FILED
COURT OF APPEALS
DIVISION II
2015 JAN 20 AM 9:04
STATE OF WASHINGTON
BY ______
DEPUTY

No. 46434-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CHARLES F. SMITH and BARBARA DUSZYNSKA, husband and wife,

Appellants

vs.

LLOYD ROOSEVELT REICH and JOYCE REICH, husband and wife,

Respondents.

APPELLANTS' BRIEF

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I.

ASSIGNMENT OF ERROR

1. The Trial Court abused its discretion by failing to grant Appellant a Continuance pursuant to CR 56(f).

II.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Respondent's 12(b)(6) motion becomes a Motion for Summary Judgment.

B. The standard for a discretionary ruling is whether that discretion is exercised in untenable grounds or for untenable reasons.

C. It is permissible to use a "hypothetical" fact pattern to oppose a Motion for Summary Judgment.

III.

STATEMENT OF THE CASE

1. Appellants Charles F. Smith and Barbara Duszynska purchased property in Skamania County, Washington. There is a well located on their property with the pump house and related mechanical equipment located on a neighboring property. Both properties were served by the well. Disputes arose between Appellants and Respondents, Lloyd Reich and Joyce Reich, husband and wife.

2. These resulted in Appellants filing a Complaint February 1, 2012 (CP 001-008) Pro Se. The Respondents hired David H. Schultz and filed a

Notice of Appearance (CP 012) and later an Answer and Affirmative Defense and Counterclaim (CP 013-074). Appellants filed an Answer to Counterclaim in March of 2012 (CP 075-077).

3. On January 30, 2014, Respondents through their attorney, simultaneously filed a Motion for Summary Judgment and a Motion to Dismiss pursuant to CR 12(b)(6). The Respondents CR 12(b)(6) Motion included an extensive Memorandum from Respondents attorney arguing as a defense that there was a comprehensive ground water code managed by the Washington State Department of Ecology which precluded Appellants from enforcing the claim against Respondents. The second issue of the Motion had to do with an allegation of perjury against Respondents.

4. The Motion for Summary Judgment was much more extensive.

5. Believing that all he needed to do was restate the Complaint and make it more clear on what his issues are, (RP 4) Appellant Charles Smith pro se filed an Amended Complaint and cited in his Motion for Leave to Amend Complaint on March 13, 2014 at 1:30 p.m. The Citation is dated March 10, 2014, the proposed Motion for Leave to File Amended Complaint and the Amended Complaint itself were both filed of record on March 7, 2014. (CP 195-284)

6. Respondents' attorney cited the Motions to dismiss and the Motion for Summary Judgment into the Court on March 13, 2014 at 2:00 p.m.

7. It is during the presentations on March 13, 2014 that the matter became a procedural quagmire. The Honorable Brian Altman took up all three

matters simultaneously rather than take up Appellants Motion for Leave to Amend Complaint first as docketed and then turn to the two Motions of Respondents. (RP pg. 2) In fact, the Court decided to "take the Summary Judgment first". (RP pg. 2) It did go on to ask Appellant what is different than the first Complaint with the new Complaint.

8. The Court noted that Appellant did not file any response for Motion for Summary Judgment. Appellant admitted he had not filed anything separately but issued a subpoena to the Defendants to testify. (RP pg. 3) The Court went on to insist that the Appellant had to file a response and did not file a response and that he cannot be treated any other way than as an attorney. (RP pg. 3)

9. Appellant stated that if the Summary Judgment was based on the Amended Complaint, he thought there was evidence that would prevail. (RP pgs. 3 and 4) He further insisted that the premise that CR 15(a) using the Amended Complaint and when justice so requires that the proposed Amended Complaint would be fundamental to the case. (RP pg. 4)

10. The Court did take time to explain CR 56 and the requirement that a response needed to be made. The Court did not say anything about CR 56(f). Never said anything.

11. Appellant attempted to start saying what specific facts there were that might be in opposition to the Motion for Summary Judgment. This included the encroachment issue. (RP pgs. 8 and 9) The Court admonished Appellants that he was going into details of the case but that it was not the trial.

