1971

Stanley Title Company v. The Continental Bank and Trust Company : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT
OF THE
STATE OF UTAH

STANLEY TITLE COMPANY,
a corporation,
Plaintiff and Appellant,

vs.

THE CONTINENTAL BANK
AND TRUST COMPANY,
a corporation,
Defendant and Respondent.

Case No.
12271

BRIEF OF RESPONDENT

Appeal from the District Court of
Salt Lake County, State of Utah
Honorable James S. Sawaya, *Judge*

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS Continued

Page

STATUTES CITED

RULES CITED

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STATEMENT OF CASE

Stanley Title Company appeals from the order of the District Court dismissing its complaint.

DISPOSITION IN LOWER COURT

The lower court dismissed plaintiff's complaint with prejudice.

RELIEF SOUGHT ON APPEAL

Stanley Title Company seeks to vacate the order of the lower court, and require it to deny the motion to dismiss, and order Continental Bank to answer or otherwise plead to the complaint.

STATEMENT OF FACTS

This case has been before this court twice before. The first time was when this appellant appealed from the judgment entered against it in favor of both Harlin Construction Company and this respondent.[1] This court upon hearing that appeal expressly affirmed both judgments of the lower court. This court concluded in that decision:

> "The findings and judgment of the trial court in favor of plaintiff Harlin Construction Company against Continental Bank and against George Stanley and Stanley Title Company are sustained; and the same order is made as to the findings and judgment in favor of Continental Bank on its cross-complaint against George Stanley and Stanley Title Company."

W. P. Harlin Construction Company vs. The Continental Bank and Trust Company, et al., Case No. 11504, 23 Utah 2d 422, 464 P.2d 585 (1970).

On February 24, 1970, Continental satisfied plaintiff's judgment against it and a Satisfaction of Judgment was filed. (case no. 12180, R. p. 655) Upon filing of the Satisfaction of Judgment and pursuant to the provisions of the original judgment, the District Court on February 26, 1970, entered judg-

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[1]The Notice of Appeal was filed by both The Stanley Title Company and George Stanley from both (a) judgment in favor of plaintiff, *and* (b) judgment *"in favor of the defendant The Continental Bank and Trust Company and against the defendants, Stanley Title Company and George Stanley." Harlin vs. Continental Bank, et al.;* this court's case no. 11504, R. p. 194.

ment against Stanley Title Company and George Stanley and in favor of Continental Bank (this court's case no. 12271, R. p. 11-12) and a copy of such judgment was mailed to counsel for Stanley Title Company and George Stanley. (case no. 12271, R. p. 13)

Subsequently, defendant George Stanley appealed from the judgment against him, alleging that the cross-judgment against him in favor of Continental was without jurisdiction, and asking that this court reverse its prior judgment against him and set aside the ruling of the Honorable Stewart Hanson affirming such judgment. On February 4, 1971, this court affirmed the judgment of the trial court and reaffirmed its former opinion. (Appellate case no. 12180)

Now Stanley Title Company, which had been incorporated under the laws of the State of Utah, brings another appeal flowing from this original judgment. This appeal arises from an independent action to set aside a judgment, which was served upon Continental on July 2, 1970. The complaint of Stanley Title Company alleges that the prior judgment is "void for want of due process of law under the 14th Amendment to the Constitution of the State of Utah." (Complaint, paragrah 6, case no. 12271, R. p. 2) Stanley Title Company appended certain of the pleadings from the original action as well as a portion of the transcript of counsel's agreement as exhibits to its complaint.

Continental filed a motion to dismiss which stated:

> "Defendant moves to dismiss plaintiff's complaint:
>
> 1. For failure to state a claim against this defendant upon which relief may be granted.
>
> 2. Plaintiff corporation was a Utah corporation. Its franchise was suspended in 1967 for failure to pay taxes, and it has failed to file an annual report since 1968.
>
> Pursuant to § 59-13-61 UCA 1953 upon non-payment of taxes by a Utah corporation, all of its corporate powers, rights and privileges are suspended and such plaintiff is barred from bringing this action.
>
> Dated this 10th day of July, 1970." (Case no. 12271, R. p. 15)

Continental's motion was heard before the Honorable James S. Sawaya on August 14, 1970. Continental contended in argument that there were no disputed facts, and that this case should be decided as a matter of law. Continental presented a certificate of the Secretary of State which showed that effective September 30, 1967, Stanley Title Company was suspended by the State Tax Commission of the State of Utah pursuant to the provisions of Utah Code Ann. § 59-13-61 (1953), and that the last annual report of such corporation required by Utah Code Ann. § 16-10-121 (1953) was filed by plaintiff with the Secretary of State on March 6, 1968. (A photocopy of the

Secretary of State's certificate is set forth in the appendix.) These facts were not disputed by appellant at the time of argument of the motion, appellant rather arguing at that time that as a matter of law this did not prohibit plaintiff from bringing this action, because such action was part of the winding up of the corporation.

