1978

Donald A. Dyson et al v. Aviation Office of America, Inc. : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

DONALD A. DYSON, *et al.*,

Plaintiffs/Donald A. Dyson Appellant,

vs.

AVIATION OFFICE OF AMERICA, *et al.*,

Defendants/Respondents.

AVIATION OFFICE OF AMERICA, *et al.*,

Third-Party Plaintiff and Counter-claim Defendants/Respondents,

vs.

DONALD A. DYSON, *et al.*,

Third-Party Defendants and Counter-claimants/Appellants.

STEPHEN F. KESLER, *et al.*,

Third-Party Plaintiffs/Respondents,

vs.

DONALD A. DYSON, *et al.*,

Third-Party Defendants/Appellants.

CASE NO. 15661

BRIEF OF RESPONDENTS: STEPHEN F. KESLER, W.T. BISSELL, RONALD McCLAIN, DONALD OBORN, ELMO WALKER and GARY FERGUSON (Intervenor).

APPEAL FROM THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, THE HONORABLE
BRYANT H. CROFT, JUDGE

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NATURE OF THE CASE

This is an action by the owners of an aircraft to recover from the insurer and/or the insurance agent their losses sustained in the destruction of the aircraft and an action between the insurer and the insurance agent to apportion such liability between them.

DISPOSITION IN THE LOWER COURT

The trial court granted the plaintiffs, Stephen F. Kesler, W. T. Bissell, Ronald McClain, Elmo Walker, Donald L. Oborn, and the plaintiff-intervenor, Gary Ferguson, collectively (hereafter referred to as "Plaintiffs"), a judgment against Donald A. Dyson and L. F. Dyson & Associates, jointly and severally (hereafter referred to as "the Dysons"), in the amount of $20,294.76. Ranger Insurance Company and Aviation Office of America (hereafter referred to as "Ranger/AOA") were awarded a judgment of "no cause of action" on all claims against them. from this action of the trial court, the Dysons have appealed, [1] and the plaintiff's have cross-appealed.

RELIEF SOUGHT ON APPEAL

The plaintiffs are seeking the following relief from this Court:

[1] Kenneth R. Shannon, pilot of the aircraft at the time it was destroyed was a defendant below and based upon his default, a judgment was entered against him and in favor of the plaintiffs, plus Donald A. Dyson, in the amount of $25,368.45. That judgment is not at issue in this appeal.

A. For an Order of this Court reversing the trial court and awarding plaintiffs and plaintiff-intervenor attorneys fees in this matter, including this appeal;

B. For an Order of this Court reversing the trial court and awarding them 10.58% interest on the judgment from date of loss;

C. Pursuant to Rule 73(l), awarding them the amount of their judgment against the Dysons plus 25% thereof as damages for the Dysons frivolous and delaying appeal of plaintiffs' judgment;

D. For an Order of this Court dismissing the Dysons' appeal of plaintiffs' judgment; and,

E. For an Order of this Court entering a Declaratory Judgment against the Dysons, declaring them liable to Gary Ferguson for his liability, if any, to Donald Oborn resulting from the loss of the aircraft.

STATEMENT OF FACTS

On March 18, 1975, Donald A. Dyson, Donald L. Oborn, Stephen F. Kesler, W.T. Bissell and Ronald McClain purchased a 1968 Cessna Aircraft. The aircraft was financed by Walker Bank & Trust Company upon a promissory note entered into jointly and severally by the above owners (exhibit 36). Simultaneously, the owners requested Donald A. Dyson to procure insurance on the aircraft, inasmuch as he is a licensed insurance agent and an employee and owner of L.F. Dyson & Associates, Inc., an insurance agency licensed to sell aircraft insurance in the State of Utah. Dyson agreed to procure and maintain insurance in force and effect on the aircraft in the amount of $27,000.00, the purchase price of the aircraft (R. 365,383,767,768). Dyson received a commission on the sale of the insurance for the aircraft (R. 557).

