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Joseph H. Dupler et al v. Maurice Yates : Brief of Appellant

Utah Supreme Court

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Case No. 9048

IN THE SUPREME COURT
of the
STATE OF UTAH

JOSEPH H. DUPLER, L. HOWARD
MARCUS, B. M. ROE and DAVID
I. ZINIK,

Appellants,

vs.

MAURICE YATES,

Respondent.

FILED

SEP 4 - 1959

Clark, Supreme Court, Utah

BRIEF OF APPELLANT

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BLACK
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9048

BRIEF OF APPELLANT

(The parties will be referred to as they appeared in the lower court. Numbers in parenthesis refer to pages of the record.)

PRELIMINARY STATEMENT

This is an appeal from a summary judgment (88) entered in favor of defendant and against plaintiffs. This summary judgment was entered before defendant an-

swered. The defendant filed a motion to dismiss and a motion to make more certain (14-18). Thereafter defendant filed a motion for summary judgment setting forth seven grounds (21-25). Various exhibits and affidavits were filed by defendant in support of said motion (see Exhibits A to M, inclusive). Plaintiffs filed counter-affidavits (26-29). The trial court granted said motion with leave to plaintiffs to amend the complaint (30) and plaintiffs filed an amended complaint (35-49). Defendants then filed a motion to dismiss and to make more certain (50-54) and a motion for summary judgment in which he reasserted the seven grounds included in the original motion and added five new grounds (62, 63).

The trial court then granted the motion for summary judgment (85) pursuant to which order a summary judgment was entered (88-89). This judgment did not permit any further amendment and plaintiffs moved to amend the judgment to permit such amendment (90) and an amendment to the amended complaint was submitted along with said motion (92-94). This latter motion was denied (99) and this appeal followed (102).

STATEMENT OF FACTS

This is an action founded in fraud and deceit and for breach of a fiduciary relationship. It arises out of a number of transactions between plaintiffs and defendant and Joe and Leo Aimonetto and C. B. Simmons. The transactions concerned the purchase and assignment of various interests in three oil wells located near New Castle, Wyoming.

The complaint contains five causes of action. The first three causes of action relate to what are designated wells #1 and #2 and involve transactions with Joe and Leo Aimonetto. The fourth cause of action relates to well #3 and involves a transaction with C. B. Simmons. The fifth cause of action combines all of the transactions as included within a scheme on the part of defendant to in effect play both ends against the middle.

Generally the allegations contained in the first four causes of action are to the effect that defendant represented that certain interests in oil wells were worth a certain amount of money, that defendant had paid for his share of the purchase price a certain amount and that he was acting on behalf of the plaintiffs as their agent. It is alleged that these representations were false, that defendant knew them to be false, that they were made with the intent of deceiving the plaintiffs and inducing them to spend money purchasing various interests in these wells that plaintiffs in reliance therein paid certain moneys to their damage.

It is further alleged that defendant received various interest in these wells for procuring plaintiffs' money to be paid to Aimonetto and Simmons. It is alleged that plaintiffs paid the money and the interests they obtained were valueless.

The fifth cause of action alleges defendant was acting in a fiduciary relationship with plaintiffs and yet was representing the sellers of these interests in oil wells and by virtue of this relationship plaintiffs were

induced to give money for these valueless interests.

Among other grounds defendant contended that there was no sufficient allegation of fraud. We will go specifically into the allegations and their sufficiency under the appropriate point in the argument contained in this brief.

In the motion for summary judgment the defendant also asserted that the three-year statute of limitations had run on this cause of action. This also will be taken up in detail under the argument.

Defendant through affidavits and exhibits and grounds of his motion contended that these plaintiffs have brought suits against the Aimonettos and Simmons to recover for these same damages and that the results in those cases are either *res judicata* or the settlement thereof has released defendant. This matter will be taken up under the appropriate points in the argument hereinafter set forth.

If defendant asserts any further grounds upon which the summary judgment could be sustained, we reserve our right to file a reply brief in answer to any such new or additional contention.

