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Bekins Bar V Ranch v. Utah Farm Production Credit Ass'n : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

BEKINS BAR V RANCH,
a Utah Corporation,

Plaintiff,
Appellant,

vs.

No. 15563

UTAH FARM PRODUCTION CREDIT
ASSOCIATION,

Defendant,
Respondent.

APPELLANT'S BRIEF

Appeal from an order of the Third Judicial
District Court for Salt Lake County, State of Utah
Honorable David B. Dee

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AUTHORITIES CITED

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| 2 A L R Fed. 1031 | |
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STATEMENT OF THE CASE

This is a question of procedure. The question presented is under what circumstances may a Motion To Dismiss be treated as a Motion For Summary Judgment? This procedural question has arisen in a case involving an alleged overpayment of an obligation owing by Plaintiff to Defendant. The issue before this Court is not concerned with the merits of that case but the manner in which the merits of that case may be reached.

DISPOSITION BELOW

Defendant filed a Motion To Dismiss. At the hearing thereon the Defendant argued a Motion other than the Motion filed. The Court deemed Defendant's Motion to be a Rule 12(b)(6) Utah Rules of Civil Procedure Motion and treated the Motion as one for Summary Judgment as provided for in Rule 56, Utah Rules of Civil Procedure which Motion was granted by the Honorable David B. Dee.

RELIEF SOUGHT

Plaintiff-Appellant seeks a reversal of the Trial Courts granting of Defendant's Motion To Dismiss and that the matter be remanded to the District Court and that Defendant be given the opportunity to answer or otherwise plead.

STATEMENT OF THE FACTS

Plaintiff was indebted to Utah Farm Production Credit Association evidenced by a Promissory Note dated May 10, 1973 and

secured by a real estate mortgage which was recorded in the office of the Recorder of Iron County, Utah, on the 11th of June, 1973, (R.2).

Plaintiff executed a Financing Statement covering crops, equipment and cattle situated on the mortgaged farmlands, which Financing Statement was filed in the office of the Secretary of State of Utah on June 13, 1973, (R.3).

Plaintiff gave a Renewal Promissory Note to Utah Farm Production Credit Association in the amount of \$709,638.00, executed on August 1974, and on the same day, Plaintiff executed a Security Agreement covering crops, cattle and equipment situated upon the mortgaged farmlands, with Utah Farm Production Credit Association as the second party (R.3).

Plaintiff made payments reducing the amount owing on the Renewal Promissory Note until on March 15, 1976, the principal sum due and owing was \$326,645.11, with accrued interest in the amount of \$52,131.66 for a total of \$378,776.77 (R.3).

Plaintiff made a further payment of \$45,000 on June 24, 1976, and on March 10, 1977, Plaintiff was prepared to pay off the principal and interest owing to Utah Farm Production Credit Association through an Escrow Agent, Security Title Company of Southern Utah, at Cedar City, Utah (R.3).

On March 8, 1977, attorneys for Utah Farm Production Credit Association mailed certain instructions relating to the payoff figure and the release of the real estate mortgage to the Escrow Agent at Cedar City, Utah (R.3,4,). Plaintiff through the Escrow Agent paid off the amount of the payoff figure furnished by

attorneys for Utah Farm Production Credit Association on March 10, 1977, (R.4). Plaintiff alleges that said payoff figure was overstated by at least \$17,180.69, has demanded return of such overpayment and has been refused.

ARGUMENT

I

THE MOTION TO DISMISS WAS DEFICIENT ON ITS FACE IN THAT IT FAILED TO ALLEGE SUBSECTION (6) OF RULE 12(b) OF UTAH RULES OF CIVIL PROCEDURE.

After being served with Plaintiff's Complaint and without answering said Complaint, Defendant filed a Motion To Dismiss. Defendant's Motion To Dismiss did not contain an allegation that Plaintiff's Complaint failed to state a claim upon which relief can be granted.

RULE 12. DEFENSES AND OBJECTIONS.

