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Mamie Nunnelly, et al., v. Ogden First Federal Savings and Loan Association, et al. : Reply Brief of Appellants

Utah Supreme Court

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In the
SUPREME COURT
of the
STATE OF UTAH

MAMIE NUNNELLY, et al.,
Plaintiffs and Appellants,

vs.

OGDEN FIRST FEDERAL SAV-
INGS AND LOAN ASSOCIA-
TION, et al.,
Defendants and Respondents.

Appellants' Reply Brief

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Case
No. 6657

CAUSE OF ACTION

It is true that neither the Badger case, 94 Utah 97, nor the Markey case, 186 So. 757, was a suit in equity. The suit in the Badger case was on the contract; in the Markey case for damages for deceit. But those cases illustrate and show the nature of the duties violated owing by building and loan association corporation to its stockholder. The suit here is to establish contractual rights, primarily between the respective plaintiffs and the savings and loan association—rights which all the defendants in combination have taken part in violating by conduct both fraudulent and infamous.

While under the facts plaintiffs might have elected to sue at law for deceit, they have sued to get rescission of the transactions which apparently have resulted in the loss of their paper or legal title to the certificates.

And they show that none of the defendants are in the situation of *innocent purchasers*. See *McAllister vs. McAllister* (N. J.), 184 A. 716.

While no defendant has cross-appealed or even cross-assigned error, counsel argue that there is no cause of action stated for that there is no tender or offer to do equity in the complaint.

The authorities cited on this point all approve the undisputed doctrine that one who seeks equity must do equity, and some of them support the claim that a plaintiff upon seeking rescission in equity must make such offer in his complaint. The authorities divide on this, but no authority requires an offer to restore when there was nothing of substantial value received.

Where the only consideration was unsubstantial, to-wit: a few meals, no restoration or offer is necessary, notwithstanding the Civil Code expressly requires a restoration. (*Section 1691*). *Gusette v. Dugan*, 60 Cal. App. 187, 212 P. 397.

Our own court has held that in even a pure law action for deceit and where no tender or return was made of certain Delta Canal Company stock the judgment would not be reversed if the stock be *presently* restored to the defendant. *Stuck v. Delta L. & W. Co.*, 63 Utah 495, 227 P. 791. In that case the defendant argued that neither the pleadings nor evidence showed that plaintiff had surrendered or restored the stock.

Abstracts case No. 3914 Appellant's Reply Brief, Page 14 (about middle of bound volume).

This is a clear holding that neither a tender before suit or in the complaint was a contention percedent to plaintiff's action.

Kelly v. Kershaw, 5 Utah 295, merely holds the general rule of placing in statu quo before decree of rescission. No question of sufficiency of pleading was involved. The case at bar seeks rescission in equity and is not based on an already accomplished rescission in pais.

Rosenthyne v. Matthews-McCulloch, 51 Utah 38, 168 P. 957, recognizes the general doctrine but does not hold or intimate that a tender must be made in the pleadings.

In re Fox West Coast Theatres, 88 Fed. (2d) 212, and Gillette v. Oberholtzer, 264 P. 229 (Ida.) recognizes the general doctrine but do not say that a tender must be made in the pleadings.

Higgins v. First National Bank (N. J.) 183 A. 197, merely holds that an action at law cannot be maintained as on a rescission in pais when such rescission had not taken place for the reason that plaintiff had not restored the consideration.

DeLange v. Ogden (Tex.) 106 S.W. (2d) 388 holds that a tender of the consideration received must be made before rescission is had. No question of pleading or tender was involved.

21 C. J. 400, cited by defendants, cites cases supporting their contention; also many cases holding that the max-

im “he who seeks equity must do equity” is not a rule of pleading and that the matter may be taken care of in the decree.

12 C.J.S. 1004 states the rule that restoration generally must be made as a condition to obtaining rescission (not as a condition of maintaining the suit), and at page 1013 that by the weight of authority it is not necessary before suit, and cites a number of cases to the effect that the mere asking for the equitable relief is an offer to do equity.

In the case of *Lange v. Geiser*, 72 P. 343, the Supreme Court of California held on this point that if there were equitable considerations with respect to restoring consideration they should have been presented by answer.

MULTIFARIOUSNESS

At pages 6, 7 and 8 counsel assume to state, and quite dogmatically, what they consider to be the various causes of action stated. They are here but a trifle more explicit than they were in stating the grounds of their special demurrers.

Manifestly, their insistence that there is no cause of action at all stated is not consistent with their contention that several causes of action are stated.

