

1991

Van Waters & Rogers Inc. v. Steven Regan Company and Steven M. Harmsen : Brief of Appellee

Utah Supreme Court

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91-0586 CA

IN THE UTAH SUPREME COURT

VAN WATERS & ROGERS, INC.

Plaintiff and Appellee,

vs.

STEVEN REGAN COMPANY, defendant,
and STEVEN M. HARMSSEN, defendant
and

Appellant.

91-0586-CA

Case No. [REDACTED]

Argument Priority 16

Subject to Assignment to
Court of Appeals

BRIEF OF APPELLEE, VAN WATERS & ROGERS, INC.

Appeal by Steven M. Harmsen from a Judgment Entered
by the Honorable Pat B. Brian, Third District Court
Salt Lake County

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FILED

MAY 16 1991

CLERK SUPREME COURT,
UTAH

IN THE UTAH SUPREME COURT

VAN WATERS & ROGERS, INC.

Plaintiff and Appellee,

vs.

Case No. 900284

STEVEN REGAN COMPANY, defendant,
and STEVEN M. HARMSSEN, defendant
and

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Subject to Assignment to
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The Appellee, Van Waters & Rogers, Inc., files this Brief in Opposition to the Brief of the Appellant, Stephen M. Harmsen, filed in April of 1991. Van Waters & Rogers seeks an Order of this Court affirming the summary judgment granted by the District Court.

STATEMENT OF JURISDICTION

Jurisdiction lies in this Court pursuant to Article VIII, Section 3 of the Utah Constitution and U.C.A. §78-2-2(3)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The sole issue presented on appeal is whether or not there were issues of material fact such that the matter could not be resolved by summary judgment. Van Waters & Rogers submits, that based upon the deposition testimony of Stephen M. Harmsen, that the entry of summary judgment was appropriate. The standard of review on this issue is for correctness. Brinkerhoff v. Schwendiman, 790 P.2d 587 (Utah 1990). This court should review the facts in the light most favorable to Stephen M. Harmsen. Blue Cross & Blue Shield v. State, 779 P.2d 634 (Utah 1989).

STATUTES AND CONSTITUTIONAL PROVISIONS

The appeal, as framed by the appellant, turns upon the application of Rule 56, U.R.C.P.

STATEMENT OF THE CASE

This action was one to determine, among other things, the personal liability of Stephen M. Harmsen as the guarantor of an account that existed between Van Waters & Rogers, Inc., and the co-defendant, Steve Regan Company. Steve Regan Company has apparently

not joined in the appeal. There was no dispute regarding the amount of the obligation owed by Steve Regan Company to Van Waters & Rogers.

The guaranty signed by Stephen M. Harmsen stated in part as follows:

This guaranty is being given for my benefit and the benefit of the marital community composed of my wife and myself, and the obligation created by this Guaranty shall be binding upon me individually. (emphasis added). (R. 006)

No setoffs were claimed. The sole disputed issue before the trial court on summary judgment was Stephen M. Harmsen's personal liability under the guaranty. (R. 82.)

The trial court entered summary judgment against both Stephen M. Harmsen and Steve Regan Company.

STATEMENT OF FACTS

The appellant, in its Statement of Facts, has failed to make a single reference to the record on appeal. This Court, for this reason alone, need not consider any of the facts not properly cited to and should assume the correctness of the judgment below. Uckerman v. Lincoln Natl. Life, 588 P.2d 142 (Utah 1978); Koulis v. Standard Oil Co., 746 P.2d 1182 (Utah Ct. A. 1987).

1. On or about February 18, 1987, Stephen M. Harmsen executed a guaranty in favor of Van Waters & Rogers, Inc. for the account of Steve Regan Company. (R. 006) The guaranty is attached hereto as Exhibit "1".

2. The guaranty was requested by Van Waters & Rogers because of the slow pay history of Steve Regan Company. (Letter,

attached hereto as Exhibit "2", deposition testimony of Stephen Harmsen, p. 7, R. 116.)

3. Stephen M. Harmsen signed the guaranty (Exhibit "1"). (Findings of Fact, 1, R. 80) The guaranty states in part that:

This guaranty is being given for my benefit and the benefit of the marital community composed of my wife and myself, and the obligation created by this guaranty shall be binding upon me individually and also upon the marital community composed of my wife and myself.

