1949

Newell J. Olsen and Newell J. Olsen & Sons v. Roland A. Reese : Petition for Rehearing

Utah Supreme Court

Case No. 7175

In the Supreme Court of the State of Utah

NEWEL J. OLSON, operating under the assumed name of NEWEL J. OLSON & SONS,

Plaintiff and Appellant,

vs.

ROLAND A. REESE,

Defendant and Respondent.

Petition for Rehearing

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TO THE HONORABLE JUSTICE AND JUSTICES OF THE SUPREME COURT OF UTAH:

Comes now the defendant in the above entitled cause and moves this Court to grant a rehearing of the above entitled cause upon the following grounds

1. That the Court erred in its opinion heretofore written in holding that the trial court erred in sustaining the general demurrer and dismissing the case and in reversing the judgment

of dismissal and the order sustaining the demurrer and in remanding the cause for a new trial and in permitting the parties to amend their pleadings.

2. That the Court erred in holding that the trial court erred in not permitting the plaintiff to amend his pleadings for the reason that the plaintiff never requested leave to amend and this in the face of the fact that the trial court specifically pointed out to him during the trial wherein his complaint failed to state a cause of action, particularly advising him the necessary allegation it should have contained, and this notwithstanding plaintiff had a period of forty days in which to do so. These facts the Court apparently overlooked in arriving at its decision.

3. That the Court erred in holding that the trial court erred for doing something the complaining party never asked it to do, and for something which the complaining party never himself attempted to remedy, that is a request for leave to amend his pleadings.

4. That the Court erred in holding that the trial court erred in refusing to admit the introduction of evidence after it became known that the plaintiff had failed to state a cause of action.

5. That the Court erred in holding that the trial court erred in refusing to permit the plaintiff time in which to present authorities on the question of the general demurrer in view of the fact that the trial court itself had specifically

pointed out wherein the plaintiff had failed to state a cause of action.

6. That the Court erred in assuming that the trial Court was so firm in his conviction that plaintiff could not state a cause of action or prove a case under any circumstances, and that it would have been futile for him to have requested any other or further consideration.

WHEREFORE, your petitioner prays that a rehearing be granted, that the errors above mentioner be corrected, and that the order of this court reversing the judgment of dismissal of the lower court be vacated and withdrawn.

Respectfully submitted,

NEWEL G. DAINES

L. DELOS DAINES

Attorneys for Defendant and Respondent.

L. DELOS DAINES hereby certifies that he is one of the attorneys for the defendant and respondent in the above entitled cause; that in his opinion there is merit to the alleged errors in the majority opinion heretofore written in the above entitled cause.

L. DELOS DAINES

ARGUMENT

We are mindful that in the great majority of cases after the Court has considered the cause, no useful purpose can be accomplished by reargument of matters decided by the Court. However, in this case we believe that as the Court apparently overlooked the following facts in arriving at its decision, that the Court will welcome a reconsideration thereof. The facts are these:

That notwithstanding the trial court pointed out to the plaintiff particularly wherein his complaint was fatally defective, he nevertheless during the trial or during the period elapsing between the oral order of dismissal and the formal entry of the judgment, failed to request or ask leave of the Court to amend his pleadings. A period of forty days expired between the date of the oral order of dismissal and the formal entry of the judgment. (Tr. 38A and 43). Furthermore, the plaintiff became aware prior to his appeal that the formal entry of judgment had not been entered, for after he had served a notice of appeal on the 22nd day of March, 1948, (Tr. 38C) he abandoned the appeal and then served a notice of appeal on the 30th day of March, 1948, the notice upon which this appeal is based, after the Court had entered its judgment on the same day. (Tr. 38A and 38D).

During the trial, the Court said:

> " * * * On this point the Court will sustain the demurrer that has been filed upon the grounds and for the reason that as a condition precedent to the bringing of an action, or to the stating of a cause of action, that

the plaintiff must allege in his complaint that he was at the time of the undertaking a licensed contractor in the State of Utah and that the proof must show that allegation. I hate this matter to go off on a demurrer." (Tr. 89).

Then in view of the fact that the plaintiff knew wherein his complaint was fatally defective, as the Court had so advised him, why is he now in a position to complain of his failure to take steps to amend his complaint, which he could have done either at the time of the trial or within the period expiring between the oral date of dismissal and the formal entry of judgment upon leave of the Court. There is no reason to believe the Court would not have granted such a request.

