1984

Kae Smith v. Dan M. Vuicich : Brief of Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

KAE SMITH,	:	
Appellant,	:	
vs.	:	Case No. 19392
DAN M. VUICICH,	:	
Respondent.	:	

BRIEF OF RESPONDENT VUICICH

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Brief of Respondent Vuicich

NATURE OF CASE

This was an action by plaintiff for trespass over vacant lots and a Counterclaim by defendant for abuse of process and for statutory attorney's fees.

DISPOSITION IN TRIAL COURT

This case was tried before a jury of eight persons in Third District Court, the Honorable Judge Kenneth Rigtrup presiding. The jury reached a verdict of no cause of action against plaintiff, finding that defendant had not trespassed on her property. The jury further found in favor of defendant on his claim for abuse of process and awarded him judgment in the amount of $3,300.00. Plaintiff's Motion for a Judgment Notwithstanding the Verdict and Motion for New Trial were denied.

RELIEF SOUGHT ON APPEAL

In responding to this appeal, respondent seeks to have this Court affirm the trial court and jury verdict.

STATEMENT OF FACTS

Respondent agrees with the statement of facts set forth in appellant's brief, except as to appellant's characterization of respondent's Counterclaim. Defendant/respondent counterclaimed against plaintiff/appellant, claiming that plaintiff had consented to defendant's crossing the subject property, that plaintiff's property was not damaged, that defendant improved plaintiff's property (by construction of a retaining wall adding support to the slope of plaintiff's property and by cleaning plaintiff's property), and that in bringing this action under those circumstances, plaintiff acted maliciously, with intent to defraud and committed an abuse of process. Record 009-011.

ARGUMENT

POINT I.

APPELLANT IS PRECLUDED FROM RAISING, FOR THE FIRST TIME ON APPEAL, THE DEFENSE OF FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Appellant has claimed for the first time on appeal that respondent's Counterclaim does not state a cause of action upon which relief can be granted, and that this Court should therefore order a dismissal of the Counterclaim and the entering of a judgment of no cause of action on that Counterclaim. Appellant concedes in her brief that "the first consideration is whether this defense may be raised at this late date." Appellant's Brief at 2. However, appellant contends that Rule 12(h)

of the Utah Rules of Civil Procedure permits this defense to be raised for the first time on appeal.

Rule 12(h) of the Utah Rules of Civil Procedure provides in pertinent part:

> A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted... may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits.... The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in light of any evidence that may have been received.

Appellant has not complied with any of the various alternative methods for raising the defense of failure to state a claim upon which relief can be granted as against respondent's Counterclaim for abuse of process. Counsel for plaintiff/appellant filed a Motion to Dismiss defendant/respondent's Counterclaim, Record at 029, but in his supporting memorandum and at argument on that motion, he only sought dismissal of that part of defendant/respondent's Counterclaim that sounded in malicious prosecution, not abuse of process. Id. at 030-035, 037-038. Subsequently, appellant never even answered respondent's Counterclaim No defense of failure to state a claim upon which relief can be granted was raised at trial, either, as evidenced by the Record and the lack of any Order having been entered on said issue in accordance with Rule 15(b).

The latest possible time that Rule 12(h) permits a party to raise the defense of "failure to state a claim", is at trial. The provision of Rule 12(h) allowing the defense to be raised by "a later pleading" does not include a Brief on Appeal, since Rule 7(a) designates the documents that are classified as "pleadings", and appellant's Brief on Appeal does not fall within that category.

Since the cause of action of abuse of process set forth in respondent's Counterclaim was never challenged by appellant up and through the end of trial, and since respondent had no notice whatsoever that appellant intended to claim that the Counterclaim failed to state a claim upon which relief could be granted, appellant must be precluded from raising this defense at such a late date and for the first time on appeal.

POINT II.

RESPONDENT"S COUNTERCLAIM DID STATE A CLAIM FOR ABUSE OF PROCESS UPON WHICH RELIEF COULD BE GRANTED.

Appellant contends that respondent's Counterclaim was deficient because there were "no particulars stated in the subject pleading" and because respondent did not claim that the subject action was brought "without probable cause." Appellant's Brief at 3. Notably, lack of probable cause is not an element of an abuse of process cause of action. W. Prosser, Law of Torts §121 at 856-58 (4th ed. 1971).

