

1986

D&L Supply v. John Saurini : Brief of Respondent

Utah Supreme Court

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William J. Cayias; Attorney for Appellant.

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UTAH SUPREME COURT

BRIEF

860261

IN THE SUPREME COURT OF THE STATE OF UTAH

D & L SUPPLY, :

Plaintiff and Respondent, :

vs. : Case No. 860261

JOHN SAURINI, :

Defendant and Appellant. :

BRIEF OF RESPONDENT

Appeal from the Judgment of the Fourth Judicial
District Court of Utah County, State of Utah,
Honorable Ray M. Harding, District Judge

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

D & I SUPPLY, :
Plaintiff and Respondent, :
vs. : Case No.
JOHN SAURINI, :
Defendant and Appellant. :

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IN THE SUPREME COURT OF THE STATE OF UTAH

D & L SUPPLY, :
Plaintiff and Respondent, :
vs. : Case No.
JOHN SAURINI, :
Defendant and Appellant. :

BRIEF OF RESPONDENT

STATEMENT OF ISSUES

The issue in this case on appeal is whether the trial court properly granted summary judgment for Respondent and against Appellant. Respondent submits that the trial court properly granted the Motion of the Respondent for Summary Judgment based upon the Motion, Memorandum of Points and Authorities and Affidavit submitted with said Motion for Summary Judgment all of which were unopposed.

STATUTES AND RULES APPLICABLE TO THE ISSUES

Rule 56, Utah Rules of Civil Procedure

(a) For Claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary

judgment in his favor upon all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 2.8, Rules of Practice - District and Circuit Court

(a) All motions, except uncontested or ex parte matters, shall be accompanied by a brief statement of points and authorities and any affidavits relied upon in support thereof. Points and authorities supporting or opposing a motion for summary judgment shall not exceed five (5) pages in length exclusive of the "statement of material facts" as hereinafter provided.

(c) The moving party may serve and file reply points and authorities within five (5) days after service of responding party's points and authorities. Upon the expiration of such five (5) day period to file reply points and authorities, either party may notify the clerk to submit the matter for decision.

(d) The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists.

The facts shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which movant relies.

(e) The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

(f) Decision shall be rendered without a hearing unless requested by the court, in which event the clerk shall set a date and time for such hearing.

STATEMENT OF THE NATURE OF THE CASE

The Appellant, John Saurini, Defendant below, appeals from a summary judgment in favor of Respondent D & L Supply granting a summary judgment in favor of Respondent against Appellant in the sum of ONE HUNDRED EIGHTY TWO THOUSAND FOUR HUNDRED THIRTY FIVE DOLLARS and NINETY SEVEN CENTS (\$182,435.97).

PROCEEDINGS IN COURT BELOW

Respondent/Plaintiff below, filed a suit on August 29,

1985 in the Fourth Judicial District Court, seeking damages from the Defendant on account of goods and merchandise sold by the Respondent to the Defendant. (R.1) An Answer and Counterclaim was filed on September 26, 1985 by Appellant through Colorado counsel. (R.6) On March 10, 1986 the Respondent moved for summary judgment. (R.25) Appellant failed to respond to the Motion for Summary Judgment or the Memorandum of Points and Authorities and Affidavits attached to said Motion. On April 21, 1986 the trial court granted summary judgment for the Respondent in the sum of ONE HUNDRED EIGHTY TWO THOUSAND FOUR HUNDRED THIRTY FIVE DOLLARS and NINETY SEVEN CENTS (\$182,435.97). (R.36)

STATEMENT OF FACTS

The Complaint of Respondent D & L Supply, alleged that Defendant owed Respondent certain sums of money for goods purchased from Respondent D & L Supply by Defendant John Saurini in the State of Utah. (R.1-2)

Appellant Saurini filed an Answer and Counterclaim. (R.6) He denied that he was engaged in transacting any business in Utah or had subjected himself to the jurisdiction of the Utah courts, nor that he had transacted any business in the State of Utah. He also denied that he was individually liable to D & L

Supply.

On March 10, 1986, D & L Supply moved for summary judgment. (R.25) Attached to the Motion for Summary Judgment was a Memorandum of Points and Authorities in support of the Motion for Summary Judgment which contained a section of facts stated in separate numbered sentences. Also attached to the Motion for Summary Judgment was an Affidavit.

The Appellant Saurini failed to respond to the Motion for Summary Judgment and the Memorandum of Points and Authorities and failed to file any counter Affidavits. On April 21, 1986, the trial court granted summary judgment for the Respondent in the sum of ONE HUNDRED EIGHT TWO THOUSAND FOUR HUNDRED THIRTY FIVE DOLLARS and NINETY SEVEN CENTS (\$182,435.97). (R.36)

The trial judge entered Findings of Fact and Conclusions of Law (R.33). The Findings of Fact duplicate the facts stated in separate numbered sentences in Respondent's Memorandum of Points and Authorities in the section referred to as facts. Appellant never filed anything in opposition to said facts.

