

1977

Summa Corporation v. Lancer Industries Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SUMMA CORPORATION, :
A California Corporation, :

Plaintiff-Respondent, :

vs. :

Case No. 15149

LANCER INDUSTRIES, INC., :
An Illinois Corporation, :
The General Partner of :
Synergetics, :

Defendant-Appellant. :

RESPONDENT'S BRIEF

Appeal from an Order denying a motion to dismiss for lack of jurisdiction and to quash service of process of the Honorable Dean E. Conder, a judge of the Third Judicial District in Salt Lake County, State of Utah.

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- UCA, Section 48-2-26, 1953
- UCA, Section 78-27-22, 1953
- URCP, Rule 4(e)(4)

IN THE SUPREME COURT
OF THE STATE OF UTAH

SUMMA CORPORATION,
A California Corporation,

Plaintiff-Respondent,

vs.

Case No. 15149

LANCER INDUSTRIES, INC.,
An Illinois Corporation,
The General Partner of
Synergetics,

Defendant-Appellant.

RESPONDENT'S BRIEF

NATURE OF THE CASE

Appellant, Synergetics, a Utah limited partnership, by and through its general partner Lancer Industries, Inc., an Illinois corporation, appeals the decision of the Third Judicial District Court which denied Appellant's motion to dismiss the complaint of the Respondent.

DISPOSITION IN LOWER COURT

Appellant made its motion to dismiss the action on the grounds that the court does not have jurisdiction of the person of Appellant in this matter and that the Appellant was not served with process in accordance with the Utah Rules of Civil Procedure. The motion to dismiss was denied by the court below.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the order of the lower court affirmed.

STATEMENT OF FACTS

Respondent, Summa Corporation, entered into a contract with Appellant, Synergetics, a Utah limited partnership, on or about August 28, 1973 (R. 1). The contract provided that Respondent would perform a study concerning the optimum use of certain tracts of real property located in Tampa, Florida (R. 8). Respondent fully performed the services which were called for under the contract, but after repeated demands did not receive payment of its fee which totaled \$16,347.24 (R. 1-2, 13).

Thereafter, Respondent brought suit in the Third Judicial District Court of the state of Utah. Appellant, Synergetics, a Utah limited partnership, was served with process by means of personal service upon the president, C. A. Bailey, of Lancer Industries, the corporate general partner of the Utah limited partnership. Mr. Bailey is a resident of Utah.

Appellant moved to dismiss the action based upon the doctrine of forum non conveniens and this motion was granted (R. 34). Thereafter, Respondent appealed the dismissal to the Utah Supreme Court which reversed the dismissal and held that the parties should proceed to try the action on the merits (R. 46).

Appellant then filed another motion to dismiss based on lack of jurisdiction over the person of Appellant. This motion to dismiss was denied by the Third Judicial District Court.

Synergetics is a Utah limited partnership and maintains a place of business within the state of Utah (R. 58). In addition the president of the limited partnership's corporate general partner maintains his personal residence in the state of Utah

and conducts certain business of the partnership here through the use of the United States mails (R. 49).

Respondent is a corporation qualified to do business within the state of Utah. Respondent contends that the Utah forum is a proper forum to assert in personam jurisdiction because Synergetics, the Utah limited partnership, is an entity existing under the auspices of Utah law, is a resident of Utah, maintains a principal place of business in Utah, and was properly served with process pursuant to the Utah Rules of Civil Procedure.

ARGUMENT

POINT I

THE COURTS OF THIS STATE HAVE IN PERSONAM JURISDICTION OVER A UTAH LIMITED PARTNERSHIP WHICH HAS FILED ITS LIMITED PARTNERSHIP CERTIFICATE IN ORDER TO OBTAIN THE BENEFIT AND PROTECTION OF UTAH LAW.

The Appellant herein is a Utah limited partnership. Pursuant to 48-2-2 Utah Code Annotated (1953), the partnership filed its certificate of limited partnership on September 20, 1971, in Salt Lake County. The Utah limited partnership certificate stated that one of the partnership's two principal places of business was 1600 South Main Street, Salt Lake City, Utah (R. 57-58).

