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James S. Stank and Priscilla M. Stank dba Acme Auto Associates v. John Hobert Jones : Brief of Respondent

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JAMES S. STANK and
PRISCILLA M. STANK
dba ACME AUDIT ASSOCIATES,
Plaintiffs-Respondents,

— vs. —

JOHN ROBERT JONES,
Defendant-Appellant.

RESPONDENTS' BRIEF

Appeal From Order Denying Motion
in the Third District Court for Salt Lake County
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Plaintiffs-Respondents,

— vs. —

JOHN ROBERT JONES,

Defendant-Appellant.

} Case
No. 10276

RESPONDENTS' BRIEF

NATURE OF CASE

The question is whether Plaintiffs-Respondents, as assignees of several claims for collection, are entitled to prosecute suit on the claims in their own name, or if the assignors are indispensable parties.

DISPOSITION IN THE TRIAL COURT

The Trial Court denied defendant-appellant's motion to dismiss for failure to join indispensable parties.

RELIEF SOUGHT ON APPEAL

Respondents seek confirmation of the judgment of the Lower Court.

STATEMENT OF FACTS

The Appellant's Statement of Facts includes several conjectural matters. The facts, as indicated by the present state of the record, are as follows:

Plaintiffs-Respondents filed this action in the Third Judicial District Court in Salt Lake County, Utah, as the assignees of several claims against the Defendant-Appellant. A written assignment of each claim was executed by the assignor and delivered to plaintiff assignee.

Pursuant to the demand of Defendant-Appellant the Plaintiff-Respondents, who are residents of Denver, Colorado, executed and filed with the Trial Court a non-resident cost bond in or about February, 1964, which is now current and effective.

On or about the 19th day of November 1964, several motions having been theretofore heard and determined by the Trial Court, a further hearing was had on Appellant's motion to dismiss or for judgment on the pleadings. This motion was made upon the sole, stated ground that Plaintiff's assignors were indispensable parties to the action (R-45).

ARGUMENT

POINT I

THE ASSIGNMENTS WITH WHICH THIS CONTROVERSY IS CONCERNED WERE FULL AND COMPLETE AND THE ASSIGNEES ARE THE REAL PARTY IN INTEREST IN THIS SUIT.

A notarized written assignment was executed and delivered to Plaintiffs-Respondents by each of the assignors of the claims here in controversy. In each instance the assignor assigned to Plaintiffs, "their heirs, executors, administrators and assigns, all my right, title and interest in and to a certain account current and stated. . . ." Further, each assignment states, "Hereby authorizing the said assignees, their agents, attorneys, heirs and assigns, to receive, sue for, collect and receipt for such account in their name or otherwise and to do and perform every act and thing necessary and proper to be done in the premises, irrevocably, as fully as I might or could do if personally present at the doing thereof."

By the express language of these written assignments the assignors have assigned ALL of their "right, title and interest" in the claims in controversy. It is, therefore, a complete contradiction of the facts to state that the assignors "retained an interest in the action." Unless and until these actions are reassigned to the original assignors, the latter have no legal interest in the action and cannot legally maintain any separate action against Appellant on an individual claim heretofore

assigned to Plaintiffs-Respondents. It may be that assignors have acquired a new beneficial interest in the net proceeds of the claim assigned, but this creates a relationship between the assignors and assignees with which the debtor defendant cannot properly be concerned. In fact, the assignor in each of these claims has bargained and sold his legal title and interest therein to the assignees-plaintiffs, and has received in part, therefor, a contingent beneficial interest. But the only concern of the debtor defendant here is whether or not plaintiffs acquired the full and complete legal title. To hold that plaintiffs have not acquired the full legal title is to do violence to the language of the contractual agreement between the assignors and the assignees.

The *McAulay* Case cited by Appellant as authority for the proposition that the plaintiffs' assignors are indispensable parties has a clearly distinguishable factual background. It should be noted immediately that the facts do not involve an assignment. Therefore, any argument, whatever its force or lack of force, must be made by analogy. Respondents submit that there is no force whatsoever in the cited case which can aid Appellant's cause. Clearly an undisputed 43 1/3 per cent interest in a claim would render the owner thereof an indispensable party in an action brought to enforce the claim. But, in citing this case, Appellant has erred in that he has assumed the very question which he seeks to raise and to have determined favorably to himself, i. e.; whether Respondents' assignors have made a full and complete assignment of their claims.

