

1970

W. Smoot Brimhall, Commissioner of Financial Institutions of the State of Utah v. Seagull Investment Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

W. SMOOT BRIMHALL, Governor
of Financial Institutions, et al.,
State of Utah,

vs.

SEAGULL INVESTMENT COMPANY, et al.

BRIEF OF DEFENSE

Appeal from the District Court
District of Columbia
Honorable J. Edgar Hoover

DALLAS H. YOUNG, JR.
Attorney for Plaintiff-Respondent
48 North University Avenue
Provo, Utah 84601
Telephone 374-1540

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IN THE SUPREME COURT OF THE STATE OF UTAH

W. SMOOT BRIMHALL, Commissioner
of Financial Institutions of the
State of Utah,

*Plaintiff and
Respondent,*

vs.

SEAGULL INVESTMENT COMPANY,

*Appellant and
Defendant.*

} Case
No.
12064

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Suit to foreclose mortgage on real property and
counterclaim to quiet title to that property.

DISPOSITION IN LOWER COURT

Judge Harding granted decree of foreclosure of
mortgage and dismissed counterclaim seeking to
quiet title against that mortgage.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks an order quieting
title to the real property as to the mortgage sought

to be foreclosed by Plaintiff, and reversing the judgment of the trial court.

STATEMENT OF FACTS

The sole issue raised on this appeal is whether Plaintiff's action is *res adjudicata* by reason of two prior dismissals of actions containing the same claim for relief as is the subject matter of this action. The facts concerning dismissal of said actions are as follows:

1. *Oct. 25, 1966* — complaint filed in case #30,293 (R. 62)
2. *Oct. 25, 1967* — case #30,293 dismissed for failure to serve summons within 1 year (Rule 4). (R. 73)
3. *Oct. 30, 1968* — summons issued (case #30,293 typed on summons). (R. 73)
4. *Nov. 5, 1968* — summons issued Oct. 30, 1968, served. (R. 73)
5. *Nov. 15, 1968* — summons served Nov. 5, 1968, dismissed for failure to file complaint within 10 days after service (Rule 3(a)(2)). (R. 73)
6. *Jan. 24, 1969* — Court quashes summons served Nov. 15, 1968, for failure to file complaint within 10 days after service of summons. (R. 73)

7. *Jan. 31, 1969* — Notice of dismissal of case #30,293 filed by Plaintiff under Rule 41(a) (1), URCP. (R. 75)
8. *Jan. 28, 1969* — This lawsuit filed. (R. 4)

ARGUMENT

POINT I

PLAINTIFF'S CLAIM IS RES ADJUDICATA BECAUSE TWO PRIOR DISMISSALS CONSTITUTE ADJUDICATION OF PLAINTIFF'S CLAIM ON THE MERITS UNDER RULE 41(a) (1), URCP.

Two prior lawsuits have been dismissed which were based upon the same claim for relief as is the subject matter of Plaintiff's claim in this action. It is undisputed that case #30,293 commenced Oct. 25, 1966, was dismissed as a matter of law on Oct. 25, 1967, when one year passed after filing of the complaint without serving a summons, as provided in Rule 3(a) (2), URCP. A notice of dismissal of that lawsuit was also filed on Jan. 31, 1969. (R. 75) If the Court determines that a lawsuit containing the same claim for relief was dismissed a second time then Plaintiff's claim in this case is res adjudicata. (Rule 41(a) (1), URCP; *Thomas v. Braffet's Heirs*, 6 U. 2d 57, 305 P.2d 507; 65 ALR 2d 742. If a second dismissal has not occurred the judgment of foreclosure is proper and the decision of the lower court should be affirmed. Accordingly the sole issue in this case is

whether a second dismissal has in fact occurred.

