

1972

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

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Recommended Citation

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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.
12872

RESPONDENT'S BRIEF

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

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FILED

JUN 30 1972

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Plaintiff-Respondent,

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} Case No.
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RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action on a promissory note, which note was admitted to have been executed and delivered by defendant to plaintiff.

DISPOSITION IN LOWER COURT

The Third District Court, Stewart M. Hanson, Judge, granted plaintiff's motion for summary judgment.

ment. Subsequent to the granting of such summary judgment, defendant filed a motion for new trial, which motion was denied.

STATEMENT OF FACTS

Respondent takes exception to the facts set forth by the appellant and therefore restates the facts of the case.

Plaintiff commenced suit against defendant on a promissory note on August 19, 1970, (R.1) to which an answer was filed by defendant admitting the execution and delivery of said promissory note for value received and the amount thereof. (R.6) Defendant in his answer to plaintiff's complaint alleged that the promissory note sued upon was compromised and settled by a third party conveying corporate stock to plaintiff for the benefit of defendant. (R.6) Plaintiff then served interrogatories upon the defendant inquiring into the basis of the defense of the defendant. (R.7) Defendant answered the interrogatories of plaintiff, which answers clearly indicated that defendant had no actual knowledge of the alleged compromise and settlement, and further, that all payments alleged to have been made by defendant were made prior to the admitted execution and delivery of the promissory note sued upon. (R.9) Plaintiff then filed a motion for the production of documents, which motion was granted, and an order entered (R.13), to which defendant responded that he had been unable to locate any docu-

ments that he was ordered to produce and thus was unable to produce same. (R.14) Plaintiff then filed a motion for summary judgment and notice of hearing with the lower court, (R.20-23) which motion was granted. (R.33-34) Subsequent to the filing of plaintiff's motion for summary judgment, defendant filed and served upon plaintiff interrogatories (R.15-19), the answering of which interrogatories was rendered moot by the Court's granting of plaintiff's motion for summary judgment. Thereafter, defendant filed a motion for new trial (R. 28-29) with an affidavit of defendant, (R.26-27) which motion was denied on hearing by the lower court. (R.49-50) That at the time of hearing of both plaintiff's motion for summary judgment and defendant's motion for new trial, the lower court was made aware of the fact that the third party alleged by defendant to have compromised and settled the account, to-wit: Norman Hayes (R.9), was deceased, and had been for sometime prior to the commencement of the action, which fact was known to the defendant.

POINT I

THE GRANTING OF SUMMARY JUDGMENT BY THE LOWER COURT WAS PROPER IN THAT THERE WERE NO DISPUTED ISSUES OF FACT PRECLUDING SUMMARY JUDGMENT.

The execution and delivery of the promissory note sued upon by plaintiff was admitted by defendant and

defendant sought to avoid liability for said promissory note by asserting a defense of compromise and settlement of the subject obligation by a third party. (R.6) The discovery of plaintiff in the form of interrogatories failed to show any admissible evidence which would establish the defense of defendant to the action of plaintiff, save the name of the third party, who was, at the time of this action, deceased. (R.9-10) Further, the affidavit of defendant in opposition to the motion for summary judgment of plaintiff, failed to set forth such facts as would be admissible in evidence and were not made on personal knowledge of the defendant as required by the provisions of Rule 56(e) of the Utah Rules of Civil Procedure. (R.24-25) A comparison of defendant's affidavit in opposition to plaintiff's motion for summary judgment with the affidavit of plaintiff of its motion for summary judgment indicates clearly that defendant's affidavit together with his admission of the execution and delivery of the promissory note sued upon, was corroborative of plaintiff's affidavit, rather than in opposition thereto.

The statute of frauds, Title 25-5-4(2) of the Utah Code Annotated, requires that every promise to answer for a debt, default or miscarriage of another must be in writing, or the same is void. The defense of defendant to the action of plaintiff on the promissory note was based upon an alleged compromise and settlement of defendant's claim by a third party on behalf of defendant. However, defendant, at the time of hearing of plaintiff's motion for summary judgment, failed to

show any evidence of an existence of an agreement in writing, by note or memorandum, which would take the defense of the defendant outside the statute of frauds.

