

1964

Pioneer Savings and Loan Association v. Pioneer Finance and Thrift Co. et al : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Pioneer Savings and Loan Association v. Pioneer Finance and Thrift Co.*, No. 10227 (Utah Supreme Court, 1964).
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Supreme Court, Utah.

IN THE SUPREME COURT OF THE STATE OF UTAH

PIONEER SAVINGS AND LOAN
ASSOCIATION, a Utah corpora-
tion,
Plaintiff and Respondent,

vs.

PIONEER FINANCE AND
THRIFT COMPANY and PIO-
NEER FINANCE AND THRIFT
COMPANY OF SALT LAKE
CITY, UTAH,

Defendants and Appellants.

Case No.
10227

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court for
Salt Lake County,
Honorable Marcellus K. Snow, Judge

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UNIVERSITY OF UTAH

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Case No.
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RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

Appellants' statement of the kind of case is accurate.

DISPOSITION IN THE LOWER COURT

In the lower court the Judge entered a decree permanently enjoining the defendants from using the

name Pioneer Finance and Thrift Company or any similar name which may be confused with the name Pioneer Savings and Loan Association in carrying on an industrial loan business within the limits of the Sugarhouse trade area. The Decree was entered on the plaintiff's (respondent's) motion for summary judgment based upon the pleadings in the case and on the discovery proceedings of record (R 21) and further based upon the agreement of the parties at the pre-trial and there were no disputed items of fact left which could become the subject of an adversary proceeding and that only matters of law remained to be determined (R 36).

RELIEF SOUGHT ON APPEAL

The defendant seeks to reverse the Judgment of the lower court. The plaintiff asks only that the Judgment of the lower court be affirmed.

STATEMENT OF FACTS

The plaintiff corporation was organized and incorporated on the 4th day of March, 1954 and shortly thereafter was authorized by the Banking Department of the State of Utah to carry on and conduct a business as a savings and loan association. It commenced the operation of its business as a savings and loan association at 1045 East 21st South, Salt Lake City, Utah

under the name and style of Pioneer Savings and Loan Association on the 28th day of April, 1955 and ever since said date has continued to carry on such business at that address. The said address, 1045 East 21st South Street, is within the corporate limits of Salt Lake City and is also within a particular economic trade and business area of Salt Lake City known as "Sugarhouse."

Defendant, Pioneer Finance and Thrift Company, was incorporated on October 21, 1953 under the name of Pioneer Industrial Loan Company, its name being changed to Pioneer Finance and Thrift Company on June 15, 1955. Pioneer Finance and Thrift Company is also a successor company to Pioneer Finance Corporation, which was incorporated on June 29, 1948 and operated in Richfield, Utah and vicinity. Pioneer Finance Corporation was consolidated with Pioneer Finance and Thrift Company by agreement of merger on November 17, 1956.

Pioneer Finance and Thrift Company of Salt Lake City was incorporated May 14, 1958. However, business was conducted in Salt Lake City and a loan license was issued July 1, 1955 under the name of Pioneer Finance and Thrift Company. Business is and has been conducted in Salt Lake County, State of Utah by the defendants under the names and during the times and at the addresses as follows:

a. Pioneer Finance and Thrift Company, 434 East 4th South, Salt Lake City, Utah. Business commenced July 1, 1955. The same business was continued at the

same address under the name of Pioneer Finance and Thrift Company of Salt Lake from May 14, 1958.

b. Pioneer Finance Corporation, 29 East Center, Midvale, Utah commenced business on August 9, 1951. Business was conducted at 53 East Center, Midvale, Utah under the name of Pioneer Industrial Loan Company, and is now conducted under the name of Pioneer Finance and Thrift Company of Midvale. This is the only place in Salt Lake County where defendants' operation pre-dated plaintiff's operation.

c. Pioneer Finance and Thrift Company, Deseret Building, Salt Lake City, Utah from November 17, 1956.

d. Pioneer Construction Company, Deseret Building, Salt Lake City, Utah, August 3, 1959. (R 9, 10 and 11).

