1968

Lavar C. Fox v. Allstate Insurance Company : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

LAVAR C. FOX,
Plaintiff and Respondent,
—vs.—
ALLSTATE INSURANCE COMPANY,
Defendant and Appellant.

Case No. 11336

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action to recover for property damage allegedly sustained by the plaintiff on May 2, 1965, while on Utah Lake, which was allegedly covered by insurance written by the defendant, Allstate Insurance Company.

DISPOSITION IN LOWER COURT

The case was heard by the Honorable Stewert M. Hanson on the plaintiff's Motion for Summary Judgment and resulted in a judgment in favor of the plaintiff for the total sum of $2,230.00.

RELIEF SOUGHT ON APPEAL

Appellant and Defendant seeks reversal of the Summary Judgment entered in the above entitled case and from the order of the trial court denying the defendant and appellant's Motion to Alter or Amend the Judgment.

STATEMENT OF FACTS

There has not been a trial of the facts in this case, and the statement of facts can only be taken from the pleadings and the deposition of LaVar C. Fox, which items are in the possession of the court.

Some time in March, 1965, plaintiff claims to have purchased a 17 foot Glasspar inboard/outboard motor boat. He first saw the boat sitting on a shopping center parking lot somewhere on 41st South Street with a "For Sale" sign in the window. After examining the boat, he contacted the seller whose phone number was on the boat. He copied the phone number of the seller down on a slip of paper and called the seller at that phone number on at least three occasions. However, he doesn't now know where that slip of paper is showing the telephone number of the seller (D 35 - 36). He also met the seller whose name he does not remember (D 34), at the parking lot where the boat was located somewhere on 4100 South Street, and purchased the boat for either $2,200.00 (D 38) or $2,000.00 (D 40), having changed the figure in the same deposition.

On his second meeting at the parking lot with the seller, whose name is unknown, he paid the seller the

purchase price of the boat in cash, which he had obtained from a metal box at home, and which he claims to have received from the sale of a home that he and his wife made in July of 1964 (D 39). However, his wife only had an idea that he had quite a bit saved for a boat, but it was unbeknown to her that he had $2,200.00 saved to buy a boat (D 38).

After paying the unknown seller cash for the boat, plaintiff and the unknown seller transferred the 17 foot Glasspar inboard/outboard motor boat, described by the plaintiff as being "awfully heavy" from the unknown seller's boat trailer to the plaintiff's boat trailer (D 41). The only paper he received from the unknown seller was a receipt (D 41), but there were allegedly other papers in the boat showing that the boat was registered in the State of California. Some of the papers bore the name of the unknown person who sold plaintiff the boat, however, the boat registration wasn't in the name of the unknown seller. The plaintiff doesn't recall the name of the registered owner of the boat in the State of California, and doesn't recall what part of California the registered owner lived in (D 42).

Thereafter plaintiff claims that on April 30, 1965 he obtained insurance on the boat from the defendant, and that on May 2, 1965, while on Utah Lake, the boat struck a submerged object and was lost (R 1).

The sinking was allegedly caused when plaintiff struck a rock 300 feet from the east shoreline of Bird Island in Utah Lake (D 19, 21). In examining the boat

the plaintiff did not observe any water being taken on by the boat, however, at the same time he struck the rock a heavy wind allegedly came up on the lake and the water got rough. As he headed back for shore, he thinks the boat was taking on water from the damage where it had struck the submerged rock 300 feet from the shoreline of Bird Island, and he also thinks that it was taking water over the top from the rough waves (D 19, 20).

After the boat allegedly went down, plaintiff made a visual sighting of the location of the boat (D 24), and then swam to shore. When he arrived at the shore he got into his truck and left for his home in Salt Lake City. He did not attempt to contact anyone from the Utah Parks Department, or any other law enforcement officer, and his first notification to anyone in authority, the Utah Parks Department, the Sheriff's Office, etc., was three or four days after the accident (D 26).

Plaintiff did not notify the defendant of his claimed loss which allegedly occurred on May 2, 1965 until May 17, 1965 (R 18). After the report of the alleged loss was furnished to the defendant by the plaintiff, representatives of the defendant went to the site of Utah Lake where plaintiff claimed his boat had sunk and in the presence and with the assistant of the plaintiff conducted a methodical search of the entire area where the boat had allegedly sunk, but no signs of the sunken craft were ever found, and no indications were found that there was a sunken craft in the area where the plaintiff indicated to the defendant his craft had sunk (R 18).

Plaintiff admits that the defendant's search was in the area he claims the boat had sunk, that it covered a real wide section, and was conducted in an efficient manner (D 31).

"Q. Did you make any other efforts to find your boat?

