

1957

William C. Moore & Co. v. Delfino Sanchez et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

WILLIAM C. MOORE & COMPANY,
A Corporation,

Plaintiff & Respondent

— vs. —

Case No. 8607

DELFINO SANCHEZ,

Plaintiff & Appellant.

AND

WILLIAM C. MOORE & COMPANY,
A Corporation,

Plaintiff & Respondent Case No. 8608

— vs. —

ILIFF GARDNER,

Defendant & Appellant,

APPELLANT'S BRIEF

DOBBS & BOWMAN

By WM. H. BOWMAN

Attorney for defendants &

Appellants

INDEX

	PAGE NO.
Introductory Statement	1 & 2
Statement of Facts	2 & 3
Statement of Questions of Law	3
Argument on First Point	4,5,6,7, & 8
Argument on Second Point	9 to end.

AUTHORITIES CITED

American Jurisprudence, Vol. 41, Page 529, Sec. 349	7
American Jurisprudence, Vol. 41 Page 525, Sec. 342	9, 10, & 11
Corpus Juris Secundum on Pleading, Vol. 71, Sec. 450, Pages 897 & 898	8 & 9
State of Montana vs. Public Service Commission et al 283 P2d, 594	8
Utah Code Annotated 1953, Title 16, Chapter 8 Sec. 3	4 & 5
Utah Rules of Civil Procedure, Rule 12F	6
Young et al vs. Felorina et al, 244 P2d, 862	11 & 12

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Plaintiff & Respondent,

— vs. —

DELFINO SANCHEZ,

Defendant & Appellant.

AND

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A Corporation,

Plaintiff & Respondent

— vs. —

ILIFF GARDNER,

Defendant & Appellant

DISTRICT COURT OF SALT LAKE COUNTY,
HON. STUART M. HANSON, JUDGE:

Both of these cases were treated by plaintiff's counsel as being of the same issue and they were treated in the District Court as consolidated cases, although never having been consolidated. As far as appellants are concerned, the facts and issues are the same. Basically, the pleadings, except for the dates of entry into the alleged

contracts or agreements with plaintiff, are the same. The law issues are identical, except for the facts as to issues concerning suitability of products. This appeal is based solely upon the judgement roll, no testimony having been introduced, no exhibits having been introduced, and no trial as to the merits having been had. Since both cases have been treated by defendant, and plaintiff as a common action, and that they are identical except for dates and times of entering into the alleged contracts, this brief will be directed toward answering and appealing from the decision of the District Court as tho there had been a consolidation of the causes.

STATEMENT OF FACTS:

Plaintiff, in its Complaint (R-1,2) alleges that certain articles of merchandise were ordered by defendants to be delivered to defendants in Salt Lake County, Utah, for a certain stated and stipulated price, and the plaintiff, in compliance with said order and agreement, delivered said stock and/or merchandise to defendant in Salt Lake county, and that defendant refused to pay for said stock or merchandise, and that said contract order or agreement, as entered into by plaintiff and defendant, provided that attorney's fees and costs of collection should be taxable to defendants in event of non-payment for said merchandise. Defendant, by his Answer, (R-3,4,5) set up that plaintiff was a foreign corporation at the time said order, agreement, or contract was entered into, and that said plaintiff had failed, refused, and neglected to comply with the Foreign Corporation Act of the State of Utah, and that said contract and agreement was there-

fore void, in that defendant alleged that at said time of entry into said contract, plaintiff was doing business within the State of Utah, contrary to Title 16, Chapter 8, Sections 1, 2, and 3, of the Utah Code Annotated 1953.

Defendants further set forth in their answer as a Third Defense, sub-paragraphs 1 thru 8, (R-4,5) that the merchandise so delivered by plaintiff, in compliance with the purported contract of defendants, was of such a nature when received, as to be of no use for the purposes ordered or contracted for and agreed upon, and that for this reason, plaintiff was not entitled to recover any portion of the agreed price for said supposed nursery stock as purportedly ordered, contracted for or otherwise requested by defendants; and that defendants were damaged to the extent of \$200.00 each in that they were delayed in the preparation of their yard and landscaping program for a period in excess of one year in relying upon the good faith of plaintiff thru its salesman and solicitors, and that defendants have been put to the expense of employing the services of attorneys to defend this action.

Thereafter, the District Court in and for the County of Salt Lake, upon a Motion duly filed (R-7,8) and heard, struck defendants' Second Defense (R-9) although no evidence was introduced as to said Second Defense, and thereafter, a Motion for Summary Judgment by the plaintiffs (R-10, 11) was granted by the aforesaid District Court, (R-12). That no affidavits or other evidence were introduced by said plaintiff in support of said Motion for Summary Judgment and defendants appeared neither in person or by counsel at said time, although noticed in.

ARGUMENT

This appeal will be dealt with upon two primary grounds. One: Was plaintiff's Motion to Strike the Second Defense of defendants' properly granted?; and Two: Was the granting of plaintiff's Motion for Summary Judgment, and the Judgment entered thereon an error?.

