1968

United Factors, A Corporation v. T. C. Associates, Inc., A Corporation, And Harry R. Ulmer, Jr., Paul J. Sugar, And Sam Herscovitz : Brief of Respondent

IN THE SUPREME COURT
of the
STATE OF UTAH

UNITED FACTORS,
a Corporation,

Plaintiff and Respondent,

vs.

T. C. ASSOCIATES, INC.,
a Corporation, and
HARRY R. ULMER, JR.,
PAUL J. SUGAR and
SAM HERSCOVITZ,

Defendants and Appellants.

BRIEF OF RESPONDENT

Appeal from the Judgment of the
of Salt Lake County
Hon. Joseph G. Jeppson,

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Ogden, Utah
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IN THE SUPREME COURT
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T. C. ASSOCIATES, INC.,
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HARRY R. ULMER, JR.,
PAUL J. SUGAR and
SAM HERSCOVITZ,
Defendants and Appellants,

Case No.
11022

BRIEF OF RESPONDENT

STATEMENT INCONSISTENT WITH THE FACTS

Respondent controverts the following statements:

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Judgment (57-58) was not granted upon oral Motion but was based on the affidavit of Alvin I. Smith (R. 46-47).

The relief sought is more than a reversal of the Order (R. 54); Appellant is attempting to have the judgment declared null and void and set aside.

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Respondent denies there was any oral modification of the guaranty either as to amount or as to accounts. The guarantees (R. 25-28, Ex. B attached to R. 21) were unlimited in amounts and appellant agreed: "That the terms and conditions hereof can in no wise be limited or without your (respondent's) written consent."

The guarantees explicitly were to cover any account factored with the respondent arising out of sales made prior to or after the date of execution.

Respondent disputes that the appellants did not consent, accept or authorize the assignment of Evans and Black Carpet Mills account to respondent. The guarantees acknowledge liability thereunder upon the Factor's acceptance of any assignment or transfer of an account receivable of a sale evidenced by an invoice.

It must be emphasized that only the statements of Mr. Vlahos in his agreement to Judge Jeppson (R. 66, lines 21-24) raise the spurious claim that the guarantees were limited to $10,000.00. The guarantees themselves (R. 25-28) are unlimited as to dollar amount. Mr. Herscovitz' affidavit (R. 46) has no mention of a $10,000.00 limit, but on contrary reads: "That at the time of the signing of said stipulation your affiant believed that the law was such that he would be obligated for the entire amount due and owing the plaintiff *rather than the amount that he signed as a guarantor*" (emphasis ours). We repeat, he signed no amount.

Although a summons was accepted by Mr. Vlahos, the judgment is based on filing of a complaint, the appearance of the defendants through their attorney, by filing a motion to set aside default (R. 13-14) and a petition that "each of the defendants, in the interest of justice, be given an opportunity to file their responsive pleadings". A complaint had been furnished to Mr. Saperstein by plaintiff's counsel when counsel was advised of Mr. Vlahos' incapacity. Plaintiff's counsel did not resist the motion and prepared the Order Setting Aside the Default and Vacating Judgment (R. 20), in which Order the Court further ruled the defendants had entered their appearance and granted them additional time to August 2, 1966 in which to file an answere. The answer (R. 29-34) was filed for appellants on August 17, 1966.

Page 4:

When the motion to set aside the default was filed, steps to have the receiver qualify were discontinued and counsel for the parties, together with other counsel for creditors, attempted to find a solution to T. C. Associates' financial difficulties. An attachment was made by another creditor which resulted in the corporation on July 28, 1966 filing a petition for arrangement under Chapter XI under the Bankruptcy Act. The arrangement was approved, but several months later when the debtor could not meet the terms proposed by it, it was on its own petition adjudged a bankrupt.

Page 5:

Respondent disputes the conclusions that there was no consideration. Mr. Saperstein did not withdraw as attorney "shortly thereafter". From September 19, 1966 until July 25, 1967 he continued to serve as appellants' attorney; during this ten month period, and particularly after April 1, 1967, when the balance was to be paid, it was only as a professional courtesy to Mr. Saperstein that the provisions of the stipulation were not enforced. When he was unsuccessful in securing a further extension of the last payment, after contacting United Factor's officials directly, did he withdraw.

The stipulation (R. 51, 52, 53) does not provide that all payments made by appellant were to apply on the Bailey-Schmitz account. Both appellants agreed to make payments to apply against both accounts; any dividends received from the Chapter XI proceeding were to apply first against E & B Carpet Mills, Inc. and the balance against Bailey-Schmitz.

Page 6:

Counsel for appellants has not only misstated the above facts, but is deficient in his arithmetic.

According to the stipulation, if payments had been made as agreed on April 1, 1967, a final payment in the sum of $3,973.12 would have paid the account in full.

