1959

T. Collins Jackson v. Kenderick Harward et al : Reply Brief of Appellant

Utah Supreme Court

Ben D. Browning; John H. Allen; Attorneys for Appellant;

IN THE SUPREME COURT

of the

STATE OF UTAH

T. COLLINS JACKSON,
Plaintiff and Appellant,

—vs.—

KENDRICK HARWARD, BLAIN C. CURTIS, HEBER CHRISTIANSON, McKAY LARSON, TEX R. OLSEN, SPENCER OLIN,
Defendants and Respondents.

Case No. 9000

REPLY BRIEF OF APPELLANT

BEN D. BROWNING, and
JOHN H. ALLEN
Attorneys for Appellant,
1020 Kearns Building
Salt Lake City 1, Utah

INDEX

CASES CITED

STATUTES CITED

OTHER AUTHORITIES

IN THE SUPREME COURT
of the
STATE OF UTAH

T. COLLINS JACKSON,
Plaintiff and Appellant,

—vs.—

KENDRICK HARWARD, BLAIN C. CURTIS, HEBER CHRISTIANSON, McKAY LARSON, TEX R. OLSEN, SPENCER OLIN,
Defendants and Respondents.

Case No. 9000

REPLY BRIEF OF APPELLANT

In Respondents' brief it is urged that the Trial Court's action in granting a Summary Judgment was correct because:

A. The Appellant, assuming all allegations of his complaint are true, has pleaded no right which may be protected at law or in equity.

B. The Appellant, assuming the allegations of his complaint are true, has pleaded no duty on the part of the respondents which has been violated.

Appellant now relies to these contentions in the order stated.

STATEMENT OF POINTS

POINT I

A. THE APPELLANT HAS PLEADED A RIGHT WHICH MAY BE PROTECTED AT LAW OR IN EQUITY.

B. THE APPELLANT HAS SUFFICIENTLY PLEADED A DUTY ON THE PART OF THE RESPONDENTS WHICH HAS BEEN VIOLATED.

ARGUMENT

POINT I

A. THE APPELLANT HAS PLEADED A RIGHT WHICH MAY BE PROTECTED AT LAW OR IN EQUITY.

Plaintiff is required to set forth as a claim for relief (1) A short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for that relief. Rule 8(a), *Utah Rules of Civil Procedure*. The Appelant's pleadings contain these essentials, however the Respondents, while not attacking these pleadings directly, contend an absence of a primary legal right in the Appellant, and set forth seven deficiencies.

The first claimed deficiency alleges no license or permit from the Federal Communications Commission or from any other governmental or administrative body.

PARAGRAPH 20, F.C.C. DOCKET No. 12443, dated APRIL 13, 1959.

20. On the basis of prolonged study of the advantages and disadvantages of authorizing repeater services in the VHF band, the Commission has concluded that, subject to necessary amendment of the Communications Act of 1934, it will be in the public interest to authorize the operation of the VHF repeaters within limits which will afford due protection against interference to other users of the radio spectrum including aerial navigation services. With this end in view the Commission is preparing, for prompt submission to Congress, recommendations for the appropriate amendment of Sections 318 and 319 of the Act to clarify existing law concerning operator requirements and to eliminate the present prohibition against the licensing of broadcast facilities constructed without prior Commission authorization. Further steps toward the licensing of VHF repeater operations will have to be deferred until Congress acts on the proposed legislative amendments.

The simple answer to this is that none is required. See *F.C.C. Docket* 12443, where it is said:

> 16. In a Memorandum Opnion and Order adopted by the Commission on April 2, 1958 (In the Matter of Frontier Broadcasting Company, *et al.,* Complainant, v. J. E. Collier and Carol O. Krummel, db/as Laramie Community TV Company, *et al.,* defendant), the Commission announced its conclusion that it does not possess licensing or regulatory jurisdiction over community antenna television systems. We may here note briefly the basis on which the conclusion of non-jurisdiction over CATV systems was reached. First, it was concluded that they are not carriers. Second, even assuming they were carriers, their operations are typically intrastate, whereas the Act gives the Commission regulatory jurisdiction over only these common carriers operating facilities which provide interstate or foreign communications service. Finally, it seemed clear that. since their operation is confined to the transmission of television programs to subscribers over closed circuit cable systems, there is no basis on which to assume licensing or regulatory powers over CATV systems as users of the radio spectrum under Title III of the Communications Act.