The Court said "we are not at the facts of the case stage. This isn't a trial." (RP pg. 9)

12. In response to that Appellants made a verbal Motion for Continuance. The Court acknowledged that Motion but never ruled on it. (RP pg. 10 and 11) Appellant indicates in the response to the question concerning res adjudicata of small claim cases, that the issues were no litigated in that lower court. (RP pg. 11) The Court then simply granted the Motion for Summary Judgment. (RP pg. 11) He ordered Respondents attorney to prepare an Order concerning the factual findings consistent with the Motion and that it was not responded to by Appellant (RP pgs. 11 and 12)

13.

IV.

STANDARD OF REVIEW

A. Motion for Summary Judgment. The Standard of Review for an Appellate Court reviewing Motions for Summary Judgment is stated in the case of Roger Crane & Associates v. Felice, 74 WA App 769, 875 P2d 705 (1994). Therein the Court of Appeals stated:

> "[1] Standard of Review. The Standard of Review of a Summary Judgment is well settled. We engage in the same inquiry as the Trial Court and review the evidence in the light most favorable to the non-moving party." [Citation omitted] Roger Crane & Associates & Felice, supra page 773.

A Motion for Summary Judgment is to allow the Trial Court to determine whether or not there is any genuine issue of material fact pursuant to Civil Rule 56. There are many cases outlining criteria for granting or

denying such a motion. The case of Balise v. Underwood, 62 WA 2d 195, 381 P2d 966 (1963) outlines it succinctly.

> "(1) the object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact. [citation omitted]
>
> . . .
>
> (3) A material fact is one upon which the outcome of the litigation depends. [citations omitted]
>
> (4) In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue. [citation omitted]
>
> . . .
>
> . . .
>
> (7) In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably to the nonmoving party and, when so considered, if reasonable men might reach different conclusions the motion should be denied." Balise v. Underwood, supra page 199.

In Wood v. Seattle, 57 WA 2d 469, 358 P2d 141 (1960), the Court ruled as follows:

> "In ruling on a Motion for summary judgment, the Court must consider the material evidence and all reasonable inferences therefrom most favorably to the non-movant party and, when so considered, if reasonable men might reach different conclusions, the motion should be denied because a genuine issue as to a material fact is presented. Brannon v. Harmon, 56 Wn. 2d 826, 355 P.2d 792 (1960). Considering Appellants evidence most favorably to him (for the purposes of this motion), we find that it presented a genuine issue of fact relative to his contributory negligence, and that the court erred in granting the motion for summary judgment." Wood v. Seattle, supra page 473.

Likewise, is Saluteen-Maschersky v. Countrywide Funding Corporation, 105 Wn. App. 486, 22 P.3d 804 (2001):

> "... A Trial Court's Order granting Summary Judgment is reviewed de novo on the record before the Trial Court at the time of the Order [citation omitted] Summary Judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [Citation omitted] All facts and reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. [Citation omitted] The Motion should be granted if, from all the evidence, reasonable persons could reach but one conclusion. [Citation omitted] Saluteen-Maschersky v. Countrywide Funding Corporation, supra page 850 and 851.

Stated another way in Ward v. Coldwell Banker 74 Wn. App. 157, 872 P.2d 69 (1994), the Court held:

> "... if reasonable minds could draw different conclusions from undisputed facts, or if all the facts necessary to determine the issues are not present, summary judgment is improper."

V.

ARGUMENT

The Trial Court abused its discretion by failing to grant Appellant an Continuance pursuant to CR 56(f) to allow them to bring in affirmative responses.

The Trial Court in this matter made every effort to make sure that Appellant had not filed any responsive Declarations to Respondent's Motion for Summary Judgment. However, there was no decision in the conversation between the parties about CR 56(f) which gives the Court discretion to grant a continuance so that the responding party has additional time to bring in responses.

> "CR 56(f), **When Affidavits are unavailable**. Should it appear from the Affidavits of a party opposing the Motion, that he cannot, for reasons stated, present by Affidavit facts essential

to justify his opposition, the Court may refuse the Application for judgment or may order a continuance to permit Affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just."

