

1990

Walter P. Larson, an individual, and Larson Ford Sales, Inc., a Delaware corporation v. Stephen Wade, individually, and Stephen Wade, Bryce Wade and Kipp Wade, dba SBK, a general partnership, and Valley Ford, a Utah corporation : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Gary E. Jubber, Patrick L. Anderson; Fabian & Clendenin; attorneys for respondents.

L. Edward Robbins; attorney for appellants.

Recommended Citation

Reply Brief, *Larson v. Wade*, No. 900535 (Utah Court of Appeals, 1990).

https://digitalcommons.law.byu.edu/byu_ca1/2955

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50

.A10

DOCKET NO.

900535-CA

IN THE COURT OF APPEALS OF THE
STATE OF UTAH

WALTER P. LARSON, an indi-	:	
vidual, and LARSON FORD	:	
SALES, INC., a Delaware	:	APPELLANTS' REPLY BRIEF
corporation,	:	
	:	
Plaintiffs/Appellants,	:	
	:	
vs.	:	
	:	
STEPHEN WADE, individually,	:	
and STEPHEN WADE, BRYCE WADE,	:	
KIPP WADE, dba SBK, a general	:	
partnership, and VALLEY FORD,	:	Case No. 900535-CA
a Utah corporation,	:	
	:	
Defendants/Respondents.	:	Argument Priority (b)(16)

Appeal from the Third Judicial District Court
in and for the County of Salt Lake,
the Honorable J. Dennis Frederick presiding,
(District Court No. C87-4273)

Gary E. Jubber, #1758
Patrick L. Anderson, #4787
FABIAN & CLENDENIN
a Professional Corporation
Twelfth Floor
215 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 531-8900

Attorneys for Respondents

L. Edward Robbins, #2766
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 355-7030

Attorney for Appellants

FILED

MAR 20 1991

IN THE COURT OF APPEALS OF THE
STATE OF UTAH

WALTER P. LARSON, an indi-	:	
vidual, and LARSON FORD	:	
SALES, INC., a Delaware	:	APPELLANTS' REPLY BRIEF
corporation,	:	
	:	
Plaintiffs/Appellants,	:	
	:	
vs.	:	
	:	
STEPHEN WADE, individually,	:	
and STEPHEN WADE, BRYCE WADE,	:	
KIPP WADE, dba SBK, a general	:	
partnership, and VALLEY FORD,	:	Case No. 900535-CA
a Utah corporation,	:	
	:	
Defendants/Respondents.	:	Argument Priority (b)(16)

Appeal from the Third Judicial District Court
in and for the County of Salt Lake,
the Honorable J. Dennis Frederick presiding,
(District Court No. C87-4273)

Gary E. Jubber, #1758
Patrick L. Anderson, #4787
FABIAN & CLENDENIN
a Professional Corporation
Twelfth Floor
215 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 531-8900

Attorneys for Respondents

L. Edward Robbins, #2766
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 355-7030

Attorney for Appellants

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY OF ARGUMENT.....	1
ARGUMENT	
I. Defendants exalt form over substance, contrary to the purpose of summary judgment. There remain substantial factual issues regarding the time at which the causes of action, both in tort and contract, accrued. Defendants have never shown their entitlement to summary judgment as a matter of law.....	3
II. On remand, the Larsons should be entitled to the "discovery" rule on the statute of limitations issue. In any event, reversal is required even under the general rule.....	11
III. The supplementary materials should be considered.....	13
CONCLUSION.....	13

TABLE OF AUTHORITIES

CASES CITED

<u>Brigham Young Univ. v. Paulsen Const.</u> , 744 P. 2d 1370 (Utah, 1987).....	11
<u>Dailey v. Barnhardt</u> , 768 P. 2d 907 (Okla. App., 1988).....	4
<u>Gill v. Timm</u> , 720 P. 2d 1352 (Utah, 1986).....	4
<u>Kula v. Karat, Inc.</u> , 91 Nev. 100, 531 P. 2d 1353 (1975).....	4
<u>Myers v. McDonald</u> , 635 P. 2d 84 (Utah, 1987).....	12
<u>Spor v. Crested Butte Silver Mining</u> , 740 P. 2d 1304 (Utah, 1987).....	5, 12