STATEMENT OF POINTS RELIED UPON

POINT I.

THE TRIAL COURT ERRED IN REFUSING TO AMEND THE JUDGMENT TO PERMIT PLAINTIFFS TO AMEND THEIR COMPLAINT.

POINT II.

TO JUSTIFY SUMMARY JUDGMENT THERE MUST BE NO GENUINE ISSUE OF FACT PRESENTED.

POINT III.

THE ALLEGATIONS OF FRAUD WERE SUFFICIENT AND RAISED FACTUAL ISSUES.

POINT IV.

THE THREE YEAR FRAUD STATUTE OF LIMITATIONS HAD NOT BARRED THE ACTIONS SET FORTH IN THE AMENDED COMPLAINT OR AT LEAST THERE WAS A GENUINE ISSUE OF FACT PRESENTED.

POINT V.

THE DISPOSITION OF THE ACTIONS BROUGHT IN WYOMING DO NOT ELIMINATE THE LIABILITY OF DEFENDANT AND THERE WAS AT LEAST A GENUINE ISSUE OF FACT ON THIS SUBJECT.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN REFUSING TO AMEND THE JUDGMENT TO PERMIT PLAINTIFFS TO AMEND THEIR COMPLAINT.

The summary judgment from which appeal is taken here made no provision for plaintiffs to amend their pleadings. A summary judgment is recognized as being a harsh remedial disposition of a case. Particularly is this so where the defendant has not even answered the complaint so as to form issues. All defendant did here was to file numerous affidavits and exhibits before answer-

ing. This left the record in a state of flux and uncertainty and plaintiffs were entitled to meet the new issues presented by amending the complaint as was necessary. Rule 15(a), Utah Rules of Civil Procedure, in so far as applicable here, provides:

“* * * a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.”

At the time defendant made his motion for summary judgment on plaintiffs' amended complaint, he filed an agreement between the Aimonettos and plaintiffs and also set forth the dismissal of several cases against the Aimonettos. The agreement contemplated further work to put the wells into production — hence the price of interests became material.

At the time of arguing the motion, plaintiffs did not believe the agreement or the dismissals released defendant. In order to make it clear that there could be no release based thereon, plaintiffs believed they should specifically set forth in their pleadings the factual situation.

The Aimonetto suits had to do with the loss suffered by plaintiffs as a result of a violation of the Securities Exchange Act. The amendment to the amended complaint (92) discloses that plaintiffs suffered damages as a result of defendant misrepresenting the amount which was to be paid for undivided interests in the mining claims.

The amendment to the First Cause of Action is

typical (92). It discloses that defendant, purporting to act as the agent of plaintiffs, asserted the purchase price of a fourth interest was \$60,000.00. As a matter of fact, he obtained the one-fourth interest for \$40,000.00. Plaintiff Dupler put up \$30,000.00 and defendant \$10,000.00. Each received a one half undivided interest in the fourth interest. This would indicate that by virtue of a breach of fiduciary relationship, together with fraudulent misrepresentation, defendant defrauded plaintiff Dupler in the sum of \$10,000.00 because the fourth interest was purchased for \$40,000.00 and plaintiff Dupler was to receive one-half and should pay only a half.

This same situation is disclosed by the other amendments. We believe though not absolutely necessary, none the less, it was helpful to plaintiffs' cause to spell out this liability on the part of defendant.

There is no reason indicated why this amendment should not have been allowed. Plaintiffs had been permitted to amend their complaint once before but certainly there was an abuse of discretion on the part of the court in denying plaintiffs' right to make further amendments of their pleadings in order that the cause of plaintiffs might be properly presented. We believe it unfair to grant a summary judgment without permitting a plaintiff the right to amend his complaint where such is possible. Especially is this true where issues and contentions are not made by answers or pleadings but by affidavits and exhibits before answer.

We submit that the trial court committed prejudicial error in not permitting plaintiffs to amend their complaint in accordance with the provisions of Rule 15(a) above.