The second dismissal of a lawsuit containing the same claim as Plaintiff's claim for relief in this case occurred on November 15, 1968, (R. 73) when ten days expired after service of that summons without the filing of a complaint. Since case number 30,293 had been dismissed as a matter of law because no summons had been served within one year after the filing of that complaint that prior action had no effect whatever on the legal effect of the failure of Plaintiff to file a complaint within ten days after that summons was served. The fact that the summons contained the number of the case which had been dismissed by operation of law (#30,293) (R. 75) does not change the legal effect of serving the ten day summons without filing a complaint within ten days thereafter, 11 ALF 2d 1411, 24 Am. Jur. 2d P.61-62. Rule 3(a) (2), URCP, provides that an action may be commenced by the serving of a summons or the filing of a complaint. Failure to file a complaint within ten days after service of summons constitutes a voluntary dismissal of the action that was commenced by the service of the ten day summons, as provided by Rule 3(a), URCP, which reads in part as follows:

"3(a) HOW COMMENCED. A civil action is commenced (1) by filing a complaint with the court, or (2) by the service of a summons. If the action is commenced by the service of a summons, the complaint, together with the summons and proof of service thereof, must

be filed within ten days after such service or the action thus commenced shall be deemed dismissed and the court shall have no further jurisdiction thereof; provided, . . .”

In its order of January 24, 1969, in case number 30,293 (R. 73), the Court expressly held that two dismissals had already occurred. In that order the Court stated in part as follows:

“It appearing to the Court that case number 30,293 was dismissed as a matter of law upon the expiration of one year from the date of filing thereof, summons not having been served within the time required by Rule 4(b), URCP, and *that the action commenced by Plaintiff in accordance with the provisions of Rule 3(a) (2), URCP, by the service of summons on or about the 6th day of November, 1968, was dismissed upon the expiration of 10 days thereafter, Plaintiff having failed to file a complaint with the Court within that time as required by Rule 3(a) (2), URCP, . . .*”
(Emphasis added) (R. 73)

Plaintiff has argued (R. 31-34) that a second dismissal cannot occur within the meaning of rule 41, URCP, unless a second complaint is filed with a new case number being assigned and a new filing fee paid. This argument accepts the facts as recited above concerning the service of the summons on November 5, 1968, the failure to file a complaint within ten days after service of that summons, and simply argues that the resulting dismissal of the action thus commenced

(by serving the 10 day summons on Nov. 5, 1968) was not a dismissal within the meaning of Rule 41, URCP. Plaintiff's argument wholly fails to consider the express provisions of Rule 3(a)(2), URCP, (quoted on page 4 above) specifies that an action may be commenced by service of a summons without the filing of a complaint and without paying a fee to the clerk of the Court, and Rule 3(c), URCP, provides that the Court has jurisdiction from the time of service of summons or the filing of the complaint. Once an action has been commenced and the Court has acquired jurisdiction by either serving a summons or by filing a complaint the dismissal of that action constitutes a dismissal within the meaning of Rule 41, URCP.

This Court affirmed the effect of Rule 41, URCP, and the fact that two dismissals of lawsuits containing the same claim for relief constitutes an adjudication of that claim on the merits and renders that claim *res adjudicata* in the case of *Thomas vs. Braffet's Heirs*, 6 U. 2d 57, 305 P.2d 507 (1956). That case is determinative of the issues in this case and requires that Plaintiff's mortgage foreclosure action be dismissed as *res adjudicata*, and that title to said property be quieted in Defendant as against the claims of Plaintiff.

CONCLUSION

The action commenced Oct. 25, 1966, by filing of a complaint to foreclose the mortgage was dismissed (R. 75). The action commenced November 5, 1968, by serving of a 10 day summons (R. 73) which was dismissed when no complaint was filed (Rule 3(a) (2), URCP). The second dismissal constituted an adjudication on the merits and rendered Plaintiff's claim res adjudicata, and is a complete bar to Plaintiff's action (Rule 41, URCP). Accordingly the judgment of foreclosure awarded by the Court to Plaintiff should be vacated and set aside and title to the real property involved in this law suit should be quieted in the name of the Defendant.

RONALD C. BARKER

Attorney for Defendant-Appellant

2870 South State Street

Salt Lake City, Utah 84115

Telephone 486-9636