1973

Robert B. Hansen v. Petrof Trading Company, Inc. : Brief of Respondent And Cross Appellant

SU

Gerald H.
KINGHO
& O'CONN
Twelve Exch
Salt Lake City,
Attorney for

LORRAINE PRESS

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

STATUTES CITED

CASES CITED

TEXTS CITED

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ROBERT B. HANSEN,
Plaintiff, Respondent and Cross-Appellant,

vs.

PETROF TRADING COMPANY, INC.,
Defendant-Appellant

Case No. 13276

BRIEF OF RESPONDENT AND CROSS APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant's statement is incomplete in that it neglected to state that the suit was for collection of an attorney's fee and that there is also a cross-appeal because the lower court based its judgment in favor of Respondent on the basis of $20.00 per hour rather than $25.00 per hour and because the judgment did not include any interest.

DISPOSITION OF THE LOWER COURT

Appellant states that its Counter Claim was dismissed because it was filed beyond the period of the Statute of Limitations. In fact, however, the lower court dismissed the Counter Claim on two grounds, each of which was correct, and would sustain the trial court's judgment in this respect, namely (1) Appellant failed to prove or offer to prove facts sufficient to constitute a claim upon which judgment could be rendered in its favor on its Counter Claim; (2) The acts complained of were known or should have been known to the plaintiff more than four years prior to the filing of said Counter Claim (R. 128, Finding of Fact #6). With respect to Respondent's Cross Appeal, Appellant contends that interest was denied on the grounds that plaintiff failed to comply with the disclosure requirements of the Consumer Credit Act and on the ground that interest was not included in the periodic billings to Appellant. In fact, however, the trial court denied interest on the principal sum found due by reason of the fact it found that there was "no express understanding with respect to the defendant being charged interest in connection with this case" (R. 128, Finding #7).

RELIEF SOUGHT ON APPEAL

Respondent in his cross-appeal seeks to have the judgment granted in the lower court corrected by computating the fee at $25.00 per hour and by allowing interest on the principal sum.

STATEMENT OF FACTS

Many, if not most, of the statements set forth in Appellant's Statement of Facts is the defendant's version of what took place and much, if not most, of the so-called facts have no support in the record and it is therefore not surprising that Appellant has failed to comply with the provisions of Rule 75 P (2) with respect to "giving reference to the pages of the record supporting such statements."

As to the first paragraph, the first two sentences are correct, As to the third sentence the dismissal was to be predicted on a payment to be made in the future rather than one in the past and the order of dismissal was not made until the payment had been effected. As to the fourth and last statement it is not true that the representation of defendant's counsel (Keith Rooker) was faulty but it was discovered that even after the payment referred to above the amount in dispute exceeded the Federal Court jurisdictional amount of $10,000.00 because the Appellant's claim was for more money than was prayed for in its complaint.

The second and third paragraphs are correct.

As to the fourth paragraph the so-called facts were not introduced in evidence as Appellant failed to offer to prove any facts which would have been sufficient to constitute a malpractice claim against Respondent. Had such proof been attempted, however, Respondent would have proved that all of his files in Case 116-67 were turned over to Attorney Arthur H. Nielsen before

said case went to trial in the Federal District Court and that the files contained all of the information with respect to the disposition referred to in Appellant's Brief.

The fifth paragraph is correct.

As to the sixth paragraph, it is not true that the Amended Reply to Counter Claim was received by Appellant's counsel less than one week before the trial of the matter as it was mailed in Salt Lake City, Utah, on August 28th, a Monday, and would have been received by at least August 30th, which was more than seven days prior to the trial on September 7th and in any event there is no proof in the record that Appellant's counsel had notice of less than a week's time and Appellant's counsel did not claim surprise at the trial nor did he move for a continuance if he felt that it would prejudice his case to have it heard on September 7th as to was.

As to the seventh paragraph this is correct except for the implication that Respondent was seeking to obtain judgment for a sum in excess of the correct amount as he had submitted corrected billing statement on which he sought judgment. Adjustment both upwards and downwards were made in the amount set forth on statements made in billing prior to the commencement of this action.

