

1972

Western States Thrift & Loan Company v. Wayne T. Blomquist : Appellant's Brief

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IN THE SUPREME COURT
OF THE STATE OF UTAH

WESTERN STATES THRIFT &
LOAN COMPANY,

Plaintiff-Respondent,

vs.

WAYNE T. BLOMQUIST,

Defendant-Appellant.

Case No.

12,872

APPELLANT'S BRIEF

Appeal from District Court of Salt Lake County
Judge Stewart M. Hanson, presiding

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Plaintiff-Respondent,

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WAYNE T. BLOMQUIST,

Defendant-Appellant.

} Case No.
12,872

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

Suit on promissory note. Defendant claims payment and accord and satisfaction by third party for his benefit.

DISPOSITION IN LOWER COURT

District court granted summary judgment and denied motion for new trial or to correct order.

RELIEF SOUGHT ON APPEAL

Defendant seeks an order vacating the summary judgment and remanding the case for trial on the merits.

STATEMENT OF FACTS

Defendant executed a promissory note in favor of Plaintiff (R. 3) which is the subject matter of the lawsuit. (R. 1-2) Defendant alleges that the note was paid, compromised and settled by a third party conveying corporate stock to Plaintiff for the benefit of Defendant. (R.6) Plaintiff's motion for summary judgment (R. 20-23) was granted (R. 33-34) and Defendant's motions for a new trial or to correct order (R. 26-29) were denied (R. 48-50) notwithstanding the fact that issues of fact concerning the defense of accord and satisfaction existed as shown by the affidavits of Defendant (R. 24-27) and the affidavits filed by Plaintiff (R. 22-23 and R. 30-32), and notwithstanding the fact that interrogatories has been submitted by Defendant (R. 15-19) seeking information from Plaintiff concerning the defense of accord and satisfaction, which interrogatories were never answered.

ARGUMENT

POINT I

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED BECAUSE DISPUTED ISSUES OF FACT PRECLUDED SUMMARY JUDGMENT.

Defendant admits execution of and non-payment by him of the promissory note sued upon. In defense he claims that his obligation under that note was compromised and settled by a third party conveying corporate stock to Plaintiff for his benefit. In his affidavits Defendant asserts the following disputed facts as to settlement by a third party of his obligation to Plaintiff, each of which requires a trial:

1. Disputes knowledge of Dale Green (R. 24, par. 3) with respect to matters stated in his affidavit filed in support of Plaintiff's motion for summary judgment. (R. 22-23)

2. Asserts that the obligation to Plaintiff was settled and paid by means of stock, and that by reason thereof no balance was owed to Plaintiff. (R. 24, par. #4, 5 and 6)

3. Asserts that a conversation occurred in September, 1971, between himself and the President of the Plaintiff wherein the President of Plaintiff acknowledged that stock has been received by Plaintiff from said third party in payment of the obligation which is the subject matter of this lawsuit, but

that credit would not be allowed since the value of said stocks had thereafter declined, and that the argument was as to whether the loss from decline was that of the Plaintiff or the Defendant. (R. 26, par. 2) Plaintiff filed an affidavit in opposition to the affidavits filed by Defendant (R. 30-32) wherein the Plaintiff disputes most of the claims of the Defendant. Issues of fact created by the opposing affidavits require a trial. In the facts asserted by Defendant were established at a trial he would be entitled to judgment of no cause of action.

A motion for summary judgment is, in effect, a demurrer to the contentions of the adverse party and states that, conceding facts to be as claimed by adversary, there is no basis for recovery by the adverse party. *Auto Lease Co. v Central Mut. Ins. Co.*, 325 P.2d 264, 7 U.(2d) 336; *Samms v. Eccles*, 358 P.2d 344, 11 U.(2d) 289, and summary judgment should be granted only when, taking view most favorable to the party's claims and any proof that might properly be adduced thereunder, he could in no event prevail. *Kidman v. White*, 278 P.2d 898, 14 U(2d) 142. If a dispute exists as to any issue of fact which would be determinative of the rights of parties, summary judgment should be denied. *Transamerica Title Ins. Co. v. United Resources, Inc.*, 471 P.2d 165, 24 U. (2d) 346. Summary judgment is a drastic remedy and should be granted with reluctance. *Housley v. Anaconda Co.*, 427 P.2d 807, 17 U.(2d) 420.