POINT II.

TO JUSTIFY SUMMARY JUDGMENT THERE MUST BE NO GENUINE ISSUE OF FACT PRESENTED.

The trial court, under the provisions of Rule 56, Utah Rules of Civil Procedure, granted defendant's motion for a summary judgment. In so doing, he necessarily ruled that there was no genuine issue of fact. If any such issue existed, then error was committed. See *Young v. Felornia*, 121 Utah 646, 244 P.2d 862; *Morris v. Farnsworth Motel*, 123 Utah 289, 59 P.2d 298; *Securities Credit Corporation v. Willey*, 1 Utah 2d 254, 265 P. 2d 422; 6 Moore's Federal Practice, 2nd Edition, Section 56.15 (1), (3) and (8).

In *Young v. Felornia*, supra, the Court stated as follows:

"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."

In *Morris v. Farnsworth Motel*, supra, this court set forth the rule which should be applied in determining whether or not a motion for summary judgment was properly granted:

“Under such circumstances, the party against whom the summary judgment is granted, is entitled to the benefit of having the court consider all of the facts presented, and every inference fairly arising therefrom in the light most favorable to him, which we do in reviewing the incident.”

With these controlling rules in mind, we will move on to a consideration of the genuine issues which were raised by the pleadings and affidavits of plaintiffs and the affidavits of defendant.

POINT III.

THE ALLEGATIONS OF FRAUD WERE SUFFICIENT AND RAISED FACTUAL ISSUES.

The elements necessary to make out a right of recovery for fraud have been set out in a number of cases. Perhaps the earliest statement is found in the case of *Stuck v. Delta Land and Water Co.*, 63 Utah 495, 227 P. 791 (1924), and one of the most recent is *Pace v. Parish*, 122 Utah 141, 246 P. 2d 273 (1952). This Court in the *Pace* case stated:

“This being an action in deceit based on fraudulent misrepresentations, the burden was upon plaintiffs to prove all of the essential elements thereof. These are: (1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the

representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage. See *Stuck v. Delta Land & Water Co.*, 63 Utah 495, 227 P. 791; *Jones v. Pingree*, 73 Utah 190, 273 P. 303; 23 Am. Jr. 773; 37 C.J.S., Fraud, Section 3, p. 215."

The law is also clear that the defendant need not benefit by his fraud, if he induces by fraud the plaintiff to part with money to another, 23 Am. Jur. 998, Fraud and Deceit, Section 179.

It will be necessary to take up the allegations contained in each cause of action so that it will at once become manifest that the necessary elements of the offense have been alleged in each cause. Our references will be to the amended complaint (35).

FIRST CAUSE OF ACTION

It is here alleged that defendant represented to plaintiff Dupler that an undivided $\frac{1}{4}$ th interest in an oil and gas lease would cost \$60,000.00 and further represented that defendant had paid for the purchase price of one-half of said $\frac{1}{4}$ th undivided interest the sum of \$30,000.00, and defendant further represented that he was acting for and on behalf of plaintiff when, in fact, he was representing himself and the Aimonettos. It is al-

leged in Paragraph 3 that these representations were false, that defendant knew them to be false and they were uttered for the purpose of having plaintiffs pay to Aimonetto \$30,000.00. In Paragraph 2 it is alleged that plaintiff, in reliance upon these representations, paid \$30,000.00 for one-half of the $\frac{1}{4}$ th undivided interest in the oil and gas lease. It is alleged, that as a result of these representations, plaintiffs were damaged in the sum of \$30,000.00. It is alleged in Paragraph 6 that defendant had a fraudulent scheme to invest in oil and gas leases and that defendant would make representations to the public that he was investing and would fraudulently conceal the fact that he had made prior arrangements with the Aimonettos whereby he was to receive either an interest in the lease or a part of the money paid by members of the public for getting them to invest money in these leases. It was further alleged that the representations made by defendant were in furtherance of this scheme. It is also alleged that plaintiff did not know of the fraud until June of 1956 and this allegation is repeated in each cause.