A. Yes. I made several other efforts and Allstate hired a couple of men to go down and look for the boat. I went down with them.

Q. Did you take them to the point in the lake where you thought the boat had gone down?

A. Yes, sir.

Q. Did you observe them search for the boat?

A. I helped them search for the boat.

Q. Were they able to find anything from your boat in their search?

A. No, they couldn't find it.

Q. To the best of your recollection did you direct them to the place where you think the boat went down?

A. Yes, sir.

Q. Did they make a wide search of the area?

A. We covered a real wide section. We covered the whole area of that lake.

Q. In your opinion was the search conducted in an efficient manner?

A. Yes, sir." (D 31).

The plaintiff claims to have also made several efforts on his own to find the boat, the first of which he claims was made the day following the sinking of the boat (D 30, 31).

Based upon the plaintiff's Complaint, the defendant's Answer thereto, the plaintiff's deposition, which had not at the time of the hearings been filed but which the parties stipulated could be used at the hearings in the same manner as if it had been signed by the plaintiff, filed with the court and published for use in the hearings, the plaintiff's Request for Admissions, and the defendant's Answer to Requests for Admissions, the plaintiff's Affidavit and the Affidavit of Keith Lambourne, the defendant's property claims supervisor, the trial court granted the plaintiff a Summary Judgment on May 17, 1968 in the sum of $2,230.00 plus costs. Defendant filed a Motion to Alter or Amend a Judgment. The order denying the Motion to Alter and Amend the Judgment was entered July 5, 1968.

ARGUMENT

POINT I

THE COURT WAS IN ERROR IN GRANTING PLAINTIFF SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION TO ALTER OR AMEND INASMUCH AS ALL OF THE FACTS INVOLVED IN THE CASE HAD BEEN PUT IN ISSUE BY THE DEFENDANT'S ANSWER AND THE AFFIDAVIT OF KEITH LAMBOURNE.

The plaintiff, in his Complaint (R 1), claims that defendant issued a binder to the plaintiff on a boat owners policy of insurance and thereafter issued a policy of insurance to the plaintiff on October 30, 1965, and that on or about May 2, 1965, while on Utah Lake, plain-

tiff's insured boat struck a submerged object and thereafter sank completely and the boat, motor and all personal property aboard was lost.

The defendant, in its Answer (R 2), generally denied all the averments, and specifically denied that it had ever issued a binder to the plaintiff or a policy of insurance covering the alleged loss the plaintiff claims to have sustained, and further denied that plaintiff had sustained a loss of any kind as alleged in his Complaint, which would apply to either an insured loss or an uninsured loss.

Defendant's Answer (R 2) meets the requirement of Rule 8 (b) of the Utah Rules of Civil Procedure requiring the defendant to state its defenses in short and plain terms to each claim asserted, and admit or deny the averments upon which the opposing party relies.

A review of the Complaint (R 1) and the Answer (R 2) clearly shows that the defendant, in its Answer (R 2) clearly denies that it ever issued a binder to the plaintiff on a boat owners policy of insurance or a policy of insurance to the plaintiff on a boat which the defendant claims was sunk on May 2, 1965 on Utah Lake; that it ever received a premium for said policy on said boat; or, that the plaintiff sustained any loss as a result of the alleged boating accident, the Answer having put in issue the question of whether or not the plaintiff was in fact on Utah Lake on or about May 2, 1965 with a boat, and whether or not a boat belonging to the plaintiff was

ever sunk on Utah Lake on May 2, 1965, or at any other time.

The only other information before the trial court at the time of the hearing of Plaintiff's Motion for Summary Judgment and the defendant's Motion to Alter and Amend were the plaintiff's Request of Admissions (R 4 - 10), the defendant's Answers to Requests for Admissions (R 11 - 12), the plaintiff's Deposition, the plaintiff's Affidavit (R 17), and the Affidavit of Keith Lambourne (R 18 - 19).

The defendant admitted the document referred to in Request No. 1 (R 6) and Request No. 2 (R 7) insofar as the Request called for an admission. However, the scope of Request No. 1 and No. 2 in the Request for Admissions (R 4) did not go so far, and the defendant did not understand them to go so far as to refer them to the boat the plaintiff claims was sunk on Utah Lake on May 2, 1965 inasmuch as the defendant, in its Answer (R 2) denied that the plaintiff had a boat insured with them that sank on Utah Lake on May 2, 1965, or that he was even on Utah Lake with any kind of boat that sank on May 2, 1965.

At no place in the record that was before the trial court on either of the two hearings on this matter was there a further Affidavit, Admission, or other type of pleading that referred the documents requested in plaintiff's Request for Admissions, Paragraphs 1 and 2, to the boat that plaintiff claimed was sunk on Utah Lake on May 2, 1965.