Thereafter, McClain sold his interest in the aircraft to Oborn and Walker. For both of these sales, Dyson caused the insurance policies to be endorsed to provide coverage for them as pilots of the aircraft. In December, 1975, Dyson sold his interest in the aircraft to Shannon. Dyson also submitted a request to Ranger Insurance Company that Shannon be added as a pilot of the aircraft under the insurance policy. Before receiving confirmation that Shannon had been added as a pilot under the insurance policy, Dyson delivered the keys to the aircraft to Shannon.

On February 1, 1976, with Shannon at the controls, the aircraft crashed, causing injuries to the occupants and totally destroying the aircraft. The plaintiffs filed a claim against Ranger Insurance Company for the loss of the aircraft. Ranger denied the claim since an endorsement had never been issued covering Shannon. Thereafter, Dyson and the other owners met and, based upon Dyson's representation that Shannon was a covered pilot (R.785) filed suit against Ranger. When it became apparent that Dyson had never received a written endorsement adding Shannon as a pilot, the other owners filed suit in a Third Party Claim against Dyson and his insurance agency on the basis of breach of contract to procure insurance and negligence in failing to obtain coverage for Shannon while piloting the aircraft.

Gary Ferguson was not initially a party in the action. However, when it became apparent that Donald Oborn, Ferguson's assignor, intended to claim against Ferguson based upon their contract, and that Ferguson might be collaterally estopped to

assert defenses in that action if he did not participate in this one, he was allowed to intervene as a party plaintiff. The court ruled, however, that the question of his relationship to Oborn was not a matter of dispute in this suit and ruled that he was forced to participate on the same basis as the other plaintiffs.[2/]

POINT I

THE DYSONS' APPEAL OF PLAINTIFFS' JUDGMENT IS TOTALLY WITHOUT MERIT, IS FRIVOLOUS AND SOLELY FOR DELAY AND SHOULD BE DISMISSED. PLAINTIFFS ARE ENTITLED TO RECEIVE AS DAMAGES AN AMOUNT EQUAL TO 25% OF THE JUDGMENT APPEALED FROM.

The Dysons have failed to contest plaintiff's judgment rendered against them. Their Statement of Points on Appeal and their brief contain absolutely no exception to the trial court's findings supporting the determination of their liability to plaintiffs on both breach of contract and negligence. Their appeal should be dismissed. Accordingly, Respondents find it unnecessary to address the issues raised by the Dysons in their brief. Since they have acquiesced in plaintiff's judgment, this court's determination of the issue raised regarding the Dysons right to jury trial can not affect that judgment.

Rule 73(1) provides:

> "(1) Dismissal of Appeal; Penalty for Delay. Failure of the appellant to take any of the further steps to secure the review of the case, except filing notice of appeal and depositing the fees therefore, shall not affect the validity of the appeal but is ground for such actions as the district court deems appropriate, which may include dismissal of the appeal. On the trial of the cause on appeal, *if it appears to the court that the appeal was made solely for delay*, it may add to the costs such damages as may be just, not exceeding twenty-five per cent of the judgment appealed from." (Emphasis added)

This rule is similar to Rule 38, Federal Rules of Appellate

2/ See discussion page 10, *infra*.

Procedure. Under that rule, it has been held that where the appeal is made solely for the purose of delay, the court may award attorney fees in addition to damages. *Overmyer v. Fidelity & Deposit Co. of Maryland*, 554 2d. 539 (2nd Cir. 1977). See, *Oscar Gruss & Son v. Lumbermen's Mutual Casualty Company*, 422 F.2d 1278 (2nd Cir. 1970). Rule 38 is discussed generally in *Moore's Federal Practice*, Volume 9, ¶238.01 and .02, pp. 4251 *et seq.* In applying rules similar to Rule 73(1) in other jurisdictions, the courts have consistently applied the penalties where there was no probable cause to appeal the judgment [See, *e.g.*, *Sterling v. Dairy Delite, Inc.* 494 P.2d 292, 262 Or. 359 (1952); *Sutton v. Empire Savings and Loan Association*, 410 P.2d 753, 147 Mont. 124 (1966)] and where the findings were amply supported by the evidence and the appeal was merely taken on general grounds [See, *e.g.*, *Mazrow v. Ritner*, 246 P.2d 54, 112 Ca.2d 345 (1952)].