This Court has met the objection raised in this appeal on several occasions and has consistently held that the assignee is the real party in interest and that as such, the assignors were not and could not be indispensable parties. The precise question was raised in the case of *Chesney v. District Court of Salt Lake County*, 99 Utah 513, wherein the Court stated:

“Plaintiffs argue, in support of their position, that Brown is not the real party in interest for the reason that he is neither actually nor substantially interested in the subject matter of the suit, and that his only interest, if such it can be called, is that of collector. This court, in conformity with the weight of judicial authority, is committed to the doctrine that the assignee of a chose in action or promissory note after maturity and for the purpose of collection alone may sue in his own name and as such is the real party in interest.”

The court cites considerable authority for the holding.

In the case of *Campbell v. Peter*, 108 Utah 565, a case decided some four years after the Chesney case, the Court firmly restated the holding of the latter case when it said:

“We will not again go into the question of whether an assignee of a chose in action who holds merely for the purpose of collection is ‘the real party in interest.’ We have repeatedly held that he is.” (Citing Chesney and other cases)

As recently as 1962 this Court has reaffirmed that holding when, in *Lynch v. McDonald*, 12 Utah 2d 427, reference is once again made with approval to the Chesney and Campbell cases and others.

That this Court is on solid ground in this matter is attested by our Sister Courts, wherein the vast majority support the proposition that an assignee, even though his assignment be exclusively for collection and the whole beneficial interest be in the assignor, is the real party in interest, and consequently, the assignor is not and cannot be an indispensable party. Aside from the Ohio Court cited by Appellant in his brief, the case law indicates that there may be two jurisdictions which have followed a minority rule. Of the Western States, the Courts appear to line up solidly with the great weight of authority, as espoused by this Court. The following cases support this proposition:

Rauers Law and Collection Co. v. Higgins, 174 P. 2d 450 (California)

National Reserve Co. of America v. Metropolitan Trust Co. of California, 112 P. 2d 598 (California)

Bankers Trust Co. v. International Trust Co., et al., 113 P. 2d 656 (Colorado)

Castleman v. Redford, 124 P. 2d 293 (Nevada)

National Motor Service Co. v. Walters, 379 P. 2d 643 (Idaho), Citing *Chesney v. District Court of Salt Lake County*

Amende v. Town of Morton, 241 P. 2d 445 (Washington), (holding the particular assignment invalid but affirming the general rule).

In the case of *First National Bank of Topeka v. United Telephone Association*, 353 P. 2d 963, a Kansas case, the Court discussed a factual situation which was

squarely in point on the issue raised here. The sole distinction between the cited case and this suit, as it relates to the question of assignment, is that there the assignor had the complete beneficial interest in the proceeds. Quoting with approval from an earlier case, the Kansas Court says at Pages 970-71:

“When the owner of a note, for reasons satisfactory to himself, assigns it to another, thereby vesting in him the full legal title, the assignee becomes, so far as the debtor is concerned, the real party in interest. The original owner is still the person to be finally benefited by the litigation, but his legal demand is no longer against the maker of the note, but against the person to whom he has assigned it. When the obligor is sued by such assignee (no claim as innocent purchaser being involved), he can make any defense he could have made against the assignor; he is fully protected against another action; and in no way is it a matter of the slightest concern to him what arrangement between the plaintiff and the original creditor occasioned the assignment. This being true, it would be a sacrifice of substance to form to permit the defendant to defeat the action by showing . . . that the plaintiff was bound to account to his assignor for a part or all of the proceeds. We hold that the objection to the judgment urged on the ground that plaintiff was not the real party in interest is untenable.”

The reasoning of this opinion is deemed persuasive.

With reference to the prior case the Kansas Court said at page 970:

“In the Manley decision the court reasserted that the assignee, who holds the full legal title to

a promissory note by assignment, is the real party in interest and may maintain an action thereon against the maker, notwithstanding he has no beneficial interest in the proceeds, the assignment having been made to enable him to realize on the claim in the interest of the original payee."

It appears clear that if the assignors of Plaintiff-Respondent are not indispensable parties then the assignee plaintiff must be the real party in interest. In fact, the cases cited generally deal with the points as a single issue and discuss them in the same context. Of course, since Defendant-Appellant did not raise the issue of real party in interest below, it should not be given consideration by this Court except as it may be inseparable from the question of indispensable party. In support of this principal, reference is made to:

Idaho State Bank v. Hooper Sugar Co., 74 Utah 24.

Richard v. Strike, 66 Utah 394.

Flynders v. Hunter, 60 Utah 314.

Byron v. Payne, 58 Utah 536.