Steve Regan Co.
(signed) Stephen M. Harmsen, pres. (s)

4. The parties stipulated in open court that Steve Regan Company was liable to Van Waters & Rogers. (Findings of Fact, 8, R. 82.)

5. In his deposition taken on February 9, 1990, Stephen M. Harmsen testified contrary to an earlier affidavit on several key issues as follows:

Q. So it's my understanding that -- correct me if I'm wrong -- that with regard to the subject of the guaranty, that you never had any conversation with anyone from Van Waters & Roger?

A. I am saying that when the guaranty was presented, put in front of me, I don't know that Van Waters' representative was present at that time. Could have been, could not have been. (P. 8)

. . . .

Q. Prior to the time that you signed it [the guaranty], did you discuss the guaranty with anyone from Van Waters & Rogers?

A. My recollection is no.

Q. All right. After you signed it, did you have any conversation with anyone from Van Waters & Rogers about the guaranty?

A. Not for some -- not until 1988.

(R. 70, 71, deposition of Stephen M. Harmsen, R. 116, p. 8 and 9.)

6. The trial court found that Stephen M. Harmsen did not express to any agent or employee of Van Waters & Rogers any reservation with respect to the guaranty. (Findings of Fact, 6; R. 81, 82.)

7. Subsequent to his deposition, Stephen M. Harmsen filed no further affidavits with the court to explain or justify the contradictions between his deposition testimony and the affidavit which he had previously executed.

SUMMARY OF ARGUMENT

Summary judgment was appropriately granted in this case based upon the stipulations made by the parties in open court regarding the amounts due, the liability of Steve Regan Company, and based upon the deposition testimony of Stephen M. Harmsen.

ARGUMENT

I. The Summary Judgment Should Be Affirmed.

Stephen M. Harmsen relies upon two factors in advancing his appeal. The first is that Harmsen allegedly had conversations with Van Waters' agents wherein Harmsen contends it was agreed that Harmsen's guaranty was limited. The second factor is that there was a failure of consideration for the guaranty based upon a contention asserted for the first time on appeal that the debt was

in existence prior to the time the guaranty was executed. Each of these arguments fails for the reasons set forth herein.

A. There Is No Genuine Issue of Material Fact.

In his affidavit dated November of 1989, Mr. Harmsen made many statements regarding the guaranty and conversations that he allegedly had with agents of Van Waters limiting his personal liability. When his deposition was taken several months later, Mr. Harmsen candidly acknowledged that he could not recall having ever discussed the guaranty with anyone from the plaintiff either before or after he signed it. (R. 70,71.) In his Brief, Harmsen has conveniently ignored the deposition testimony which he gave.

The rule in this state when there are inconsistencies between deposition testimony and affidavits is articulated in the Utah case of Webster v. Sill, 675 P.2d 1170 (Utah 1983). In Webster, the plaintiff testified first in his deposition and then gave conflicting statements in his affidavit. This court, stated as follows:

But when a party takes a clear position in a deposition, that is not modified on cross examination, he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy....A contrary rule would undermine the utility of summary judgment as a means for screening out sham issues of fact.

...The rule that a party may not rely on a subsequent affidavit that contradicts his deposition to create an issue of fact on a motion for summary judgment does not apply when there is some substantial likelihood that the deposition testimony was in error for reasons that appear in the deposition or the party-deponent is able to

state in his affidavit an adequate explanation for the contradictory answer in his deposition.

(675 P.2d 1172, 1173.)

In this case, Mr. Harmsen testified clearly and unequivocally in his deposition that he did not speak with anyone from Van Waters & Rogers regarding the guaranty. No subsequent effort was ever made by Mr. Harmsen to reconcile the clear testimony which he gave in his deposition with the statements contained in his prior affidavit or to show that his statements in his deposition were erroneous. Under these circumstances, the trial court properly relied upon the deposition testimony in support of its order granting summary judgment.

Additional Utah authority supporting the result of the trial court on this issue is found in Guardian State Bank v. Humphreys, 762 P.2d 1084, 1087 (Utah 1988) and Floyd v. Western Surgical Associates, 773 P.2d 401, 403 (Utah App. 1989). In each of these cases, summary judgment was sustained based upon the deposition testimony of a party where there was a failure to explain discrepancies between the deposition testimony and contradicting affidavits.

In effect, Stephen Harmsen asks this court to find a genuine issue of material fact based solely upon his own contradictory testimony. For the reasons discussed, this would be inappropriate.

