1968

J. Seal v. Leslie Lefevre : Brief of Appellant

IN THE SUPREME COURT

OF THE

STATE OF UTAH

J. SEAL,

Plaintiff and Appellant,

vs.

LESLIE LeFEVRE, et al,

Defendants and Respondents.

Case No. 11307

BRIEF OF APPELLANT

Appeal from Order of Summary Judgment of the
District Court of Garfield County

Honorable Ferdinand Erickson

DAVID A. GOODWILL
Attorney for Appellant

KEN CHAMBERLAIN
Attorney for Respondents

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STATEMENT AND NATURE OF CASE

The Appellant, J. SEAL, having brought suit for breach of an express or implied contract for services rendered by its Assignor, an attorney, appeals from an Order granting Defendants' Motion for Summary Judgment.

DISPOSITION IN THE LOWER COURT

The trial Court granted Defendants' Motion for

Summary Judgment based on supporting Affidavits, following Appellant's filing of opposing Affidavits thereto and on the basis of briefs submitted by both parties on the ground and for the reason that "the proof . . . negatives any" express or implied promise for a contract of employment and there was therefore no material issue of fact.

RELIEF SOUGHT ON APPEAL

Appellant submits the Summary Judgment of the trial Court should be reversed and the case remanded for a trial on the merits.

STATEMENT OF FACTS

Attorney Harold A. Ranquist, Appellant's Assignor, was retained in 1964 by the holder of a permit on the Federal Range in Kanab Grazing District No. 11, managed by the Bureau of Land Management, pursuant to the Taylor Grazing Act, to prosecute an appeal under the administrative procedure of the Federal Range Code. From an Order of the Kanab District Manager of the Bureau of Land Management requiring, among other things, that all cattle be removed

from the Federal Range and placed on base property for two (2) months. This issue was common to all of the livestock men in the district, including the Respondents (R. 27).

The officer of the Kane County Cattlemen's Assoc., The Escalante Cattlemen's Assoc., and the Tropic Permittees met and agreed to retain the services of Appellant's Assignor and to bring the necessary action to resolve all of the disputes between their members and the Kanab District Office of the B. L. M. (R. 28).

These associations agreed to pay Appellant's Assignor for his services and to collect the same by sending to each of their members a letter, asking them to participate in meetings designed to discover the nature of their complaints. (R. 53, 55 and 58).

In addition, the members were to be contacted in person and asked to pay an assessment of ten cents (10¢) per A. U. M., as their pro-rata share of the attorney's fees. (R. 28).

Each of the Respondents were advised in several

written communications of the existence of the problems and how they affected each permittee in the entire District. After being invited to the meetings they were all advised that they would be assessed if they participated in the attempt to resolve the problems facing the livestock men of the District. (R. 25).

Each of the Respondents then participated in the meetings in an attempt to communicate all of the facts involved in the dispute to the head of the U. S. Bureau of Land Management. (R. 29).

On December 16, 1964, Appellant's Assignor reached an agreement with the B. L. M., a copy of which was sent to the Respondents (R. 66) that provided, among other things, the important provision that "(t)he B. L. M. will not attempt to enforce a program of making each permittee remove his livestock completely from the Federal Range for a two month, or one month period." (R. 62 and 63).

On December 21, 1964, all the Respondents were informed that the major problem involving the use of the Range

in the Kanab District had been solved and that they must each sign a Range Management Agreement to protect their A. U. M., at meetings to be held on December 29, 1964, and that if their assessment had not been paid they should come prepared to make arrangements for payments. (R. 58).

In accordance with the understanding previously agreed to, one hundred sixty (160) livestock men in the district paid their pro-rata share to the respective cattlemen's associations who remitted the sum to Plaintiff's assignor, but the sixty (60)Respondents herein refused to make payment. (R. 29).

