

1951

Nathan Seamons v. Larry D. Anderson et al : Brief of Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

NATHAN SEAMONS, as the sur-
viving partner of SEAMONS &
LOVELAND,

plaintiff,

vs.

LARRY D. ANDERSEN, and
HANS P. ANDERSEN,

defendants and
appellants

and RICHARD PETERSEN,

defendant and
respondent

and CLAYTON E. NIELSEN and
RAY BITTERS, Co-partners, do-
ing business in the firm name and
style of VALLEY CAR MARKET,
defendants.

FILED

JUL 28 1951

Clerk, Supreme Court, Utah

**BRIEF OF
APPELLANTS**

Case No.

7691

**Appeal from the District Court of the First Judicial
District of the State of Utah, in and
for the County of Cache**

Hon. Lewis Jones, Judge

GEO. D. PRESTON

Attorney for Appellants

STATEMENT OF POINTS

1. The Court erred in making and entering it's judgment in favor of the respondent and against these appellants, and in making any finding of fact and conclusions of law in support thereof, as no cause of action upon which the Court could grant such relief was alleged against appellants. p. 4

2. The Court erred in permitting the amendment to the prayer of the cross-complaint and in failing to grant appellants' motion to strike the same and in failing to sustain appellants' objection to the amendment to the prayer. p. 4

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STATEMENT OF FACTS

This case involves an appeal upon the record only and therefore a transcript of the record from the court reporter's notes is not included. These notes would in no manner aid the Court in a final decision. The amount involved is not important to the parties, but the princi-

ples under the new rules of procedure are extremely important—in fact so important that it is hoped the final decision will be a guide for the future trial of cases in the lower courts.

The plaintiff filed a complaint in the District Court on April 7, 1950 against all of above defendants (p. 1) seeking money judgment of \$1648.06 and foreclosure of a conditional sales agreement against these appellants. The respondent Petersen, answered and counterclaimed (p. 9). Respondents also answered and cross-complained. There are several intermediate pleadings not pertinent to this statement. Suffice it to state that plaintiff was so confused in his theory of the case the issues were never clearly stated.. One of his amended complaints was for a declaratory judgment (p. 33). Plaintiff's second amended complaint (p. 40) finally brought an answer and counterclaim (p. 48) from respondent Petersen, and it is upon this pleading and subsequent matters appearing in the record which brings this appeal. At the time of filing of this last answer and counterclaim the same did not contain any allegations, either in the prayer or the main body to the effect that these appellants were indebted to respondent in any amount whatsoever. It simply prayed for possession and sale of the Mercury car in liquidation of the debt alleged between respondent Petersen and defendants Nielsen and Bitters, and the plaintiff.

The appellants demanded a jury (p. 31) and the

answer and cross-complaint (p. 16) and answer to amended complaint (p. 25) of appellants were treated by all parties as the pleading to plaintiff's final complaint. The jury returned it's verdict (p. 76) indicating that the value of the car was, when repossessed in excess of the judgment claimed by plaintiff. No question was asked of the jury as to any amount owed by appellants to respondent. This verdict was taken under advisement by the Court on the 11th of October, 1950, when the jury was discharged.

On January 8, 1951, the Court permitted respondent to amend by interlineation the prayer of his cross-complaint (p. 52) by adding the words "and said Larry D. Andersen and Hans P. Andersen", which amendment was objected to by appellants (p. 104), as specifically found by the Court (p. 113). Thereupon, the Court entered it's finding of fact, conclusions of law, and judgment as appears in the files.

STATEMENT OF POINTS

1. The Court erred in making and entering it's judgment in favor of the respondent and against these appellants, and in making any finding of fact and conclusions of law in support thereof, as no cause of action upon which the Court could grant such relief was alleged against appellants.

2. The Court erred in permitting the amendment to the prayer of the cross-complaint and in failing to

grant appellants' motion to strike the same and in failing to sustain appellants' objection to the amendment to the prayer.

All of the statement of points filed with the notice of appeal are concerned with this statement of points, and are so closely allied with each other, that the above is intended to summarize the same without duplicity or redundancy.

ARGUMENT

Appellants' Points 1 and 2. There will be no good reason to extend this brief to great length. None of the parties in Court ever harbored the idea that appellants were ever indebted to respondent. Please refer to the respondent's brief (p. 86) where Mr. Sjostrom states: We believe that we are entitled to a judgment severally and jointly, against Seamons, Nielsen and Bitters for the sum of \$550.00 we having received but \$1400.00 on the Mercury . . . " Then, again, (p. 87): "Larry Andersen also testified that it was agreed between him and Nielsen that the \$267.00 check was to be cancelled and I do not recall any testimony coming from Nielsen to the contrary nor did Nielsen ever tell Petersen who, *by the way did not want the check*, that \$150.00 had been paid on the \$267.00 check". It is the difference between this \$150.00 that appellants paid to Nielsen and the post dated check of \$267.00, that the Court rendered judgment against appellants in the sum of \$117.00.

