1977

Redman Warehousing Corp. v. Clearfield City Corp. et al : Brief of Appellant

Utah Supreme Court

Peter W. Billings; Fabian & Clendenin; Attorneys for Respondents;
Robert W. Miller; Nelson, Harding, Richards, Leonard & Tate; Attorneys for Appellant;

IN THE SUPREME COURT

OF THE STATE OF UTAH

REDMAN WAREHOUSING CORPORATION, a Texas corporation,

Plaintiff-Appellant,

vs.

CLEARFIELD CITY CORPORATION, ROBERT O'BLOCK and GORDON OLCH d/b/a FREEPORT CENTER ASSOCIATES, and WHIRLPOOL CORPORATION,

Defendants-Respondent.

No. 15159

APPELLANT'S BRIEF

Appeal from the Summary Judgement
of the Second District Court for Davis County
Honorable John F. Wahlquist, Judge

ROBERT W. MILLER
NELSON, HARDING, RICHARDS, LEONARD & TATE
48 Post Office Place
Salt Lake City, Utah 84110
Attorneys for Appellant

PETER W. BILLINGS
FABIAN & CLENDENIN
800 Continental Bank Building
Salt Lake City, Utah 84101
Attorney for Freeport Center Associates, Respondent

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STATE OF UTAH

REDMAN WAREHOUSING CORPORATION, a Texas corporation, Plaintiff-Appellant, vs. CLEARFIELD CITY CORPORATION, ROBERT O'BLOCK and GORDON OLCH d/b/a FREEPORT CENTER ASSOCIATES, and WHIRLPOOL CORPORATION, Defendants-Respondents.	Docket No. 15159 APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action by Redman Warehousing Corporation against the several defendants seeking reimbursement for expenses Redman incurred in preserving and protecting property stored in Redman's warehouse which property was damaged in floods at the Freeport Center on the 13th and 19th of July, 1973.

DISPOSITION IN LOWER COURT

Summary Judgment has been granted against plaintiff-appellant and in favor of defendant Clearfield City Corporation (hereinafter Clearfield) which decision is not appealed. Summary Judgment was later granted to defendant-respondent Freeport Center (hereinafter Freeport Center) which is the subject of this appeal. The case still pends in the lower court against defendant Whirlpool Corporation.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Order Granting Summary Judgment in favor of Freeport Center.

STATEMENT OF FACTS

Plaintiff-appellant is a Texas corporation engaged in the warehousing business in the State of Utah. (R-1) It stores substantial amounts of property for defendant Whirlpool Corporation (R. 4, 20) which sustained water damage in two separate floods on July 13 and 19, 1973. Plaintiff incurred $33,480.57 in expenses in preserving, protecting and restoring the water-damaged property (R. 3, 29). On December 6, 1973, plaintiff filed its Complaint (R. 18, reverse side) seeking reimbursement from Whirlpool Corporation, Clearfield and/or Freeport Center in the sum of $28,480.57, or $33,480.57. (R. 5) Summons were prepared and mailed to the Davis County Sheriff's Office on December 16, 1974 (R. 323), and defendant Clearfield was served on December 23, 1974 (R. 324). The Record does not indicate when defendant Whirlpool was served, but the fact that Whirlpool was served is shown by Whirlpool's Answer filed January 6, 1975 (R. 20, reverse side) The litigation thereafter actively proceeded between appellant, Whirlpool and Clearfield. On September 27, 1976, a Summons was issued (R. 204) and the Summons and Complaint were served upon defendant Freeport Center on September 29, 1976. (R. 205) Freeport Center filed its Answer and Cross-Claim on October 26, 1976 (R. 206) The Answer did not

raise the defense of insufficiency of process (R. 206-210), nor did any motion pursuant to Rule 12(b) of the Utah Rules of Civil Procedure. The Answer did, however, raise the affirmative defense of Statute of Limitations (R. 206) On February 4, 1977, defendant Freeport Center filed a Motion to Amend its Answer so as to raise the defense of insufficiency of process. (R. 297, 298) That Motion has never been granted by the lower Court. Defendant Freeport Center filed its Motion for Summary Judgment and supporting Memorandum on the same date. (R. 303-308) Appellant submitted its Memorandum in Opposition to defendant's motion on March 18, 1977. (R. 319-325) The motion was argued and granted on March 22, 1977, Judge Wahlquist presiding. (R. 326) The Order Granting Defendant Associates' Motion for Summary Judgment was entered March 25, 1977. (R. 327-328) Appellant timely filed Notice of Appeal. (R. 338).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF FREEPORT CENTER