During the year 1964 the defendants commenced the construction of a building at 1025 East 21st South Street in Salt Lake City, Utah, said address being on the same side of the street as the principal place of business of plaintiff at 1045 East 21st South Street and less than 100 feet physically removed from said place of business of the plaintiff. Defendant contemplated operation of an industrial loan company at said address under the style of Pioneer Finance and Thrift Company.

Both the plaintiff and the defendants had served interrogatories and each had answered under oath the

interrogatories required to be answered, which answers were a part of the files at the time the motion for summary judgment was considered. Both the plaintiff and the defendants filed motions for summary judgment, each stating that their motions "will be based upon the pleadings and the discovery proceedings now of record" (R 21, 22).

The respective motions for summary judgment were heard by the Court, the Honorable Marcellus K. Snow sitting, at which time each counsel moved for their respective summary judgments, "agreeing and admitting that there were no disputed items of fact left which could become the subject of an adversary proceeding, and that the only matter left was the matter of law to be presented by each counsel . . ." (R 36). The lower court entered an order granting plaintiff's motion for Summary Judgment and denying defendants' motion. Thereafter, the lower court entered its Findings of Fact, Conclusions of Law and a Decree permanently enjoining the defendants from using the name Pioneer Finance and Thrift Company or any similar name which may be confused with the name Pioneer Savings and Loan Association in carrying on and conducting an industrial loan business within the limits of the Sugarhouse trade area.

ARGUMENT

I

THE FINDINGS OF FACT ENTERED BY THE DISTRICT COURT WERE AMPLY SUPPORTED BY THE EVIDENCE, ANSWERS TO INTERROGATORIES, PLEADINGS AND ADMISSIONS OF THE PARTIES.

Defendants complain that some of the Findings of Fact were based upon answers to interrogatories already on file and state that "had the plaintiff supported its motion for Summary Judgment by notice that it intended to use the answers made by it to interrogatories already on file as an Affidavit in support of its motion, the defendants would have filed opposing Affidavits . . ." Surely the plaintiff could have given no clearer notice that it intended to use said answers than it gave in its notice of the motion when it stated that it would be "based upon the pleadings in the case and on the discovery proceedings now of record" (R 21).

It appears that the defendants were willing that the matter be determined on the basis of the information contained in the answers for each party to the interrogatories and of the facts set forth in the pleadings, when it agreed with the Court that there were no material disputed items of fact. But, when the Court, in considering all the facts and the law, determined that the plaintiff was entitled to judgment, the defendants now wish to back up from their previous

admissions and position and say that such agreement was intended to apply only if the court should rule in their favor. Such purely should not be countenanced.

This is particularly true when we examine the matters concerning which the defendant makes the most objection. Defendant objects that there was not introduced in evidence, except through the pleadings and through the answers to interrogatories, information as to the date of incorporation of the plaintiff company. Surely, this is a matter of public record and we believe the defendants ought not in good faith be heard to complain about a finding as to a matter so easily ascertainable, and one which, had request for admission been made, would surely have had to be admitted.

Futhermore, as to the question of the trade area of operation of the plaintiff corporation, through its priority of establishment in that area, the defendants complain that the only evidence as to what contemplates the Sugarhouse area is that contained in the answers to the interrogatories.

It would appear that the Court sitting in the Third District in Salt Lake County could take judicial notice of what generally composes the area known as "Sugarhouse." Surely the Court can take judicial notice of the fact that the establishment of a new business within 100 feet of an old, long established business is within the confines of the trade area served by that old established business. As stated by this Court in *Little Cot-*

Lonwood Water Company vs. Kimball, 76 Utah 243, 267, 289 P. 116, “ . . . a Court is presumed to know what every man of ordinary intelligence must know about such things.”

Had the defendants in fact filed Affidavits denying the date of incorporation of the plaintiff and its date of commencing business at its address in Sugarhouse, in opposition to the matters set forth in the answers under oath to interrogatories, it would appear that such Affidavits would have been made in bad faith and should have been treated as such under the provisions of Rule 58 (g) of the Utah Rules of Civil Procedure.