<u>Taylor v. Pearl,</u> 249 Or. 611, 439 P. 2d 7 (1968).....	4
<u>Vincent v. McDonald,</u> 635 P. 2d 84 (Utah, 1981).....	12

STATUTES

Section 78-12-15, Utah Code.....	6
Section 78-12-26, Utah Code.....	6
11 U. S. C. Section 1129(c).....	7, 9, 10
11 U. S. C. Section 1141.....	7, 8

RULES OF PROCEDURE

Rule 15(b), Utah Rules of Civil Procedure.....	5
--	---

OTHER AUTHORITIES

Contracts, Sections 445, 449, 17 Am Jur 2d 903, 912.....	10
Limitation of Actions, Section 132, 51 Am Jur 2d 701.....	11

IN THE COURT OF APPEALS OF THE
STATE OF UTAH

WALTER P. LARSON, an indi-	:	
vidual, and LARSON FORD	:	
SALES, INC., a Delaware	:	
corporation,	:	
Plaintiffs/Appellants,	:	
vs.	:	
	:	
STEPHEN WADE, individually,	:	
and STEPHEN WADE, BRYCE WADE,	:	
KIPP WADE, dba SBK, a general	:	
partnership, and VALLEY FORD,	:	Case No. 900535-CA
a Utah corporation,	:	
Defendants/Respondents.	:	

SUMMARY OF ARGUMENT

None of the cases cited by defendants-respondents (hereinafter "Wades" or "defendants") support defendants estoppel-by-pleading argument in the context of a motion to dismiss. Pleadings are to be liberally construed, particularly in early proceedings such as this, where the defendants have not even answered, and particularly with respect to the tort claims of plaintiffs-appellants (hereinafter "Larsons") as to which no inconsistency can even be claimed. There remains no evidence

that the Stephen Wade, Inc. Plan of Reorganization breached the oral contract on any date certain because neither the Plan nor any of the post confirmation orders were ever placed in the record.

The Notice of Order of Confirmation, which is in the Record, vests the property of the estate in Valley Ford, Inc., "except as otherwise provided in the Plan," which Plan is not disclosed. Under bankruptcy law, a "confirmed" plan is binding only if its terms so provide, and then only to the extent provided. Since the terms are not provided here, summary judgment cannot be sustained. Submission of the Plan, at most, repudiated the oral contract, although even this conclusion cannot be reached without consideration of the terms of the Plan itself.

Even under the general "accrual" standard, the Larsons' complaint is timely. Because the Plan was not placed into the Record, the only date on which the breach of contract claims can be found to have accrued is June 24, 1983, within four years prior to filing. The assets were "intact" as of that date. The Larsons' tort claims therefore accrued after that time. Upon remand, the Larsons should benefit from the discovery rule because the assets were "intact" when the Larsons were ordered from the premises and the Larsons did not discover the torts until more than one year later.

The Larsons intend to urge consideration by the panel of the materials included in the Larsons' motion to supplement the record.

ARGUMENT

- I. DEFENDANTS EXALT FORM OVER SUBSTANCE, CONTRARY TO THE PURPOSE OF SUMMARY JUDGMENT. THERE REMAIN SUBSTANTIAL FACTUAL ISSUES REGARDING THE TIME AT WHICH THE CAUSES OF ACTION, BOTH IN TORT AND CONTRACT, ACCRUED. DEFENDANTS HAVE NEVER SHOWN THEIR ENTITLEMENT TO SUMMARY JUDGMENT AS A MATTER OF LAW.

Neither the words in the second cause of action (interference with business relations) that Stephen Wade, "having breached his agreement with the plaintiff, conspired with and induced...", nor the words in the third cause of action (breach of fiduciary duty, unjust enrichment and conversion) that defendants "did submit a contrary and adversary Plan to the Plaintiff's plan ... which plan violated the contractual agreement between Plaintiff and Defendants" proves, as a matter of law, that defendants breached their contract with plaintiffs (as alleged in the first cause of action), more than four years prior to the filing of plaintiffs' complaint. This language has nothing whatsoever do to with the timeliness of plaintiffs' tort claims, as will be demonstrated below. Neither should it bar plaintiffs' breach of contract claims, particularly where defendants elected not to disclose to the court either the terms of the Plan of Reorganization below or the post confirmation orders dealing with the effective date of the Plan.