Continental argued that the case should be dismissed for two reasons: 1. Plaintiff had no capacity to bring this action; 2. The matter had already been determined. These two issues were argued. Counsel for plaintiff Stanley Title Company had present in court the official file in the original case.

On September 1, 1970, the lower court executed the following order:

> "'Defendant's Motion to Dismiss coming on for hearing before The Honorable James Sawaya on Friday, August 14, 1970; plaintiff being represented by George Stanley, Esq., and defendant by Albert J. Colton of Fabian & Clendenin, and argument being heard, and the court having considered the pleadings, the entire file in W. P. Harlin Construction Company vs. The Continental Bank and Trust Company, et al., Civil No. 269179, in the District Court of Salt Lake County, and the stipulated fact that the records of the Secretary of State of Utah show that effective September 30, 1967, plaintiff was suspended by the State Tax Commission of the State of Utah pursuant to the provisions of Section 59-13-61 U.C.A. 1953, and that the last annual report re-

quired by Section 16-10-121 U.C.A. 1953, was filed by plaintiff with the Secretary of State on March 6, 1968, and the court, therefore, pursuant to Rule 12(c), Utah Rules of Civil Procedure, having treated defendant's motion as one for summary judgment, and no facts being in dispute, and good cause appearing therefor;

It is hereby ORDERED:

The plaintiff's complaint be and hereby is dismissed with prejudice.

DATED this 1st day of September, 1970."

ARGUMENT

POINT I

RULE 12(c) WAS PROPERLY INVOKED AND APPLIED, AND SUMMARY JUDGMENT WAS RIGHTFULLY GRANTED.

There is no genuine issue as to any material fact in this action which is in dispute. The facts are those contained in the official file of the original case and the official records in the office of the Secretary of State.

If this case were to be sent back for trial on the merits, the trial court would have nothing more before it than what was before the lower court at the time of Continental's motion.

The sole questions which have to be decided are questions of law, viz. (1) whether plaintiff's complaint, in light of the facts set forth in the official file

of the original case state a claim upon which relief may be granted; (2) whether suspension of the corporation pursuant to Utah Code Ann. § 59-13-61 (1953) and failure to file annual reports required by Utah Code Ann. § 16-10-121 (1953) since March 6, 1968 would bar a plaintiff from commencement on July 2, 1970 of an action to set aside the prior judgment. Contrary to appellant's assertion, both of these issues were clearly raised in Continental's motion.

Rule 56(b) provides:

> "(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

The purpose of the rule is to obtain quick and inexpensive dispostion of cases where no facts are in dispute. Such relief was granted. If the lower court was in error in applying the law to these facts, this court may at this time so state. However, respondent urges that there are two separate and distinct legal bases for upholding the dismissal, each fatal to this appeal.

POINT II

THIS MATTER HAS ALREADY BEEN ADJUDICATED.

Co-defendant George Stanley in a separate appeal (this court's case no. 12180) contended that the judgment against him was without justification be-

cause in the initial pleadings in the case he was not specifically named as a defendant to Continental's cross-claim. Continental in that appeal argued that such contention is without merit as George Stanley consented to the court's jurisdiction and determination of this matter, *inter alia*, by appealing to this court from such judgment on its merits, and that the issue was argued in briefs, and this court affirmed such judgment.

However, this co-defendant, Stanley Title Company, does not even have this slender reed to lean upon. The cross-claim of Continental specifically names Stanley Title Company as a cross-defendant (case no. 12271, R. p. 7) and an answer to the cross-claim was filed by Stanley Title Company (case no. 12271, R. p. 10).

At the end of the trial the court made findings of fact and conclusions of law and judgment was entered providing for judgment

> "(a) in favor of plaintiff Harlin against Continental, Stanley Title and George Stanley, jointly and severally; and (b) upon payment of this judgment by Continental Bank and Trust Company to plaintiff, Continental Bank and Trust Company do have and recover from Stanley Title Company and George Stanley, jointly and severally, the sum of $10,503.60 . . ." (case no. 11504, R. p. 189)

This judgment was affirmed on appeal by this court.