The disputed factual issue as to whether or not the debt sued upon had been compromised and settled by a third party conveying stock to Plaintiff precludes the granting of a summary judgment. If Plaintiff's motion for summary judgment is treated as a demurrer, and for purposes of that motion the facts alleged by Defendant in his affidavits are considered to be true (R. 22-23 and R. 30-32), we must then assume that the obligation of Defendant to Plaintiff has been paid and that Defendant is entitled to judgment dismissing Plaintiff's complaint. Application of the "demurrer" rule stated in *Samms v. Eccles*, supra, to the facts in our case illustrates the impropriety of the summary judgment awarded against defendant in this case.

POINT II

UNANSWERED INTERROGATORIES SUBMITTED BY DEFENDANT TO PLAINTIFF, THE ANSWERS TO WHICH MAY WELL HAVE ESTABLISHED AN ACCORD AND SATISFACTION, PRECLUDES SUMMARY JUDGMENT.

Interrogatories were submitted by Defendant to Plaintiff (R. 15-19) at about the same time as the motion for summary judgment was filed (R. 20-21) but were ignored and never answered by the Plaintiff. Summary judgment is not appropriate where discovery has not been completed, particularly where the discovery may well reveal facts which

would establish an absolute defense to Plaintiff's claims. Rule 56(c), URCP, contemplates that answers to interrogatories will be considered in ascertaining whether or not issues of fact exist. That rule provides in part as follows:

“Rule 56(c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, *answers to interrogatories*, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . .”

The granting of a motion for summary judgment when interrogatories which are relevant and material to the defense pleaded by the Defendant remain unanswered by the party moving for summary judgment deprived the Defendant of his right to submit interrogatories for discovery as provided by Rule 33, URCP, prevented Defendant from an opportunity to properly and effectively defend against Plaintiff's claims and constitutes a denial to Defendant of procedural due process.

POINT III

THE COURT LACKED JURISDICTION TO GRANT SUMMARY JUDGMENT BECAUSE OF INSUFFICIENT NOTICE.

Rule 56(c), URCP, pertaining to a motion for summary judgment provides in part as follows:

“The motion shall be served at least 10 days before the time fixed for hearing. . . .”

Rule 6(e), URCP, provides as follows:

“Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.”

The motion for summary judgment (R. 20-21) was mailed by counsel for Plaintiff on October 11, 1971, and noticed the hearing of the motion for October 18, 1971, (R. 21), which is only 7 days after the date of mailing of the motion. The time required for notice of a motion for summary judgment is 10 days (Rule 56(c) URCP, supra) and an additional 3 days are required where the notice is mailed, (Rule 6(e), URCP, supra), for a total of 13 days. Accordingly the notice of hearing was 6 days short of the required time and precluded the Court from awarding sum-

mary judgment in this case on October 18, 1971, (R. 33-34).

CONCLUSION

Defendant asserts that the promissory note sued upon by Plaintiff was paid, compromised and settled by conveyance of corporate stock to Plaintiff by a third party for the benefit of Defendant. Opposing affidavits submitted in connection with Plaintiff's motion for summary judgment, together with Defendant's answer, establish that disputed issues of material facts existed which precluded the granting of summary judgment. Interrogatories submitted by Defendant seeking information concerning payment, compromise and settlement of the obligation sued upon were outstanding and unanswered at the time of hearing of the motion for summary judgment, the answers to which could well have established Defendant's defense, and accordingly also precluded the granting of summary judgment. The summary judgment hearing was noticed by Plaintiff and heard only 7 days after the date of mailing of the motion for summary judgment and notice of hearing, whereas 10 days are required by Rule 56(c), URCP, for a summary judgment hearing, and an additional 3 days are required by Rule 6(e), URCP, where the notice is mailed. Accordingly the notice was insufficient by 6 days and the Court lacked jurisdiction

to consider or decide the motion for summary judgment.

For the foregoing reasons the summary judgment should be vacated and the case remanded for trial on the merits.

Respectfully submitted

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