

1982

Dave Westley v. Farmer's Insurance Exchange et al : Brief of Appellant

Utah Supreme Court

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Lambertus Jansen; Attorney for Plaintiff-Appellant;

Warren Patten; Attorney for Defendant-Respondent;

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IN THE SUPREME COURT OF THE
STATE OF UTAH

DAVE WESTLEY,)
)
Plaintiff/ Appellant)
)
vs.) Civil No. 80-3085
)
FARMER'S INSURANCE EXCHANGE,)
)
dba FARMER'S INSURANCE)
GROUP, DEVEAUX CLARK and)
CLARK YOUNG,)
)
Defendants/Respondents.)
)

APPELLANT'S BRIEF

On Appeal from the Third Judicial District Court
and For Salt Lake County, State of Utah

LAMBERTUS JANSEN
525 South 300 East
Salt Lake City, Utah 84111
Telephone: 521-2552
Attorney for Plaintiff/Appellant

WARREN PATTEN
800 Continental Bank Building
Salt Lake City, Utah 84101
Telephone: 531-8900
Attorney for Defendant/Respondent

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18225

Clark, Supreme Court, Utah

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Telephone: 521-2552
Attorney for Plaintiff/Appellant

WARREN PATTEN
800 Continental Bank Building
Salt Lake City, Utah 84101
Telephone: 531-8900
Attorne for Defendant/Respondent

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dba FARMER'S INSURANCE
GROUP, DEVEAUX CLARK and
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Defendants/Respondents.

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action for breach of contract wherein Plaintiff/Appellant sought damages for breach of a written contract between himself and the Defendant for the operation of an insurance agency.

DISPOSITION IN LOWER COURT

Plaintiff/Appellant filed a Motion to Amend the Complaint and Defendants/Respondents filed a Motion for Summary Judgment. At a hearing before the Law and Motion division of the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable G. Hal Taylor, Judge, presiding, the Court granted Defendant/Respondent's Motion for Summary Judgment and denied Plaintiff/Appellant's Motion to Amend the Complaint.

RELIEF SOUGHT ON APPEAL

Plaintiff/Appellant seeks a reversal of the Court's ruling denying Plaintiff's Motion to Amend the Complaint and a reversal of the ruling

granting Summary Judgment in favor of the Defendants/Respondents.

STATEMENT OF FACTS

In November, 1981 Plaintiff/Appellant released his former counsel, whom he believed to be dilatory in the prosecution of Plaintiff/Appellant's law suit and retained his present counsel, Lambertus Jansen, who immediately submitted his appearance as counsel for Plaintiff/Appellant and at the same time submitted to the Court, a Motion to Amend Appellant's Complaint to include an allegation that Defendants/Respondents, by willful and malicious conduct removed Plaintiff/Appellant's name from the Salt Lake City, telephone directory as an agent for Farmer's Insurance. Said cause of action was interwoven factually with other causes of action of Plaintiff/Appellant's Complaint, set for the legitimate additional count against the Defendants/Respondents and was intended to litigate all of the issues between the parties at one time rather than piecemeal. At the same time, counsel for Plaintiff/Appellant filed a Motion for a Continuance of the trial date which was set for January 13, 1982. Appellant's Motion to Amend was denied, and the Court refused to rule on the Motion for a Continuance. At the same hearing, Defendants/Respondents brought a Motion for Summary Judgment, and the lower Court granted Summary Judgment to the Defendant/Respondents as to Count 1 but not as to Count 2, the Court having ruled that there were no issues of fact remaining for determination. The factual issues upon which the Summary Judgment was granted are as follows:

Plaintiff/Appellant contracted to become an agent for Farmer's Insurance Company in May of 1978. Plaintiff/Appellant was given what is called "500 series" policies upon which Plaintiff/Appellant received commissions for servicing said policies of approximately \$250.00 per month. Farmers, upon the

request of Defendant/Respondent, Deveaux Clark later took the "500 series" policies from the Plaintiff/Appellant on the grounds that Plaintiff/Appellant (1) operated an office on the third floor of an office building, (2) that Plaintiff/Appellant's office telephone was answered Boberg-Westley rather than Farmer's Insurance Company and, (3) that Plaintiff/Appellant was devoting a portion of his time to activities outside of representing Farmer's Insurance.

ARGUMENT

POINT 1: THE TRIAL COURT COMMITTED REVERSABLE ERROR IN NOT ALLOWING PLAINTIFF/APPELLANT TO AMEND HIS COMPLAINT.

