2000

Holbrook Company, a Utah corporation v. Stanley S. Adams, Von H. Whitby, Tony M. Wand, a partnership, dba the Exchange : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

HOLBROOK COMPANY, a Utah corporation,

Plaintiff and Appellant,

vs.

STANLEY S. ADAMS, VON H. WHITBY, TONY M. WAND, a partnership, d/b/a THE EXCHANGE,

Defendants and Respondents.

Case No. 14005

APPELLANT'S BRIEF

* * * * * * *

Appeal From The Third District Court for
Salt Lake County, State of Utah
Honorable Stewart M. Hanson, Jr., Judge

* * * * * * *

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NATURE OF THE CASE

On November 1, 1974, plaintiff sued the defendants as a partnership doing business as "The Exchange," for the reasonable value of materials furnished and labor performed upon real property leased by the defendants. The Complaint stated two claims for relief, one pursuant to Section 14-2-1, Utah Code Annotated, 1953, and the other in quantum meruit.

Plaintiff alleged that the defendants as a partnership had an interest in land at the time a contract to improve their leasehold interest was entered into. The defendants denied the allegation in a verified motion to dismiss wherein it was stated:

1. That they were not, nor had ever been a partnership, a joint venture or a d/b/a;

2. That they had never done business as The Exchange;

3. That The Exchange was a non-profit corporation; and

4. That the defendants individually had never contracted with plaintiff or with anyone.

DISPOSITION IN LOWER COURT

The parties supplemented the pleadings with affidavits and exhibits and a hearing was held. The trial court dismissed the Complaint and action as to the three defendants, determined that The Exchange Place Social Association, a non-profit corporation was the "proper defendant" and granted plaintiff 10 days to refile its action. From a final order or judgment of dismissal in favor of the defendants, plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the final order of the lower court and a determination by this Court that its Complaint states a claim upon which relief can be granted and that genuine issues of material fact exist.

STATEMENT OF THE FACTS

In January, 1973, in company with Dan Losee, an architect who had been employed by Stanley Adams, Ben Holbrook, Presi-

dent of Holbrook Company, plaintiff, visited the Intermountain Stock Exchange Building at the invitation of Mr. Losee for the purpose of discussing a contract for remodeling the premises for a business for defendant Adams. (R. 12)

In February, 1973, at the invitation of Raymond Jones, an architect employed by defendant Adams, Mr. Holbrook again visited the said premises for the purpose of determining needed remodeling on said business. (R. 12) The Complaint alleges that the premises which were visited by Mr. Holbrook and the architects is commonly known as 39 Exchange Place, and that the defendants had a leasehold interest in said real property. (R. 1) The certificate of doing business under an assumed name lists the defendants as doing business as The Exchange, which is located at 39 Exchange Place. (R. 37)

After said February visit, Holbrook Company was instructed by architect Jones to proceed with the design of the project and time was accrued to the job prior to the commencement of construction in May of 1973. (R. 13)

The Exchange Place Social Association filed Articles of Incorporation with the Secretary of State and was incorporated on May 4, 1973. (R. 29) On May 9, 1973, a certificate was filed with the Secretary of State wherein Stanley S. Adams, as trustee, certified that Stanley S. Adams, Von H. Whitby, and Tony M. Wand were carrying on, conducting or transacting business under an assumed name of The Exchange. (R. 36 & 37)

The Complaint alleges that plaintiff completed its contract and was not paid the reasonable value of labor performed and materials supplied to said real property. The Complaint further alleges that the defendants are partners, that they were doing business as The Exchange, that they contracted to have the building altered or repaired, that they did not post a bond to insure that plaintiff would be paid, and that they should therefore be held personally liable as provided in Section 14-2-1, Utah Code Annotated, 1953. (R. 1 & 2)

Prior to the hearing of defendants' motion to dismiss, the record was supplemented with the affidavit of plaintiff's President, setting forth the facts aforesaid. (R. 12 & 13) At the time of the hearing, plaintiff further supplemented the record by introducing a copy of a certificate of doing business under an assumed name filed with the Secretary of State on May 9, 1973. (R. 36 & 37) The defendants also offered into evidence a copy of the Articles of Incorporation of The Exchange Place Social Association, (R. 29-33) and a copy of the certificate regarding doing business under an assumed name filed December 7, 1974. (R. 34-35)

ARGUMENT

POINT I

PLAINTIFF'S COMPLAINT STATES A CLAIM AGAINST THESE DEFENDANTS UPON WHICH RELIEF CAN BE GRANTED.