The requirements of notice pleading do not mandate or even encourage the type of pleading suggested by appellant. Rule 8(a) of the Utah Rules of Civil Procedure merely requires a "short and plain statement of the claim showing that the pleader is entitled to relief" although Rule 9(b) states that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." (Emphasis added). It also provides that "malice, intent, knowledge, and any other condition of mind of a person may be averred generally". Respondent's Counterclaim conformed to those requirements, alleging facts sufficiently encompassing all of the elements of a cause of action for abuse of process - misuse of civil process "for an end other than that which it was designed to accomplish." W. Prosser, supra.

Specifically, respondent's Counterclaim alleged that:

> Plaintiff had consented to defendant's activities on the subject property;
>
> Plaintiff's property was vacant and unimproved, and defendant's activities caused no injury to said property;
>
> The value of plaintiff's property increased through such activity;
>
> Defendant's independent contractors restored and improved the subject property;
>
> "Plaintiff has no basis for alleging that damage has been done to the subject property, and has commenced this meritless action

against defendant maliciously and with the intent to defraud defendant";

Defendant incurred damages as a result of plaintiff's action.

Record at 009-011. Accordingly, respondent's Counterclaim was entirely adequate in alleging that appellant did not have any basis or cause for bringing the action, inasmuch as she had given respondent permission to use her property, that the property was not damaged but actually improved, and by way of general allegation, that appellant was acting maliciously and with intent to defraud in bringing the action against respondent. The Counterclaim stated the necessary facts and circumstances surround the claim such as to provide appellant with fully adequate notice of the nature of respondent's claim.

POINT III.

THE EVIDENCE AT TRIAL FULLY SUPPORTED RESPONDENT'S CLAIM FOR ABUSE OF PROCESS, INCLUDING AN IMPROPER PURPOSE ON THE PART OF APPELLANT.

At trial, respondent established that appellant had initiated the subject action knowing that she did not have a valid cause of action and therefore, the only possible purposes for bringing such a suit would be improper, such as vexing and harassing respondent or attempting to obtain a judgment through false testimony.

There was an abundance of testimony presented at trial to support respondent's claim that appellant had given her

permission for him to cross her property, and that her vacant lots were not damaged in the least, but rather improved as a result of respondent's activities on that property.

Defendant/respondent, Dan Vuicich testified that plaintiff/appellant gave him and his general contractor her permission to have the pieces of construction equipment cross her property in order to gain access to his lot. Reporter's Partial Trial Transcripts at 16-17 (Record at 0158-0159). The general contractor on the project confirmed respondent's testimony that appellant had given her verbal authorization to cross the lots:

Ron Wilkins:	And so she told me that if we had no other way to cross the lot that we could do so twice.
Q:	Did you understand that to mean crossing whatever piece of property you needed twice each?
A:	Yes.
Q:	Are there any other limitations given on the permission?
A:	Not that I remember.
....	
Q:	Did you have any doubt when you left that you had her permission?
A:	Absolutely not.

Id. at 74-76 (Record at 0216-0218). This evidence was supported by additional testimony that respondent went to extraordinary

lengths to insure compliance with appellant's authorization to cross the property, and to make certain that appellant's vacant lots were left in at least as good a condition as prior to the crossing of the equipment. For example, evidence was presented that respondent went to extra expense to pump the cement for the construction project over the top of his house. Testimony of Dan Vuicich, Id. at 27-28 (Record at 0169-0170); Testimony of Ron Wilkins, Id. at 79 (Record at 0221). Lumber was hauled by hand from the street below respondent's house, and a neighbor's driveway was used for removal of the dirt from the project. Testimony of Ron Wilkins, Id. at 79-80 (Record at 0221-0222); Testimony of Dan Vuicich, Id. at 27-28 (Record at 0169-0170). Ron Wilkins, the general contractor, also hired the best excavator available, cautioned him to take extra care, and insured limited crossings of appellant's property. Testimony of Ron Wilkins, Id. at 76-77 (Record at 0218-0219).