Freeport Center's position which the trial court followed was that even though plaintiff's Complaint was filed well within the applicable limitations period, its failure to have summons issued as against Freeport Center within three months of the filing of the Complaint retroactively nullified the Complaint for Statute of Limitations purposes. The lower Court clearly

erred in sustaining this position for both substantive and procedural reasons. First, in Utah, the filing of a complaint alone tolls the Statute of Limitations. It is not necessary for Statute of Limitations purposes, that summons be issued within three months or any other time, however important the three-months issuance requirement may be in other contexts (Point II below). Second, plaintiff was not required to issue summons as to defendant Freeport Center within three months, as this is a multiple-defendant case wherein issuance within three months is required only as to one defendant under the applicable Utah Rule of Civil Procedure. As the Record shows, issuance was so obtained as to both of Freeport Center's co-defendants (Point III below). Furthermore, Freeport Center did not properly raise its claim from a procedural point of view, because pleading the affirmative defense of Statute of Limitations does not call into question the sufficiency of process. Since the defense of insufficiency of process was not pleaded, it was waived, and could not be used in support of the Statute of Limitations defense (Point IV below). For any or all of these reasons, the lower court's judgment should be reversed and the cause remanded for trial.

POINT II

THIS ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS

In Utah, filing the Complaint in an action tolls the

Statute of Limitations with respect to any defendant named therein whether served with Summons or not. Since the Complaint naming Freeport Center Associates in the instant case was filed on December 6, 1974, it is immaterial whether a three- or a six-year statute applies since any statute was tolled approximately one year-and-a-half after the cause of action arose.

In Askwith v. Ellis, 85 U. 103, 38 P.2d 757 (1934), the Utah Supreme Court held that it was not necessary to do any more than file a Complaint to toll the Statute of Limitations. The plaintiff in that case had filed a complaint which laid dormant for seven years. No summons was issued within three (3) months nor service made within one (1) year as required by the then applicable procedural rule. That rule (Section 104-5-5 R.S. Utah, 1933) is substantially identical to the present Rule 4(b) of the Utah Rules of Civil Procedure which contains the same time limitations. After seven years, the plaintiff filed an amended complaint and issued and served Summons thereon. Defendant moved to strike the amended complaint. The lower court denied the motion but held the amended complaint had actually commenced a new action and ordered plaintiff to pay a new filing fee. Defendants then successfully demurred to the "new" cause of action on the ground that it was barred by the Statute of Limitations. The Utah Supreme Court reversed, relying heavily on Section 104-5-1 R.S. Utah, 1933, which provided that an action could be commenced either by service of summons or by

the filing of the complaint. Rule 3(a) of the Utah Rules of Civil Procedure also so provides:

> A civil action is commenced (1) by filing a complaint with the court, or (2) by the service of summons. . .

Since in Askwith the action was commenced by the filing of the original complaint within the period required by the Statute of Limitations, and remained pending because nothing was affirmatively done to put it out of court, the Statute of Limitations did not bar the action.

The Askwith case clearly states the Utah rule: The filing of a complaint alone tolls the Statute of Limitations. Since in the instant case, the complaint was filed well within the statutory period, the lower court erred in granting Summary Judgment based on the Statute of Limitations defense.

POINT III

DEFENDANT FREEPORT CENTER ASSOCIATES WAS PROPERLY SERVED

Rule 4(b) of the Utah Rules of Civil Procedure reads in full as follows:

> If an action is commenced by the filing of a complaint, summons must issue thereon within three months from the date of such filing. The summons must be served within one year after the filing of the complaint, or the action will be deemed dismissed, provided that in any action brought against two or more defendants in which personal service has been obtained upon one of them within the year, the other or others may be served or

appear at any time before trial.
(emphasis added)

The obvious purpose of the exception in multiple defendant cases is to make the conduct of multiple party lawsuits more efficient. It permits plaintiffs to file actions naming all possible defendants at the outset, and then to initially proceed against those most implicated by the available evidence. Remaining defendants can then be served as the evidence develops in the course of discovery. To effectuate the purpose of the multiple defendants exception, the earlier Rule 4(b) requirement that summons be issued within three months of the filing of the complaint cannot be interpreted to require that summons issue within three months as to each defendant in a multiple-defendant case. Such an interpretation cuts the heart out of the multiple-defendant exception. It would be operative only in the rare case that the process server could not effectuate service within the one year period otherwise applicable. It could not have been the intent of those who so carefully drafted the Rule 4(b) multiple defendant exception that it be undermined by an unwarranted construction of the three-month issuance requirement.

Rule 4(b) states that:

> If an action is commenced by the filing of a complaint, summons must issue thereon within three months from the date of such filing . . .

