2. At an unspecified date, but subsequent to the receipt of notice of the entry of the judgment (June 25, 1979), and before the levy on the defendant's personal property (after July 20, 1979) the defendant returned the two vehicles whose value represented the principal amount claimed by the plaintiff to the plaintiff presumably believing that this discharged any obligation he might have to the plaintiff. (While one learned in the law would know that this was an ineffective procedure to discharge an obligation and the defendant, as a businessman, could be charged with such knowledge; nevertheless, considering the defendant's version of the underlying transaction, i.e., a consignment, we are not prepared to say there was not some logic and reason in his action.)

3. After the Sheriff's levy on the defendant's personal property (sometime after July 20, 1979) the defendant must have realized he still had a legal problem and for the first time retained counsel.

4. Counsel for the defendant and for the plaintiff then engaged in negotiations looking to the settlement of the controversy during the month of July, but the negotiations failed to produce a settlement. (It is difficult for the Court to understand why no evidence was introduced as to the duration of the negotiations by counsel other than the cryptic pleading "during the month of July" in paragraph eighteen of defendant's petition.)

5. After the termination of negotiations the petition was prepared by counsel for the defendant and presented on August 24, 1979.

In our judgment an analysis of all of the facts and the applicable law leads us to the conclusion that there was no unreasonable delay on the part of the defendant in seeking relief from the Court.

As heretofore noted the second position of the plaintiff is that the defendant has failed to allege in his petition a meritorious defense and this is primarily predicated upon the defense argument that the Parol Evidence Rule will preclude the admission of oral testimony attacking the validity of the judgment note admittedly signed by the defendant.

An examination of the defendant's petition discloses allegation of payment in full of the note, that the underlying transaction between plaintiff and defendant was a consignment of vehicles, and defendant was induced to sign the note in blank solely for the purpose of securing the plaintiff's position in the

event of the defendant's death after a motor vehicle sale and before plaintiff had been paid, and that the death of the defendant was a condition precedent to the plaintiff confessing judgment on the note. It is the opinion of this Court that the Parol Evidence Rule would not preclude the testimony of the plaintiff, for evidence of payment of a written obligation is always admissible, and the allegations appear to sufficiently allege fraud or mistake to constitute an exception to the rule.

It is not the function of this Court at this time to make any determination concerning the credibility of the witnesses. We have read all of the depositions filed in the matter. We are persuaded that in a jury trial such evidence, if produced, would require the issues to be submitted to the jury. Therefore, under Pa. R.C.P. No. 2959(e) and *Reliance Insurance Company v. Liberati*, supra., we conclude the judgment should be opened.

ORDER OF COURT

NOW, this 5th day of August, 1980, the judgment in the above-captioned matter will be opened and the defendant is granted premission to enter a defense.

Exceptions are granted the plaintiff.

HERSHBERGER CHEVROLET, INC. v. ROMALA CORP., C.P. Franklin County Branch, A.D. 1979 - 229 In Trespass

Trespass - Malicious Use of Civil Process - Attorney Fees - Ad Damnum Clause - More Specific Pleading

1. Generally, attorney's fees are not recoverable in litigation in Pennsylvania; however an exception to this rule is the right of a verdict winning plaintiff in a trespass action for malicious use of civil process.

2. Where a plaintiff's ad damnum clause requests judgment in the amount of $128,926.77, it offends Pa. R.C.P. 1044(b) which requires a statement whether the amount requested is or is not in excess of $10,000.00 and the ad damnum clause will be stricken.

3. In a trespass action for malicious use of civil process arising out of unalleged wrongful and malicious confession of judgment, the loss of profits from a sale of business assets where no levy has been alleged would not be a foreseeable consequence and would be special damages which should be specifically stated.