As to the eighth paragraph it is not correct that the court limited the purpose of Appellant's proffer of evidence to the question of determining whether the

claim was barred by the Statute of Limitations. It is true that the Court found that the Appellant should have discovered the acts upon which he did claim respondent was liable. The Court not only found that the Appellant corporation should have discovered the acts of "alleged professional negligence" prior to August 19, 1972, but also more than four years prior to that date. The dismissal of the Counter Claim, however, was not grounded solely or even primarily on that basis as the Court first found that the proffer did not state a claim upon which relief could be granted (R. 128, Finding #6).

As to the ninth paragraph the Court did not make the Finding set forth in the first sentence thereof and the denial of interest was not based thereon but upon the Court's finding that there was no express agreement on the part of the defendant to pay interest (R. 128, Finding #7).

As to the tenth paragraph the Respondent did not accept the sum paid in satisfaction of judgment. On the contrary Respondent in its praecipe to the Sheriff of Salt Lake County expressly stated that it was not receiving any sum collected on the Execution issued on the Judgment as satisfaction. In any event these facts occurred subsequent to the Judgment appealed from and are not of record.

The last paragraph is correct.

Understandably the Appellant has not set forth the facts as they relate to Respondent's cross-appeal.

In fact, it ignores the cross-appeal except in its designation of the parties where it is correctly noted that Respondent is also the "Cross-Appellant". Since the facts regarding the cross-appeal are also the argument in support of the cross-appeal, they will be set forth under Point III to avoid undue repetition.

ARGUMENT

POINT I

THE TRIAL COURT DISMISSED APPELLANT'S COUNTERCLAIM BECAUSE APPELLANT FAILED TO OFFER PROOF OF ANY FACTS ON WHICH A JUDGMENT FOR MALPRACTICE COULD BE BASED.

Appellant's counterclaim was dismissed primarily because appellant did not allege nor offer to prove any facts which would state a claim upon which relief could be granted (R. 128, Finding #6). The fact that the dismissal was also based upon the Statute of Limitations does not nullify that fact and either ground alone is sufficient to justify the dismissal.

POINT II

THE TRIAL COURT CORRECTLY FOUND THAT THE LIMITATIONS WOULD BAR APPELLANT'S CLAIM AS A MATTER OF LAW BASED ON FACTS ASSERTED BY APPELLANT.

Respondent agrees with Appellant that the applicable statute of limitations for professional malpractice cases against attorneys in Utah is the four year period set forth in Sec. 78-12-25 U.C.A. 1953 and Respondent also agrees that the party asserting that defense to a claim has the affirmative burden of pleading and proving it. Respondent disputes Appellant's claim, however, that the trial court shifted the burden to Appellant to prove that the Statute of Limitation did not apply. Respondent wishes to point out that Appellant fails to cite any part of the record in which the Court did as Appellant alleges in this regard.

Respondent accepts the decisions of this Court in the case of *Christiansen v. Rees,* 20 U.2d 199, 436 P.2d 435 (1968) and *Holland v. Morton,* 10 U.2d 390 353 P.2d 989 (1960) as good law but wishes to point out that the facts in those cases are entirely different from the facts in this case, the basic distinction being that the conduct of malpractice in the case of the doctor and lawyer respectively in those cases was not known during the applicable limitation period whereas in this case it was known, assuming arguendo that there was in fact any acts of malpractice in the instant case, an assumption which the Respondent vigorously denies and which denial was found to be correct in the trial court since Appellant's alleged facts in his Offer of Proof would not constitute a claim for malpractice even if they were true. The same is true with respect to the New York case of *Wilson v. Econom* § 6 Misc.2d 272, 288 N.Y. Supp. 2d 381 (1968).

This difference in facts is best highlighted by contrasting the situation in the instant case with what Appellant in its brief on page eleven says is true, "in most cases". There Appellant's brief reads as follows: "In most cases, an attorney has exclusive custody of records, evidence, research, and other pertinent materials to his client's case which are not usually available to others having the professional qualifications to determine whether an action of professional negligence has occurred." In this case Attorney Arthur H. Nielsen who tried the case which Respondent was initially employed in and who ultimately prevailed in the main in that case, was the one who had the exclusive custody of records, evidence, research, and pertinent materials to Respondent's case and he certainly had and has the professional qualifications to determine whether an act of professional negligence had occurred.