1.

It has been held repeatedly by this Court, and every other jurisdiction that appellant has been able to review, that the question of whether or not a foreign corporation is doing business within a State as to bring that corporation within the provisions of the Foreign Corporation Acts of the various States, is a question of fact, which in itself, must be determined by the evidence introduced. A Motion to Strike an allegation setting forth the incapacity of a corporation to sue or collect upon an account, which Answer purports that said corporation was unlawfully doing business within the State, without having complied with the Foreign Corporation Act of said State, is therefore not subject to a Motion to Strike, unless it appears from the evidence or the stipulated facts that said corporation is not doing business within the State and is merely engaged in interstate commerce. In this instance, there were no stipulated facts, nor has there been any evidence introduced as to qualification or disqualification of said corporation under the statute.

The law concerning foreign corporations and their right to use the courts of this state, is clearly stated in

Section 3, Chapter 8, Title 16, Utah Code Annotated 1953, as follows:

“Disabilities of non complying foreign corporations. — Any foreign corporation doing business within this state and failing to comply with the provisions of sections 16-8-1 and 16-8-2 shall not be entitled to the benefit of the laws of this state relating to corporations, and shall not sue, prosecute or maintain any action, suit, counterclaim, cross complaint or proceeding in any of the courts of this state on any claim, interest or demand arising or growing out of or founded on any tort occurring, or of any contract, agreement or transaction made or entered into, in this state by such corporation and every contract, agreement and transaction whatsoever made or entered into by or on behalf of any such corporation within this state or to be executed or performed within this state shall be wholly void on behalf of such corporation and its assignees and every person deriving any interest or title therefrom, but shall be valid and enforceable against such corporation, assignee and person.

In defendants’ Answer, defendants set up the following defense:

Sub-paragraph 3 of defendants’ Second Defense is as follows:

“That although said plaintiff has failed, refused and neglected to comply with the laws of Utah in regard to foreign corporations as hereinabove set forth, said corporation has, at all times herein mentioned, conducted business with the State of Utah as tho it was fully qualified, and

that all contracts for orders obtained by its agents are therefore void as to said corporation, and unenforceable in the Courts of the State of Utah."

That this matter was squarely presented to the District Court as an issue of fact as to whether or not plaintiff corporation was engaged in doing business within the State of Utah, so as to bring it within the terms of the aforesaid act, and that this matter could not be attacked on a Motion to Strike, without stipulated facts, or a hearing upon the evidence of the parties.

Our rules of Civil Procedure were basically drawn from the Federal Rules of Civil Procedure, and the Motion to Strike has been held, under Federal Procedures, and other jurisdiction such as Utah, to have the effect of a special or general demurrer; and that to sustain a Motion to Strike, a Court must first be satisfied that the matters alleged in those portions attempted to be stricken, if true as alleged, would have no bearing upon the outcome of the suit in question.

Rule 12F, of Rules of Civil Procedure, Motion to Strike, is as follows:

"Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter".

This brings the question squarely to point. Under Title 16, Chapter 8, Sub-Section 3, as hereinabove set

forth, any corporation organized under the laws of any state, other than Utah, doing business as alleged in defendants' Second Defense, sub-paragraph 3 of defendants' Answer, may not use the Courts of this State or the Federal Courts to enforce any contracts written or to be performed in this state. To determine whether or not said corporation, respondent herein, was doing business as to bring itself within the meaning of the aforesaid statute, is a matter of fact which must be determined thru the evidence as presented in Court and upon trial of the issues, and each case, as this Court has so many times held, depends upon its own facts.

The general rule concerning a Motion to Strike, is set forth in 41 American Jurisprudence,

Page 529, section 349:

“Generally. — If a pleading contains some good and proper averments or denials as well as other matters having no proper place therein, the latter averments may be stricken out on the motion for that purpose. Under the practice in many jurisdictions, objections which were formerly raised by special demurrer may now be reached by motion to strike. A motion to strike out a portion of a pleading has been said to be in substance a demurrer to that portion attacked, when it is used to trim off and cast out improper matter inserted in a pleading which contains proper averments, as distinguished from the use of a demurrer to root up and cast out the whole pleading as which it is directed.”

The general rule is that a Motion to Strike is not as broad as a special demurrer, or general demurrer, but in jurisdictions such as Utah, where demurrers have been done away with and eliminated from the practice, it would seem that a Motion to Strike would serve essentially the same purpose.

In the State of Montana vs. Public Service Commission et al, 283 Pacific 2d, 594, the Supreme Court of Montana reversed the District Court of the District Court's ruling upon a Motion to Strike and on page 597 of said opinion, used the following language:

“(4) Striking a pleading is a harsh remedy and should be resorted to sparingly and every fair intendment will be indulged in favor of the pleading.”

In said opinion, the Court cited

71 Corpus Juris Secundum on Pleading,

Section 450, Pages 897 and 898 where the following language is used:

“Striking a pleading is a severe remedy, to be resorted to only in cases palpably requiring it for the proper administration of justice. Such a motion is not to be encouraged, and will be granted only in a clear case, and where the moving party otherwise will be aggrieved.