Michael E. Farr, Esq., Counsel for Plaintiff

Wayne F. Shade, Esq., Counsel for Defendant

OPINION AND ORDER

KELLER, J., September 19, 1980:

This action in assumpsit and trespass was commenced by the filing of a praecipe for writ of summons on August 29, 1979. The writ was reissued on praecipe dated October 12, 1979, and served upon the defendant Romala Investment Corporation on November 10, 1979. A complaint in trespass was filed February 1, 1980. Peculiarly there is no record of service of the complaint in any manner upon the defendant. Nevertheless, counsel for the defendant on February 7, 1980 filed preliminary objections in the nature of a motion to strike, and a motion for more specific pleading. Counsel for the plaintiff accepted service without noting the date of that acceptance. Counsel for the plaintiff by praecipe listed the matter for the August Term of Argument Court, and arguments were heard on August 7, 1980.

The complaint alleges that the plaintiff and defendant's predecessor Romala Investment Corporation entered into a lease agreement on or about May 21, 1976; the defendant entered judgment by confession on March 10, 1977 against the plaintiff in the amount of $202,494.63, and plaintiff on March 16, 1977 filed its petition for a rule to show cause why the judgment should not be stricken or in the alternative opened. On August 30, 1977 an Opinion and Order was entered striking the defendant's judgment and no appeal was taken from that decision by the defendant herein. The plaintiff alleges the defendant acted wrongfully and unlawfully in entering its judgment and with careless and reckless disregard for the rights of the plaintiff, without probable cause and with malice. As a direct result of the entry of judgment the plaintiff alleges it incurred substantial attorney's fee and other expense in the amount of $3,926.77, and it was hindered and prevented from effecting a sale of certain of its business assets as a result of which it suffered a loss in the amount of $125,000.00. In addition the plaintiff alleges the right to recover punitive damages as a result of the defendant's alleged acting intentionally, maliciously and carelessly, in bad faith and with wanton and reckless indifference to and disregard of the interests and rights of the plaintiff. The plaintiff's ad damnum clause demands judgment in the amount of $128,926.77 together with punitive damages in excess of $10,000.00.

The defendant moves to strike all references to attorney's fee as impertinent and contrary to law, and the ad damnum

clause of the complaint as in violation of Pa. R.C.P. 1044. It moves for a more specific pleading on the grounds that the plaintiff has failed to aver the specific items of business assets and the values thereof which plaintff allegedly lost the sale of.

By way of comment and to place this matter in its proper perspective, we do note that the decision of this Court to strike the judgment entered in favor of Romala Investment Corporation against Hershberger Chevrolet, Inc. to No. 368 — 1977 was based upon the fact that counsel for Romala Investment Corporation confessed judgment against the plaintiff herein and in favor of Romala for the entire rent due for the term of the lease plus real estate taxes due as of the date of confession of judgment. The terms of the lease agreement authorized the confession of judgment only in the event of default in the payment of rent, and then only for rent and there was no such default, and the inclusion of unpaid taxes when there was no authorization for such inclusion.

Preliminarily, we note that counsel for the defendant in his brief and in his argument asserted that after the filing of his preliminary objection to the complaint he became aware of law which would compel the Court to conclude that the complaint did not state a cause of action and must be dismissed as a matter of law. In the brief of counsel for the plaintiff he objected to the defense efforts to raise by way of a brief a demurrer to the plaintiff's complaint as violative of Pa. R.C.P. 1028(a) (b). Counsel for the defendant conceded that the Court would have no authority to consider a demurrer not pleaded in his preliminary objections unless counsel for the plaintiff would agree. Counsel for the plaintiff immediately responded that he had no authority to agree to expand the scope of the argument.

The position of counsel for the plaintiff is well taken and the Court will not consider the unraised issue whether plaintiff's complaint states a cause of action. We do find the situation regrettable, for we have no doubt but that the issue will have to be met at some later date. We fail to comprehend why counsel for the defendant did not seek to amend his preliminary objections in a timely manner.

In the interest of economy for all concerned, we direct the attention of counsel to *Treister, et al. v. 191 Tenants' Association, et al.*, 415 A. 2d 698 (1979), which may be dispositive of the entire issue.

