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John Ira Baer v. Gail Young : Respondent's Brief

Utah Supreme Court

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In the Supreme Court of the State of Utah

JOHN IRA BAER,

Plaintiff and appellant,

vs.

Case No.
12055

GAIL YOUNG,

Defendant and respondent.

RESPONDENT'S BRIEF

Appeal from Judgment of the Third District Court
for Salt Lake County, Honorable Merrill C. Faux.

LOWELL V. SUMMERHAYS
SUMMERHAYS, KLINGLE
& COHNE

1010 University Club Building
Salt Lake City, Utah 84111

Telephone: 364-7737

*Attorneys for the Defendant
and Respondent*

MARK S. MINER

301 Newhouse Building
Salt Lake City, Utah 84101

Telephone: 359-5793

*Attorney for the Plaintiff and
Appellant*

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN THE LOWER COURT	1
STATEMENT OF FACTS	2
ARGUMENT	3
POINT ONE. SERVICE UPON THE DEFENDANT- RESPONDENT'S ESTRANGED WIFE AT A HOME WHERE THE DEFENDANT WAS NOT RESID- ING, DID NOT CONSTITUTE GOOD SERVICE UPON THE DEFENDANT UNDER APPLICABLE PROVISIONS OF THE UTAH RULES OF CIVIL PROCEDURE.	3
POINT TWO. THE APPEARANCE OF THE DE- FENDANT BEFORE THE HONORABLE ALDON J. ANDERSON DID NOT CONSTITUTE A GEN- ERAL APPEARANCE IN THE ACTION WHICH SUBJECTED HIM TO THE JURISDICTION OF THE COURT FOR THE PURPOSE OF RENDER- ING PERSONAL JUDGMENT AGAINST HIM.	9
POINT THREE. THE COURT DID NOT ERR IN RENDERING ITS DECISION AFTER THE DE- FENDANT'S APPEAL HAD BEEN DISMISSED FROM THE SUPREME COURT.	11

TABLE OF CONTENTS — Continued

	Page
POINT FOUR. THE PLAINTIFF-APPELLANT HAS IMPROPERLY INCLUDED MATTERS IN ITS BRIEF WHICH ARE NOT REFLECTED BY THE RECORD.	12
CONCLUSION	12

CASES CITED

Booth v. Crocket, 110 Utah 363, 173 P.2d 647 (1946)	4
Fulton v. Ramsey, 67 W.Va. 321, 68 S.E. 381	10
Grant v. Lawrence, 37 Utah 450, 108 P. 931 (1920)	8
Honeycutt v. Nyquist P 6 Co., 12 Wyo. 183, 74 P. 90	10
Smith v. Gadd (ky), 280 S.W.2d 495	10
Sorensen v. Sorensen, 18 Utah 2d 102, 417 P.2d 118 (1966)	9
Watkins v. Simonds, 14 Utah 2d 406, 385 P.2d 154 (1963)	12

STATUTES CITED

Utah Rules of Civil Procedure Rule 4(e)(1)	3
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TEXTS CITED

5 American Jurisprudence 2nd, Appearance, Section 17, Page 493	10
5 American Jurisprudence 2nd, Appearance, Section 33, Page 507	11

In the Supreme Court of the State of Utah

JOHN IRA BAER,

Plaintiff and appellant,

vs.

GAIL YOUNG,

Defendant and respondent.

Case No.
12055

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is a suit by a husband against the wife's alleged paramour, claiming damages for alienation of affection and criminal conversation.

