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A&M Enterprises, Inc., Et Al. v. Paul Hunziker, Et Al. And Gilmore Steel Corporation v. Paul Hunziker, Et Al. : Brief of Respondent

In The Supreme Court of the State of Utah

A & M ENTERPRISES, INC., et al.,
Plaintiff-Appellant,
vs.
PAUL HUNZIKER, et al.,
Defendant-Respondent,

GILMORE STEEL CORPORATION,
Plaintiff-Appellant,
vs.
PAUL HUNZIKER, et al.,
Defendant-Respondent.

BRIEF OF

Appeal from
Third District
Comm
Honorable

SUMMERHAYS, KLINGLER
& COHNE
Lowell V. Summerhays
1010 University Club Building
Salt Lake City, Utah
Attorneys for Appellants
A & M Enterprises, Inc.,
Cleaning by Tony, Inc.,
Midwest Electric.

VAN COTT, BAGLEY, CORNWALL
& McCARTHY
Robert D. Merrill
141 East First South
Salt Lake City, Utah
Attorneys for Appellant
Gilmore Steel Corporation

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CASES CITED

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vs.

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vs.

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Defendant-Respondent.

Case No. 12224

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF THE CASE

This case asks for review of two consolidated actions, the first of which A & M Enterprises, Inc., et al vs. Paul Hunziker, et al asserts claims of nine named plaintiffs. The second action, Gilmore Steel Corporation vs. Paul Hunziker, et al was commenced on June 10, 1969. Subsequently, numerous other lien claimants appeared to assert their claims. The complaints each assert mechanic's lien rights as against Defendant Paul Hunziker and assert various relationships between the said Paul Hunziker

who was in possession of the property under a lease and option agreement (Gilmore R. 148-154) and also asserts claims against Defendant and Respondent herein Barrett Investment Company, alleging various claims, including agency, partnership, joint venture, fraud, and unjust enrichment. Of the numerous lien claimants in the original consolidated action, only four, being A & M Enterprises, Inc., Cleaning by Tony, Inc., Midwest Electric and Gilmore Steel Corporation, are pursuing this appeal.

DISPOSITION IN LOWER COURT

Defendant Barrett Investment Company moved the court for Summary Judgment based upon the pleadings, various affidavits, depositions, answers to interrogatories and exhibits on file. This Motion for Summary Judgment was granted by the Court.

RELIEF SOUGHT ON APPEAL

Defendant Barrett Investment Company seeks the affirming of the judgment of the lower court, awarding as to Defendant Barrett Investment Company a Summary Judgment of No Cause of Action.

STATEMENT OF FACTS

Respondent Barrett Investment Company (hereinafter referred to as "Barrett") will refer to the two transcripts in the consolidated action in the same manner as have Appellants, to-wit: The transcript of Gilmore Steel Corporation will be referred to as

"Gilmore R. ....", and the transcript in the A & M Enterprises, Inc. case will be referred to as "A & M R.....".

Upon the commencement of these actions, Respondent filed, inter alia, a Motion for More Definite Statement (A & M R. 91) and Interrogatories (A & M R. 96-99) in the A & M Enterprises case; and filed its Answer (Gilmore R. 67-69) and interrogatories (Gilmore R. 86-88) in the Gilmore action. The Interrogatories were served upon Plaintiffs in the A & M Enterprises case on November 13, 1969, and Interrogatories were served upon Plaintiff Gilmore in that action on July 22, 1969. Thereafter, a Notice of Readiness for Trial was filed (Gilmore R. 101, 105) to which objections were duly made by Respondent Barrett (Gilmore R. 94, 103) and (A & M R. 134) on the grounds that the Interrogatories propounded by this Respondent had not been answered by all the Plaintiffs. Thereafter, the action was set for trial on June 15, 1970. Each of the Appellants joining in this appeal filed their Answers to Interrogatories on June 11, 1970 (Gilmore R. 108-110, 111-115, 116 - 126, 130-136). Because of the extremely late date of the filing of these Answers, immediately preceding the weekend before the trial date, because of the nature and content of the answers themselves, and because the Motion for More Definite Statement as to the A & M Enterprises' Complaint had never been heard and determined, the trial date was continued to August 10, 1970. Immediately following this date, on June 23, 1970, counsel for this Respondent filed