In support of defendant's contention that all references to attorney's fees made by the plaintiff in resisting the earlier

action are impertinent and must be stricken, counsel cites *Hudock, et al. v. Donegal Mutual Insurance Company*, 438 Pa. 272 (1970). We have examined this case carefully and find no reference to any right to recover or not recover attorney's fee and, therefore, conclude it is either an erroneous or an inapplicable citation.

The general rule is that attorney's fees are not recoverable in litigation in Pennsylvania. One well-recognized exception to that rule is the right of a verdict winning plaintiff in a trespass action for malicious use of civil process. This is true because a plaintiff is entitled to recover in that cause of action all damages both general and special sustained in the prior proceeding. Of necessity this would include attorneys' fees where they are shown to be reasonable and necessary. *Howarth v. Segal*, 232 F. Supp. 617(E.D.C. Pa.). In *Anolik v. Marcovsky*, 122 Pa. Super. 133, 136 (1936), the Superior Court in affirming the verdict of the trial court noted, "The only actual expense proven was the $100.00 attorney's fee." In *Lynn v. Smith*, 193 F. Supp. 887, 892 (W.D.C. Pa. 1961), the court concluded that counsel fees in such a cause of action are special damages. See also 54 C.J.S. "Malicious Prosecution" Sec.113, P. 1105.

The defendant's first preliminary objection is dismissed.

Pa. R.C.P. 1044(b) provides:

> "Any pleading demanding relief for unliquidated damages shall without claiming any specific sum, set forth only whether the amount is in excess of, or not in excess of $10,000.00."

Obviously the plaintiff's ad damnum clause offends this rule of civil procedure, and the defendant's motion to strike will be granted.

The defendant's preliminary objection in the nature of a motion for a more specific pleading alleges:

> "Plaintiff has failed to aver the specific items of business assets and the value thereof as to which plaintiff allegedly lost the sale thereof."

The brief of counsel for the defendant consists of a two sentence paragraph which in the first sentence restates the question, and the second sentence states:

> "We contend that such items, being special damages must be pleaded specially as to each asset and the value thereof. Pa. R.C.P. 1019(f)."

We are constrained to point out to counsel that the purpose of a brief is to aid the court in the resolution of a legal problem by setting forth fully and completely the arguments of counsel with citations supporting those arguments. Defense counsel's "one-liner" may well be a model of brevity and simplicity, but it is neither helpful nor useful to the Court. Hereafter, if counsel feels an issue worthy of submission to the Court for adjudication he will perform his function as an advocate or the Court will deem his failure to do so an abandonment of that issue.

Opposing defendant's motion for a more specific pleading as to paragraph 14 of the plaintiff's complaint, counsel for the plaintiff contends that Pa. R.C.P. 1019(a) requires only that the facts on which the claim is based be pleaded in a concise and summary form; and that the pleading of evidentiary matters is improper; that the complaint does adequately inform the adverse party of what he will be required to meet at trial; and that the defendant can acquire such additional information as it might feel necessary by way of discovery. Counsel has cited various cases in support of plaintiff's contention. In addition counsel argues that plaintiff was a car dealer with thousands of items of inventory, vehicles, equipment and other personal property, and it would be unrealistic and unreasonable to contend it must plead each and every item and the value thereof in its pleading.

We recognize that among the Courts of Common Pleas of this Commonwealth there are substantial differences of opinion as to the specificity required in the pleading of damages in order to comply with the Rules of Civil Procedure, and also as to whether the availability of discovery constitutes an acceptable substitute for compliance with the specificity required by the applicable rule. This Court, however, has long taken the position that the fact the right of discovery exists in a party improperly ignores the basic issue whether the pleader is required to plead his alleged damages with more specificity for:

> 1. The purpose of fact pleading as it is mandated in Pennsylvania not only is intended to inform the contesting parties of the issues which they will be required to meet at the ultimate trial of the matter, but it is also intended to provide the Court with a trial format establishing the parameters of the issues. The discovery procedures do not serve this second purpose.
>
> 2. "The Rules of Civil Procedure are based on the fact pleading system. It is, therefore, necessary that the pleadings set forth the facts specifically even though the facts could also

be determined by discovery. Thus the fact that discovery procedures are available does not excuse the plaintiff from specifically pleading the material facts on which its cause of action is based.