DISPOSITION IN THE LOWER COURT

Findings of Fact and Conclusions of Law and a Decree were entered by the lower court on the 15th day of September 1969, rendering judgment for the plaintiff and against the defendant in the amount of \$25,000

and reciting, that "defendant having failed and refused to appear, did not appear, and his default was entered." (R. 13-15)

STATEMENT OF FACTS

Mrs. Gail Young was served a summons and complaint on the 17th day of April at her home. (R. 8)

The defendant, Gail Young, did not live at that residence with his wife, but was rather residing at the home of plaintiff, and resided there from January 25, until June 10. (R. Page 46, line 12, R. 11)

The defendant subsequently somehow did obtain a summons and complaint and had the same in his possession at a hearing held before Judge Anderson on May 28, 1969 as evidenced by the following language found on page 66 of the record, lines 8-19:

"Q. Now, immediately after the hearing, Mr. Young, didn't you come up to me with a summons and complaint in this very action and hand it to me and say, "Look, my time is up; what should I do with this?" Now, did you or didn't you?

A. I think this was on the one that — yes, one I brought in; this was your "show cause"; right.

Q. But you had a summons and complaint in this action, did you not, and you said, "My time is up now, what should I do" Isn't that correct — right in the courtroom?

THE COURT: Judge Anderson's courtroom?

Q. Judge Anderson's courtroom; do you recall that?

A. I think so, yes.

All other facts stated by the plaintiff-appellant are immaterial to this appeal.

ARGUMENT

POINT ONE

SERVICE UPON THE DEFENDANT - RESPONDENT'S ESTRANGED WIFE AT A HOME WHERE THE DEFENDANT WAS NOT RESIDING, DID NOT CONSTITUTE GOOD SERVICE UPON THE DEFENDANT UNDER APPLICABLE PROVISIONS OF THE UTAH RULES OF CIVIL PROCEDURE.

Plaintiff-appellant has misquoted Rule 4(e)(1) in his brief, and that Rule is correctly quoted as follows:

"(e) Personal Service in this State. Personal service within the State shall be as follows:

(1) Upon a natural person of the age of 14 years or over, by delivering a copy thereof to him personally, or by leaving such copy at his usual place of abode with some

person of suitable age and discretion there residing; or by delivering a copy to an agent authorized by appointment or by law to receive service of process."

The primary issue in this case is whether or not the service of process was made at the usual place of abode of the defendant.

As set forth in the Statement of Facts, it is very clear that the defendant was not at the time living at the address where the service of summons was made, and had not been living there for over two months.

A fundamental distinction has been made in this State between the notion of residence and usual place of abode, the latter term being defined as the place at which one is actually living. This distinction was made by Justice Wolfe in *Booth v. Crockett*, 110 Utah 363, 173 P.2d 647 (Utah 1946). The following language is extensively quoted from that case, because of its relevance and applicability:

"The recent cases of *Kurilla v. Roth*, August, 1944, 132 N.J.L. 213, 38 A.2d 862, 864, and *McFadden v. Shore*, D.C., March 1945 60 F.Supp. 8, 9, involved fact situations indistinguishable in legal effect from the original case here.

The New Jersey court in the *Kurilla* case said in part:

“‘Abode’ is one’s fixed place of residence for the time being — the place where a person dwells. One’s ‘usual place of abode,’ in the statutory view, is the place where one is ‘actually living’ at the time when service is made.”

“Of course, a person may enter one of the armed services under conditions that permit him to retain his preexisting place of abode within the meaning of this Act; but such is not the case here. Upon defendant’s induction into the armed forces, his mother’s home ceased instantaneously to be his place of abode. It does not matter in this regard that some of his clothing and personal belongings remain there, or that he intends to return to his mother’s home, wherever it may be, as soon as his military service is terminated. While filial love binds him to his mother wherever she may be, and her home is his for lack of another, it is no longer his ‘actual place of abode’ within the intentment of the statute.”

The New Jersey court ordered the service quashed.

McFadden v. Shore, *supra*, was decided by a Federal District Court in Pennsylvania. The court held the defendant’s “usual residence” was his usual place of abode’ and held substituted service made by leaving the copy of the summons at the home of the sailor defendants parents.