In order for a complaint to state a claim for relief under Rule 8(a), Utah Rules of Civil Procedure, it, ". . . shall

contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled." These basic requirements are to advise the opponent and the court of the issues raised, Howard v. Howard, 11 Utah 2d 149, 356 P.2d 275, 277 (1960), and are restricted to the task of general notice-giving. Rules of Civil Procedure, Rule 8(a); Blackham v. Snelgrove, 3 Utah 2d 157, 280 P.2d 453, 455 (1955).

Plaintiff's Complaint alleges facts constituting a short and plain statement of a claim either under Section 14-2-1, Utah Code Annotated, 1953, or in quantum meruit. The essential allegations supporting either claim are: (1) that the defendants are partners doing business as The Exchange, 39 Exchange Place; (2) that the defendants are owners of a leasehold interest in real property at said location; (3) that the defendant Stanley S. Adams entered into a contract of $500.00 or more to construct, add to, alter or repair said property; (4) that defendants failed to post a bond as required by Section 14-2-1, Utah Code Annotated, 1953; (5) that plaintiff furnished materials and performed labor on said property; (6) that plaintiff has not been paid the reasonable value thereof; and (7) that defendants will be unjustly enriched if plaintiff is not paid. Clearly, two alternate claims showing the pleader is entitled to relief are stated in plaintiff's Complaint.

Plaintiff submitted an affidavit and other evidence which substantiates the aforesaid claims. The affidavit of plaintiff's President shows that Stanley S. Adams, through his architect, contracted to have said property altered or improved. Furthermore, the affidavit points out that said contract was entered into and services were accrued to the job prior to the date of incorporation of The Exchange Place Social Association. (R. 12 & 13) The certificate of assumed name filed May 9, 1973, further supports the Complaint's allegations that the defendants were doing business under the assumed name of The Exchange, located at 39 Exchange Place. (R. 36 & 37) Thus, alternate claims were stated against these defendants, and thereafter substantiated in opposition to defendants' verified motion to dismiss. Therefore, a motion to dismiss could not be granted where these alleged facts are presumed to be true. See Petersen v. Jones, infra.

POINT II

THE TRIAL COURT COMMITTED ERROR BY GRANTING THE DEFENDANTS' MOTION TO DISMISS.

The defendants' motion does not state with particularity that it is brought pursuant to Rule 12(b)(6), Utah Rules of Civil Procedure, but it must be assumed to be the case since that motion is the "usual and proper method of testing the legal sufficiency of the complaint." 2A Moore, Federal Practice 2266 (2d Ed. 1974).

It is unclear from the record whether the trial court treated the defendants' "motion to dismiss" solely as a motion to dismiss for failure to state a claim under Rule 12(b)(6), Utah Rules of Civil Procedure, or as a motion for summary judgment under said Rule and under Rule 56, Utah Rules of Civil Procedure. Rule 12(b) gives the trial court discretion to receive matters not contained in the pleadings and to treat it as a motion to dismiss or one for summary judgment. 2A Moore, Federal Practice 2300 (2d Ed. 1974); Hill v. Grand Central, Inc., 25 Utah 2d 121, 477 P.2d 150, 151 (1970). Rule 12(b) states in part:

> Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third party claim, shall be asserted in responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, ... If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56. (Emphasis added.)

The record makes no mention of a granting of summary judgment, but states, " . . . that Plaintiff's Complaint and causes of action . . . are hereby dismissed against . . . " the defendants, with 10 days to refile. (R. 17) The court neither expressly excluded nor included from its consideration affidavits and other materials

submitted to the court which are outside of the pleadings. (See Minute Entry and Order of Court. (R. 14 & 17) The order of denial of the motion to reconsider makes mention of "evidence" having been presented to the court. Whether the court considered this evidence when it made its prior ruling is unknown. However, whether the court treated the defendants' motion to dismiss solely under Rule 12(b)(6), or as a motion for summary judgment under Rule 12(b) and Rule 56, Utah Rules of Civil Procedure, is moot because the court erred under either rule.

A. Motion to Dismiss for Failure to State a Claim Under Rule 12(b)(6).

If the court dismissed plaintiff's Complaint for failure to state a claim pursuant to Rule 12(b)(6), it clearly was in error. In Petersen v. Jones, 16 Utah 2d 121, 396 P.2d 748 (1964), the court states the well-settled rule:

> The motion to dismiss challenges only the sufficiency of the complaint, and as against such a motion, its allegations must be taken as true.

On appeal from a 12(b) motion to dismiss, the appellate court must accept plaintiff's allegations of fact as true, together with such reasonable inferences as may be drawn in plaintiff's favor. Murry v. City of Milford, Connecticut, 380 F.2d 468, 470 (CA. 2d 1967). This Court has stated in Stevens v. Colorado Fuel and Iron, 24 Utah 2d 214, 469 P.2d 3, 4 (1970) that:

> A complaint does not fail to state a claim unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.