A. Respondent's CR 12(b)(6) motion becomes a Motion for Summary Judgment.

First it should be acknowledged that Respondents Motion to Dismiss under CR12(b)(6) has been determined to be a CR12(c) when there was other materials presented besides simply the pleadings. Blenheim v. Dawson and Hall, 35 Wn. 435, 667 P.2d 125, (1983). That case also indicated that the CR 12(b)(6) Motion is considered Judgment on the Pleadings under CR 12(c) when an Answer has been filed. The Respondents had filed their Answer. (CP 013-074).

The Blenheim case goes on to cite some other issues pertinent to the case at bar.

> "...
>
> While ordinarily where a Trial Court treats a Motion under CR 12(c) as one for Summary Judgment it must ask all parties if they wish to present materials, when the appealing party, in fact presented materials and argued the motion as one for Summary Judgment, the Trial Court need not on its own initiative ask the parties if they wish to present additional materials." Blenheim v. Dawson, supra page 439.

B. The standard for a discretionary ruling is whether that discretion is exercised for untenable grounds or for untenable reasons.

In Coogle v. Snow, 56 Wn App. 499, 784 P.2d 554 (1990). The facts regarded a patient (Coogle) whose case was dismissed on Summary Judgment against Defendant Snow. That case from Division I of Washington Board of Appeals rejected its earlier decision in Rehak v. Rehak, 1 Wn App. 963, 465 P.2d 687 (1970).

> "The proper standard is whether discretion is exercised on untenable grounds or for untenable reasons concerning the purposes of the Trial Court's discretion.

> With these principles in mind, we consider whether the trial court properly exercised its discretion in this case. CR 56(f) states that where Affidavits of the party opposing the Motion for Summary Judgment show reason why the party cannot present facts justifying it opposition, the Court may refuse the Motion for Summary Judgment or order a continuance in order to obtain affidavits or the depositions. Where the party knows of the existence of a material witness and shows good reason why the witness affidavit cannot be obtained in time for the Summary Judgment proceeding, the Court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case. However, the trial court may deny a Motion for a Continuance when (1) the moving party does not offer a good reason for the delay in obtaining the evidence; (2) the moving party does not state what evidence would be established through the additional discoveries; or (3) the evidence sought will not raise a genuine issue of fact." Turner v. Kohler, supra at 693. In considering the application of CR 56(f) we note that the trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case. Weeks v. Chief of Washington State Patrol, 96 Wn 2.d 893, 639 P.2d 732 (1982). In addition the Superior Court Civil Rules are to be construed to secure the just speedy and inexpensive determination of every action." (CR 1) Google v. Snow, supra page 507 and 508.

The Coogle Court went on to criticize the Trial Judge in applying a "draconian application of time limitations."

Finally the Coogle Court stated:

> "We cannot discern a tenable ground or reason for the Trial Court decision. We hold that the Trial Court improperly exercised discretion in denying the Motion for a Continuance." Coogle v. Snow supra page 508.

In the State ex rel. Carroll v. Junker, 79 Wn. 2d 12, 282 P.2d 775 (1971), the Court used the same principles of law about the discretion being manifestly unreasonable or exercised on untenable grounds for untenable reasons. It goes on to say:

> "Whether this discretion is based on untenable grounds or is manifestly unreasonable, or as arbitrarily exercised, depends on the comparative or compelling public or private interest of those affected by the Court or decision in comparative weigh

> of the reasons for and against the decision one way or another." Carroll v. Junker, supra page 26. [Emphasis added]

In the case at bar the Trial Court, the Honorable Brian Altman, exercised very little discretion, if any. By failing to allow Appellant the opportunity to respond to the questions he acted arbitrarily and exercised his discretion arbitrarily. There was a Motion for Continuance made by Appellant which was acknowledged but never ruled on. When the Appellant attempted to go through the issues of the Complaint and give reasons for why they would result in a denying of the Motion for Summary Judgment, the Trial Court cut him off, saying now is not the time to state facts. (RP 9)

There were never any "grounds" stated by the Trial Court to deny the Motion for Continuance. Mannington Carpets v. Hazelrigg, 94 Wn App. 899, 937 P.2d 1103 (1999), the Court made a point that Trial Court has a duty to give that party a reasonable opportunity to complete the records before ruling on the case.

