1970

Transamerican Title Insurance Company, Formerly Phoenix Title And Trust Company v. United Resources, Inc., Formerly United Teletronics, Inc. : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

TRANSAMERICAN TITLE INSURANCE COMPANY, FORMERLY PHOENIX TITLE AND TRUST COMPANY,
Plaintiff and Respondent,

vs.

UNITED RESOURCES, INC., FORMERLY UNITED TELETRONICS, INC.
Defendant and Appellant.

Case No. 11921

BRIEF OF APPELLANT

Appeal from Judgment of Third District Court for Salt Lake County Honorable Stewart M. Hanson

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STATEMENT OF NATURE OF CASE

Summary judgment was awarded the respondent in the Third Judicial Court in and for Salt Lake County based on an Arizona default judgment.

DISPOSTON IN LOWER COURT

The judge awarded summary judgment for the Respondent in the amount of $17,650.40 principle, $19,098.49 accrued interest, $4,000.00 attorney's fees in obtaining the Arizona judgment, and $20.00 costs.

RELIEF SOUGHT ON APPEAL

The appellant seeks a trial on the merits of his defense of lack of jurisdiction of the Arizona Court to render such judgment.

STATEMENT OF FACTS

There is no transcript as summary judgment was awarded the Respondent by the Honorable Stewart M. Hanson of the Third Judicial District Court, Salt Lake County. After hearing arguments and reviewing the briefs submitted, the Court reasoned that the Arizona "long arm" statute was clearly applicable and therefore the Court should give full faith and credit to the Arizona default judgment against the Appellant.

The only evidence for the lower Court's decision was the pleadings, including interogatories and the objections to said interrogatories filed by the Appellant. Copies of the Arizona Judgment were filed with the Respondent's motion for summary judgment but no facts were ever allowed to be presented to a Court or Jury as to the Appellant's affirmatively pleaded defense

of the lack of jurisdiction of the Arizona Court over the Appellant's person, nor were the objections to interrogatories ever ruled upon.

The Appellant's answer reads as follows:

> "As an affirmative allegation herein, defendant alleges that if any judgment was obtained in the State of Arizona and as pleaded herein, the same *was void* for the same reason that there was *not proper jurisdiction* had of either of these defendants." (emphasis added)

ARGUMENT

POINT I

LACK OF JURISDICTION OF A COURT TO RENDER JUDGMENT IS A PROPER DEFENSE TO THE GRANTING OF FULL FAITH AND CREDIT TO THAT JUDGMENT BY ANOTHER STATE COURT.

The facts and record of this case show that the defendant-appellant was never given an opportunity to present his case on the issue as to the lack of the Arizona Court's jurisdiction over the appellant corporation. If the appellant had been permitted to do so, and prevailed as others have before, then the Arizona judgment would be declared void by the Utah Court and therefore not entitled to or given full faith and credit in this state, and a host of evils avoided.

A case exactly in point is the case of *Conn v. Whitmore,* 9 Utah 2d 250, 342 P. 2d 871 (1959), decided by this Court.

In the above case there was an action brought in Utah for judgment on an Illinois judgment. The appellant there claimed that he was entitled to full faith and credit based on his Illinois judgment. The Trial Court, on the facts presented at trial, held that there was not sufficient contacts or transactions of business to satisfy the due process clause and the constitutional meaning of the Illinois statute allowing personal service of summons on a party outside of the state who had submitted to the jurisdiction of the foreign Court.

This Court affirmed the lower court's decision that there was no jurisdiction, and full faith and credit was not granted, and the Illinois judgment was declared void. The soliciting of the purchase of a horse by mail, by a Utah resident, the sending of an agent to inspect the horse in Illinois, and the mailing of a check for part payment, did not constitute sufficient "minimum contacts" under the due process interpretation made by the Supreme Court in the leading case of *International Shoe Company v. State of Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945).

In *Conn v. Whitmore,* this Court states that full faith and credit will not be automatically granted in the case of all foreign State judgments, but that it is the policy of this Court to apply "minimum contacts"

and due process tests as outlined in the *International Shoe* and other cases.

