

1959

Vada J. Tomlinson Acott et al v. Union Carbide Nuclear Company and Leslie A. Tomlinson : Brief of Third-Party Defendant and Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
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VADA J. TOMLINSON ACOTT, REBA
TOMLINSON FULLER, RUBY TOMLIN-
SON BEEBE, NORA E. TOMLINSON
SCHOCKLEY, MARGUERITE TOMLIN-
SON CISNEY, and ALTON E. TOMLIN-
SON,

Plaintiffs and Respondents,

—vs.—

UNION CARBIDE NUCLEAR COM-
PANY,

Defendant and Third-Party Plaintiff

—vs.—

LESLIE A. TOMLINSON, Individually
and as Administrator of the Estate of A.
L. Tomlinson, Deceased,

Third-Party Defendant and Appellant.

BRIEF OF THIRD-PARTY DEFENDANT AND
APPELLANT

Appeal from the District Court of the Seventh Judicial District,
in and for the County of Carbon, State of Utah

HONORABLE F. W. KELLER, *Judge*

FRED H. EVANS

*Attorney for Third-Party Defendant
and Appellant*

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Case No. 9115

BRIEF OF THIRD-PARTY DEFENDANT AND
APPELLANT

STATEMENT OF FACTS

The appeal herein arises out of a prior action entitled *Acott, et al., vs. Tomlinson*, 9 Utah 2d 71, 337 P.2d 720, which case will hereinafter be referred to as the prior case. The plaintiffs and respondents herein are indenti-

cal to the plaintiffs in the prior case, and the third-party defendant and appellant herein was the defendant in the prior case. The parties referred to constitute all of the heirs of A.L. Tomlinson, deceased, except the widow who was not a party to the prior case and is not a party to this action. For convenience, plaintiffs and respondents will hereafter be referred to as Respondents and third-party defendant will hereafter be referred to as Appellant.

The fundamental matter involved in this case is the interest of the Appellant in certain mining claims situate in Emery County, which were the subject matter of the prior case. This interest will be referred to herein as the Tomlinson interest. The judgment in the prior case imposed a constructive trust in favor of the Respondents as to 12/21st of the Tomlinson interest. It also awarded Respondents a substantial money judgment by reason of an accounting relating to the trust property. The proceedings following the judgment in the prior case, which was entered on February 20, 1958, gave rise to the instant case.

On the 1st day of April, 1958, the Respondents caused an execution to issue out of the District Court of Carbon County to subject the Appellant's rights in the Tomlinson interest to the judgment of February 20, 1958, (R. 2). The Appellant moved the court to stay the sale and execution, but so far as the record shows, the motion was ignored. On May 8, 1958, the sheriff of Emery County made and filed his return on execution, which represented

that the Appellant's interest had been sold to Respondents for the sum of \$3,000.00, all of which, with the exception of \$40.03, was applied to the judgment. The sheriff's deed, which was executed pursuant to the sale, recited that the Respondents were the owners of the entire Tomlinson interest. This is the representation in paragraph (c) of Respondents' motion for summary judgment, (R. 33). On April 21, 1958, the Appellant filed his notice of appeal in the prior case, (Appeal No. 8879). In that appeal, the Respondents filed a cross-appeal claiming that the parties and the widow, Lillie M. Tomlinson, had agreed to divide the estate of A. L. Tomlinson equally, each heir being entitled to a 1/8th interest. The decision of this Court in the appeal was filed on April 6, 1959. It affirmed the judgment of the trial court as far as the constructive trust was concerned, but denied Respondents' claim relating to the division of interest. The language of the court is as follows :

“Notwithstanding plaintiffs' evidence that the heirs, including the mother, when they shared in the proceeds did so in equal shares, the evidence is not so clear and persuasive as to make mandatory a finding that such was the agreement between them. Furthermore, the mother is not a party to this suit. The effect of the plaintiffs' contention is that the court should adjudicate her rights, depriving her of her full widow's statutory share in the property, in a suit to which she is not a party, which the trial court properly refused to do.” *Acott, et al., v. Tomlinson, supra.*

During the process of the litigation of the prior case, certain royalties had accumulated in the hands of certain

trustees and Union Carbide Nuclear Company, defendant and third-party plaintiff herein. As a result of the attempts to force the payment of the funds, the Respondents filed their complaint in this action on April 1, 1958, the date on which the writ of execution herein issued. Upon the motion of Union Carbide Nuclear Company, the Appellant was joined. Appellant filed his answer to the third-party complaint and set forth a counterclaim, and the Respondents thereafter filed their reply to the counterclaim. On the 18th day of August, 1958, the Respondents filed a motion for summary judgment, (R. 36). The Respondents' motion came on for hearing on the 19th day of August, 1958, at which time the court denied the motion without prejudice to Respondents' right to renew, (R. 62). The motion was renewed, and was again heard on October 7, 1958, at which time the court granted the motion and entered a judgment. (R. 43, 62). The Appellant thereafter filed his motion to vacate judgment on the 23rd day of June, 1959, and the court signed an amended judgment on the 7th of July, 1959, (R. 49).