In another Appellate Court Case Butler v. Joy, 116 Wn App. 291, 65 P.3d 671 (2003) we find another case in which the opposing party's lawyer was introduced just before the Motion for Summary Judgment was heard. In this case it was one day. The attorney appeared without written Affidavits in Support of Continuance and presented the Motion for a Continuance orally. That case held:

> "...
>
> However, "the primary consideration and Trial Court's decisions on the Motion for a Continuance should have been justice." Coogle v. Snow, supra.
>
> ...
>
> Although additional discovery was not needed to decide the issue of insufficient service of process, Mr. Umulo deserved an opportunity to prepare a response on the issues of law. Dr.

> Joy has not argued that she would have been prejudice by a continuance as noted Coggle, it is hard to see "how justice is served by a draconian application of time limitations" where a party is hobbled by legal representation that has no time to prepare a response to a Motion that cuts off any decision on the true merits of the case. Id. at 508." Potter v. Joy, supra 299-300.

By the same token even though Appellants were not represented by an attorney they should have been given an opportunity, in fact the Court had a duty to give them an opportunity, to prepare a response. Respondents never said anything about being prejudiced by the continuance.

There are a couple of points that need to be made concerning the facts. If the proposed Amended Complaint had had the Appellant's signature and a sworn notary seal that could well have been taken as an Affidavit in opposition to Respondents Motion for Summary Judgment. This was actually accomplished by Appellants in their later Motion for Reconsideration (CP 295-382).

In analyzing the Amended Complaint, one of the first issues is the Respondents were irritating an area larger than one-quarter acre or one-half acre, which seem to be the rule of the Department of Ecology. Respondents' Motion suggests that Appellants are trying to get the State of Washington to enforce its rules which the State refused to do. However, there is also a private right of action using the State standard as to allow irrigation. Appellants were never allowed the opportunity to present their private right of action. The issue of the use and value of groundwater is a factual question without competing Affidavits.

A second issue was the allegation that there was a contract between the property owners on how the well that served two properties on one side of the boundary line and the pump house on the other side of the boundary line were going to be mutually accomplished.

Appellant referred to Water System Easement and Agreement No. 92091 of Skamania County Recorder's office. He then made assertions that the Respondents had not provided the electrical service, not installed the water pressure tank in an outbuilding and refused to allow Appellants to have access to the building housing, with the shared pressure tank. There were allegations by the Appellants that there water service had diminished substantially which is a factual determination that needed to be made. There is an allegation that a water line broke and the electricity needed to be shut off, but Respondents were not available.

A third issue is the encroachment of a fence belonging to the Respondents onto Appellants property. While the actual encroachment may be reasonably small, it is the one issue that Appellant attempted to point out to the Trial Court, but was cut off because it was not time to "hear the facts".

Respondents made an argument that the CR 15(a) Motion to Amend was not timely served. (RP pg. 6). The Motion itself was filed March 7, 2014 (CP 195-284) and the Motion was to be heard on March 13, 2014, six days later. CR 6(d) indicates that Motions should be served not later than five days before the time specified for the hearing.

Then there is the matter of the subpoena requested asking Respondents to personally appear. That subpoena was served on March 6, 2014 according to the Affidavit of Service. (CP 285-288) There is no indication whether or not the Respondents personally appeared on the day of the hearing, but that is a methodology supported by the case law decisions allowing a responding party to a Motion for Summary Judgment to bring opposing witnesses. Since the record is unclear as to whether or not the Reichs were even available and the Trial Court made no indication as to whether or not he would listen to them. There

again is a failure to allow Appellants to present its materials.

C. It is permissible to use a "hypothetical" fact pattern to oppose a Motion for Summary Judgment.

Another example of Washington case law allowing or requiring the Trial Court to be careful about granting Motions for Summary Judgment is found in Brown v. MacPherson's, 86 Wn 2d 293, 545 P.2d 13 (1975). In this case the Washington Supreme Court took up the case "de novo" and they needed to decide whether the facts described, if established, would entitle Appellants to relief under the allegations in their Complaints. They allowed the use of the relevant "hypothetical" factual basis Appellant claims in a series of communications. Thus when there were no real facts available, the "hypothetical" factual basis was allowed to show that Appellants might be entitled to relief on a theory of misfeasance by the State of Washington.

