1964

Utah State Building Board et al v. George R. Romney et al : Appellants' Reply Brief

Utah Supreme Court

Elliott Lee Pratt; Clyde, Mecham & Pratt; Attorneys for Appellants;
Shirley P. Jones, Jr.; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH STATE BUILDING BOARD, et al,

Plaintiffs,

- vs -

GEORGE R. ROMNEY and M. WALLIS ROMNEY, d-b-a G. MAURICE ROMNEY COMPANY, a partnership, et al,

Defendants, Third-Party Plaintiffs, and Appellants,

- vs -

INDUSTRIAL INDEMNITY COMPANY, a corporation,

Third-Party Defendant and Respondent.

Case No. 10143

APPELLANTS' REPLY BRIEF

ELLIOTT LEE PRATT, ESQUIRE
CLYDE, MECHAM & PRATT
351 South State Street
Salt Lake City, Utah 84111
Attorneys for Appellants

SHIRLEY P. JONES, JR., ESQUIRE
411 American Oil Building
Salt Lake City, Utah
Attorney for Respondent

INDEX

Index of Authorities Cited

Statutes Cited

Texts Cited

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH STATE BUILDING BOARD, et al,
Plaintiffs,
- vs -
GEORGE R. ROMNEY and M. WALLIS ROMNEY, d-b-a G. MAURICE ROMNEY COMPANY, a partnership, et al,
Defendants, Third-Party Plaintiffs, and Appellants,
- vs -
INDUSTRIAL INDEMNITY COMPANY, a corporation,
Third-Party Defendant and Respondent.

Case No. 10128

APPELLANTS' REPLY BRIEF

ARGUMENT

POINT I.

THE PRETRIAL ORDER WAS NOT A FINAL JUDGMENT FROM WHICH AN APPEAL SHOULD HAVE BEEN TAKEN.

This Court has previously denied Respondent's Motion to Dismiss the appeal. However, since Respondent has again brought this question into focus under

its Point IV in Respondent's brief, Appellants must reply to Respondent's arguments.

A. THE PRE-TRIAL ORDER WAS INTERLOCUTORY IN FORM AND SUBSTANCE.

1. *The Court reserved the right to change the Pre-Trial Order.*

A Pre-Trial is by its very nature and form a preliminary order defining the issues to be tried at the subsequent trial. It is susceptible of modification after the Pre-Trial hearing, thereby reserving to the Court the power and jurisdiction to change it. The Pre-Trial Judge in this case expressly made this reservation in Paragraph 17 thereof: (R. 228)

> "It is ordered that no further amendments be permitted to the pleadings or to this order *except for good cause shown and to prevent manifest injustice.*" (Italics added)

In the case of *David v. Goodman,* (Calif.) 200 Pac. 2d 568, and again in *Hunter v. Merger Mines Corporation,* (Idaho) (1945) 160 Pac. 2d 455, the Courts held that in cases of such reservations, the order of the Court was not final and an appeal would not lie therefrom.

In *Maybury v. City of Seattle* (Wash.) 336 Pac. 2d 878, the Court held that a Pre-Trial Order limiting the issues to be tried was not a final appealable order. See also *Green v. Green,* (Tex.) (1952) 247 S.W. 2d 583, and *Meehen v. Hopps,* (Calif.) (1955) 288 Pac. 2d 267.

Certainly, in view of the prevailing practice relating to Pre-Trial Orders, in view of the specific wording of

the Order itself, and under the above cases, appellants were rightfully entitled to rely upon the Pre-Trial Order being interlocutory in nature.

2. *An order for dismissal is not a final judgment.*

In Paragraph 17 of the Pre-Trial Order, (R. 228) the Court said:

> "It is ordered that the action insofar as the Industrial Indemnity Company, a corporation, is concerned be dismissed with prejudice."

