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Rulon R. West v. Terry R. West and Flora E. West : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH FILED

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RULON R. WEST,

Clerk, Supreme Court, Utah

Plaintiff and Appellant,

vs.

Case No.
9870

TERRY R. WEST and FLORA E.
WEST,

Defendants and Respondents.

APPELLANT'S REPLY BRIEF

Appeal From a Judgment of the Third District Court
For Salt Lake County
Honorable A. H. Ellett, Judge

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I

IN THE SUPREME COURT
of the
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Plaintiff and Appellant,

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APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

Respondent has either willingly misconceived or willfully misportrayed the proceedings in the trial court; and a reply seems warranted.

Notwithstanding the court granted a summary judgment with respect to construction of the partnership articles, respondents' counsel insists upon discussing the case as if there had been a trial of fact issues.

He refers at length to estoppel, good faith, reliance and fair dealing, none of which were presented to or passed upon by the trial court.

On page 6 of respondents' brief the following statement is found: "Rulon's counsel made no objections to any pleadings, admissions, affidavits, exhibits or any objections of any kind;" but beginning on page 96 of the record, (the hearing in which Judge Ellett granted the summary judgment) the following is reported:

"MR. SCHOENHALS: May we introduce that instrument into evidence and have it received into the evidence, the actual instrument itself that was delivered to Terry West, and have it marked and received?

"THE COURT: Is it admitted that the signature of Terry West and Rulon R. West appears on the document?

"MR. ROE: It is, but I have some defenses to this document your Honor and—well, I will move to reconsider.

"THE COURT: What defenses will you have?

"MR. ROE: Well, I have this defense for one thing, that this was—this is supposed to be a supplement to this agreement of—this purports to be agreement for consideration. This purports to be supplement to that agreement of dissolution. The partnership articles themselves provide that in anything other than ordinary day to day things that affect the business of the partnership, it has to be signed by all three parties unanimously.

"MR. SCHOENHALS: May we have that letter also received into the evidence, your Honor?

"THE COURT: The agreement—

"MR. ROE: *I am objecting to all of the evidence introduced here.*

* * * *

"MR. ROE: I want to state for the record, because I think that this record may have to go up, Judge—

"THE COURT: Yes, I would expect you to take it up.

"MR. ROE: —and I would like to state my position for the record that we have contended all along that the additional amounts that were paid by Rulon R. West to Terry R. West were not and never intended to be contributions to capital, that they were loans to the partnership, and that *the evidence in the case of a trial of this thing would so show.*

"THE COURT: Well, maybe I had better take the bench and let you put your evidence on. Do you have a motion before me?

* * * *

"MR. ROE: If the record does not support my motion for summary judgment and it appears that there are triable issues of fact, then the court should not grant my motion, and *they should set it up for trial of those triable issues.*

"THE COURT: I think with what he has shown me here that I should grant your motion for summary judgment and should determine that contract means, and I will here—

"MR. ROE: Well, I'm not—I *don't want to put on evidence where there are fact issues. You can interrogate counsel and find out what they are* I think, Judge, and I can tell you what those issues are (R. 98, 99).

* * * *

"MR. ROE: Well, the partners can loan money to the partnership, and the partnership act recognizes this. That has always been an issue as to what the character of those things are, and there just isn't anything in the record at all before you now as to what those were except they say he's put One Hundred Sixty-two Thousand Five Hundred into it. We say he lent the money to the partnership.

"MR. SCHOENHALS: Then you shouldn't have moved for summary judgment.

"MR. ROE: Oh, I can move for summary judgment on that because under my construction of the instrument they don't get anything anyway but *that doesn't take away from this case fact issues that are there* (R. 100)." [Emphasis added.]

Rulon's counsel consistently objected to the course of the proceedings, insisted that it was not a proceeding at which evidence should be taken, and asserted throughout that if there were issues *af fact* to be tried that the matter should be set for trial. Although there is nothing in the record, anywhere, to show that counsel consented to the trial judge trying the case as a factual matter, respondents have treated the case as if it were one that had been *tried*.

The hearing was on a motion for summary judgment and the only factual issue before the judge was whether there were disputed issues of material fact.