In this case, the trial court found: (1) that the Dysons had breached their contract to provide insurance coverage while the aircraft was being piloted by Shannon; (2) that Donald A. Dyson, individually and as agent for L. F. Dyson and Associates, Inc., was negligent in allowing Shannon to operate the aircraft prior to obtaining insurance coverage for him; (3) that his negligence was the proximate cause of the plaintiff's damages, and; (4) awarded judgment against him and his agency (R. 349, 353, 371, 742). Although the Dysons stated in their Notice of Appeal that they were appealing this judgment, they have totally abandoned that claim, contesting neither the judgment nor the findings upon which the judgment was based. The intent of their appeal is

to secure indemnification from Ranger/AOA. They say in their statement of "Relief Sought on Appeal":

> "Plaintiff Donald A. Dyson, as one of the Owners, seeks reversal of the trial court's judgment in favor of AOA and Ranger on plaintiffs' Complaint; and Donald A. Dyson and L.F. Dyson & Associates, as third-party defendants and counter-claimants, seek reversal of the trial court's judgment against them in favor of AOA and Ranger on Dysons' Counterclaim and pray that the trial court be directed to enter judgment in favor of Dysons against AOA and Ranger *in the sum of any judgment entered in favor of the plaintiffs against them.*" (emphasis added) [App. Br. p.2]

The failure to contest the plaintiffs' judgment against them, makes it apparent that they are hoping for a judgment of this court which will shift liability for the plaintiffs' losses from them to Ranger/AOA. Of course, they do not want to pay any money now if that contingency were to happen. Obviously, they have appealed plaintiff's judgment solely to delay making payment on the judgment. Absent an appeal, the Dysons would have no basis upon which to stay execution of plaintiff's judgment against them. *cf.* Rule 62(d) Utah Rules of Civil Procedure, Replacement Vo. 9B (1953 Rev.ed.). This maneuver by the Dysons clearly falls into the proscription of Rule 73(l); it is precisely the offensive abuse of the appellate process which Rule 73(l), Federal Rule 38, and similar rules in other jurisdictions are designed to prevent. This court in this case is clearly warranted in assessing damages against the Dysons.

That the plaintiffs' have suffered damages because of this frivolous appeal is obvious; they have had to obtain counsel to prosecute this appeal and they have had to pay 10.58% interest on the note to Walker Bank & Trust Company with the expectancy of receiving a maximum of 8% interest when the judgment is finally executed upon. The damages the plaintiffs have suffered in this

case, however, go far beyond this appeal. For the duration of this case, they have been locked into waiting while Ranger/AOA and the Dysons litigated who would be responsible for plaintiffs' admitted loss. At trial, the Dysons stipulated that if insurance coverage were found not to exist, they would be liable to the plaintiffs (R. 346-47, 349, 353, 371, 742). After this stipulation was entered, however, plaintiffs' counsel were required to spend five more days in court (R. 374). All during the time of discovery and through the trial, the plaintiffs were required to pay 10.58% interest on the note with Walker Bank. The delay and added costs of this appeal should not be borne by plaintiffs; the full 25% penalty should be assessed against the Dysons.

POINT II

THE TRIAL COURT ERRED IN NOT AWARDING PLAINTIFFS ATTORNEY FEES.

While expenses of litigation and attorney fees are normally not recoverable unless expressly provided by contract or statute, in both contractual and tortious cases such expenses and attorney fees have been awarded where the actions by the liable party has caused the claimant to be involved in litigation with third parties. See, 22 AM.Jur.2d. §166; 45 A.L.R.2d 1183; 4 A.L.R.3d 270. This court considered the question in *In Re Pacific Coast Title Company v. Hartford*, 325 P.2d 906 (1958).

