

1964

Federated Security Insurance Co. v. Isaac Obsen Burton and Horace J. Knowlton : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
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FEDERATED SECURITY
INSURANCE COMPANY, a Utah
corporation,

Plaintiff and Apellant,

vs.

ISAAC ORSEN BURTON, aka Orsen
Burton; and HORACE J.
KNOWLTON,

Defendants and Respondent.

Supreme Court, Utah

Case
No.
10135

APPELLANT'S BRIEF

Appeal from Order of the 3rd
District Court for Salt Lake County
Hon. Merrill C. Faux, Judge

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UNIVERSITY OF UTAH

MAY 3 - 1985

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APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This action now involves only a counterclaim by defendant Horace J. Knowlton. The appeal involves plaintiff's right to a dismissal of the counterclaim under Rule 37(b)(2)(iii), U.R.C.P., and, necessarily, the questions whether, after entering an order of dismissal, the district court acted properly (1) in considering a pleading filed by defendant Knowlton after the entry of the dismissal; (2) in treating the pleading as a motion for new trial; and (3) in setting aside its order of dismissal.

DISPOSITION IN LOWER COURT

The district court dismissed defendant Knowlton's counterclaim for his failure to comply with an order compelling discovery under Rule 37(a), U.R.C.P. Defendant Knowlton thereafter filed a pleading styled "Objections to Order of Dismissal" on which the district court held a hearing and considered as a motion for new trial under Rule 59, U.R.C.P. The district court denied plaintiff's motion of strike the pleading and thereafter set aside its order of dismissal.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the decision of the district court denying plaintiff's motion to strike and setting aside the order of dismissal.

STATEMENT OF FACTS

The facts giving rise to this appeal are rather involved. For purposes of clarity the parties will be referred to as they appeared in the district court. Plaintiff brought an action against defendants Isaac Orsen Burton and Horace J. Knowlton to determine disputed ownership of a certain certificate representing shares of plaintiff's common capital stock. Defendant Knowlton filed a counterclaim alleging that certain commissions were due him from plaintiff for sales of insurance policies and sales of stock, and alleging plaintiff made certain improper charges against his account. On November 9, 1962, consideration of the complaint and the counter-

claim of defendant Knowlton were separated by the court, and on November 13, 1962, summary judgment was entered ruling that defendant Burton had no claim against plaintiff for issuance of its stock and dismissing plaintiff's complaint against defendant Knowlton. (R. 30). This left as the only matter for disposition in the case the counterclaim of defendant Knowlton. The term "defendant" will hereafter be used to describe only the defendant Knowlton.

Pursuant to Rule 33, U.R.C.P., plaintiff served interrogatories upon defendant on June 13, 1962. (R. 1, 2,). These interrogatories sought information as to the details and basis of defendant's claim in order to enable plaintiff to prepare a defense. On October 17, 1962, defendant Knowlton served purported answers to the interrogatories which failed to contain the information asked for by plaintiff. (R. 3, 4). Defendant claimed the information regarding his claim was all in plaintiff's exclusive possession. Thereafter on April 18, 1962 defendant filed supplemental answers to plaintiff's interrogatories which, although 14 pages long, still failed to provide the information sought by plaintiff in its interrogatories. (R. 5-18). These supplemental answers were vague as to subject matter and, as an example, contained the names of 413 families and made reference to a list of several hundred more. (R. 7-12, 17). However, they failed to adequately state the basis and details of defendant's claim as to the families listed.

Because of the evasiveness and insufficiency of the answers plaintiff was unable to prepare its defense, and

moved the court for an order under Rule 37 (a), U.R.C.P. requiring defendant to make discovery by providing the information sought in plaintiff's interrogatories. (R. 19). The court held seven or eight hearings to determine what information defendant fairly had available to him and what information he should be required to produce to satisfy plaintiff's interrogatories. (R. 30). As a result of these hearings the court found that the defendant had substantially all of the information sought by plaintiff through statements which had been provided monthly by plaintiff and other information available to him. (R. 31). However, to fully explore the question the court ordered plaintiff to produce evidence on a sampling of the items claimed by defendant to determine whether, under all of the circumstances, defendant should be required to make full and complete discovery. The court found that:

“A sampling of items relied upon by defendant and portrayed to the court by answers under oath by plaintiff indicated to the court that defendant, by his counter-claim, was on a fishing trip, only, at plaintiff's expense.” (R. 31).

Nevertheless the court permitted defendant to select one item under his claim which he felt showed the greatest possible merit. The court on that point found:

“Defendant, thereupon, selected an item of \$6,180.00, represented by a check and set out as No.(1) in plaintiff's Answers of April 18, 1963. The court then required plaintiff to submit and portray by evidence the complete accounting of all transactions relating to this item. After day's hearing relative thereto, with evidence upon the

books and records of plaintiff company, defendant withdrew his claim admitting that he had no claim, whatever, based upon said check." (R. 31).