> " . . . We are further of the opinion that the alternative to the above holding (*lack of jurisdiction*) is that if the defendant's acts here were deemed sufficient to fulfill the requirements of the Illinois Statute and confer jurisdiction upon its courts, then the statute would not provide the "minimum contacts" * * * Such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' required under the doctrine set forth in the case of International Shoe v. State of Washington, supra (66 S. Ct. 158), and would therefore be unconstitutional as not affording due process of law." (9 Utah 2d 253)

In speaking of the out of state appellant in the above case, this court says: "He claimed 'full faith and credit' for the judgment which would preclude any defense upon the merits, but not a challenge to the jurisdiction of the court which entered it." (9 Utah 2d 251) For authority for the above proposition, this Court cites the case of *Williams v. State of North Carolina,* 1945, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, and the case of *Miliken v. Meyer,* 1940, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278. These cases stand for the proposition that the full faith and credit clause operated only with respect to judgments rendered by a court whose jurisdiction, either as to subject matter or person, is not impeached. Want of jurisdiction over either the person or the subject matter is open to inquiry

where a judgment rendered in one state is challenged in another.

In *Conn v. Whitmore* this Court examines the new liberalized trend of the recent "long arm statutes" and concluded that is reasonable that there must be some substantial basis for allowing jusidiction over out of state defendants. This presupposes that the defendant would have an opportunity to challenge that basis. This Court ,at 9 Utah 2d 254, states as follows:

> "Even under the liberalized view the foregoing cases represent as to the prerequisites to holding one subject to personal jurisdiction of the courts of a foreign state, this requirement remains: there must be some substantial activity which correlates with a purpose to engage in a course of business or some continuity of activity in the state so that deeming the defendant to be present therein *is founded upon a realistic basis and is not a mere fiction.* That this is so and that a single act or transaction does not suffice unless it fits into the above pattern is well established." (emphasis added)

After concluding that the out of state court had no basis for jurisdiction Chief Justice Crockett goes on at page 255 to give some of the reasons why a resident should be entitled to his defense of lack of jurisdiction.

> "Brief reflection will bring to mind difficulties to be encountered if the ordering of merchandise in a foreign state by mail and taking delivery through a designated carrier, whether private or common, is to be deemed "doing business" in a foreign state, which will draw one into the orbit

of the jurisdiction of its courts. *This would for practical purposes obliterate any protection one might have from being compelled to go to a foreign jurisdiction to defend a lawsuit.* A person contemplating business in another state would have only two alternatives: either subject himself to the jurisdiction of the foreign court if any dispute arises, or refrain from doing such business. This would have a bad effect upon commerce. Mail order houses, for example, accept and fill orders from all over the country. If they could sue on their accounts in their own state where it would be highly inconvenient for out-of-state customers to defend, then forward the judgments to the jurisdictions where the customers live, demanding full faith and credit from them, this would effectively prevent the customers from presenting a meritorious defense where one existed. The ultimate result would be to dissuade customers from doing business across state lines by mail. Thus what may seem a temporary advantage to such businesses, in all likelihood would be detrimental to them and to business generally in the long run." (emphasis added)

In determining if individual residents non-manufacturing activities were doing business in a judisdictional sense, *the court must examine each case as it arises,* having in mind a duty and desire to balance interests of those involved from different jurisdiction. *Dykes By and Through Dykes v. Reliable Furniture and Carpet,* 277 P. 2d 969, 3 Utah 2d 34.

It is respectfully submitted that there is sufficient authority and reason for the proposition that this particular appellant is entitled to have the defense of lack

of jurisdiction of the Arizona court heard. The full faith and credit clause of the Constitution does not preclude the appellant his rights to due process of law and to have his defense heard on its merits.

POINT II

THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT AS THERE REMAINED A GENUNE ISSUE AS TO A MATERAL FACT.

The record on file shows that there was no evidence allowed or considered on the appellant's defense. As previously pointed out, the defense was properly pleaded in the answer to the complaint and therefore remained at issue. It cannot be controverted, as pointed out in Point One of this brief, that the defense is a genuine issue and also a material fact.

The respondent's second interrogatory requested was propounded as follows: "State the basis of the contention that the Arizona Court had no jurisdiction over Defendant." The very fact that it was asked shows that the respondent recognized that a genuine issue of a material fact remained. The appellant then properly served his objection to the interrogatory, stating as follows: "Interrogatory No. 2 is a request for a legal opinion or the law of the case, and it is not the subject of this discovery as far as concerned." The objections to the interrogatories were never ruled upon,

which is highly irregular of itself, as summary judgment was granted the respondent. This left a genuine issue pleaded, and no factual basis, not even one affidavit, as to the appellant's defense of want of jurisdiction. He was given no opportunity to show his defense on the merits, as it was summarily disposed of with no factual basis.

U.R.C.P. 56 (c) is set out here for convenience and to show that it is elemental that summary judgment is not proper if there is any *material* fact at issue.

> "*Motion and Proceeding Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith of the pleadings, depositions, answers to interogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue to *any material fact* and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages." (emphasis added)

It is the policy of this court that if any material issue asserted by the plaintiff is contradicted, then the contradiction must be taken as true, for purposes of summary judgment.