The question presented herein is the power of the courts of this state to assert in personam jurisdiction over a Utah resident, a business organization created under the auspices of Utah law and which receives the benefits and protections of that law. The question presented herein is not whether the corporate general partner of the resident Utah limited partnership has had sufficient "minimum contacts" to justify the imposition

of in personam jurisdiction over it. The cases cited by the Appellant deal exclusively with the kinds of activities which a foreign corporation or entity must engage in within a particular state in order to subject the foreign entity to the jurisdiction of that state's courts. In this particular case, the limited partnership is a Utah resident.

Appellant has thus confused the issue of in personam jurisdiction over the Utah partnership by its repeated references to the scope of business of the general partner of this partnership which is a corporation organized and existing under the laws of the state of Illinois. Appellant's argument under its first point speaks exclusively to the issue of whether Lancer Industries, Inc., the corporate general partner, has sufficient contact with the state of Utah to subject Lancer to the jurisdiction of the state's courts. This, however, is not the narrow issue on appeal here, which focuses on the court's power over the Utah limited partnership.

A limited partnership has an existence separate and apart from the members which compose it and is an entity as to all matters germane to its interest. Many jurisdictions regard even a general partnership as a separate and distinct legal entity. Loucks v. Albuquerque Nat. Bank, 76 N.M. 735, 418 P. 2d 191 (1966); C. H. Leavell & Company v. Oklahoma Tax Commission, 450 P. 2d 211 (Okla. 1968). As a distinct and separate legal entity, a limited partnership is capable of suing and being sued just like a person. In this sense, then, a partnership is like an individual, a corporation or other organization which is a citizen, a resident.

or a domicile of a particular jurisdiction. Because the partnership is like a person, the general rules regarding in personam jurisdiction over persons living within the territory of the jurisdiction are applicable to this partnership. One court states these rules as follows:

"The general rule is, that every country has jurisdiction over all persons found within its territorial limits, for the purposes of actions in their nature transitory. It is not a debatable question, that such actions may be maintained in any jurisdiction in which the defendant may be found, and is legally served with process. However transiently the defendant may have been in the state, the summons having been in the state, the summons having been legally served upon him, the jurisdiction of his person was complete...." Smith v. Gibson, 83 Ala. 284, 285, 3 So. 321 (1887).

The Appellant herein is not a transient person, but rather a Utah resident. Therefore, in accordance with the general rule, this state has jurisdiction because the entity has been legally served with process within the territorial limits of the state.

That the Appellant is properly subject to the jurisdiction of the courts of this state is illustrated by a comparison of this action to "transitory" actions decided in other jurisdictions. The case of Rubey v. United Sugar Companies, 109 P. 2d 845 (Ariz. 1941), is instructive in this regard.

In Rubey, a suit was filed by the plaintiff in the Superior Court of Arizona against a corporation organized and existing under the laws of the Republic of Mexico. The plaintiff was the assignee of a party which entered into a contract with the defendant. This contract was executed in the state of California and affected real property which was located in the Republic of Mexico. The contract was to be fully performed in Mexico.

One of the issues before the court in the plaintiff's action for a breach of contract was whether the Arizona courts could properly exercise jurisdiction over the nonresident defendant. The Court commented as follows:

"Contracts for the payment of money are generally held to be transitory, and an action may be brought thereon in any court which has jurisdiction of actions of that nature and where proper service can be obtained upon the defendant." Id., at 847.

The court determined that where proper service of process had been accomplished, the court not only had jurisdiction of the subject matter, but also of the person of the defendant.

The action herein is also transitory in that it is an action for breach of contract and the recovery of money damages. However, this action does not seek recovery from a nonresident defendant. The courts of this state clearly have jurisdiction over the subject matter of such actions and over all persons found within its territorial limits who have been legally served with process.

Another case similar to the one at issue is Emerson Quiet Kool Corp. v. Manuel M. Eskind, 32 Misc. 2d 1037, 228 N.Y.S. 2d 839 (Sup. Ct. 1957). This was an action on a contract. The plaintiff, a New Jersey corporation, brought suit against defendant, a nonresident partnership, for breach of contract. With respect to jurisdiction over the defendant, the court stated:

"We are of the opinion, under the circumstances here, that is, neither party is a resident of or doing business within the state, and the agreement was not executed within the state, and there was no personal service made, that the designation was ineffectual to confer jurisdiction." Id., at 840 (emphasis added).