Respondent's made a Motion for Summary Judgment with supporting Affidavits from four (4) of the sixty (60) Respondents in which those four (4) stated that each knew "of his own personal knowledge that none of the Defendant's ever had any contractual relationship, either verbal or written", with Plaintiff's Assignor "for the performance of any legal services." (R. 18, 22, 20 and 24). The Motion was granted by the trial Court dismissing out of hand Appellant's First Claim for breach of an express contract

with nothing more than the comment that, "Plaintiff relies principally on the doctrine of Quantum Meruit" and dismissed his Second Cause of Action, pleaded in the alternative on the theory of implied contract, on the basis of Defendants' Affidavits for the reason that there was no proof of any contract of employment either express or implied. (R. 96).

ARGUMENT

POINT I.

AN IMPLIED PROMISE ON THE PART OF THE RESPONDENT TO PAY THE SERVICES OF AN ATTORNEY ARISES WHERE HE KNOWINGLY ACCEPTS THE BENEFITS OF THE SERVICES, OR A SUBSTANTIAL INTEREST IS PRESERVED, OR THE RESPONDENT FAILS TO OBJECT OR PROTEST AND WHERE ALL THREE CON DITIONS EXIST IT IS REVERSIBLE ERROR FOR THE TRIAL COURT TO GRANT RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT THERE IS NO MATERIAL ISSUE OF FACT.

Where one knowingly accepts the benefits of an attorney's services rendered on his behalf, an implied promise to pay the value of his services arises. Bogorad v. Schwartz, C.A. 4 Md., 208 F.2d 704 (1953); and the cases cited in 78 ALR 2d 318.

While there is some conflict in the cases on this point, they were reconciled in 78 ALR 2d. 322:

> "It should be pointed out that the knowledge mentioned is not merely knowledge that the services are being rendered, but knowledge that they are being rendered by the attorney on behalf of one who knows, or has reason to know, that the attorney is looking to him for payment. If this is kept in mind in reading the cases, seemingly conflicts case will be harmonized to request intent."

The Respondents in this case received a copy of an agreement setting forth the benefits they were to receive (R. 66) as a result of a successfully prosecuted appeal following their attendance at meetings designed to ascertain their complaints against the B. L. M. Range policies (R. 29). Along with the copy of the agreement they received a request to pay for the legal services. (R. 67). Therefore, since the Respondents knowingly received the benefits following their active role in the prosecution of a successful appeal an implied contract arose for the payment of those legal services.

In Burnett v. Graves, C. A. 5 Texas, 230 P. 2d 49 (1956); 56 ALR 2d. 1, the Court held that when an implied promise to pay the reasonable value of the services of an

attorney arises, one factor of significance is the preservation of a substantial interest.

In the instant case, all of the Respondents were faced with the prospect of having to remove their cattle from the Federal Ranges for as much as two (2) months. Upon the successful resolution of the issues by Appellant's Assignor, they each received, among other benefits, an agreement that "(t)he B. L. M., will not attempt to enforce a program of making each permittee remove his livestock completely from the Federal Range for a two month, or one month period." (R. 62 and 63). The benefits were substantial and accordingly an implied promise to pay arose with respect to the payment of the attorney's fees.

In Brown v. Friesleben Estate 184 Cal. App. 2 720, 307 P. 2d 388 (1957), the Court observed that when the Defendant has knowledge that an attorney is performing valuable services for him and fails to object, or dissent from such performance, an implied promise to pay the reasonable value of the services arises.

Respondents were contacted by letter and in person and asked to pay a pro-rata share of the attorney's fees R. 28). Each of the Respondents was advised in several written communications of the existence of the problem and that if they participated in the attempt to resolve the problem facing the livestock men of the District, they would be assessed for the attorney's fees. (R. 29).

After being informed of the proposed assessment they all attended meetings in an attempt to resolve the dispute with the B. L. M. (R. 29). Further, after the successful settlement of the issue, they were again informed by mail of the then obligation to pay for the services and while one hundred sixty (160) of the cattlemen paid their assessments, the Respondents refused to pay (R. 20).