"Procedures should not be made unnecessarily complicated by requiring the defendant to resort to discovery proceeding to obtain information which the plaintiff could properly plead in his complaint when such information constitutes the basis on which his cause of action is based." 2 Anderson Pa. Civil Practice Rule 1017.111, page 490.

Therefore, the argument on the availability of discovery will be disregarded in the resolution of this preliminary objection.

Pa. R.C.P. 1019 provides inter alia:

"(a) The material facts on which a cause of action or defense is based shall be stated in a concise or summary form."

"(f) Averments of time, place and items of special damage shall be specifically stated."

Paragraph 13 of the plaintiff's complaint alleges that the plaintiff was negotiating a proposed sale "of certain of its business assets" during March 1977, and defendant was aware of those negotiations prior to the time it confessed its judgment. In paragraph 14 the plaintiff alleges that as a direct proximate result of the confession of judgment it "was hindered and prevented from the aforesaid sale of certain of its assets," and it thereby lost and was deprived of "monies and profits" it believes to be in the sum of $125,000.00.

"General damages are those which in the ordinary course of events result in the injury or harm sustained by the plaintiff, that is, they are the usual and ordinary consequences of the wrong committed. Since they bear such relationship to the plaintiff's injury, the mere pleading of the injury conveys to the adverse party the existence and the nature of the loss which the plaintiff sustained..." 2 Anderson Pa. Civil Practice Sec.1019.64, pages 258, 259.

"Special and consequential damages are those which in fact are proximately caused by the injury or harm sustained by the plaintiff, but which do not always follow such harm, and are not foreseeable, with the consequence that the mere pleading of the plaintiff's harm or injury does not apprise the defendant that the plaintiff has sustained such special or consequential

damages. It is, therefore, necessary that the special and consequential damages be pleaded specifically and with particularity in order that the defendant will know that they have been sustained...The purpose of requiring the plaintiff to specifically aver items of special damages is to enable the defendant to investigate and determine the accuracy of the averments." Anderson, supra, Sec.1019.66, pages 267-268.

In our judgment in a trespass action for malicious use of civil process arising out of the alleged wrongful and malicious confession of judgment the loss of profits from a sale of business assets where no levy has been alleged would not be a fore seeable consequence. Therfore, the damages claimed would be special damages which should under Pa. R.C.P. 1019(f) be specifically stated.

Disregarding the question whether the damages claimed are general or special, it should be stated that we concur with the majority of courts which require general damages to be particularized insofar as reasonably practical when such is requested in the form of a preliminary objection.

"...a distinction is to be made between whether a pleading is sufficient to permit the offer of proof at the trial of the damages sustained by the plaintiff, and whether the pleading is sufficiently specific so that if objected to at the pleading stage the defendant is not entitled to a more specific pleading. And it is held that when the damages sustained consist of a number of distinct items which can be itemized, or which represent distinct types of losses, it is improper to lump them together and merely plead a total or aggregate sum as the damages sustained. That is, the plaintiff should specify the items of damage claimed, whenever possible, and should plead the nature and extent of his loss with sufficient particularity to inform the defendant of the nature and extent of the loss sustained." 2A Anderson, supra, Sec.1019.68 pages 274,275.

Paragraph 14 of the plaintiff's complaint lacks the requisite specificity to inform the defendant how the alleged loss was determined. Certainly it is not necessary for the plaintiff to plead each and every item and its value, but it is not unreasonable to require the plaintiff to establish categories of business assets that were the subject of the sale negotiations and demonstrate the calculations leading to the alleged loss of $125,000.00.

ORDER OF COURT

NOW, this 19th day of September, 1980, the defendant's

preliminary objection:

In the nature of a motion to strike No. 1 is denied and No. 2 is granted.

For a more specific pleading is granted.