The Wades cite three cases to support the conclusion that this language should bar plaintiffs' breach of contract claims, however, none of them even considers this estoppel-by-pleading argument as early in the course of litigation as the pre-answer

motion to dismiss in the present case. All three cases cited by defendants were fully tried. In Dailey v. Barnhardt, 768 P. 2d 907 (Okla. App., 1988), the case was fully tried, including a pretrial order into which the pleadings were deemed merged. In Kula v. Karat, Inc., 91 Nev. 100, 531 P. 2d 1353 (1975), the case was fully tried. In Taylor v Pearl, 249 Or. 611, 439 P. 2d 7 (1968), the case appears to have been fully tried.

It is ironic that these defendants claim an estoppel from the Larsons' unverified complaint, when they have not even answered its allegations. The Wades should have been required to answer before moving to dismiss on the basis of any statute of limitations, as the Larsons initially argued. Brief of Appellants, p. 15.

To sustain the dismissal of plaintiffs' breach of contract claims, this Court must be prepared to rule, as a matter of law and solely on the basis of the Larsons' unverified complaint, that at no point in these proceedings would the Larsons be entitled to prove that "breach" of the oral contract occurred only when the Plan became effective. To so hold would be wholly inconsistent with the liberal pleading policy in effect in this jurisdiction. Consider Gill v. Timm, 720 P. 2d 1352 (Utah, 1986):

"Rule 8(a) is to be liberally construed when determining the sufficiency of a plaintiff's complaint....

"....

"If there is any question about the sufficiency of the complaint, it was removed when the trial court, acting under Rule 15(b), allowed amendment of the pleadings to conform to the evidence adduced

at trial. This procedure is much preferred to the alternative of dismissal...." 720 P. 2d at 1353.

Even at trial, to maintain an estoppel-by-pleading objection to the introduction of evidence, the objecting party must convince the court "that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." Rule 15(b), Utah Rules of Civil Procedure. Here there can be no prejudice to the Wades whatsoever since the same attorneys which defend them here also prepared the Plan. The simple fact is that they elected not to place the Plan into the record, relying instead on the mystical concepts of "submission" and "confirmation" to convince the lower court that the door between the Wades and the Larsons had closed more than four years before filing. As will be shown below, the submission of the plan was, at most, a repudiation of the oral contract which did not start the running of the statute of limitations.

The defendants should not be permitted to so exalt form over substance, or put another way, to so reduce this case to a question of legal gamesmanship, particularly not this early in the litigation, before any answer has even been filed.

In effect, the Wades have used summary judgment contrary to its true intention, that being, to pierce the pleadings and determine genuine triable issues. Spor v. Crested Butte Silver Mining, 740 P. 2d 1304 (Utah, 1987).

This conclusion applies a fortiori to the allegations of the Larsons' complaint sounding in tort. "Breached," and "violated" as they appear in the complaint, do not even speak to the

question of when the torts occurred, and there is nothing in the record to even suggest when that may have been because the Wades elected not to place either the Plan or the post confirmation orders into the record.

All three of the torts alleged in the third cause of action--breach of fiduciary duty, unjust enrichment and conversion--involve wrongful transfers of Larson Ford Sales, Inc. property: (1) an \$1,800,000.00 lease; (2) a \$200,000.00 parts inventory; and (3) \$90,000.00 of furniture and equipment. The Notice of Order of Confirmation, which is part of the Record here (R. 34-36), provides:

"2. Except as otherwise provided in the Plan or the Confirmation Order, the confirmation of the Plan vests all of the property of the estate in Valley Ford, Inc." [Emphasis supplied.] (R. 35).

On the basis of the Notice itself, it is impossible to conclude, as a matter of law, the date on which any assets "vested" in Valley Ford, Inc. since the Notice itself expressly refers the recipient of the Notice to the Plan for additional information on that question. In addition, the affidavit of Walter Park Larson creates clear factual issues precluding summary judgment on the tort claims. It declares that the parts "were intact on June 24, 1983," a date within four years prior to filing of the Larsons' complaint, and had "disappeared" only 18 months later. 1/

1/The Wades below relied exclusively on Utah's four year statute of limitations, Section 78-12-25, Utah Code. Here they obliquely reference Utah's three year statute, Section 78-12-26, Utah Code as well. This latter statute should not be considered.