In *Commercial Credit Corporation vs. California Shipbuilding Corporation*, DC Cal. 1947, 71 Fed. Supp, 936, it was held that where parties admit that there are no genuine issues as to any material fact, summary judgment may be granted in favor of a defendant even on the plaintiff's motion for summary judgment. In the case of *Greenlaw vs. Rodick* (Maine 1962) 186 Fed. 529, it was held that plaintiff's answers to interrogatories (even thought not under oath) could be relied upon by the plaintiff itself in opposition to a motion for summary judgment.

The whole logic of the situation is simply this, that where statements are made under oath by parties and a motion is made for summary judgment and each party is put specifically on notice that the statements so made under oath, whether by answer to interroga-

tories, or otherwise, will be relied upon in support the motion for summary judgment, then it is incumbent upon any party intending to dispute or controvert such allegations under oath to present evidence or other contradictory information specifically negating any such allegations.

If defendant's intended to controvert the facts, they should have so advised the Court and the plaintiff. Under the representations made by counsel (R 36) the Court had no alternative than to grant summary judgment for either plaintiff or the defendants.

In *U.S. vs. Kansas Gas and Electric Company* (CA 10th Cir.) 287 Fed 2d 601, considering Federal Rule 56 relating to motions for summary judgment, it was held that the answer of the plaintiff to interrogatories of the defendant should be properly considered in opposition to a motion of the defendant for summary judgment. In other words, that the answers of a party should be considered in its favor, as well as against it, in a motion for summary judgment. The court stated that the answers of the defendant to the interrogatories of the plaintiff were substantial statements of material facts which the court was not only entitled, but was required to consider.

It is not the purpose for which an affidavit or answer under oath is filed in an action which determine whether or not the same may be used in connection with a motion for summary judgment. It is the substance thereof and the fact that, having been made

under oath and under a compulsion to set forth the facts as they are known accurately to exist, that the statement was made a part of the record. Barron and Holtzoff, *Federal Practice and Procedure*, Volume 3, Section 1236, states:

“Affidavits are not required by the rule and their absence will not prevent summary judgment if the other matters shown on the motion are sufficient. The affidavit of a party on file in the case will be considered regardless of the purpose for which it was filed.”

Section 1239 of that same volume states:

“It frequently happens that both sides will agree that there are no fact issues, and will join in the request that the case be decided, for one side or the other, on the basis of a motion for judgment made by one of the parties. In such a situation grant of judgment for the technically nonmoving party is plainly proper.”

Such being the rule, surely when both parties have agreed that there are no issues of fact and join in a request that the case be decided, and when both have made motions for summary judgment, it is proper for the Court to grant such a motion upon the basis of the facts before it.

In *Albert vs. McGrath*, 104 Fed. Supp. 891 (DC Cal. 1952) in discussing summary judgments, the Court stated that “the object of the rule permitting summary judgment is to allow summary disposition of cases which, on the face of the complaint and of addi-

tional facts appearing from supporting documents—show there is no genuine issue as to any material fact to be tried; and in determining the matter, resort is had to extrinsic facts through affidavits, admissions and the like. This implies that a finding of absence of a genuine issue as to any material fact will be made, despite the fact that the pleadings, as they stand, present such an issue. (Citing cases). When the factual issue is simple and can be determined by the Court without choosing between conflicting views, summary judgment is proper.” The factual situation in the case at bar is simple and the parties having agreed that there were no genuine issues of material facts, the Court was surely justified on the basis of the facts before it in entering summary judgment for the plaintiff.

A review of the files and pleadings of the action will amply support the findings of fact made by the Court in support of its summary judgment in favor of the plaintiff herein.

II

PLAINTIFF-RESPONDENT HAD ESTABLISHED PRIORITY OF RIGHT TO THE NAME “PIONEER” IN THE SUGARHOUSE TRADE AREA.

There is a division of authority among the states in this country as to whether or not a company can acquire

a property right in a generic name such as "Pioneer," so that it may invoke the law in protecting such a right. In the case of *Budget System Incorporated v. Budget Loan and Finance Plan*, 12 Utah 2d. 18; 361 P.2d 512, the Supreme Court of the State of Utah decided in accordance with the majority rule, that there is such a property right, and that courts of equity, if called upon, will protect it. On the basis of these cases, it seems clear that the word "Pioneer" in the name is such a term as will be protected by law if a competing firm uses it in such a way that it may confuse the public or injure the firm first using the name in a given trade area.