(b) HOW PRESENTED. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counter claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more

other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief". Rule 12(b), URCP

The Defendant neither asserted in the Motion To Dismiss nor argued subsequently at the hearing that the Plaintiff's Complaint failed to state a claim upon which relief could be granted. The Trial Court in its Memorandum Decision of October 26, 1977, states "The Court grants the defendant's Motion To Dismiss with the exception of the prayer for attorney's fees and costs in bringing this Motion. Defendant's counsel is instructed to prepare the appropriate order for the signature of the Court." (R.41).

II

THE TRIAL COURT ERRED IN GRANTING A MOTION WHICH WAS NEVER FILED.

The Trial Court in its Memorandum Decision of October 26, 1977, granted the Defendant's Motion To Dismiss and instructed Defendant's counsel to "prepare the appropriate order for the signature of the Court" (R.41). The Order Dismissing Plaintiff's Complaint signed by the Court on November 14, 1977, states "1. The Court deems the Defendant's Motion to be a Rule 12(b)(6) motion submitted together with affidavits which have not been excluded by the Court and therefore has treated the Motion as one for summary judgment and has disposed of it as provided in Rule 56 of the Utah Rule of Civil Procedure" (R.41,42). Thus the Trial Court ruled on a Rule 56 Summary Judgment Motion which was never filed and erred in so doing.

III

THE TRIAL COURT ERRED IN TREATING THE MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT AS THAT CAN ONLY BE DONE WHEN AN ORIGINAL MOTION TO DISMISS ALLEGES SUBSECTION (6) OF RULE 12(b) UTAH RULES OF CIVIL PROCEDURE

The Trial Court erred in treating the Motion To Dismiss as a Motion For Summary Judgment. The Trial Court is entitled to do so only when the Defendant has alleged that the Complaint fails to state a claim upon which relief can be granted. Rule 12(b)(6) URCP. Defendant's motion did not do so and thus the Court is without power to treat a Motion To Dismiss as a Motion For Summary Judgment.

In a commentary found in 2 A L R Fed. 1031 discussing Rule 12(b)(6), Federal Rules of Civil Procedure which is identical to Rule 12(b)(6), of the Utah Rules of Civil Procedure, it is stated:

" It should also be pointed out that the provisions for conversion of a Rule 12(b) motion to a motion for summary judgment is expressly made applicable only when such motion is for dismissal for failure to state a claim on which relief can be granted under subsection (6) of 12(b), and references herein to motions under Rule 12(b) are intended to indicate motions based on subsection (6) thereof. See Riley v Titus (1951) 89 APP DC 79, 190 F 2d 653, cert den 342 US 855, 96 L Ed 644, 72 S Ct 82, reh den 342 US 889, 96 L Ed 667, 72 S Ct 179, where it is noted that ' under Rule 12 (b), it is only on a motion asserting the defense numbered (6), failure to state a claim upon which relief can be granted, that the motion shall be treated as one for summary judgment when matters outside the pleadings are presented to and not excluded by the court'".

In Hill vs Grand Central, Inc., 25 Utah 2d 121, 477 P. 2d 150 (1970), the appellant appealed from the granting of a summary judgment against her in her action of libel. After she filed her complaint wherein she alleged malice on the part of the defendant without answering

moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6), U.R.C.P. This Court reversed the judgment of dismissal with directions to reinstate the complaint and to proceed with the case pursuant to the Rule of Civil Procedure, stating:

"True it is that when a motion to dismiss is accompanied by affidavits it may be treated as a motion for summary judgment, yet the court should not on his own initiative try to convert a motion for dismissal into one for summary judgment. He has no more right to ask plaintiff how he will establish his claim than he has to require the defendant to state what its defense will be."
(emphasis supplied)

That the judge in the instant case on his own initiative converted the motion for dismissal into one for summary judgment is evident as neither Plaintiff nor Defendant requested or argued a motion for summary judgment, the Court holding "1. The Court deems the Defendant's Motion to be a Rule 12(b)(6) motion submitted together with affidavits which have not been excluded by the Court and therefore has treated the Motion as one for summary judgment and has disposed of it as provided in Rule 56 of the Utah Rules of Civil Procedure". (R.41,42,).

