

1954

Vincent Dykes v. Reliable Furniture & Carpet Company et al : Brief of Appellant

Utah Supreme Court

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C. E. Henderson; Ray, Rawlins, Jones & Henderson; Attorneys for Defendant and Appellant;

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In the
Supreme Court of the State of Utah

VINCENT DYKES, by and through
Neil Farrell Dykes, his Guardian Ad
Litem,

Plaintiff,

vs.

RELIABLE FURNITURE & CARPET
COMPANY,

*Defendant and Third-Party
Plaintiff and Respondent,*

vs.

WALKER MANUFACTURING COM-
PANY,

*Third-Party Defend-
ant and Appellant.*

FILED

MAY 21 1954

Court, Utah

Case No.
8179

BRIEF OF APPELLANT

C. E. HENDERSON,
of

RAY, RAWLINS, JONES,
& HENDERSON,

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*Third-Party Defend-
ant and Appellant.*

Case No.
8179

BRIEF OF APPELLANT

STATEMENT OF FACTS

For convenience in referring to the parties in this case, they will be referred to herein the same as they are designated in the pleadings filed in the lower court.

The plaintiff, a minor, commenced an action by his guardian ad litem, in the District Court of Weber County, State of Utah, to recover judgment against the defendant, Reliable Furniture & Carpet Company, defendant and third-party plaintiff, for personal injuries alleged to have been sustained by plaintiff in falling from a baby crib which was purchased by plaintiff's parents from said defendant, a retail furniture merchant engaged in business at Ogden, Utah. Plaintiff's complaint alleges that the catch mechanism on the gate of the crib was defective and: "That the defendant was negligent in failing to inspect, discover and remedy said defects in said crib mechanism, and that said negligence was the proximate cause of said child's fall and injury." The third-party defendant, Walker Manufacturing Company, is not a party to said action brought by plaintiff against said defendant. (R. 2).

Subsequent to the filing of said complaint, said defendant, as third-party plaintiff, filed a third-party complaint against Walker Manufacturing Company, as third-party defendant, in which it is alleged that if said crib was defective as alleged in plaintiff's complaint, such defect was proximately caused by said third-party defendant in the manner in which said crib was designed or manufactured; and said third-party complaint demands judgment against third-party defendant in the amount of any judgment which may be recovered by plaintiff against third-party plaintiff. (R. 4). Summons was issued on said third-party complaint and purported service thereof was made in Salt Lake County, Utah, on a person named Harland Fredrickson. (R. 7).

Third-party defendant filed a motion in this case, as authorized by Rule 12(b) of the Utah Rules of Civil Procedure and in the form prescribed thereby, whereby third-party defendant moved the district court as follows:

"To dismiss the third-party action or in lieu thereof to quash the return of service of the third-party summons on the grounds (a) that the court lacks jurisdiction over the person of said third-party defendant, and (b) that said third-party defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of Sam Walker and Harland Fredrickson hereto annexed as Exhibit "A" and Exhibit "B", respectively.

C. E. Henderson
of Ray, Rawlins, Jones & Henderson
Attorneys for Third-Party Defendant,
Walker Manufacturing Company." (R. 8).

Said motion of third-party defendant came on regularly for hearing on October 13, 1953, before the Honorable John A. Hendricks, one of the judges of said district court and, following the arguments of counsel, the matter was taken under advisement. In support of said motion, affidavits of Sam Walker (owner and proprietor of Walker Manufacturing Company) and Harland Fredrickson, marked Exhibit "A" and Exhibit "B", respectively, were annexed to and filed with said motion. (R. 8). The deposition of Harland Fredrickson, on behalf of third-party plaintiff, was taken pursuant to stipulation of counsel for third-party plaintiff and third-party defendant and the original transcript thereof was submitted to and filed in said district

court. (R. 10). For convenience, the transcript of said deposition, which is designated in the record as 010, will be hereinbelow designated as "Tr".

On or about March 31, 1954, said district court made and entered the following order:

"Minute Entry

Ogden, Utah
March 31st, 1954

Gentlemen:

Re; Civil file #28090 Vincent Dykes et-al vs Reliable Furniture and Carpet Co., Defendant, and Walker Manufacturing Co third party defendant, the motion to dismiss was argued by Mr. Henderson and taken under advisement, on the First day of March The Court denied the Third Party Motion, and no notice was given.

The Court at this time grants the Third Party defendant 10 days from this date to file an answer.

Lawrence M. Malen, County Clerk
A. M. Allen, Deputy." (R. 9).

A copy of said order, which was the only order entered with respect to said motion of third-party defendant, was received by counsel for third-party defendant, on April 1, 1954.

