1968

John Elwood Dennett v. Alvin I. Smith : Respondent's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

JOHN ELWOOD DENNETT :
Plaintiff and Appellant

vs. : No. 11256

ALVIN I. SMITH :
Defendant and Respondent.

RESPONDENT'S BRIEF

Appealed from the Third Judicial District Court in and for Salt Lake County, State of Utah
Honorable Leonard Elton, Judge

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RESPONDENT'S BRIEF

Because appellant has included in his Statement of Facts so many extraneous matters totally unrelated to the issues of this case, the respondent chooses to make his own statement of facts:

STATEMENT OF FACTS

John Elwood Dennett, plaintiff-appellant, commenced an action in the Third Judicial District Court, in and for the County of Salt Lake, State of Utah, against Alvin I. Smith by a summons and complaint, the significant portions of which consisted of the following allegations:

> "3. That during the months of September, October and November 1967 defendant made, declared and

published to one Phil Phillips, and others, certain derogatory and libellous (sic.) statements relating and pertaining to the plaintiff, which tended to degrade and discredit him, to plaintiff's special and general damage.

"4. That the statements made were without truth, merit, or substance, and were intentionally made for the purpose of purveying and promulgating malicious untruths and gossip, and for no other purpose which entitled plaintiff to punitive damages.

"5. That the amount and extent of damage has not yet been ascertained, but will be supplied by way of amendment to plaintiff's complaint.

"WHEREFORE, plaintiff prays special, general and punitive damages be awarded in his favor and against defendant in such amount as the evidence sustains, together with costs and other appropriate relief." (Emphasis added.)

Contrary to the recitation (on page 3 of plaintiff's brief) of things Mr. Smith purportedly told Mr. Phillips, plaintiff's complaint is devoid of any hint of the nature of the alleged "derogatory and libellous (sic) statements."

Thereafter, Smith served on Dennett, who was acting as his own attorney, a Motion to Dismiss, alleging (1) that the complaint fails to state a claim against defendant upon which relief can be granted, and (2) that the plaintiff has been adjudicated a bankrupt and is not the proper party to bring such action.

A hearing on defendant's motion to dismiss was held on March 12, 1968 before the Honorable Leonard W. Elton, Judge of the Third Judicial District Court. Judge Elton ruled that the plaintiff's complaint was deficient in that it failed to state verbatim the alleged defamatory words; and thereupon, on April 3, 1968 entered an order dismissing plaintiff's complaint unless the plaintiff amended his complaint within 20 days. Plaintiff apparently elected to stand on the legal sufficiency of his complaint, and after the 20 days allowed for amendment had elapsed plaintiff filed a Notice of Appeal.

STATEMENT OF POINTS

POINT I. PLAINTIFF'S COMPLAINT DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRATED AS REQUIRED BY RULE 8(a) AND WAS PROPERLY DISMISSED.

POINT II. THE EFFECT ON THIS CASE OF PLAINTIFF'S PENDING BANKRUPTCY PROCEEDINGS.

ARGUMENT

POINT I. PLAINTIFF'S COMPLAINT DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AS REQUIRED BY RULE 8(a) AND WAS PROPERLY DISMISSED.

Respondent intends in this Point to answer all of the issues raised in Points, One, Two, and Three of appellant's brief on appeal.

Historically it has always been necessary in an action for libel or slander to set forth in the complaint sufficient allegations to show that the statement or matter complained of is defamatory as to the plaintiff. Under the early English practice the pleading of an action for defamation was highly technical; and many cases have been lost for minute variances between the pleading and the proof. Under the common law form of action for defamation it was necessary to set forth certain technical allegations known as the innuendo, the inducement and the colloquium in order to have a legally sufficient pleading. With the adoption of code pleading, these requirements were relaxed somewhat. However, it was, and is, still necessary to set out the defamatory words verbatim in the complaint. The only modification of this requirement is that many states will permit the libel or slander complained of to be set out in substance and effect. The general rule is well stated in 33 Am. Jur.- Libel and Slander - Sec. 237, as follows:

> "While some courts have held that the libel or slander complained of may be set out in substance and effect, the great weight of authority supports the view that in the absence of any statutory provision to the contrary, it must be reproduced verbatim, not only in order to enable the court to determine whether it is in fact defamatory, but also to apprize the defendant of the exact charge that he will be called upon to answer."