We submit that all of the elements required by the above authorities are alleged in the First Cause of Action.

In addition, since the amendment was wrongfully denied, we may take into consideration the offered amendment in this case. It is there alleged that, as a matter of fact, the $\frac{1}{4}$ th interest was purchased by defendant for \$40,000.00 and that he paid only \$10,000.00 toward the

purchase of said interest and that he received an undivided one-half interest in the $\frac{1}{4}$ th interest for \$10,000.00 and plaintiff Dupler obtained an undivided one-half interest in the $\frac{1}{4}$ th interest for \$30,000.00. Hence, under these allegations, if plaintiff were not entitled to the entire amount paid, he would be entitled to at least the \$10,000.00.

SECOND CAUSE OF ACTION

In this cause of action, it is alleged that defendant represented that he had put up \$17,500.00 to purchase an interest in a lease, when, in fact, he had not. He represented further that he was acting in said transaction as the agent of plaintiffs when, in fact, he was representing himself and the Aimonettos. It is alleged that these representations were false, that defendant knew they were false and made them for the purpose of inducing plaintiffs to put up the money for the drilling of an oil well; that plaintiffs in reliance upon those representations made by defendant put up certain monies for an interest in an oil and gas lease which is valueless. It is alleged that this was part of a scheme on the part of defendant to obtain money on these oil and gas leases. It sets forth the experience of defendant and the reliance placed upon him which establishes the materiality of the representations that he was an investor and that he was acting for them and not at arm's length.

Here again, the allegations in the amendment offered to the Second Cause show its materiality. As appears from the Second Cause of Action in the Amended Com-

plaint, defendant represented he had put up \$17,500.00. In the offered amendment it appears he put up nothing, yet he received a one-half interest in the $\frac{1}{4}$ th interest in the oil and gas lease along with plaintiff Dupler. This establishes plaintiff Dupler would be entitled to recover \$8,750.00 since the total $\frac{1}{4}$ th interest only cost \$17,500.00. It should be noted that Dupler and defendant were purchasing an undivided $\frac{1}{4}$ th interest and were not each buying an eighth.

Again, all of the necessary elements are alleged.

THIRD CAUSE OF ACTION

Here it is alleged that defendant represented he had purchased for plaintiff a 5% interest in an oil well and a 5% interest for himself. He made the representation that he had made the payment of \$7,000.00 for each, Dupler and himself. It is alleged that these representations were false and known by defendant to be false. It is alleged that these representations were made with the intent to deceive plaintiff and to induce him to pay the amount of \$7,000.00 to defendant, and it further appears that Dupler, in reliance upon this, made the payment and as a result was damaged. It is alleged that the interest obtained was of no value.

Here again the background of defendant is alleged as a successful investor and one acting in behalf of plaintiff and they would not have made the payments had they known of his fraudulent scheme and that he was acting for himself and the Aimonettos.

We submit that all of the elements are present here as required under Utah law. Also, we may take into consideration the allegations contained in the offered amendment. It appears by the amendment that defendant represented that the purchase price of 10% of the lease was worth \$14,000.00. As a matter of fact, it was purchased with Dupler's \$7,000.00 and defendant put up no money. Upon this allegation, plaintiff Dupler would be entitled to half of the money he paid.

FOURTH CAUSE OF ACTION

The Fourth Cause of Action relates to a transaction with one Simmons. Here the allegation is made that Simmons agreed to sell a 50% working interest which would require plaintiffs and defendant to put up \$77,500.00. The representations alleged were that plaintiff and defendant had to put up \$77,500.00 in order to acquire a 50% interest. Defendant represented that he had put up \$15,500 for his interest and defendant represented that he was acting for and on behalf of plaintiffs.

