4, 2002, and court costs.

IT IS SO ORDERED THIS 8TH DAY OF JULY, 2003.

**CHARLES W. WELCH
JUDGE**