Unpaid principal balance	2,736.54
Interest to April 1, 1967	747.68
Attorney fees	500.00
	3,973.12

By failing to comply with the terms of the agreement a judgment was entered for:

Unpaid Principal	2,736.54
Interest to July 17, 1967	979.12
Attorney's fees	2,000.00
Court Costs	20.00
	5,735.66

It is thus clear that the agreed fee of $2,000.00 and not $2,500.00 was incorporated in the judgment. This fee was not based on an unpaid amount of $2,736.24 but was an agreed amount to pay part of the respondent's reasonable legal expenses incurred to collect $18,643.45 for which the appellants were responsible under the following provisions of the guarantees:

> "The undersigned further agrees that his liability to you hereunder shall be primary and that he (they) will pay to you on demand without deduction by reason of offset, affirmative defense or counterclaim of said customer and without previous recourse by you to your remedies against customer, *together with reasonable legal expenses* as may be incurred by you, all sums of money which may be due or grow due for merchandise sold or hereafter sold to the customer". (Emphasis ours)

STATEMENT OF FACTS

Because the record is not in chronological order, we believe it would be helpful to summarize by dates the essential parts thereof.

May 4, 1965. Agreements of Guarantee signed by Appellants, Herscovitz and Ulmer. (R. 25-28)

April 5, 1966. Letter signed by T. C. Associates, Inc., Harry R. Ulmer, Jr., and Sam Herscovitz, in which the corporation acknowledged that there was due and owing $18,643.45 to the respondent and all parties agreed to pay the same in four installments by June 30, 1966. (R. 23-24)

June 8, 1966. Complaint filed. (R. 1-2)

June 30, 1966. Judgment by default for $13,643.45, interest of $530.23, Attorney's fees of $2,000.00 and costs. (R. 37)

July 7, 1966. Motion to Set Aside Default and Vacate Judgment and Order Appointing Receiver. (R. 14) Under Paragrah 7 of said Motion, Mr. Saperstein alleged that the defendants, Ulmer and Herscovitz, have a meritorious defense to all or a portion of plaintiff's claim "by reason of the fact that the guarantee alleged in plaintiff's complaint extends, by its terms, to only a portion of the claim sued by said plaintiff." (R. 13-14)

July 27, 1966. Order setting aside Default and Vacating Judgment. In this Order the Court ruled defendants had entered their appearance and ordered them to file an answer by August 2, 1966. (R. 20)

July 28, 1966. Petition filed by T. C. Associates for an Arrangement under Chapter XI of the Bankruptcy Act.

August 8, 1966. Motion for Summary Judgment. (R. 21)

August 17, 1966. Answer of Defendants Harry Ulmer and Sam Herscovitz filed. (R. 29-34)

September 19, 1966. Stipulation of Alvin I. Smith, Herschel Saperstein, Harry Ulmer and Sam Herscovitz. (R. 51-53)

April 7, 1966 to February 27, 1967.

Payments against original principal claim of		$18,643.45
April 7, 1966	5,000.00	
September 20, 1966	3,000.00	
October 6, 1966	1,317.88	
November 7, 1966	1,317.88	
December 6, 1966	1,317.88	
January 6, 1967	1,317.88	
February 7, 1967	1,317.88	
February 7, 1967	1,317.88	
		15,907.28
		$ 2,736.17

July 25, 1967. Motion to Set Aside Stipulation to File Amended Answer and Counterclaim. (R. 43-47)

August 16, 1967. Affidavit of balance unpaid. (R. 55-56)

August 17, 1967. Judgment. (R. 57-58)

STATEMENT OF POINTS

Point 1. The Trial Court did not abuse its discretion in denying appellants' motion to amend its answer and counterclaim and set aside a stipulation entered into between the parties and their respective counsel made more than nine months after the date of the stipulation.

Point 2. There was consideration whether the stipulation be deemed to be an accord and satisfaction or a compromise and settlement of the claims of the respective parties.

Point 3. All triable issues of fact had been resolved and there was no issue of law.

Point 4. The defenses of misjoinder or claims and parties is inapplicable when, as here, there was but a single claim by a single plaintiff.

Point 5. The Court had jurisdiction to enter judgment.

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' MOTION TO AMEND ITS ANSWER AND COUNTERCLAIM AND SET ASIDE A STIPULATION ENTERED INTO BETWEEN THE PARTIES AND THEIR RESPECTIVE COUN- AFTER THE DATE OF THE STIPULATION.

Appellants are asking the Court to reverse the Trial Court's denial of a Motion to Vacate the Stipulation and for leave to file a Counterclaim and Amend Complaint (R. 43) after they have filed an answer to a complaint asserting defenses and denying personal liability as to one of the counts and after a Stipulation (R. 51) by the parties and their

counsel in which appellants admit personal liability on all counts of the complaint.