This court in Grant v. Lawrence, 37 Utah 450, 108 P. 931, 933, Ann. Cas. 1912C, 280, interpreted the phrase “usual place of abode” and

gave it the restricted meaning given by the New Jersey court in the Kurilla case. In the Lawrence case this court said:

“Usual place of abode is sometimes referred to as being synonymous with domicile or permanent residence. In our judgment there is a broad distinction between domicile and usual place of abode as the latter term is used in our statute. Such also seems to be the conclusion reached by the authorities, as is demonstrated by the following cases: In *Mygatt v. Coe*, 63 N.J. L 510, 512, 44 A. 198, 199, the Supreme Court of New Jersey, in construing a statute authorizing substituted service in terms similar to ours says:

“The Statute does not direct service to be made, at the “residence” of the defendant, but at his dwelling house or usual place of abode, which is a much more restricted term. As was said in *Stout v. Leonard*, 37 N.J.L. 492, many persons have several residences which they permanently maintain, occupying one at one period of the year and one at another period. Where such conditions exist, a summons must be served at the dwelling house in which the defendant is living at the time when service is made.’”

The court went on to say:

“After departing for naval service, Frank’s ordinary activities of living were no longer centered around the Fairbanks home. He no longer usually ate or slept there. He was no longer usually physically present at the home or shortly

expected. His duties required him to be at his station, which at the time the copy of the summons was left at the home, was at a navy base in another state. The facts that many of his personal possessions remained at the home and that the ties of blood and affection continued and that he frequently corresponded with persons at the home are to be considered in determining where he was "living," but in this case those facts are greatly outweighed by his physical departure from the place for the purpose of undertaking naval duty at a distant base for apparently an indefinite period. We think it clear that Frank Fairbanks was not "living" at the Fairbanks home when the copy of the summons was left there.

We do not mean that when a person departs from his usual place of abode temporarily for business, pleasure or cultural purposes he has ceased living at his usual place of abode. Living at a place does not mean that a person must be always there. But if the break in the continuity of his activities which constitute living a what was his home is so marked, such as an indefinite tenure of military or any duty away from that home or a departure for a prolonged though definite term of study or where he has distinctly taken up a new station for business purposes, even though he may have his belongings at his former place of abode or keep in close correspondent touch with it, the place where he lived would be not his present usual place of abode, but a former place of abode. Such a marked severance with the place at which he abided means that he no longer usually abides there." . . .

“From the facts and circumstances of this case, we hold the Fairbanks home was not Frank Fairbanks’ “usual place of abode” on December 13, 1945, and that therefore, Judge Crockett ruled correctly in granting the motion to quash service in the original case.”

The court, in the foregoing case also found that the fact that the defendant has actually been advised of the suit and had actually received notice of the summons from his parents did not change the fact that the initial attempted service was void.

Grant v. Lawrence, 37 Utah 450, 108 Pac. 931, stated as follows:

“The statute does not direct service to be made at the ‘residence’ of the defendant, but at his dwelling house or usual place of abode, which is a much more restricted term. As was said in *Stout v. Leonard*, 37 N.J. Law, 492, many persons have several residences which they permanently maintain, occupying one at one period of the year and another at another period. Where such conditions exist, a summons must be served at the dwelling house in which the defendant is living at the time when the service is made.” That is, where a person abides — lives — at the particular time when the summons is served, constitutes his usual place of abode.”

We see therefore that the courts in construing the question have very narrowly limited the application of

the statute in order to give the defendant an opportunity to be heard in court.

POINT TWO

THE APPEARANCE OF THE DEFENDANT BEFORE THE HONORABLE ALDON J. ANDERSON DID NOT CONSTITUTE A GENERAL APPEARANCE IN THE ACTION WHICH SUBJECTED HIM TO THE JURISDICTION OF THE COURT FOR THE PURPOSE OF RENDERING PERSONAL JUDGMENT AGAINST HIM.

The defendant appeared pursuant to the order of the court that he appear, of which order he received actual notice.

The defendant Gail Young however should not be penalized for appearing voluntarily for the hearing on the issue as to whether or not he should be required to remove himself from the home of Kayla Baer.