The defendants argue that "confirmation" of the Plan is a breach of the oral contract as a matter of law because under 11 U. S. C. Section 1129(c) the bankruptcy court "may confirm only one plan." In reply, the Larsons cite 11 U. S. C. Section 1141, captioned "Effect of Confirmation." 11 U. S. C. Section 1141(a) specifically provides that "the provisions of a confirmed plan bind the debtor . . . [and] any entity acquiring property under the plan. . . ." [Emphasis supplied.] Thus, is it clear that "confirmation" is not an event of unvarying and universal import; it is instead an event whose legal significance is dictated by the terms of the plan itself. 2/ Since the terms of this Plan were not presented below, the legal significance of "confirma-

2/That the legal effect of "confirmation" varies according to the terms of the plan is buttressed by other provisions of 11 U. S. C. Section 1141:

"(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

"(c) Except ... as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors...."

"(d)(1) Except as otherwise provided in ... the plan, or in the order confirming the plan, the confirmation of a plan--

(A) discharges the debtor from any debt that arose before the date of such confirmation....

"....

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan." [Emphasis supplied.]

tion" cannot be decided here, particularly not as a matter of law.

Under 11 U. S. C. Section 1141, it is clear that neither the debtor nor the plan proponent are bound until "confirmation," and then only if and to the extent that the plan so provides. If the plan so provides, there is, in effect, no binding plan until contingent future events occur. A plan with contingencies therefore gives the plan proponent great flexibility, for if the contingencies are not realized, the plan proponent is not bound. Since the record below does not show the terms of the plan, the proposition that the plan did anything as a matter of law, either in contract or in tort, simply cannot be sustained.

It is not insignificant that the Notice of Order of Confirmation of Plan (R. 34-36) parrots the language of 11 U. S. C. Section 1141(a) with one telling exception. 11 U. S. C. Section 1141(a) provides that "the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder" of the debtor [Emphasis supplied]. The Notice of Order of Confirmation of this specific Plan parrots this language, except for the deletion of "any entity acquiring property under the plan." It reads instead, "the provisions of the Plan bind the debtor, any entity issuing securities under the Plan and any creditor, or equity security holder of the debtor...."

The language in the Notice of Confirmation which describes

the rights of any entity acquiring property under the Plan has been referred to above and is expressly contingent upon the undisclosed terms of the Plan itself:

"2. Except as otherwise provided in the Plan or the Confirmation Order, the confirmation of the Plan vests all of the property of the estate in Valley Ford, Inc. (R. 35). See Addendum 3, Exhibit A, p. 2, Brief of Appellant.

The Larsons respectfully submit that the Court should read this modification of 11 U. S. C. Section 1129(c) as set forth in the Notice, as an admission by defendants that the Plan does indeed "otherwise provide" on the question of vesting of the property of the Estate. It is therefore impossible to say as a matter of law this Plan either breaches the oral contract or causes any transfer of assets sufficient to effect a tort on any date certain. 3/

Since the Court cannot find, as a matter of law, that "confirmation" of the Plan was a breach of the oral contract, it certainly cannot find, as a matter of law, that

3/Other provisions of the Notice also noting exceptions to confirmation based on the terms of the Plan are:

"3. The property dealt with by the Plan is free and clear of all liens, claims, encumbrances and interests of creditors and of equity holders in the debtor, except as otherwise provided in the Plan or in the Confirmation Order.

"4. Except as otherwise provided in the Plan, or in the Confirmation Order, the confirmation discharges the debtor, the proponent of the Plan, SBK, and Valley Ford, Inc. from any debt that arose before the Confirmation Order was entered" (R 35). See Addendum 3, Exhibit A, p 2, Brief of Appellants.

"submission" of the Plan was a breach of the oral contract. The plan proponent, Stephen Wade, Inc., is not even a party to this litigation, and as already shown, no plan has any binding effect until confirmed and then only if and to the extent that the terms of the plan so provide, which terms are not disclosed.

While it is true that there can be only one confirmed plan, 11 U. S. C. Section 1129(c), there is no prohibition against the submission of multiple, alternative plans. There is, therefore no basis for the conclusion that submission of this plan "breached" the oral contract.