Appellants contended that the case of *Harmon vs. Yeager, et al,* 110 P. 2d 352, sets forth the applicable law on amendments in the State of Utah and claim the facts in this case are on all fours with the facts in the case here on Appeal.

We agree that the law cited therein is controlling. Appellants quoted from the court in *Harman vs. Yeager, supra,* as follows:

> "Viewing the motion therefore as a speaking demurrer, when the answer was held to be had and the defendants sought to amend, they should have been granted such right *unless under the facts admitted there was no reasonable probability that they could state a defense or make an issue on a matter material to plaintiff's cause of action.* (Emphasis added)

The court in reversing the judgment of the trial court granting a judgment on the pleadings observed:

> "We think these matters, while perhaps not constituting a positive denial of plaintiff's allegations, certainly cannot be said to be an admission of plaintiff's claims. They manifest an effort to join issue, and when leave to amend was asked the court should have granted the same."

In the instant case, after joinder of the issues, appellants admitted liability on all counts of respon-

dent's complaint in the stipulation signed by the parties and their attorneys, while in the case of *Harman vs. Yeager*, the pleadings, i.e. complaint and original inarticluate answer, joined issue on matters which had not then been resolved.

Since all of respondent's allegations were admitted in the Stipulation there was no reasonable probability that appellants could state a defense and the Motion to Amend was properly denied. In fact, in the present case appellants had an opportunity to and did deny liability as to the E & B Carpet Mills account in their answer (R. 32), while in the Stipulation (R. 51) they admit personal liability to that debt. Appellants should not be allowed to constantly traverse their own personal liability to that debt. Appellants should not be allowed to constantly traverse their own position in order to suit their then present desires.

None of the cases cited by appellants involved the granting of a Motion to Amend following the entering of judgment pursuant to a stipulation which was entered into after the suit had commenced, issues joined, and the case was ready for trial and research has revealed no such cases to respondent.

Further the additional cases listed by appellant are distinguishable as to the facts and the law relied on.

Respondent agrees with the geenral principles

enumerated in *Johnson vs. Brinkerhoff, et al,* 57 P. 2d 1132, but submits that the sentence immediately following the quotation cited by appellants is more applicable to the facts here on appeal:

> "On the other hand it has been said that well-established principles and precedents are not to be lightly set aside, and that amendments are to be allowed in furtherance of justice and not as a reward for indifference or neglect, or where prejudicial to the rights of the adverse party or placing him at an unfari disadvantage. Further, the liberality exercised in allowing amendments is greatest at the time the law suit is commenced and decreases as the suit progresses, and the rule granting amendments changes to the disadvantage of applicant upon each new amendment being allowed."

A settlement by stipulation is a termination of litigation and highly favored in the law and once executed by the parties and their counsel, liberality toward amendments ceases, for litigation has ceased.

The case of *Johnson vs. Peck,* 63 P. 2d 253, stands for the proposition that a trial court does not abuse its discretion in refusing to allow amendment after trial and submission of the case. The court in *Johnson vs. Jeck, supra,* observed:

> "The policy of the law is toward liberality in the allowance of amendments and to regard them with favor to the end that the real controversy between the parties may be settled. The liberality is greatest at the time suit is commenced and decreases as the suit pro-

gresses. The Trial Court has a broad discretion in the matter of amendments to pleadings. 49 C. J. 466, 520; *Johnson vs. Brinkerhoff* (Utah) 57 P. (2d) 1132. Where amendments to pleadings are offered so long after trial and submission of the case, and after decision of the court is announced, the parties offering such amendments have no standing to complaint if their offer is refused. The Trial Court did not abuse its discretion in refusing the filing of such paper."

Since the compromise and settlement of a claim reduced to writing, signed by the parties and their counsel and made part of the record is as much a final disposition of litigation as a judgment after trial and highly favored in the law "to secure the just, speedy and inexpensive determination of every action" Rule 1 (d), the Trial Court has not abused its discretion and appellants have no standing to complain under the rationale of *Johnson vs. Peck, supra.*

Appellants cite the case of *Hancock vs. Luke, et al,* 148 P. 452. In that case, however, immediately after the court ruled sustaining plaintiff's Motion for Judgment, defendant's counsel asked for leave to amend his answer.

Respondent would agree that a request for leave to amend at that stage of the proceedings was timely. However, immediately following the portion quoted by appellants, the court observed:

"*Nor can we conceive how any one can*

say in advance that in this case at least a partial defense may not be set forth by a proper amendment to the answer. Nor can we see how it can successfully be contended that the motion for leave to amend was not timely made, or that prejudice or undue delay will result if allowed." (Emphasis added.)

In the instant case not only was the Motion to Amend not timely in that it was made one year after the original answer, almost 10 months after the stipulation had been executed and the appellants had made payments thereunder, but the trial court before which appellant made its Motion to Amend and Vacate the Stipulation could say in advance that no defense could be interposed, for appellants had admitted respondent's entire case in the stipulation (R. 51) and on previous occasions. In addition, respondent would be greatly prejudiced in that it had relied to its detriment on the executed stipulation for an extended period of time without proceeding to trial on the merits.