Defendant, in his brief on appeal, (Point I, Page 3) asserts the existence of certain disputed facts which would have precluded the lower court from granting plaintiff's motion for summary judgment. The first of these is wholly without merit when reviewed in connection with the Answer of defendant and defendant's affidavit in opposition to plaintiff's motion for summary judgment. (R.6-24-27) The second of these is without merit when reviewed in connection with defendant's answers to plaintiff's interrogatories R.9-10), defendant's affidavit in opposition to plaintiff's motion for summary judgment, (R.24-25) and the provisions of Rule 56(e) of the Utah Rules of Civil Procedure. The third alleged and asserted disputed fact had not in fact been raised by the defendant at the time of hearing of plaintiff's motion for summary judgment, in that the same was asserted in connection with defendant's motion for new trial in his affidavit in support thereof, and was not before the Court. (R.26-27) Thus, where disputed facts, as asserted by defendant, would not establish a basis upon which defendant could avoid his responsibilities and liability for the note sued upon, no matter how resolved, it would have been useless to try the matter, and summary judgment was proper. *Abduekadir vs Western Pacific Railroad*, 7 U.2d 53, 318 P.2d 299. Summary judgment also may be based

upon an affirmative defense, such as the statute of frauds, where the same would defeat the alleged defense of defendant to the action of plaintiff of compromise and settlement, as is the situation here. *Ulibarri vs Christensen*, 2 U.2d 367, 275 P.2d 170.

In applying the rule laid down in the case of *Auto Lease Company vs Central Mutual Insurance Company*, 7 U.2d 366, 325 P.2d 264, and *Samms vs. Eccles*, 11 U.2d 289, 358 P.2d 334, that a motion for summary judgment is to be treated as demur and for purposes of that motion, the facts alleged by defendant in his affidavit are to be considered true, the Court cannot be blind to the facts and the law. Defendant's affidavit in opposition to plaintiff's motion for summary judgment, to be effective, must set forth such facts as are admissible in evidence. An affidavit consisting of inadmissible hearsay evidence would be ineffective and would not be in compliance with the provisions of Rule 56(e) of the Utah Rules of Civil Procedure. (See *Rainford vs Rytting*, U.2d 252, 451 P.2d 759) The Court, at the time of hearing of plaintiff's motion for summary judgment, having before it no other evidence than that which was contained in the pleadings then on file, defendant's admission of the note, (R.6) his answers to plaintiff's interrogatories (R.9-10), plaintiff's affidavit (R.22-23), and defendant's affidavit (R.24-25), correctly concluded that there were no disputed issues of fact which would have precluded the granting of plaintiff's motion for summary judgment and granted summary judgment accordingly.

POINT II

THE GRANTING OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT RENDERED MOOT THE ANSWERING OF INTERROGATORIES OF DEFENDANT BY PLAINTIFF.

Respondent does not dispute the provisions of Rule 56(c) as set out by defendant in Point II of his brief. However, defendant overlooks the fact that plaintiff was not required to answer the interrogatories of defendant on file at the time of the hearing of plaintiff's motion for summary judgment. (Rule 33 URCP) Where defendant's answer to plaintiff's complaint, his answers to plaintiff's interrogatories, and his affidavit on file merely made a general allegation of compromise and settlement of the complaint of plaintiff and stated nothing concerning any fact as a basis for his conclusion in spite of specific interrogatories asking for such information, the Court was justified in ruling that the pleadings of defendant did not raise a question as to a material fact at the time of hearing and the granting of plaintiff's motion was proper. (*Trans-america Title Inc., Co. vs United Resources, Inc.*, 24 U.2d 346, 471 P.2d 165) Appellant cites no statutory authority to support his position that unanswered interrogatories precluded the court from granting plaintiff's motion for summary judgment under the circumstances then existing upon the basis of the pleadings then on file in accordance with Rule 56(c) of the Utah Rules of Civil Procedure. However, this Court in the case of

Transamerica Inc. vs. United Resources, supra, approved such action by a lower court whereas here, there existed no disputed issues of fact and granted plaintiff's motion, though interrogatories of defendant were then pending.

