

1968

Midvale Motors, Inc., a Utah Corporation v. Melvin J. Saunders and Wanda Talbot Saunders, His Wife, et al. : Appellant's Brief

Utah Supreme Court

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In The Supreme Court of the State of Utah

MIDVALE MOTORS, INC., a Utah corporation,

Plaintiff and Appellant,

vs.

MELVIN J. SAUNDERS and WANDA
TALBOT SAUNDERS, his wife, et al.,
Defendants.

Case No.
11146

APPELLANT'S BRIEF

Appeal from the judgment of the Third Judicial
District Court in and for Salt Lake County, in favor of
Robert M. McRae, not a party to this action, and
against the Plaintiff, Midvale Motors, Inc.
Honorable Stewart M. Hanson, Judge

BEASLIN, NYGAARD,
COKE & VINCENT

920 Boston Building

Salt Lake City, Utah

Attorneys for Appellant

ROBERT M. McRAE, ESQ.

707 Boston Building

Salt Lake City, Utah

Attorney Pro Se

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APPELLANT'S BRIEF

NATURE OF THE CASE

This is an appeal from the judgment order dated November 30th, 1967, in which the respondent, Robert M. McRae, received a judgment for a total sum of \$881.76 representing attorney's fees for certain services performed by the said Robert M. McRae and for costs advanced by him in handling certain work for Midvale Motors, Inc., the appellant in this case. In addition to fixing the above named amount for attorney's fees and costs, the judgment order of November 30th, 1967 fixed a judgment lien on the file and real property which is the subject matter of the plaintiff's cause of action.

DISPOSITION IN LOWER COURT

On October 23rd, 1967, pursuant to a motion of Robert M. McRae, the former attorney of appellant herein, an order was entered giving permission to the said Robert M. McRae to withdraw as counsel of record for the plaintiff corporation, and further fixing attorney's fees for services performed by the said Robert M. McRae in the sum of \$750.00 and in addition the sum of \$134.76 was awarded to the said Robert M. McRae for costs advanced in connection with the prosecution of the said case. A further provision of the order placed an attorney's fee lien on the files and property which is the subject of this action.

Thereafter, on November 29th, 1967, pursuant to plaintiff's Motion to Set Aside the order, a hearing was held in which the plaintiff attempted to have the order set aside pursuant to Utah Rules of Civil Procedure, Rule 60 (b) (1) and (7), in which the plaintiff alleged that to its knowledge it did not receive a notice of the Motion for Determining Attorney's fees although admittedly the file purports that a copy of the said notice was mailed to the plaintiff. At that hearing the motion of the plaintiff was denied and a judgment order was entered on the 30th day of November, 1967 reiterating the previous order that had been entered awarding the sum of \$881.76 to the said Robert M. McRae representing attorney's fees and costs advanced to prosecute this action.

Thereafter, the plaintiff filed Objections to Find-

ings of Fact and Conclusions of Law and a Motion to Vacate the Judgment. The said Motion to Vacate Judgment was heard on the 29th day of December, 1967 and the plaintiff's motion was denied. Plaintiff appeals from the said judgment order entered on the 30th day of November, 1967.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the judgment order of November 30th, 1967 and the dismissal of this action.

FACTS

On August 17th, 1965, the respondent, Robert M. McRae, the then attorney for the appellant, Midvale Motors, Inc., filed a complaint against Melvin J. Saunders. Wanda Talbot Saunders, his wife, and Thomas J. Ivester. The action was brought under a Uniform Real Estate Contract into which the Saunders and Ivester had entered covering certain real property in Kearns, Utah. The complaint asked for two of the remedies available under the said Uniform Real Estate Contract, to-wit: money damages of \$100.00 per month which was the sum called for in the Uniform Real Estate Contract as payments on the house, plus the amount of \$4.00 per month as late charges for delinquent payments, or a total sum of \$832.00; the complaint also sought to have the possession of the property turned over to the plaintiff, Midvale Motors, Inc.

In answering the complaint, the defendants

tendered possession of the house to the plaintiff. Thereafter, the trial court ruled that the plaintiff was foreclosed from seeking money damages on the theory that the tender of possession of the property to the plaintiff had foreclosed it from seeking any of the alternative remedies called for in the contract, and that it was entitled only to possession.

The case was appealed and on appeal this Court ruled that the plaintiff was entitled to take any of the alternative remedies up to the time of actual trial in the matter, and that the defendants could not choose which of the remedies the plaintiff would seek. The case was then remanded for further proceedings in accordance with the instructions of this Court. *Midvale Motors v. Saunders*, 432 P. 2d 37 (Utah 1967).

At that time Robert M. McRae sought to withdraw as counsel for the plaintiff and permission by the Court was given to withdraw and attorney's fees were fixed as has been stated.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN AWARDING A JUDGMENT TO THE RESPONDENT, ROBERT M. McRAE, AND AGAINST THE PLAINTIFF, MIDVALE MOTORS, INC., FOR THE REASON THAT ROBERT M. McRAE IS NOT A PARTY TO THIS ACTION.

