

1970

## A. B. Summerhays, dba Summerhays Insurance Agency v. Carl Holm : Brief of Respondent

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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A. B. SUMMERHAYS, dba  
SUMMERHAYS INSURANCE  
AGENCY,  
*Plaintiff and Respondent,*

vs.

CARL HOLM,  
*Defendant and Appellant.*

Case No.  
**11559**

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## BRIEF OF RESPONDENT

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*LAYNE B. FORBES*  
~~CHAS. E. BRADFORD~~  
1610 South Main Street  
Bountiful, Utah  
Attorney for Respondent

HORACE J. KNOWLTON  
214 Tenth Avenue  
Salt Lake City, Utah  
Attorney for Appellant.

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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## BRIEF OF RESPONDENT

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### STATEMENT OF KIND OF CASE

This case is an action initiated by the Plaintiff against the Defendant for the collection of a promissory note.

### DISPOSITION IN LOWER COURT

The court granted the plaintiff's motion for summary judgment.

## **RELIEF SOUGHT ON APPEAL BY DEFENDANT**

The defendant seeks to have the case remanded for trial.

### **STATEMENT OF FACTS**

Plaintiff initiated an action against the defendant for the collection of sums due under a promissory note. After answering certain interrogatories submitted by the defendant, the plaintiff filed a motion for summary judgment and in support of the motion, filed an affidavit signed by the plaintiff. On the day of the hearing defendant's counsel served copies of a controverting affidavit upon the court and the plaintiff. After argument, the court granted plaintiff's motion for summary judgment.

### **ARGUMENT**

#### **POINT I**

**AFFIDAVIT OF THE DEFENDANT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS NOT PRESENTED TIMELY AND THEREFORE THE COURT WAS JUSTIFIED IN REFUSING TO TAKE THE AFFIDAVIT INTO CONSIDERATION.**

The affidavit of the defendant in opposition to plaintiff's motion for summary judgment was not presented timely and therefore the court was justified in refusing to take the affidavit into consideration.

In support of plaintiff's motion for summary judgment, plaintiff submitted an affidavit which was timely filed with the motion. The motion was set for argument

on February 17, 1969. When defendant's counsel appeared for argument, he served a copy of a controverting affidavit on the court and plaintiff's counsel.

Rule 56(c) of Utah Rules of Civil Procedure, provides as follows:

"(c). **Motions and Proceedings thereon.** Motions shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment shall be rendered forthwith if the pleadings, depositions and admissions on file together with the affidavit, 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. . ." (emphasis added).

It is the position of the plaintiff that although the defendant was not under an affirmative duty to serve opposing affidavits prior to the day of the hearing, the court was justified in refusing to consider his affidavit presented at the day of the hearing and was further justified in judging that there was no genuine issue of fact. The defendant undoubtedly will argue that defendant's answer to plaintiff's complaint creates an issue of fact. It is the position of plaintiff that the mere filing of an answer denying that any sums are due and owing is not sufficient to prevent a summary judgment, particularly where the plaintiff in support of said motion filed an affidavit setting forth the basis and grounds for said summary judgment with some particularity. This concept is stated in *Continental Bank & Trust Co. v. Cunningham*, 10 Ut 2d 329; 353 Pac 2d 168 (1960):

"The rule permits an excursion beyond the pleading if facts discovered in the journey irrefutably disprove the facts pleaded. A summary judgment is appropriate upon motion therefor. The rule has been interpreted more articulately by eminent authorities on the subject who suggest that the rule permits us to pierce the pleading resulting in the summary judgment if an examination of facts developed under the discovery procedure by affidavit, admission and the like, makes it appear that no genuine issue of fact is presentable. To travel beyond that fact would be a waste of time, energy and costs."