The *Christiansen* case stands for the proposition that it is for the trier of the facts, (here Judge Stewart M. Hanson who was sitting without a jury) to determine whether or not the patient knew or should have known that a foreign body was left in his body more than four years prior to the commencement of this action so that a Motion for Summary Judgment ought not to be granted. Here the Court's found that the Appellant knew or should have known of any of the acts complained of in his offer of proof more than four months prior to the filing of its Cross Claim (R. 128, Finding #6) and that Finding is amply supported by the evidence intro-

duced in this case and particularly in light of Appellant's offer of proof. (R. 270-277)

Certainly, that case lends no support to the implication made in Appellant's Brief that the trial court is not entitled to make the factual determination that it did here without receiving the proffered evidence after receiving the Offer of Proof which it found insufficient to sustain Appellant's contention. In any event we are not left in doubt as to what that proof might have been even beyond the scope of the offer of proof as Appellant's president has made a very extensive statement of what he contends to be the facts as set forth in his Affidavit in Appellant's Motion to open case, Take Testimony and Enter New Judgment under Rule 59, U.R.C.P. (R. 146-216). Without unduly burdening the Court with a detailed analysis of that Affidavit and why it fails to show that the Appellant asserted no claim upon which relief could be granted and that even if the alleged acts constituted malpractice that they were in fact known or should have been known more than four years prior to the filing of the Cross Claim, Respondent will simply point out that Appellant's Brief failed to refer this Court to those allegations in that 11 page Affidavit with 16 Exhibits attached upon which the lower Court could have found such malpractice and that its claim was presented within the time provided by law.

As to the *Holland* case the plaintiff there based his claim on fraud and the main thrust of that case as

contended for by the Appellant here is that the client was entitled to trust in his attorney and was not charged with notice of a deed being recorded in the absence of his counsel advising him of this fact. The findings and Judgment of the court below in this case are not in any particular in conflict with that holding.

In a proper case a defendant-appellant might well urge this Court to overrule its holding in the *Christiansen* case where its application might subject a professional to liability long after it would be fair to hold him answerable but that is not the case here as the Respondent is not urging that the termination rule be applied here in order to get off his prospective liability long before it would cease under the *Christiansen* discovery rule.

POINT III

THE COURT ERRED IN FINDING THAT THE FEE ARRANGEMENT WAS $20.00 PER HOUR WHEN ALL THE EVIDENCE IN THE RECORD ESTABLISHED THAT IT WAS $25.00 PER HOUR.

The facts in regard to this point are as follows: (1) On June 22, 1967 the Appellant paid the Respondent $100.00 as a retainer on certain legal services and $25.00 in court costs (Exhibit 10-P, last page). (2) On December 23, 1967 the Respondent billed Appellant for $627.50, credited the $100.00 payment and requested payment of the balance of $527.50. (Exhibit 10-P, last

three pink sheets) Said statement stated that all of the services amounted to 25.1 hours. (3) On February 3, 1968 the Respondent billed Appellant for $1,667.32 (Exhibit 10-P, first two pink pages). On that bill it stated expressly that 31.1 hours were being billed at the rate of $25.00 per hour for services of the plaintiff personally and 23.3 hours for the services of David A. Goodwell, an associate of the plaintiff, at the rate of $15.00 per hour. (4) On January 5, 1968 the Respondent paid the sum of $500.00 on account of the aforesaid services. (5) On June 1, 1970, Respondent billed Appellant for $2,178.12 for 34.85 additional hours and based that billing at the rate of $25.00 per hour (see Exhibit 10-P, last gold page). (6) No payment was made pursuant to that statement and on July 31, 1970 the Respondent filed suit for payment of the said $2,178.12 together with interest thereon at the rate of 6% per annum from various dates when parts of the billings were due and unpaid. (R-1) On December 7, 1970 the Respondent expressly admitted in his Answer that the amount of compensation which the Appellant agreed to pay Respondent for the aforesaid legal services was $25.00 per hour for services performed by Respondent personally and $15.00 per hour for services performed by David A. Goodwill (R-5, paragraph one). On December 7, 1971 the Appellant filed an Answer in which he denied the basis of conmpensation alleged in Plaintiff's Complaint (R-20, Second Defense) (7) On the 16th day of October, 1971 the Respon-