ARGUMENT

I

The rule that an appellate court will not reverse where there is sufficient evidence to sustain the trial court's position has no application to a summary judgment.

In his argument under Point I the respondent doesn't cite a single case and makes statements about the law and the effects of evidence which are contrary to the most rudimentary principles. For instance, it is stated that the fact that Rulon "agreed" to file a gift tax return constituted an "admission" and showed his intention "conclusively," but the statement disproves itself because the *agreement* shows that there was no gift. Moreover, an extra-judicial admission is evidential only, not conclusive, and even if the "supplemental agreement" was admissible as evidence of Rulon's intention, the trier of fact would have to determine the weight to be given to it on the question of "completed gift."

This court has held again and again that if there is dispute as to any material fact a summary judgment is not proper. *If* there had been a trial on the issues and *if* the trial court had then come to certain conclusions

with respect to the meaning of certain conduct of the parties, respondents might have been correct in contending that the findings, conclusions and judgment should be upheld if they were supported by sufficient evidence. But there was no trial despite the trial court's attempt to compel the parties to go to trial *eo instanti* on questions raised in the argument. The appellant, as he had a right to do under procedural rules, refused a trial at that point, relying upon Rule 56(c), Utah Rules of Civil Procedure to the effect that judgment will be granted only if "there is no genuine issue as to any material fact" and a party is entitled to judgment as a matter of law.

II

Filing a motion for summary judgment does not deprive the moving party of a right to trial of fact issues.

The respondents argue under Point II that the appellant "represented" to the court that there was no genuine issue of fact¹ and that this, coupled with the circumstance that he had made no denial of an affidavit filed in behalf of Terry West, required the lower court to accept "all evidence" as true and resolve the issues in accordance therewith.

It is obvious that the court couldn't accept all of the evidence as being true because the evidence was

1. Appellant also "represented" to the court that he was entitled to judgment as a matter of law, but this representation apparently wasn't binding on anyone.

conflicting, and the conflict had to be resolved by a trial. The trial court could not, in a summary judgment hearing, choose which evidence was to be believed. Although both parties move for a summary judgment there is no implied consent that the court proceed to try factual issues. See 6 *Moore's Federal Practice*, par. 56.13.

"The function of a motion for summary judgment is analagous to that of a motion for directed verdict. Although all parties move for directed verdicts that does not warrant the court in withdrawing the case from the jury if there is any genuine disputed issue of fact.

"A parallel principle is applicable to the summary judgment procedure. The well-settled rule is that cross-motions for summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed.

"(1) A party, to be entitled to summary judgment, has the burden of showing that the facts, which would warrant judgment in his favor under applicable substantive law principles are indisputable. *It does not follow from a party's failure to meet that burden, that his adversary has satisfied a similar burden as to the facts which would entitle the adversary to summary judgment.* * * *

"(2) There may be no dispute as to the facts which would justify judgment for one party on a particular legal theory, although there may be a dispute as to the facts which would justify judgment for the adverse party. * * *

“Where, then, it is clear that there is no dispute as to the facts which would justify judgment for one of the parties, the court may properly sustain his motion, including an oral motion made at the hearing; and, even in the absence of a formal motion, may grant summary judgment to a party when it is clear what the facts are and his adversary has had a fair opportunity to dispute them. On the other hand, *if it is not clearly established that there is no dispute* as to the facts which would justify judgment for one of the parties, then *the court may not properly grant him judgment even though each side has moved for summary judgment* in its favor. And this rule applies whether the case is a ‘jury’ action or a ‘court’ action.” [Emphasis added.]

The following statement from *Begnaud v. White* (6 Cir., 1948) 170 F.2d 323, supports and is quoted by Professor Moore:

“The fact that both parties makes motions for summary judgment, and each contends in support of his respective motion that no genuine issue of fact exists, does not require the court to rule that no fact issue exists. * * * Appellant’s concession that no genuine issue of fact existed was made in support of its own motion for summary judgment. We do not think that the concession continues over into the court’s separate consideration of appellee’s motion for summary judgment in his behalf after appellant’s motion was overruled.”