“A pleading attacked by motion to strike is to be liberally construed in favor of the pleader and will be aided by every fair inference and intendment.”

Further, on page 901, Section 451, the following general rule is set forth:

“A motion to strike may not be treated as the equivalent of a special plea when it is necessary to import new matter not appearing in the pleadings to decide the issue.”

It is therefore contended by appellants that the Court erred in granting plaintiff's Motion to Strike the Second Defense as contained in defendants' Answer.

II.

That the Motion for Summary Judgment and Judgment entered thereon was in error in that, defendants' Third Defense presented a distinct issue of fact, and that there is nothing in the record on appeal, or in the record of the District Court as transcribed to the Supreme Court, which would give the District Court of Salt Lake County authority to sustain a Motion for Summary Judgment. This question has been passed on by numerous courts and by the Utah Supreme Court on several occasions, and has, at all times, been ruled by the various appellate courts passing upon such a question, that when there is an issue of fact in controversy upon which the issues of said action might be determined, then a Motion for Summary Judgment should be denied; that a Motion for Summary Judgment cannot take the place or supplement a trial of the issues.

In 41 American Jurisprudence.

Section 342 of Pleading, on page 525, the following general rule is set forth:

“If there are issues of fact, the motion for summary judgment is denied, or, in some jurisdictions, the issues are narrowed to the material facts which are actually and in good faith controverted.

“If there are no questions of fact, the judge applies the law in accordance with the admitted facts as disclosed by the affidavits. The situation corresponds to that of a judge directing a jury to render a verdict on admitted facts in the plaintiff’s favor.

“These affidavits stand on a different footing than those in which the trial judge is determining a question of fact on affidavits. If the affidavit of defense shows a substantial issue of fact, summary judgment should not be ordered even though the affidavit is disbelieved. If the affidavits on the one side and on the other are directly opposed as to the facts shown, the case must go to trial. Oral evidence is not admissible, nor are interrogatories propounded for the purpose of discovery, where the statutes or rules under which they are propounded do not contemplate their use.

“343. As Searching Record. — In motions for summary judgment the rule is the same as under a demurrer to the pleadings. The record will be searched to ascertain where lies the first fault in pleading. This rule is declared to be sound, because if the court is to be asked to grant the somewhat harsh relief of a summary judgment, it should be upon a complaint which states a cause of action. Moreover, it is held that in giving effect

to the real purpose and spirit of the summary judgment law, the search of the record includes the affidavits in support of the complaint; where these affidavits disclose no cause of action the complaint will be dismissed even though, without the affidavit and solely upon the pleadings, a demurrer would have been overruled. And the insufficiency of the defendant's affidavit of merits will not warrant the entry of a summary judgment where the plaintiff has not supported his complaint with such affidavits as are required by the applicable statute and rules of court."

In the case of

Young et al vs. Felorina et al,

decided in the Supreme Court of Utah in 1952,

244 Pacific 2d, 862, the Court used the following language:

"In respect to a summary judgment Rule 56 (c), U.R.C.P. provides: 'The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, 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.'

"Under this rule, it is clear that if there is any genuine issue as to any material fact, the motion should be denied.

"An examination of the pleadings and pre-trial stipulations reveals that the only possible

issue of fact on which there may be some dispute is whether defendants, who contend they are a separate and distinct band or clan of Navajos, were actually parties to and hence bound by the Treaty of 1868, 15 Stat. 667.

“The Treaty of June 1, 1868 between the United States’ and the Navajo nation or tribe of Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe’. Article 9 of the Treaty provided:

“ ‘In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are party to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation * * *.’

“Article 13 provides:

“ ‘The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home and they will not as a tribe make any permanent settlement elsewhere * * *.’”

As distinguished from this case, in the cited case there had been not only pre-trial conferences, but stipulations as to the facts and apparently affidavits had been filed in conjunction therewith. In this instance, plaintiff filed no affidavits in support of its Motion for Summary Judgment.

ment, nor was there any evidence introduced or tendered, nor were any exhibits tendered or introduced in the hearing, and defendants' Answer put directly in issue the question as to whether or not there had been a complete failure of consideration in the delivery of goods to defendants. There was also the issue of a Counter-Claim wherein defendants raised the question of damages due to the misrepresentations and misstatements of the agents of plaintiff.

It is therefore respectfully submitted that error was committed by the District Court of Salt Lake County in granting plaintiff's Motion for Summary Judgment. And that this Court should order vacated the order of the District Court striking defendants' Second Defense, and also the order of the District Court granting Summary Judgment, and that said matter should be set down for hearing upon its merits, in the District Court of Salt Lake County, with costs and attorney's fees to appellants, as the questions involved are of considerable public concern in the State of Utah.

Respectfully Submitted,

DOBBS & BOWMAN

By WM. H. BOWMAN

Attorney for defendants &

Appellants