The foregoing presents the events leading up to this appeal with reference to the pleadings involved, and particularly the motion for summary judgment, the granting of which is the subject matter of this appeal.

STATEMENT OF POINTS

THE COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

ARGUMENT

THE COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

The Appellant believes that the proper purpose and function of a motion for summary judgment is to separate the formal from the substantial issues, eliminate improper issues, determine the issues of fact which must be presented to the court or jury and enable the court to give judgment on the issues of law where no disputed issues of fact are found. In arriving at the appropriate answer, this Court has followed the rule that the party against whom the judgment has been granted is entitled to have all of the facts presented and the inferences arising therefrom considered in the light most favorable to him, *Young v. The Texas Company*, 8 Utah 2d 206, 331 P.2d 1099. Accordingly, the party asking the court to grant a motion for summary judgment has the burden of demonstrating clearly that there is no genuine issue of fact. 3 *Federal Practice and Procedure*, section 1235. Where the motion attempts to adjudicate the entire controversy, it should be directed toward all of the pleadings.

It is difficult to determine whether Respondents' motion was directed only to issues between them and defendant and third-party plaintiff, or was to include Appellant's answer and counterclaim. The appellant's answer and counterclaim raised issues of fact relating to the sale on execution and the adequacy of the price paid by the Respondents, who were the sole bidders and purchasers. The record does not disclose that any men-

tion was made of the presence or absence of these issues. In spite of the fact that Respondents admitted there were issues of fact, (T2, 5 line 7) the court apparently adjudicated the entire controversy. There was no presentation of facts to the court, and the court apparently accepted the representations of Respondents in their motion for summary judgment as sufficient to satisfy the burden of proof. There is nothing else to establish the presence or absence of issues of facts or indicate a showing by Respondents, let alone meeting the burden of proof. Appellant believes that he is entitled to be heard as to all issues, fact or law. He is entitled to ask a court of equity to inquire into the execution sale and consider whether, in the light of all of the facts, the court should intervene because of inadequate consideration and whether the Respondents had a right to purchase and whether or not the sale was attended by circumstances of unfairness. This Court has so held in *Pender v. Dowse*, 265 P.2d 644, 1 Utah 2d 283 at page 288:

“It is well settled that equity will intervene and set aside an execution sale or cancel a sheriff’s deed, after the redemption period has expired, where it appears the consideration was grossly inadequate and the sale was attended by unfairness and fraud.”

While a motion for summary judgment has the purpose of expediting litigation and therefore serves a useful and proper purpose, it was not intended to dispense with every facet of legal proceedings. Respondents’ motion for summary judgment was not directed to the Appel-

lant. The complaint herein prayed for relief against Union Carbide Nuclear Company, and the motion for summary judgment asked that the Respondents have judgment against that party alone and did not purport to determine any issues raised by Appellant's counterclaim. It avoids the questions raised by Appellant, and seeks a determination sufficient to compel the defendant Union Carbide Nuclear Company to pay over money it holds. After this is accomplished, Appellant's rights will certainly go begging, without regard to their merit. Without inquiry, an amended judgment was entered decreeing that the Appellant had no rights whatsoever in the Tomlinson interest, (R. 49). In the first judgment, (R. 43) the Respondents led the court into error by urging it to decree that Respondents were the owners of the entire Tomlinson interest, contrary to the trial courts own judgment and the decision of this Court. The amended judgment (R. 48) accomplishes the same result. In their motions for summary judgment, (R. 33, 36) the Respondents represent that they are entitled to a judgment "(c) declaring plaintiffs to be entitled to receive the entire 3.7158 per cent of the royalties due or becoming due under said lease from May 1, 1958, when plaintiffs became the purchasers of Third Party Defendant's interest in said claims at a Sheriff's Sale pursuant to a writ of Execution of Civil No. 7468, a copy of the Certificate of Sale being attached to the Answer to Third Party Complaint in this action;". If anyone looked at the record to determine the title to the property involved, the judgment in the prior case, the sheriff's deed and the amended

judgment would place the ownership of the entire Tomlinson interest in the Respondents, just as they claimed. While the trial court intended to correct this, the amended judgment fails in the attempt.