After numerous hearings, the court on July 26, 1963 entered an order pursuant to Rule 37(a), U.R.C.P., under which it ordered the defendant to provide plaintiff with the following information relating to his claim on or before August 22, 1963:

"1. Copies of the contracts with plaintiff upon which he relies in asserting his Counter Claim, including the schedules of commissions on each such contract.

2. The policy numbers for each policy for which he makes claim, and if he cannot designate said policy numbers then the name of the insured and the date upon which said policy was issued for which he makes claim.

3. The nature, basis and amount of his claim with regard to each specific policy and the date upon which each claim originally arose.

4. A designation as to each policy for which claim is made of the contract and commission schedule under which claim is made." (R. 19, 20).

Defendant failed to provide plaintiff with the information indicated in the court's order, and on August 26, 1963, plaintiff filed a motion to dismiss defendant's counterclaim pursuant to Rule 37(b) and Rule 41(b) and (c), U.R.C.P. On September 6, 1963, defendant filed "Defendant's Answer in Response to Order," but except for answer No. 1 the Answers failed to provide the information required by the order. (R. 22, 23).

The court held a hearing on plaintiff's motion to dismiss the counterclaim of defendant Knowlton for failure to comply with Rule 37, U.R.C.P., and on November 12, 1963, the court entered its memorandum decision concluding that the counterclaim of defendant Knowlton should be dismissed under Rule 37(b)(2)(iii), U.R.C.P. (R. 30, 31, 32).

Pursuant to the memorandum decision the order of dismissal was entered November 14, 1963, dismissing with prejudice the defendant's counterclaim. (R. 33). On November 25, 1963, defendant Knowlton filed a pleading titled "Defendant's Objections to Order of Dismissal." (R. 34, 35). The substance of "Defendant's Objections to Order of Dismissal" constitutes a repetition of certain specific and some general claims defendant set forth in his counterclaim. On December 12, 1963, plaintiff filed a Motion to Strike "Defendant's Objections to Order of Dismissal." (R. 36, 37). Hearing was held on "Defendant's Objections to Order of Dismissal" and plaintiff's motion to strike, and thereafter on March 20, 1964, the court, treating the pleading as a motion for a new trial, entered its supplemental memorandum decision setting aside the order of dismissal and denying plaintiff's motion to strike. (R. 38). From this decision plaintiff has appealed.

ARGUMENT

POINT I

THE COURT ERRED IN DENYING PLAINTIFF'S MOTION TO STRIKE "DEFENDANT'S OBJECTION TO ORDER OF DISMISSAL" SINCE THE PLEADING ENTITLED "DE-

FENDANT'S OBJECTION TO ORDER OF DISMISSAL" IS BEYOND THE SCOPE PERMITTED BY UTAH RULES OF CIVIL PROCEDURE AND WAS NOT PROPERLY BEFORE THE COURT.

The court erred in denying plaintiff's Motion to Strike defendant's pleading entitled "Defendant's Objection to Order of Dismissal." Since such pleading in title, form and substance (R. 34, 35) is beyond the scope permitted by the Utah Rules of Civil Procedure, and could not properly be considered by the court.

Rule 7(b)(1), U.R.C.P., provides:

"Motions. An application to the court for an order shall be made by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in written notice of the hearing of the motion."

The pleading which the defendant entitled "Defendant's Objections to Order of Dismissal" fails to fulfill any of the requirements of Rule 7(b)(1). The court regarded the pleading as a motion for a new trial under Rule 59, U.R.C.P., (R. 38). However, such a motion is subject to the requirements of Rule 7(b)(1), and an examination of the pleading (R. 34, 35) and an application of its substance to the requirement to Rule 7(b)(1) clearly show that the pleading can not be construed a motion in any manner and its form is not that required by a motion. The substance of the pleading fails to state with particularity the grounds therefore and fails to set forth the

relief or order sought as required by Rule 7(b), U.R.C.P. Although the Rules of Procedure are liberally construed by the court to permit the substance of a pleading to prevail over the form, to constitute a motion the pleading must set forth the grounds on which its rests and the relief or order sought. The pleading is so vague and uncertain in its substance it cannot be said to set forth grounds supporting a motion. Further, in no place or manner does the pleading state the relief or order sought.

