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Roy F. Tygesen v. Magna Water Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

Clerk, Supreme Court

ROY F. TYGESEN,

Plaintiff and Appellant,

—vs.—

MAGNA WATER COMPANY,
An Improvement District,

Defendant and Respondent,

Number 9681

APPELLANT'S BRIEF

Appeal from Summary Judgement of the Third Judicial
Court of Salt Lake County, Utah
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(In explanation of the lack of cases cited, the point that on summary judgment pleadings in favor of appellant are accepted as true; and the point that summary judgment is a final judgment; are so well established, that I did not feel the need to cite cases. Failure to cite cases on other points raised is not because I have not made a search, but I just haven't found cases in point either way.)

IN THE SUPREME COURT of the STATE OF UTAH

ROY F. TYGENSEN,

Plaintiff and Appellant,

—vs.—

MAGNA WATER COMPANY,

An Improvement District,

Defendant and Respondent,

Number 9681

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is a case where Defendant assessed charges for sewer service, that Plaintiff contends are discriminatory.

DISPOSITION IN LOWER COURT

Defendants filed motion for summary Judgement and Judge Stewart M. Hanson denied Defendant's motion. Subsequently at a pre-trial Judge Ray Van Cott, Jr. granted Defendant's motion for summary judgment.

STATEMENT OF FACT

In 1941 the people of Magna, Utah, constructed and paid for a sewer system to serve the town, then consisting of approximately 1,000 homes, which will be referred to hereafter as the old town. This sewer system was then turned over to Salt Lake County who have since operated

the sewer system to serve the old town, up to January 1, 1961, when the same was sold to the Defendant for \$10.00. The Defendant has since that date operated the old sewer system.

Over the years, since 1941, the area immediately east of the old town developed by subdivision and otherwise to a point that there are now approximately the same number of homes as were in the old town (1,200).

These new homes could not hook onto the old sewer system because the disposal plant had reached its capacity, and Salt Lake County refused permission to hook onto the old system. They relied on septic tanks. The Board of health considered the matter a health hazard.

After a number of public meetings the people of the community persuaded the Defendant to expand its activities from its original purpose and activity as a water company serving the area, the old town and the new area, to expand its activities to include sewer service for the old and new area.

A bond election was called and a \$1,200,000.00 bond issue was authorized. The purpose to construct a new disposal unit, and construct sewer lines covering the entire new area. No monies were to be spent on new lines for the old town. The only benefit realized by residents on the old sewer system was that their sewage would be transferred from the old obsolete disposal plant to the new one. No other benefits were, or are now furnished residents on the old system. The disposal plant cost ap-

proximately \$400,000.00. All the rest of the bond issue was used for lines in the new area.

Prior to the Defendant obtaining the old sewer system, January 1, 1961, and on December 20, 1960, Defendant adopted a resolution as to rates and charges, requiring all those on the old system to pay \$3.00 per month service charges. No charges were made against the people in the new area.

The expense of operating the old system was never in excess of \$500.00 per month, or less than fifty cents per home. The \$3.00 per month charge resulted in those in the old system paying 50 cents or less for actual services rendered and paying \$2.50 per month, or more, to pay for the sewer system for the new part of the town. During the period from January 1, 1961 to date, people residing on the old system, (1200) have paid approximately \$65,000.00 for sewer service. Five-sixth of this has gone to pay for the sewer system in the new part of town.

During the same period, residents in the new part of town have paid nothing.

Plaintiff concedes that the residents of the old part of town should pay for the expense of operating the old system, (less than fifty cents per month) but contends they should not be required to pay for the new system until (1) the old system is hooked onto the new disposal plant, and (2) residents in the new part of town pay at the same rate as those in the old part. As of now, residents in the old part of town are still being served by the old disposal plant.

In January 1961, Defendant began billing residents hooked onto the old system \$3.00 per month sewer charges, which was included with their water bill, and Defendant adopted a resolution, that if the sewer bill was not paid, Defendant could and would shut off the water.

Plaintiff received his bill in January and immediately notified Defendant in writing that he did not intend paying the sewer charges in excess of actual expense for operation of the old system, and that in his opinion the charges were excessive, discriminatory and illegal.

No action was taken by Defendant in response to this letter, and Defendant continued to bill Plaintiff for sewer service at the rate of \$3.00 per month. Plaintiff has paid no sewer charges to date.

On November 27, 1961 Plaintiff received notice for the first time, that unless the back sewer charges were paid within ten days, his water would be shut off.

On December 7, 1961, the present action was filed.

On a motion filed by Defendants for summary judgment, heard by Judge Stewart M. Hanson, Judge Hanson on February 1, 1961, denied Defendants motion for summary judgment.

The matter was extensively argued by Defendant on the basis of 17-6-3:11, and particularly the following:

“For a period of thirty (30) days after the date of such publication (rate resolution) any person in interest shall have the right to contest

the legality of such resolution or proceedings or any *bonds* which may be authorized thereby or by the provisions made for the security and payment of any such *bonds*, and after such time no one shall have any cause of action to contest the regularity, formality or legality thereof for any cause whatsoever.”

On March 28, 1961, the matter came before Judge Ray VanCott, Jr., for pre-trial. Defendant again renewed his argument for summary judgment, using the identical argument presented to Judge Hanson. No new points were presented. In spite of the prior adjudication of the issue by Judge Hanson, Judge VanCott granted Defendants motion for summary judgment. No other matters were considered at the pre-trial.

This appeal followed.

ARGUMENT

It is conceded by Plaintiff that if this Court sustains the position of Defendant, that he is precluded by failing to file his suit within the thirty day period from the adoption of the resolution, then of course the issue as to the fairness of the rate is moot.

POINT 1.

