

1980

# Harcourt, Brace, Jovanovich Legal and Professional Publications Inc et al v. Victor M. Gordon : Brief

Utah Supreme Court

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SUPREME COURT OF UTAH  
STATE OF UTAH

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HARCOURT, BRACE,  
JOVANOVICH LEGAL AND  
PROFESSIONAL PUBLICAT  
INC., ET AL.

Plaintiff and  
Respondent

v.

Brief  
No. 17021

VICTOR M. GORDON  
Defendant and  
Appellant

\*\*\*\*\*

Statement of Facts

On or about June 4, 1979, Victor M. Gordon appellant entered into an agreement with Harcourt, Brace, Jovanovich Legal and Professional Publications, Inc., d/b/a Bar Bri Bar review of Utah, respondent. Respondent was to render certain services to appellant. The services consisted of taped and live lectures on areas of law included in the Bar examination, study materials and and practice exams which were to be graded and returned. Appellant recieved some of the study materials after the lecture for which the study materials were topically related, some materials were below standard and respondent failed to return and score the last set of examination questions submitted to respondent by the appellant.

On or about October 16, 1979, respondent filed a complaint in the Third Judicial District Court in and for Salt Lake County, State of Utah. Appellant answered November 5th 1979. Summary judgment was moved for on January 21, 1980. The motion was continued January 29, 1980; because, the pleadings were not in order. Plaintiffs motion for summary judgment was finally granted March 5, 1980 and Judgment and Order were subsequently entered March 17, 1980.

ISSUE: SUMMARY JUDGMENT

Appellant contends that it was improper to grant summary judgment in this matter because there was on the face of the pleadings an issue of fact. Respondents affidavit is not sufficient to support respondents pleadings. Appellant contends that issue of fact is that the respondent assert that they be paid full contract price, on a contract they assert has been completed on their part. Appellant contends that the contract has not been completely satisfied by respondents. Appellant has paid Three Hundred and Fifty dollars to respondent for such services as were rendered. Respondent is suing to recover One Hundred and Forty Dollars

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Appellant contends that the respondent would be unjustly enriched if respondent were paid the balance, because services contracted for were either rendered in a manner that made the less valuable to the appellant or were not rendered at all. Appellant contends that all of these are issues of fact indicating that there is a genuine issue of fact to be resolved.

Appellant contends that even on the undisputed fact that appellant and respondent did enter into an agreement on or about June 4, 1979, that appellant has all the defenses of an aggrieved party to a breached contract.

"On a motion for summary judgment against a defendant where some of the facts are in dispute a judgment can only be rendered against him only if, on the undisputed facts the defendant has no defense." Disabled American Veterans v. Hendrixson, 9 U (2d) 152, 340 P. 2d 191.

"The sole purpose of summary judgment is to bar from the courts unnecessary and unjustified litigation, and only, where it clearly appears that the party against whom the judgment would be granted cannot possibly establish a right to recover should such judgment be granted. Any doubts should be resolved in favor of such party when summary judgment against him is being considered!" Reliable Furniture Co., v. Fidelity & Guaranty Ins., Underwriters, 6 U (2d) 211, 398 P. 2d 685.

Appellant contends that respondent has not developed evidence which when viewed in the light most favorable to appellant show that there is no genuine issue as to any material fact. It is the contention of appellant that the affidavit of Bart J. Bailey which contains a recitation of the chronology of papers filed and or served in the case does not support an showing that there is no genuine issue as to any material fact.

"A summary judgment must be supported by evidence, admission and inferences which, when viewed in the light most favorable to the loser 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", such showing must preclude all reasonable possibility that the loser could if given a trial produce evidence which would reasonably sustain a judgment in his favor." Bullock v. Deseret Dodge Truck Center, Inc., 11 U (2d) 1, 354 P 2d 18. Also Freed Finance Co., v. Stoker Motor Co., 537 P. 2d 1039.

Appellant contends that adequate proof in support of the motion was not submitted. Appellant contends that the affidavit of Bart J. Bailey is not sufficient to constitute adequate proof in support of the motion to grant summary judgment.

"If summary judgment procedure is to be effective

it must be held that when adequate proof is submitted in support of the motion, the pleadings are not sufficient to raise an issue of fact.

Dupler v. Yates 10 U (2d) 251, 351 P 2d 624.

Appellant contends that the affidavit of Bart J. Bailey raises serious questions of materiality. It is appellants contention that a recitation of the pleadings and process of service do not support the material allegations of respondents complaint and are not relevant to the issue in controversy. Appellant contends that the affidavit of Bart J. Bailey does not contain facts, and is not itself a fact, admissible in evidence to prove or disprove any allegations set forth in the pleadings.

Rule 56 (e) of the Utah Rules of Civil Procedure provides that "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions answers to interrogatories or further affidavits. When a motion for summary judgment is made and supported as provided in this Rule an adverse party may not rest upon mere allegation or denials in his pleadings, but his response, by affidavits or otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond summary judgment if appropriate shall be entered against him."

Appellant contends that the affidavit of Bart J. Bailey was not even intended to prove or disprove any allegation nor was it intended to qualify as a supporting affidavit in the meaning of the Rule 56 (e), in that respondents motion and notice of summary judgment states "Based upon the pleadings on file herein, there being no question in law or fact to be tried, Plaintiff by and through its attorneys, Bailey & Hassing, hereby moves the court for summary judgment in the sum of \$140 together with interest at nine percent (9%) per annum from June 4, 1979 untill paid, and attorney fees and cost related to this action." It is appellants contention that respondent rested on his pleadings. If respondent as well as appellant produced no supporting affidavits summary judgment should have been decided upon the pleadings.

ISSUE: COURT COST

Appellant contends that respondents court cost are unreasonable and should be disallowed. Respondent amended complaint is only amended as to item two in respondents prayer in respondents complaint. This item deals with the request for reasonable attorneys fees. It is appellants contention that respondent has attributed cost to appellant that are of respondents attorneys making created not by the litigation but respondents attorneys own problems.

Appellant contends that the cost are unreasonable in light of the fact that this action could have been commenced in Small Claims Court, where cost are minimal because of the informality of the proceedings.

Appellant contends that respondent had a duty to mitigate cost so that Court Cost would indeed be reasonable .

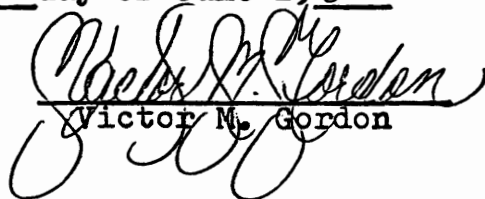
ISSUE: JURISDICTION

Appellant contends that the Third Judicial District did not have subject matter jurisdiction in the matter at hand. Jurisdiction for amounts of 400 hundred dollars or less, has been expressly committed to Small Claims Court.

"The District Court had general common law chancery jurisdiction and that covered about everything of a civil or criminal nature not expressly committed to any other tribunal"  
Ducheneau v. House, 4 U 369, 10 P 838

WHEREFORE the appellant prays that this Court will overturn the motion for summary judgment and to remand the case to District Court for a hearing on the facts and or such other remedy the court may deem correct. Appellant prays that the court grant him relief from the Attorneys fees and such other cost that this court deems just. Finally appellant prays for such other cost and relief that this court deems equitable and just.

signed this 27<sup>th</sup> day of June 1980

  
Victor M. Gordon

Victor M. Gordon  
179 K Street  
Salt Lake City, Utah