dent served a Request for Admissions on Appellant which requested that he admit that "the initial fee arrangement obligated the defendant to pay plaintiff $25.00 per hour for services rendered by him in connection with the aforesaid law suit". (R-8) (8) On December 15, 1971 Respondent through its attorney admitted said Request for Admission (R-30, #8) (9) On October 16, 1971 the Respondent served on Appellant the following written Interrogatory: "State what the basis of the compensation to the plaintiff was according to the initial agreement and any subsequent modification for services rendered by the plaintiff and by his associate, David A. Goodwell." (R-10, #2) On December 15, 1971, the Respondent answered that Interrogatory as follows: "$25.00 for services rendered by plaintiff, $15.00 for services of David A. Goodwell. See answers above for further explanation." (R-32, #2) (10) Previous to all of the foregoing transactions, the Respondent had offered on July 26, 1965, to render services for the Appellant for the sum of $20.00 per hour (E. 2-P) and it was on the basis of this letter that the trial court based its judgment in favor of the plaintiff and against the defendant (R-127, #1) (11) In explaining Ex. 2-P at trial the Respondent pointed out that he had increased his hourly charges from $20.00 per hour to $25.00 per hour sometime after July 26, 1965, and prior to the time that the services in question were undertaken. In support of that explanation Respondent offered a copy of a

billing to the Appellant dated Feb. 13, 1967, which showed that he had billed respondent $25.00 per hour for services in December, 1966 and January 1967. That exhibit also referred to a letter to Attorney Lewis F. Sherman, which is Exh. 7-P which also showed that the billing was being made on the basis of $25.00 per hour. The respondent paid both charges by paying Respondent the sum of $193.62 prior to the Appellant employing the Respondent to perform the services which are the subject matter of this law suit. (Ex. 8-P, R. 242)

POINT IV

THE COURT ERRED IN NOT ALLOWING INTEREST ON THE PRINCIPAL SUM FOUND TO BE OWING FROM APPELLANT TO RESPONDENT.

The trial court, as noted in the Statement of Facts, denied Respondent interest on the basis that there was no express agreement that interest would be charged if payment was not made upon receipt of billings (R-128, #7). Respondent respectfully submits that there is no legal authority which would justify the denial of interest on that basis and Appellant apparently concedes this to be the case as it seeks to justify the denial of interest on some vague reference to the Consumer Credit Code.

Sec. 15-1-1 U.C.A. 1953 provides, inter alia: "The legal rate of interest for the loan or forebearance of any money good or things in action shall be 6% per annum." There was no loan here but there certainly was forebearance.

In *Godbe v. Young*, 15Ut. 55; 15 Wall 562." (1890) this court said on page 60: "When interest, as such, should be allowed by courts as a matter of law, and when it may be allowed as damages by juries in descretion are questions that have been much discussed by courts and commentators. We are satisfied, however, that in regard to the first of these questions, the rule most firmly found on record, and reason, and best supported by authority is, 'that in actions of contract interest is no longer in the discretion of the jury, but a matter of right and as essential to legal indemnity as the principal sum or ascertained value to which it is instant.' (Sedgwick on Damages, 5th Edition, 432, note 2 and citing nine cases from New York and elsewhere in support thereof.) Here, of course, this was an action based on an oral contract and hence the interest should have been accorded to the Respondent as a matter of right and of law.

CONCLUSION

Respondent respectfully urges this Court to remand this case to the lower Court with instructions to amend the Findings to show that the hourly rate for the judgment should be $25.00 per hour rather than $20.00 per

hour and that interest is due to the Respondent on the principal sum at the rate of 6% per annum even though there was no express agreement with respect to interest and that the judgment should be amended accordingly and that this Court should affirm the trial Court's dismissal of Appellant's Counter Claim on either the merits or on the bar of the limitations of actions or on both.

Respectfully submitted,

ROBERT B. HANSEN
Respondent
838 18th Avenue
Salt Lake iCty, Utah