It appears more likely that what occurred in this case was that Mr. Harmsen had some subjective or unexpressed thoughts

regarding the guaranty which were never expressed to Van Waters & Rogers. Subjective intentions to limit a guaranty could not be binding upon Van Waters & Rogers and should not be considered by this court in limiting the personal liability assumed by Harmsen under the guaranty. Janzen v. Phillips, 432 P.2d 189 (Wash. 1968).

If Mr. Harmsen's conversations regarding the guaranty were, as he acknowledges in his deposition, solely with the employees of his own company, those conversations would be barred at trial by the Utah Rules of Evidence, Rule 802, as hearsay. Because the conversations would not be admissible at trial, they were properly excluded from consideration by the trial court in ruling upon the motion for summary judgment. Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983). In addition, the language of the guaranty with respect to the personal liability of Mr. Harmsen is very clear. Any conversation by Mr. Harmsen prior to signing the guaranty to the contrary would be parole evidence and barred by the parole evidence rule. That type of evidence would be excluded at trial and was also properly excluded from consideration by the court in the summary judgment proceedings. Norton, supra.

B. There Was No Failure of Consideration for the Guaranty.

The second issue advanced by Stephen Harmsen is that there was no consideration for his guaranty. Based solely upon the Rules of Civil Procedure, this argument must fail. Mr. Harmsen did not plead any defense based upon failure of consideration in his answer (R. 15-17). Failure of consideration is an affirmative

defense required to be specifically plead under Rule 8(c), U. R. C. P. Failure to plead the defense constitutes a waiver.

In addition, the only evidence regarding the debt which was guaranteed was that set forth in the affidavit of Frank Emory (R. 29-39) filed in support of the motion for summary judgment. The guaranty was dated February 18, 1987. (R. 6) All of the invoices attached to the affidavit of Mr. Emory reflect shipments made in July, August and September of 1987, subsequent to the execution of the guaranty.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

DATED this 16 day of May, 1991.

COHNE, RAPPAPORT & SEGAL, P. C.

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Keith W. Meade
Attorney for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 2 true and correct copies of the foregoing BRIEF OF APPELLEE VAN WATERS & ROGERS were mailed in the United States mail, first class postage prepaid, to the following:

THEODORE LINCOLN CANNON, JR.
Attorney for Appellant
Oquirrh Place Suites, Suite 305
350 South 400 East
Salt Lake City, Utah 84111-2908

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Exhibit "1"

VAN WATERS & ROGERS, INC.
650 West Eighth South
Salt Lake City, Utah 84110

Gentlemen:

As the President of Steve Regan Co. I request that you extend credit to said company, and in consideration therefor, I hereby guarantee and agree to pay any and all indebtedness now due and hereafter to become due from said company to you.

This guarantee shall extend to and cover any and all forms of indebtedness and a liability on the part of said company to you, whether occurring or arising on account of goods, wares and merchandise sold, loans or advances made, services furnished, or otherwise.

In connection with the maturity or default of any such indebtedness, in whatever form I expressly waive presentment, demand, protest or notice of non-payment, and no legal proceedings need be brought against said company as a condition of my liability hereunder.

This guaranty shall cover all transactions between you and said company, and my obligation hereunder shall be in no way affected if, in your dealings with the company, you shall, without notice to me, grant indulgence, extend the time for payments, take trade acceptances, notes, or other evidences of indebtedness, take, substitute or release security of any kind, allow credits for merchandise returned, or apply payments on any particular accounts you may select.

Until terminated in writing, it is agreed that this guaranty shall be absolute and continuing, and that it shall remain in force and be binding upon my estate until terminated by my executor, administrator, or other personal representative.

Dated at S.L.C. - UT this 18 day of Feb 1987.

This guaranty is being given for my benefit and the benefit of the marital community composed of my wife and myself, and the obligation created by this guaranty shall be binding upon me individually and also upon the marital community composed of my wife and myself.

(signed) Steve Regan Co.

