PLATEAU, INC. V. WARREN, 1969-NMSC-070, 80 N.M. 318, 455 P.2d 184 (S. Ct. 1969)

PLATEAU, INC., a corporation, Plaintiff-Appellee,
vs.
S. E. WARREN, an individual and HOME OIL COMPANY, a corporation, Defendants-Appellants

No. 8715

SUPREME COURT OF NEW MEXICO

1969-NMSC-070, 80 N.M. 318, 455 P.2d 184

June 09, 1969

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY, McCULLOH, Judge

COUNSEL

BURR & COOLEY, Farmington, New Mexico, Attorneys for Appellee.

EDWIN L. FELTER, Santa Fe, New Mexico, Attorney for Appellants.

JUDGES

COMPTON, Justice, wrote the opinion.

WE CONCUR:

Irwin S. Moise, J., Paul Tackett, J.

AUTHOR: COMPTON

OPINION

COMPTON, Justice.

{1} The question presented is whether evidence to the effect that a written contract between the parties had been terminated by a subsequent agreement of the parties was erroneously admitted as being outside the scope of the pleadings.

{2} Plaintiff brought suit on a promissory note and an open account. Judgment was awarded thereon, and no appeal has been taken therefrom. By way of counterclaim the defendants asserted a written contract between the parties under which they claimed a

substantial amount in excess of the amount due the plaintiff. The written contract provided that the plaintiff was to sell to the defendants all of the petroleum required by the defendants for resale to Clark Oil Company, to accept assignments from the defendants of their invoices against Clark Oil Company, and to credit the amount of such assigned invoices against defendants' account with plaintiff. Defendants allege in their counterclaim that they assigned to plaintiff invoices for sales of gasoline to Clark Oil Company greatly in excess of $100,000.00; and that the plaintiff in violation of the terms of the written agreement fraudulently charged to and collected from defendants' invoices for sales of gasoline to Clark Oil Company that were assigned to plaintiff in the amount of $64,367.75. Judgment was sought for this amount and additional amounts on different counts. In its answer to the counterclaim, the plaintiff denied the existence of the written contract and alleged that it had been terminated by mutual agreement of the parties.

{3} At the trial the plaintiff introduced evidence of a subsequent oral agreement between the parties to the effect that the written contract had been terminated and that the defendants were to accept return of all unpaid Clark Oil Company invoices. The objection interposed to the evidence of an oral agreement was that this evidence *{*319}* asserted an affirmative defense and that this defense had not been specifically pleaded as required by § 21-1-1(8)(c), N.M.S.A. 1953, being Rule 8(c), our Rules of Civil Procedure. The trial court overruled the defendants' objection and the ruling of the court is the basis of the defendants' appeal.

{4} While matters constituting an avoidance or an affirmative defense must be specifically pleaded, Rule 8(c), § 21-1-1(8)(c), N.M.S.A. 1953, we think there was substantial compliance with the rule. See 1A Barron & Holtzoff, Federal Practice & Procedure, §§ 279, 283. The plaintiff's answer specifically states that "said contract was terminated by mutual agreement of the parties." Also, the pretrial order contains a statement that the plaintiff was contending that the written contract had been terminated by mutual agreement of the parties. Compare Transwestern Pipe Line Company v. Yandell, 69 N.M. 448, 367 P.2d 938; Johnson v. Citizens Casualty Company of New York, 63 N.M. 460, 321 P.2d 640; Rule 16, Rules of Civil Procedure, § 21-1-1(16), N.M.S.A. 1953. Further, the defendants themselves injected into the record evidence whether there was a subsequent oral agreement between the parties. The defendant Warren, while testifying in support of the counterclaim, was asked by his counsel if during any of the conversations with Mr. Garretson [plaintiff's agent] he had agreed to take back the assignments of the Clark Oil Company invoices. Compare Harbin v. Assurance Company of America, 308 F.2d 748 (10th Cir. 1962); Trebuhs Realty Co. v. News Syndicate Co., 12 F.R.D. 110. McLean v. Paddock, 78 N.M. 234, 430 P.2d 392, cited by the defendants is to be distinguished on the facts and does not require a different result.

{5} The judgment should be affirmed. IT IS SO ORDERED.

WE CONCUR:

Irwin S. Moise, J., Paul Tackett, J.