Walker Manufacturing Company is the trade name by which Sam Walker, who is a resident of the State of California, carries on business in said state at the City of Burbank. (R. 8—Exhibit "A"). Said third-party defendant has never been a resident of the State of Utah and has not been served with summons in this action unless the

purported service in Salt Lake County on Harland Fredrickson be held a valid service on said third-party defendant. At all times herein involved, third-party defendant carried on the business of manufacturing infant furniture at Burbank, California, and had no place of business, no office, no plant, facilities or equipment, no bank accounts, no records, no merchandise or samples of its products and no property of any kind in the State of Utah. (R. 8—Exhibit “A”, R. 10—Tr. 4, 5, 17, 38, 41, 45-47). Third-party defendant has no employees, no telephone or directory listing, and did no advertising in Utah. (R. 10—Tr. 4, 5, 13, 38-39, 45).

Harland Fredrickson, upon whom said purported service of summons was made, was, at all times herein mentioned, an independent contractor who maintained his place of business in Salt Lake County, Utah, at his own expense. His business, which he characterizes as a manufacturers’ representative, involved the solicitation of orders for products of various manufacturers, including those of third-party defendant. When he obtained an order, he forwarded it to the manufacturer for acceptance and if accepted by the manufacturer, the goods covered by the order were shipped by the manufacturer direct to the purchaser who made payment therefor direct to the manufacturer. If an order for goods was accepted by the manufacturer and shipped to the purchaser and the purchaser accepted and paid for the goods, Harland Fredrickson received a commission for his services in obtaining such order. (R. 8—Exhibit “B”, R. 10—Tr. 17-20, 25-26, 34-36, 40-42, 47-48). He handled no merchandise and had no authority to negotiate with respect to the price or terms of payment for goods

ordered, nor to pass on the credit risk of a customer or make adjustments on goods ordered and shipped. (R. 8—Exhibit “A”, Exhibit “B”, R. 10, Tr. 13-15, 18-20, 22-25, 31, 34-37, 40-46).

STATEMENT OF POINTS

1. The District Court of Weber County erred in denying the motion of third-party defendant to dismiss the third-party action because the record shows that said court lacks jurisdiction over the person of said third-party defendant and that the purported service of summons in said action is null and void.

2. Said third-party complaint states no claim and presents no issue upon which relief could be granted against said third-party defendant in favor of said third-party plaintiff.

ARGUMENT

POINT NO. 1

THE DISTRICT COURT OF WEBER COUNTY ERRED IN DENYING THE MOTION OF THIRD-PARTY DEFENDANT TO DISMISS THE THIRD-PARTY ACTION BECAUSE THE RECORD SHOWS THAT SAID COURT LACKS JURISDICTION OVER THE PERSON OF SAID THIRD-PARTY DEFENDANT AND THAT THE PURPORTED SERVICE OF SUMMONS IN SAID ACTION IS NULL AND VOID.

To sustain the purported service of summons in the third-party action, third-party plaintiff relies, and must

rely on Rule 4(e) (10) of the Utah Rules of Civil Procedure, which provides for service:

“Upon a natural person, nonresident of the State of Utah, doing business in this State at one or more places of business, as set forth in Rule 17(e), by delivering a copy thereof to the defendant personally or to one of his managers, superintendents or agents.”

Rule 17(e) which is referred to in Rule 4(e) (10) provides as follows:

“Action Against a Non-resident doing Business in this State. When a non-resident person is associated in and conducts business within the State of Utah in one or more places in his own name or a common trade name, and said business is conducted under the supervision of a manager, superintendent, or agent, said person may be sued in his own name in any action arising out of the conduct of said business.”

We respectfully submit that such purported service was null and void and of no force and effect because it is established by the record in this case that third-party defendant, a non-resident of the State of Utah, was not doing business in this state at any place of business within this state at the times herein involved, or for that matter at any other times, and that such purported service was not made on a manager, superintendent or agent of said third-party defendant. *Parke, Davis & Co. vs. Fifth Judicial District Court in and for Beaver County et al.*, 93 Utah 217, 72 P. (2d) 466; *McGriff vs. Charles Antell, Inc.* (Utah), 256 P. (2d) 703; 10 A. L. R. (2d) pages 200-203.

In *Parke, Davis & Co. vs. Fifth Judicial District Court in and for Beaver County et al.*, (supra), this court states the facts and holding of said case as follows:

"The cause is before us on petition of plaintiff and the demurrer of defendants. McLennan was a traveling salesman for Parke, Davis & Co. in Utah. Such orders as he obtained were sent to the branch office of the company at Kansas City and, if accepted, the goods were shipped direct to the purchasers in interstate commerce. McLennan was not an officer of the company. He handled no merchandise, and all orders solicited by him were on credit to be approved and extended by the credit manager at Kansas City. The salesman had no authority to extend credit to any one. The corporation was not otherwise in business in Utah, had no office or place of business, and owned no property in the state. It had never applied for permission to do business in the state, had done no business therein, and had designated no person within the state upon whom process might be served.