The second and third claimed deficiencies allege that Appellant has no franchise from Sevier County, in violation of Article XII, Section 8 of the Utah Constitution and Section 17-5-39, Utah Code Annotated (1953) or from any municipality within Sevier County, in violation of the same constitutional provisions and Section 10-8-14,

Utah Code Annotated (1953). Appellant has admitted that he has no such franchise and has answered by way of interrogatory number 10 that he claims the right to operate without formal franchise, by user and implied consent from the governing body of Sevier County. This raises a genuine issue of fact. Moreover, the Constitutional and Statutory provisions cited by Respondent do not require that Appellant obtain a franchise as a condition precedent to doing business nor do they take from Appellant the right to conduct his business. They merely grant to these governing bodies the right to require franchises under certain conditions. At no time material to this lawsuit has any governing body within Sevier County enacted a resolution requiring that Appellant obtain a franchise.

The fourth claimed deficiency alleges that during all times material to these proceedings Appellant has been subject to a contract authorizing the use of utility poles for carrying his line, which provides as a condition precedent that he must secure all local franchises required by law. What has been said above in answer to claimed deficiencies two and three are equally applicable to this fourth claimed deficiency. Even if the terms of the contract were violated, which Appellant denies, this would only give rise to a dispute between the contracting parties, namely Telluride Power Company and Appellant, and would not destroy any primary legal rights of Appellant.

The fifth claimed deficiency alleges that at all times material to these proceedings, Appellant has operated under an unregistered assumed name, contrary to the provisions of Section 42-2-1, Utah Code Annotated (1953). Violation of this provision does not take any of the legal rights of the offender, but renders an offender guilty of a misdemeanor. Section 42-2-4, *Utah Code Annotated* (1953). The purpose of this statute is to give notice to the public of the name or names of persons conducting or owning a business, and to protect those who would transact business with persons under an assumed name. *Putnam v. The Industrial Commission,* 80 Utah 187, 14 P. 2d 973. Respondents make no claim that they or any other person has been misled. It has also been held that provisions for assumed names are inapplicable to torts. See 38 *Am. Jur.* 600.

The sixth and seventh claimed deficiencies alleged that Appellant has been capturing a fugitive television signal without paying any consideration for or contributing to the production thereof and that he is a "receiver" rather than a "broadcaster" and as a receiver is attempting to "reap where he has not sown." Appellant contends that this claimed deficiency is wholly immaterial. The pleadings claiming damages will necessitate findings of fact showing the investment Appellant has in this business, in such things as master antennae located high on mountain peaks, from which lead wires and pole lines

extend over great distances to customers' receiving sets. Appellant's business is recognized and duplicated by other such entrepreneurs all over the United States. The case of *Scroll Realty Corp. v. Mandell,* 92 N.Y.S. 2d 813 (N.Y. 1949), involved the question whether a tenant in an apartment house could maintain a television antenna on the roof in view of a lease provision forbidding drilling into any part of the building. That court held that the provision precluded such antenna, but went on to say that it might be realistic and practical to provide a master aerial on the apartment house from which leader lines could be run to the various tenants, providing for a fair and reasonable rental for such service. In a case before the Fourth Circuit Court of Appeals in 1956, in order to decide a tax matter, the Court described the function of a business analagous to Appellant's. There a community antenna system was described as consisting of "the gathering, transmission and delivery of broadcast sound and picture television signals from owned central high towers located on land leased or owned by it . . ." The description goes on to recite that the entrepreneurs collect a connection charge plus a monthly service fee. *Lilly v. United States,* 238 F.2d 584 (4th Cir. 1956). For further evidence of the recognition of this sort of conduct as a business possessing inherent rights see *F.C.C. Docket Numbers* 11611, 11331, 12116, and 12443. The fact of the

