ORAL ARGUMENT – 12-11-02
02-0179
SIXTH RMA PARTNERS V. SIBLEY

LAWYER: At the outset, I would like to make three observations with regard to the facts of this case. First, this is a lawsuit on two promissory notes which matured in March 1992. Those notes remain unpaid and despite a statement by the respondent that he did not dispute the debt and realized that the loan had matured. Second, it is important to note that the entity RMA Partners was used as a common name or trade name for the entity called Sixth RMA.

O'NEILL: You don't dispute that they are two separate legal entities in every way?

LAWYER: They are separate legal entities in the year 1995. Because in Dec. 1995, the entity called RMA Partners ceased to exist. And after that date through the years 1996 through today the name RMA Partners has been used by the entity Sixth RMA and its sister entities Sixth, Seventh, Eight, Ninth, all the way up to Sixteenth RMA Partners continue to use the name RMA Partners.

I would like to stress to the court that the evidence at trial and as part of the record would show that the trade name was not just something thought of. The demand letter that was sent in 1994, that was sent to Mr. Sibley before suit was filed was sent on letterhead that said, RMA Partners.

Secondly, that same letter that demanded payment said, Make the payment to RMA Partners, not Sixth Partners.

O'NEILL: Put aside the limitations issue for now. They are two distinct legal entities. If RMA maintained the suit, got a judgment, became final, time ran for an appeal, final judgment. Presume it's still timely, Sixth RMA signs this note and says, Hey, we own this note, we're going to sue on it. They could still bring suit on that note and the fact that a judgment has been entered in favor of RMA would not affect Sixth RMA's ability to also sue on the note. Right?

LAWYER: I would respectfully disagree. First, in any promissory note lawsuit you must as the plaintiff prove that you were the holder of the note. That is why throughout litigation of promissory notes there is the requirement that the original promissory note be produced or there is a problem that that plaintiff is going to have. And being in this field for 22 years, I can assure that has happened. But in this case, the original promissory note was in the courtroom when this case went to trial in August 2000. So to answer your question, another entity called Sixth RMA or anybody else could not come into court because that original note was there and that judgment was there. And that would bar any other claims. I think that's first. Secondly, as has been pointed out by this court, an entity such as Sixth RMA may file suit or be sued in its common or trade name and that's what happened here. That the lawsuit was filed on that common and trade name. So somebody else again could not come in and try to claim they have a note or they have a claim

because the trade name was used, and at the time that the trade name was used the entity holding that trade name was Sixth RMA.

The letters that came from an address on Hilton Avenue, whether you were writing RMA or Sixth RMA there was only one address ever used. And also it will be shown in the record that when files were sent out of that office in Columbus Georgia for lawyers to file suit, again even the referral letters to lawyers says, RMA Partners. The word Sixth RMA does not appear.

O'NEILL: Would the argument be different if let's say that Sixth RMA engaged in some illegal collection practices. And a suit is brought against them for their wrongful activity in doing that. Could the plaintiff in that suit say all these entities are one in the same and they are tortly and separately liable?

LAWYER: Yes they could. In fact that could be a claim under the Federal Fair Debit Collections Practices Act because there could be confusion caused by the collecting entity with trying to do that. Now if RMA or Sixth RMA is trying to collect its own debt the federal act does not apply. But that does not mean that the Texas Debt Collection Act would not apply, which has some of the same provisions about a collector not throwing out confusing issues and otherwise violating the laws. And in this particular case Mr. Sibley did send a letter pursuant to the Federal Fair Debt Collections Practices Act to our firm and asked us to respond to verify the debt, which was done. And there was no issue or question about who owned the note or any issues raised. The verification of the note did occur and it complied with the law. And no issue was brought for any violation of the federal Fair Debt Collections Practices Act or the Texas Debt Collections Act in this suit.

With regard to the trade ____ issue. The final point in terms of facts is that even the testimony of the Sixth RMA representative said to us, there was no distinction between RMA Partners, an entity that formally existed and Sixth RMA. So my second point is, the suit was brought in the trade name, the right party was there.