While all the courts must be just in their pronouncements, in Morris v. McNicol, 83 Wn 2d 491, 519 P2d 7 (1974), the Court held:

> "The Motion should be granted only if, from all of the evidence, reasonable men could reach but one conclusion. (CR 56(c) [citation omitted]. Only when the pleadings, depositions, admissions, and Affidavits considered by the Trial Court did not created a genuine issue of material fact between the parties, is the moving party entitled to a Summary Judgment. Ferrin v. Donnellefeld, 74 Wn 2d 283, 444 P2d 701 (1968)." Morris v. McNicol supra 494-495.

Citing the McNicol case the Court of Appeals in Mostrom v. Pettibon, 25 Wn App. 158, 607 P2d 864 (1980) held:

> The Trial Court must deny a Motion for Summary Judgment if the record shows any reason hypotheses which entitled the non-moving party to relief. Mostrom v. Pettibon, supra page 162.

In reviewing further procedures in this case at the Trial Court level Appellant submits that it filed a Motion for New Trial, Reconsideration and Amendment of Judgment. (CP 295-382) Attached to that Motion is a 15-page Affidavit of Appellants Charles F. Smith and Barbara Duszynska. That Affidavit essentially states what the Amended Complaint would have stated and this time it is under oath as it perhaps should have been at the time of the Motion for Summary Judgment. Nonetheless, the Court now has full disclosure of the issues that were arguable. Yet the Court scarcely reviewed that Affidavit and merely continued to try to explain to the Appellant why he couldn't help him as a pro se litigant. He summarily denied the Motion for Reconsideration (RP 33) and admonished or encouraged Appellant to go up to the next level of Court – Court of Appeals. Had the Trial Court exercised discretion appropriately at the time of the Motion for Summary Judgment, Appellants could have presented this Affidavit to support its hypotheses of various issues contained within its Complaint. In addition it would have had the supporting information of third parties and exhibits.

VI.

CONCLUSION

In this matter the issues were formed with Appellants, acting pro se, filing a Complaint and Respondents filing an Answer and Counterclaim. Respondents then made two simultaneous motions: one to dismiss under CR 12(b)(6) and a second under CR 56. Believing that he had to restate his Complaint to meet the first Motion, Appellant Smith prepared an Amended Complaint and a Motion for Leave to Amend. When the three Motions all appeared on the same date, the Trial Court moved directly to hear Respondents Motions, and ignored Appellant's Motion to Amend. During argument, Appellant made a

Motion for a Continuance, which was never commented on or ruled on by the Trial Court.

The Trial Court acted arbitrarily on cutting off Appellant's attempts to explain the factual situation of his issues. He was not given the opportunity to explain why he had not responded to Respondents Motion for Summary Judgment, nor to explain what witnesses he may have to contravene Respondents. Respondent did not suggest any prejudice in having a continuance. The Trial Judge repeatedly told Appellant he could not be treated differently than a lawyer and was committed to the concept that Appellant needed to have responded by Affidavit.

For all of the foregoing the Trial Judge abused his discretion in not granting Appellants' Motion for Continuance. The Courts ruling was untenable and because no reason was given at all, the reason is untenable. This matter should be reversed and sent back to the Trial Court for further hearing.

RESPECTFULLY SUBMITTED this 12nd day of January, 2015.

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CERTIFICATE OF SERVICE

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I certify under penalty of perjury under the laws of the State of Washington that, on January 12, 2015, I caused Appellants' Initial Brief to be filed with the Court of Appeals (original and one copy); and caused to be served on the persons listed below in the manner shown:

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DATED this 12th day of January, 2015 at Vancouver, Washington

Brian H. Wolfe, P.C.

Roberta Woelke, assistant to Brian H. Wolfe

FILED
COURT OF APPEALS
DIVISION II
2015 JAN 20 AM 9:05
STATE OF WASHINGTON
BY ______
DEPUTY

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