One leading authority for this statement is Kirby v. Martindale, 19 S.D. 394, 103 N.W. 648 (1905). In that case the material part of the complaint with respect to the defamation stated as follows:

> "...that in the 1903 issue of the said Law Directory the defendant wrongfully, wilfully, injuriously, maliciously, and without any justifiable cause printed and published... of, about, concerning, and touching this plaintiff in his professional standing, a certain libelous statement and publication, the substance and effect of which was that this plaintiff was a second-rate lawyer, of only fair standing, and worth only some $10,000 to $20,000 ...." (Emphasis added.)

The defendant filed a demurrer, which the lower court sustained; and thereafter, upon the plaintiff's appeal, the Supreme Court of South Dakota said:

"The rule seems to be well settled, that in a complaint for libel the libelous publication must be set out in the complaint, and that it is not sufficient to set out therein the publication in its 'substance and effect.'

"In Bradstreet vs. Gill, 72 Tex. 115, 9 S.W.753... the Supreme Court of Texas speaking upon this subject says:

' The petition does not set out in haec verba the very language of the libel but pretends to give its substance and meaning * * * A libel suit is based on language, or its equivalent. The complaint in a libel suit should put the court in possession of the libelous matter published--the language used, with such innuendoes as are necessary to explain what was meant by the language and to whom it applied--so as to enable the court to determine whether the words are actionable. In this case the complaint attempts to give the meaning of the language only, without stating what the libel was. If the libel consisted in reporting plaintiff's standing, as mentioned, in blank, the complaint should have informed the court and the defendant of the fact with such explanations as to what was meant by the report as were necessary to show that the report was injurious and defamatory .... It is not sufficient in this kind of a suit to state the substance of the language used or its meaning. We believe the general demurrer ought to have been sustained....'

"It is quite clear, therefore, that the complaint as to the alleged libel, published in 1903, was insufficient,

and the demurrer was properly sustained to that cause of action or clause of the complaint."

On January 1, 1950 the State of Utah adopted Rules of Civil Procedure, modeled after the Federal Rules. Since that time, the sufficiency of a complaint has been governed by Rule 8(a), which states as follows:

> " A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall conatin (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. Relief in the alternative or of several different types may be demanded."

In this brief, appellant disputes the present applicability of the above quotation from Am. Jur. and the Kirby case on the basis that both were published prior to the adoption of the Rules of Civil Procedure. On page 13 of his brief, he notes that the first series of Am. Jur. is being revised, and speculates that the revised volume on libel and slander, when published, will announce a different rule. It is significant that appellant offers this speculation as a substitute for case authorities. In fact, there are no cases before or after the adoption of the Rules, which support appellant's view of the law. However, there are cases, even after the adoption of the Rules, which reaffirm the necessity of alleging the defamatory matter verbatim.

In the case of Watwood vs. Credit Bureau, Inc., 68 A. 2d 905 (Mun. Ct. App., D. C. 1959), the plaintiff filed an action against the Credit Bureau, Inc., alleging that the defendant "made false and libelous statements as to the financial situation of the plaintiff, as to her marital status, and other libelous information which was untruthful and false." Defendant filed a motion to dismiss the complaint. The trial court entered its order granting the motion to dismiss; the plaintiff appealed. In its decision, the Municipal Court of Appeals for the District of Columbia acknowledged the liberalizing effect of the Rules of Civil Procedure, but held as follows:

> "Dismissal of the complaint was plainly correct. The weight of authority is that a complaint for libel should set forth the alleged defamatory matter verbatim, although some authorities hold that it is sufficient to state the substance and effect of the defamatory words. 53 C.J.S., Libel and Slander, 164; 33 Am. Jur., Libel and Slander, 237. Here neither the language nor its substance was set forth. The allegation that defendants made 'libelous statements' is a bare legal conclusion with nothirgin the complaint to supportthe conclusion. Appellant argues that her complaint is sufficient under the trial court's Rule No. 8, based on Federal Rules of Civil Procedure, Rule 8, 28 U.S.C.A., which requires that a complaint 'shall contain a short and plain statement of the claim showing that the pleader is entitled to judgment thereon'. Appellant's statement is short but not plain. It does not show appellant is entitled to relief. We do not understand that even the

most liberalized system of pleading permits a statement of a claim by a legal conclusion."