Appellant by his answer and counterclaim has urged that the deed was wholly void. Appellant contends that he has an interest that the deed extinguishes; and therefore, he has a right to attack its validity. This presents additional issues of fact which Appellant believes genuine. The recital in the judgment that there is no genuine issue of any material fact is based solely on the affidavit of Thomas C. Cuthbert, one of the Respondents' attorneys. That affidavit merely stated that upon information he believes that the defendant Union Carbide Nuclear Company was holding \$738.64, of which Respondents were entitled to \$422.08. Not only does this affidavit fail to dispel the notion that there are no genuine issues of fact, it is insufficient as an affidavit as to the matters it does set forth:

“It has been held that since affidavits must be made upon personal knowledge, an attorney's affidavit is usually insufficient, unless he has personal knowledge of the facts.” 3 *Federal Practice and Procedure*, section 1237 at page 166.

“Where attorney's affidavit, in support of motion or summary judgment was made upon information and belief and relevant portion thereof did not comply with Rule 56(e), United States Supreme Court would disregard averment in the motion as not supported by record. *Automatic Radio Mfg. Co. v. Hazeltine Research*, Mass. 1950.

70 S. Ct. 894, 339 U.S. 827, 94 L. Ed. 1312.” 3 *Federal Practice and Procedure*, section 1237 at page 166, note 47.

The court realized that issues were involved which should be presented on a trial. The court at the hearing on the motion stated:

“THE COURT: What I am concerned about is whether the record is such that I could grant a summary judgment. That is the whole story. It is not supported by any affidavit.

* * *

THE COURT: Well, I have some doubts about this but I’ll let you take your summary judgment on that basis. But I may be making an error on that. Why don’t you have the case come on for trial and settle all these things?” (T2. 4,5).

The above statement of the court was made at the time the first judgment was entered, but at the hearing on Appellant’s motion to vacate, nothing more was said about issues of fact. It merely went to the proposition that the court had been led to grant more than it intended, (T1. 3, lines 8-22). It is evident from the transcript that the court intended that the Respondents should only have judgment for a portion of the monies held by the defendant Union Carbide Nuclear Company. The transcript clearly indicates this to be the case:

“THE COURT: Then all you want is a judgment for four hundred twenty-two dollars and some odd cents and any other sums that have become due. You want that sort of a thing on your summary judgment?”

MR. LOWE: I'd like that." (T2. 4,5).

Upon the hearing of Appellant's motion to vacate judgment, it was clear that the court intended Appellant to have an opportunity to be heard before an amended judgment was signed. The court realized that the method of presenting the amended judgment was a short cut because it was not consistent with the Respondents' motion for summary judgment, and the court admitted that the matter was not properly before him, (T1. 4, line 22). Respondents' counsel mailed the proposed amended judgment to the court under date of July 3, 1959. A copy was not served on Appellant or any other party. The court apparently waited three or four days and then signed the judgment thinking no objections were to be made by Appellant's counsel. This is indicated by the following statement by the court:

"THE COURT: All right, you prepare it, file it, and I will entertain a motion to strike it if you have any question about it, and that is the way we will do that." (T1. 4).

The judgment having been signed, it appeared that a motion to strike would be untimely, and Appellant's only relief was an appeal. The notion that there are genuine issues to be tried by the court is evident from other parts of the record. Appellate courts in determining a motion for summary judgment have taken the view that they are entitled to look at all matters in the record to determine the propriety of the granting or denying a motion for summary judgment.

"On such a motion the court considers the

entire setting of the case and all papers of record. The pleadings as a whole, and not merely the complaint, are considered." 3 *Federal Practice and Procedure*, section 1236 at page 158.

Subsequent to this appeal, other parties have moved to vacate the judgment on the ground that the interests are not yet determined. These are: Motion to Modify or Vacate Judgment by defendant Union Carbide Nuclear Company (R. 54); Motion to Modify Judgment (R. 55); and Motion to Vacate Garnishee Judgment (R. 56).

CONCLUSION

It appears to be apparent from the record in this case that there was no adequate basis for the granting of the motion. Many issues are still pending and have arisen subsequent to the appeal herein. Appellant requests that this case be reversed and remanded to the trial court for further proceedings.

Respectfully submitted,

FRED H. EVANS

*Attorney for Third-Party Defendant
and Appellant*