IV

AS A RESULT OF ERRORS OUTLINED IN I, II, AND III, THE TRIAL COURT DEPRIVED PLAINTIFF OF A REASONABLE OPPORTUNITY TO PRESENT COUNTER AFFIDAVITS OR OTHER MATTERS OUTSIDE THE PLEADINGS AND THUS DEPRIVED PLAINTIFF OF HIS DAY IN COURT.

On October 4, 1977, Defendant, without answering Plaintiff's Complaint, filed a Motion entitled Motion To Dismiss. The Motion bears a certification of mailing dated October 3, 1977. On October 14, 1977, the Motion To Dismiss came on for hearing. The

Trial Court granted the Motion To Dismiss. In doing so, it departed from the Motion as filed and in reality granted a Motion For Summary Judgment which had never been filed. In doing so the Court erred in granting relief never asked for and deprived Plaintiff of an opportunity to have controverted facts submitted to the trier of fact; deprived Plaintiff of an opportunity to present counter affidavits, and thus deprived Plaintiff of his day in Court. The Trial Court has assumed facts not in evidence, assumed facts contrary to those alleged in Plaintiff's Complaint, (which Plaintiff is entitled to substantiate at time of trial), and granted Defendant's Motion which Plaintiff was not prepared to meet, having prepared to argue Defendant's Motion To Dismiss. Had Defendant filed a Motion For Summary Judgment instead of a Motion To Dismiss and had Plaintiff not provided counter affidavits for a Motion For Summary Judgment, then Plaintiff would have no cause to complain. But Plaintiff relied on the characterization of Defendant's Motion To Dismiss and submits that Defendant is bound by that designation. In dealing with a deficient Motion To Dismiss erroneously transmuted by the Court into a Motion For Summary Judgment, Plaintiff was deprived of an opportunity of presenting counter affidavits which Plaintiff would have had if a sufficient Motion For Summary Judgment had been filed. Defendant should not be benefited by erroneously filing a deficient Motion To Dismiss. If Defendant has a basis for filing a Motion For Summary Judgment, this case should be returned to give Defendant an opportunity to file a procedurally correct Motion For Summary Judgment and thus give Plaintiff an opportunity to file counter affidavits and have his day in Court.

The Utah Rules of Civil Procedure have been promulgated and adopted by the Supreme Court of the State of Utah. Their purpose is not to confuse, deceive or frustrate the legal process by one attempting to obtain a proper adjudication and resolution of a problem but to procedurally move matters forward so that the truth can be ascertained in any give situation that is brought to the Courts by a determination on the merits. In this case the merits have never been reached but have been avoided by the granting of a Motion which was deficient on its face, improperly filed and the transmuting of the Motion to one other than the one filed; all to the prejudice of the Plaintiff.

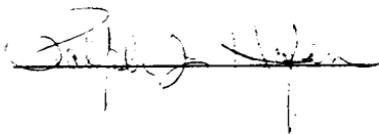
CONCLUSION

Plaintiff should have his day in Court and prays that this Court reverse the Trial Courts granting of the Defendant's Motion To Dismiss and that the matter be remanded to the District Court and the Defendant be given the opportunity to answer or otherwise plead.

Respectfully submitted

By Ralph J. Hafen
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I hereby certify that I delivered a true and correct copy of the foregoing Plaintiff-Appellants Brief to Lowell V. Summerhays, Esquire, of Robinson, Guyon, Summerhays & Barnes, attorneys for Defendant-Respondent, 1010 University Club Building, Salt Lake City, Utah 84111, this 21st day of February, 1978.

A handwritten signature in cursive script, appearing to read "Lowell V. Summerhays", written over a horizontal line. The signature is written in dark ink on a white background.