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Ada Bridge and Joseph L. Bridge v. LeGrand P. Backman et al : Reply Brief

Utah Supreme Court

Glen Y. Richards; Counsel for Plaintiffs and Appellants;

IN THE SUPREME COURT
of the
STATE OF UTAH

ADA BRIDGE and
JOSEPH L. BRIDGE,
husband and wife,
Plaintiffs, and Appellants,

vs.

LEGRAND P. BACKMAN,
MILTON V. BACKMAN, and
HARLAN W. CLARK, d.b.a.
BACKMAN, BACKMAN & CLARK,
Defendants and Respondents,

Case No. 9197

REPLY BRIEF

GLEN Y. RICHARDS
Counsel for Plaintiffs and Appellants.
313 Judge Building
Salt Lake City, Utah

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STATEMENT OF CASE

Respondents, in their brief, by Point 1, raise issues which they did not give as grounds for their motion for summary judgment. The trial court did not state the grounds in the order granting summary judgment. The plaintiffs and appellants must presume that the court searched the complaint only, and therefrom determined that there were no triable issues of fact, since it was not entitled to search the depositions for evidence. There were no affidavits filed by either party. Rule 26 (f), Utah Code Annotated, 1953 provides:

> "At the trial or hearing any party may REBUT any relevant evidence contained in a deposition whether introduced by him or by any other party."

ARGUMENT

Respondents argue that there was no agreement between the parties to appeal. They argue issues. If there is argument, it should be to a trial court and not be decided by summary judgment. Appellants maintain there was an express agreement for the appeal by respondents. The exact percentage respondents should receive was to be less than 1/3 per cent of the recovery. Did the agreement fail for uncertainty? We think not.

7 C.J.S. 1063, notes 43 and 46, the law is properly stated:

> "Contingent fee agreements are valid in the absence of fraud or imposition, where they are fair and reasonable as to the client and an agreement of this kind is not objectionable for want of mutuality, or for UNCERTAINTY."

In the case of Moore v. Stanfill, 81 S.W. 2d 610 the court said:

> "A contract providing that the compensation shall not exceed a certain limit leaves the amount to be determined on a quantum meruit within such limits." See also 7 C.J.S. p. 848, Note 53 exact compensation not stated; 45 A.L.R. P. 14.

Respondent, on page 7, asks whether the contract was with LeGrand P. Backman or his law firm. The answer is, the agreement can be enforced or damages may be received against LeGrand P. Backman or any member of his firm.

7 C.J.S. P. 986, Section 150 states the law:

> "Members of a law firm are individually liable for negligence of partner to the client."

On page 9, respondents state, "In the instant case the burden is on appellants TO PROVE the agreement of employment and respondent's negligence." That requires a trial to try those issues. It cannot be decided by summary, judgment.

Much is said about the payment of costs, or the failure of appellants to pay the costs of appeal. It is pleaded in the amended complaint that respondents did not ask appellants for advancement of costs at the time the agreement to appeal was entered into. They had no idea what the costs were or when they should be paid, except for respondent's statement they would be about $100.00. They had the right to rely upon their attorney, and were able, ready and willing to pay the costs upon demand, which they did. This is an issue of fact to be proved at the trial.

Summary judgment is a harsh remedy and merely supposed to search the record in the same manner as does a general demurrer and is supported by the authorities for the purpose of finding a FAULT IN PLEADINGS. Marie A. Sullivan v. State of Wisconsin, 251 N. W. 251; City Trust Co. v. Anthony Ricci Realty Co. ,137 Misc. 128, 241 N.Y.S. 481; Tauber v. National Surety C. 219 Appp Div. 253, 219 N. Y. Supp. 387.

If there is a fatal defect in Appellant's amended complaint, appellants should have an opportunity to correct the defect if they can.

"Summary judgment must be denied when the defendant has taken issue with every material allegation in the complaint thereby raising an issue to be tried." 91 A.L.R. P. 879.

"Summary judgment does not provide a substitute for existing methods in determination of issues of fact." Walsh v. Walsh 116 P 2d 62, 18 Cal. 2d 439, Gibson v. De La Salle Institute 152 P 2d 774, 66 Cal. App. 2d 609.