The allegations of plaintiff's Complaint in the case at bar accepted as true, clearly state a claim against said defendants under Section 14-2-1, Utah Code Annotated, 1953, or in quantum meruit as more specifically set forth under Point I, supra.

Where the court exercises its discretion under Rule 12(b), excludes supplemental evidence, and does not treat a motion to dismiss as a motion for summary judgment, the court must consider only the pleadings, and may not consider affidavits or evidence outside the pleadings. Grand Opera Company v. Twentieth Century Fox Film Corp., 235 F.2d 303, 307 (CA. 7th 1956); Williford v. People of California, 352 F.2d 474, 475 (9th Cir. 1965). In the present case, the record includes evidence outside the allegations contained in the pleadings. Defendants filed a verified motion to dismiss. Plaintiff prior to the hearing date served an affidavit opposing the motion. The trial court could not give credence to the defendants' verified motion over the allegations of the complaint without considering plaintiff's affidavit too. Cohen v. Cahill, 281 F.2d 879 (9th Cir. 1960). If this is done, the trial court is required to proceed under the provisions of Rule 56.

The trial court could not have given credence to the defendants' verified motion over the mere allegations of plaintiff's Complaint. In Chappell et al v. Goltsman et al, 186 F.2d 215, 218

(5th Cir. 1950), the court held that the motion to dismiss turned into one for summary judgment where a motion was supported by affidavits which disputed the allegations of plaintiff's Complaint. The Chappell court stated:

> Rule 12(b) clearly permits a defendant to raise affirmative defenses in bar by a motion to dismiss for failure to state a claim and vests the court with discretion to treat such a motion as one for summary judgment. But disputed issues of fact cannot be resolved by affidavits nor may affidavits be treated for purposes of a motion for summary judgment as proof contrary to well-pleaded facts in the complaint. (Emphasis Added.)

Plaintiff's Complaint contains sufficient facts to state a claim and to raise issues when compared with the defendants' verified motion to dismiss. More so is the case when supplemental evidence introduced by plaintiff is considered together with the allegations of fact in plaintiff's Complaint. If this is done, however, the court must proceed under Rule 56. Nevertheless, if this court determines that the trial court looked only to the pleadings and granted defendants' motion to dismiss pursuant to Rule 12(b)(6), it should find that the trial court erred because the allegations of the Complaint must be taken as true for purposes of such a motion.

B. Summary Judgment Under Rule 12(b)(6) and Rule 56.

If it is found that outside matters were considered by the trial court, error was committed because a motion to dismiss was granted when genuine issues of material fact were raised by the

pleadings and the outside matters contained in the record. (See Point III for issues raised.) If the trial court chose to consider the materials contained in the record, then Rule 56, Utah Rules of Civil Procedure, must apply. Rule 12(b) states in part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56. (Emphasis added.)

The general rule is that if the court does not exclude outside matters, the motion shall be treated as one for summary judgment. The case of Erlich v. Glasner, 374 F.2d 681, 683 (9th Cir. 1962), held that it was error to dismiss an amended complaint as to all defendants upon filing of a motion to dismiss, where the trial court in its order stated that it had considered all written documents on file and where the trial court had not entered an order expressly excluding the affidavit filed in support of the motion. The appellate court went on to hold that the trial court was therefore required to treat the motion as one for summary judgment and was required to give all parties reasonable opportunity to submit all material facts pertinent to such motion made.

As to the manner of submitting those facts, and the standard by which to test them, Rule 56, Utah Rules of Civil Procedure, states in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In Williams v. Pacific Maritime Ass'n, 384 F.2d 935 (CA. 9th 1967), Cert. Denied, 390 U.S. 987 (1968), the appellate court disregarded the label that the district court put upon its disposition and held that whenever outside matters are presented to the court and not excluded, the requirements of summary judgment rule must be met. Thus, if such matters are considered and on appeal it appears that there was a triable issue of fact, the judgment will be reversed.

POINT III

THERE ARE GENUINE ISSUES OF MATERIAL FACT BEFORE THE COURT AND THEREFORE THIS CASE SHOULD BE REVERSED.

The record contains outside matters, (R. 4, 5, 12, 13, 29-37) which divulge numerous genuine issues of material fact that are triable. The trial court did not expressly exclude these outside matters, and therefore, Rule 56 requirements must be met. The issues include, but are not limited to, the following:

1. Whether plaintiff contracted with defendants, or any of them, or the agent of any of them, prior to incorporation by the defendants of The Exchange Place Social Association.