In the case of *Howard v. Howard*, 11 U. (2d) 149, 356 P.2d 275, the Supreme Court applied the rule of liberal construction to a pleading claimed to be motion for a new trial. Even under the holding of the *Howard* case the "Defendant's Objections to Order of Dismissal" cannot be brought within the purvue of Rule 7(b)(1). In that case the pleading was denominated a notice of intention to file a motion for a new trial, but the court pointed out that in the body of the pleading it was termed "Motion." The pleading in that case clearly showed the relief or order sought and the grounds therefore. Further, the pleading met the requirements of Rule 59(a), U.R.C.P., in that it set forth the grounds required by subparagraph (1) of Rule 59(a) U.R.C.P., supported by an attached affidavit, as required by Rule 59(c), U.R.C.P., and stated the ground provided in subparagraph (7) of Rule 59(a), U.R.C.P. The court found that pleading in substance requested a new trial. However, the defendant's pleading in the instant case does not meet any of the requirements of Rule 7(b)(1), U.R.C.P.

or Rule 59, U.R.C.P. as set forth in the Rules and as construed in the *Howard* decision.

Since there is no other Rule under which defendant's pleading, "Defendant's Objections to Order of Dismissal" could come before the court for consideration it is clear that the pleading is beyond the scope permitted by the Utah Rules of Civil Procedure and the trial court erred in considering it at all.

POINT II

THE COURT ERRED IN TREATING DEFENDANT'S PLEADING "DEFENDANT'S OBJECTIONS TO ORDER OF DISMISSAL" AS A MOTION FOR A NEW TRIAL UNDER RULE 59, U.R.C.P., AND FURTHER ERRED IN SETTING ASIDE THE ORDER OF DISMISSAL THROUGH ITS SUPPLEMENTAL MEMORANDUM DECISION WHICH IN EFFECT GRANTED DEFENDANT A TRIAL IMPROPERLY UNDER THE GUISE OF RULE 59, U.R.C.P.

Under Rule 7(b)(1), U.R.C.P., it is clear the "Defendant's Objections to Order of Dismissal" is not a motion and therefore the court erred in treating it as a motion for a new trial. Further, under Rule 59(a), U.R.C.P., a motion for a new trial must be based upon certain grounds set forth therein. None of these grounds are stated in defendant's pleading and cannot, in the total absence of such grounds, be read into the pleading by the court.

The effect of the decision is to grant defendant a trial without any justification under or basis in the Utah Rules of Civil Procedure. Obviously, since defendant had not had a trial he is not entitled to move for a new

trial. The action was dismissed for failure to make discovery and defendant had a remedy by appeal which he failed to pursue. The court cannot act for him except as provided in the Rules of Procedure. The court here did not undertake to act on its own motion under the Rules and improperly granted defendant relief under Rule 59, U.R.C.P. which he had not lawfully petitioned for.

POINT III

THE COURT ERRED IN SETTING ASIDE THE ORDER OF DISMISSAL SINCE PLAINTIFF IS ENTITLED TO DISMISSAL OF THE COUNTERCLAIM OF DEFENDANT UNDER RULE 37(b)(2)(iii), U.R.C.P., AS A MATTER OF LAW.

The district court found that the "Defendant's Answers in Response to Order" filed September 6, 1963, did not provide the information required by the Order dated July 26, 1963, under Rule 37, U.R.C.P. (R. 19, 20), and defendant failed to challenge the court's finding that he refused to make discovery.

Rule 37(b), U.R.C.P. deals with the consequences of refusal to make discovery, and with respect to interrogatories served under Rule 33, U.R.C.P. provides:

“. . . Upon refusal of a party to answer any interrogatories submitted under Rule 33, the proponent of the question may on like notice make application for [an Order compelling an answer].”

For failure to comply with an Order compelling an answer Rule 37(b)(2)(iii), U.R.C.P., provides that the court may dismiss the action or proceeding or any part thereof. The proper procedure was followed in the instant case.

Plaintiff served interrogatories under Rule 33, U.R.C.P., and defendant's answers failed to provide the information called for by the interrogatories. Upon defendant's failure to provide the information, plaintiff applied to the court for an Order under Rule 37(a), U.R.C.P., which was issued. Upon defendant's failure to comply with that order, and after a number of hearings and much deliberation, the court granted an order dismissing the counterclaim.

While there are no Utah cases construing Rule 37(b)(2)(iii), U.R.C.P., the Rule is taken directly from the federal rule which has been construed many times. In a decision in which the facts are closely analagous to the instant case, *Michigan Window Cleaning Company v. Martino, et al*, 173 F.2d 466 (C.A. 6th Cir), the plaintiff filed an action for damages and served interrogatories on the defendant. The defendant failed to answer and plaintiff obtained an order from the court requiring defendant to provide answers to the interrogatories. The answers made by the defendant were not responsive to the questions and the court then granted additional time. After further delays, under Rule 37, default was entered against defendant for his failure to respond to interrogatories. The court of appeals affirmed the default and the judgment rendered pursuant thereto, and pointed out that the defendant had adequate opportunity to present the required information. The court further said that defendant's failure to make any attempt to give adequate and complete answers to the interrogatories left it with no alternative but to enter the order of default.