In that case, Hartford had provided a bond upon which Pacific was the obligee. When the contractor failed to perform and Pacific was required to incur attorneys fees in settlement of claims of materialmen, this court allowed Pacific to recover its attorney fees from Hartford on its bond. The court stated, at 379:

> The rule as to what damages are recoverable for breach of contract is based upon the concept of reasonable forseeability. That loss of such general character would result from the breach. Therefore, to be compensable, the loss must result from the breach in a natural and usual course of events so that it can fairly and reasonably be said that if the minds of the parties had averted to breach when the contract was made, loss of such character would be within their contemplation."
>
> "Applying the above rule to this case: It would reasonably be foreseen that the natural and usual consequence of Cassidy's failure to pay the labors and materialmen would bring about the series of events which occurred: that liens would be filed and legal proceedings instituted to enforce them; That Plaintiff Title Company, having the duty to keep the titles clear, would interpose defenses and attend to some disposition of the claims, which would require the services of attorney's and court costs incidental thereto. This is the type of loss for which Hartford's Bond was given to guard against."

The trial court reviewed the above authority but, in applying that authority to the facts of this case, ruled that the plaintiff's attorneys fees were incurred in asserting their claims against Dyson and not in litigation with third parties. Plaintiffs submit that the trial court misapplied the law in this case in the following particulars:

A. It is not disputed that when the aircraft was damaged and Ranger/AOA refused coverage, Dyson insisted to his co-owners that there was coverage for the aircraft and convinced them to secure counsel and file suit against Ranger/AOA (R.748-49, 775-6, 785). Even the trial court acknowledged in its memorandum decision that the plaintiffs did not sever their relationship with Dyson

until after Ranger/AOA had answered their complaint. By this time the plaintiffs were in litigation which, under the terms of the policy as *negligently procurred by Dyson*, they could not maintain directly against Ranger/AOA.

B. As recognized at the outset of the trial, it was apparent that the plaintiffs were entitled to recover from either Ranger/AOA or the Dysons. The plaintiffs were, however, forced to participate in the lawsuit because of their being moving parties in initiating the action and because they could not be released from attendance at the trial. (R. 374). The record clearly indicates that at the outset of the trial, the parties made several attempts to reach stipulations which would have allowed a judgment to be entered in favor of the plaintiffs regardless of how the liability was apportioned between Ranger/AOA and the Dysons. (R. 350-351; 353; 369; 372; 518; 616-623)

However, failure to agree to the entry of such a stipulated judgment necessitated plaintiffs' counsel's continued attendance at the proceedings.

C. From the record (R. 793-796), it is clear that the bulk of plaintiffs' attorneys fees were incurred in the lengthy trial of the matter which lasted more than five days and preparation directly related to that trial. There can be no question that the plaintiffs' attorneys fees were incurred as a direct and proximate result of Dyson's negligence and breach of contract. Furthermore, such an expense was clearly foreseeable from Dyson's action in naming himself as the only "named insured" and in failing to secure coverage for Shannon as a pilot. Because of Dyson's

role in the selection of counsel and initiation of a lawsuit against Ranger/AOA (which he knew or should have known as an expert in the insurance business, could not be maintained because of his negligence in only naming himself as "named insured") he should now be estopped from denying that the attorneys fees incurred by plaintiffs were incurred in maintaining their action against third parties.