Plaintiff's Affidavit (R 17) is a mere restatement of the allegations of his Complaint, with, however, the exception that the plaintiff does not in that Affidavit allege that the boat he was in on or about May 2, 1965, while alone on Utah Lake was the boat he allegedly had insured with the defendant.

The Affidavit of Keith Lambourne, Property Claims Supervisor for the defendant (R 18 - 19) fully rebutes each and every allegation raised in either the plaintiff's Complaint or the plaintiff's Affidavit, and sets out further facts for the court's consideration that show that there are numerous genuine issues of material fact to be tried in the case.

Mr. Lambourne's Affidavit (R 18 - 19) sets out numerous facts to be considered by a trier of fact in determining the ultimate question in the case, namely, whether the plaintiff was even on Utah Lake on May 2, 1965 with a boat; whether or not a boat ever sunk on Utah Lake on May 2, 1965 where the plaintiff claims his boat was sunk; and, whether the plaintiff ever owned a boat which was sunk on May 2, 1965 that he claims was insured by the defendant.

In light of the fact that plaintiff admits that the defendant's search for the boat in the area he claims the boat was sunk was conducted in an efficient manner and that it covered a real wide section of the lake in that area, but that no sign of the boat was found (D 31), there can be little doubt but that there are numerous material issues of fact to be tried in this case, and to

deny the defendant its right to try the case on its facts would deprive it of a fair trial.

Another most obvious error in the trial court's ruling was in its awarding the plaintiff judgment in the sum of $2,230.00, together with costs of action inasmuch as the plaintiff prayed for only $2,000.00 in judgment, and the defendant, pursuant to Rule 8 (b) of the Utah Rules of Civil Procedure denied, in Paragraph 3 of its Answer (R 2), that the plaintiff sustained any damages in the matter complained of. At no place thereafter in the file before the trial court at the hearing of the Motions, the orders of which are being appealed from, is there any uncontroverted evidence showing that the plaintiff has sustained any damage as a result of the matter complained of in the plaintiff's Complaint.

POINT II

IF THERE WAS ANY DOUBT AFTER READING ALL OF THE PLEADINGS IN THE CASE THAT THERE WERE MATERIAL ISSUES OF FACT, THESE DOUBTS WERE DISPELLED BY THE DEFENDANT'S COUNSEL'S ARGUMENT OF THE MOTION.

In arguing his Motion for Summary Judgment, the plaintiff's counsel argued to the court that defendant's denials to the allegations contained in the plaintiff's Complaint were insufficient, and that any defenses that the defendant had would have to be raised as an affirmative defense under Rule 8 (c) of the Utah Rules of Civil Procedure. Plaintiff further argued that inasmuch as

the defendant had not set out affirmative defenses in its Answer that he was entitled to a Summary Judgment as a matter of law inasmuch as the defendant had failed to raise any defenses to the plaintiff's Complaint.

After plaintiff's argument, and in reply thereto, defendant conceded that there had been no affirmative defenses, as defined by Rule 8 (c) of the Utah Rules of Civil Procedure as such, but that it was defendant's understanding of the rules that a sufficient defense had been raised to the plaintiff's Complaint even though no affirmative defenses had been stated at that point.

Defendant went further, and cited the case of *Russell* vs. *Hooper Irrigation Company,* 435 P 2d 294, 20 U 2d 173, where it appears the Supreme Court accepts oral argument of counsel in determining whether material issues of fact have been raised in a case, and stated to the trial court, lest the court misunderstand the intention of the defendant in making its answer to the plaintiff's Complaint, that the defendant was denying that the plaintiff ever owned a boat, or an insurable interest in a boat on which the defendant had written a policy of insurance which had sunk on Utah Lake on or about May 2, 1965 or which had in any other way sustained damage insured against by the defendant, and specifically denied that the plaintiff had sustained any loss or damage of any type whatsoever which was or had been insured with the Allstate Insurance Company and which had not been paid.

The trial court was advised that the defendant denied each and every allegation of the plaintiff's Complaint, and that it was the defendant's intention in filing its Answer to put in issue each and every allegation contained therein.

POINT III

SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF WAS IMPROPERLY RENDERED, AND DEFENDANT'S MOTION TO ALTER AND AMEND SAME WAS IMPROPERLY DENIED.

