1949

Russell W. Young and Saba O. Young v. Elvis Hansen and Bonnie Hansen : Brief of Appellants

Utah Supreme Court

Gaylen S. Young; Attorney for Plaintiffs and Appellants;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

RUSSELL W. YOUNG AND SABA O. YOUNG, his wife,

Plaintiffs and Appellants,

vs.

ELVIS HANSEN AND BONNIE HANSEN, his wife,

Defendants and Respondents.

CASE No. 7426

BRIEF OF APPELLANTS

GAYLEN S. YOUNG,
Attorney for Plaintiffs and Appellants

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STATEMENT OF FACTS

This is a suit for dissolution of partnership and for an accounting. The plaintiffs and defendants entered into a partnership in the middle of May, 1948, to own and operate a farm at 220 West Central Avenue in Salt Lake County, Utah. The plaintiffs, being husband and wife, thereafter moved on the property with the defendants who are also husband and wife where each couple and their families occupied a separate apartment in the same house. They raised pigs, rabbits, sheep, etc. The agreement was oral but it was the understanding of the partners that at a later time they would set down in writing the agreement in detail. Under the oral agree-

ment the defendants were to deed to the plaintiffs an undivided one half interest in the farm property at 220 West Central Avenue and a bill of sale to an undivided one half interest to practically all the personal property thereon including, among other things, cattle, chickens, pigs, rabbits, tools, farm equipment, etc. The partnership went along smoothly for about six months, but before the deed, written agreement and bill of sale were executed, the parties began to have misunderstandings. By then the plaintiffs had put into the venture between $4,000.00 and $5,000.00 of their money. The plaintiffs ever since August 1, 1948 have occupied said apartment.

The plaintiffs' understanding of the agreement was that they were to pay $9,000.00 to the defendants for the one half interest in said venture. This money was to be paid by November 15, 1948, provided the plaintiffs had by that time sold their home on State Street. In the event it was not sold by November 15, 1948, then the plaintiffs were to pay some amount and begin paying defendants $50.00 per month on the balance and defendants were to receive interest at 5 per cent per annum on the balance until their house on State Street was sold at which time the remaining balance was to be paid. Proper deed, bill of sale and written partnership agreement were to be arranged for in any event by November 15, 1948.

The plaintiffs paid $4,060.00 on the $9,000.00 in July, 1948. By November 15, 1948, the house of plaintiffs' on State Street had not been sold. Plaintiffs thereupon tendered the $50.00 monthly payments and de-

manded the execution by defendants of the necessary deed, bill of sale and written partnership agreement. The defendants refused to accept the payments or to take any steps to draw up papers for a business-like understanding until plaintiffs paid the entire balance of $4,940.00. In February, 1949, the defendants refused to have anything more to do with the plaintiffs, ordered them out of the house and refused to give them any accounting whatsoever (T. 1 to 4 and 23 to 26).

The plaintiffs feeling that their remedy at that time was in a court of law for damages for breach of contract started such an action. It was tried before Judge Van Cott of the Third District Court. The plaintiffs set up and introduced into evidence as damages the various amounts that they had put into the partnership totally about $5,000.00. The defendants claimed they did not at any time agree to accept $50.00 monthly payments but that the balance of the $9,000.00 was to be paid on or before November 15, 1948. The plaintiffs claimed the defendants were to accept $50.00 per month. The court held that the testimony was too evenly divided for him to be satisfied whether there was any breach of contract on the part of either plaintiffs or defendants, concluded "that defendants did not violate the terms of said agreement" and entered judgment "no cause of action" (T. 23 to 26, 36 and 37).

Plaintiffs thereafter commenced this action for dissolution of partnership and for an accounting (T. 1 to 4). The defendants set up in their answer the defense of res judicata, claiming that all matters were determined

in the breach of contract suit and that plaintiffs are barred from having another hearing where substantially the same facts would be necessary. They set up all the pleadings and Findings, Conclusions and Decree in that case (T. 11 to 37). Plaintiffs demurred to each and every part of defendants' answer which raised the issue of res judicata on the ground that res judicata was not a defense. Plaintiffs also moved to strike the same matter on separate grounds of irrelevancy, sham and redundancy (T. 39 to 42). Said Demurrer and Motion to Strike came on for hearing before Judge Crockett on November 10, 1949. The said Judge held that the breach of contract suit was a bar to this dissolution and accounting case in that res judicata applied. Counsel for plaintiffs, therefore, stated to the court it would be useless to go to trial whereupon and on motion of counsel for defendants the court ordered this case dismissed (T. 44 to 46). This appeal is taken from said ruling and dismissal.

The time for appeal not having expired in the breach of contract case, the plaintiffs are appealing that case (number 7428 herein) along with this one so that the court will have the benefit of the entire record in both cases.

ERRORS

1. The court erred in overruling plaintiffs' demurrer to defendants' answer.

2. The court erred in denying plaintiffs' motion to strike.

3. The court erred in dismissing the case.

ARGUMENT

The three errors are of such a nature that it will be necessary to argue all together as all of them raise but one question:

DOES RES JUDICATA APPLY IN THIS CASE?