This rule of law is likewise dealt with extensively by various textual studies. The rule is stated in **Federal Practice and Procedure, Barron & Holtzoff, §1231, page 96:**

"Dilatory tactics resulting from the interposition of specious denials or sham defenses can be defeated by motion for summary judgment. Parties may be accorded expeditious justice and log jams and congested court dockets may be broken by this means. Motion for summary judgment lies whenever there is no genuine issue of any material fact. It necessarily follows that of formal denial in an answer should not necessarily defeat such a motion as otherwise the rule can be rendered nugatory at will. To take a simple example, if in an action on a promissory note, the defendant in his answer denies the making of the note; the plaintiff makes a motion for summary judgment accompanying it by an affidavit of a person who swears that he saw

the defendant sign the note and the defendant does not file an opposing affidavit, summary judgment should be rendered for the plaintiff."

The rule is likewise stated in Moore's Federal Practice, Vol. 6, §56.11 (3), page 2:

"There was some judicial authority . . . to the effect that an allegation of facts in a pleading could not be overcome by an affidavit and hence in such a case a motion for summary judgment must be denied. This doctrine overlooked the fact that one of the prime purposes of summary judgment procedure is to pierce the pleadings and the doctrine if applied would largely nullify the summary judgment procedure. The true rule is opposed to the foregoing pleading where the supporting affidavits if any show that there is no genuine issue of material fact. Stubborn reliance upon allegations and denials in the pleadings will not alone suffice when faced with affidavits or other materials showing the absence of triable issues as a material fact."

## POINT II

THE AFFIDAVIT OF THE DEFENDANT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT DID NOT PRESENT A GENUINE ISSUE OF FACT EVEN IF CONSIDERED.

Even if the court were to consider the affidavit presented by the defendant, the court was justified in granting the summary judgment. In Plaintiff's affidavit filed in support of the motion, he alleged as follows:



- A. Plaintiff and defendant entered into an agreement in 1963 by the terms of which the defendant was permitted to solicit insurance applications to be submitted to the plaintiff and to collect the premiums for insurance and apply the same to the payment of an open account owing by defendant to plaintiff.
- B. That there was no such agreement entered into between plaintiff and defendant that the commissions earned were to be applied against the promissory note which is subject of the suit herein.
- C. That the premiums were applied to the payment of the open account and that the excess in the amount of \$95.07 was applied to the payment of the note.
- D. That the defendant has never made any other payment on said note and that the note was due and owing.
- E. That the plaintiff was not an officer, director, stockholder or in any way interested in Trans-Western Insurance Agency and that any agreement the defendant may have had with said Agency with respect to the receiving of premiums had nothing to do with the plaintiff and the payment of the promissory note.
- F. That plaintiff applied all credits due defendant against the claims of plaintiff, leaving the amount due and owing as stated in the complaint.

In response to this affidavit, the defendant presented to the plaintiff and the court a controverting affidavit denying the truthfulness of the statements set forth in

plaintiff's affidavit. Defendant's affidavit did not specifically deal with the particular allegations of plaintiff's affidavit but simply indulged in the conclusion that the defendant was not indebted to the plaintiff. It is the position of the plaintiff that presenting an affidavit in which the defendant categorically denies indebtedness is not sufficient to meet the allegations of plaintiff's affidavit and to create a genuine issue of fact. This rule is well stated in *Federal Practice & Procedure, Barron & Holtzoff*, §1235, page 146:

"In other words, the opposing party must show a plausible ground for his claim or defense. The facts set forth in the moving party's affidavit showing that he is entitled to a judgment must be accepted as true when not met by counter affidavits or testimony. The mere denial of the moving party's contentions without showing any facts admissible in evidence, raises no issue of fact. The opposing party must show how he will support his contention that issues of fact are present."

## CONCLUSION

In this case it appears that defendant was indulging in dilatory tactics. The answer filed by the defendant in which he categorically denies indebtedness, is not sufficient to create an issue of fact where subsequent thereto and in support of plaintiff's motions for summary judgment, plaintiff filed a supporting affidavit. Defendant's controverting affidavit, which was not timely filed, did not specifically meet the issues and disavow

the claims of plaintiff's affidavit. In viewing the case in totality, the court did not err in granting plaintiff's motion for summary judgment.

Respectfully submitted,

Chas. E. Bradford  
Attorney for Plaintiff