> "On a motion for summary judgment against a defendant where some of the facts are in dispute, a judgment can properly be rendered against him only if, on the undisputed facts, the

defendant has no valid defense." *Disabled American Veteran v. Hendrixson,* 9 U.(2d) 152, 154, 340 P. 2d 416 (1959).

A similar case in point is that of *Hatch v. Sugarhouse Finance Company,* 20 Utah 2d 156, 434 P. 2d 758, (1967). The case was an action by attorneys to recover for services rendered defendant together with expenses and out-of-pocket expenditures advanced by them in connection with their services. From judgment of the Third District Court, Salt Lake County, Stewart M. Hanson, granting summary judgment, defendant appealed. The Supreme Court held that issues as to quantity and reasonable value of legal services rendered by attorneys to defendant were presented, precluding summary judgment for attorneys. The case was reversed and remanded for trial upon the merits.

This Court in the above cited case at 20 Utah 2d 157 makes the following statement:

> "The court, after hearing upon the motion of the plaintiffs for a summary judgment *at which time no evidence was introduced,* took the matter under advisement and thereafter granted the plaintiff's motion. It is evident that the court after considering the pleadings of the parties and the affidavits supporting the party's contentions determined that there was no genuine issue of fact which would necessitate a trial.
>
> We are of the opinion that there was an issue of fact raised by the pleadings and the counter-affidavit of the defendant in opposition to the plaintiff's motion for a summary judgment and

> that the *defendant is entitled to have its day in court* in respect to the quantity and the reasonable value of the services rendered by the plaintiffs. *Rule* 56, *U.R.C.P., should not be used where there are issues of fact in dispute.*" (emphasis added)

In the above cited case at 20 Utah 2d 158 Justice Ellett in his concurring opinion says that statements of fact are not sufficient to sustain a summary judgment where there are issuse raised by the pleadings. That is exactly why that case was, and this one should be, reversed and remanded for a trial on the merits. We quote further from Justice Ellett:

> "*The court cannot evaluate evidence on summary judgment,* and even at trial the court cannot fix an attorney's fee *except where evidence has been introduced on the matter* or a stipulation entered into by the parties as to how the judge may determine it. See F.M.A. Financial Corporation v. Build, Inc., 17 Utah 2d 80, 404 P. 2d 670; Hurd v. Ford, 74 Utah 46, 276 P. 908." (emphasis added)

The sole purpose of summary judgment is to bar from the courts unnecessary and unjustified litigation, and only where it clearly appears that the party against whom the judgment would be granted cannot possibly establish a right to recover should such judgment be granted. Any doubts should be resolved in favor of such party when summary judgment against him is being considered. *Reliable Furniture Co. v. Fidelity & Guaranty Ins. Underwriter,* 16 U. (2d) 211, 398 P.2d 685, (1965).

In the above cited case this Court, upon consideration of the record, concluded that there was not sufficient evidence to justify a finding that as a matter of law the case should have been dismissed. The Court made the following observations on the existing evils of summary disposal of a case that would exist if the case at bar is not remanded also. We quote from 16 Utah 2d 216.

> "The summary disposal of a case serves a salutary purpose in avoiding the time, trouble and expense of a trial when it is justified. But unless it is clearly so, there are other evils to be guarded against. A party with a legitimate cause, but who is unable to afford an appeal, may be turned away without his day in court; or, when an appeal is taken, if a reversal results and a trial is ordered, the time, trouble and expense is increased rather than diminished. It is to avoid these evils and to safeguard the right of access to the courts for the enforcement of rights and the remedy of wrongs by a trial, and by a jury if desired, that it is of such importance *that the court should take care to see that the party adversely affected has a fair opportunity to present his contentions against precipitate action* which will deprive him of that privilege. His contentions as to the facts should be considered in light most favorable to him, and only if it clearly appears that he could not establish a right to recovery under the law should such action be taken; and *any doubts which exist should be resolved in favor of affording him the privilege of a trial.*" (emphasis added)

Resolving the doubtful facts in the record in favor of the appellant it is obvious that he has been denied his right to a presentation of his defense on the merits as required by U.R.C.P. 56 (c) and the due process clause of the constitution. It is respectfully submitted that the trial court error should be corrected by this Court.

CONCLUSION

Taking the record on its face the valid defense of lack of jurisdiction was pled but the opportunity to prove it was simply never given. There is no basis in fact or in law for the granting of a summary judgment which violates the appellant's rights. Therefore, in this case, it should be remanded for trial on the genuine issues of a material fact.

Respectfully submitted,

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