The key facts of this case were that neither party was a resident or doing business within the state and further that there was no personal service upon the defendant. In the present case, the Appellant is a Utah resident and a creature of Utah law in the sense the New York court treated a partnership as a resident. In addition, personal service has been accomplished in this state.

In addition to the above mentioned basis for establishing jurisdiction over the Appellant, Appellant by its own admission has revealed that it does business within the state of Utah. The affidavit of the president of Lancer Industries, Inc., the corporate general partner of Synergetics, the Utah limited partnership, reveals that both Lancer and Synergetics have been the object of correspondence in this state from other jurisdictions with regard to the business of the partnership (R. 49). Thus, not only is the partnership a Utah limited partnership, but its corporate general partner's president maintains a permanent residence within this state from which he conducts the business of the partnership via the mail. This establishes an additional basis for jurisdiction over the Appellant.

Finally, Respondent must reply to Appellant's detailed references to the metamorphosis of in personam jurisdiction over a foreign corporation. Specifically, Appellant places great emphasis on the case of Hill v. Zale, 25 Ut. 2d 357, 482 Pac. 2d 332 (1971). This case made an analysis of how jurisdiction is acquired over nonresidents and quoted the Utah long-arm statute which provides:

"...that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons...." 78-27-22 Utah Code Annotated (1953), (emphasis added).

It must be pointed out that the Hill case and the Utah long arm statute are by definition inapplicable as authority in deciding the jurisdictional issues of this case. The long-arm statute and the case law under it are meant only to define the scope of activity of a nonresident corporation which subjects that corporation to the jurisdiction of the courts of this state.

The issue here is whether the state of Utah may properly find that it has in personam jurisdiction over a Utah resident, a Utah limited partnership which maintains a principal place of business in this state and which has a general partner which is a nonresident corporation whose president maintains his permanent residence within this state and who conducts a portion of the partnership's business by way of the United States mail. The analysis regarding the assertion of jurisdiction over a nonresident corporation is misplaced.

The Respondent's position is that the district court properly found that the courts of this state have in personam jurisdiction over a Utah limited partnership.

POINT II

THE ASSERTION OF IN PERSONAM JURISDICTION BY THE STATE OF UTAH WOULD BE CONSTITUTIONAL.

It would be constitutional to litigate this matter in the State of Utah and assert in personam jurisdiction over a Utah resident despite Appellant's assertion of hardship and inconvenience.

In reality, Appellant is rearguing the issue of forum non conveniens.

which has already been decided by this court. Summa Corporation v. Lancer Industries, Inc., an Illinois corporation, and the General Partner of Synergetics, a Utah limited partnership, 599 P. 2d 544 (Ut. 1977). In discussing the issue of hardship and inconvenience with respect to these parties, the court stated as follows:

"The main justification for defendant's /Synergetics/ motion to dismiss appears to be the logistics of arranging for testimony, and/or deposition of witnesses from Florida and California. As opposed thereto, to be taken into account and in connection with what should be the Plaintiff's prerogative of selecting the court where it could and has obtained jurisdiction over the Defendant, Plaintiff makes the further cogent arguments that in this lawsuit, which involves only \$16,000.00, it has already gone to considerable trouble and expense in engaging counsel, initiating and getting the action underway here; and that the dismissal would put it to the necessity of again going through this total process, in another state, which would be an unreasonable burden upon it." Id., at 547.

In thus balancing the factors weighing for and against the relative hardship and inconvenience to the parties, the court held that the greater hardship would be upon the Respondent, Summa Corporation. The cost of transporting witnesses either from Florida to Utah or from Utah to Florida is approximately the same. The cost of feeding and sheltering each witness and the cost of man-hours lost over the duration of the trial is also approximately the same for each witness. Although Appellant has asserted that it will be unable to enforce a right of contribution against others in a Utah court (R. 9), it has admitted in its brief that it will be able to enforce a right of contribution in a Florida court.

There is certainly no inconvenience to the local court system

an interest in the welfare of its residents that is not overcome by the Defendant's desire to litigate elsewhere. The local interest in the residents' welfare is recognized in the cases in which the Plaintiff is a resident. See Thompson v. Continental Insurance Company, 66 Cal. 2d 738, 59 Cal. Rptr. 101, 104, 427 P. 2d 765, 768 (1967); Goodwine v. Superior Court, 63 Cal. 2d 481, 485, 47 Cal. Rptr. 201, 204, 407 P. 2d 1, 4 (1965); Hadler v. Western Grayhound Racing Circuit, 34 Cal. App. 3d 1, 109 Cal. Rptr. 502 (1973). There is no good reason to say that the state's interest in its residents is any less because the resident is a Defendant and not a Plaintiff. This interest of the state should overcome any claim by Appellant that litigating the claim against it in its state of residence is an imposition or a burden upon the jurisdiction of the courts of this state.