Summary judgment was entered on April 21, 1986. (R.36) When Appellant failed to oppose Respondent's Motion for Summary Judgment and failed to file any opposition to the Memorandum of Points and Authorities in support of the Motion for Summary

Judgment and failed to file any counter affidavit, there were no issues of fact remaining and Respondent was entitled to summary judgment as a matter of law.

POINT I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO
RESPONDENT BASED UPON THE STATEMENT OF FACTS WHICH WHEN
UNOPPOSED ARE DEEMED ADMITTED

Rule 2.8 of the Rules of Practice in the District and Circuit Courts (e) provides "all material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

The 15 separate numbered sentences in Respondent's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment were unopposed. The Affidavit attached to the Motion for Summary Judgment remained unopposed. Since all of the material facts set forth in the statement of the movant are deemed admitted, it was totally appropriate for the court to grant the Motion for Summary Judgment and prepare Findings of Fact in accordance therewith.

Rule 56 of the Utah Rules of Civil Procedure, specifically provide, "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law."

POINT II

RECORD FAILS TO PROVIDE BASIS FOR APPEAL

There is nothing in the record that would excuse Appellant from the effects of Rule 2.8 of the Rules of Practice in the District and Circuit Courts of the State of Utah. Respondent appropriately made its Motion for Summary Judgment and in the Memorandum of Points and Authorities in Support thereof set forth the facts in 15 separate numbered sentences. Appellant's failure to oppose said statement of facts entitles Respondent to have all 15 statements of fact deemed admitted for the purpose of summary judgment.

The court in Whittaker vs. Nikols, 699 P2d 685 (Utah 1985) made rulings with regard to requests for admissions which were not responded to and deemed admitted. The court ruled "the matters contained in Plaintiff's Request for Admissions are conclusively deemed admitted". Facts deemed admitted under Rule 2.8 of the Rules of Practice are entitled to the same conclusion.

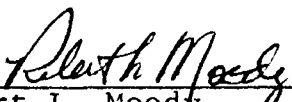
In the case at issue, the Findings of Fact taken from the facts deemed admitted are fully supportive of Respondent's

entitlement to summary judgment. Summary Judgment was given at the legal rate of interest rather than the higher rate requested and no attorneys fees were awarded though requested since the facts did not support the same.

CONCLUSION

Summary judgment was the only consistent judgment that the court could render based upon the record before it. The record fails to support any basis upon which Appellant is entitled to relief. Based upon the record, there were no genuine issues as to any material fact. Bringing before this court allegations that were never brought before the trial court, is not a basis for granting a relief by way of appeal and the summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of Sept, 1986.



Robert L. Moody
Attorney for Respondent

ADDENDUM

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

D & L SUPPLY, :
Plaintiff, : MEMORANDUM OF POINTS
vs. : AND AUTHORITIES IN
JOHN SAURINI, : SUPPORT OF MOTION FOR
Defendant. : SUMMARY JUDGMENT
Civil No. 70,513

Plaintiff submits the following Memorandum of Points and
Authorities in Support of its Motion for Summary Judgment.

FACTS

1. Plaintiff has sold to the Defendant and/or
corporations that he has been associated with for more than 20
years.

2. In 1982, Plaintiff advised the Defendant that he

would no longer sell to corporations that Defendant was associated with and that any and all future dealings would be with the Defendant individually and not with corporations that he was associated with and it was agreed that any and all future billings and/or dealings would be with the Defendant personally.

3. Commencing in November of 1982 and continuing through 1985 each and every invoice for materials purchased by the Defendant were made out to the Defendant personally and shipments were made pursuant to instructions at the time any such orders were received.

4. That any and all orders were received by Plaintiff in its place of business in Lindon, Utah County, State of Utah.

5. It was agreed that any and all payments for materials shipped would be made to Plaintiff at its address in Lindon, Utah County, State of Utah.

6. On a number of occasions, Defendant personally visited Plaintiff's place of business in Lindon, Utah County, State of Utah.

7. That any and all shipments were shipped FOB Lindon, Utah pursuant to shipping instructions.

8. That pursuant to said agreement, Plaintiff made numerous charges from its plant and received numerous payments for many of said shipments pursuant to the agreement at its

office in Lindon, Utah County, State of Utah.

9. Pursuant to orders received at its plant in Lindon, Utah, Plaintiff shipped merchandise having values as follows:

MONTH	YEAR	AMOUNT
November	1982	\$ 32,239.96
December	1982	27,684.39
January	1983	25,492.18
February	1983	14,134.57
September	1984	25,221.50
October	1984	35,786.50
November	1984	(810.40 credit for returned merchandise)
TOTAL		\$167,842.70

10. That Plaintiff has received payments at its plant in Lindon, Utah as follows:

YEAR	AMOUNT
1983	\$ 7,305.50
1984	20,218.01

11. There is a balance owing on the principal for merchandise ordered and shipped from Lindon, Utah in the sum of ONE HUNDRED FORTY THOUSAND THREE HUNDRED NINETEEN and 11/100 (\$140,319.11) DOLLARS.

