

1993

William R. Olsen and Audrey Olsen v. Redevelopment Agency of South Salt Lake City : Reply Brief

Utah Court of Appeals

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Craig G. Adamson; Dart, Adamson & Donovan; Attorney for Plaintiff/Appellee.

Harold A. Hintze; William D. Oswald; Attorneys for Defendant/Appellant.

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U.S. DEPARTMENT OF JUSTICE

930613-4A

Case No. 930613-CA

Priority No. 15

APPEAL FROM ORDER AND JUDGMENT FOR COSTS
GRANTING SUMMARY JUDGMENT ISSUED BY THE
THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY
HONORABLE RICHARD H. MOFFAT

WILLIAM D. OSWALD
201 South Main Street #1200
Salt Lake City, UT 84111

Attorneys for Defendant/
Appellant RDA of South Salt

FILED

COU

REALS

WILLIAM R. OLSEN and
AUDREY OLSEN,

Plaintiffs/Appellees,

vs.

REDEVELOPMENT AGENCY OF
SOUTH SALT LAKE CITY,

Defendant/Appellant.

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WILLIAM D. OSWALD
201 South Main Street #1200
Salt Lake City, UT 84111

Attorneys for Defendant/
Appellant RDA of South Salt

Attorney for Plaintiff/Appellee

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DETERMINATIVE LAW

[NONE]

SUMMARY OF THE ARGUMENT

Whether WILLIAM and AUDREY OLSEN (hereinafter "OLSENS") can be joined as defendants in the RDA's condemnation complaint depends on the factual issue of whether OLSENS have an "identity of interest" with the defendants already named in that action. Although the statute of limitations would normally bar this joinder, an exception is made if notice of the legal action may be imputed to OLSENS. In order to impute this notice to OLSENS, there must be a sufficient nexus between the parties already named and OLSENS. Whether this nexus exists is a factual issue to be determined by the finder of fact on a case-by-case basis.

In the case at bar, there are several factors which form a sufficient nexus. These factors, individually, do not create the necessary identity of interest to override the statute of limitations. However, it is reasonable to conceive that a finder of fact could find that combined they are adequate to prove an identity of interest. Whether these factors exist is beyond the scope of a summary judgment, but must be determined by a finder of fact. Therefore, the lower court improperly allowed summary judgment in this case.

ARGUMENT

I.

"IDENTITY OF INTEREST" IS A FACTUAL ISSUE THAT MUST BE DETERMINED ON A CASE-BY-CASE BASIS.

Whether an identity of interest exists between OLSENS and the original defendants in the condemnation case depends on the individual facts of this case because there is not a strict standard that must be applied. Whether an identity of interest exists is the key to this appeal and its application must be clear in order to apply it to the case at bar. An analysis of this issue is well explained in Hensley v. Soo-Line R. Co., 777 F.Supp. 1421 (N.D.Ill. 1991). In Hensley the court stated that "[e]ven if the added party did not receive actual notice, relation back may still occur if a sufficient identity of interest exists between the new and original defendants." Id. at 1424. The court's conclusion shows the proper questions to ask, and the proper order to ask them:

We conclude that Mid-South is a new defendant that was not named within the three year statute of limitations period. Further, we conclude that Mid-South did not have actual formal or informal notice of the suit before the expiration of the limitations period. Finally, we hold that Mid-South is not sufficiently connected to NLG to be considered the "same" under an identity of interest analysis.

Id. at 1425.

Applying this to the case at bar produces the following series of questions: First, did the RDA try to join OLSENS within the statute of limitation period? If the answer is yes, then OLSENS should be joined. If the answer is no, and it is in the instant case, then a new question is asked: Did the new party have actual formal or informal notice of the suit before the limitations period expired? If the answer is yes, and there is a question of fact whether in the instant case the answer is yes, then OLSENS should be joined. If the answer is no, then one final question is asked: Is there a sufficient nexus between the original party and the party to be added to conclude an identity of interest exists? If the answer is yes, and this depends on evidence presented at trial, then the party should be joined. If the answer is no, then the party should not be joined and no further questions are asked.

The proper question for analysis in this appeal is whether an identity of interest does exist. In the Hensley case, the court concluded it did not exist, and then discussed in detail the issue of whether there had been formal or informal notice. However, in discussing the identity of interest analysis, the court made an important observation, stating "[c]ircumstances other than the three stated above may nevertheless create a sufficient identity of interest." Id. at 1424. The three

circumstances they had just discussed involved business relationships. It is clear that there may be situations other than business relationships which may create an identity of interest.