"Breach" is a "failure to perform...." Contracts, Section 445, 17 Am Jur 2d 903. "Repudiation," on the other hand, is a "renunciation" of performance "before the time for performance, which amounts to a refusal to perform...." Contracts, Section 449, 17 Am Jur 2d 912. Since there is no law against the submission of alternative, multiple plans, it is impossible to conclude, as a matter of law, that submission of this Plan did anything more than repudiate the oral contract. It is, in fact, impossible to conclude, as a matter of law, that this Plan even repudiated the oral contract without consideration of its terms.

The law of limitations as applied to repudiation is clear: "[W]here an action is brought after the time fixed by an executory contract for the beginning of performance by a party who has committed an anticipatory breach, the period of limitations runs, not from the time of such breach, but from the time fixed by the contract for performance by the defaulting

party. Limiation of Actions, Section 132, 51 Am Jur 2d 701. Since there is no evidence of (1) the time for performance; (2) what a reasonable time for performance would be; or (3) whether this plan even repudiated performance or was instead so contingent that it could be deemed neither a breach nor a repudiation, the questions of breach or repudiation at this or that time, require further factual development through the course of the litigation.

The judgment below should be reversed.

II. ON REMAND, THE LARSONS SHOULD BE ENTITLED TO THE "DISCOVERY" RULE ON THE STATUTE OF LIMITATIONS ISSUE. IN ANY EVENT, REVERSAL IS REQUIRED EVEN UNDER THE GENERAL RULE.

Even under the standard relied upon by defendants, that being, that a cause of action does not accrue until "'the happening of the last event necessary to ... the cause of action.'" Becton Dickinson & Co. v. Reese, 668 P. 2d 1254, 1257 (Utah, 1983)." Brigham Young Univ. v. Paulsen Const., 744 P. 2d 1370 (Utah, 1987), summary judgment should not have been granted. Since there is no proof of either the terms of the Plan or its effective date, there is no proof of when the last event necessary to any cause of action may have occurred. Walter Park Larson's statement that he did not know the Wades were not going to honor their verbal contract until June 24, 1983 is entirely consistent with a plan still contingent as of that date. With respect to the tort claims, the affidavit of Walter Park Larson shows that the torts alleged were continuing well after

eviction on June 24, 1983, culminating with a parts sale 18 months later. All of this precludes summary judgment.

Even though summary judgment should not have been granted under the above standard, the Larsons submit that the discovery rule should be held to apply here, particularly with respect to the tort claims. With respect to the breach of contract, Walter Park Larson states that he did not know the Wades would not perform on the contract until June 24, 1983 when ordered evicted. This discovery would be consistent with a Plan still contingent as of that date. It is also entirely consistent with the Notice of Order of Confirmation which in fact refers each recipient of the Notice to the Plan itself on many specific questions relating to the overall effectiveness of the Plan. With respect to the tort claims, Walter Park Larson states that he was ordered out on June 24, 1983, that on that date the parts inventory was intact and that he "only learned eighteen (18) months later when an official sale took place that all but \$5,000.00 (appraised) had disappeared." Giving this affidavit the reasonable inferences to which it is entitled, Spor v. Crested Butte, supra, the conversion of the parts did not start until after eviction from the dealership on June 24, 1983 and was not completed and discovered until eighteen (18) months later. Since the Larsons were removed from any contact or control over the parts, this case is indeed one in which the discovery rule should be held to apply. cf. Vincent v. Salt Lake County, 583 P. 2d 105 (Utah, 1978); Myers v. McDonald, 635 P. 2d 84 (Utah, 1981).

III. THE SUPPLEMENTARY MATERIALS SHOULD BE CONSIDERED.

The Larsons' motion to supplement the record has been denied, but without prejudice to renewal of that motion before the panel which hears this appeal. The Larsons intend to renew their motion to supplement before that panel, but, in fairness to defendants, without further argument here.

CONCLUSION

The summary judgment should be reversed and the case remanded for discovery and trial.

DATED this 20th day of March, 1991.

By: 


L. Edward Robbins
Attorney for Plaintiffs/
Appellants

Certificate of Service

I hereby certify that on the 20th day of March, 1991, I served the foregoing Appellants' Reply Brief upon the following individuals by depositing in the U. S. Mails, first class postage fully prepaid, four copies thereof, one copy manually signed by counsel, addressed as follows:

Gary E. Jubber
Patrick L. Anderson
FABIAN & CLENDENIN
Twelfth Floor
215 South State Street
Salt Lake City, Utah 84111

Attorneys for Respondents


L. Edward Robbins