Of course we state or attempt to state a cause of action *ex contractu* and the fact that a *fraudulent* breach of the contractual relation is alleged by no means makes the action *ex delicto*.

The fact that rescission of the fraudulent transaction is sought as preliminary to the ultimate relief, does not show a distinct and separate cause of action from that involving the plaintiffs' right to be restored on the record to their status as stockholders.

Counsel, we submit, are likewise wrong in their assumption that matters of receivership and matters of accounting, preliminary in their nature, are distinct and several causes of action. See 1 Pom. Eg. (5th Ed.) 146, 149.

We submit also counsel are likewise wrong in their assumption that the allegations and prayer touching the Colonial Corporation in the nature of a creditor's suit to set aside fraudulent conveyance is a distinct cause of action not connected with the same subject of action.

It is possible that prior to the enactment of Chap. 42, Laws of 1925, Chap. 1, Title 33, U.C.A., the plaintiffs not being judgment creditors, could not have properly joined the Colonial Corporation or themselves as co-plaintiffs with respect to this particular matter, but Sections 33-1-15 and Section 33-1-16 seem to dispense with the necessity of first obtaining a judgment against the fraudulent grantor, as we pointed out on page 7 of our brief.

But judgment creditors could always join in an action to set aside a fraudulent conveyance. *Enright v. Grant*, 5 Utah 334. And it is immaterial whether the plaintiff be a technical creditor.

In *Bump on Fraudulent Conveyances*, 3d Edition, 502-3, it is said, "the statute by the words 'creditors and others' embraces others than those who are strictly and technically creditors. Even the word 'creditor' does not receive a strict definition, for a party who is not strictly such a creditor may stand in the equity of a creditor and have an interest which may be defrauded. The statute protects all just and lawful actions, suits and debts, accounts, damages, penalties and forfeitures, and consequently all persons having such interests must be included in the phrase 'creditors and others,' which extends to every person having a legal demand against another, whether the demand is one standing in damages or arising under a contract. The character of the claim is, if it is just and lawful, immaterial."

Our statute defines the term creditor as "a person having any claim whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." Sec. 33-1-1.

And as to joinder of plaintiffs, it has always been held that creditors with distinct claims could join in a suit to set aside a fraudulent conveyance or a part could maintain in class suit. 15 C.J. 1413, citing many cases, including the *Enright* case.

Respondents rely strongly on U.C.A. 104-3-16, and they emphasize certain matters under subdivision 7 of the section. As to the causes of action joinable it is said that they must all belong to one of the specified classes and "must affect all the parties to the action." Now,

the first subdivision permits a joinder of causes of action where they all arise out of either "the same transaction or *transactions connected with the same subject of action.*" Under the allegations each and every transaction is connected with the principal matter and subject of this suit, namely, the establishing of the relations between appellants and the two defendants corporations. The statute does not say that the parties must be affected in the *same manner* or in the *same degree.*

Counsel cite Creer, et al., v. Irrigation Co. (Idaho), 90 P. 228, a plain case of misjoinder of fourteen plaintiffs having separate contracts where there was no common point or community of interest in the several plaintiffs.

The mere suggestion that the case is in point with the case at bar is indicative of a want of or failure to exercise the slightest power of analysis.

Counsel cite Lockhart v. Christian, et al. (N. M.) 29 P. 490, and quote therefrom words holding the statute is clear and where there are two causes of action or more each must affect all the parties. This recalls Don Quixote and his attack on the windmills. We do not dispute the principle of law claimed, but the facts were that in the same action the plaintiff there sued C for one matter and sued S for another matter, no allegation nor claim that C was connected in any wise with the S matter or that S was in any wise connected with the C matter.

Counsel cite *Hollad, etc. Co. v. Holland*, 220 P. 1044 (Kan.). There was no community of interest among the plaintiffs. The action was simply to recover damages at law for false representations and the fact that identical misrepresentations had been made to each of the plaintiffs was very properly held not to constitute any tie among the plaintiffs.

Harmon and Co. v. Eastern etc. Co. (Wash. 255, P. 964, is cited and quoted from. There a single plaintiff sued one corporation on one contract and a different corporation on another, a very simple case, and the court held that the defendants were not alleged to have any connection with each other and the causes of action against the several defendants were distinct, which they were.

The next two cases cited are similarly not in point here.

