1970

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

Utah Supreme Court

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 RESPONDENT

Appeal from Judgment of Fourth Judicial District Court of Utah County
Honorable Maurice Harding, Judge

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TABLE OF CONTENTS

RULES CITED

TEXTS CITED

CASES CITED

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STATEMENT OF FACTS

This is an action to foreclose a mortgage on real property located in Utah County, State of Utah. The appellant filed a counter claim to quiet title to the property subject to the mortgage.

This is the second action filed to foreclose the mortgage which is the subject of this action. An earlier com-

plaint, civil no. 30,293, was filed in the District Court of Utah County on November 25, 1966. Almost two years passed after civil action 30,293 was filed before a summons was issued. On October 30, 1968, a summons was issued in the first action. The summons was served on November 3, 1968.

The defendants made a motion to quash the service of summons issued October 30, 1968, and served November 3, 1968, in civil no. 30,293 because it was not served within the time limited by Rule 4(b) *U.R.C.P.* The court granted that motion. Subsequently the plaintiff filed a notice of dismissal pursuant to Rule 41 (a) (1) *U.R.C.P.* in civil no. 30,293.

Plaintiff then commenced this action to foreclose the mortgage. The defendant claims that civil case no. 30,293 was dismissed in such a fashion as to bring this action within the "two dismissal" rule.

DISPOSITION IN THE LOWER COURT

The present action was tried at Provo, Utah, before the Hon. Maurice Harding, presiding. Upon the hearing of the matter, the court found in favor of the plaintiff and held that the two dismissal rule under Rule 41(a)(1) *U.R.C.P.* does not apply to this particular case. The court, therefore, ordered that the property be foreclosed and gave judgment to the plaintiff in the amount of $14,304.41 principal, interest in the amount of $5,195.68 to July 15, 1969, and attorney's fees and

costs. The defendant's appeal from the lower court's decision requests that an order be issued quieting title to the property as against the plaintiff and reversing the judgment of the trial court .

RELIEF ON APPEAL

Respondent requests that the court affirm the lower court's decision and that the appeal be dismissed.

ARGUMENT

The facts of this case do not lend themselves to the application of the two dismissal rule. According to the general rules of law governing dismissal, an action can be dismissed but one time. The dismissal or nonsuit leaves the action as if the suit had never been filed, and takes with it all prior rulings and orders in the case. 11 A.L.R.2d 1411. Such a dismissal annulled any orders or rulings made in the case so that the action is as if it had never been. In effect, the parties are out of court as to the case dismissed. 24 Am.Jur.2d 6162.

The summons issued on November 30, 1968, was not an initiation of a new action, but was a summons which was served pursuant to the complaint filed on December 25, 1966. The summons was a regular 20 day summons with an attached complaint. This fact is substantiated by the civil number set forth on the summons. The number found there is the same as the one

marked on the complaint filed in November, 1966. Furthermore, no new filing fees have been paid by the plaintiff for the commencement of a new action. There was no intention by the plaintiff to initiate a new action. If the plaintiff had intended to begin a new action with the service of the summons, the summons would have been in the form of a 10 day summons rather than the ordinary 20 day summons.

The plaintiff contends that this matter has been dismissed but once. Furthermore, notice of dismissal, filed by the plaintiff pursuant to Rule 41(a)(1) *U.R.C.P.* did not operate as a second dismissal of the action. That notice pertained to the complaint written and filed in civil no. 30,293 which had already been deemed dismissed by Rule 4 *U.R.C.P.*

Applying the facts of this case to the rules set forth above, plaintiff contends that the dismissal of the action pursant to the defendant's motion made the suit as if it had not ben filed by the plaintiff. Based upon that conclusion, the only way in which a second dismissal could have been entered, thereby bringing the matter within the application of the two dismissal rule, would have been to file a new and separate pleading, paying new filing fees and costs, and filing a new complaint and summons. The record indicates that such an action was not commenced. The above entitled matter could have been dismissed but once.

The case of *Thomas vs. Braffet's Heirs*, 6. U.2d 57, 305 P.2d 507 (1956), is substantiating law to the

plaintiff. In *Thomas,* the court was faced with a two dismissal rule. There the action was to quiet title to a certain piece of property located in Duchesne County, Utah. There were a number of actions filed in that case. The first action was filed on May 22, 1946, and was dismissed upon plaintiff's request. The second action was filed on October 27, 1951, under a new civil number. Plaintiffs again requested that the court dismiss the action and the dismissal was granted. On September 14, 1953, the court entered an order dismissing the action as to those defendants who had not answered. Subsequently one of the defendants intervened and claimed an interest in the property. The argument was made that Rule 41(a)(1) *U.R.C.P.* caused the dismissal to the intervening defendants to be an adjudication on the merits. The court held that under Rule 41(a)(1) such a dismissal did operate as an adjudication on the merits. Each of the prior actions in the *Thomas* case were commenced by the filing of a new complaint, paying new filing fees and obtaining new civil numbers. In this case but one action was commenced prior to this action and it was commenced by the filing of a complaint.

The case now before the court contains no record of two different actions being commenced and subsequently being dismissed. The file indicates filing but one action and subsequently granting a motion of dismissal of that action.

The court's attention is called to an annotation in 65 A.L.R.2d 742, wherein the two dismissal rule is

discussed. Cases cited in that annotation come within the bounds of the rule and make reference to the filing of two suits, e.g., the filing of the second suit or the filing of a third suit. Reference is made to separate and distinct actions being filed. Under the two dismissal rule, the plaintiff is entitled to one dismissal of his suit before a subsequent dismissal will operate against him as an adjudication on the merits. *Crump vs. Goldhouse Restaurants, Inc.*, 96 So.2d 215.

CONCLUSION

At the hearing of the matter on its merits, the defendant failed to apply the facts of this case to substantiate a dismissal under the two dismissal rule. The plaintiff contends that under the facts of this case, there has been but one dismissal. The appeal should be dismissed and the decision of the lower court should be affirmed.

Respectfully submitted,

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