

1980

Morris Myers and Peggy A. Myers v. Howard R. Morgan and David T. Green : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MORRIS MYERS and
PEGGY A. MYERS,

Plaintiffs-Respondents,

V.

NO. 16991

HOWARD R. MORGAN
and DAVID T. GREEN,

Defendants-Appellant.

RESPONDENTS' BRIEF

Appeal from a Judgment of the Third
Judicial District Court in and for
Salt Lake County, State of Utah, the
Honorable Jay E. Banks, Judge

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Salt Lake City, Utah 84103
PLAINTIFFS-RESPONDENTS

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APPELLANT

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Defendants-Appellant.)	

RESPONDENTS' BRIEF

Appeal from a Judgment of the Third
Judicial District Court in and for
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Honorable Jay E. Banks, Judge

STATEMENT OF THE CASE

This lawsuit, as originally commenced, is for money lent (R 2-5). Defendants filed separate answers which consisted of general denials (R 6,7). Approximately two years after the commencement of the action the complaint was amended to add to the declaration a claim on the promissory note which is described in the motion to amend (R 36-39, 43-46). Defendants' original answers stood as against the amended complaint.

DISPOSITION IN THE LOWER COURT

A money judgment was rendered in favor of the plaintiffs and against both defendants in the total sum of \$3296.03 (R 59).

RELIEF SOUGHT ON CROSS-APPEAL

Remand to the lower court with direction to enter judgment against defendant-appellant Green, and in favor of the plaintiffs, for \$3700.00, the full amount of plaintiffs' claim, interest thereon at the legal rate, and costs.

STATEMENT OF FACTS

Defendant-appellant's statement of facts is inconsistent with the facts in that this action is an action for money lent (R2) and for the balance due on a promissory note (R 44); and the judgment entered (R59) is a general money judgment and by its terms is not tied to the promissory note.

In August and September, 1974, plaintiffs lent defendants \$3700.00 which is not disputed (R 146, Line 14; R 168, Lines 4-6). The defense of payment was not pled (R 6,7). At the trial defendants sought to establish payment through the introduction of a series of twenty-two checks in which plaintiff, Peggy A. Myers, was payee (Exhibit D-1). Some of the checks, according to the testimony of defendant Morgan, were issued to pay the loan and some were issued to pay plaintiffs a share in the profits of a business operated by defendants (R 156, Lines 26-29; R 157, Lines 20-23). Exhibit D-1 (the checks) was admitted over plaintiffs' objection of 1) insufficient foundation, and, 2), not within the issues as made by the pleadings (R 151, Lines 9-11; R 154, Lines 22-26; R 157, Lines 8-13; R 159, Lines 5-12; R 164, Lines 7-15), and subject to a motion to strike

(R 158, Lines 11-12). There is no evidence upon which a determination could be made as to how each of the checks comprising Exhibit D-1 should be applied (R 157, Lines 29-30; R 165, Lines 21-27). Plaintiffs' motions to strike were denied (R 161, Line 27; R 164, Lines 11-14).

Both defendants admitted the validity of the promissory note (R 171, Line 30; R 172, Line 1).

Of its own motion, and over plaintiffs' objection, the trial court amended the pleadings to conform to the evidence but was not specific as to what amendments were allowed (R 164, Lines 27-28; R 170, Lines 29-30; R 171, Line 1).

In a purported post-judgment motion, defendant Green moved the court ". . . pursuant to Rules 59(a)(1) and 59(e) of the Utah Rules of Civil Procedure, to alter or amend the judgment entered against the defendant David T. Green. (¶) Defendant David T. Green further moves the court pursuant to Rule 60 of the Utah Rules of Civil Procedure for relief of the judgment entered against David T. Green." The motion stated no grounds as required by Rule 7(b)(1), U. R. C. P., and plaintiffs moved to strike the same (R 60) for that reason and ultimately moved to dismiss this appeal upon the authority of *Martinez v. Trainor*, 556 F 2d 818 (7th Cir., 1977) which was denied. Plaintiffs' motion to dismiss this appeal is herewith renewed.

ARGUMENT AND AUTHORITY

(Appeal of defendant-appellant Green)

Affirmance of the judgment of the trial court is required. Rule 54(c)(1), U. R. C. P. provides that every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled. Under this record plaintiffs are entitled to judgment for the amount they loaned to defendants which defendants admit is \$3700.00.