To the same general effect, see, Garcia v. Hilton Hotels, 97 F. Supp.5 (D.C. Puerto Rico, 1951).

In the case of Heathman v. Hatch, 13 U.2d 266, 372 P.2d 990 (1962) this court had occasion to examine the sufficiency of a complaint as judged by Rules 8(a) and 9(l). This court said:

> "The objective of these rules is to require that the essential facts upon which redress is sought be set forth with simplicity, brevity, clarity and certainty so that it can be determined whether there exists a legal basis for the relief claimed; and, if so, so that there will be a clearly defined foundation upon which further proceedings by way of responsive pleadings and/or trial can go forward in an orderly manner." (Emphasis added.)

Thus, it would appear that the adoption of Rule 8(a) did not change the former requirement that the defamatory matter be set out verbatim in the complaint.

Rule 9 of the Utah Rules of Civil Procedure relates to a miscellaneous assortment of matters which may or must be treated specially in pleading. Rule 9 (j) (l) states as follows:

"It is not necessary in an action for libel or slander to set forth any extrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish on the trial, that it was so published or spoken.

While this Section obviously changes some of the things which had to be pleaded, it has no application to the requirement that the defamatory words be set forth verbatim. Under the common law requirements of pleading, the plaintiff had to show that he was the person defamed. Where the publication forming the subject matter of the action did not contain any direct reference to the plaintiff, the complaint had to set forth such extrinsic facts as were necessary to show the application of the defamatory words to the plaintiff. This was called the colloquium. Thus, for example, in the case of Shaw Cleaners and Dyers, Inc. vs. Des Moines Dress Club, 245 N.W. 231 (Iowa), the plaintiff in its complaint alleged that the defendant had published an advertisement in a newspaper containing words as follows:

"Garments cleaned at half price are only half cleaned.

"When you buy cleaning for half price, you get

just what you pay for...half way cleaning and pressing."

While these words on their face do not seem to be defamatory, the plaintiff further alleged by way of the colloquium that the plaintiff for several weeks prior thereto had been advertising a cleaning sale using the phrase, "Half price for the second garment", and that at the said time no other person or firm in the cleaning business in the vicinity of Des Moines was advertising cleaning at half price. These allegations were necessary under the former statutes relating to pleadings in order to show that the defamatory matter applied to the plaintiff. However, under the provisions of Rule 9 (j) (1) the plaintiff's complaint could merely have stated the words published and alleged that the same were published concerning the plaintiff.

Furthermore, it should not be thought that Rule 9 (j) (1) is a liberal innovation which started in Utah with the Rules of Civil Procedure. In fact, Rule 9 (j) (1) has no corresponding subject in the Federal Rules of Civil Procedure, but rather was taken from Section 104-13-9, Utah Code Annotated, 1943, and was inserted into the Utah Rules of Civil Procedure in order to preserve a liberalizing element first adopted in Utah under code pleading prior to the adoption of the Rules of Civil Procedure.

The code form of Section 104-13-9, Utah Code Annotated, 1953, and its preservation in Rule 9 (j) (1) of the Utah Rules of Civil Procedure merely affect the manner in which a plaintiff pleads the common law colloquium; it does not change any other allegation necessary

to be pleaded in a defamation action; and particularly, it does not remove the necessity for setting forth verbatim in the complaint the alleged defamatory words.

POINT II. THE EFFECT ON THIS CASE OF THE PLAINTIFF'S PENDING BANKRUPTCY PROCEEDING.

On September 14, 1967 appellant filed a voluntary petition in the United States District Court for the District of Utah under the provisions of Chapter XII of the Bankruptcy Act. Subsequently (but prior to the filing herein) the United States District Court entered its order adjudicating appellant a bankrupt and directing that the bankruptcy be proceeded with pursuant to the provisions of Chapters I through VII of the Bankruptcy Act.

At the hearing of this case before Judge Elton, respondent conceded that the pendency of the bankruptcy proceedings would have no effect on the rights of the plaintiff (rather than his Trustee in Bankruptcy) to commence the action herein as the real party in interest. Respondent does not intend to argue differently before this court. However, whether the appellant is bankrupt or not has no effect on the sufficiency of plaintiff's complaint.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the action of the District Court was clearly correct in dismissing plaintiff's complaint, and that the order of dismissal should be affirmed.

Respectfully submitted,

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