The plaintiff is granted leave to amend its complaint within twenty (20) days of the date hereof.

Exceptions are granted the parties.

KRAMER v. SPRINGHOUSE LTD, et al. C. P. Franklin County Branch, A.D. 1980 - 107

Mortgage Foreclosure - Fraud - Secret Equity

1. Merely alleging fraud as a legal conclusion adds nothing if it is not based upon facts clearly and explicitly set forth as constituting such fraud.

2. Where defendants' deeds were not recorded but held by the Grantor-Mortgagor, when the plaintiff mortgagee accepted a mortgage on the land, the defendants' deeds were a secret equity.

3. A mortgage who lends money upon the security of the title of the mortgagor, and who has neither actual or constructive knowledge of any claims of third parties, holds the lien free of any secret equities.

Gerald E. Ruth, Esq., Attorney for Plaintiff

John McD. Sharpe, Jr., Esq., Attorney for Defendants, McLaughlins

Robert E. Graham, Jr., Esq., Attorney for Defendants, Eckards

OPINION AND ORDER

KELLER, J., October 13, 1980:

This action in mortgage foreclosure was commenced by the filing of a complaint on March 26, 1980. The complaint alleges the granting of a mortgage by defendant, Springhouse, Ltd. to Remarkable Enterprises of York, Inc. on November 28, 1977, and binding upon a certain 109.16 acre tract of real estate located in Fannett Township, Franklin County, Pennsyl-

vania. The mortgage was recorded on December 13, 1977 in Franklin County Mortgage Book Vol. 367, Page 560, and accepted for recordation by the Recorder of Deeds as Day Book Document No. 15073. Remarkable Enterprises of York, Inc. assigned its interest in the said mortgage to John W. Kramer, Sr., plaintiff herein. The complaint alleges the defendants other than Springhouse, Ltd. purchased tracts of real estate from Springhouse, Ltd. which were recorded subsequent to the recordation of the plaintiff's mortgage, and that no payments of principal or interest were made on account of the mortgage as required therein. The defendants, John J. McLaughlin and Marilyn McLaughlin filed their answer containing new matter on May 2, 1980, and an amendment to new matter on May 30, 1980. The defendants, Norman G. Eckard and Kathleen C. Eckard, filed their answer containing new matter on May 12, 1980, and their amendment to new matter on June 6, 1980. The new matter pleaded by the defendants McLaughlin and Eckard alleges that the plaintiff's mortgage did not create a lien on their real estate by reason of the fraud perpetrated upon them and others by Springhouse, Ltd. The essence of the defendants' allegation under new matter is that Springhouse, Ltd. conveyed to them and others various tracts of real estate for a fair and adequate consideration, receiving cash and a purchase money mortgage as security for the balance; thereafter Springhouse, Ltd. borrowed money from Remarkable Enterprises and gave as security the mortgage pleaded in the complaint; Springhouse, Ltd. held the deeds to the defendants until December 13, 1977, when Cindy J. Smith, an agent or employee of Springhouse, Ltd., entered all of the documents for recordation and recorded as the first document the mortgage due Remarkable Enterprises. The defendants aver Remarkable Enterprises was not a bona fide mortgagee and had notice of the prior conveyances either by actual knowledge or knowledge imputed from its relationship with and knowledge of Springhouse, Ltd. and Cindy J. Smith; whereas the defendants had no knowledge of the existence or recording of the mortgage of Remarkable Enterprises until March 1980. The amendments to new matter filed by both sets of defendants allege two other prior conveyances of Springhouse, Ltd. by deeds pre-dating the mortgage which were recorded prior to the recordation of the other documents.

The plaintiff filed preliminary objections to the new matter pleaded by the McLaughlins on May 27, 1980, and to the new matter pleaded by the Eckards on June 3, 1980. Both preliminary objections are in the nature of a demurrer, a motion to dismiss the new matter, and for a more specific pleading. Briefs were submitted and arguments heard on August 7, 1980. The matter is now ripe for disposition.