matter is, Appellant and his counterparts elsewhere, far from conducting a business without paying any consideration therefore (or reaping where he has not sown), have invested substantial sums in supplying television to areas not capable of receiving the signal from the mother transmitting station. The other cases cited by Respondent under this heading are not in point, for there are no issues raised in the pleadings pertaining to proprietary rights of the product televised such as a heavyweight fight, I Love Lucy, or other shows which are copyrighted. The issue here is more nearly analagous to a person contaminating the water of a private water supply system.

B. THE APPELLANT HAS SUFFICIENTLY PLEADED A DUTY ON THE PART OF THE RESPONDENTS WHICH HAS BEEN VIOLATED.

The Appellant claims that he has sufficiently pleaded a duty on the part of Respondents by his allegations in the first cause of action in trespass; second cause of action in negligence; third cause of action in nuisance; fourth cause of action in inducing breach of contract; fifth cause of action in conspiracy; and sixth cause of action for punative relief for malice. These actions were all known at common law.

Respondent contends variously that they have no duty because they have sovereign immunity for their acts, because except for defendants Olin and Larson they

are all elected County Officials; also that their conduct is lawful; and that Appellant seeks to take advantage of the federal licensing statute for broadcasting, for his own advantage to eliminate competition.

Each defense asserted under this section of their reply necessarily argues genuine issues of fact to reach the proffered conclusion. Respondents say that they were compelled to supply television to Sevier County by the provision of Section 11-2-1, and 11-2-2, *Utah Code Annotated* (1953). That statute restricted the governing bodies to the use of translators, but the Respondents did not follow the Statute. Appellant's complaint alleges that the Respondents are using boosters without first obtaining a license, contrary to federal law. (See complaint, paragraph 5.) Respondents have neither admitted nor denied this allegation. Appellant concedes that elective county officials are immune from liability when performing their governmental functions, but Appellant is unable to understand how Respondents can invoke this immunity without pleading it, and without resolving the issue as to whether they are complying with the very statute from which they seek their immunity.

Respondents' point that Appellant is seeking to eliminate his competition is both immaterial and absurd. Their brief attempts to equate their own failure to have an F.C.C. license for an unlicenseable booster, with Appel-

lants failure to have an F.C.C. license. This simply ignores the rules of the federal statutes set forth in paragraph five of Appellant's complaint and the decisions of the F.C.C., see *F.C.C. Docket numbers* 111611, 11331, 12116 and 12443. As previously shown, Appellant does not require a license.

Appellant has laid his complaint on common law causes of action, asking for redress for wrongs committed directly against him. This is not an application before the Federal Communications Commission to determine who should get a license, or whether someone is broadcasting in violation of any license.

Finally, Respondents take comfort from the case of *C. J. Community Services v. F.C.C.,* 246 F. 2d 660, and chide Appellant for maintaining that "boosters are still unlawful." Only a cursory reading of that case will demonstrate that this is the case that extends beyond any doubt that the F.C.C. has the same jurisdiction over television *broadcasting* that it previously held, unquestionably, over radio. The dictum of the case suggested that the F.C.C. look into the feasibility of booster television. The F.C.C. Dockets referred to, supra, are conclusive of the question that the F.C.C. has studied this issue both before and after the decision and that they are still unlicenseable and therefore illegal.

CONCLUSION

Plaintiff and Appellant has pleaded a right which may be protected at law and in equity and has pleaded a duty on the part of Respondent, which has been violated. The Trial Court erred in granting the Motion for Summary Judgment since genuine issues of fact material to the cause of plaintiff and Appellant are outstanding. The judgment of the Trial Court should therefore be reversed and the cause remanded to the District Court for a trial on the merits of the case.

Respectfully submitted,

BEN D. BROWNING, and
JOHN H. ALLEN
Attorneys for Appellant,
1020 Kearns Building
Salt Lake City 1, Utah