POINT II

THE TWELVE CAUSES OF ACTION ARE PROPERLY JOINED IN PLAINTIFF-RESPONDENTS' COMPLAINT, AND IN ANY EVENT DEFENDANT-APPELLANT HAS WAIVED THIS OBJECTION AND IS ESTOPPED TO ASSERT IT EITHER IN THIS COURT OR IN THE COURT BELOW.

Defendant-Appellant seeks for the first time on appeal, to raise an issue of misjoinder. This question was

not raised in the pleadings or in any proceedings whatsoever in the Court below and suffers, therefore, from the same defect as noted with reference to real party in interest and the cases cited in the last paragraph of Point I above. The sole issue for which Defendant-Appellant sought review in this Court, as appears from his petition (R-45), is the denial by the Trial Court of his motion to dismiss for failure to join an indispensable party.

Except for the statement of Appellant in his brief that “. . . several causes of action with independent facts and independent parties are joined in one action” there is no evidence in the record of any facts supporting a claim of misjoinder. In fact, it is submitted that the opposite is true and that ample evidence is adducible to establish the propriety in law of this joinder. However, since the suit will only be delayed and quite possibly result in further and subsequent appeal unless some notice is taken of the issue of misjoinder, the following brief argument is submitted on the point.

Having failed to raise the issue of misjoinder either by way of responsive pleading or motion, the Defendant-Appellant has waived whatever rights he may have had otherwise and is estopped to raise the issue here or in the lower Court. After approximately a year of hearings and proceedings on the issues of this case in the lower Court, during which time Appellant has raised a series of issues, it would be unconscionable were he allowed to question the basis of the joinder at this juncture.

It is submitted that Rule 12, Utah Rules of Civil Procedure expressly prohibits this attempt to raise such

an objection or defense at this late date. Rule 12 (b) states in part:

“Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or a third party claim, shall be asserted in the responsive pleading thereto, if one is required, except that the following defenses may, at the option of the pleader, be made by motion.”

The rule then lists seven defenses which may be raised by motion including failure to join indispensable party. Rule 12 (h) provides:

“A party waives defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his reply or answer, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading if one is permitted, or by motion for judgment on the pleadings or at the trial on merits. . . .”

Having failed to object to the joinder of these actions either by motion as provided (and in this case a motion to dismiss was interposed before pleading) or by answer, such an objection comes too late and should not be entertained by any court. *Moore's Federal Practice*, 2d Ed., Volume 2, Page 2329.

Our Rules make appropriate remedies available to the Appellant if he can persuade the proper court that he would be unjustly injured by joint trial of these ac-

tions; but Respondent submits that by Appellant's argument in Point III, even were it brought in the proper Court and at the proper time, Appellant has completely misconceived his remedy. The Courts do not favor a multiplicity of actions.

POINT III

THIS PROCEEDING WAS COMMENCED IN THE ONLY PROPER STATE TRIBUNAL.

Defendant-Appellant seeks in his argument, under Point IV to charge the plaintiffs and their assignors with questionable conduct in bringing the action in Utah. In this connection, it appears that Defendant-Appellant would have preferred to litigate the issues in Colorado where each of the claimed liabilities arose. It was not the Plaintiffs nor their assignors who left the state of Colorado, but the Appellant. The action was commenced in the state tribunal which had jurisdiction of the Defendant-Appellant, and for the latter to complain of the natural legal consequences, whatever they may be, of this fact is deemed unseemly in the very least. The Appellant is at liberty to bring any proceeding he deems advisable in the Colorado Courts against Plaintiffs' assignors.

CONCLUSION

It is respectfully submitted that on the only question which is properly presented in this appeal the Court has heretofore held consistently that the assignor of a cause, though it be for collection, is not an indispensable

party to an action brought by the assignee thereon, but the assignee is the real party in interest. This holding is in line with the overwhelming weight of authority and there appears to be no persuasive reason to change it in the instant case.

There has been no misjoinder of actions, and by bringing the objection up for hearing for the first time upon appeal, after having filed a series of motions and an answer, and delaying approximately one year in bringing the objection up at all, Defendant-Appellant has waived the defense or objection and should be estopped to assert it either here or in the lower Court.

Respondents and their assignors should not be held responsible for the election of the Defendant-Appellant, and having effectively denied jurisdiction over his person to the Colorado Courts by removing himself to Utah, he should not now be allowed to shift the legal responsibility and consequences, thereof, to others.

Respondents submit that the nature of the assignments, upon the face thereof, show that Respondents acquired full legal title to the chose in action each represented. Therefore, the judgment should be affirmed.

Respectfully submitted,

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