Respondent has difficulty in following appellant's argument on this point. It appears that appel-

lant contends that such judgment is unconstitutional under the due process clause because "The cross-claim is contingent on the outcome of the original action and does not state an existing cause of action." (Appellant's brief, case no. 12271, p. 13)

But such argument flies directly in the face of Rule 13(f) which provides:

> "(f) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject-matter either of the original action or of a counterclaim therein or relating to any property that is the subject-matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

The allegation of Continental was that if it were found jointly liable with the other defendants, it nevertheless had a claim over against such defendants if it had to satisfy the judgment itself. The cross-claim was a request for a determination as to who was to be ultimately liable among the various co-defendants.

The argument that Continental "dismissed and abandoned" its cross-claim is wholly without merit, as an examination of the entire transcript of argument and the specific argument of this point in Continental's appellate brief and the judgment of this

court shows. It is wholly without merit even from the quotation from argument which appellant uses.

Respondent is further puzzled by appellant's contention that no findings and conclusions were filed by Continental, but rather the conclusions were those "of Harlin Construction Company." Respondent had always assumed, and still believes this to be the law, that the findings and conclusions formally entered are those *of the court*, not of any party. The findings, conclusions and judgment adjudicated the rights and duties among all of the parties in this action.

But it is unnecessary to rebut appellant's contentions in any detail. The simple facts of the record are enough. Continental filed a timely and proper cross-claim against this appellant, which this appellant answered. Judgment on the cross-claim was entered in favor of Continental and against appellant. This appellant appealed from that judgment on its merits, and this court expressly affirmed the judgment. The matter is *res judicata.*

POINT III

PLAINTIFF HAS NO STANDING TO SUE

Appellant brought this as a separate action in equity to set aside a judgment. Respondent contends that suspension of appellant by the State of Utah on September 30, 1967 pursuant to Utah Code Ann. § 59-13-61 (1953) prohibits appellant from bringing such an action.

Utah Code Ann. § 59-13-61 (1953) provides as follows:

> "*Failure to pay tax — Suspension or forfeiture of corporate rights.* If a tax computed and levied hereunder is not paid before 5 o'clock p.m. on the last day of the eleventh month after the date of delinquency, *the corporate powers, rights and privileges of the delinquent taxpayer*, if it is a domestic corporation, *shall be suspended*, and if a foreign corporation, it shall thereupon forfeit its rights to do intrastate business in this state.
>
> "The tax commission shall transmit the name of each such corporation to the secretary of state, who shall immediately record the same in such manner that it may be available to the public. The suspension or forfeiture herein provided for shall become effective from the time such record is made, and the certificate of the secretary of state shall be prima-facie evidence of such suspension or forfeiture." (emphasis added)

Appellant seeks to avoid the sanction of this statute in several ways. Thus it argues that "from the face of the record the present action was commenced before the charter was suspended." (Appellant's brief, case no. 12271, p. 11) This is patently not so. This was a separate, independent action in equity by appellant's own admission. (Appellant's brief, case no. 12271, page 1) Appellant was suspended in September, 1967. This action was not commenced until July of 1970.

Appellant does raise a more interesting argu-

ment in contending that the code provision relating to winding up after dissolution expressly gives the corporation the power to sue, quoting Utah Code Ann. § 16-10-101 (1953). But merely to read that section is to disprove appellant's claim. The section provides:

> "*Continuation of corporate existence to wind up after dissolution.* Nothwithstanding the dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the secretary of state, or (2) by a decree of court, or (3) by expiration of its period of duration, the corporate existence of such corporation shall nevertheless continue for the purpose of winding up its affairs in respect to any property and assets which have not been distributed or otherwise disposed of prior to such dissolution, and to effect such purpose such corporation may sell or other wise dispose of such property and assets, sue and be sued, contract, and exercise all other incidental and necessary powers."

Appellant here is not claiming to be acting because of either (1) the issuance of a certificate of dissolution of the secretary of state, or (2) a decree of court, or (3) expiration of its period of duration. It is not alleged that the corporation is dissolved and is winding up. The facts are that it has been *suspended,* and while it is suspended its "corporate powers, rights and privileges" are suspended. Indeed, any attempt to exercise such rights, privileges or powers is made a misdemeanor. Utah Code Ann. § 59-13-62 (1953). Its "powers, rights and privileges" of course would include the right to bring an independent ac-

tion in equity to set aside a judgment. Relief from such suspension may be obtained by proper application and payment of twice the amount of tax and penalties due, and thereupon the Secretary of State is authorized to issue a certificate of revivor. Utah Code Ann. § 59-13-63 (Supp. 1969). But no claim is here made that this has been done.