Felt City Townsite Co. v. Felt Investment Co., et al, 50 Utah 363, 167 P. 835, also is cited. In that case there was a single plaintiff. As the court held in that case, the causes of action were entirely distinct, one being against the defendant corporation for a breach of contract and the other being against individual defendants alone for the conversion of a trust fund. We submit one must have a very fantastic and fertile imagination to see any matter of analogy between that case and the one at bar.

Crummer v. Wilson, et al. (Kan.) 237, P. 1035, is cited. There a single plaintiff sued Wilson and his

official sureties for certain wrongs done by Wilson in his official capacity. In the same action he sued for wrongs done by Wilson in his individual capacity. The court held that there was a misjoinder. There clearly was such, both of causes of action and defendants.

Neither is the Jordan case, 75 Fed. (2d), 447, at all apposite.

In Hamilton v. Empire, etc. Co., 297 Fed. 422, individual defendants were joined with a corporation. The court held that there was *no cause of action stated* against the individuals and hence that joining them did not prevent the corporation from removing the cause from the State court to the Federal court.

The case of Walser v. Moran (Nev.) 173, P. 1149, is cited without comment. We fail to see any appositeness of that case. However, it is to be noted that the governing practice act there did not have in substance or effect a provision similar to subdivision 1 of our Section 104-3-16.

Counsel cite Lile v. Kefauver (Ky.) 51 S.W. (2d) 473. In that case several bank depositors sued the directors of the bank for having paid dividends while the bank was insolvent. There was no claim made that there was any community of interest in the plaintiffs in any trust fund or that defendants were involvent or that there was any necessity to prorate any losses. The court treated the case as being on its facts identical in principle with and ruled by the case of Bateman v. Louisville Gas Co., 187 Ky. 559, 220 S.W. 318, in which case plain-

tiff sought to maintain a class suit on behalf of a large number of overcharged gas consumers. That case held because “the *only* relief asked was *separate* money judgments.” (Italics supplied.) We do not find that the court in the Lile case discussed the duties in the Duke case cited by us. However, there is a good deal of inconsistency, apparently, in the Kentucky decisions in cases involving several plaintiffs in actions at law.

Miller v. Ariz. Bank, 43 P. (2d) 518 (Ariz.), is cited. In that case it was sought to join several plaintiffs in a suit for frauds and the only claim community of interest in the plaintiffs lay in the fact that similar frauds were practiced on the several plaintiffs. There was no question of prorating the recovery or anything similar to the various ties that appear in the case at bar.

In that case the court noted there is a great diversity of decision and it expressed regret that it felt constrained to hold as it did.

In the California case cited in the last case and by counsel here, Noroian v. Bennett (Cal.) 179, P. 158, twenty separate plaintiffs sought to join in a suit to cancel their promissory notes given to the defendant where the only ground of cancellation was that each plaintiff had been separately induced to give his note by fraudulent representations. There was no other asserted matter showing a community of interest. The court held and contrary to many good authorities that they could not be so joined.

On page 16 of the brief counsel cite what they imply is a later case from the same court deciding *Whiting v. Elmira Industrial Association*, 61 N.Y.S. 27, namely *Brown v. Werblin*, 244 N.Y.S. 209. The case is later but it is not from the same court. It is a case at nisi prius and is not similar, as counsel say, to the case at bar. There was in fact no trust fund in existence in which the various plaintiffs had an interest. The action was in tort to recover damages for deceit. It merely appeared that there was a similarity in the causes of action. The court held that the legal remedy was adequate.

The note to 114 A.L.R. 1015 is quoted from. That note deals with the question of simple representative suits based primarily upon deceit. Of course it is true that where the primary relief sought is damages for deceit there can usually be no joinder of plaintiffs and usually a class suit may not be maintained. It takes something more. There must be a community of interest in the relief sought and such appears in many ways in the case at bar.

The note cites *Waterman Title Guaranty and Trust Company*, 293 N.Y.S. 168, where the plaintiff sought to maintain two representative causes of action, one based on fraudulent representation or false warranties; the other based on allegations that defendant as record holder of the mortgage securing the certificates held by the plaintiffs and other fraudulently extended them mortgage. The court held that the first cause of action was not maintainable as a class suit but the *second cause*

of action was so maintainable because of the community of interest with respect to the mortgage.

In the same note is cited *Mickelson v. Penny*, 10 Fed. Sup. 537, an interesting and instructive case, holding that depositors in a failed bank could not maintain a class suit against a director for false representations as to solvency; yet they could maintain a class suit in the nature of a creditor's bill against the director for and on account of the wrongs done to the bank.

