PETER FISHER TRADING PTY. LTD., Plaintiff-Appellant

v.

SANTOS OLIKONG, d/b/a PALAU GENERAL FOODS, Defendant-Appellee

Civil Appeal No. 242

Appellate Division of the High Court

Palau District

February 8, 1980

Appeal by plaintiff from a judgment that defendant was only 50% liable in a suit for goods allegedly taken by defendant on consignment. The Appellate Division of the High Court, Nakamura, Associate Justice, held that no appeal would lie from the denial of a motion for summary judgment where evidence clearly established that defendant operated as an agent of plaintiff and did not take goods on a consignment basis, and that the issue of agency was properly pleaded and before the trial court, and therefore judgment of the trial court was affirmed.

1. **Appeal and Error—Summary Judgment**

   No appeal lies from a denial of a motion for summary judgment.

2. **Appeal and Error—Summary Judgment**

   Decision of the trial court denying plaintiff's motion for summary judgment was not reviewable on appeal.

3. **Appeal and Error—Scope of Review—Facts**

   Unless manifest error appears, the findings of the trial court will not be disturbed when supported by competent evidence.

4. **Commerce and Trade—Consignment**

   In suit for goods allegedly taken by defendant on consignment, where evidence at trial clearly established that defendant operated as but an agent of plaintiff, plaintiff's argument on appeal that defendant took possession of the goods on a consignment basis and therefore must bear the risk of their loss was without merit.

5. **Pleadings—Issues Pleaded—Agency**

   In suit for goods allegedly taken by defendant on consignment, where defendant indicated in his enumerated affirmative defenses that he was not indebted to plaintiff under any consignment agreement, the issue of agency was properly before the trial court, and there was no further requirement under the Rules of Civil Procedure to specifically describe the concept of agency in the pleadings. (Rules of Civil Proc. 8)

Counsel for Appellant: WILLIAM M. FITZGERALD, ESQ.

Counsel for Appellee: JOHNSON TORIBIONG, ESQ.

Before BURNETT, *Chief Justice*, NAKAMURA, *Associate Justice*, and GIANOTTI, *Associate Justice*

NAKAMURA, *Associate Justice*

This is an appeal from a judgment of the Trial Division Palau District. Plaintiff-appellant filed suit for the amount of $4,500 for goods allegedly taken by defendant-appellee on consignment. The trial court found that contrary to the allegations of the complaint, defendant was a mere agent of plaintiff and was liable for but 50% of the stated value of the goods in question. Plaintiff duly filed his appeal, alleging error in the denial of his Motion for Summary Judgment, error in the allocation of risk of loss and further that the affirmative defense of agency, not being raised in the pleadings, could not have been raised at trial.

Appellant urges us to hold that the trial court erred in denying summary judgment. He incorporates in toto his memorandum in support of the Motion for Summary Judgment.

[1] The general rule is that a denial of a motion for summary judgment is not appealable. Ordinarily a litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant summary judgment is not reviewable. *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130 (2nd Cir. 1945); *Safe Flight Instrument Corp. v. McDonnell-Douglas Corp.*, 482 F.2d 1086 (9th Cir. 1973). No appeal lies from a denial of a motion for summary judgment. See: *Simons v. United States*, 497 F.2d 1046 (9th Cir. 1974), *Dutton v. Cities Service Defense Corp.*, 197 F.2d 458 (8th Cir. 1952).

[2] Accordingly, this Court will not disturb the decision of the trial court. However in passing, we note that there were ample grounds for the denial of summary judgment. Even assuming that the statements of the law offered by

plaintiff were correct, there had been no showing that defendant sold the goods in question, a requisite element by plaintiff's authority. Indeed, such allegation had been denied in the defendant's answer. Furthermore, it could not be said that it was clear that defendant had chosen to undertake the obligations inherent in the consignments of the goods in question and thus it appears that the trial court properly denied the motion.

[3, 4] Appellant further argues that defendant took possession of the goods on a consignment basis and therefore must bear the risk of loss. The role of this Court is not to reweigh the evidence and decide whether or not to reach a similar conclusion as that obtained by the trial court. Unless manifest error appears, the findings of the trial court will not be disturbed when supported by competent evidence. *Arriola v. Arriola*, 4 T.T.R. 486 (Tr. Div. 1969). We cannot say that the record does not support the contention that the agreement between plaintiff and defendant was in the nature of a consignment. It was, however, clearly established that defendant operated as but an agent of plaintiff, and thus appellant's discussion on the risk of loss as to a consignee was not relevant to the findings of the trial court. A review of the record uncovers no manifest error on the part of the trial court.

[5] Finally appellant insists that the matter of agency, not having been raised as an affirmative defense could not have been argued at trial. We note that defendant had indicated in his enumerated affirmative defenses that he was not indebted to plaintiff under any consignment agreement. Thus stated, there was no further requirement under T.T. R. Civ. P., Rule 8 to specifically describe the concept of agency in the pleadings; and thus we hold that the issue of agency was properly before the trial court.

The Judgment of the trial court is AFFIRMED.