POINT II

THERE WAS CONSIDERATION WHETHER THE STIPULATION BE DEEMED TO BE AN ACCORD AND SATISFACTION OF A COMPROMISE AND SETTLEMENT OF THE CLAIMS OF THE RESPECTIVE PARTIES.

Appellant quotes 1 C.J.S.—Accord and Satisfaction, Section 4, Page 473. This section contains in addition the following:

"This is all that the law requires by way of consideration, and broadly speaking, whereever a creditor receives from a substituted

contract a distinct benefit which he otherwise would not have had, such benefit is sufficient to uphold the accord and satisfaction."

P. 475 — "Where the claim or demand constitutes the subject matter of the accord is a disputed one, or unliquidated, the mere adjustment of the dispute or agreement of accord affords, *of itself*, sufficient consideration for the accord, whether or not the latter has been actually executed and satisfaction had; *and it may be added that it is ordinarily the only consideration in such case.*" (Emphasis added)

Respondent agrees with the principles stated above, and assuming the stipulation was an accord and satisfaction, submits that there was consideration within the meaning of those principles last above referred to.

Appellant cannot now maintain that the claim was not disputed, for in answer to respondent's complaint, appellants denied personal liability as to the E and B Carpet account (R. 31), entered into a stipulation admitting personal liability as to both accounts (R. 51) and then after default under the terms of the stipulation sought to set aside the stipulation on the ground that the personal guarantee was made as to the Bailey-Schmitz account and not to E & B Carpets. (This is the same disputed matter raised by appellant prior to the execution of the stipulation). Thus since there was a real dispute, the settlement thereof constituted "sufficient consideration for the accord". 1 C.J.S., 475.

The paragraph above stated was followed by the court in *Laws vs. Parker Petroleum Company*, 237 S.W. 2d 398 (1951) which observed:

> "An accord is an agreement for the discharge of an obligation. The execution of this agreement is a satisfaction. Such an agreement must be based upon a valid consideration. *The settlement of a claim, liquidated or unliquidated which has been disputed in good faith is of itself sufficient consideration to support the agreement.*" (Emphasis added)

Appellants cite *Metropolitan State Bank vs. Cox, et al*, 302 P. 2d 188, for the proposition that an accord entered into as a result of a mistake of one of the parties results in a lack of meeting of the minds and hence an absence of consideration.

We submit that the following facts present in this case demonstrate a distinction from the above case in that no mistake of fact or law exists.

In spite of the fact that counsel for Appellant, and Appellant Herscovitz, by affidavit (R. 46-47) attempted to convince Judge Jeppson and are now urging to this Court that the stipulation and particularly the substance thereof was entered into without full disclosure of the facts to counsel, the record and the background, prior to the stipulation, demonstrate that from the very beginning Appellants have had every opportunity to protect their legal rights. The Trial Court in refusing to vacate the stipulation quickly reached this conclusion after having reviewed the file:

> "You are not telling me your clients made a mistake. In fact you say they failed to communicate to their attorney. I cannot get into the question of how much a client tells his attorney. I have got to assume the attorneys are fully informed by their clients." (R. 70, L. 17-21)

The following events demonstrate that the client had full opportunity to advise their counsel and everything points to the fact that they had previously advised counsel of every defense they might have had.

Before the letter of April 5, 1965, which was signed by all of the parties, a full discussion of the claim of $18,643.45, plus attorney's fees, was had with respondent's counsel. Prior to June 13, 1966 when Mr. Vlahos was incapacitated, on June 1, 1966, he (Vlahos) after telephoning, wrote counsel for respondent. We quote applicable parts thereof:

> "This will confirm your conversation with me by phone on May 26th, 1966 — pursuant to said conversation please be advised that in addition to the $5,000.00 already paid on this account an additional $5,000.00 will be paid on or before May 31st or June 1st, 1966, and an additional $5,000.00 on or before June 30th, 1966 an dthe balance of $3,643.45 will be paid by July 15, 1966."

We must assume that at this time his client, Mr. Herscovitz, had discussed the facts of the case with him or he would not have taken it upon himself to acknowledge this obligation.

Appellants' former counsel, Mr. Saperstein, in his motion to set aside the default and vacate judgment (R. 13-14) sets out in great detail a summary of the defenses the parties defendant had to the claim. All of the reasons now being advanced by present counsel to vacate the stipulation were summarized in this motion and were discussed informally by Mr. Saperstein with respondent's counsel. The issues raised were:

1. The guarantee applied only to a portion of the claim.

2. The guarantee did not include the Evans and Black Carpet Mills account.

3. The written garantee could be modified by an oral agreement.

4. The right to attorney's fees.

5. The right to setoffs.

Although respondent's counsel did not agree that legally the guarantors could prevail either in law or fact on the above issues, he did agree that defendents should have their day in court by having the court vacate the judgment.