So here can the plaintiffs maintain a class suit in respect of the wrongful diversions of the assets to the Colonial Corporation, and in this aspect it is immaterial as to exactly what their status is as long as their status is in the nature of a claim to an interest in the fund.

Counsel lean heavily on *Lindem Land Co. v. Milwaukee Railroad, etc. Co.* (Wis.) 83 N.W. 851. That case had a double aspect. Plaintiffs there sought to maintain a class suit in behalf of themselves and others similarly situated as taxpayers. The court held the class suit proper but that no cause of action was stated in right of taxpayers as such.

In the same case a class suit was attempted in behalf of plaintiff and others as *abutters* on the miles of street railroad. The court correctly held as a *matter of fact* that in the nature of things abutters on a long line of street railroad would have essentially dissimilar interest and could not be similarly situated, and the court therefore concluded that one abutter could not represent other abutters. The case was properly decided. Also

it is absolutely pointless here as aiding the defendants.

In this connection counsel seek to buttress their demurrer by denying the allegations of insolvency.

Counsel should remember that demurrers should not "shout" and that the demurrant admits the truth of the facts stated in the complaint.

It is suggested that some stockholders might not desire the relief sought by this complaint. Very well, they do not have to come in to the suit but merely have a right to come in. This is not a derivative suit, purely in right of the corporation building and loan association. There is a wide difference between a purely derivative suit and a representative suit in right of the plaintiffs and others similarly situated as individuals. See 4 Cook on Corporations, P. 3294; *Dana v. Morgan*, 232 Fed. 85; *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 57, 58; 52 L. 379, at 388.

At page 21 counsel say "the association is made both a plaintiff and a defendant." This is not strictly accurate, but if it were then counsel have stultified themselves (and worse), by general appearances for both the association and the Colonial Corporation. Have counsel forgotten that no man can serve two masters. Do they not know that they cannot with propriety or legality for the association contend that the Colonial Corporation has a right to receive on its common stock funds equitably belonging to the investors in the association. The very appearance of same counsel for both corporate defendants is strictly in accord with the allegations of the

complaint as to the general conspiracy and wrongs of the defendants.

Counsel cite *Blake v. Boston Development Co.*, 50 (Utah) 347, 167, P. 672. There several causes of action were alleged personal to the plaintiff and directly against the corporation to cancel stock assessments. Also a purely derivative cause of action in right of the corporation against certain directors and officers. There was no connection stated between the different kinds of causes of action and the one in no wise depended upon the other.

Here the cause of action against the association to be reinstated as a stockholder of record is connected directly by reason of insolvency, etc., with the cause of action against the Colonial to set aside the fraudulent conveyance and the latter matter is dependent upon the first. Furthermore, such matter is not within the reason or doctrine of purely derivative stockholders suits, notwithstanding in ultimate principle they are in some respects analagous.

At page 26 various cases are cited on questions of misjoinder. The *Ballew Lumber*, etc., case was a suit in equity (on law causes of action) by several independent shippers to recover separate overcharges from the railroad company. The court said that they were merely law actions but intimated that if the claims had been severally cognizable in equity the joinder would be proper.

In the *Rural Credit*, etc., case the court held that a

cause of action against a corporation for cancellation was not joinable with a cause of action for damages against individuals.

In *Stewart v. Ficken*, 149 S.E. 164 (S. C.), there was an attempt to join a law action by a depositor of a bank to recover his deposit with a cause of action in right of the bank not dependent on the first cause of action and a cause of action in another plaintiff as trustee. No community of interest or connection appeared.

In the *Spear* case from Massachusetts there were about forty plaintiffs comprising seven distinct groups of plaintiffs with different interest and there were three distinct corporation defendants. The court properly said "there is no community of interest on the part of these several classes" and they are "not sufficiently bound together by allegations of fraud and conspiracy to render them appropriate matters for inquiry in a single suit."

At page 24 counsel say "the causes of action for an accounting and to set aside the claimed fraudulent conveyance to Colonial Corporation as alleged could of course be only derivative." There is no cause of action stated for an accounting any more than there is a cause of action stated for receivership. Such matters are ancillary and preliminary in their nature. Furthermore, no case holds that a suit to set aside a fraudulent conveyance is derivative.

The allegations in paragraph 16 of the complaint with respect to diversion from the treasury of money for

excessive salaries does not purport to state a separate cause of action but are matters of inducement rather, and indeed may be surplusage and vulnerable to a motion to strike.

But the claimed defect was not specifically pointed out in the demurrer for misjoinder of causes of action.