The Utah Supreme Court has dealt on numerous occasions with the principle that a Summary Judgment is proper only if the pleadings, depositions, affidavits, admissions, and oral arguments show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

In *Disabled American Veterans, etc.* vs. *Hendrixson,* 340 P 2d 416, 9 U 2d 152, the court dealt with a situation where the plaintiff claimed it was an authorized state chapter of a national corporation and as such was granted certain rights given by law to that corporation. The defendant questioned plaintiff's contention and challenged its capacity as corporation and its right to sue. The District Court in granting the plaintiff's Motion for Summary Judgment refused to submit the question of the plaintiff's capacity to sue to the trier of fact. On appeal, the court held that this was error and in so doing said:

> "On a Motion for Summary Judgment against a defendant, where some of the facts are in dispute, a judgment can properly be rendered against a defendant only if, on the undisputed facts, the defendant has no valid defense; if then any material fact asserted by the plaintiff is contradicted by the defendant, the facts as stated by the defendant must, on such motion, be taken as true."

In *Securities Credit Corporation* vs. *Willey,* 265 P 2d 422, 1 U 2d 254, where the District Court entered judgment on the pleadings, including some Interrogatories and Answers to Interrogatories in favor of the respondent, the Supreme Court reversed the judgment and in so doing noted the problems involved in entering judgments based upon the pleadings where there appeared to be some dispute in the facts. The court stated:

> "The difficulty in treating Answers to Interrogatories as part of the pleadings for purposes of judgment on the pleadings is clearly pointed up in this case. Plaintiff was limited in its reply by the questions and was, at this point of the case, unable to introduce the contract or evidence of default on the contract. Apparently, the trial court interpreted the meaning of plaintiff's Answer that only $528.00 liquidated debt existed between the motor center and plaintiff as being tantamount to a declaration that there had been no default on the installment payments on this particular contract. The Answer to the Interrogatories although they did explain the nature of plaintiff's claim, did not supply sufficient facts to justify a judgment on the pleadings or a Summary Judgment."

This case is cited due to the documents admitted in this case by the defendant, but which were never tied down as being related to the boat of the plaintiff's which was allegedly sunk on Utah Lake.

In *Abdulkadir* vs. *Western Pacific Railroad Company,* 318 P 2d 339, 7 U 2d 53, the Utah Court held that the right to trial by jury should be scrupulously safeguarded, and set down the rule that only when an issue of fact in dispute could not establish a basis upon which a person could recover should it be taken away from the Jury. To the same effect see *In Re Williams' Estate* 348 P 2d 682, 10 U 2d 83, where the court holds that Summary Judgment is proper only if there is no genuine issue of material fact existing between the parties which is shown by the pleadings, depositions, affidavits and admissions, and *Asphalt Products, Inc.* vs. *Paulos Auto Company, et al,* 413 P 2d 596, 17 U 2d 402, where the court agrees with the appellants contention "that if the pleadings, depositions, affidavits and reasonable inferences therefrom, when viewed in light most favorable to them, it is apparent that there are genuine issues of material fact which should be determined by a trial, the moving party is not entitled to a judgment as a matter of law and Summary Judgment should not have been granted."

The statement of the Utah Supreme Court in *Bullock* vs. *Deseret Dodge Trucks Centers, Inc.* 354 P 2d 559, 11 U 2d 1, which was reiterated in its decision of *Green* vs. *Garn* 359 P 2d 1050, 11 U 2d 375, *Fredrick May & Com-*

pany vs. *Dunn,* 368 P 2d 266, 13 U 2d 40, *Christensen* vs. *Financial Service Company,* 377 P 2d 1010, 14 U 2d 101, and *Strand* vs. *Mayne,* 384 P 2d 396, 14 U 2d 355, that:

> A Summary Judgment must be supported by evidence, admissions and inferences which when viewed in the light most favorable to the losers shows 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." Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor.

In the case before the court there are numerous material issues of fact existing. There is the question of whether or not the plaintiff ever owned the boat spoken of in his Complaint, whether the defendant ever insured that particular boat, whether that boat was sunk on Utah Lake as the plaintiff claims, and what the value of the boat, if any, is.

There can be little doubt but that these issues are material inasmuch as the plaintiff would not be entitled to judgment against the defendant if any of those issues were decided against him.

The trial court having inappropriately entered judgment for the plaintiff and against the defendant should have, on the defendant's Motion to Alter and Amend under Rule 59 (e) of the Utah Rules of Civil Procedure altered and amended the judgment so as to vacate and set it aside as it has power to do under Rule 59 (e). See

Gainey vs. *Brotherhood of Railway and Steamship Clerks, etc.* 303 F 2d 716 (1962).

CONCLUSIONS

Plaintiff's Summary Judgment against the defendant should be reversed, and the Order Denying Defendant's Motion to Alter and Amend should be reversed, and the case should be heard on a trial of the facts in the District Court.

Respectfully submitted,

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