(Home Address) _____

(Social Security No.) _____

-----DO NOT WRITE BELOW THIS LINE-----

The above obligation is approved and accepted by VAN WATERS & ROGERS:

(signed) [Signature]

(Credit Manager)

000000

Exhibit "2"

Van Waters & Rogers Inc.
subsidiary of Univar

BOX 2369
SALT LAKE CITY UT 84110
PHONE (801) 328-1112

2/1/87

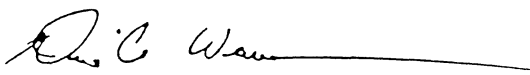
Steve Regan Co.
4215 South 500 West
Salt Lake City, UT 84123

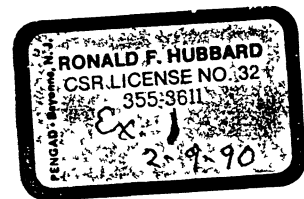
Mr. Steve Harmsen,

In order for Van Waters & Rogers to extend open credit terms in the future, we are requiring you to sign the enclosed Guaranty. This has come from the past results of the slow pay Van Waters & Rogers has experienced from Steve Regan Co.

Should you have any questions, please give me a call.

Sincerely,
VAN WATERS & ROGERS INC.


David Wewee
Area Credit Mgr.



891700-000000

MAY 23 1990

1 IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

2 SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY

Deputy Clerk

3 -o0o-

4 VAN WATERS & ROGERS, INC.,)

5 Plaintiff,)

Civil No. 880907994CV

6 vs.)

DEPOSITION OF STEPHEN M.
HARMSSEN

7 STEVE REGAN COMPANY and)
8 STEPHEN M. HARMSSEN,)

9 Defendants.)

10 -o0o-

11 BE IT REMEMBERED, that on Friday, February 9, 1990,
12 commencing at the hour of 2:25 p.m., the deposition of
13 Stephen M. Harmsen, a defendant in the above matter, called
14 as a witness on behalf of the plaintiff, was taken pursuant
15 to notice and pursuant to the Utah Rules of Civil Procedure
16 before Ronald F. Hubbard, notary public and certified
17 shorthand reporter in and for the State of Utah (License
18 No. 32), at 525 East First South, Suite 500, Salt Lake
19 City, Utah.

20 That there were present as counsel:

21 For plaintiff:

Keith W. Meade
Attorney at Law
Cohne, Rappaport & Segal
525 East First South, Suite 500
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone: 532-2666

25 For defendants:

Robert H. Copier
Attorney at Law
243 East 400 South, Suite 200
Salt Lake City, Utah 84111
Telephone: 531-0099

1 A I can't tell you. If you want my best recollection--
2 my best recollection is it was probably Paul Lacroix, the
3 general manager, that said that: "This document needs
4 to be signed." Or it could have been Paul Lacroix with
5 the Van Waters person there.

6 Q But you don't have a specific recollection?

7 A I don't have any specific recollection of a face to
8 face meeting with Dave Wewee over this subject.

9 Q Do you recall having a telephone conversation with
10 Mr. Wewee about this subject?

11 A ~~No.~~ Possibly

12 Q Do you recall having a telephone conversation with
13 anyone else or face to face meeting with anyone else from
14 Van Waters & Rogers regarding this subject?

15 A ~~No.~~ Can't remember

16 Q So it's my understanding that--correct me if I'm wrong--
17 that with regard to the subject of the guaranty, that you
18 never had any conversation with anyone from Van Waters
19 & Rogers?

20 A I am saying that when the guaranty was presented,
21 put in front of me, I don't know that Van Waters'
22 representative was present at that time. Could have been,
23 could not have been.

24 Q So you don't recall if someone was in the room with
25 you when you signed?

1 A No. No.

2 Q I'm trying--

3 A I have no knowledge--I have no recollection to that
4 effect.

5 Q Prior to the time that you signed it, did you discuss
6 the guaranty with anyone from Van Waters & Rogers?

7 A My recollection is no.

8 Q All right. After you signed it, did you have any
9 conversation with anyone from Van Waters & Rogers about
10 the guaranty?

11 A Not for some--not until 1988.

12 Q All right. Now, let's mark the letter as Exhibit 1.

13 (Exhibit 1 was marked
14 for identification.)

15 A What's important in relation to that letter is that
16 I was out of the country until probably the 4th of January
17 1987. And I've been out of the country for a period of
18 four months.

19 Q Why is that important in relation to this letter?

20 A Because that letter is dated February 1. I was just
21 in the process of reorganizing my affairs, and it's probably
22 likely that letter would not have--letters that were
23 addressed to me were usually sent to the general manager,
24 not to me. There's a reason that I wouldn't have seen
25 that letter.