It is alleged that these representations were false, known by defendant to be false and made for the purpose of deceiving plaintiffs and inducing them to put up the money for the 50% interest. It is further alleged that, in reliance on this, plaintiffs each put up certain sums of money, and they were damaged in that sum and the interests which they were to obtain were, in fact, of no value. Again, the background of defendant is alleged and the fact that this was an over-all scheme on his part.

This would establish the materiality of these representations. We submit that all of the elements are set forth to make out a case of deceit.

The allegations contained in the offered amendment aid in the over-all establishment of liability. It is here alleged that as a matter of fact the price of acquiring said 50% interest was \$62,000.00 and that defendant did not put up any money himself. And, not only did defendant receive his 1/5th interest of the 50% interest but also, in addition, he obtained 12½% interest in the lease. This shows not only deceit, but also a breach of fiduciary relationship requiring the defendant to disgorge his proper share for the purchase of his interest in this lease which had been paid for by the plaintiffs.

FIFTH CAUSE OF ACTION

In this cause of action all of the transactions are alleged as part of an over-all scheme on the part of defendant to act as a fiduciary for plaintiffs and then, in fact, acting for the seller of these interests and also for himself, thereby and thus by his representations inducing plaintiffs to spend money for valueless claims to their damage in the amount paid. Here also defendant should be required to pay for the interests he received from payments by plaintiffs.

We submit that in each cause of action the elements of deceit were alleged and also a breach of the fiduciary or confidential relationship between plaintiffs and defendant.

POINT IV.

THE THREE YEAR FRAUD STATUTE OF LIMITATIONS HAD NOT BARRED THE ACTIONS SET FORTH IN THE AMENDED COMPLAINT OR AT LEAST THERE WAS A GENUINE ISSUE OF FACT PRESENTED.

The monies were advanced by plaintiffs to either the defendant, the Aimoncttos or Simmons on and between the 6th day of January, 1954 and the 3rd day of April, 1954. The original complaint was filed October 21, 1957, which would make the filing more than three years and less than four years after the payment of the various sums of money. So far as the causes of action are based on deceit or fraud, the three year statute of limitations provided for in Section 78-12-26(3) applies. So far as the actions are based upon a breach of fiduciary relationship, the four year statute of limitations applies and are not barred. *Kamas Securities Co. v. Taylor*, 119 Utah 241, 226 P. 2d 111; Section 78-12-25(2), U.C.A. 1953.

The three year statute does not begin to run "until the discovery by the aggrieved party of the facts constituting the fraud or mistake." In each cause of action, the following allegation is found: "That the plaintiffs did not discover the facts constituting the foregoing fraud until June, 1956."

This allegation is a sufficient allegation to postpone the accrual of the cause of action until the time therein alleged. See *Nunnally v. First Federal Building & Loan Assn.*, 107 Utah 347, 154 P. 2d 620; *Benion v. First*

Federal Savings & Loan Assn. 107 Utah 381, 154 P. 2d 634.

The defendant, by asserting plaintiffs learned of the fraud at an earlier time, only raised a genuine issue of fact which would eliminate any authority of the trial court to enter a summary judgment based upon any contention that the statute of limitations had run. The record here does not disclose or establish that plaintiffs were aware of the frauds here relied upon until June of 1956 which is the express allegation of the amended complaint. In any event, the plaintiffs in contradiction of the contention of defendant filed the affidavit of Joseph Dupler, in which he testified that in the fall of 1954, he talked with defendant concerning whether defendant had paid his share on the oil transactions. At this time defendant assured plaintiff Dupler that he had, but refused to let him see the checks. In the late Fall of 1954, plaintiff Dupler informed defendant that unless he produced the checks, he would file suit for an accounting. In the forepart of 1955, defendant showed him checks which covered the payments which defendant was supposed to have made. Plaintiff alleges that this caused him to be lulled into a false sense of security and he believed the statements made by defendant. It was not until June, 1956, that he learned that the checks shown to him were false.

