1972

FMA Financial Corporation v. Richard Mckean And Timothy F. Buehner : Brief of Appellant Richard Mckean

IN THE

SUPREME

STATE

F. M. A. FINANCE
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Plaintiff

RICHARD
OTHY F. BU

Defendants

BRIEF OF APPE

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES

CASES

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

F.M.A. FINANCIAL CORPORATION,
Plaintiff and Respondent,

vs.

RICHARD McKEAN and TIMOTHY F. BUEHNER,
Defendants and Appellants.

Case No. 12726

BRIEF OF APPELLANT RICHARD McKEAN

STATEMENT OF NATURE OF CASE

This is an appeal from the lower court's granting of a Summary Judgment for Plaintiff upon Plaintiff's motion therein.

DISPOSITION OF CASE IN LOWER COURT

The District Court granted Plaintiff's motion for Summary Judgment.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellant seeks to have this court overrule the lower court's granting of a Summary Judgment on the basis that the Plaintiff failed to show that there were no genuine issues as to any material facts nor that they were entitled to a judgment as a matter of law.

STATEMENT OF FACTS

In October 1968, Appellant Richard F. McKean was asked by an acquaintance of his, Defendant Timothy Buehner, to co-sign with him to enable Buehner to obtain an automatic car wash unit for Buehner's service station. Although Appellant McKean had no personal interest in investing in the car wash business, he consented to co-sign with Buehner on the basis of their long standing friendship. On or about November 15, 1968, an agreement was signed between Respondent F.M.A. Leasing and Appellant McKean and Defendant Buehner which required McKean and Buehner to make monthly payments to F.M.A. of $296.01.

In co-signing the above lease agreement, Appellant McKean and Defendant Buehner agreed that the latter would be fully responsible for the management of the car wash equipment and for the payment of the monthly installments. Furthermore, Defendant Buehner was to provide Appellant McKean with a monthly report of the operations of this equipment including the receipts and disbursements resulting from its operation. However, in

spite of frequent requests for this report, Buehner never provided the same to Appellant.

Some time after the signing of the lease, Appellant McKean and Defendant Buehner entered into an oral agreement whereby Buehner agreed to refund to McKean the sum of $300 which was the amount McKean advanced as a down payment on the lease. Buehner further agreed to have McKean released from all obligations under the lease with Respondent F.M.A. Shortly after this agreement was made, Buehner informed Appellant McKean that he had located a prospective purchaser of the car wash equipment, to wit: Mr. Bill Roderick. A meeting was arranged at which Appellant McKean, Defendant Buehner, and Respondent F.M.A. were present. At this meeting Appellant McKean stated that he had no objection to any sale or other disposition of this car wash equipment so long as he received the return of his initial investment of $300 and a complete release of all liability under the original lease with F.M.A. Respondent F.M.A. fully understood that Appellant would not agree to allow the car wash equipment to be removed from Buehner's premises unless McKean received a full release on the original lease. Appellant McKean understood as a result of this meeting that the equipment would be sold to Roderick and that McKean would be fully released by F.M.A.

Subsequent to this meeting, Appellant McKean learned that Respondent had not in fact sold the car wash unit to Roderick, but that it had been leased to Roderick with an option to purchase. This sub-lease agreement

was not negotiated by Appellant McKean nor by Defendant Buehner but was negotiated exclusively by F.M.A. and Roderick. At the time of these negotiations Respondent F.M.A. was aware that Appellant McKean agreed to this sale (or sub-lease) to Roderick only upon the condition that Appellant McKean would be fully released from his obligations under the original lease agreement with F.M.A. That notwithstanding, Respondent F.M.A. failed to inform Appellant McKean of the provision in their agreement with Roderick, which stated that Respondent F.M.A. refused to discharge Appellant McKean from any responsibility or liability under the original lease. As a result of this failure by Respondent and based upon the oral communications between Appellant and Respondent, Appellant was led to believe in good faith that he had been fully discharged from all obligations to Respondent under this original lease agreement.

In the latter part of 1970 Respondent F.M.A. comcenced an action against Appellant McKean and Defendant Buehner to enforce the latter's obligation under the original lease. This was Appellant's first knowledge that his obligations under the original lease had not been discharged. Subsequently, on or about September 2, 1970 Appellant McKean received a letter from Respondent's attorney which stated that Respondent F.M.A. would exercise its option under the lease and consummate a sale of the car wash equipment on or about September 3, 1970. Inasmuch as Appellant received no further notice regarding this sale he assumed that the car wash equip-

ment had been sold. On the basis of this information and belief Appellant made no further attempt to mitigate his damages by personally sub-leasing or selling the car wash equipment. However, later Appellant discovered that Respondent had in fact not sold the car wash equipment as stated in Respondent's letter but had rather retained the same and claimed damages against Appellant McKean accruing after the date of the proposed sale.

