

1983

Lolita Pentecost v. M.W. Harward, And John Doe I-ii : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LOLITA PENTECOST, :
Plaintiff/Appellant, :
vs. : Civil No. 62246
M.W.HARWARD, and JOHN :
DOE I-III, :
Defendants/Respondents. :

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BRIEF OF RESPONDANT

--ooo0ooo--

Appeal from the Judgment of the Fourth
District Court for Utah County
Honorable J. Robert Bullock, Judge

--ooo0ooo--

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Clerk, Supreme Court, Utah

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AUTHORITIES CITED

3 Am Jur 2nd Agency § 294. 8

STATUTES CITED

Rule 56 (b) Utah Rules of Civil Procedure. 4

RELIEF SOUGHT ON APPEAL

Defendant/Respondant seeks to affirm the judgment of the trial Court.

ISSUES

The issue before the Court is whether the trial Court properly ruled no cause of action against Defendant/Respondant upon consideration of all the pleadings in the case.

STATEMENT OF FACTS

The statement of facts presented herein purposely omits consideration of the basis of any tort or contract claim and deals solely with the facts that pertain to the basis for the finding by the trial Court of no cause of action against Defendant/Respondant.

Plaintiff/Appellant brought her cause of action (R-2 and 3) alleging wrongful eviction and did specifically allege that Defendant/Respondant was acting "...as manager of apartments..." and as "...agent..." in Paragraph 8 of her complaint. Plaintiff/Appellant's complaint made no allegation that Defendant/Respondant acted in any manner for himself or in any capacity other than "...as manager..." of the premises that Plaintiff/Appellant allegedly leased.

Defendant/Respondant answered the complaint (R-10 and 11) and specifically admitted that he had acted "...as manager..." of the premises in his response to Paragraph 8 of the complaint. Paragraph 3 of his answer also made the specific allegation that he "...was an agent for the owner of the property."

In response to Plaintiff/Appellant's Fourth Interrogatory, Defendant/respondant's answer was that he retained the Plaintiff/Appellant's personal property "...[o]nly as an agent for the owner of the apartment..."

Defendant/Respondant filed his Motion for Summary Judgment (R-20) giving notice in Paragraph 2 that the allegations contained in Plaintiff/Appellant's complaint did not state a cause of action against him because he was acting as agent for the owner of the property and supported the motion by way of an affidavit (R-21) that he had functioned as an agent for the owner of the property.

Nothing in the Record raised an issue with regard to the capacity of Defendant/Respondant as agent for the property owner, and the trial Court properly applied that fact to the law (R-30 and 31)

POINT I

THERE IS NO MATERIAL ISSUE OF FACT

Defendant/Respondant takes no issue with the statement made in Point I of Plaintiff/Appellant's brief; however, the question is whether the trial Court, in accordance with Rule 56 (c), Utah Rules of Civil Procedure, appropriately found that "...the pleadings...together with the affidavits...show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law..." (Rule 56 (c) U.R.C.P.) The issue of Defendant/Respondant's capacity is undisputed.

POINT II

THERE IS NO BASIS FOR A CAUSE OF ACTION AGAINST DEFENDANT/RESPONDANT

A review of Plaintiff/Appellant's complaint (R-2 and 3) is necessary to determine the purpose of each allegation.

a) Paragraph 1 is presumably a jurisdictional fact which is not necessary in this case.

b) Paragraph 2 alleges facts that first have venue ramifications and which, when supported by the summons (R-8) and the Substitute Service Return (R-9) make out a basis for personal jurisdiction over Defendant/Respondant.

c) Paragraph 3 alleges the fact of a lease agreement which purports to create the relationship of Lessor-Lessee;

however the term "Defendant" is used in the singular and makes no specific effort to identify to which of the named defendants in the caption the allegation applies.

d) Paragraphs 4, 5, 6, and 7 allege facts which, if supported by evidence, would serve as the legal basis for liability.

e) Paragraph 8 contains the only allegation that attempts to name the person who was to be held liable under the theory propounded in Paragraphs 4, 5, 6, and 7, and that allegation is one of exoneration of Defendant/Respondant as an individual.

f) Paragraph 9 falls short, but is only Plaintiff/Appellant's effort to identify the "John Doe I-III" named as defendants but without further description.

g) Paragraphs 10 and 11 make allegation that would give notice of the measure of damages sought.