Utah Code Ann. § 59-13-62 (1953) which makes exercise of the rights, privileges or powers of a corporation which is suspended under Utah Code Ann. § 59-13-61 (1953) for failure to pay tax a misdemeanor, evidences a legislative intent to deny *all* corporate activities, including access to courts, to the delinquent taxpayer. The legislative intent becomes even more clear upon consideration of Utah Code Ann. § 59-13-63 (Supp. 1969) which provides for revivor upon payment and states that:

> "The revivor shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture."

Had the legislature not intended to deny the delinquent corporation access to the courts, this sentence would have been unnecessary and certainly would not have been carried forward from the old statute into the 1969 amendment. Respondent submits that the three sections discussed above, when read together, reveal an effective and self-executing scheme of corporate tax collection.

On the other hand, Utah Code Ann. §§ 16-10-100

and 16-10-101 (1953) are designed to allow a dissolved corporation to wind up its affairs and dispose of its assets. This is necessary for the three specific situations provided for in those sections, but has no applicability to a corporation which is suspended for failure to pay taxes. Furthermore, such an expansive interpretation of winding up would weaken the effect of the suspension. In short, dissolution is clearly distinguishable from forfeiture and suspension. See *Bland vs. Knox Concrete Products*, 207 Tenn. 206, 338 S.W. 2d 605. The distinction has been made by the legislature and should be followed by the court. Appellant has the legal means of curing this disability. It has the means of obtaining the keys to the courthouse. But it must pay the State of Utah its proper taxes first.

Appellant asserts that "[t]he closest case in point is that of *Prudential Fed. S. & L. Ass'n. vs. Hartford Acc. & Ind. Co.*, 7 Utah 2d 366, 325 P.2d 899." (Appellant's brief, case no. 12271, p. 11) If the assertion is correct, there is no controlling case law on this issue. Prudential involved a foreign corporation which had qualified to do business in Utah, but forfeited for failure to pay taxes *during* the pendency of the litigation. To allow a suit to proceed under such circumstances serves the purpose of judicial efficiency. It does, however, weaken the effect of forefeiture and suspension as a tax collection device. Thus, in cases which involve no competing interest, such as judicial efficiency, *Prudential* should be held closely to its facts.

It is unfortunate that appellant has not included a transcript of the argument on the ruling of the lower court, as it is the clear recollection of counsel for the respondent that the issue as to plaintiff's suspension was admitted at that time, and the argument was joined on the applicability of the "winding up" provisions of Utah Code Ann. § 16-18-101 (1953). Indeed, the lower court in its Order of Dismissal refers to the entire file in the original case "and *the stipulated fact* that the records of the Secretary of State of Utah show that effective September 30, 1967, plaintiff was suspended." (case no. 12271, R. p. 20) Inasmuch as the suspension is a matter of public record, it would be an unnecessary formality to require this case to be returned merely for the formal insertion of this fact in the record. This court may take judicial notice of "public and private official acts of the legislature, executive and judicial departments of this state . . ." Utah Code Ann. § 78-25-1(3), and it is hoped that this court would do so in this instance, so that this issue may be decided on its merits.

CONCLUSION

Respondent contends that this action is without merit. Its position is similar to that taken in Harlin vs. Continental (case no. 12180) and r e j e c t e d by this court, but here the case is even stronger for Continental, Stanley Title Company having been specifically named as a cross-defendant from the

time of the initial pleadings, and Stanley Title Company having no legal standing to commence an action.

A determination and dismissal of the case by summary judgment is the proper and most expeditious manner of dealing with the problem and this the lower court did.

Respectfully submitted,

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APPENDIX

STATE OF UTAH

EXECUTIVE DEPARTMENT

Secretary of State's Office

I, CLYDE L. MILLER, SECRETARY OF STATE OF THE STATE OF UTAH,

DO HEREBY CERTIFY THAT The Office of the Secretary of State made a record effective September 30, 1967 reflecting the suspension of STANLEY TITLE COMPANY, a domestic corporation of the State of Utah, by the State Tax Commission of the State of Utah pursuant to the provisions of Section 59-13-61. Utah Code Annotated 1953, Replacement Volume 6.

I further certify that the last Annual Report of the corporation required by Section 16-10-121, Utah Code Annotated 1953, Replacement Volume 2, was filed in this office on March 6, 1968.

AS APPEARS Of Record IN MY OFFICE.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED THE GREAT SEAL OF THE STATE OF UTAH AT SALT LAKE CITY, THIS Ninth DAY OF July 19 70

Clyde L. Miller
SECRETARY OF STATE

BY
AUTHORIZED PERSON