The only issue resolved at that hearing was the question of his removal, and he was ordered by the court to so remove himself, and complied with that order. As was stated under point one in the quotation from the case of *Booth v. Crockett*, the fact that the defendant may have actually received the complaint does not make valid an initially void service.

The case of *Sorensen v. Sorensen*, 18 Utah 2nd 102, 417 Pacific 2nd 118, cited by appellant, is clearly not in point, for in that case the party who contended that

there was no justification in the court had answered and filed a counterclaim.

“So: Mother says the lower court had no jurisdiction because father didn’t serve her with summons within the time prescribed by Rule 4(b), Utah Rules of Civil Procedure. Up until this time service seems to have been satisfactory.

She would be correct under the rule except she counter-claimed, sought relief, got part of that for which she asked, and now complains that with all this she should receive the benefits of the lower court’s decision but not the bitter fruits thereof . . .”

The defendant in this case has not requested any relief of the court prior to his motion to set aside the judgment for the reason of lack of jurisdiction over his person.

The mere physical presence of a party or his attorney in the court room during some phase of the proceeding does not constitute the entry of an appearance. 5 American Jurisprudence 2d, Appearance, Section 17, page 493, also see *Smith v. Gadd* (Ky) 280 SW2d 495; *Fulton v. Ramsey*, 67 W. Va. 321, 68 SE 381; *Honeycutt v. Nyquist, P. & Co.*, 12 Wyo. 183, 74 P. 90.

The relief sought in the order to show cause was similar to or would have resulted in a contempt proceed-

ing. In that regard, see 5 American Jurisprudence 2d, Section 33, at page 507, which states as follows:

“Similarly, an appearance in response to a contempt rule, and the actual purging of the contempt by compliance with the order of the court, does not constitute an appearance in the action in which the order was entered.”

The lower court did not make a finding that Judge Anderson's hearing constituted a general appearance on behalf of the defendant at the time of the default, nor was any evidence offered in that regard at the default hearing but rather, jurisdiction over the default was found based upon the service of the summons upon the defendant's wife. (R. 12-14) The decree specifically provides defendant “did not appear.” (R. 12)

POINT THREE

THE COURT DID NOT ERR IN RENDERING ITS DECISION AFTER THE DEFENDANT'S APPEAL HAD BEEN DISMISSED FROM THE SUPREME COURT.

The appeal to the Supreme Court was dismissed on the 26th day of February, 1970. (R. 31) The order setting aside the judgment was entered March 23, 1970. (R. 36) Therefore, the lower court clearly had jurisdiction to enter the judgment when it did based upon the record before that.

POINT FOUR

THE PLAINTIFF-APPELLANT HAS IMPROPERLY INCLUDED MATTERS IN ITS BRIEF WHICH ARE NOT REFLECTED BY THE RECORD.

The plaintiff-appellant states in his conclusion as follows:

“Defendant readily admits that all allegations of the Complaint are true. He has further intentionally failed to answer and, in open Court acknowledged that Findings of Fact, and Conclusions of Law are accurate.”

It is improper for the defendant-appellant to include such an allegation in his brief, for nowhere in the record does the defendant readily admit that all allegations of the complaint are true. *Watkins v. Simonds*, 14 Utah 2d 406, 385 Pac. 2d 154.

CONCLUSION

The presumptions which rest in favor of affirming the lower court and in favor of allowing the defendant-respondent to have his case tried upon the merits and the obvious inequities appearing from the records should in view of the law lead the court to conclude that the service was void, that the defendant did not make a

general appearance, submitting himself to jurisdiction, and that the lower court was not precluded from hearing the motion to set aside the judgment.

Respectfully submitted,

SUMMERHAYS, KLINGLE
& COHNE

By: Lowell V. Summerhays

*Attorney for the Defendant-
Respondent*

1010 University Club Building
Salt Lake City, Utah 84111
Telephone: 364-7737