The affidavit of Ben Holbrook shows that two architects hired by Stanley S. Adams made contact with Holbrook Company and

instructed plaintiff to commence work prior to the date that The Exchange Place Social Association was even incorporated. (R. 12) These facts show the formation of a contract with an individual, Stanley S. Adams, prior to incorporation of the alleged proper party. The certificate of assumed name, signed by Stanley S. Adams, (R. 34 & 35), tends to substantiate the fact that Mr. Adams was doing business in a capacity other than as an agent for a corporation. This is in direct opposition to paragraphs 1, 3 and 4 of the verified motion to dismiss, (R. 4 & 5) and therefore genuine issues of material fact are raised.

2. Whether the defendants, or any of them, did business as The Exchange prior to the aforesaid date of incorporation, and at the time the contract was entered into.

The d/b/a certificate, (R. 36 & 37) shows that at least Stanley S. Adams may have been doing business as The Exchange prior to the date of incorporation of The Exchange Place Social Association and was legally doing business as The Exchange on May 9, 1973, and thereafter. In fact, The Exchange Place Social Association was not legally doing business under any assumed name until December 2, 1974, when a d/b/a certificate was filed with the Secretary of State. (R. 34 & 35) The filing of that certificate at such a date was an attempt by the defendants to cloud the matter and to insert a corporation as a defendant where three individuals were in fact liable and had done business as The Exchange for a lengthy period of time as evidenced by the d/b/a certificate on file from May 9, 1973, until

at least November 21, 1974. The foregoing is in opposition to paragraphs 1 and 3 of the motion to dismiss, and therefore genuine issues of fact are raised.

3. Whether prior to the aforesaid date the defendants, or any of them, were associated together as a joint venture or partnership.

The d/b/a certificate, (R. 37) lists the names of three people, the defendants named in this action, who are to do business under the assumed name of The Exchange, which is not a corporation. It is true that only Stanley S. Adams signed the certificate, but the question is raised as to whether the two other individuals were doing business in a partnership along with Stanley S. Adams. This fact contradicts paragraphs 2 and 3 of the motion to dismiss, and therefore raises genuine issues of material fact.

4. Also at issue is the question of the relationship between the defendants prior to the incorporation of The Exchange Place Social Association, at which time plaintiff had already commenced work to improve the leasehold.

Nowhere in the record is it denied that the defendants, nor any one of them, had a leasehold interest in the real property commonly known as 39 Exchange Place. The leasehold interest is alleged in the Complaint, and through affidavit, it is indicated that the plaintiff visited the premises which Mr. Adams controlled or had some interest in prior to the time The Exchange Place Social Association was incorporated. (R. 12 & 13) The premises were lo-

cated at 39 Exchange Place, the address given for The Exchange, d/b/a Stanley S. Adams. (R. 36 & 37) Therefore, genuine issues of material fact are raised here.

In light of these numerous material facts that are genuinely at issue, in order for the trial court to have granted summary judgment, it must have determined these facts in defendants' favor. This it cannot do!

> Summary judgment is never used to determine what the facts are, but only to ascertain whether there are any material issues of fact in dispute. If there be any such disputed issues of fact, they cannot be resolved by summary judgment . . . . Hill v. Grand Central, Inc., 25 U.2d 121, 477 P.2d 150, 151 (1970).

Moreover, in Controlled Receivables, Inc. v. Harman, 17 Utah 2d 420, 413 P.2d 807, 809 (1966), this Court stated that a motion for summary judgment is "a harsh measure" and that for this reason an opposing party's contentions "must be considered in a light most advantageous to him and all doubts resolved in favor of permitting him to go to trial."

The court clearly erred upon granting the defendants' motion where such issues clearly exist, and therefore the case should be reversed and remanded to trial for a determination on those issues.

CONCLUSION

Plaintiff's Complaint states a claim upon which relief can be granted. Plaintiff claims that the defendants are per-

sonally liable for the reasonable value of materials and supplies furnished to property leased by them. Material issues of fact were raised by outside matter not excluded by the court. It would be unjust to permit the defendants to substitute a corporation in their stead after plaintiff commenced work so as to avoid personal responsibility for their contracts. This court should reverse the District Court's order for the reasons stated herein.

DATED: May 21, 1975

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief of Appellant Holbrook Company were mailed to Mr. John S. Adams, Attorney for Defendants-Respondents, Suite 200, The Glass Factory, Arrow Press Square, Salt Lake City, Utah, 84101, this 21 day of May, 1975, by First Class, postage prepaid mail.

Charles C. Brown