Among other cases in which relief was granted to the first party using a trade name in a certain trade area are the following:

Atlas Assurance Company-Atlas Insurance Company, 112 N.W. 232; *Iowa Auto Market-Auto Market and Exchange*, 197 N.W. 312; *Buick Motor Co.-Buick Used Motors*, 229 N.Y. Supp. 3; N.M.; *Newcomer Company-Newcomer's New Store*, 217 S.W. 822; *Albany Savings Bank-Albany City Savings Bank*, 190 N.Y. Supp. 334, both banks located in the same city; *International Trust Company-International Loan and Trust Company*, 26 N.E. 693, Mass.; *B. Forman Company-Forman Manufacturing Company, Inc.*, 125 N.Y. Supp. 597. Here both companies dealt in the retailing of furs and the second company proposed to establish its store only a few doors distance from

that of the first company. *Kansas City Real Estate and Stock Exchange-Kansas City Real Estate Exchange*, 5 S.W. 29; *Lamb Knit Goods Company-Lamb Glove and Mitten Company*, 78 N.W. 1072. Factories here were located in different towns, but the business was done mainly through agents, and there were many instances of confusion; *McFall Electric Co.-McFall Electric and Telephone Co.*, 110 Ill. App. 182; *Planters' Fertilizer & Phosphate Co.-Planters' Fertilizer Co.*, 133 S.E. 706; *Van Aucken Steam Specialty Co.-Van Aucken Company*, 57 Ill. All. 240; *Empire Trust Company-Empire Finance Corporation*, 41 S.W. 2d 847; *American Radio Store Inc.-American Radio & Television Stores Corp.*, 17 Del. 127, 150 A. 180, where the court observed that the words "radio" and "stores" were purely descriptive and so not appropriable, but the addition of the word "American" was a distinguishing mark, in the use of which claimant was entitled to be protected. *Personal Finance Company of Lincoln-Personal Loan Service*, 275 N.W. 324, Nebr.; *Standard Oil Co. of Calif.-Standard Oil Co. of New Mexico*, 56 F.2d 973, CCA 10th. The Court observed that there could be no doubt that if defendant were permitted to engage in the petroleum business, third persons would deal with defendant thinking they were dealing with plaintiff; *Standard Oil Co. of New York-Standard Oil Co. of Maine*, 45 F. 2d 309, CCA 1.

In the case of *Security Title Insurance Agency v. Security Title Insurance Company*, 15 Utah 2nd

93, 387 P. 2d 691, this Court also held that the names were sufficiently similar to cause confusion and that the first company using the name in the given trade area could protect it by injunctive proceedings.

Under the decided cases the question of which corporation was prior in point of time in registering the name with the Secretary of State or other public officers, does not seem to be controlling. The crucial matter is which of the firms first used the name in commerce in a given trade area. For example, in the lower court, in the case of *Budget System Incorporated v. Budget Loan & Finance Plan, supra*, the Court found that:

“ ‘Budget’ in defendant’s name has caused and will continue to cause confusion and deception to the public *in the Salt Lake City area* among present and potential customers therein.”

Again the Supreme Court in this case says:

“By its findings the trial court seems justified because of the first two of the stated theories in concluding that plaintiff has acquired a right to exclusive use of the word “Budget” in the finance business *in this locality*.” (Emphasis added).

We will concede that the defendants were the first to use the term “Pioneer” in their title (although a different title than they now use) in Salt Lake County. They had an industrial loan operation in Midvale. The question to be determined under this section, therefore, is whether or not Midvale and Sugarhouse are in the same “locality” or “trade area, as the term is used in

the decided cases. In a very recent case, *Seegmiller v. Hunt*, 15 Utah 2nd 269, 391 P. 2d 298, the Supreme Court of Utah stated:

“The Court has recognized the principle that equity will protect a trade name in the area which is coextensive with its reputation. The extent of this area and its boundaries is a question of fact rather than law.”