Appellant therefore contends that as a result of Respondent's repeated misrepresentations and disregard for Appellant's interest in the above transactions, Appellant has suffered substantial damages. Appellant further contends that he has been unable to mitigate his damages under the original lease as a result of Respondent's activities and that Appellant should be given the opportunity to have a trial on the merits in this case in order to show further evidence of his damages and offsets. Appellant further contends that the lower court erred in granting a summary judgment in this matter because Respondent failed to show neither that there were no genuine issues as to any material facts nor that they were entitled to a judgment for the full amount alleged in their complaint as a matter of law.

ARGUMENT

POINT I.

RESPONDENT FAILED TO SHOW THAT THERE WERE NO GENUINE ISSUES AS TO ANY MATERIAL FACTS NOR THAT

THEY WERE ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

The circumstances under which a summary judgment are proper have been well defined by this Court. In *Bridge* vs. *Backman*, 10 Utah 2d 366, 353 P. 2d 909, (1960) this Court stated:

> "A summary judgment is supported only by a showing that 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." Id. at 368 (See also Rule 56 Utah Rules of Civil Procedure).

The Court went on further and stated that "In determining the sufficiency of such showing we must view the evidence and inferences therefrom in light most favorable to the party against whom such judgment is sought. So, unless there is a showing that the disfavored parties cannot produce evidence which would reasonably support a finding in their favor on a material or determinative issue of fact, a summary judgment is erroneous." Id. at 368. See also *In Re Swan's Estate*, 4 Utah 2d 277, 293 P. 2d 682 (1956); *Bullock* vs. *Desert Dodge Truck Center, Inc.*, 11 Utah 2d 1, 354 P. 2d 559 (1960).

In *Reliable Furniture Company* vs. *Fidelity and Guarantee Insurance Underwriters*, 16 Utah 2d 211, 398 P. 2d 685 (1965), this Court was reviewing a summary judgment, and re-stated the well recognized principle that in reviewing whether a summary judgment was proper, the Supreme Court must assume the facts as the Appellant contends them to be. (Id. at 215.) This Court

further stated in *Hatch* vs. *Sugarhouse Finance Company*, 20 Utah 2d 156, 434 P. 2d 758 (1967), that a summary judgment was erroneously entered for the Plaintiff where issues of fact were raised by the pleadings and counter affidavits of the Defendant.

In the instant case, the pleadings and counter-affidavits of Appellant Richard F. McKean clearly raise several factual issues which must be determined and resolved before judgment can be rendered in this matter. Clearly the issue was raised whether Respondent F.M.A. by negotiating a contract with a third party expressly or impliedly released Appellant McKean from his obligation under the original lease. The possibility of this express or implied release is even greater in light of the knowledge which Respondent F.M.A. had that Appellant McKean agreed to this sub-lease (which McKean thought to be a sale) only upon the condition that McKean would be fully released by Respondent. Appellant is entitled to introduce further evidence of this implied release.

Furthermore, as stated by the pleadings and affidavits of the Appellant, the Appellant McKean relied upon the Respondent's representations that Respondent was mitigating damages by selling this automatic car wash equipment on or about September 3, 1970 and as a result, Appellant McKean made no further efforts to mitigate damages. Appellant should be allowed to introduce this evidence at trial in order to receive an offset of at least the damages accruing after this alleged sale by Respondent.

All of the above issues were properly raised in the lower court by pleadings and affidavits and they clearly raise issues of fact which constitute a defense, either whole or in part, to the Respondent's claim for damages in this matter. In light of these remaining material issues of fact which were not litigated, the lower court clearly erred in granting a summary judgment for the full amount alleged in the Respondent's complaint. Furthermore, upon review of the lower court's summary judgment in this matter, as stated in the *Reliable Furniture* case *supra*, this Court must assume the facts as Appellant contends them to be. It follows that the lower court's summary judgment cannot stand.

CONCLUSION

This Court has established specific standards which must be satisfied before a summary judgment may be properly granted. In the instant case, Appellant McKean has clearly raised material issues of fact which he is entitled to present to a trier of facts. These issues were properly raised by the Appellant in the lower court. The presence of these factual issues clearly makes the lower court's granting of a summary judgment improper in this case.

Appellant therefore respectfully requests this Court to reverse the lower court's decision granting a summary judgment and issue an order requiring the lower court to try the factual issues which were properly raised by the Appellant herein.

Respectfully submitted,

HUNT, WALKER & HINTZE, Inc.

M. RICHARD WALKER
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Richard McKean