The day after the above motion was filed the corporation represented by Mr. Saperstein filed a petition for an Arrangement under Chapter XI of the Bankruptcy Act; under the plan proposed, the entire claim was to have been paid by April 1, 1967.

In addition, the mistake of fact purportedly

made by appellants and supposedly not communicated to their attorney, is that the stipulation obligated them to pay "in excess of their guaranty" (R. 67); this was specifically raised by their attorney. In answer to the complaint their attorney pleaded an affirmative defense to part of the claim when he observed:

> "It was further represented by plaintiff to these defendants at the time of the execution of said agreement of guarantee that the only factored account to which said agreement of guarantee would apply was that of Bailey-Schmitz." (R. 31)

Defendants' counsel thereafter urged that there was no reason to argue the case under the Motion for Summary Judgment or to set the case down for trial because payment would be made in due course, and under any circumstances the individual appellants would agree to make the payments as later arranged in the stipulation and could then recoup them from the dividends paid by the bankruptcy court. When the final draft of the stipulation was prepared by appellant's counsel, it was distinctly understood by all of the parties that all of the above issues were being resolved in the same manner as they could have been either at the conclusion of a hearing on the Motion for Summary Judgment, or on a settlement approved at a pretrial.

In order that there could be no misunderstanding of the terms of settlement, a conference was ar-

ranged in the offices of Mr. Ulmer at which meeting both appellants and both counsel were present. It is true that Mr. Herscovitz argued at great length against the final agreement, which was reached after a half day session. So that there would be no question that the stipulation conformed with the understanding of the principals involved, both counsel insisted that Ulmer and Herscovitz sign the same individually and be named as parties to the stipulation.

Only after they had made payments according to the terms of the stpulation from September, 1966 to February, 1967 (R. 56) did appellants seek to avoid the stipulation. After Mr. Saperstein withdrew having advised them that they were obligated to pay the balance under the terms of the stipulation, if they wished to avoid the entry of a judgment against them (R. 65-66), through new counsel they asked the trial court to believe that they entered into the stipulation under a mistake of fact, again traversing their previous position.

A reading of the transcript indicates that Judge Jeppson was particularly interested in being advised what new matters existed and could be asserted in an amended answer. We submit that neither by affidavit nor by the responsive answers of Mr. Vlahos has a single new issue being raised that was not previously raised and discussed and then resolved by the stipulation.

The purpose in attempting to set aside the stip-

ulation was so that the judgment provided therein could not be entered. The provisions of Rule 60 (b) therefore apply. Judge Jeppson so applied them, but appellants have failed to supply any reason such as mistake, excusable neglect, newly discovered evidence, fraud, or any other customary ground. In view of the record, the trial court's position should not be reversed for there can be no mistake of fact claimed by one who asserts the same defense before and after the execution of a stipulation.

With the principles cited by appellant in *Brown vs. Equitable Life Association*, 72 P. (2d) 1060, we fully agree, but the court further observed:

> "*There must be consideration for the agreement. Settlement of an unliquidated or disputed claim where the parties are apart in good faith presents such consideration.*" (Emphasis added.)

The court reasoned that there was not accord and satisfaction because the claim "was filed and paid in accordance with the demand with no dispute". On the other hand, they observed that:

> "If a dispute between the parties had arisen regarding this matter of partial and liability, and was before the court, and the plaintiff had then agreed to the settlement of July 2, 1934, it would have been an accord and satisfaction."

Again, we agree with the general principles quoted by appellants in *Ralph A. Badger & Co. vs.*

Fidelity Building and Loan Assn., 75 P. 2d 669, but the court again repeated the following rule:

> "There must be consideration for the agreement. Settlement of an unliquidated or *disputed* claim where the parties are apart in good faith presents such consideration." (Emphasis added.)

In the Badger case the court states that plaintiff relied upon information given it by defendant and "until it received information other than that furnished by defendant, it had no basis upon which to predicate a dispute."

We have pointed out previously that there was a genuine dispute, contested issues pleaded and a settlement thereof by stipulation. It pushes credibility to believe that appellant could now urge the parties had no good faith dispute as to the amount of the claim owed by appellants to respondent and the court should find consideration in the settlement of a disputed claim.