D. The plaintiff-intervenor, Gary Ferguson, stands in somewhat different shoes than the other plaintiffs. As a purchaser of an interest in the aircraft from Donald Oborn, one of the original owners, he was not directly involved in procurring the insurance, nor was he directly obligated on the note with Walker Bank. Ferguson's counsel repeatedly attempted to introduce evidence of the relationship between Oborn and Ferguson, but was not allowed to do so by the Trial Judge (R. 324-325; 360-361; 365-368; 619).[3/] Ferguson suffered certain damages from the loss of the aircraft, but his biggest potential loss was his potential

3/ Part of the evidence which Ferguson attempted to introduce to the Court related to Oborn's claim against Ferguson under their agreement for all damages such as Oborn might sustain (*e.g.*, interest on the Walker Bank note, attorneys fees, etc.), and Ferguson's assertion that by instituting the action against the Dysons, Oborn had made an election under their agreement (Exhibit 1-PF) to declare a forfeiture and to retain all sums paid as liquidated damages. Ferguson's position was, therefore, that he was relieved of any obligation to Oborn and Oborn was entitled to receive all proceeds of the insurance. In that case, Ferguson would have no need to participate in the litigation in the instant case. Ferguson's counsel participated in the pre-trial settlement conference for the sole purpose of allowing the parties to resolve all disputes in the event settlement were reached. After settlement negotiations had failed, the suggestion by Judge Baldwin (presiding atthe pre-trial settlement conference) that Ferguson might be collaterally estopped from asserting claims against Dyson that would be litigated in this action made Ferguson's participation in this trial a necessity.

liability to Oborn. If Oborn sued Ferguson, he would file a third-party complaint against Dyson based upon breach of contract and negligence, precisely the issues being litigated in this case. It was this possibility that led to the collateral estoppel suggestion. Obviously, the only reason for Ferguson participating in this trial at all was to obtain a declaratory judgment against Dyson on the liability issue. Despite the evidence supporting such relief, the court refused to grant it. (R. 822-824) Further, the Dyson's counsel resisted any attempt by Ferguson to raise this issue (R.360, 366). Clearly, Ferguson's predecessor in interest was competently represented by Mr. Hintze and Ferguson really had no reason to be in the lawsuit except for that declaratory relief. Yet, he was involved because of Judge Baldwin's suggestion of collateral estoppel and, even more basically, because of the Dysons breach of contract and negligence in failing to obtain insurance for the aircraft while being piloted by Shannon. Ferguson gainsed nothing more from his participation in this trial than he would have gained had he not been in it at all. Clearly he falls within the class of individuals entitled to receive attorneys fees under the above authority. Furthermore, since the Dyson's counsel opposed Ferguson litigating for declaratory relief, they should now be estopped from denying that Ferguson's attorneys fees were incurred in litigation with third parties.

POINT III

THE TRIAL COURT ERRED IN NOT GRANTING THE ACTUAL INTEREST INCURRED BY PLAINTIFFS ON THE NOTE WITH WALKER BANK & TRUST COMPANY FROM THE DATE OF LOSS UNTIL THE DATE OF PAYMENT.

In making an award of damages for breach of contract, the Court attempts to put the injured party in as good a position as he would have been had the contract been fully performed. *Marsh v. Pratt*, 514 P.2d 823 (Alaska, 1973). The desired objective in computing damages is to evaluate any loss suffered by the most direct, practical and accurate method. *Even Odds, Inc. v. Nielson*, 448 P.2d 709, 22 Utah2d 49 (1968). See also, *Pacific Title v. Hartford, infra.* The evidence before the court in this case was uncontroverted that the time of the crash of the aircraft, there was a principal balance due on the promissory note at Walker Bank in the amount of $25,350.79 (R. 790) and that the note bore interest at the rate of 10.58% per annum (R. 790, 776). Since Dyson was one of the obligor's on the promissory note, there can be no question but what it was foreseeable on his part that if the aircraft were destroyed and insurance coverage was not obtained, he and the other obligators would be required to make payment on the note and would have to pay the 10.58% interest rate. The trial judge ruled that interest at the 10.58% rate was not allowable since the plaintiffs would have had to pay that interest rate regardless of Dyson's actions. His position is untenable. If the contract had not been breached, the insurer would have paid for the loss and the plaintiffs would not have been required to pay the higher interest while Ranger/AOA and the Dysons were squabbling about who was liable to the plaintiffs. If the aircraft had not been destroyed, the plaintiffs would have paid the higher interest, but they would have had the use of their aircraft. While it is clearly foreseeable that some incidental interest differential might accrue

in the 30 to 60 days required to make settlement on the insurance claim, but for the breach of contract and negligence of the Dysons, the plaintiffs would not have paid the interest at the higher rate for the period of time that they have. The trial judge's failure to make the Dysons pay the higher interest rate is unfathomable when one considers that, as a joint obligator on the note, Dyson was contractually responsible for paying 10.58% anyway. In effect, Dyson has agreed to pay the higher rate of interest.