The third factual point is that in any lawsuit in Texas it is important that the parties have notice and they have the ability to obtain evidence and be able to present their arguments to the court. In this case the respondent was able to do discovery, take depositions, was able to obtain a witness from the original savings and loan in which the note was signed, was able to obtain a witness who testified at trial from the RTC which was trying to collect the note prior to the note being transferred to Sixth RMA, and even had testimony from an expert witness with regard to the substantive law issues about the case and what was the applicable law there. Thus there was a real trial on the merits and a decision was made by the TC.

ENOCH: I thought this case was fighting over whether or not you probably substituted in the right plaintiff by using a supplemental petition. But your argument here is that the right party was there to begin with and so it is immaterial about the supplemental petition. They didn't disprove that you were the owner and holder of the note, and as a result the CA should go ahead and address

the rest of the issues in the appeal.

LAWYER: We are Sixth RMA partners. And we did business as RMA Partners. That is how Sixth RMA and all the other RMA entities communicated to the public and made demands for it. That is how the system operated.

O'NEILL: And is the record going to bear that out? I thought the consistent testimony at the hearing was that these are all separate and unrelated entities.

LAWYER: They are separate partnerships. The original RMA bought a portfolio of loans and went out to collect them. Apparently they did well enough that those people who were members of RMA went out and sought other investors to raise more money to buy other loan portfolios. So you have ultimately 16 loan portfolios. Each portfolio has some different investors and it's called Sixth, Seventh, Eight, Nine, Ten.

O'NEILL: But was there any testimony or any documentation showing that RMA was appointed formally or as the agent for collection?

LAWYER: There was no formal designation. Instead the undisputed testimony in which the court could find, beginning on page 180-198 of the reporter's record, that all the collection activity for the RMA entities was done under a common name or trade name which was RMA Partners. Therefore, the correspondence that went out did not say, Sixth RMA is making demand on you or Eighteenth or Fourteenth RMA. It would only say RMA Partners. And that evidence is in the record.

O'NEILL: So you're saying by practice that's the case, bu there's no formal/legal relationship between these two?

LAWYER: It certainly was the practice.

O'NEILL: No one could look at any documents or the Sec. of State's office or anything to show that that's the case other than RMA testifying this is just the way they did things?

LAWYER: That would be correct. There was nothing that was filed in the Sec. of State's office. But that is how they did business, which we don't think acts as a bar in any way because an entity may file suit in its common name or its trade name, or be sued in its common name or trade name.

O'NEILL: But it didn't file a d/b/a?

LAWYER: No they did not. If there was a lack of a certificate of authority filed, then that should have been brought up as a plea in abatement which was not done in this case if you're challenging someone's certificate of authority.

O'NEILL: If Sixth RMA had never been brought into the suit, RMA could not have collected on this note?

LAWYER: No. I would not agree with that.

O'NEILL: But they were not the owner in whole?

LAWYER: The proper way would be for the entity that owns and holds the note to come into court and prove it.

O'NEILL: Again, if RMA had been in court and said here is the note and we are here to collect it, they couldn't have done that.

LAWYER: That's correct. Because of the endorsement on the note and/or the _____ would not show them to be the owner of the note, consequently they could not prevail.

O'NEILL: So they were not a proper party?

LAWYER: RMA was not a proper party. Agreed. However, our position is that Sixth RMA was proper in this lawsuit because it filed suit under its common name or trade name as allowed by Rule 28 from the Tex. R. of Civ. Proc.

We practice lawsuits on their merits to have a decision based on the merits, and that's exactly what rule 1 of the Tex. R. Civ. Proc. does provide for. It says that the lawsuits are to be decided under established principles of substantive law, and that's what has occurred in this case.

With regard to the idea of limitations, I would point out that the test has always been whether or not a party's disadvantaged with getting his evidence or other items.

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RESPONDENT

COWAN: I notice the court seems to have trouble figuring out who RMA is? who Sixth RMA is? who is the real party? I don't blame you because if you read their briefs they can't.