Respondent submits that the stipulation was really a compromise and settlement of a disputed claim and that the line of cases under this category are controlling rather than cases involving accord and satisfaction. In *Achtel vs. Lieberman*, 141 N.Y. S. 2d 750 (1956) the court observed:

> "To permit settlement so made to be vacated except upon a showing of good cause therefor, such as fraud, collusion, mistake, accident or some other ground of the same na-

ture — would open the door to possible abuse and make litigation interminable —. The following language of the case of *Kaipinshi vs. Kaipinshi,* 130 N.Y.S. 2d 364, 366, is aptly persuasive here:

> 'The plaintiff is bound by the stipulation and it is valid and enforceable. The courts look with favor upon agreements and stipulations to end litigation, and will enforce them if possible —. In fact, it is the duty of the court to enforce the stipulation in this case'."

In *Opitz vs. Hayden,* 17 Wash. 2d, 347, 135 P. 2d 819, the court observed as to compromise and settlement:

> "The real consideration which each party receives under such a compromise is, according to some authorities, not the sacrifice of the right, but the settlement of the dispute."

Utah makes a distinction without real significance between accord and satisfaction and compromise and settlement in that with both if there is a disputed claim, the consideration required is supplied through the settlement of that dispute. *Brown vs. Equitable Life Assoc. Soc., Supra.*

Under either accord and satisfaction or compromise and settlement since there was a good faith settlement of a dispute, that settlement presents the required consideration.

POINT III

ALL TRIABLE ISSUES OF FACT HAD BEEN RESOLVED AND THERE WAS NO ISSUE OF LAW.

Appellant cites *Bauer vs. Pacific Financing Co.,*

383 P. 2d 347, for the proposition that on a Motion to dismiss doubt should be resolved in favor of the pleader in order to allow him an opportunity to present his proof. We submit this rule is inapplicable when, as here, the parties and their counsel have entered into a stipulation resolving disputed matters arising out of the filing of a complaint and answer thereto. Where the parties have resolved a dispute and provided in a stipulation that if a default occurs, "the court may enter, without notice to the defendants, judgment against defendants", (R. 51) the reason for the principal has terminated along with all disputes arising out of the litigation. At this point a new principle emerges which is to encourage a termination of hostilities by settlement short of trial. *Achtel vs. Lieberman, supra.*

Appellants then maintain that since they denied all of the allegations contained in respondent's complaint (R. 29-34) and specifically denied the guaranty of any amount on the E & B Carpet Mill account, there is therefore a triable issue of fact but they ignore the facts, once again, in their argument in that subsequent to their denial they and their attorney signed a stipulation admitting all contested matters (R. 51) and made payments acknowledging that agreement of five (5) months. Then being unable to further perform they, through new counsel, sought to set aside the stipulation and amend their answer (R. 43) on the ground that they were mistaken as to their liability as against E & B Carpet

Mills and failed to inform their counsel of the facts, obligating themselves to pay in "excess of the guaranty". (R. 67)

Respondent fails to see how the court can believe that appellants were mistaken as to facts purportedly limiting their liability when that defense was specifically raised in their answer. (R. 31)

Appellant further maintain on Page 25 of their brief that "unless Bailey-Schmitz is forced to become a party in their action that justice will not be obtained and the result would be unconcionable because the appellants would have to bring legal action in the State of California against Bailey-Schmitz on their setoff when all of said issues should be handled at one time in an effort to avoid multiple suits." This contention is unsound on its face for the Utah Rules of Civil Procedure 13 (j) provides:

> ". . . any claim, counterclaim, or cross-claim which have been asserted against an assignor, at the time of or before notice of such assignment, may be asserted against his assignee, to the extent that such claim, counterclaim or cross-claim does not exceed recovery upon the claim of the assignee."

Therefore, the right of set-off could have been determined had the case proceeded to trial. The fact that the stipulation provided that appellants reserved rights of setoff against Bailey-Schmitz is not material as against respondent for the personal guarantee acknowledged and admitted by appellants (R. 51) provided that all payments would be made "on

demand without deduction by reason of set off, defense, or counterclaim." (R. 25) That provision in the stipulation was merely a compromise by respondent, for had the case gone to trial appellants would have been barred from asserting a setoff against respondent by reason of their express waiver in the guaranty.

Thus there was no triable issue of law or fact before the trial court and appellants' Motion to file an amended answer and counterclaim was properly dismissed.

POINT IV

THE DEFENSES OF MISJOINDER OF CLAIMS AND PARTIES IS INAPPLICABLE WHEN, AS HERE, THERE WAS BUT A SINGLE CLAIM BY A SINGLE PLAINTIFF.

The case cited by appellants as controlling is distinguishable in Fact and principle from the case presented on appeal.

The case of *Stank vs. Jones*, 404 P. 2d 364 (1965) is factually distinguishable in that it involved seven (7) distinct claimants with twelve (12) independent causes of action having unrelated facts who assigned their claims to the plaintiff for purposes of suit and collection. The assignors retained a two-third interest in the amount to be collected.

In the instant case respondent-plaintiff purchased the accounts receivable from the assignors who retained no interest therein (Rl, 8, 9, 25, 27).