That ground, No. 11 (Record 26), merely asserts a misjoinder of causes, describing no separate causes of action, except by the adjective "respective" and then referring to the matter of receivership as a distinct cause of action and the matter of liquidation and distribution as a cause of action and the matter of accounting as a separate cause of action. No suggestion is made that would in any wise indicate to the plaintiffs wherein any misjoinder consisted, and the statute as we have heretofore pointed out requires a particular specification in a special demurrer. "A general averment to the effect that causes of action have been improperly joined is insufficient."

1 Chitty on Pleading 447. 49 C.J. 237.

A special demurrer under the code with respect to misjoinder is in the nature of a plea in abatement at common law and the defect must be so pointed out as to "give the plaintiff a better writ." See also Gould on Pleading, 249-250 and 446.

Were it not for the fact that a demurrer does not lie to a demurrer we might well have demurred to the demurrer for uncertainty.

UNCERTAINTY

Counsel admit, as they must, on page 27, the appositeness of our authorities touching the pleading of discovery of the fraud. They cite 37 C.J. 1200. From that authority we glean that under the old equity practice the complainant must generally anticipate a defense and avoid it. Also that under the codes it is not necessary to anticipate a plea of the statute, except that where the limitation is one which goes to *the right of action itself* it is sometimes necessary to anticipate and avoid.

In *Hatch v. Hatch*, 46 Utah 116, at page 129, this court makes some useful comment on the distinction between the State and Federal courts with respect to matters of limitation and laches.

State courts sometimes cite Federal cases as persuasive or controlling without noticing some fundamental principles.

C.J. cites many cases and various conflicting holdings on the general question of pleading when the statute of limitation is involved.

The same may be said of 34 Am. Jur., Sec. 425. 4 Sutherland Code Pleading cites a single case in support of its text, namely, *Sterns v. Page*, 7 How. 819, 12 L. 928, which case holds that a bill in equity in a fraud suit must anticipate the defense and show as an integral part of the cause of action all the circumstances connected with the matter of fraud and its discovery.

Wood v. Carpenter, 101 U. S. 135, 25 L. 807, in-

volved an Indiana statute quite unlike our own. There the statute would be tolled by an affirmative act of the defendant in concealing the existence of the cause of action. Naturally enough the plaintiff might be required to allege all the facts with respect to the concealment and as a part of that the time and circumstances of plaintiff's discovery.

Hardt v. Heidweyer, 152 U. S. 547, 38 L. 548, was a suit in equity where plaintiff was required to anticipate the defense, and in order to show equity was required to set forth specifically all matters connected with the fraud and its discovery. Mr. Justice Brewer who wrote the opinion was the same judge who wrote the opinion in the case we cited, K. P. Railroad v. McCormick, 20 Kan. 107. He was not inconsistent, but he recognized that the principles of the high court of chancery were different from an explicit State statute.

Counsel also cite Lady Washington, etc., Co. v. Wood (Cal.) 45, P. 809. That case seems to support counsel's contention. It was participated in by three judges.

A contrary holding of the same court was made in Loftis v. Marshall, 66, P. 571, where the court adopted the opinion of commissioner George H. Smith, concurred in by Haynes, commissioner, and Cooper, commissioner. Commissioner Smith was noted for his learning. He was a judge at one time of a district court of appeal in California and was the author of numerous excellent works.

The case of Teats v. Caldwell (Cal. App.) 151, P.

973, also holds that the general allegation substantially as we make it is sufficient.

At page 31 of the brief it is argued that if any ground of the demurrer is held to be correct the order sustaining it should be affirmed.

If counsel mean by that that the *judgment* should be affirmed, in such event, then we say that such result should not follow. It is our position that if we have shown substantial and prejudicial error in the ruling, then this court should reverse such ruling and to that end should reverse the judgment. Otherwise manifest injustice would result to the plaintiffs and we submit that in modern times courts should endeavor within the limits of their power to effectuate justice. In many jurisdictions a party may appeal from an order sustaining a demurrer, and in such a case the court will reverse the order insofar as it is found to be erroneous. In this jurisdiction we assume that the order overruling the remurrer is not itself appealable, but we insist that the order in every respect is subject to review on appeal from the judgment, and if substantial error is found in the ruling then the court should so hold and make its holding effective and fruitful. It appears to be the position of counsel from the last two pages of the brief that they seek an unholy advantage in the event that some ruling in their favor may be right, unless all are held to be wrong. Sometimes such results follow, but it is deplorable that they should in any court.

Again we respectfully submit that the appeal is meritorious and that the judgment should be reversed.

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