Other courts have agreed with this approach. "Identity of interest means that the parties are 'so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of litigation to the other.' 6 Wright & Miller, supra, at 517." Spiker v. Hooceboom, 628 P.2d 177, 179 (Colo.App. 1981) (emphasis added). Whether these "other activities" create an identity of interest is a question of fact for the fact finder to determine on a case-by-case basis.

The Utah Supreme Court has discussed this issue in two cases (Doxey-Layton Company v. Clark, 548 P.2d 902 (Utah 1976); Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214 (Utah 1984)). In both cases the Court looked to the factual conclusions of the trial court, based on "other activities" to determine whether said activities were sufficient to create an identity of interest. In Doxey-Layton, the Court concluded that being heirs to the original defendant was a sufficient nexus of other activities to create an identity of interest. In Perry, the Court concluded that privity of contract did not create an

identity of interest.

In Doxey-Layton, the Court relied on evidence that showed "the real parties in interest were sufficiently alerted to the proceedings, or were involved in them unofficially, from an early stage" (Id. at 906). The Court went on to mention other facts that may enter into the decision, stating:

"Courts have also allowed amendments to relate back, by invoking an estoppel where an initial pleading error has been exploited until the running of the statute of limitations." Id.

The Perry Court specifically relied on the Colorado Spiker court when they stated "[s]uch an identity exists, for example, between past and present forms of the same enterprise." Perry, 681 P.2d at 217. The Court in Perry was faced with facts that could only support an identity of interest if there were close business ties; otherwise, there was no nexus. Therefore, the Court stated that "in this context [identity of interest] means that the parties are so closely related in their business operations" Id. In other words, in the context of that specific fact pattern, the Court must find close business relations. The Court is not saying that the only situation supporting a finding, in all cases, of an identity of interest is in business relations.

The Perry Court specifically looked to the evidence as found by a trial court, stating "there was no evidence showing any

identity of interest" Id. Clearly a careful reading of the Utah cases, and other cases as cited in the opening briefs, dictates that determining whether an identity of interest is created is an issue for the fact finder, and cannot be concluded as a matter of law. OLSENS' assertion that only business relations as discussed in Spiker or Perry create an identity of interest is simply a misreading of the cases.

In the case at bar, the fact finder has much to consider as it determines whether there is a nexus which creates an identity of interest. Individually, the factors may seem insignificant; combined in this one situation, however, they may be adequate to convince a finder of fact that an identity of interest exists. Some of the facts that may be proven at trial include: Mr. Olsen was a co-owner of Olsen & Peterson Consulting Engineers, Inc. (the "Company"), the corporation already named as a defendant; Mr. Olsen leases two lots to the Company and these two lots are part of a six-lot unit used by the Company; Mr. Olsen and the Company use the same attorneys for their legal work; these attorneys delayed their reply to the original condemnation suit for over one month while the statute of limitations ran; the reply then stated that the Company did not own two of the parcels; while Appellants waited for a title search to be completed, Appellees began this action to hinder their joinder in

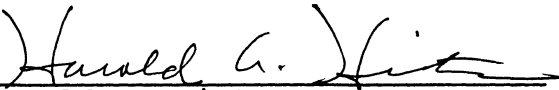
the condemnation suit. Naturally, other important facts may be revealed through discovery and the trial itself.

If it is determined that these facts create an identity of interest, then notice to the original defendant of the condemnation case is imputed to OLSENS (Hensley, 777 F.Supp. at 1424). This imputed notice was given before the limitations period expired; therefore OLSENS suffer no prejudice. Because OLSENS suffer no prejudice, they should be freely joined in the condemnation suit. Since OLSENS can be joined, the summary judgment declaring that they cannot be sued is in error and should be reversed.

CONCLUSION

This Court should reverse the lower court's summary judgment order and remand for trial. Furthermore, this Court should order that the instant case be consolidated with the condemnation case, Redevelopment Agency of South Salt Lake City v. Olsen & Peterson Consulting Engineers, Civil No. 920906324. This Court should order that OLSENS be joined as defendants in the condemnation case, knowing that part of the facts that are to be determined at trial will relate to whether OLSENS have an identity of interest with Olsen & Peterson Consulting Engineers.

RESPECTFULLY SUBMITTED this 25th day of January, 1994.


Harold A. Hintze
Attorney for RDA of South Salt
Lake

CERTIFICATE OF MAILING

I hereby certify that on January 25th, 1994, I caused two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to be mailed, postage prepaid, first-class, to the following:

Craig G. Adamson, Esq.
Eric P. Lee, Esq.
DART, ADAMSON & DONOVAN
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101