Concerning the rights to discovery under Rule 33 the court said:

“. . . [Rule 33] is to be accorded a broad and liberal treatment, for civil trials in the federal courts no longer need to be carried on in the dark.

* * * * *

“Much has been left to the discretion of the court, and in view of the appellant’s dilatory and contumacious tactics we are not persuaded that the discretion has been abused.”

In *Milewski v. Schneider Transportation Company*, 238 F.2d 391 (C.A. 6th Cir.), the plaintiff brought an action to recover for injuries. Defendant served interrogatories on November 19, 1954. Extension for answering was stipulated by the parties setting, in succession, December 23, 1964, March 8, 1955 and June 7, 1955 for the filing of answers. Plaintiff failed to answer and defendant moved for judgment under Rule 37(d), Federal Rules of Procedure. The district court entered an order of dismissal which was affirmed on appeal. The court of appeals said:

“It appearing that the entry of the order was authorized under Rule 37(d), Rules of Civil Procedure, 28 U.S.C.A., and the court being of the opinion that the District Judge did not abuse his discretion in doing so (citing cases). The Judgment is affirmed.”

Similarly in *Interstate Cigar Company v. Consolidated Cigar Company*, 317 F.2d 744, (C.A. 2nd Cir.), the plaintiff filed suit and defendant started taking the deposition of one Spielfogel, a member of plaintiff part-

nership. He refused to answer a number of questions and defendant moved for an order compelling answers under Rule 37(a), Federal Rules of Civil Procedure. The court ordered Spielfogel to answer the questions, but he failed to appear at the time and place set for his deposition. Thereafter the defendant moved to dismiss. The district court dismissed the complaint, and on appeal the circuit court affirmed the decision and said:

“It is too clear for doubt, we believe, that at least some of the questions Spielfogel was directed to answer were ‘relevant to the subject matter involved in the pending action.’”

In the instant case the question of whether an order of dismissal under Rule 37, U.R.C.P., should have been granted in the first instance was within the discretion of the district court. However, upon its entry, relief from the order could only be obtained in the manner provided by the Utah Rules of Civil Procedure. The file reflects the defendant's refusal to provide plaintiff with direct answers and his repeated evasions. The court afforded defendant adequate opportunity to provide responsive answers to both plaintiff's interrogatories and the questions which the court ordered defendant to answer under Rule 37(a), U.R.C.P. In its memorandum decision the court noted that it had held numerous hearings to determine the propriety of the discovery procedures sought by plaintiff in the case. (R. 30, 31, 32). The court further noted that plaintiff was required to produce evidence disproving numerous items involved in defendant's counterclaim, including evidence taken throughout a full

day's hearing on the single item defendant claimed had had the greatest possible merit. The court concluded that the information was available to defendant, that his claim was without merit and determined that defendant's counterclaim should be dismissed under Rule 37(b)(2)(iii), U.R.C.P. for defendant's refusal to make discovery. Thereafter the court signed and entered the order of dismissal. The file reflects no new or other material which would challenge or contradict the court's basis for granting the order of dismissal as shown in its memorandum decision, although defendant had adequate opportunity to present any matters he desired. The defendant merely filed a pleading entitled "Defendant's Objection to Order of Dismissal." An order of dismissal under Rule 37 (b)(2)(iii), U.R.C.P., is a final judgment and is subject to appellate review, and defendant's remedy was properly a direct appeal from that order. See 4 Moore, Federal Practice, Section 26.37. There is no basis in the record or in law for the action of the district court in setting aside the order of dismissal and denying plaintiff's motion to strike "Defendant's Objection to Order of Dismissal." The supplementary memorandum decision entered by the court recites no facts or basis on which its previous order of dismissal could be set aside.

CONCLUSION

The decision of the district court setting aside the order of dismissal and denying plaintiff's motion to strike should be reversed since under the facts as found

by the court and applicable law, "Defendant's Objection to Order of Dismissal" should not have been heard by the court since it is beyond the scope of pleadings permitted by the Utah Rules of Civil Procedure. The court further erred when it considered "Defendant's Objection to Order of Dismissal' as a motion for a new trial and based its setting aside of the order of dismissal on the ground that a motion for a new trial should be granted. Further, plaintiff is entitled to a dismissal as ordered by the court under Rule 37(b)(2)(iii), U.R.C.P., and no basis existed in law or in fact for the action of the district court in entering a supplementary memorandum decision setting aside the order of dismissal.

Respectfully submitted,

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