Two neighbors, Larry Paneck, whose property adjoins that of appellant, and Karen Holton, whose property is across the street from that of appellant, Ron Wilkins and Dan Vuicich all testified that appellant's property was in as good or better condition after the crossings than it was before the equipment crossed the property, and that no damage whatsoever was done to that property. Testimony of Larry Paneck, Id. at 35, 43, 45 (Record at 0177, 0185, 0187); Testimony of Karen Holton,

Id. at 87-88, 91 (Record at 0229-0230, 0233); Testimony of Ron Wilkins, Id. at 78-80 (Record at 0220-0222); Testimony of Dan Vuicich, Id. at 28 (Record at 0170). Appellant's property was improved by respondent's activities because of the construction of a retaining wall, as well as the extraordinary efforts of the clean-up crew, which also rebuilt a dirt cliff on the front of appellant's property, which had previously been damaged by children playing in the area. Testimony on Dan Vuicich, Id. at 19, 28 (Record at 0161, 0170); Testimony of Ron Wilkins, Id. at 78-79 (Record at 0220-0221).

At the time of trial, appellant was in the process of selling her property to Robert Cushing, a realtor-contractor. Mr. Cushing testified at trial that appellant's lot was "a perfect lot" for the house that he would be constructing, that he was paying more for the lot than the asking price of similar lots in the area, and that it would be necessary for him to remove eight vertical feet of earth from a front portion of the lot in order to construct a garage on the lot. Testimony of Robert Cushing, Id. at 49-50, 52-54 (Record at 0191-0192, 0194-0196).

In essence, appellant has argued that respondent should not recover under his abuse of process claim since he produced no direct evidence at trial that appellant brought this action for an improper purpose. However, the only direct evidence possible regarding an improper purpose would be an admission of an intent

to vex, harass or extort by plaintiff/appellant. The lack of such an admission does not prevent the jury from drawing reasonable inferences from the weight of the evidence presented at trial. In a recent opinion of this Court in a case that was similar in many respect to the case at bar, Leigh Furniture and Carpet Company v. Isom, 657 P.2d 293 (Utah 1982), this Court affirmed a jury award of compensatory damages under a Counterclaim for intentional interference with prospective economic relations. In doing so, this Court ruled that all conflicts in the evidence from trial must be

> resolved in favor of the prevailing party and all evidence viewed and inferences drawn in the light most supportive of the verdict of the jury, Cintron v. Milkovich, Utah 611 P.2d 730, 732 (1980); Ute-Cal Land Development Corp. v. Sather, Utah 605 P.2d 1240, 1245 (1980); Lamkin v. Lynch, Utah 600 P.2d 530, 531 (1979).

657 P.2d at 296-97.

Similarly, in this case, there was substantial evidence presented at trial to support the jury's inferences that plaintiff/appellant had an improper purpose in bringing this action, justifying a verdict in favor of respondent on his Counterclaim.

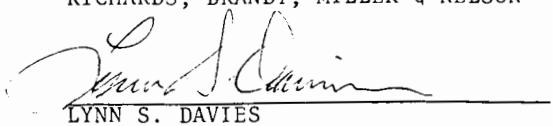
CONCLUSION

Appellant's contention on appeal that respondent's Counterclaim fails to state a cause of action upon which relief

can be granted, and that the Counterclaim must be dismissed, is incorrect and improperly raised at this point in the action. Rule 12(h) of the Utah Rules of Civil Procedure does not allow such a defense to be raised for the first time on appeal. Even if the defense could be raised, respondent's Counterclaim states sufficient facts and circumstances to support a claim based on abuse of process. Finally, appellant contends that there is insufficient evidence in the Record to support the jury's verdict on respondent's Counterclaim for abuse of process. However, the references to the Record set forth above demonstrate that there was substantial evidence from which the jury could infer that plaintiff/appellant had no possible justification for bringing this suit, and that her purpose for bringing this suit was therefore improper. Accordingly, the jury's verdict on the Counterclaim and resulting judgment must be affirmed.

DATED this 7th day of May, 1984.

RICHARDS, BRANDT, MILLER & NELSON



LYNN S. DAVIES
Attorneys for Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Brief of Respondent to Robert B. Hansen, attorney for appellant, 965 East 4800 South, Suite 2, Salt Lake City, UT, 84117, on this 7th day of May, 1984.

Catherine E. Dunn