At no time did the Respondents object or dissent from the performance of the services which gave rise to the dispute herein and therefore an implied promise to pay for the reasonable value of the services arose.

Since an implied promise to pay arises when only

one of the three factors above mentioned are present, to-wit:

1. knowing acceptance of the benefits of the services
2. the preservation of a substantial interest
3. the failure to object or protest

when all three factors are present, as here, a fortiori, an implied promise to pay the reasonable value of the services arises.

POINT II.

RULE 56 (e) OF THE U. R. C. P. REQUIRES AN AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT TO BE BASED ON SUCH FACTS AS WOULD BE ADMISSIBLE IN EVIDENCE AND RECEPTION OF FOUR OF RESPONDENTS' AFFIDAVITS CLAIMING PERSONAL KNOWLEDGE THAT NONE OF THE OTHER FIFTY-SIX RESPONDENTS ENTERED INTO AN EXPRESS OR IMPLIED AGREEMENT WITH APPELLANT'S ASSIGNOR IS HEARSAY AND SUMMARY JUDGMENT BASED THEREON IS REVERSIBLE ERROR.

In McCormick on Evidence, Chap. 25 (1954), it is observed:

> "Hearsay evidence is testimony in court or written evidence of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out of court assertor."

The four (4) Affidavits in support of Respondents'

Motion for Summary Judgment set forth the following:

> "The Affiant states that he knows of his own knowledge that none of the defendants above named ever had any contractual relationship; either verbal or written. . . . for the performance of any legal services. . . " (R. 18,20, 22 and 24) (Emphasis added.).

If the four (4) Respondents' personal knowledge is based on what the other fifty-six Respondents told them it would be founded on the out of court assertions of each of them and as such, hearsay, and would not be in compliance with the requirements of Rule 56 (e), U. R. C. P., and the Affidavits were erroneously received.

Further, since there were several meetings,all Respondents being in attendance of at least one of them (R. 29), it stretches credibility to think that the four (4) Respondents were present at all meetings knowing positively that during the same, none of the other fifty-six (56) Respondents ever made an express or implied agreement.

POINT III.

A UNILATERAL CONTRACT IS ONE IN WHICH NO

PROMISOR RECEIVES A PROMISE OR CONSIDERATION FOR HIS PROMISE AND WHEN FACTS ALLEGE ACCEPTANCE BY A SPECIFIC ACT APPELLANT HAS PLACED A MATERIAL FACT IN ISSUE AND IT IS ERROR FOR TRIAL COURT TO GRANT MOTION FOR SUMMARY JUDGMENT.

In Port Huron Machinery Co. v. Wohlers, 207 Iowa 826, 221 N.W.843 (1928), the Court observed with respect to acceptance of a unilateral offer:

> "An offer may invite an acceptance to be made by merely an affirmative answer or by performing a specific act."

The Restatement of Contracts, A. L. I. § 12, P. 10, sets forth the following:

> "A unilateral contract is one in which no promisor receives a promise or consideration for his promise. . . comment a. In a unilateral contract the exchange for the promise is something other than a promise."

In the instant case each of the Respondents were advised that if they attended and participated in meetings designed to resolve the problem facing the livestock men that they would be assessed a pro-rata share of the attorney's fee. Subsequently, each of the Respondents attended and participated in these meetings. (R. 29).

The offer of the Appellant's Assignor was clearly communicated to the Respondents and the method of acceptance set forth in the form of an act: to-wit, the attendance and participation in meetings designed to resolve the problems of all the livestock men. The Respondents then accepted by attendance and participation. Despite the trial Court's only comment as to Appellant's First Claim for relief that "(p)laintiff relies principally on the doctrine of Quantum Meruit," (R. 96) the foregoing facts demonstrate that a unilateral contract was entered into by the parties herein and the Order granting Respondents' Motion for Summary Judgment should be reversed.

Respectfully submitted,

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