The record further discloses that the trial court granted the plaintiff every reasonable consideration and request made. It allowed him to amend his complaint, (Tr. 43 and 44), and it granted his motion to vacate the order of dismissal which was made when plaintiff failed to appear and prosecute his cause at its prior setting on June 6, 1948. (Tr. 30 and 38).

Furthermore, we believe that in the light of the prior considerations granted the plaintiff that the Court would have granted him leave to amend his pleadings to state a cause of action on request as the Court has before stated said: "I hate this matter to go off on a demurrer." Especially, had plaintiff taken the time, the effort and the consideration to advise the trial court that he could state a cause of action, pointing out to him that the authorities as mentioned by the Court in its opinion are practically unanimous to the effect

that the true date of the execution and delivery of the contract, regardless of the fact that it differs from the date shown in the contract, may be shown by parol evidence, and had given the Court the benefit of the citations mentioned in the Court's opinion. Plaintiff owed the Court this consideration. He had forty days in which to do so.

Again we can see no error in the Court refusing to proceed with the trial and admitting the introduction of further testimony after it became apparent to the Court that plaintiff had failed to state a cause of action or to grant him time in which to present authorities on the question of the general demurrer, for is not the stating of a cause of action necessary to the Court's jurisdiction of the subject matter? And then there would be no reason for the plaintiff to present authorities on the question of the general demurrer as the Court had pointed out to him wherein his complaint was particularly defective and advised him as to what allegation was necessary to cure it.

AUTHORITIES

That the plaintiff could have requested leave to amend his pleadings in time before the entry of the formal judgment is apparent from the decisions of this Court. In the case of Hancock vs. Luke, 148 P. 456, in an opinion written by Justice Frick, the Court said:

> * * * Certainly no judgment had been formally rendered at the time, and of course none could have been entered, as the colloquy between the Court and

> counsel shows. Why, then, was the offer to amend not timely? In case pleadings are assailed, must a party move to amend before he is apprised of what the ruling of the court will be? We think not. We are of the opinion, therefore, that the motion for leave to amend was timely. * * * * "

That it is not error to stop a case and dismiss the action where no request to amend the pleadings is made notwithstanding a cause of action might have been alleged is the holding of the Supreme Court of Arizona in the case of Stewart vs. Phoenix National Bank, 64 P. 2d 108. The court said:

> " * * * Since it appears that the complaint did not state a cause of action, the trial court, when it became convinced of that fact, was justified in stopping the trial at any stage of the case. It is true that, had plaintiff at this time asked leave to amend his complaint, it would have been reversible error to refuse to grant such leave, but apparently there was no request therefor. We can surmise from the pleadings that perhaps a cause of action might have been stated which, if proved by plaintiff's evidence to the satisfaction of the triers of fact, would have sustained a judgment in his favor, but we are bound by the rules of law, and must apply them to the record before us, and not to the record as it might have existed. Since the complaint, taken into consideration with the record of the mortgage foreclosure suit, of which the court properly took judicial notice, did not state a cause of action, and since there was no request for leave to amend it, judgment was correctly rendered in favor of defendant."

The California Court in the case of Watts vs. Currie, 101 P. 2d 764, said:

> " * * * If the facts warranted, the complaint doubtless could have been amended so as to obtain the benefit of the extension of time afforded by the Moratorium Act. But no claim is made by appellants that they asked or made any attempt to amend after the court ruled on the demurrer; and the law was well settled at the time this action was pending that where a defective complaint could be cured by amendment, the fact that the demurrer was sustained without leave to amend does not constitute reversible error in the absence of a request or application by a plaintiff for such permission. Haddad v. McDowell, 213 Cal. 690, 3 P.2d 550."

To the same effect is the Supreme Court of Idaho, for in the case of Durant vs. Snyder, 151 P. 2d 776, the Court said:

> "It is necessary that proper showing be made and that the application is made within a reasonable time before denial of the application for amendment becomes an abuse of discretion * * *".

To the same effect, also, see:

> Meyer vs. Board of Public Works of City of Los Angeles, et. al, 125 P. 2d. 50; Gomes vs. Warn et. al, 91 P. 2d. 214; Vilardo vs. Sacramento County, 129 P. 2d. 165.

WHEREFORE, it is submitted that a rehearing should be granted, that the errors herein complained of be corrected, and that the order of this Court reversing the judgment of dismissal and remanding the cause for a new trial be vacated and set aside, and the judgment of the lower court be reinstated.

Respectfully submitted,

NEWEL G. DAINES

L. DELOS DAINES

Attorneys for Defendant and Respondent.