The trial Court committed reversible error in not allowing Plaintiff/Appellant to amend his Complaint to include the allegation that the Defendants/Respondents by willful and malicious conduct removed Plaintiff/Appellant's name from the Salt Lake City telephone directory as an agent for Farmer's Insurance. Rule 15, Utah Rules of Civil Procedure states that a party may amend his pleading only by leave of Court and leave shall be freely given when justice so requires. This Court in Hjorth v. Whittenburg, 121 U 324, states, "An amendment of the Complaint adding a count for damages does not impart into the case a new and different cause of action, and is therefore permissible." In Hancock v. Luke, 46 U 26 this Court has stated, "Courts would ordinarily encourage all proper amendments to the pleadings to the end that a full hearing could be had upon all phases of the controversy in the trial Courts." Also Johnson v. Brinkerhoff, 89 U 530 this Court had stated "A more liberal rule would be applied in cases where amendments were offered before trial, where the parties might be taken by surprise or handicapped in the meeting of new allegations," Plaintiff/Appellant brought his Motion

to Amend before the lower Court intending that a full hearing be had upon all phases of the controversy. Said Motion was made in a timely fashion before trial and therefore was not prejudicial to the rights of Defendants/ Respondents.

Appellant respectfully submits that the lower court erred in denial of Appellant's Motion to Amend, which permission as set forth by the Utah Rules of Civil Procedure should be freely given where justice requires.

POINT 2: THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS/RESPONDENT.

The lower Court erred in granting Summary Judgment to Defendants/ Respondents because substantial issues of fact remained for determination by the lower Court with regard to the breach of contract issue alleged by Plaintiff/Appellant against Respondents. No record of the hearing exists, in that the Court below did not have a shorthand reporter present during arguments; but during argument, the following issues of fact, which could not be summarily disposed of, were cited to the Law and Motion Judge.

a. Whether the allegations of Defendants/Respondents that Farmer's withdrawal of its "500 series" policies was in its own and in the policy holder's best interest. Clearly this is an issue of fact to be determined by evidence presented by Defendants/Respondents in support of their claims as well as evidence given by Plaintiff/Appellant answering as to his alleged conduct.

b. The issue of whether Defendants/Respondents could remove and withdraw the "500 series" policies merely because Plaintiff/Appellant was operating an office on the third floor, had his phone answered Boberg-Westley, and because Plaintiff/Appellant was engaged in outside activities. It was repre-

to the Court that these were issues of fact because Farmer's had numerous agents who had offices in highrise buildings had offices answered other than Farmer's Insurance and had agents in the Salt Lake area who engaged in real estate, investment and other activities outside of their insurance agency business. As a result, Plaintiff/Appellant was given no opportunity to answer these allegations before the "500 series" policies were taken.


c. The entire issue of Plaintiff/Appellant's status and credibility as an agent is an issue of fact to be determined by the court. Plaintiff/Appellant was not allowed to answer to the issue of why he was terminated thereby proving the breach by Defendants/Respondents. By granting Summary Judgment, the court denied the Plaintiff/Appellant herein the right to bring forth evidence on all the issues set forth. Utah Rules of Civil Procedure Rule 56(c) states "if there is no genuine issue as to any material fact, the moving party is entitled to a Judgment as a matter of law." In this case, several issues of fact of a substantial nature still exist. This court has stated, "If there if any genuine issue as to as to any material fact, the motion should be denied." Young v. Felornia, 121 U. 646; In re Williams' Estates, 10 U 2d 83, Frederick May and Co. v. Dunn, 13 U 2d 40.

CONCLUSION

The trial court committed reversable error in not allowing Plaintiff/Appellant to amend his Complaint and committed further reversable error in granting Summary Judgment in favor of the Defendants/Respondents.

DATED this _____ day of April, 1982.

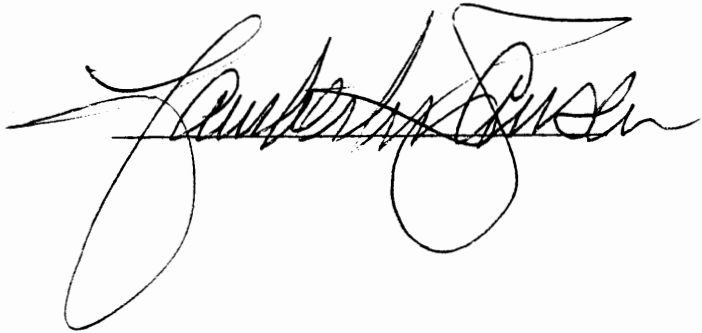
RESPECTFULLY SUBMITTED



LAMBERTUS JANSEN
Attorney for Plaintiff/Appellant
525 South 300 East
Salt Lake City, Utah 84111
Telephone: 521-2552

CERTIFICATE OF MAILING

I do hereby certify that I mailed a true and correct copy of the foregoing Brief to Warren Patten 800 Continental Bank Building Salt Lake City, Utah 84101, Attorney for Defendants/Respondents, by depositing the same in the United States mail, postage prepaid, on this 30 day of April, 1982.

A handwritten signature in black ink, appearing to read "Robert H. Jensen". The signature is written in a cursive style with large, sweeping loops and is positioned over a horizontal line.