Giving defendant-appellant his point that he cannot be held liable on a promissory note which he did not sign, he still may be held liable under this record for the amount of the loan. The fact that the trial court, at least as defendant-appellant Green perceives the record, by its findings and conclusions, premised its judgment against defendant-appellant Green on the promissory note, does not change matters. It is the rule of appellate review in Utah, as well as in every other jurisdiction, that the judgment of the trial court must be affirmed if it can be done on any proper ground squarely presented on the record even if the court below assigned an incorrect reason for its ruling (Alphin Rlty., Inc. v. Sine, 595 P 2d 860 (Ut., 1979); Edward v. Iron County, 531 P 2d 476 (Ut., 1975); Foss Lewis & Sons Constr Co. v. General Life, 517 P 2d 539, 30 Ut 2d 290; Peterson v. Fowler, 510 P 2d 523, 29 Ut 2d 366; Limb v. Federated Milk Producers Ass'n, 461 P 2d 290, 23 Ut 2d 222; Green Ditch Water Co. v. Salt Lake

City, 390 P 2d 586, 15 Ut 2d 224; Fleming v. Fleming-Felt Co., 323 P 2d 712, 7 Ut 2d 293; Rasmussen v. Davis, 262 P 2d 488, 1 Ut 2d 96; Tree v. White, 171 P 2d 398, 110 Ut 233; Smith v. American-Packing & Provision Co., 130 P 2d 951, 102 Ut. 351; Davis v. U.S., 589 F 2d 446 (9th Cir., 1979)). If the trial court reaches the correct conclusion on the merits for an erroneous reason, the error is harmless and the judgment must be affirmed (Matter of Estate of Torstenson, 609 P 2d 1073 (Ariz., 1980)).

(Plaintiffs' cross-appeal)

1. The trial court improperly admitted, heard, and considered evidence as to payment. - The defense of payment is required to be pleaded under Rule 8(c), U.R.C.P., and if not so pled, is waived under Rule 12(h), U.R.C.P. (Bezner v. Continental Dry Cleaners, Inc., 548 P 2d 898 (Ut., 1976; Tygesen v. Magna Water Co., 13 Ut 2d 397, 375 P 2d 456.)).

2. The trial court committed an abuse of discretion in amending the pleadings to conform to the evidence. - The issue of payment was not tried by the express or implied consent of the plaintiffs so as to justify the trial court's amending the pleadings to conform to the evidence. When a party seeks to amend the pleadings to conform to the evidence to include an unpleaded defense, the critical question is whether that unpleaded issue was tried by the express or implied consent of the parties (Rule 15(b), U.R.C.P.; Hamm v. Merrick, 605 P 2d 499 (Haw., 1980)). At every juncture at which defendants sought to introduce evidence relevant to the unpleaded

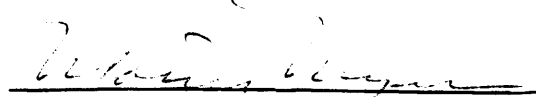
defense of payment, plaintiffs objected on the grounds that such evidence was not within the issues as made by the pleadings, and further that such defense was waived by defendants under Rule 12(h), U. R. C. P. for not having been specifically pleaded as required by Rule 8(c), U. R. C. P. ("Consent will be implied from the failure to object to the introduction of evidence relevant to the unpleaded issue.", Hamm, supra.)

3. Exhibit D-1 was received in evidence subject to a motion to strike if not thereafter connected to payment(s) on the loan. There is no evidence or testimony connecting even one of the items contained in Exhibit D-1 to payment on the loan and the trial court erred in denying plaintiffs' motion to strike. And without foundation as to the purpose for which the items contained in Exhibit D-1 were issued, it being the testimony of the defendants that each check was issued for one of two purposes, one unrelated to payment(s) on the loan, the exhibit could not properly be the basis to amend the pleadings to conform to the evidence in the respect of pleading the unpleaded defense of payment on the loan.

CONCLUSION

Plaintiffs-respondents are entitled to judgment against defendant-appellant Green for \$3700.00, interest thereon at the legal rate from September 5, 1974, and their costs.

RESPECTFULLY SUBMITTED,


A Plaintiff-Respondent

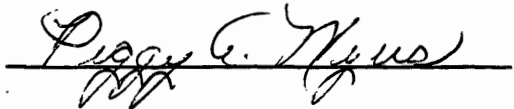
Affidavit of Service

State of Utah, County of Salt Lake, SS:

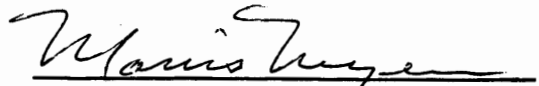
Peggy A. Myers, being first duly sworn, on oath, states:

1. She is one of the plaintiffs-respondents in the foregoing Respondents' Brief;

2. On July 12, 1980, she mailed two true and correct copies of said Respondents' Brief to James W. Gilson, 400 Deseret Building, Salt Lake City, Utah 84111, postage for first class mail thereon fully prepaid.



Subscribed and sworn to before me this 12nd day of July, 1980.



Notary Public-Utah
Residing in Salt Lake City
Commission expires: 2-20-84