This statement is not a final judgment from which an appeal will lie. In the case of *Attorney General of Utah v. Pomeroy, et al,* 93 Utah 426, 452, this Court in setting forth the general rules relating to the finality of various orders, stated that no appeal would lie when an " . . . order for but no judgment of dismissal is entered. *Lukich v. Utah Construction Company,* 46 Utah 317."

In *Lukich,* supra, after the plaintiff's case had been completed, defendant made a motion for a non-suit, which motion was granted. In the transcript of the record appears this:

> "In this case, the Court sustains the motion for a non-suit and judgment for non-suit may be granted."

There was attached to the transcript a document entitled, "Entered Order," which stated in part:

> "The Court having considered the defendant's motion for judgment of non-suit and dismissal herein, and being fully advised in the premises, it is ordered that the said motion be, and it is, hereby sustained."

In holding that such an order was not a final judgment, the Court said:

> "The recitals at most but show an order granting a non-suit, or directing a judgment of non-suit. It does not show a judgment, one in fact rendered or entered. From what is recited, it may be said the case was sent out of court. But that a judgment was in fact rendered or entered is left to argument and discussion. If a judgment was rendered and entered, it ought to appear by the court's record and the Judgment Book . . . That has not been done. Until so done, we cannot possibly know that a judgment has been rendered or entered."

It is thus clear that the judgment finally entered pursuant to said Order was not properly filed and entered until April 2, 1964, (R. 233-235) and thus the appeal was timely made.

3. *The Pre-Trial Order did not comply with Rule 54 (b), Utah Rules of Civil Procedure.*

Rule 54 (b) provides, as follows:

> "(b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, a final judgment may be entered upon one or more but less than all of the claims only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form

of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

In the Pre-Trial Order, there specifically is no determination that "there is no just reason for delay." Thus by the very provisions of said rule, the Order cannot be final. Had there been some reference to the rule, or had there been compliance with its provisions, then assuming the Order is one capable of becoming final, it it fair to assume the appellants would have been placed on notice as to its claimed finality. Since there was no such reference or compliance with the rule, the Order is not final.

Rule 54 (b) is identical to Rule 54 (b) of the Federal Rules of Civil Procedure. In *6 Moore's Federal Practice,* pages 204-212, there is an extensive discussion of the purposes of this rule, which discussion can best be summarized by the Advisory Committee's notes, a portion of which reads as follows:

> "The amended rule is designated to make clear that interim adjudications disposing of some, but not all, of the claims, counterclaims, cross-claims and third-party claims arising out of a single transaction or occurrence are generally provisional. Judgment is not to be entered until all of such claims, counterclaims, cross-claims and third-party claims are determined, unless the court expressly determines that there is no just reason for delaying judgment as to the claims adjudicated and expressly enters a final judgment thereon. Thus the rights of the parties are protected and, except in the case where a specific final judgment is entered as to some but not all

claims as aforesaid, one appeal will suffice to present all of the rulings to the appellate court."

Again, on page 207, Moore states in citing *David v. District of Columbia,* (CA D.C.) (1950) 187 Fed. 2d 204, 206:

> "The District Court is not obliged to enter a final judgment until it has completely adjudicated the multiple claims action. The rule merely prescribes that, when the District Court has adjudicated at least one claim but less than all of the claims, the Court 'if it does choose to enter such a final order, must do so in a definite, unmistakable manner.'"

Rule 54 (b) does not, however, enlarge appellate jurisdiction by making appealable judgments or orders which otherwise would not be. *Flegenheimer v. General Mills Company,* 191 Fed. 2d 237 (CA 2d, 1951).

Therefore, the Court has a definite obligation to specifically define a judgment in a multiple claims case as a final judgment. Failing this, the judgment or order is not final and matters included therein may be raised on appeal after disposition of the entire case.