The Rule does not state "summons must issue thereon as to each defendant within three months . . ." In this case, summons did

issue within three months of the filing of the complaint. The Record shows that the complaint was filed December 6, 1974 (R. 18, reverse side); that summons were prepared and mailed to the Davis County Sheriff's Office on December 16, 1974 (R. 323); and that defendant Clearfield was served on December 23, 1974 (R. 324). As such, plaintiff complied with the literal requirements of Rule 4(b) in multiple-defendant cases by successfully obtaining personal service upon at least one defendant, and serving all others before trial. Since the service upon defendant Freeport Center was entirely proper, the lower court erred in granting their Motion for Summary Judgment.

POINT IV

DEFENDANT WAIVED ANY CLAIM BASED ON INSUFFICIENCY OF PROCESS

The basis of defendant's Statute of Limitations defense is the purported insufficiency of the process served on them September 29, 1976. It is fundamental that claims against the sufficiency of process will be waived if not timely asserted, either by way of 12(b)(4) motion or in defendant's Answer. Utah Rules of Civil Procedure 12(b) and (h). Defendant's Answer filed October 26, 1976, pleaded the affirmative defense of Statute of Limitations, but did not raise insufficiency of process. Therefore, defendant has waived any defense or contention based on insufficiency of process. Utah Rules of Civil Procedure 12(h).

The Utah Rules clearly do not contemplate that an attack on the insufficiency of process can be made pursuant to

an answer pleading only Statute of Limitations. Statute of Limitations is recognized as an affirmative defense in Utah Rule of Civil Procedure 8(c). Insufficiency of process is treated separately in Utah Rule of Civil Procedure 12(b)(4) as a defense which can be raised, at the pleader's option, by motion or by answer. Implicit in this scheme is the recognition that pleading the Statute of Limitations as a defense does not call into question the sufficiency of process.

The Askwith case, earlier cited, supports this position. In that case, plaintiff filed his original complaint in 1923. It laid dormant for seven years, at which time plaintiff filed an amended complaint and caused service to be issued upon it. The defendant moved to strike the amended complaint. The trial court denied the motion, but held the amended complaint was a new cause of action, and required a new filing fee to be paid. The defendant then made a general appearance and demurred to the complaint on the ground that it was barred by the Statute of Limitations. The demurrer was sustained by the trial court, but reversed on appeal. The Utah Supreme Court found against the defendant on the Statute of Limitations issue as earlier noted, but was careful to distinguish the insufficiency of process question:

> Had they [defendants] appeared specially with a motion to quash service of summons because not made within the year from the time the action was commenced, such motion might have been

> good. It may also be that defendants could have ignored the service of summons, on the ground that the return showed on its face that it was a nullity and could not vest the court with jurisdiction of defendants. But they did neither. They made no attack on the process by which it was sought to subject them to the jurisdiction, which they may have done specially, but attacked the complaint itself--the jurisdiction of the court over the res. They did not deny the jurisdiction of the court, but invoked it in their own behalf. They asked the court to exercise its power and jurisdiction on the action itself in their behalf. A party cannot invoke the jurisdiction of a court and at the same time deny he is in court . . . Askwith v. Ellis, 85 U. 103, 38 P.2d 757 at 759 (1934).

Precisely the same thing has happened here. Defendant Associa... appeared generally by answering and moving for summary judgmen... By so appearing, it has waived any claims based on insufficien... of process.

Indeed, the Statute of Limitations is of no significance in the case at bar. The service of September 29, 1976, was valid, and the action was commenced December 6, 1974, well within the limitations period. Thus, defendant's real defense was directed to the validity of service, which defense was not timely asserted and therefore waived.

CONCLUSION

There are three sufficient reasons why the lower cou... judgment should be reversed.

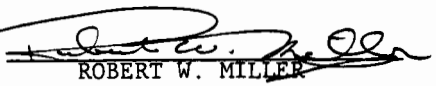
First, the filing of the complaint tolled the Statute of Limitations.

Second, the service upon defendant Associates was entirely in keeping with the Utah Rules of Civil Procedure.

Third, defendant Associates was precluded from arguing any asserted deficiencies in service because it waived them by entering a general appearance.

IT IS THEREFORE RESPECTFULLY SUBMITTED, that the lower Court's Order Granting Summary Judgment in favor of Defendant Associates be reversed, and the cause be remanded for trial.

Respectfully submitted,

By 
ROBERT W. MILLER

Nelson, Harding, Richards,
Leonard & Tate
48 Post Office Place
P. O. Box 2465
Salt Lake City, Utah 84110

Attorneys for Appellant

The undersigned hereby certifies that he delivered a copy of the attached APPELLANT'S BRIEF to Mr. Peter W. Billings, Jr., at the law firm of Fabian & Clendenin at 800 Continental Bank Building, Salt Lake City, Utah 84101, this 22 day of July, 1977.