O'NEILL: But if you really wanted to know, you could have filed a denial. Isn't this a bit of a gotcha?

COWAN: Defendants First Amended Plea in Abatement and amended answer raised all these issues as defenses that RMA and Sixth RMA are not the same, that Sixth RMA didn't have authority to do business under the name RMA, that RMA Partners was a separate legal entity.

O'NEILL: But you only did that after limitations had run.

COWAN: We did that after they attempted to substitute the parties. When they decided that they were going to switch from RMA Partners to Sixth RMA partners that's when it happened.

ENOCH: Did the original pleading say RMA Partners also known as Sixth RMA? The chronology of this is bugging me. The originally petition only shows RMA Partners verses Sibley?

COWAN: Correct. RMA Partners, L.P. verses Sibley. Some time it was discovered that RMA Partners, L.P. was not the name on the notes. It's Sixth RMA Partners L.P. After limitations had run RMA filed the supplemental petition saying, RMA Partners, L.P. and Sixth RMA Partners L.P. are one in the same, they are the same company. There's no difference between them. And changed the styled in the case to RMA Partners, a/k/a Sixth RMA Partners.

Subsequently they filed a second supplemental petition...

ENOCH: So the first time that Sixth RMA Partners L.P. shows up is by way of what document?

COWAN: RMA Supplemental petition.

HECHT: Is there any jurisprudential reason why you shouldn't be able to use supplemental answer to correct a misnomer?

COWAN: Not if it's made in response to the last pleading. The rule is clear. It says, supplemental petition is used in response to the last proceeding pleading, which was not the case here. I believe they have abandoned their argument now. So essentially we have a rule that's clear and unambiguous. There's no traps in there. They just didn't read it. They chose to do a supplemental petition instead of an amended petition.

HECHT: Can you think of a reason to support the rule? Is it a good rule?

COWAN: I don't know what to say. I don't know why the Texas rule says, supplemental petition is done this way. The federal rule says, supplemental petition can only be used to add new matters that occurred after suit was filed. What I do know is, that when you look at the opinions courts will allow you to add parties. The US SC says you can add a new party as long as it was a party who came into it after - you know complying with the federal rule. All the Texas courts have said you can add a new party to the supplemental petition so long as it's _____ supplemental petition. If the rule ought to be changed, the court has rule making power and it's free to do that. But it's not something the court does through opinions.

First off, they never said in their pleadings that they were substituting a new party. They said it's the same party, which is what they say now. Except that they also said in their

second supplemental pleading, they didn't say it was a trade name, they said it was a misnomer, that we just got it wrong. When they try to use rule 28 here, it contradicts what they say. In their pleadings which was that it was a misnomer and also Mr. ____ testified at trial on this issue and he said that he was aware that they were different companies. He said that their contention was that Sixth RMA came in at the second supplemental petition and then later said maybe the first supplemental petition, too. But never said that they were contending that RMA was a trade name or an assumed name that they could sue under.

ENOCH: When a plaintiff misnames a defendant, the court seems to look at. Well was the right defendant served? were there enough facts listed in there to indicate that everybody knew what they were talking about and that sort of thing? And it would seem to me the defendant knows the defendants own identity. I'm not sure that works clearly when the plaintiff gives the wrong name. The defendant gets served, but the defendant would not necessarily know the identity of the right plaintiff. They just know that this plaintiff is not the one that they think they are obligated to. I'm having a difficult time seeing how these things match. You thought you had a counterclaim against RMA Partners Ltd..

COWAN: Right. They are the ones who sent the demand letter. That was the name on the demand letter.

ENOCH: And your note showed it was Sixth RMA Partners Ltd.

COWAN: I believe that RMA actually had the note. Sibley had received a letter at one time from RTC or something.

ENOCH: In this case you really knew you were litigating over the note and you really knew it was RMA Partners basically that were suing on the note. So how are you prejudiced? I'm not sure misnomer really fits here.