POINT III

THE GRANTING OF SUMMARY JUDGMENT IS PROCEDURAL AND NOT JURISDICTIONAL.

Respondent does not dispute the provisions of Rules 56(c) and 56(e) of the Utah Rules of Civil Procedure as set forth by appellants in Point III of his brief. It is also admitted by respondents that plaintiff's motion for summary judgment and notice thereof (R.20-21) was heard approximately seven (7) days after the date of mailing of the motion and notice of hearing. (R.33) It is important to note that defendant does not claim that he was prejudiced by reason of the shortened time for hearing or claim that he has not been given ample opportunity to be heard. Further, the requirement for giving of ten (10) days notice under Rule 56(c) is for the purpose of giving the opposing party opportunity to prepare opposing affidavits and to be heard. Appellant cites no authority for his proposition that the requirement of giving ten (10) days notice and the additional requirement of three (3) days for mailing, is jurisdictional rather than procedural. Jurisdiction of this case was established at the time the summons

with complaint were served upon defendant and he filed his answer to the complaint. The same was not in question at the time that the motion for summary judgment was filed and served upon defendant.

Rule 56(c) of the Utah Rules of Civil Procedure is similar to the Federal Rule. A review of cases concerning the requirement of giving at least ten (10) days notice reveals that it is discretionary with the Court to refuse to pass on a motion for summary judgment when the moving party fails to give proper notice. (*Williams vs Howard Johnson's, Inc. of Washington*, CA Vir. 1963, 323 F.2d 102)

In the case of *Ikerd vs Lapworth*, CA Ind. 1970, 435 F.2d 197, the Court stated, "The Court's oversight in disposing of summary judgment motion one day earlier than provided by this rule, is not ground for reversal in the absence of any indication of prejudice." The spirit of subsection (c) of Rule 56 requiring service at least ten (10) days before the time fixed for hearing is for the purpose of giving the opposing party upon which the motion is served ample notice and opportunity to be heard on the question of summary dismissal. At no time did defendant, at hearing on the motions for summary judgment or new trial, raise the question of lack of ample notice. This question has been raised here on appeal for the first time. Thus, it would appear that the defendant-appellant has waived this particular issue and under familiar principles of appellant view, a point or issue may not be raised for

the first time on appeal. (*Tigerson vs Magna Water Company*, 13 U.2d 397, 975 P.2d 456) Without a showing on the part of defendant that he was prejudiced and was not given ample opportunity to be heard at the time of hearing of plaintiff's motion for summary judgment, the granting of the motion was proper under such circumstances. (*Ikred vs Lampworth, supra.*, and *Bowridge vs Lehman*, CA Ohio, 1958, 252 F.2d 366.

CONCLUSION

The only defense raised to the action of plaintiff by defendant was to the effect that the obligation sued upon was allegedly compromised and settled by a third party for the benefit of defendant. The only evidence presented by defendant in support of such contention was to the effect of hearsay statements as contained in his affidavit in opposition to plaintiff's motion for summary judgment, which failed to be effective in that it did not set forth such facts as were admissible in evidence.

Further, the statute of frauds would have precluded defendant from asserting or proving such defense without some memorandum or note or other agreement in writing. These facts coupled with the fact that the alleged third party had predeceased the action of plaintiff against defendant by several months, clearly showed that the disputed facts would not establish a basis upon which defendant could avoid his responsi-

bilities for the obligation sued upon and summary judgment was proper. The fact that the defendant or his counsel did not object to the hearing on the motion of summary judgment as being only seven (7) days after the date of mailing of the motion and notice of hearing of the motion as opposed to the ten (10) days as required by Rule 56(c) of the Utah Rules of Civil Procedure; and have failed to allege and make a showing that any prejudice resulted by reason thereof; or that they were not given ample opportunity to be heard in this matter; defendant has waived any rights he may have had concerning the assertion of the failure to comply with the requirement of notice. The Court proceeded properly in all respects in granting plaintiff's motion for summary judgment and its action should be sustained on appeal.

It is respectfully submitted that the lower court proceeded properly in granting plaintiff's motion for summary judgment and that judgment should be affirmed in all respects.

Respectfully submitted,

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