1977

Dahnken Inc. of Cottonwood v. Andy Marshinsky : Respondent's Brief

Utah Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF UTAH

DAHNKEN, INC. OF COTTONWOOD,)

Plaintiff-Appellant,)

vs.) Case No. 15335

ANDY MARSHINSKY,)

Defendant-Respondent.)

RESPONDENT'S BRIEF

Appeal from Order of Dismissal of the Third District Court for Salt Lake County, State of Utah.

Honorable Dean E. Conder, Judge

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TABLE OF CONTENTS

	PAGE
NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	3
CONCLUSION	7

CASES CITED

Cate Rental Company v. Whalen, 549 P2d 707 (1976)	4
Hill v. Zale Corporation, 25 Utah 2d 357, 482 P2d 332 (1971)	3,4
Mack Financial Corporation v. Nevada Motor Rental _____ Utah 2d _____529 P2d 429 (1974)	3
Transwestern General Agency v. Morgan, 526 P2d 1186 (1974)	3
Union Ski v. Union Plastics Corporation, _____Utah 2d _____ 548 P2d 1257 (1976)	3,4

AUTHORITIES CITED

Section 78-27-22 U.C.A. (1953 as amended)	2,8
Section 78-27-23 (2)	2
Section 78-27-24 U.C.A. (1969)	2
Section 78-27-24 (1)	2
27 ALR 3rd 416	5

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RESPONDENT'S BRIEF

NATURE OF CASE

Plaintiff is suing for rescission of contract or for the balance of the price for a ring, based upon a unilateral mistake as to the original price of the ring. The defendant is and was at the time of the transaction a resident of Wyoming and made the single purchase while on a visit to Salt Lake City, Utah.

DISPOSITION IN LOWER COURT

The District Court granted an order of dismissal for lack of jurisdiction on the ground that the defendant was a non-resident of the state of Utah and had not transacted business

within the state of Utah pursuant to Section 78-27-24 U.C.A. (1969) as interpreted by the Utah Supreme Court.

RELIEF SOUGHT ON APPEAL

Defendant seeks an affirmance of the order of the lower Court.

STATEMENT OF FACTS

Defendant, a resident of Wyoming, while on a visit to Salt Lake City, Utah, purchased a ring from the plaintiff for the sum of $127.22, which was the price that said ring was marked by plaintiff. Plaintiff now claims that the price of the ring was improperly marked by employee of plaintiff and the price of the ring should have been $1,595.00 rather than $127.22 and has sued defendant in the state of Utah for return of the ring or for the difference in the purchase price.

ARGUMENT

THE DEFENDANT HAS NOT TRANSACTED BUSINESS IN THE STATE OF UTAH SO AS TO BE WITHIN THE JURISDICTION OF THE UTAH COURTS WITHIN THE TERMS OF SECTION 78-27-22 U.C.A. (1953 as amended) AS INTERPRETED BY THE UTAH SUPREME COURT.

Even though the literal terms of Section 78-27-23 (2) when read in conjunction with Section 78-27-24 (1) would seem to say that even one transaction of business within the state of Utah which affected a resident of the state would give a Utah

court jurisdiction over a non-resident, the Supreme Court of the State of Utah has steadfastly refused to give such a literal meaning to those sections because of the constitutional issues involved. Hill v. Zale Corporation, 25 Utah 2d, 357, 482 P2d 332 (1971).

Consistant with Hill v. Zale, this court held in the case of Mack Financial Corporation v. Nevada Motor Rentals, _____Utah 2d _____, 529 P2d 429 (1974) that where an officer of a foreign corporation came into the state of Utah to gain permission of the seller of certain motor vehicles to assign a conditional sales contract made in another state, and also operated motor vehicles on the highways of the state of Utah, that such facts were not sufficient to obtain jurisdiction over the defendant corporation under the foregoing section.

Also, in the case of Union Ski v. Union Plastics Corporation, _____ Utah 2d _____ 548 P2d 1257 (1976) where the main activity of the defendant was that a corporate officer visited Utah a total of four (4) times during which a contract was negotiated which was subsequently signed in California, there was no jurisdiction of Utah court under Utah's long arm statute.

In the case of Transwestern General Agency v. Morgan, 526 P2d 1186 (1974), this Court, holding that there was no jurisdiction arising out of a single transaction, commented as follows:

> "However, it does not appear that the defendant Joe Campbell engaged in any business in the state of Utah other than procuring the policy of insurance

> from the plaintiff through his agent in the state of Idaho. This single transaction which was initiated in the state of Idaho is insufficient to meet the requirements of the statute above referred to, nor does it meet the criteria set forth in our prior decision of Hill v. Zale Corporation as to "doing business" and minimal contacts sufficient to establish a business presence in this state."