B. IN SUBSTANCE THE ORDER IS NOT FINAL.

Assuming arguendo that the Pre-Trial Order was final in form and did comply with Rule 54 (b), it would still fail as a final judgment. The Third-Party Complaint (R. 8) and the Pre-Trial Order (R. 228) show that respondent Bonding Company was charged with liability for any bills which the appellant was required to pay to the plaintiffs under the Utah Bonding Statute,

Section 14-1-1, Utah Code Annotated, 1953, as amended. The bond under which appellants claimed over against respondent (Pre-Trial Exhibit 1) shows appellants as obligees and the various plaintiffs and creditors as beneficiaries.

The liability of the respondent to the appellants was contingent upon the Court's determining the extent of appellants' liability to the various plaintiffs or creditors. To the extent that appellants had to pay any of said claims, then appellants were seeking recovery over against respondent for that amount on the bond. The final liability of respondent to appellants could not, therefore, be determined until a trial was had at which the validity and amount of the creditors' claims were determined. Obviously, if the creditors did not establish their claims under the Bonding Statute against appellants, then appellants would have no claim over on the bond against respondent. In this event, appellants would have no objection to respondent being dismissed out of the law suit. If appellants did have a claim over, then, of course, they would object to the dismissal of respondent.

This Court, in the *Pomeroy, supra,* case, discusses at great length the finality of judgments in cases involving multiple claims such as this case at bar. The discussion in the *Pomeroy* case involves various parties and claims rather than cases cases involving merely a plaintiff and a defendant. The general rule followed in the Utah cases prior to the *Pomeroy* case as enunciated in such case as *Oldroyd v. McCrea,* 65 Utah 142, 235 Pac. 580, and *North Point Consolidated Irrigation Company*

v. Utah and Salt Lake Canal Company, 14 Utah 155, 46 Pac. 824, 826, is to the effect that the judgment must dispose of all parties and all claims in the case and must finally dispose of the subject matter.

In *Pomeroy supra,* the Court lays down the following rules in determining the finality of a judgment for purposes of appeal:

> "We do not pretend to lay down a completely comprehensive definition or test of what constitutes such a severable interest in a suit as to make such judgment of dismissal final as to the plaintiff and such defendant for purposes of appeal. But it seems that in order to be severable, and therefore appealable, any determination of the issues so settled by the judgment of dismissal must not affect the determination of the remaining issues whether such judgment on appeal is reversed or affirmed, nor may the determination of the issues remaining affect the final determination of the issues between plaintiff and the dismissed defendant. If the determination of the issues relating to the dismissed defendant will or may affect the determination of the remaining issues, the judgment of dismissal is not appealable. Perhaps another way of saying it would be that the judgment is severable when the original determination of those issues by the trial court and reflected in the judgment or any determination which could be as the result of an appeal cannot affect the determination of the remaining issues of the suite, nor can the determination of such remaining issues affect the issues between plaintiff and the dismissed defendants if such defendants are restored to the case by a reversal.
>
> " . . . If the claimed basis of liability of the dismissed defendants is connected with or so related to the claimed basis of liability of the

> remaining defendants so that one may affect the other, a judgment as to the discharged defendants is not appealable until the issues as to the remaining defendants are settled."

It is clear in our case that the rights and liabilities respectively of the appellants and respondent are so interrelated that a final disposition in the trial of the creditors' claims was necessary before any judgment could be made falling under the *Pomeroy* rule.

SUMMARY

Neither in form nor in substance does the Pre-Trial Order assume a status of a final judgment. Appellants have every right to rely upon the interlocutory nature of the wording of the Order. Appellants are just as entitled to rely upon the provisions of Rule 54 (b) in its definition of the manner in which a final judgment must be entered in cases of multiple claims.

Appellants have a just cause in holding respondent to its bonding liability and should not be denied the proper appellate review of the issues raised by the trial court's dismissal of respondent. Appellants respectfully submit that the appeal should not be dismissed.

Respectfully submitted,
CLYDE, MECHAM & PRATT

By .....

Elliott Lee Pratt
Attorneys for Appellants
351 South State Street
Salt Lake City, Utah 84111