POINT IV

THE TRIAL COURT ERRED IN NOT GRANTING GARY FERGUSON A DECLARATORY JUDGMENT AGAINST THE DYSONS.

As pointed-out above, the only reason for Ferguson being in the lawsuit was to obtain judgment against the Dysons, declaring them to be liable to him for claims which Oborn might make based upon the agreement between Ferguson and Oborn. The evicence clearly reflects that Dyson was aware of Ferguson's interest in the aircraft and his purchase of that interest from Oborn (R. 400, 757-58). Dyson made representations to Ferguson and to the other owners that he had acquired insurance on the aircraft while being piloted by Shannon (R. 750-51). Clearly, his negligence and breach of contract, as found by the Court and not contested on appeal, was the direct, active and proximate cause of Ferguson's potential liability to Oborn under their agreement.

When the evidence presented at trial entitles a party

to relief, judgment shall be entered although the relief to which the party is entitled was not specifically prayed for in the pleadings. Rule 54(c)(1), Utah Rules of Civil Procedure, Replacement Vol. 9B (1953 Rev.Ed.). *Cf.*, Rule 54(c), Federal Rules of Civil Procedure. *Moore's Federal Practice*, Vol. 6, ¶54.62, pp. 1261*ff.* See, also, *Dann v. Studebaker-Packard Corporation*, 288 F.2d 201 (6th Cir. 1961); *Ortiz v. Englebrecht*, 61 FRD 381 (D.C. N.J. 1973). Even though the claimant may not be entitled to the specific relief requested, the Court may retain jurisdiction to grant declaratory relief as established by the evidence. *Ortiz v. Englebrecht, supra.*

All parties required in an action for declaratory relief were present in this action. See, §78-33-11, Utah Code Annotated, Replacement Volume 9A (1953 Rev.ed.). In no way would the entry of a declaratory judgment against the Dysons prejudice an interested party, including the Dysons, since all were present and had an opportunity to contest and litigate the evidence presented. The issue of Ferguson's damages, if any, could be ascertained in a supplemental proceeding. See, §78-33-8, Utah Code Annotated.

CONCLUSION

Having raised no objections to the findings regarding their breach of contract and negligence nor objections to the evidence underlying those findings, the Dysons have abandoned their appeal of the plaintiffs' judgment and same should be denied. However, inasmuchas the appeal of the plaintiffs' judgment was solely to delay making payment on it, the Dysons should be penal-

ized for this abuse of the appellate process and the plaintiffs compensated for their damages in such abuse by assessing the Dysons 25% of the judgment amount. Plaintiffs are entitled to a reversal of the trial courts determination on the interest rate and are entitled to be awarded 10.58% interest on the judgment from the date of loss until paid. Plaintiffs should be awarded their attorneys fees incurred in this appeal and in the trial of this matter. Plaintiff-Intervenor Gary Ferguson should be awarded his attorneys fees incurred in this appeal and in the trial of this matter and should be awarded declaratory judgment against the Dysons adjudging them liable to him for damages he may sustain by reason his liability to Oborn. The determination of those damages should be reserved for subsequent proceedings.

Respectively submitted this 21 day of October, 1978.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed, postage prepaid, two copies of the foregoing Brief of Respondents Stephen F. Kesler, W.T. Bissell, Ronald McClain, Donald Oborn, Elmo Walker and Gary Ferguson (Intervenor), to each counsel for the parties as designated below on the _____day of October, 1978.

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