12. That on each and every invoice shipped and received by Defendant, the terms were set forth and if not received on the 10th of the month following shipment, interest would accrue at the rate of one and one-half (1 1/2%) percent per month.

Interest has accumulated at the rate of eighteen (18%) percent as follows:

YEAR	AMOUNT
1982	\$ 1,797.73
1983	16,927.79
1984	28,773.91
1985	33,807.34
Total interest as of December 31, 1985	\$81,306.77

13. Interest computed on the same basis as the next proceeding paragraph but at the rate of ten (10%) percent calculates to be FORTY TWO THOUSAND FORTY NINE and 86/100 (\$42,049.86) DOLLARS.

14. The terms and conditions of each and every invoice provide that in the event it becomes necessary to enforce the terms and conditions of the invoice that the Defendant would pay a reasonable attorney's fee.

15. Copies of the invoices for the materials shipped are attached hereto as Exhibit "A".

ARGUMENT

Defendant has purchased and Plaintiff has shipped from its plant in Lindon, Utah and there is an unpaid principal balance in the sum of ONE HUNDRED FORTY THOUSAND THREE HUNDRED NINETEEN and 11/100 (\$140,319.11) DOLLARS. That Defendant's activities constitute doing business in the State of Utah and

Plaintiff is entitled to judgment for the principal, interest, costs and attorney's fees.

Since the fall of 1982, Defendant has made personal visits, has placed orders and has caused merchandise to be shipped from Lindon, Utah and has made some payments but has left a balance owing in the principal amount of ONE HUNDRED FORTY THOUSAND THREE HUNDRED NINETEEN and 11/100 (\$140,319.11) DOLLARS.

After being properly served, Defendant has entered a general appearance and does not dispute the amount of the principal.

In 78-27-22, Utah Code Annotated, 1953, as amended it states as follows:

"It is declared, as a matter of legislative determination, that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons, who through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting in increased interaction between persons of this state and persons of other states.

The provisions of this act, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over nonresident Defendants to

the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution."

In Producer's Livestock Loan Company vs. Miller, 580 P2d 603 (1978) the Utah Court stated:

"The fundamental proposition remains that in order to assert jurisdiction over a party it must appear that he engaged in some substantial activities within the state beyond the merely transitory matters mentioned above, so that it is reasonable and just to assume that he has had the benefit of the protections and advantages of the laws and institutions of the state to the extent that it is within the concept of fairness and due process that he be subjected to the jurisdiction of its courts."

Had Defendant not agreed to become personally liable as is set forth in the attached Affidavit, and had he not placed his orders in the State of Utah and agreed to pay Plaintiff at its office in Lindon, Utah, no merchandise would have ever been shipped. For over two years, Defendant placed orders and on occasion made payments, visited the plant, and the volume and the long period of time surely is more than a transitory transaction.

Accordingly, it is respectfully submitted that Plaintiff should receive judgment in accordance with the foregoing facts.

CONCLUSION

In summary, it is submitted that Plaintiff is entitled

to judgment in the sum of ONE HUNDRED FORTY THOUSAND THREE HUNDRED NINETEEN and 11/100 (\$140,319.11) DOLLARS together with interest either at eighteen (18%) percent as set forth in the invoices or ten (10%) percent as provided by law together with costs and attorney's fees.

DATED this 10th day of March, 1986.

/s/ Robert L. Moody

Robert L. Moody
CHRISTENSEN, TAYLOR & MOODY
Attorneys for Plaintiff
55 East Center Street
Provo, Utah 84601

CERTIFICATE OF MAILING

Mailed a copy of the foregoing to Mr. William J. Cayias Attorney for Defendant, 1558 South 1100 East, Salt Lake City, Utah 84110; postage prepaid, this 10th day of March, 1986.

/s/ Robert L. Moody


Robert L. Moody
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Attorneys for Plaintiff and Respondent
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P.O. Box 1466
Provo, Utah 84603
Telephone 810-373-2721

IN THE SUPREME COURT OF THE STATE OF UTAH

D & L SUPPLY, :
Plaintiff and Respondent, :
vs. : CERTIFICATE OF MAILING
JOHN SAURINI, : Case No. 860261
Defendant and Appellant. :

I HEREBY CERTIFY that on the 5th day of September, 1986 I mailed four true and correct copies of the BRIEF OF RESPONDENT to William J. Cayias, Attorney for Appellant, 1558 South 1100 East Street, Salt Lake City, Utah 84105; postage prepaid.

DATED this 5th day of September, 1986.



ROBERT L. MOODY
Attorney for Respondent