We think it does not apply. To make a case come within the rule of res judicata "there must be identity (1) in the thing sued for; (2) *in the cause of action;* (3) in persons and parties; (4) in the quality in the persons for or against whom the claim is made" (Vol. 37, Words and Phrases, p. 400). To the same effect are numerous cases quoted on pages 400 to 404, inclusive, in that volume.

Plaintiffs have come into a court of equity to ask for dissolution of the partnership and for an accounting. When the court concluded and found in the breach of contract case that defendants did not breach the contract it left the parties right where they stood before the action was brought. It left them still in partnership with one another. Who gets the $4,060.00 cash advanced to the defendants by the plaintiffs in the partnership? Who gets the plaintiffs' interest in the electric saw, the sand and gravel, the cement, the trailer, the lumber and other building materials the plaintiffs put into the venture? Who gets the money advanced to defendants by the plaintiffs to assist in paying their taxes?

The court in the breach case held against plaintiffs

"no cause of action" but it did not hold that plaintiff is not entitled to a dissolution of partnership and it did not hold plaintiffs are not entitled to an accounting (T. 36 and 37). This is a distinct and separate cause of action. In order to be res judicata there must exist, among other elements, an identity in the cause of action. There may be a different cause of action involving the same subject matter.

An action on an *express contract* determined on its merits is not a bar to action on a *quantum merit* on the same set of facts. See Lorang v. Flathead Commercial Co. (Sup. Court of Mont. 1941). This was such a case. It is reported in 119 P. (2d) page 273. It seems plaintiff did not sustain the burden of proof on an express contract. On page 275 the court said:

"Assuming without so deciding, that the judgment in action No. 8936 was and is a bar *to another action to enforce the express contract* it is not a bar to the maintenance of this action which was brought to recover on quantum merit. The general rule applicable is stated in 34 C. J. 806, as follows: "Where a plaintiff is defeated in an action based on a certain theory of his legal rights or as to the legal effects of a given transaction or state of facts through failure to substantiate his view of the case, this will not as a rule preclude him from renewing the litigation, *without any change of the facts,* but basing his claim on a new and more correct theory."

The judge in the first case felt that breach of contract was not the proper form of proceeding and thought

the proper remedy was one in dissolution of partnership and accounting. In 30 Am. Jurisp. at page 946, we have:

"210 Misconception of Remedy. The doctrine of res judicata is not available as a bar to a subsequent action if the judgment in the former action was rendered because of a misconception of the remedy available or of proper form of proceeding. In such situation, the plaintiff is entitled to bring the proper proceeding to enforce his cause of action."

On page 949 of that volume, we read:

"*A final decision at law of a cause which involves matters exclusively within the jurisdiction of chancery does not preclude its reexamination of the latter tribunal.*"

There may be such a thing as the plaintiff seeking to invoke a remedy that does not exist. Suppose the plaintiffs did refuse to go ahead with the partnership and demanded their money back as defendants claim, would that not be the equivalent of demanding the dissolution of the partnership? Under section 69-1-28 U.C.A. 1943, a partner may withdraw from the partnership at any time when no definite term or specific undertaking is specified. That would be true of both parties to the partnership agreement. It may be therefore that there could have been no such thing as breach of contract in the relationship and the plaintiffs were mistaken in seeking the remedy of breach.

In 9 R.C.L. page 962 under election of remedies, we have the following:

"MISTAKE AS TO REMEDY.—The principles gov-

erning election of remedies are necessarily based upon the supposition that two or more remedies exist. If in fact or in law only one remedy exists, there can be no election by the pursuit of another and mistaken remedy. It is a well-established rule that the *choice of a fancied remedy* that *never existed* and the futile pursuit of it, either because the facts turn out to be different from what the plaintiff supposed them to be, or the law applicable to the facts is found to be other than supposed, *though the first action proceeds to judgment,* does not preclude the plaintiff from thereafter invoking the proper remedy."

"A partner who has contributed only a part of what he agreed to contribute to the firm enterprise may proceed for an accounting without tendering the balance" 47 C.J. page 1200, Section 903.

The rule of law on res judicata is stated on the point of identity of cause of action in East Mill Creek Water Co. v. Salt Lake City, 159 P. 2d 863 108 Utah 315. On page 86 of the Pacific reference after discussing the general rule, it says:

'but it only applies where the claim, demand or cause of action is the same in both cases . . . . . where the claim, demand or cause of action is different in the two cases, then the former is res judicata of the latter only to the extent that the former *actually raised and decided the same points and issues which are raised in the latter."*

In case number 7428 the only issue raised and properly decided on was that of breach of contract.

Other points of damages were raised but since the court found defendants were not guilty of a breach the other points became, and even though the court made findings on many of them they were, immaterial. This suit is not for breach of contract, but one for an entirely different cause of action, that of dissolution of partnership and accounting. Dissolution of partnership and accounting were not the issues in the first case and were not raised or decided.

So we think the ruling of the District Court should be reversed.

Respectfully submitted,

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