What are the agreed facts in regard to the Sugarhouse area and the Midvale area, and what are the facts which the Court could know and consider as a matter of common knowledge?

As hereinabove stated, the Court is presumed to know what every man of ordinary intelligence must know. The Court knows and the answers to interrogatories substantiate that Sugarhouse is located within the corporate limits of Salt Lake City. It is a shopping or trade area on East 21st South in Salt Lake City, which is highly commercialized and which is insulated from other trade areas by a residential area (R 15). The Court can know as a matter of common knowledge that Sugarhouse is separated from Midvale by approximately ten miles. Furthermore, there are intervening between them a number of shopping or trade areas, surrounded by residential areas. There is no community of economic interest between Midvale and Sugarhouse. In its answers to supplemental interrogatories, the plaintiff states that the great majority of its 2169 accounts which it services from its Sugarhouse office

would reside in the area bounded as follows: South of 13th South, North of 4800 South and East of 7th East (R 19). The individuals residing in this area would seldom, if ever, have occasion to conduct business in Midvale. It also appears from these interrogatories that the plaintiff has limited its direct mail advertising campaigns to those residing within a three mile radius of its Sugarhouse office (R 20). The individuals who would be doing business of a financial nature in Sugarhouse are almost entirely distinct from those who would be doing a similar type business in Midvale. There can be no question but that if the plaintiff attempted to open a savings and loan branch adjacent to the defendants Midvale office under the name of Pioneer Savings & Loan Association, the defendants would be entitled to injunctive relief as having first used the name Pioneer in the Midvale trade area.

III

THE BUSINESS ACTIVITIES OF THE PLAINTIFF AND DEFENDANT ARE SO SIMILAR AS TO BE CONFUSING AND MISLEADING TO THE PUBLIC.

In their brief the defendants take the position that the nature of the business carried on by the plaintiff and the defendants are so dissimilar that no confusion in the minds of the public can result. The very fact, however, that the defendants have to strain so hard

on this point indicates the confusion that will result. It is true, as the defendants' brief points out, that different statutory sections authorize the organization of and define the powers of building and loan associations than those governing industrial loan corporations. However, the average citizen does not even have access to a set of the Utah statutes, much less is he inclined to read them. Therefore, this distinction is a meaningless distinction which would certainly not have the effect of differentiating the activities of the two companies in the public mind. The same thing can be said for the distinction which the defendants attempt to draw on the basis of the different amounts of authorized loans which may be made by savings and loan corporations and industrial loan companies. The fact remains, however, that the plaintiff and the defendants are both engaged in the business of taking deposits from the public and making loans to the public, and particularly in the field of taking deposits is it probable that the public could be misled to its detriment. Industrial loan companies typically pay higher interest rates on their deposits than do savings and loan associations, which they have to do to try to attract capital because of the greater stability of savings and loan associations. A member of the public might well be misled, in this instance, in making a deposit with the defendant companies at their higher rate of interest, to believe that he was getting the security of a savings and loan company deposit.

It is not necessary under the decided cases that the business of the companies involved be identical. They may merely be so similar in nature as to give rise to the probability of confusion. The following language is found in the *Security Title* case, *supra*:

“Although appellant is a title insurer and not in the business of abstracting and examining land titles in this state, nevertheless, the business activities of respondents and appellant are so closely related that unfair activities can have a deleterious effect. This is so because respondents’ and appellant’s services are connected with land titles, and the customer’s ultimate need is supplied by the same type of preliminary service as to title.”

In this case, as pointed out above, both the plaintiff and the defendants are engaged in taking deposits and making loans. In other words, of meeting the financial needs of the public, both as to investment and as to the obtaining of financing. While a trained legal mind may well be able to differentiate between the two types of activities, the average person desiring to deposit his money on interest, or the average person desiring to make a loan will not so differentiate.

CONCLUSION

We respectfully submit that the Findings of Fact and Conclusions of Law of the lower court were amply supported by the evidence, pleadings and admitted facts and that such judgment should be affirmed.

Respectfully submitted,

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