The entire tenor of Appellant's argument with regard to Point II is founded upon principles of forum non conveniens. The difference between the doctrines of in personam jurisdiction and forum non conveniens has been perceptively commented on by the Idaho Supreme Court in a recent decision wherein that court concluded that a lower court had improperly dismissed a case for lack of in personam jurisdiction upon the principle of forum non conveniens. The court stated as follows:

"In ruling on Biehl's motion to dismiss, the trial court utilized a forum non conveniens analysis and concluded that in light of the disputed facts, this case should be tried in Michigan. This approach was incorrect. Jurisdiction refers to the power of a court to decide disputes and to compel parties to come before it, Black's Law Dictionary, 4th ed., which is different from the question of where a suit should be tried. Faced with Biehl's motion to dismiss

in this case, it was incumbent upon the trial court to determine whether it had power to hear Marco's complaint, and could not escape that responsibility by asserting that the case should be tried elsewhere." Marco Distributing, Inc. v. Brent Biehl, 97 Idaho 853, 857-8, 555 P. 2d 393, 397 (1976).

Likewise in this case, Appellant's approach is misplaced.

The arguments made under Point II deal with the issue of forum non conveniens and not with the issue of the power of this court to decide a case involving its resident. Assertion of jurisdiction over the resident Appellant in this action would be clearly constitutional.

POINT III

THE PLAINTIFF HAS BEEN PROPERLY SERVED AS REQUIRED BY RULE 4(e)(4) U.R.C.P.

Rule 4(e)(4) U.R.C.P. provides as follows: Personal service within the state will be as follows:

"4(e)(4) Upon any corporation, not herein otherwise provided for, upon a partnership, or other unincorporated association which is subject to suit under a common name, by delivering a copy thereof to an officer, a managing or general agent, or to any other agent authorized by appointment of law to receive service of process...." (Emphasis added.)

In accordance with the terms of this rule, Plaintiff served the partnership by delivering the summons and complaint to its general agent, i.e. its corporate general partner, by means of personal service on the president of said corporate general partner who is a permanent resident of the state of Utah.

Section 48-2-26 of the Utah Code Annotated (1953) provides with respect to limited partners as follows:

"A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership."

The obvious inference from this provision is that the general partner is a proper party to proceedings against a partnership. Therefore, because Lancer Industries, Inc., is a general partner of this limited partnership, and because its president is a permanent resident of the state of Utah, service was made upon the president of said corporation. Rule 4(e)(4) provides that a partnership is properly served by delivering a copy of the complaint and summons to a managing or general agent of the partnership. Certainly the corporate general partner would be considered to be the managing or general agent of the partnership. Certainly, where said corporation does not designate a party to receive service of process in a jurisdiction, its corporate president who permanently resides there would be a proper party to receive service. Otherwise the corporation could simply avoid all service of process by not providing for an agent.

The requirements of Rule 4(e)(4) have been fulfilled completely. Therefore, the motion to quash the service of process upon W. A. Bailey, corporate president of Lancer Industries, Inc., was properly dismissed.

CONCLUSION

The Appellant is a Utah limited partnership and a Utah resident which maintains a principal place of business in this state. The president of the corporate general partner of this Utah limited partnership maintains his permanent residence within the state and conducts a portion of the partnership business through the use of the United States mails. The action sued upon is a trans-

action which may be maintained in this state by virtue of the residency of this limited partnership and service of process in accordance with the Utah Rules of Civil Procedure. Because Appellant was properly served in accordance with said rules, the Third Judicial District Court properly denied Appellant's motion to quash service of process and to dismiss for lack of jurisdiction.

Respectfully submitted,

FOX, EDWARDS & PLUMB



Walter J. Plumb III
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of October, 1977, I mailed two copies of the foregoing brief to John L. McCoy of Ryberg & McCoy, attorneys for Defendant-Appellant, 325 South Third East, Salt Lake City, Utah 84111.