See, also, *F.A.R. Liquidating Corporation v. Brownell* (3 Cir., 1954) 209 F.2d 375, another case in

which both parties had moved for summary judgment. The court said:

“F.A.R. also contends that since defendant cross-moved for summary judgment, it is now precluded from questioning the propriety of disposing of the case upon such a motion. But, it is well established that cross-motions for summary judgment do not warrant the trial court granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed.”

Hycon Manufacturing Company v. H. Koch & Sons (9 Cir., 1955), 219 F.2d 353, was an action for infringement of letters patent. Upon cross-motions for summary judgment the court had before it documentary evidence relating to patent infringement; it granted summary judgment for plaintiff, made findings of fact and conclusions of law, and entered judgment. In reversing, the Court of Appeals said:

“The trial court exceeded the permissible limits of determination of disputed questions without trial. A motion for summary judgment cannot be granted simply because both sides move for it. An indispensable pre-requisite to such a judgment is the absence of a material question of fact. But it is obvious that there were postulates of fact involved in the diametrically opposite positions of the respective litigants. Both contentions of fact could not be true.

“It is then said the proof was documentary and was all before the trial court. If this were conceded, there were still questions of fact to

be resolved which an appellate court is not permitted to adjudicate. * * * The existence of the basis of fact in documentary form or in agreed statement of the parties does not transmute such propositions into questions of law.”

We have been unable to find any case in which counsel has been estopped from claiming certain facts to be in dispute because of a prior statement in a motion for summary judgment that there were no genuine issues as to material facts.²

III

The issues raised by appellant in this case were raised before the trial court.

In point III of their brief, respondents seem to say that the only defense raised by Rulon was lack of consideration, and that it is now too late to raise any other question as to the propriety of the trial court's ruling. If that is what they are saying, they are again engaged in writing fiction.

The transcript of the summary judgment hearing records appellant's contentions that the “Supplemental Agreement” was not effective as a deed of gift because it could not be construed as relating to anything except “contributions” and did not describe what was supposed to have been given (R. 98, 99) ; that it purported

2. The statement is merely formal, in any event. The motion for summary judgment incorporated language from Rule 56 and set forth the grounds upon which a summary judgment may be granted.

to be part of a supplemental agreement for consideration (R. 96); that agreed consideration was never delivered (R. 102); and that Rulon was induced by the undue influence of Terry's lawyer to sign the "supplemental agreement" at a time when the lawyer knew plaintiff, under great pressure, was in a hurry to make an important trip (R. 102). The contention was made clear to the trial court that the "supplemental agreement" was not good as a contract because there is no consideration, and not good as a gift because there was no adequate description of the property being given. Moreover, there was no donative intention since the instrument shows on its face, and the affidavit and answer of Terry show on their faces, that the document was one part of a larger transaction entered into with respect to dissolution of the partnership. The defenses (except undue influence) were also raised by Rulon's reply to Terry's counterclaim (R. 32, 33). Questions as to construction of the articles of partnership were raised by the complaint.

IV

Terry's affidavit cannot be accepted as proof of disputed facts.

Respondents place a greater reliance on Terry's affidavit than is warranted by the affidavit itself, the law relating to affidavits, or Terry's lack of credibility as demonstrated by his deposition. The summary judgment was entered by the trial court on the basis of

depositions, interrogatories, and pleadings in the file (R. 107), as well as the affidavit. Terry could not, by filing an affidavit, escape from the testimony recorded in his deposition, and establish as “admitted” factual matters which had been expressly denied by Rulon in his deposition. The affidavit’s only purpose was to show the existence or non-existence of a dispute as to material facts. As stated by the Court of Appeals for the third circuit in *F.A.R. Liquidating Corp. v. Brownell*, 209 F.2d 379, cited *supra*:

“F.A.R. argues on appeal, however, that there is not the slightest doubt that Fernseh’s June 14th cable was dispatched prior to 1:10 p.m. As ‘clearly proving’ this contention F.A.R. relies heavily on a detailed affidavit from an expert from R.C.A. Communications, Inc., wherein the opinion is rendered that the cable was transmitted before 1:10 p.m. on June 14. But, although an affidavit filed in support of a motion for summary judgment may be considered for the purpose of ascertaining whether an issue of fact is presented, it cannot be used as a basis for deciding the fact issue. *Frederick Hart & Co. v. Recordgraph Corp.*, 3rd Cir., 1948, 169 F.2d 580. In addition, it is obvious from a reading of the affidavit that it is nothing more than an opinion. Summary judgment on such evidence is improper.”