Appellants' liability is not based on two separate claims but on appellants' personal guarantee for payment for "all merchandise sold or which is hereafter sold. . .. by you (respondent herein) and for any one or more of your FACTORED ACCOUNTS." (R. 25)

Specifically, the judgment appealed from was against appellants in their individual capacity as a result of their personal guarantees and the objection as to misjoinder of plaintiffs and claims is inapplicable here, there being only one plaintiff with one claim arising out of a single guarantee. (see pa. 5 of complaint, R. 2)

An analogous, but distinguishable, situation is that of a plaintiff who purchased two notes both made by the same maker, but having two separate payees. There is no doubt that a holder in due course of both notes could file a single complaint against the single defendant-maker by stating in a complaint two counts. The liability and the right to proceed in a single complaint is analogous to respondent-plaintiff's claim against defendant, T. C. Associates. On the other hand the case here on appeal arises out of a judgment against appellants *in their individual capacity* and is not predicated upon two claims, but a single claim based on their personal guarantee for payment of "any and all merchandise sold or which is hereafter sold . . ." (R. 25)

In essence, the action was one brought by re-

spondent-plaintiff against the guarantors of a running account debt.

Not only may *Stank vs. Jones, supra.* be distinguished on the facts, but it is also distinguishable on principle.

The majority opinion in *Stank vs. Jones, supra.* struck at the evil of allowing multiple claimants to avoid the rule on permissive joinder by assignment to an assignee for collection. The court observed:

> "Here we have an action wherein the plaintiff, an assignee for collection, appears to invoke Rule 18(a)[3] and circumvent Rule 20(a) of the Utah Rules of Civil Procedure. Seven different claimants have assigned twelve different, distinct, and unrelated claims to the plaintiff. Plaintiff is to retain one-third of any moneys collected and the assignor is to receive the remaining two-thirds. Under such circumstances should plaintiff be permitted, as he has done here, to join all of these claims against the defendant in one action? We think not. Yet, it can be argued that, inasmuch as the plaintiff is the real party in interest, he may prosecute this action by virtue of Rule 18(a) and join therein all claims, both legal and equitable, which his assignors might have against the defendant. Such a conclusion cannot be tolerated.

(Footnote 3) "If the assignee sues at law, he is turned out of court, and if the assignor sues in equity, he is turned out also . . . The true rule undoubtedly is that which prevails i nthe court of equity, *that he who has the right is the person to pursue the remedy.* We have adopted this rule. First Report of the Commissioner on Practice and Pleadings, N.Y. (1848) 124." (Emphasis added.)

> "Obviously, the seven assignors could not have joined as plaintiffs and asserted their diverse and unrelated claims in one action against the defendant. Why, then, should they be allowed to do indirectely what they could not do directely? The answer is that they should not."

In the Stank case the seven unrelated claimants assigned one-third (⅓) of their interests in claims against the debtor-defendant who had not executed a personal guarantee to pay any and all claims assigned to the assignee, thereby avoiding the requirement of Rule 20(a) of the Utah Rules of Civil Procedure that multiple plaintiffs "may join in one action . . . if they assert any right to relief . . . in respect of or arising out of the same transaction, occurance, or series of transactions or occurances. . ." In the instant case there was no attempt to avoid the rigors of Rule 20(a), nor is that Rule herein applicable for there was but one plaintiff with but one claim arising out of the execution of a personal guarantee and thus the principle set forth in the majority opinion is neither thwarted, nor is it applicable.

In his concuring opinion, Justice Henroid expressed the fear that an assignee might gather up separate and unrelated claims against a single defendant forcing him to defend them all in a single proceeding and for a single filing fee. Justice Henroid observed in *Stank vs. Jones, supra.*:

> "If this case were decided otherwise, a

person could have one claim by assignment, and then could go around gathering up ten others against a defendant, all unrelated, and force the defendant to meet all of them in one suit, with a single filing fee and before a single jury."

In the instant case, as noted previously, there is but one claim by a single claimant and the rationale of the concurring opinion of avoiding a situation where one is forced to meet many unrelated claims brought by an assignee with a isngle filing fee is not applicable for liability arose out of the execution of a personal guarantee in favor of a single factor, respondent herein.

As to appellants' argument that the assignors should be joined to avoid irreparable injury due to their right of set off against Bailey-Schmitz, respondent submits that this is without merit on two grounds.

First, we have previously argued the significance of Rule 13(j) of the Utah Rules of Civil Procedure. Therefore since the right to allowances of the setoff against Bailey-Schmitz could have been heard, had the case proceeded to trial, without joining Bailey-Schmitz, the appellants cannot claim irreparable injury.

Second, appellants specifically waived their right of setoff and counterclaim in their personal guarantee (R. 25-28) and if the case were to proceed to trial the matter could not be heard for that

reason. The right of setoff preserved in the stipulation was merely a compromise made by respondent and if said stipulation were to be vacated as suggested by appellants the guarantee would then govern, barring the assertion of said setoff.