Further, in the case of Cate Rental Company v. Whalen, 549 P2d 707, (1976) where a non-resident corporation rented equipment from the plaintiff on an average of five (5) times a year for the past ten (10) years and where the plaintiff shipped the rental equipment F.O.B. its offices in Salt Lake City, Utah, and where the defendant's president was in the state of Utah at least once to discuss business dealings, there was no jurisdiction.

Comparing to the facts of the decided cases above and the facts in the instant case, it is apparent that a single transaction whereby the defendant paid the sum of $127.22 in cash, for a ring and apparently, at the time of the transaction, both of the parties intended that sum to be the full price for the ring, that such a transaction should not give rise to jurisdiction over the person of the defendant within the state of Utah. The Union Ski case and the Cate Equipment case both show much more purposeful activity relating to and in the state of Utah by the defendants, and in both of those cases, this court held that there was no jurisdiction.

The appellant, in its brief, cites three criteria from 27 ALR 3rd 416 generally regarded as ruling these matters as follows:

> "(1) The defendant must purposefully avail himself of the privilege of acting in the forum state,
> (2) The cause of action must arise from the defendant's activities therein and
> (3) The act of the defendant or consequence caused by the defendant must have been substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable."

Taking the first criterion, in making a simple cash transaction for $127.22, it would be extremely dubious to say that the defendant thereby "purposefully availed himself of the privilege of acting in the forum state or causing a consequence in the forum state," as it was apparent from the facts of the situation that the matter was closed as far as the defendant was concerned and there was no further balance to pay on the ring and therefore no consequence arising from the purchase of the ring, as the plaintiff was paid the entire price charged for the ring.

As to criterion number two, it is a somewhat dubious proposition that the cause of action in this case arose from the defendant's activities within the state of Utah, as he paid the full asking price in cash for a ring sold by the plaintiff. The cause of action does not arise from anything that the defendant did, but if it arises at all, the cause of action actually sued upon arises from the negligence or inadvertance of the plaintiff

in not asking the proper price for the ring in the first place.

As to criterion three, the question would be whether a $127.22 cash transaction is a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. There again the answer must be no, as the consequences of an affirmative answer to this proposition in this case would result in a multitude of small claims being prosecuted across state lines requiring defendants from as far as 3 to 5,000 miles being required to defend some law suit in a foreign jurisdiction that the defendants passed through on a business or vacation trip.

As to the matter of "fair play" mentioned at page 7 of appellant's brief, it is submitted that the last thing that the defendant had in mind in making this transaction with the plaintiff was to have to return to the state of Utah to litigate a matter not even known by him at the time of the making of the transaction.

The appellant at page 10 of its brief, makes the comment "this was no mere casual or transitory presence in the state." There is nothing in the record to suggest that the defendant was anything more than a casual visitor to the state of Utah, as transitory as any non-resident is while visiting this state. The burden is upon the plaintiff to prove jurisdictional facts, there is nothing in the affidavits to suggest that the

defendant was within the state for any longer than a brief time, the same as any tourist would be and purchased the ring in the process.

Taking the activity of the defendant within the state in context, if the court here were to hold that the defendant subjected himself to the jurisdiction of the state of Utah, then conceivably a motorist from the state of Maine or Alaska could find himself sued on a credit card account or cash transaction for the purchase of tires or other products in the sum of $127.22 or some other small sum within the state of Utah with the plaintiff claiming jurisdiction. The chaos that this would cause in our legal system and the inconvenience to which it would subject persons not only from other states but residents of Utah as well, would be tremendous, subjecting persons to the jurisdiction of distant states over insignificant transactions made by them while on vacation or occasional business trips. Such a policy would cause a great deal of resentment by lay persons to our legal system and to attorneys, for lay persons would have to hire attorneys to make special appearance for them in foreign states and would be required to make trips to those foreign states in order to defend themselves in court.

CONCLUSION

In conclusion, the defendant did not transact business

within the state within the terms of Section 78-27-22 U.C.A. (1953 as amended), therefore the order of the trial court should be upheld.

Respectfully submitted,

RYBERG & McCOY

John L. McCoy
Attorney for Defendant-Respondent

I hereby certify that I delivered ten (10) copies of the foregoing Brief to the Utah Supreme Court, State of Utah, this _____ day of _____, 1977. I also certify that I mailed two (2) copies of the foregoing Brief to Verden E. Bettilyon, attorney for plaintiff-appellant, at 145 South State Street, Salt Lake City, Utah, 84111, this _____ day of _____, 1977, postage prepaid.

_____
Liz Miller