No. 14,122

In the

United States Court of Appeals

For the Ninth Circuit

WALTER W. JOHNSON COMPANY,
Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Appellee.

Petition for Rehearing on Behalf of Appellant

EDWIN S. PILLSBURY
DAVID M. ATCHESON
564 Market Street
San Francisco 4, California
Attorneys for the Appellant

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

No. 14,122

In the

United States Court of Appeals

For the Ninth Circuit

WALTER W. JOHNSON COMPANY,
Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Appellee.

Petition for Rehearing on Behalf of Appellant

To the Honorable Clifton Mathews and Richard H. Chambers, Circuit Judges of the United States Court of Appeals for the Ninth Circuit, and William M. Byrne, District Judge (District of California):

This court has completely failed to consider the effect of *Federal Rule* 56(c) which raises the principal issue on this appeal: Does a genuine issue as to any material fact exist in this case?

Federal Rule 56(c) provides that a summary judgment shall only be granted on a showing that "no genuine issue as to any material fact" exists in the case. This court has affirmed the summary judgment rendered below without

once considering this issue. The District Court did not consider it. The court has ignored this issue despite the fact that we have demonstrated in approximately 90 pages of brief that there are numerous genuine issues as to material facts in this case. The heart of the District Court opinion is that the statute of limitations bars any recovery by appellant. This court completely ignores—as did the District Court—substantial evidence showing waiver of the statute of limitations by the Reconstruction Finance Corporation. In doing so, its holding is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Begnaud v. White,* 170 F.(2d) 323 (1948) where that court reversed a summary judgment because an issue of fact relating to waiver of the statute of limitations was present.

This court has completely ignored substantial and genuine issues of fact relating to the basic liability of the appellee on the following grounds:

(a) Intention of the appellee and Tuolumne that appellant should be the beneficiary of a third party beneficiary contract;

(b) Appellant was entitled to an equitable lien upon the gold dredge senior to appellee's lien;

(c) Appellee had a duty to see that proceeds of the construction loan were utilized to pay appellant for its construction of the gold dredge;

(d) Appellee was unjustly enriched by appropriating the earnings of the dredge while appellant remained unpaid for constructing it;

(e) Appellee was liable for payment of sales taxes on the dredge which were paid by appellant.

This action of the court is all the more incomprehensible in view of its careful consideration of other provisions of

the Federal Rules of Civil Procedure applicable to this case. For example, this court dismissed our initial appeal because the original judgment of the District Court failed to comply with the requirements of *Rule* 54(b); then, in its opinion rendered February 10, 1956, this court undertook to redesignate the pleadings to conform to *Rules* 7 and 8: furthermore, in the same opinion, this court literally applied the provisions of *Rule* 36(a) that failure to answer a request for admissions within the time specified constitutes admission of the matters involved therein, regardless of the fact that answers were subsequently filed *pursuant to stipulation expressly recognizing that the answers were a part of the record.* (Tr. 279) In view of these examples, it is difficult to explain how the court can justify ignoring the plain provisions of *Rule* 56(c) requiring the absence of any genuine issue as to a material fact before summary judgment will be granted.

It seems anomalous for this court to require a person appealing to it to prepare a Statement of Points on Which Appellant Intends to Reply when the court avoids discussing those points in its opinion. Also, we can discern little purpose in extensively briefing this case to point out the errors made by the District Court when this court completely ignores the matters set forth in our briefs.

Walter W. Johnson Company has earnestly sought satisfaction of its claims in the courts for nearly eighteen years. What it here seeks is the first fundamental principle of justice and due process—a trial on the merits. Instead of this, Johnson has been met by a judicial charge that it is seeking "alms." Johnson has, in effect, received from the District Court and from this court a "trial by affidavits" which has overlooked its major contentions entirely. This court has rejected Johnson's appeal by means of a brief

opinion dealing principally with procedural matters of minor importance, having by the court's own admission, no decisive bearing upon the merits of the appeal.

With regard to these procedural matters, the conclusion of the court that late answers to a request for admissions are ineffective *per se* and "*need not be considered*" (Op., footnote 8) is contrary to decisions of this and other courts. In *Bowers v. E. J. Rose Mfg. Co.*, 149 F.(2d) 612 (CCA 9, 1945), this court in an opinion by Chief Judge Denman held that it was an abuse of discretion for the trial court to strike late answers to a request for admissions and render a summary judgment upon inferences to be drawn from the failure to answer the request for admissions. In reversing the summary judgment, partially upon this ground, Chief Judge Denman said:

> "* * * Though they sufficiently denied the requested admissions, they were ordered stricken from the files at the time the judgment was ordered. We think it was an abuse of the court's discretion so to strike the answers." (P. 615)

See also:

Countee v. United States, 112 F.(2d) 447 (CCA 7, 1940);

Hopsdal v. Loewenstein, 7 F.R.D. 263 (D.C. Ill., 1945);

Woods v. Stewart, 171 F.(2d) 544 (CA 5, 1948);

Jackson v. Kotzebue Oil Sales, 17 F.R.D. 204 (D.C. Alaska, 1955).

Much time, effort and money has been expended in prosecuting Johnson's claims. Win or lose, appellant is entitled to have its contentions considered and discussed in the court's written opinion, rather than to have them ignored.

Appellant respectfully suggests that a court may unwittingly fail to analyze and consider sufficiently the factors in a complicated case, where it decides the case without discussing the points raised by counsel, and, as here, merely states, in general terms, that it agrees with the court below. On the other hand, where the court delivers an opinion which deals squarely with the issues involved, it would seem more likely that the issues would have received more adequate consideration. In this connection, the following language by James A. McLaughlin of the Los Angeles Bar appearing in 9 California State Bar Journal, at page 246, is in point:

> "Regardless of the superior qualities which a judge may possess, it is almost a mathematical certainty that he would not give the cases in which he wrote no opinion the same careful consideration which he gives to the cases where his opinion will be perpetually subject to the scrutiny of judges, professors, legal writers, and of the legal profession in general."

Ten months elapsed between the oral argument on the first appeal and the court's opinion after the second appeal was perfected. No oral argument was had on the second appeal. It is possible that the court did not have the issues of the case as clearly in mind as it did ten months ago.

For the above reasons and because this case apparently represents a failure to observe the provisions of *Rule* 56(c), the appellant respectfully prays that this court grant a rehearing before the full court in banc.

Dated: March 12, 1956.

Respectfully submitted,

Edwin S. Pillsbury
David M. Atcheson
Attorneys for the Appellant

Certificate of Counsel

The undersigned attorney for the appellant hereby certifies that in his judgment this petition for rehearing is well founded and that it is not interposed for delay.

Dated: March 12, 1956.

Edwin S. Pillsbury
David M. Atcheson
Attorneys for the Appellant