PRESUMPTION

"There is authority for the view that there is a presumption that an attorney of record for a party in the lower court has authority to take an appeal. (1) Some cases hold that where a notice of appeal is filed by an attorney, the presumption is that he had authority to take such action (see cases) (2) Such presumption can be overcome only by clear proof. (see cases)7 CJS P. 881, Note 70. It seems from the above that respondents would have to disprove this pre-

sumption upon trial, the presumption going to the existence of an agreement to appeal as they could have authority to appeal on behalf of appellants only by agreement.

LACHES

"The defense of laches exists only where there has been such a delay in the assertion of a claim as naturally TO PREJUDICE him against whom the claim is set up." 7 A. L.R. 1014, McClure v. Northrop, 93 Conn 558, 106 A 504, See Permanent A.L.R. Digest Vol. 8, P 208, Sec. 7.5 (1). Respondents claim as a defense laches, without having shown in their answer that they were placed at a disadvantage by such delay. If there was any delay by appellants in bringing this action, it was because of respondent's deceit and fraudulent concealment of their, plaintiff's and appellant's, cause of action against them, as alleged in the amended complaint. The defense of the running of the Statute of Limitations cannot be claimed by respondents because of their fraudulent concealment. Hicock Producing & Development Co. Vs. Texas Co. 128 Fed. 2d 183, 173 A.L.R. 583, 54 CJS 219 Note 27 Cites the Utah case, Atty. Gen. of Utah v. Pomeroy, 93 Utah 426, 73 P 2d 1277. The prevailing rule is:

> "Where relationship is fiduciary or confidential, the person occupying the relation of fiduciary or of confidence is under a duty to reveal the facts to the plaintiff (the other party) and that his silence when he ought to speak, or his failure to disclose what he ought to disclose, is as much a fraud at law as an actual affirmative false representation or act, and that mere silence on his part as to a cause of action,

> the facts giving rise to which it was his duty to disclose, amounts to a fraudulent concealment within the rule under consideration." 173 A.L.R. 588 Sec. 13, Sec. 26 on pages 604-605; Fortune v. English, 226 Ill. 262, 89 N.E. 781, 12 L.R.A. NS 1005.

Respondents, apparently, were afraid to inform appellants of their failure to appeal, as they had agreed to do, and then of the dismissal of appellant's appeal lest appellants be made aware of their cause of action against them for their negligence in failing to apeal on time and to otherwise perfect the appeal.

On page 12 of respondent's brief, respondents compare the many acts of kindness of Kostopulos with the friendship of the Bridges. It is true that Kostopulos was nearly a slave to Wilda Gail Swan, but the trial court found that Kostopulos was present when the second codicil was signed (Finding No. 23) but that the Bridges were not (Findings No. 28 and 33). That make the difference in law. Lavelle's Estate, 248 P 2d 372.

CONCLUSIONS

1. There was an express agreement between respondents and appellants to appeal.

2. Where there is a top limit specified as attorney's fee without stating the exact amount, the fee will be determined by the court and the agreement is not void because of uncertainty.

3. Appellants amended complaint states a cause of action against respondents, and respondents having denied all

the allegations contained therein, raised issues of fact to be tried.

4. Summary judgment is a harsh remedy and merely takes the place of a general demurrer for the purpose of finding defects in the amended complaint.

5. The trial court erred in that it did not specify the grounds upon which it entered summary judgment.

6. Laches or statute of limitations have not run against appellants because of the fraudulent concealment and deceit of respondents.

7. Appellants should be entitled to amend their amended complaint to cure any defect found in their said amended complaint.

We respectfully submit that this Honorable Court should determine the question of whether or not it would have reversed the trial court in the Hendee case had respondents properly perfected appellant's appeal, set aside the summary judgment herein and direct that the matter be tried.

Respectfully submitted,

GLEN Y. RICHARDS
Counsel for Plaintiffs and Appellants.
313 Judge Building
Salt Lake City, Utah