1968

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

Utah Supreme Court

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

RESPONDENTS' 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

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Defendants.

Case No. 11146

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CAE

Plaintiff appeals from an order of the Honorable Stewart M. Hanson granting to Robert M. McRae, appellant's former attorney in this case, an attorney's compensation lien on the subject matter lawsuit, and to the attaching of said lien to the realty which was the subject matter of that action.

DISPOSITION IN LOWER COURT

A motion had been filed by Robert M. McRae seeking leave to withdraw as counsel of record for appellant. A copy of the motion was served on defendants' counsel, and a copy mailed to the president of appellant corporation. That motion was heard on October 19, 1967, and a written order entered thereafter on October 23, 1967 (R. 10 and 11).

The appealed-from portion of the order, which appellant sought to review on several occasions after its entry, is that portion wherein the court at McRae's request ascertained reasonable attorney's fees for services rendered to that point and ordered the same attach as an attorney's lien to the file and property which was the subject matter of the suit.

RELIEF SOUGHT ON APPEAL

Robert M. McRae, appellant's former attorney, seeks to have this Court uphold the attorney's lien as affixed.

STATEMENT OF FACTS

Confining the statement of facts to the instant appeal, respondent had represented appellant in a civil action pertaining to a defaulted land contract wherein appellant was the seller and defendants were the purchasers.

The case was tried and from an adverse judgment an appeal was taken to this Court, where a reversal of the lower court was obtained (R. 7). After remittiture, McRae filed a motion for leave to withdraw as counsel because of client-relationship difficulties with appellant's president, Neuman C. Petty. The motion requested the lower court to ascertain what amount of attorney's fees would be reasonable to attach to the file and subject matter realty as a compensation lien. No one appeared in opposition to the motion. The court heard sworn testimony in support of the costs and disbursements made in connection with appellant's civil action and heard testimony in support of the reasonableness of attorney's fees earned for representing appellant's interests in the lower court proceeding through and including trial in the case and a successful prosecution of an appeal from an adverse trial verdict (R. 32 through 34). A formal order entered on October 23, 1967, which fixed the amount of respondent's fees and determined the reasonableness of costs and expenses advanced, and ordered the determined amount attach ". . . to the files and pleadings in this case, and also is herewith deemed a lien on the property . . . (describing realty) and said lien shall have the same force and effect and shall be of the same legal standing as a judgment lien on *said realty.*" (emphasis added) (R. 11)

Thereafter, appellant filed a motion to set aside the order of October 23, 1967, which was argued and denied (R. 21). In so doing, the court *reiterated* the reasonableness of the fee and the propriety of it attaching as a com-

pensation lien on the file and real property, and entered in support of the order findings of fact and conclusions of law (R. 12 and 13), which findings were objected to, and which objections were denied (R. 23). From that denial, the instant appeal.

POINT ON APPEAL

WHEN AN ATTORNEY'S SERVICES ARE TERMINATED IN A PENDING CASE, DOES HE HAVE A COMPENSATION LIEN ON THE PROCEEDS YET TO BE RECOVERED FOR THE FAIR AND REASONABLE VALUE OF SERVICES RENDERED TO THE DATE OF TERMINATION OF THE REPRESENTATION?

The court entered its finding on November 30, 1967, see paragraph 3 thereof, to the effect that evidence had been offered in open court in support of the reasonableness of the $750.00 fee earned by respondent and the necessity of costs and expenses of the proceedings advanced by respondent in the sum of $131.76. That finding was made based on testimony offered by respondent in support of the reasonableness of fees (R. 34), which finding of fact was at no time rebutted by any evidence offered by appellant or its counsel. This is, therefore, not the fact situation of *Hatch v. Sugarhouse,* 437 P.2d 758. It is interesting to note that appellant's counsel attempted to make a *statement* to the court giving his opinions on fees but did not see fit to be sworn in support of it (R. 41). It is also interesting to note that appellant in its argument has not seen fit to accuse the trial court of abusing its discretion in failing to set aside the October 23, 1967,

order for the reasons stated in the verified motion in support thereof (R. 18). The court therefore had before it evidence of fees, and no other evidence being offered, was entitled to rule based on the evidence before it.

It is apparent from reading 78-51-41, Utah Code Annotated, that respondent would have a lien on appellant's cause of action which should attach to the ultimate recovery, the lien being in the amount of the fair value of the services rendered to date and costs advanced.

> "78-51-41. Compensation—Lien.—The compensation of an attorney and counselor for his services is governed by agreement, express or implied which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and to the proceeds thereof in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment."

A careful reading of the findings and orders certified for review in this case does not indicate that a "general judgment lien" has been entered against appellant, but merely, after hearing, a lien against the commodity worked on, to wit, the money proceeds or realty which was the subject matter of appellant's lawsuit against defendants, which lien would be paid or enforced at the termination of litigation in the same manner as all liens.

Respondent knows of no fairer way to terminate employment with a client whom he no longer wishes to represent than to file a motion with the court asking for leave to withdraw and asking the court to determine the fair value of services rendered to date, and to enter a lien order accordingly, which is the exact fact situation of this case (R. 10 and 11). The effect, in so doing, avoids unnecessary delays and interpleaded actions thereby permitting former clients to promptly continue their suits to conclusion with the amount of the client's obligation already determined once and for all, being res judicata when the time of division of suit proceeds occurs; or in the event enforcement of the lien against property becomes necessary, the amount of the lien would be established. See Rule 1(a), Utah Rules of Civil Procedure.

This Court, in *Petrie v. General Contracting Co.*, 17 Utah 2d 408, 413 P.2d 600, discussed the above statute, and at Utah 411 stated:

> "Where the recovery is real estate, the lien attaches to it. . . ."

and concluded that attorney Tuft had a lien interest in the realty involved in that case.

To conclude as appellant would have this Court conclude in its brief, to wit, that respondent must bring a separate civil action to enforce recovery, would defeat the entire purpose of 78-51-41, and would permit meaningless legislation to remain on the books.

The record speaking for itself in this case, the conclusion reached by semantical argument in Point II of appellant's brief does not need a reply since actual notice of an evidentiary hearing on October 19, 1967 was given appellant.

CONCLUSION

Judge Hanson having ascertained the reasonableness of fees and costs advanced by Robert M. McRae, and the appellant having offered no evidence in support of a different fee, he was not obligated to vacate his order of October 23, 1967. Therefore, the lien orders of the lower court should be sustained and be deemed res judicata on the issue of amount and nature of lien, and respondent should have his costs of defending this appeal.

Respectfully submitted,

ROBERT M. McRAE
Attorney per se