The Court, certainly entertained no idea that appellants owed Peterson \$117.00 or at least was so confused that the findings of fact reflect a different state of mind than the judgment. See findings No. 6 where the Court states:: "That thereafter the said Larry D. Andersen paid to Nielsen and Bitters \$150.00 on said \$267.00 post-dated check with the understanding and agreement that the balance of \$117.00 was to be paid, but said post-dated check was to be destroyed and cancelled; but contrary to said agreement said Nielsen and Bitters delivered said post-dated check to said defendant Richard Peterson though they knew it was worthless. That said Peterson was not informed of the \$150.00 that had been paid on said Post-dated check or that check was cancelled and Larry D. Andersen was to pay the balance of \$117.00 without reference to check".

The above finding can accure no right in favor of respondent. The check was not negotiable. In fact if post-dated, and it was, it was not a check, but a promise to pay to Nielsen which was cancelled by the parties, as well as by the finding of the jury to the efect that when Nielsen retook possession of the Mercury it was worth \$1800,00, or more than \$117.00 over the total of the original contract sued on by plaintiff.

A casual reading of all of the pleadings of respondent indicates that he never did state a cause of action against appellants. The lower Court tried to abridge this gap (finding No. 17, p. 113) by adding in his own

hand writing: "by this amendment to answer filed herein on May, 1950, but had not reiterated said allegations in his answer filed 3 October 1950". Now, the pleading of May 1950 is absolutely silent on the matter of money judgment against appellants.

When respondent's pleadings have been stripped of verbiage not affecting the appellants it consists solely of the prayer amended by interlineation, which is to say that respondent must claim that under our new rules, he may merely file a complaint consisting of a prayer without a statement of facts.

The difficulty we are faced with in this case is that there were no issues raised by the pleadings, no amendments to the pleadings, because the prayer in a complaint is no part of the pleadings or cause of action. 41 Am. Jur 366. No further authorities need be cited on this point.

I do want to refer to an article, by Justice Wade contained in the Utah Law Review, 1950. Justice Wade discusses the Capitol Electric and Kinsman cases therein cited. Our case should not be sent back with permission to amend the pleadings because Peterson himself has never made any claim against appellants. As a matter of fact the appellants did not even plead to Peterson's counterclaim because no relief was asked against him by way of money judgment. Note Attorney Sjostrom's affidavit to re-open the case (p. 79). That affidavit

was made after the jury had been discharged, and not a word was made about further evidence to establish a claim against appellants. Also, note Attorney Sjostrom's brief (p. 86) where he states against whom he should have a money judgment: "We believe that we are entitled to a judgment severally and jointly, against Seamons, Nielsen and Bitters for the sum of \$550.00". Not one word was mentioned in that brief of any claim against appellants, and that brief was filed with the Court on January 8, 1951. The appellants paid the jury fee, and if there was any question about a liability in favor of Peterson as against the appellants, they were entitled to have this issue, properly pleaded, submitted to the jury. Under the finding of the jury (p. 76) No. 4 the car was worth \$1800.00 when repossessed—more than ample to pay Seamons in full, and leave enough over to have Seamons pay Peterson the \$117.00. This would have paid Peterson in full, so that it would be an injustice to permit an amendment.

The complaint should have been dismissed against appellants upon the objection timely taken (p. 104). Our new Rule 8 (a) states in simple language: "A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled." Then form 21 shows how to plead

against a defendant on crossclaim.

I would like to point out to the Court one of the suggested forms contained in the new rules, but I can not do this because there is nothing suggested in the respondent's pleadings which indicate a theory upon which he can recover. It cannot be upon the check because the Court specifically found (finding No. 17) "That the Andersens are indebted to the co-defendant Peterson in the sum of \$117 as the balance due for the cancellation and liquidation of their conditional sales contract originally made and given to the plaintiff including the value of the use of the Mercury car by said Andersens but which was not ever paid in full." The trouble with that finding is that such a debt would be in favor of Seamons and not Peterson, and this could not be a debt because of finding No. 5 of the jury. Furthermore, finding No. 6 specifically finds that "said post-dated check was to be destroyed and cancelled". In finding No. 6 there is this finding: "That Larry D. Andersen paid to Nielsen and Bitters \$150.00 on said \$267.00 post dated check with the understanding and agreement that the balance of \$117.00 was to be paid." This is a finding that Andersen owed Bitters and Nielsen. It is not a finding that Andersen owed Petersen.

In any event, even though the pleadings of respondent and the findings of the Court are impossible to understand, let us assume only for the sake of argu-

ment, that the theory of respondent is upon a contract made for the benefit of a third party beneficiary under the old Lawrence vs. Fox theory. He would have to make some allegation which nearly fits some of the suggested forms on page 164 of the Rules of Civil Procedure. Going back to Rule 8, it is noted that there are two catagories in the requirements. Respondent's pleading entirely omits the 1st requirement to state the claim in a short and plain statement showing he is entitled to relief.

The arguments contained above, apply with equal force to this point and are adopted in support hereof.

GEO. D. PRESTON

Attorney for Appellants