COWAN: I think it's a misidentification is what it is, which is the wrong party sued. The rule is when the wrong party is sued generally - in a misidentification what the court said in Ensearch is that generally that when you have the wrong party sued it's a misidentification. Misidentification generally doesn't really _____ for limitations purposes. There's an exception in Continental Southern Lines which is cited in our briefs, where there are related companies who held themselves out to the public and caused the confusion. And so the court was willing to forgive the misidentification there. But if you look at Matthews Rock and V. Smith, when you don't have that relationship and that holding out then the misidentification exception, the exception in Continental Southern Lines doesn't apply.

SMITH: RMA's second supplemental petition was filed 7/6/99, and it makes clear that Sixth RMA Partners is the plaintiff, and then the trial was held sometime after that.

COWAN: First of all, I would disagree with that characterization. It continues to say that

Sixth RMA Partners LP is RMA Partners LP. The same company.

SMITH: Let's assume that when you read it that Sixth RMA Partners has made an appearance on 7/6/1999 and it should be clear to the defendant that they are asserting that they are a plaintiff in this cause of action. Trial was held some months later. If this was a first time that the defendant knew that Sixth RMA Partners was asserting that they were a plaintiff, how was the defendant prejudiced in the pending substance of the suit at trial some months later?

COWAN: I can't tell you.

O'NEILL: If RMA had sued and gotten a judgment and it was later determined that they were the wrong party, could Sixth RMA then later sue and also get a judgment?

COWAN: I am not an expert in banking law. I can't comment.

O'NEILL: I think this is the reason behind the rules is to keep someone from being sued twice on the same obligation. And so, yes, there are rules, but they've got to have a meaning behind them.

COWAN: I'm not an expert on banking law. I don't have anything to dispute that with. But what we're looking at here is we're requesting a general rule.

O'NEILL: I guess what I'm saying is the potential prejudice. It seems these rules are designed to prevent would be that type of situation that you got to have a judgment taken against you by one party and another party comes in who was actually the proper party who gets another judgment.

COWAN: I don't disagree with that. There wasn't anything at trial in this case that some other party couldn't come back later.

O'NEILL: What happened to the offset claim at the TC? Was that tried?

COWAN: It was raised in the summary judgment and it was tried. The court denied the summary judgment. It was Sibley's summary judgment motion.

O'NEILL: The court denied the offset?

COWAN: Yes.

O'NEILL: They heard testimony on it?

COWAN: Yes there was, and we didn't appeal that.

SMITH: The CA's decision says the statute of limitations ran March 1, 1998. Is that defendant's position that there was 6-year statute of limitations that ran in 1998?

COWAN: Our position was 4-years. There's a Texas 4-year statute of limitations, and then there's a federal 6-year one. I believe that our position at trial was that it was the 4-year statute of limitations that applied.

Mr. Sibley said that it would have been barred under either one. I'm not quite sure of the chronology there.

First of all for Rule 93, verified pleadings. There is nothing that was required to be verified that isn't in the record that wasn't raised in Sibley's amended answer. The rule only requires that it be verified if they don't appear at record. They could have objected and kept the evidence out but they didn't. It's in. It's there on the record.

On Rule 90, special exceptions issue. All the issues have been raised a year before trial. Everything that's covered in there about issue no. 3, about naming the parties. The issues were brought to the judge's attention before the judgment was signed, which is required under rule 90.

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REBUTTAL

O'NEILL: If A brings suit claiming it is doing business as B, or if A brings suit claiming it is also known as B and it's proved at trial that A is not doing business as B or A is not also known as B, then is B properly before the court?

LAWYER: No. Because the court has said that trial has proven that A did not do business as B or alternatively A was not the same as B. But the evidence was at trial and then that situation the courts presented that deposed of the matter because A did not do business as B. That was not the evidence. Unlike the evidence here that is overwhelming that anytime Sixth RMA attempted to collected the debt it used the letterhead that said RMA Partners.

O'NEILL: So are you claiming then that this is an evidentiary review that we say that the TC abused its discretion by not finding that B was also known as A as a matter of law? I mean if the evidence is that B is not also known as A as alleged, then how could B properly be before the court?