"(1) This court has held that the soliciting of orders for goods by an agent of a foreign corporation and shipment of goods pursuant to such order by such corporation of another state directly to the purchaser is in interstate commerce and does not constitute doing business within the state so as to subject the corporation to the statute prescribing conditions applicable to foreign corporations doing business within the state. *Advance-Rumely Thresher Co., Inc.*, v. *Stohl*, 75 Utah 124, 283 P. 731. It is a general rule that: 'The mere soliciting and obtaining of orders within a state by the agent of a foreign corporation, for goods to be shipped into the state to the purchasers, do not amount to doing business within the state so as to render the corporation

amenable to service of process therein.' Note, 101 A. L. R. 133; *People's Tobacco Co., Ltd., v. American Tobacco Co.*, 246 U. S. 79, 38 S. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537; *Curlee Clothing Co. v. Oklahoma Tax Comm.* (Okl. Sup.) 68 P. (2d) 834."

POINT NO. 2

SAID THIRD-PARTY COMPLAINT STATES NO CLAIM AND PRESENTS NO ISSUE UPON WHICH RELIEF COULD BE GRANTED AGAINST SAID THIRD-PARTY DEFENDANT IN FAVOR OF SAID THIRD-PARTY PLAINTIFF.

It is now established by a recent decision of this court that said third-party complaint should be dismissed on the ground that said third-party complaint states no claim and presents no issue upon which relief could be granted against third-party defendant in favor of third-party plaintiff.

Plaintiff's complaint, to which third-party defendant is not a party, alleges as follows:

"3. That late in January, 1953, the parents of said child at Ogden, Utah, went to the defendant's store for the purpose of buying a baby crib. That Raymone Labrecque, said defendant's salesman, showed them cribs and demonstrated one of the same make as the one selected by said parents. That the defendant's salesman, in demonstrating said crib, had difficulty in making the gate of said crib catch and tried several times before he was able to do so. That the parents of said child selected a crib similar to the one demonstrated but informed the defendant that they would not accept that one be-

cause of the difficulty with the catch, whereupon the salesman assured them that the particular crib was only for display purposes and that they were to be sent a different crib, but of the same make which would be free from defects. Whereupon the parents purchased a crib and the defendant's employee subsequently delivered and assembled the same at the parent's house for use by said child. That said delivered crib was likewise defective in that the catch or locking mechanism which held the gate in the raise position was improperly manufactured and assembled.

"4. That the parents of said child placed him in the crib the night of February 21, 1953, and raised the gate until it was held in the raised position, but because of the defect in the construction of the catch mechanism said gate fell, permitting said child to fall from said crib to a cement floor, where he suffered a fractured skull.

"5. That the defendant was negligent in failing to inspect, discover and remedy said defects in said crib mechanism, and that said negligence was the proximate cause of said child's fall and injury."

The third-party complaint demands judgment against third-party defendant only in the event plaintiff recovers judgment against third-party plaintiff and, in support thereof said third-party complaint alleges:

"That if said crib was defective as alleged in 'Exhibit C', such was proximately caused by the third party defendant in the manner in which said crib was designed or manufactured, and if the plaintiff obtains judgment or any part thereof, against the third party plaintiff, then said third party defendant is liable to the said third party plaintiff for the amount of said judgment."

In *Hardman vs. Mathews, et al.*, 262 P. (2d) 748, which was decided by this court on November 2, 1953, Justice Henroid, speaking for the court, held:

"If the negligence of the interpleaded parties were the sole proximate cause of the injuries as defendants maintain, the latter would have a complete defense to the action without the joinder. If actively they were jointly or concurrently negligent with defendants, joinder would avail the latter nothing since contribution cannot be had between joint or concurring tort-feasors, in a case like this, unless sanctioned by statute, there being none such in Utah."

CONCLUSION

It is respectfully submitted that the lower court erred in denying the motion of third-party defendant to dismiss said third-party action because said court did not acquire jurisdiction over third-party defendant by the purported service of summons in Salt Lake County, Utah, on said Harland Fredrickson. The material facts shown by the record establish that third-party defendant, at all times herein involved, was a nonresident of the State of Utah. that he was not doing business in this state at any place of business in this state, and that Harland Fredrickson was an independent contractor who maintained his own place of business in Utah at his own expense and was not a manager, superintendent, or agent of third-party defendant.

Furthermore, it is now clear under a decision of this court, *Hardman vs. Mathews* (supra), decided during the pendency of the present case in the lower court, that the

third-party complaint filed against third-party defendant states no claim and could present no issue upon which relief could be granted against third-party defendant in favor of third-party plaintiff.

Respectfully submitted,

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