Further, had respondent sought leave to add the assignors as additional parties the court would properly have denied the request. The court in *York Blouse Corp. vs. Kaplowitz Bros., Inc.*, 97 A. 2d 465 (1953) observed:

> "In this jurisdiction an assignee of an open account may sue for the same in his own name, and rule 17(a) of the trial court requires that every action shall be brought in the name of the real party in interest. When substantive law gives an assignee the right to sue in his own name and rule of court requires suit by the real party in interest, action on an assigned claim must be brought by the assignee in his own name. Having sold or assigned its claim against defendant, plaintiff no longer had a right to enforce that claim. Fashion Fan had the right by substantive law to enforce the claim and was therefore the real party in interest. Not only was Fashion Fan the real party in interest, it was an indispensable party. When the rights of an assignee will be affected by an action, the assignee in an indipensable party. . . .
>
> "*At trial plaintiff asked leave to add as additional parties plaintiff the stockholders of plaintiff corporation. This request was properly denied. Since the corporation had sold its claim, its stockholders had no rights thereto. . . .*" (Emphasis added.)

It has also been held that an action brought by the assignor of a complete assignment of a chose in action should be dismissed since it was not prosecuted in the name of the real party in interest. *Bench vs. State Automobile & Casulty Under. etc.*, 408 P. 2d 899 (1965).

In conformity with the above the court in *Northwest Oil & Refining Co. vs. Honolulu Oil Corp.* 195 F supra 281 (1961), observed:

> "Plaintiff, having assigned all its rights, title and interest in the contract, no longer has any interest therein and may not accordingly maintain the action . . . Where all rights under a contract have been transferred the assignee is the real party in interest."

Rule 17(a) of the Utah Rules of Civil Procedure provides that every action shall be prosecuted in the name of the real party in interest.

The purpose of the real party in interest rule is set forth in Moore's Federal Practice, vol 3A, p. 271 #1709 as follows:

> "The primary purpose of the real party in interest provision was to change the common law rule that an action upon an assigned chose in action had to be prosecuted in the name of the assignor."

The cases above quoted are in accord with the principle that the assignee of a complete chose in action is the real party in interest and that a suit brought in the name of the assignor should be dis-

missed and leave sought to join the ass
be denied for the reason that the assig
has any interest in the matter.

If the facts here on appeal involve
al assignee for collection a different result mig
warranted, but since it involved a co
ment of a chose in action the courts a
observed in Moore's Federal Practice, v
272-3, #17.09 as follows:

> "The federal courts, in construing the real party in interest provisi of various state codes, and all of the stat struing their own provisions, h accord in holding that the un signee of a complete chose in ac party in interest and *suit must his name.*" (Emphasis added.)

Moore P. 279

> "Whether an assignee for only, who has a duty of accountab to his assignor, can sue in his own na nder a real party in interest provision ha aused some variance of opinion among the courts."

Since the respondent was the unqualified assignee of a complete chose in action, the owner of the legal title and beneficial interest to the exclusion of the assignor he is the real party in interest with the meaning of Rule 17(a) of the Utah Rules of Civil Procedure and entitled to sue in his own name.

Therefore, since an action, brought by the assignors would have been dismissed, *Northwest Oil &*

vs. Honolulu Oil Corp. supra; leave to
nors as parties plaintiff would proper-
denied, *York Blouse Corp. vs. Kaplo-*
nc., 97 A 2d 465 (1953) and the setoff
ist Bailey-Schmitz could have been heard under
the Utah Rules of Civil Procedure
g the assignors, appellants' claim of
ury is unfounded in fact and in law.

POINT V

THE COURT HAD JURISDICTION TO ENTER JUDGMENT

out previously this action was com-
filing of a Complaint. Any prior de-
was cured by defendant's general ap-
13-14), the Order dated July 27, 1966,
he Answer filed August 17, 1966 (R.

See *vs. Pollock*, 20 U. 371, 59 P. 87; *Kramer vs. ton*, 72 U. 1, 268 P. 1029; *Cooke vs. Cooke*, 67 U. 71, 248 P. 83.

CONCLUSION

The Trial Court did not abuse its discretion in denying appellants' motion to set aside the stipulation and for leave to file an amended answer and counterclaim for the following reasons more fully enumerated heretofore: The Motion was not timely made and if granted would be prejudicial to the rights of respondent and would discourage settlement of litigation; there was good consideration in

the settlement of a disputed claim; there was no triable issues of fact and law for they had all been resolved in the settlement of the disputed claim after joinder of issue in the complaint and answer thereto; the defenses of misjoinder of claims and parties are inapplicable because there was but one claim by a single claimant; and any defect in jurisdiction was cured by appellants' general appearances and answer to respondent's complaint.

Respectfully submitted,

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