The above statement of the rule is consonant with the language of the rule itself respecting the requirements for affidavits. Rule 56(e), Utah Rules of Civil Procedure, provides:

“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. * * * ”

Terry’s affidavit is filled with conclusions, opinions, and hearsay declarations, and there is no showing (affirmative or otherwise) that Terry was competent. For example, he states that his agreement to sign the dissolution was “conditioned” upon Rulon signing the agreement identified as Exhibit No. 1; that plaintiff “understood and agreed” that Exhibit 1 constituted a transfer; that plaintiff “verified” the fact to another member of the family; that plaintiff “indicated” that he would receive back only 40%; that it was the “intention” of plaintiff and defendant and that both parties “understood and agreed” that the distribution would be in a certain way; that it was “the intention of the parties” that, should the partnership be terminated, distribution would be as contended by the respondent—and so on. The statements contained in the affidavit would be completely inadequate to support a summary judgment even if most of them were not controverted by other statements of fact contained in the depositions of Terry R. West, Flora E. West and Rulon R. West—which they in fact are.

CONCLUSION

The respondents were not entitled to summary judgment. There is evidence that the original partnership agreement was prepared by Terry R. West, a fact which would be considered by the trier of fact in resolving any ambiguities in the agreement. The contemporaneous construction by the parties themselves is also an important fact. A fact-trier would have to consider the fact that capital accounts were carried for Rulon R. West and Flora E. West and Terry R. West in the accounting system set up by Terry; that amounts paid into, or lent, to the partnership by Rulon were credited to him, and were not transferred by Terry to himself and Flora until there was a falling out. Moreover, all amounts lent to the partnership by Flora were paid back by Terry, with interest at 8%. (R. 53).

With respect to the dissolution agreement, there are questions of fact as to the signing of the agreement by Flora, whether the agreement ever became effective, and the negotiations bearing upon construction of the term "liabilities to partners" in the portions of the agreement requiring repayment of such liabilities prior to distribution of the "net assets."

With respect to the so-called supplemental agreement there are questions of fact relating to the intention of the parties in signing it; whether part of the agreement was for Terry to buy Rulon's interest within a specified time after signing of the supplemental agreement; whether it was intended to be part of the disso-

lution agreement; whether it was ever acquiesced in by Flora prior to the time it was repudiated by Rulon; whether Terry's attorney exerted undue influence on Rulon in getting him to sign the agreement in the first place.

In the trial court Rulon contended that the partnership agreement was clear enough, particularly in light of the contemporaneous construction by the parties, that the court would have to conclude that the 40-40-20 distribution would be of the assets of the partnership remaining after "winding up" of the partnership and the payment of all partnership liabilities, including liabilities to partners.

The so-called supplemental agreement signed by Rulon and Terry (but not by Flora) is consistent with this construction. Whether Terry and Flora receive all contributions of Rulon, or only the initial contributions, or whether they only receive a share of profits, it could be treated by the parties as a "gift" under the terms of the supplemental agreement. But that agreement never did define what was being "given." It referred to the "contributions"—whatever they were. The court through some kind of wizardry was able to find in that agreement a gift to Terry West and Flora West all of the moneys that had ever been put into the partnership, by way of contribution, loan, advancement, or what have you, from the beginning of the partnership to the date of the agreement by Rulon—all without any trial with respect to the circumstances

under which the agreement was signed and the intention of the parties in signing it.

We submit that the case should be reversed and the court directed to enter judgment that distribution of the partnership assets on a 40-40-20 basis should not be made until repayment of all liabilities to the partners, particularly contributions to capital and loans to the partnership, as well as interest earned by the capital contributions and loans. If the court feels that the agreement is not clear enough in this respect, the case should nevertheless be sent back to the trial court for a trial of issues relating to construction of the agreement and the dissolution agreement, and the circumstances under which the so-called supplemental agreement was signed by two of the three partners.

Respectfully submitted,

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