THE STATUTE IN QUESTION DID NOT RELATE TO RATES, BUT TO BOND ISSUE.

17-6-3:10 and 17-6-3:12 both relate to protecting the party buying the bonds. It is Plaintiff's contention that the thirty day limitation contained in 17-6-3:11 relates to bond resolutions and not to rate resolutions.

The statute uses the word “*may*” as to publication of resolutions. Assuming that the word “*may*” made it discretionary, and they did not publish the resolution as to rates. What happens then to the thirty day limitation?

17-6-3:2 through 17-6-3:12 all relate to bond issuance. It seems only reasonable, the thirty day limitation should be restricted to resolutions as to bonds, and not rate charges.

POINT 2.

AT THE TIME THE RATE RESOLUTION WAS ADOPTED, DEC. 20, 1961, THE DEFENDANT DID NOT OWN THE OLD MAGNA SEWER SYSTEM, AND THEREFOR THE RESOLUTION COULD NOT APPLY.

On December 20, 1961, the old Magna sewer system was owned and operated by Salt Lake County. It is Plaintiff’s position that Defendant could not adopt a resolution regulating the rates to be charged on a system they did not own.

POINT 3.

DEFENDANT BY ITS CONDUCT IS ESTOPPED FROM NOW RAISING THE THIRTY DAY LIMITATION STATUTE.

For the sake of argument, assuming the thirty day statute applied to the rate statute, it is Plaintiff’s position that the Defendant by its conduct is precluded from now relying on the same.

When Plaintiff received his first bill for sewer charges in January, 1961, he notified Defendant by letter, January 30, 1961, that he objected to the charges. Other than billing Plaintiff each month along with his water

bill, Defendant did nothing as to demand, suit, or other action to enforce payment. It is Plaintiff's position that Defendant lulled Plaintiff into a sense of security that precludes Defendant now from relying on the thirty day statute of limitations.

POINT 4.

PLAINTIFF COULD NOT BE REQUIRED TO CONTEST THE LEGALITY OF THE RATE RESOLUTION UNTIL HIS RIGHTS WERE JEOPARDIZED.

Up until Plaintiff received official notice that unless the sewer assessments were paid, his water would be shut off, Plaintiff had the right to assume, after twelve months of no action by Defendant, that his position taken in the letter in January 1961 had been accepted, and no sewer charges would be enforced till those residing in the new part of town would also be assessed sewer charges, and until the new disposal plant actually began serving Plaintiff and the old sewer system.

Until such time as Plaintiff was actually injured, or given notice of impending injury (shutting off water) Plaintiff would have no standing in Court.

POINT 5.

THE THIRTY DAY LIMITATION IS IN VIOLATION OF ARTICLE I, SECTIONS SEVEN AND ELEVEN OF THE STATE CONSTITUTION.

On the well established principal that in a summary judgment all allegations of Plaintiff are accepted as true, and further assuming that the rates are excessive, discriminatory and illegal, then certainly the 2.50 per month

extra charge demanded by Defendant is taking property of Plaintiff, in violation of section seven of the state constitution.

It is Plaintiff's position that the constitutionality of a issue cannot be precluded by a thirty day statute of limitation; and that the the constitutional issue can be raised at any time.

POINT 6.

JUDGE VAN COTT EXCEEDED HIS AUTHORITY WHEN HE REVERSED THE PRIOR ADJUDICATION OF JUDGE HANSON ON THE SUMMARY JUDGMENT.

It is Plaintiff's position that Judge VanCott had no authority to act as a reviewing Court of a final adjudication made by Judge Hanson. Particularly in view of the fact that no new matters, either in law or fact were presented to Judge VanCott that were not presented to Judge Hanson.

Plaintiff contends that Judge Hanson's ruling was a final adjudication as to the issue of summary judgment and the thirty day statute of limitation. That Plaintiff could rely on that issue having been determined, and that Defendant was not entitled to a second chance, and in the event of trial a third chance, and on motion for new trial a fourth chance.

Defendants right to review was to this Court, not to another Judge of the third Judicial District.

Article 8 Section seven of the State constitution carries no provision for one district Judge sitting as review-

ing Court of another District Judge; nor does 78-3 of the statutes carry any such provision.

On the other hand Article 8, section 4 of the State Constitution provides that "The Supreme Court shall have appellate jurisdiction only."

78-2-2 of the statutes provide:

"In other cases the Supreme Court shall have appellate jurisdiction only; and in the exercise of such appellate jurisdiction, may review final judgments of the district court, and all final orders and decrees of the district court . . ."

I have been unable to find any power vested in one district court judge reviewing the final order of another district court judge. It is Plaintiff's position, Judge Hanson's ruling on the motion for summary judgment was a final order.

Defendant's recourse was that of appeal from that order to this Court, or presenting the issue to Judge Hanson for reconsideration. To hold otherwise would mean chaos in the third Judicial District where there are seven Judges; if you don't like Judge "A" ruling go to Judges B-C-D-etc., till you find one who agrees with your position in the matter.

The cases holding that a ruling on summary judgment is final adjudication are so numerous, Plaintiff feels support for this position by citing cases is not necessary.

No argument on the merit of Plaintiff's case is herein presented for the reason that neither Judge Hanson, nor

Judge VanCott considered that matter. Their hearing and ruling was exclusively on the motion for Summary Judgment.

CONCLUSION

That the lower Court committed error in granting summary judgment for the reason the thirty day statute of limitation did not apply to the issues herein involved; and if it did, Defendant is precluded from raising the same for the reason they did not own the sewer system when the rate ruling was adopted; and by their conduct are estopped from raising the same.

Further that Judge Van Cott's ruling was ineffectual for the reason the matter had been already determined by another Court, and Judge VanCott was without authority to review that decision.

Respectfully submitted this fifth day of July, 1962.

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