Where a person accused of fraud reaffirms the misrepresentations by words or conduct, he is not in a position to say that the person should not rely upon his statements and conduct for the purpose of postponing

the commencement of the statute of limitations. Here plaintiffs could rely upon defendant's statement that he had the checks which showed that he had made his contributions in connection with the purchase of interests in oil leases. See *Kalkruth v. Resort Properties*, 57 Cal. App. 2d 145, 134 P. 2d 513 (1943) wherein the Court stated:

"We believe that when, as here, the buyer has only a suspicion of the fraud, and the seller who has defrauded the buyer, lulls the buyer into a sense of security by both words and conduct, the seller should not be permitted to assert that the buyer had lost his rights by waiving the suspicion and accepting the reassurance of the seller that no fraud had been perpetrated. This rule was applied in *Curtis v. Title Guarantee etc., Co.*, 3 Cal. App. 2d 612, 40 P. 2d 562, 566, 42 P. 2d 323, where it was said:

'Respondent testified that when she saw the University buildings were not being constructed, she talked to an agent of respondent (appellant), who explained the delay by informing her that representatives of the University were in the East raising money. This apparently quieted her fears and she made her payments. Where the vendor by promises or representations to the vendee causes the vendee to postpone efforts to rescind the contract, the vendor cannot urge the failure of the vendee to rescind within the time during which the vendee's fears of fraud have been lulled by such representations. *Cooper v. Huntington*, supra (178 Cal. 160, 172 P. 59).'

We respectfully submit that the question of whether or not the statute of limitations had run in this case was

a genuine issue of fact raised by plaintiffs' amended complaint and by the affidavits and exhibits of defendant. This being so, the statute of limitations could not be a basis for entry of a summary judgment in favor of defendant and against plaintiffs.

POINT V.

THE DISPOSITION OF THE ACTIONS BROUGHT IN WYOMING DO NOT ELIMINATE THE LIABILITY OF DEFENDANT AND THERE WAS AT LEAST A GENUINE ISSUE OF FACT ON THIS SUBJECT.

The plaintiffs Dupler, Roe and Zinik each brought separate actions against the Aimonettos. These are set forth in Exhibit D attached to the original Motion for Summary Judgment and by attachments to the second motion at R. 65 and R. 75. Each of these actions was dismissed pursuant to stipulation (see Exhibit E, R. 73, R. 83). There is no showing what stipulation is referred to or the grounds or reasons for the dismissal.

Defendant also has made a part of the record an agreement (57) between the Aimonettos, Dupler, Roe and Zinik and concurred in by Marcus. There is no showing in the record or any testimony which would connect this agreement with the dismissals. This agreement was entered into August 20, 1956 and the dismissals are dated October 25, 1956. This agreement provided as follows:

"Dupler, Roe, and Zinik are willing to settle and compromise said claims and to release and discharge the Aimonettos from any liability thereunder if the Aimonettos are willing, as herein specified, to undertake to rework the said two

wells, install therein such equipment as may be necessary, and put the same on production in accordance with the terms hereof. It is intended, therefore, that upon the execution of this agreement each of said civil suits will be dismissed with prejudice, each party to pay his own costs."

All of the plaintiffs brought an action against Simmons and Keller, a partnership. No disposition of this action is disclosed except the defendant, in his motion for summary judgment, (62) in Paragraph (c), asserts that in that action a judgment was entered against Simmons and that a copy thereof would be made a part of the record if available. This was not done.

In the first place, these several actions were predicated upon violations of the Securities Exchange Act. They were actions based upon a statute of the United States. These actions were not the same action as the one in the case at bar, which is a simple action for deceit and breach of fiduciary relationship. Upon this ground alone, the disposition of these cases should have no effect upon the determination of the case at bar. Those actions are entirely separate and distinct from this one.

