

1982

Deanne Penrod et al v. Nu Creation Creme Inc. : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

DEANNE PENROD, MAXINE G.)
KITCHEN, DON SEVEY, JACK E.)
LaFOLLETTE, TRUMAN O. MOORE,)
and LINDA R. MOORE,)
Appellants,)
vs.)
NU CREATION CREME, INC., a)
Utah corporation, GEORGE)
D'AMBROSIO, FRANK A. NELSON,)
JR., and JOHN SAVAS,)
Respondents.)

BRIEF OF RESPONDENTS

CASE NO. 18197

Appeal from the Third Judicial District Court
of Salt Lake County, Honorable G. Hal Taylor, Judge

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Supreme Court No. 18197

BRIEF OF RESPONDENTS

NATURE OF THE CASE

The statement of appellants is accurate.

DISPOSITION IN LOWER COURT

The statement of appellants is accurate except that the motion to dismiss was with prejudice as to the Second Cause of Action and as to the First, Third, Fourth, and Fifth Causes of Action, the motion to dismiss was with leave to file an amended complaint.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellants' statement is correct.

STATEMENT OF FACTS

The facts as set forth by appellants are basically correct except as to the assertions made therein with respect to the interpretation of the Second Cause of Action

and as to whether or not, it, in fact, asserts a private right of action under the Federal Trade Commission Act or the federal regulations promulgated thereunder.

ARGUMENT

THE COURT DID NOT ERR IN DISMISSING WITH
PREJUDICE THE SECOND CAUSE OF ACTION UNDER
THE DOCTRINE OF RES JUDICATA.

A question of interpretation as to what the plaintiffs pled in their Second Cause of Action is wholly determinative of the issues now before the Supreme Court.

The trial court read the Second Cause of Action to mean that the plaintiffs were, in fact, asserting a claim under the Federal Trade Commission Act of the United States and under the federal regulations promulgated thereunder. This issue was squarely before the Honorable Bruce S. Jenkins, United States District Judge for the District of Utah, who rendered an exhaustive memorandum decision setting forth that no private right of action exists under the Federal Trade Commission Act of the United States or the regulations promulgated thereunder. A copy of that memorandum is part of the record.

The court also had before it the First, Third, Fourth, and Fifth causes of action which had been objected to by the defendants as being violative of Rule 9(b), Utah Rules of Civil Procedure, in that the causes of action, founded on fraud, did not set forth with particularity the fraud claimed.

It is respectfully submitted that the Second Cause of Action did, in fact, rely upon Federal Trade Commission Act

and the regulations promulgated thereunder, and the court's dismissal on the basis of res judicata was legally correct.

The dismissal of Causes of Action One, Three, Four, and Five was proper in that the alleged fraud is not set forth with particularity and pursuant to Rule 9(b), the motion to dismiss was well taken.

This court must now read the complaint and determine for itself as to whether or not the court's action was proper under the circumstances.

There can be no question with respect to the issue of res judicata and plaintiffs in their brief do not dispute this to be the law. It is respectfully submitted that the Second Cause of Action was, in fact, the First Cause of Action in the action filed in the United States District Court for the District of Utah which was dismissed by Judge Jenkins.

The same cause of action was again stated in the state court action and the trial court having the opportunity to view the matter, properly entered its order dismissing the Second Cause of Action with prejudice. The cases cited by plaintiffs are, therefore, inapplicable.

Rhodes v. Wright, (Utah, 1976) 552 P.2d 131, cited by appellants, only stands for the proposition that a case dismissed on the grounds of jurisdiction is not res judicata to the merits of the action. This is not an issue in the present case. To the contrary, neither the respondents

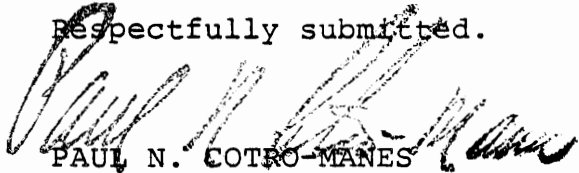
raised this issue nor did the Court rule on this issue. It merely dismissed for failure to plead fraud with particularity as to the First, Third, Fourth, and Fifth Causes of Action. But, as to the Second, it dismissed as the Court in the federal action did not dismiss for lack of jurisdiction, it dismissed because as a matter of law, there was no cause of action that could be asserted. This is the same situation as found in Gibson v. Utah State Teachers Retirement Board, (Utah, 1940) 105 P.2d 353. Respondents do not dispute the ruling in the East Mill Creek Water Co. v. Salt Lake City, (Utah, 1945) 159 P.2d 863, case. However, appellants' Second Cause of Action was the same cause of Action as raised in the federal case, and, therefore, this case, on its fact, is inapplicable. In the East Mill Creek case the plaintiff litigated the contract in a previous action and then brought a second suit to litigate the affect of the contract after the contract expired by its terms. Entirely distinct and separate matters.

SUMMARY

It is respectfully submitted that the Court did not err in dismissing the Second Cause of Action with Prejudice, the same having been litigated in the Federal Court, further the Court did not err in dismissing, with leave to amend, the other causes of action for failure to adhere to Rule 9(b),

Utah Rules of Civil Procedure. The Court should enter its decision affirming the lower court.

Respectfully submitted.



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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of May 1982,
I mailed by United States Mail, postage prepaid, two copies
of the Brief of Respondents to John A. Snow, Esq., and
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