It should be made clear from the beginning that this is not a situation in which a successful plaintiff

goes to court for the fixing of reasonable attorney's fees to be collected from an unsuccessful defendant in accordance with the provisions of a contract calling for the defendant to pay attorney's fees if a court action is necessary in order to enforce that contract. This is a situation in which an attorney has, by motion, had the amount of attorney's fees to be collected from his own client fixed by the Court. Under such a procedure there is no opportunity for the client to object to the amount of attorney's fees and if he feels that the amount is excessive have a fact determination before a trial of fact as to the reasonable amount of the said attorney's fees.

The Utah Rules of Civil Procedure, Rule 3, states:

"A civil action is commenced (1) by filing a complaint with the Court, or (2) by the service of a summons."

In this class the respondent, Robert M. McRae, now has a judgment against his own client without ever having gone to the bother of sending to his client a statement of the amount of money owing and due for his services and if the client objects, suing the client in a court of law in accordance with the provisions of the Utah Rules of Civil Procedure.

At the hearing held on the 29th day of November, 1967, pursuant to plaintiff's Motion to Set Aside Order, the attorney for the plaintiff moved the court for a dismissal of this action on the basis that it was not brought in accordance with the Utah Rules of

Civil Procedure. For some reason the motion of the plaintiff was not recorded in the transcript, and page 9 of the transcript states: "Further arguments of counsel not recorded." Appellant does not know the reason for the omission of this part of the record but wishes this motion of the appellant before the court as part of said record.

It is therefore maintained by the appellant that the procedure by which Mr. McRae has obtained a judgment against his own client for attorney's fees is not in accordance with the Utah Rules of Civil Procedure, and that the case should be dismissed on that basis, and if Mr. McRae then wishes to bill his former client for the amount he claims is the reasonable value of his services, he may do so, and may also, in accordance with the Utah Rules of Civil Procedure, file an action by serving a summons and complaint upon the plaintiff for the amount he claims, should the plaintiff fail to pay the same.

POINT II

THE LOWER COURT ERRED IN GRANTING A JUDGMENT TO ROBERT M. McRAE WHEN THE PARTIES HAD STIPULATED THAT THE PRIOR ORDER COULD BE SET ASIDE AND MR. McRAE OFFERED NO EVIDENCE OF THE REASONABLENESS OF HIS CLAIMED ATTORNEY'S FEES.

The transcript of proceedings at page 9 shows the following statement of Mr. Robert M. McRae: "May I give a statement? Can the entire matter be resolved at this time if the Judge is willing?" The

findings of fact and conclusions of law entered in this matter and signed on the 30th day of November, 1967, contain the following:

“Plaintiff’s present counsel, William J. Anderson, and Robert M. McRae stipulated in open court that the entire matter concerning the motion of Robert M. McRae and the motion of plaintiff to vacate the order of October 23, 1967, could be heard at this time.”

Plaintiff contends that this stipulation could have no other meaning than that the matter of the motion of Robert M. McRae to fix attorney’s fees could be heard at that time. This was, in effect, a stipulation that the order of October 23rd, 1967, could be set aside and that the Motion of Robert M. McRae could then be heard at that time. It was then the burden of Robert M. McRae to offer evidence at that hearing on the matter of the reasonableness of attorney’s fees and to allow the plaintiff an opportunity to rebut any evidence which he may then have offered. His failure to do so could leave the court no other alternative but to deny Mr. McRae’s motion to fix attorney’s fees. In *Hatch v. Sugarhouse Finance Company*, 434 P.2d 758, 760 (Utah 1967), it is stated:

“It is generally held that only a lawyer can know the value of legal services rendered, and it would seem that no great inconvenience to a plaintiff lawyer would result in having proof made in open court as to the reasonable value of his services rendered, for he would be subject to cross examination and where other witnesses may offer contradictory evi-

dence. Certainly the client must feel better if the fee is fixed upon evidence given in court rather than by fiat of the lawyer."

It is submitted that there is no evidence on record other than that of the hearing of October 23rd, 1967 as to the reasonable value of the services of Robert M. McRae. As has been seen above, the order entered in that hearing was set aside by stipulation of the parties and the evidence produced by Mr. McRae at that time has no evidentiary value as to the reasonable value of his services.

Therefore, it is contended by the appellant that plaintiff's Motion to Set Aside the order entered pursuant to the hearing of October 23rd, 1967, was granted and that since Mr. McRae produced no evidence at that point the judge should have ruled in favor of the plaintiff and denied Robert M. McRae's Motion to Fix Attorney's Fees.

CONCLUSION

The action of Robert M. McRae to have attorney's fees fixed as against his own client should be dismissed and if Mr. McRae then wishes to bring an action in accordance with the Utah Rules of Civil Procedure, he may be free to do so.

Further, it is clear from the record that the Motion of the plaintiff to set aside the order fixing attorney's fees was, by stipulation, granted, and that the failure of Robert M. McRae to produce evidence of the reasonable value of his services required the

court to grant the motion of the plaintiff to set aside the order and that Robert M. McRae's motion of October 23rd, 1967 was then and there heard and should have been denied.

Respectfully submitted,

William J. Anderson

**Beaslin, Nygaard, Coke
& Vincent**

**Attorneys for Plaintiff
and Appellant**

Midvale Motors, Inc.