AIMONETTO ACTIONS

We will consider the Aimonetto actions first. There is no evidence to establish that the actions were dismissed with prejudice pursuant to any settlement or release. That one of several tort feasons is dismissed from an action already filed does not release other parties nor does it effect a release of other joint or several tort feasons. In the absence of a release, the Orders of dis-

missal referred to in the Aimonetto cases could only amount to judgments in favor of another joint tortfeasor. We believe the law is clear that such a judgment would not result in a release of this defendant. 52 Am. Jur. 465, Torts, Section 128, states the rule as follows:

"The general rule is that a judgment in favor of one joint tort-feasor is no bar to an action against another tort-feasor. This rule has been applied to a judgment rendered in favor of one tort-feasor in one state and a subsequent action brought against another tort-feasor in another state, under the principle that the conclusiveness in the courts of one state of a judgment rendered by the courts of another state extends only to parties to the record of the prior adjudication and persons in privity with them, and not to strangers to the judgment."

The agreement relied upon by defendant does not show it was ever carried into effect. As a matter of fact, it was based upon an "if" as shown by the preceding quotation and it nowhere appears from the evidence that that condition came to pass.

In any event, the agreement is to the effect that the Aimonettos were to rework and attempt to bring into production the wells described. The agreement did not affect the matters stated in the amendments to the amended complaint. These involved the proposition that defendant had represented that the various interests had cost more than they actually did. For instance, in the first cause of action, defendant represented that the undivided one-half of the $\frac{1}{4}$ th interest cost \$60,000.00. As

a matter of fact, it only cost \$40,000.00 and defendant paid \$10,000.00 for a half interest and plaintiff Dupler paid \$30,000.00 for a half interest. Hence, the release does not reach the situation involved in these causes of action. The same thing can be said for each of the other four causes of action in connection with the activity of defendant in misrepresenting the purchase price of the various interests purchased by plaintiffs.

SIMMONS ACTION

The final disposition of the Simmons action is not shown. If the results were in favor of plaintiffs and against Simmons, it would not be a bar to the fourth cause of action. The judgment in favor of plaintiffs is not shown to be satisfied. The law is stated in 52 Am. Jur. 464, Torts, Section 127 as follows:

“The rule generally supported by the cases as to the conclusiveness of judgments involving joint and several tort-feasors is that an unsatisfied judgment in one action against one or more of a number of joint and several tort-feasors is no bar to the prosecution of other actions against the other tort-feasors.”

We respectfully submit that a summary judgment should not be entered upon the type of fragmentary evidence that appears in the record in the case at bar. We have heretofore pointed out its shortcomings. In any event, we submit that a genuine issue of fact exists as to whether or not these various causes of actions, judgments and agreements can be said to dispose of the case at bar. These matters should be fully explored in a

plenary trial where all testimony, pro and con, could be submitted to the court concerning this genuine factual issue.

We submit that the foregoing argument and authorities precluded the trial court from properly entering a summary judgment on the grounds that the defendant had been released by various dispositions of prior cases in Wyoming.

CONCLUSION

It is regrettable that plaintiffs in this Brief have had to deal more or less with generalities. The summary judgment from which appeal has been taken (R-88) sets forth as follows:

“That defendant’s motion for summary judgment on plaintiffs’ amended complaint is hereby granted upon all the grounds set forth in said motion and upon which it is based.”

For instance, the first ground set forth in the original motion for summary judgment (21, paragraph a) is so general and argumentive that no ground for a summary judgment is really set forth.

The granting of a summary judgment before answer is a drastic remedy. Particularly is this true when defendant merely files a motion for summary judgment and seeks to support it by affidavits, without setting up an answer disclosing the issues he desires to make. We submit that even-handed justice could be better dealt out in this case after a full and complete trial of all of the many issues here involved. We submit that the trial court

acted hastily and abused his discretion in refusing to permit plaintiffs to file amendments to its complaint to meet the specific matters set up in defendant's affidavits and exhibits. We submit that under the procedure followed here, no orderly presentation of the case could be or was made.

It appears from the pleadings and affidavits of the parties hereto that there are genuine issues of fact, the decisions of which will be determinative of the right of plaintiffs to recover. We submit that the summary judgment should be reversed and this cause should be returned to the District Court for orderly trial after answer filed and issues drawn.

Respectfully submitted,

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