his Motion for Summary Judgment (Gilmore R. 138) supported by the Affidavits of Ralph Goodrich (Gilmore R. 139-140), Ross S. Tyson (Gilmore R. 141-142), Paul G. Grant (Gilmore R. 143-145), and George E. Bridwell (Gilmore R. 146-155). No traversing or counter affidavits were filed by any of the Plaintiffs, and the matter pursuant to notice proceeded to hearing on July 17, 1970, and on July 21, 1970 the Court entered its Order granting this Respondent's Motion for Summary Judgment (Gilmore R. 158).

The real property upon which Plaintiffs and Appellants seek to impose a lien, was repossessed by Respondent Barrett prior to the commencement of these actions in an action in the District Court of Salt Lake County, Utah, based upon the default of Defendants Western Life & Crane Corporation and Paul Hunziker.

ARGUMENT

POINT I

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED, THERE BEING NO GENUINE ISSUE OF MATERIAL FACT.

It would appear that the Appellants, realizing that lien rights would only attach to the contracting party's interest, which had been terimnated by foreclosure, are now attempting to raise issues of partnership, joint venture, etc. in an effort to circumvent the obvious. See *Buehner Block Co. vs. Glezos*, 6th Utah 2d 226, 310 Pac. 2d 517. To this end, numerous and

repeated allegations concerning the conduct and, in fact, the bona fides, of Mr. Barrett as the principal of the Respondent, have been made. However, when confronted with Interrogatories requesting that the facts upon which these general allegations were based be set out in some detail, Appellants respond with answers which are no more than the allegations which were requested to be explained, hearsay statements, conclusions, and argumentative assertions. Further, it should be kept in mind that Appellants did not even file these answers, as inadequate as they are, until the end of the week preceding the date originally set for trial. These answers, sworn to by the respective Appellants, consist in part, of such statements as follows. By Defendant Cleaning By Tony, Inc.: "It was my understanding that . . ." (Gilmore R. 108); "Paul Hunziker told me . . .' (Gilmore R. 108); "I did not ever talk to Bob Barrett personally . . .' (Gilmore R. 109); Plaintiff A & M Enterprises, Inc. ". . . assumed and believed that Paul Hunziker was the owner . . . because of the extensiveness of the work and the fact that only a owner could have approved such major changes." (Gilmore R. 111, Interrogatory 1). Again "Plaintiff A & M Enterprises, Inc. dealt primarily with Paul Hunziker and does not recall any specific representations made to Plaintiff by Bob Barrett Investment Company. . . . except that if Bob Barrett and Barrett Investment Company owned the premises, they must have agreed to the changes and construction that we did." (Gilmore R. 112-113, Answer to Interrogatory No. 5) and again at Inter-

rogatory No. 8 (Gilmore R. 113) in response to an interrogatory requesting any facts known to the Plaintiff A & M Enterprises, the answer is merely "The extensive work that was done could not have been done without the owner's knowledge and permission." In answer to Interrogatory No. 10 requesting facts on any contract it was claimed that Respondent had with any one for construction or improvement on subject premises, he answered as follows (Gilmore R. 114) "Paul Hunziker represented he was the owner, to the best of my recollection and that is the premise under which I entered the contract."

Again in the answers given by Appellant Midwest Electric, ". . . the fact that Hunziker was still in possession after that date led Plaintiff to believe that he had permission *to be in possession* after that date." (Italics added.) Again in the answers of Midwest Electric (Gilmore R. 117, Answer to Interrogatory No. 5) "I did not ever talk to Bob Barrett personally, see Interrogatory Nos. 3 and 4 for representations *made on behalf* of Bob Barrett by Paul Hunziker." (Italics added.) To the Interrogatory Nos. 5, 6 and 7, propounded by this Respondent to Appellant Gilmore Steel Corporation, attempting to establish any facts upon which Appellant based its claims of agency, knowledge of Barrett or consent of Barrett, this Plaintiff answered (Answer to Interrogatory No. 5, Gilmore R. 132) "Plaintiff is informed and believes that prior to and during the course of the construction of the improvements upon the premises, Moun-