LAWYER: Because assuming this common name. This case is almost identical to the Chilkewitz v. Hyson case where Dr. Hyson was sued individually and the stationary Dr. Hyson used to evaluate patients and things said only Martin Hyson, M.D. It did not say Martin Hyson M.D., PA. Yet, the properly named defendant in that case would have been Martin Hyson M.D, PA. And this court in that opinion in 1998 written by J. Owen found that the proper party was sued when the entity

was sued in its common trade name.

ENOCH: The CA decided this case based on the supplemental petition not being sufficient to substitute in the party. The TC granted a summary judgment in your client's favor didn't it?

LAWYER: No. There was no summary judgment. There was a trial.

ENOCH: A trial on the merits. And during the trial on the merits did you bring forth proof that LP was the common name for Sixth RMA Partners?

LAWYER: Yes. Please look at the record beginning on page 180 through 198.

ENOCH: Then why did the CA only address the question of whether or not you properly supplemented your pleadings for that?

LAWYER: They were in error. I could not understand the reasoning of the court. Because we sued in the common name which didn't cause a problem, which caused no special exception to be filed.

ENOCH: But up here in this court do you bring a point of error on the CA's decision that you proved at trial as a matter of law that Sixth RMA Partners was doing business as RMA Partners, LP?

LAWYER: No. We're saying that we had sufficient pleadings. They had sufficient notice, and they did not preserve their error with regard to that issue.

ENOCH: They didn't preserve error that you failed to prove that Sixth RMA was doing business as RMA Partners?

LAWYER: No. I must have misspoke. My point was that if you are going to look at the rules of procedure, and they are going to be construed strictly to both parties, if they are saying that our supplemental pleading was not sufficient and they want to rely on rule 69, then I would ask the court to consider that a strict construction be applied to rule 90 because there if there's any defect as to form or substance it's to be brought to the attention of the court in writing. That's rule 90. And a supplemental petition which improperly brings into a suit either a new party or a new cause of action still must be objected to.

In our briefing we present to the court the Hawkins case, where the Dallas CA found that the plaintiff tried to bring in a new cause of action to a supplemental petition and that was not correct. But they would not reverse the judgment in favor of the plaintiff because the defendant failed to file a special exception under rule 90. And there is a long history of Texas law requiring that if someone feels there has been an improper party being added or an improper cause of action

being added, you need to file that special exception.

ENOCH: But you still have to prove your entitlement to judgment in the first instance that Sixth RMA Partners was doing business as RMA Partners LP. Do you bring a point of error in this court asking this court to reverse the CA because you proved Sixth RMA Partners was doing business as RMA Partners as a matter of law in the TC?

LAWYER: No. We didn't put in the brief that way. We said there are three reasons why the statute of limitations should not apply. One is the misnomer analysis that the correct party is there, but has simply misnamed. The Womack opinion addresses that issue. Secondly, we have misidentification where you have two similarly named parties but the wrong one is there. Never in this case was the wrong party there. But if you wanted to find out about Sixth RMA Partners you sent correspondence, you needed to contact the people on Hilton Ave in Columbus, GA. And that's the only place you would go, and that's where Mr. Sibley went with his correspondence and that's where this case came from.

Please look at the SMS case cited in our briefing. Because it discusses both the idea of misnomer and misidentification in facts that are identical to this save and except for that we filed a supplemental petition whereas in the SMS case there was two entities: SMS1 and SMS 2, trying to collect on promissory note.

OWEN: What do we do about the statute that deals with assumed name that says you've got to file a certificate?

LAWYER: If we didn't do that, then the proper cause of action and it's in our reply brief, the authorities say that you must file a plea in abatement to address that. And they did not file a plea in abatement on that issue or get a hearing on that plea of abatement. They did file some pleadings called plea in abatement but not on that issue.

O'NEILL: Was the supplemental petition that first named RMA a/k/a Sixth RMA filed beyond the limitations period?

LAWYER: I think it was. The original petition that was filed had attached to it the promissory notes with the endorsement that said it was Sixth RMA. And also in 1996 they sent out interrogatories asking about Sixth RMA.