The trial Court must find, and in a logical sequence, the following:

a) That it has jurisdiction over the subject matter of the lawsuit. Defendant/Respondant concedes that the district Court does have jurisdiction over the subject matter of this lawsuit.

b) That it has in personam jurisdiction over the Defendant. The allegation in Paragraph 2 of the complaint, the Summons and Substitute Service Return along with the Answer (R-10) establish absolutely that the Court has the authority to render a personal judgment against Defendant/Respondant if the claim for liability is supported by evidence.

c) That there is a legal basis for holding Defendant/Respondant personally liable under the theory of recovery alleged by Plaintiff/Appellant. It is here that Defendant/Respondant M.W. Harward asserts that there is no legal basis, based upon undisputed facts, to find a cause of action against him in his individual capacity. He is alleged in the complaint to be "... manager" and "agent", he answers an admission to that allegation, and in his affidavit he deposes that he was indeed an agent and did function in an agency capacity. Nor did the complaint make any allegation of fact that would serve to show a basis for personal liability against him.

d) That there is a legal theory upon which liability may be based. Here there are genuine issues of fact.

e) That a damage has been suffered. Here also there are genuine issues of fact.

The trial Court was not asked to rule on whether it ha

jurisdiction over the subject matter of the lawsuit or whether it had jurisdiction over Defendant/Respondant. It was asked, as the consequence of his motion for summary judgment, to determine whether there was any legal basis, considering only the pleadings, and even assuming that the theory of liability and damages could be proved, to hold Defendant/Respondant personally liable. Because of the existence of allegations that his legal capacity was only as an agent and of the absence of allegations showing he acted in a personal capacity the trial Court properly found no cause of action against the only defendant who was before it.

If this matter were to go to trial on the issues as framed in the pleadings, and if the Plaintiff/Appellant were to prevail on the issues of liability and damages, there would be no one before the trial Court against whom the judgment could be imposed.

POINT III

DEFENDANT/RESPONDANT WAS ACTING
AS THE DISCLOSED AGENT OF THE
OWNER OF THE PROPERTY UNDER A
CONTRACT WITH PLAINTIFF/APPELLANT

The Plaintiff/Appellant's statement of the kind of case makes reference to a landlord/tenant relationship which places the liability theories in the area of contract law rather than tort

law. There is no allegation in the complaint (R-2 through 5) claiming that any alleged actions of Defendant/Respondant were outside the scope of his authority as agent for the property owner. The complaint, as recited earlier, states that Defendant/Respondant was "manager" and "agent of the owner" thereby serving as an acknowledgement of his agency capacity.

3 Am Jur 2nd Agency §294, states the general rule of law that:

An agent is not liable for lawful acts done within the scope of his authority for and in behalf of a disclosed principal. (See pocket part)

There is no allegation that the acts of Defendant/Respondant, as alleged in the complaint, were beyond the scope of his authority as agent for the owner of the property. This, of course, follows the basic rule of agency law that:

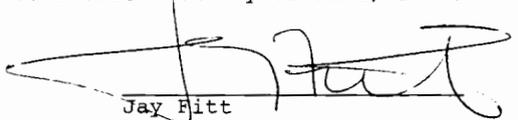
If a contract is made with a known acting within the scope of his authority for a disclosed principal the contract is that of the principal alone and the agent cannot be held liable thereon... (3 Am Jur, Supra)

CONCLUSION

There are no material facts in dispute in this case. Plaintiff/Appellant has not raised any allegation which can be

used as a basis to hold Defendant/Respondant liable in any manner. To the contrary, Plaintiff/Appellant's allegations firmly establish the agency status of Defendant/Respondant.

Respectfully submitted this 13th day of June, 1983.

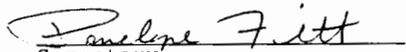


Jay Fitt
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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Defendant/Respondant was mailed in a postage prepaid envelope to: Ronald E. Dalby, Utah Legal Services, 105 South 100 East, Provo, Utah 84601.

Dated this 13th day of June, 1983.



Pamela Fitt
Secretary