tain Empire had a relationship with the Defendant Barrett Investment Company in the nature of a joint venture whereby it was understood and agreed that Mountain Empire would undertake the construction of the subject improvements for and on behalf and for the benefit of the joint venture." This Appellant then repeats this as an "answer" to the successive Interrogatory Nos. 6, 7 and 9. When questioned concerning the particulars of the claimed contract, this Plaintiff answers (Gilmore R. 133) "Plaintiff does not know the name of the person with whom such contract was entered into, the date of such contract or whether the same was oral or written. Plaintiff intends to ask counsel for the Barrett Investment Company to provide Plaintiff's counsel with a copy of said contract." This, as an answer, four days before the date set for trial and almost one year after the Interrogatories had been served. (Gilmore R. 86-88)

Following receipt of these answers, counsel for Respondent obtained the affidavits referred to in the Statement of Facts, and filed the same with his Motion for Summary Judgment. The first, the affidavit of Ross S. Tyson (Gilmore R. 141). Mr. Tyson recites that he was an employee of Tracy-Collins Bank & Trust Company, that Mr. Hunziker described himself as a purchaser of Solitude Ski Resort, that he furnished certain financial information to Tracy-Collins Bank and that a loan was made to Western Lift & Crane on the basis of this financial statement; that the loan became delinquent, that foreclosure proceedings were initiated, and counsel for Re-

spondent Barrett Investment Company was advised that unless Mr. Barrett's mortgage on the property was brought current, steps would be taken to foreclose the interest of Mr. Barrett as well.

The affidavit of Paul G. Grant, then a practicing attorney and presently a Salt Lake City Judge, recites that he met Mr. Hunziker who was identified as President of the purchasing company of Solitude Ski area, that at Mr. Hunziker's request, he called Mr. Barrett at his home in Clayton, Idaho, advised Mr. Barrett that Mr. Hunziker had gone to Switzerland to obtain financial assistance. Further, that Mr. Grant and others subsequently met with Mr. Hunziker in an attempt to obtain additional capital to finance his venture which offer was declined by Mr. Hunziker. He advised Mr. Hunziker of his serious delinquency, that he was a tenant-at-will and was told that "If they tried to kick me off, the place would never operate again." (Gilmore R. 143-145)

The affidavit of Mr. George E. Bridwell who had acted as attorney for Western Life & Crane Company, the contract purchaser and its principal, Mr. Hunziker, stated that he, together with counsel for Barrett Investment Company, drafted the "Option and Contract of Sale" which was entered into between the parties, copy of such contract being attached to said affidavit. (Gilmore R. 146-154) That the Agreement was an accurate reflection of the agreement discussed between the parties. That Mr. Hunziker subsequently contacted him for certain

assistance in obtaining necessary documents to take to Switzerland to raise funds.

The affidavit of Ralph Goodrich recites that he was acquainted with both Mr. Hunziker and Mr. Barrett, that he was aware that Mr. Barrett desired to sell Solitude and conveyed this information to Hunziker. That subsequently Mr. Hunziker formed Western Lift & Crane Co. and affiant Goodrich became a stockholder and director of Western Lift & Crane Co. That Mr. Barrett worked in Clayton, Idaho with affiant constantly from the date of purchase until the date of the affidavit, or the period from October 1967 until June 1970; that he left Idaho only when necessary in the operation of his mining venture or to visit his counsel in Salt Lake City. Further that he advised Mr. Hunziker in the summer of 1968 that Tracy-Collins Bank, which held a mortgage on the property, was applying considerable pressure on Mr. Barrett to bring the mortgage current and that this much, at least, had to be done.

At this state of the record, with the Answers to Interrogatories as above described before the Court on the one hand, the affidavits above recited, together with the depositions of counsel for Barrett Investment Company and also the Secretary of Barrett Investment Company before the Court on the other, no counter or traversing affidavits having been filed, the situation became similar to the one described by this Court in *Montoya vs. Berthaua Investment Company*, 21 Utah 2d 37, 439 Pac. 2d 853 at page 853 Pac. as follows:

> "These were allegations—not proof. By employing the discovery process under the rules, by affidavit and interrogatories directed to each party by the other, there developed a clear departure from pleading and proof, that precipitated no germain issue of fact, but one of law based on the evidence submitted by both parties before trial."

Respondent in this action, following the inadequate and inadmissable statements of hearsay, conclusions and arguments contained in the Answers to Interrogatories of these Appellants had the burden, on a Motion for Summary Judgment, of proving negatives—that there was no evidence of agency, no evidence of joint venture, no evidence of partnership, and no evidence of fraud. This, Respondent submits that it has done by the admissable evidence of record, which is uncontroverted by the Appellants. This Court, in *Dupler vs. Yates* at 10 Utah 2d 251, 351 Pac. 2d 624, aptly commented on this type of situation at page 635, Pac.

> "In attempting to show lack of reliance, Defendant has the difficult task of proving the negative of facts that plaintiffs have an afirmative burden to prove at trial. The quantum of proof to show non-existence of a material fact is of necessity less than that required to prove a matter of affirmative defense."

Upon the filing and service of the affidavits above referred to, had these Appellants had any competent and admissable evidence concerning any of

the issues attempted to be raised, here as in *Dupler supra* at page 636, Pac.,

> "It is apparent here that the Defendant has produced evidence that pierces the allegations of the Complaint. The Plaintiffs have not controverted, explained or destroyed that evidence by counter affidavit or otherwise."

Again in *Dupler supra* at page 637, Pac.,

> "Upon a Motion for Summary Judgment, the Courts ought to recognize, as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movant's case or specify in an affidavit the reasons why he cannot do so.
>
> "Where, as in the instant case, the materials presented by the moving party are sufficient to entitle him to a directed verdict and the opposing party fails either to offer counter affidavits or other materials that raise *a credible issue* or show that he has evidence not then available, summary judgment may be rendered for the moving party." (Italics added)

See also the following authorities: *Gillmore vs. Carter*, 15 Utah 2d 280, 391 Pac. 2d 426; *Controlled Receivables vs. Harman*, 17 Utah 2d 420, 413 Pac. 2d 807; *Spencer Auto Sales, Inc. vs. First Security Bank*, 20 Utah 2d 145, 434 Pac. 2d 455; and *Pioneer Finance & Thrift Company vs. Powell*, 21 Utah 2d 201, 433 Pac. 2d 389.

Interestingly enough, two of the four Appellants in this action filed lien claims against the

Lessee Hunziker for the amounts claimed due in the present action and reduced the same to judgment long prior to the commencement of the present action. These liens were filed by A & M Enterprises, Inc. and by Cleaning by Tony, Inc. on February 16, 1968 (A & M R. 8, para. 7; 11, para. 9) and were reduced to judgment against the interests of Defendant Hunziker by each of these Appellants on May 8, 1968 (A & M R. 8, para. 8; 12, para. 10). No claim was made against Barrett in these actions.

Appellants state in their Brief at page 8: "In this matter, the answers to Interrogatories provide ample affidavits to contradict the affidavits of Barrett on the issue of agency." It is submitted that the Answers to Interrogatories of these Appellants and each of them, so far as they bear on the issues raised by the pleadings, are without exception, hearsay, argument, conclusion and allegations. The fact that they are placed in the form of Answers to Interrogatories, and sworn to, does not enhance their probative value nor does it change allegations and assumptions to statements of fact.

CONCLUSION

The record on appeal in each of these actions demonstrates conclusively that proof has replaced allegation, that Appellants have failed to offer any competent proof whatever in support of their allegations, and that such record adequately demonstrates, by the statements of disinterested and re-

liable persons, that there is no genuine issue of material fact, and accordingly, the trial court properly granted Respondent's Motion for Summary Judgment, and the same should be affirmed.

Respectfully submitted,

LEE W. HOBBS