1976

Genuine Parts Co. v. Gene Larson Jr dba Truck Parts: Brief of Appellant

Utah Supreme Court

Kenneth L. Rothey; Attorney for Defendant.
John McCoy; Attorney for Plaintiff.

IN THE SUPREME COURT OF THE STATE OF UTAH

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GENUINE PARTS CO.,	)	
Plaintiff,	)	Case No. 14414
vs	)	
GENE LARSON JR., DBA TRUCK PARTS	)	
Defendant.	)	

BRIEF OF DEFENDANT/APPELLANT

THIS IS AN APPEAL FROM AN ORDER OF THE DISTRICT COURT DENYING DEFENDANT'S MOTION TO DISMISS AND MOTION TO QUASH SERVICE OF SUMMONS AND WRIT OF EXECUTION AND MOTION TO STAY WRIT OF EXECUTION AND TO SET ASIDE DEFAULT AND JUDGMENT BY DEFAULT

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TABLE OF CONTENTS

Cases Cited

Statutes Cited

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Defendant.	)	

BRIEF OF DEFENDANT/APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from an Order denying Defendant/Appellant's Motion to Quash Service of Summons and Writ of Execution, and Motion to Stay Writ of Execution and to Set Aside Default and Judgment by Default based upon Defendant/Appellant's contention that serious questions existed respecting the jurisdiction of the Court and the validity of the Judgment by Default in light of the pleadings filed by the Plaintiff/Respondent.

DISPOSITION BY THE DISTRICT COURT

Defendant/Appellant filed a Motion to Quash which came on for hearing on December 8, 1975, before the Honorable Judge Bryant H. Croft after having been continued from the original setting of October 23, 1975. Judge Croft denied Defendant/Appellant's motion in its entirety. Defendant/Appellant thereafter filed a Notice of Appeal, but the Notice was not docketed by the District Court Clerk until January 8, 1976, the same time that a written Order of disposition was signed and filed by Judge Croft. Said Order was not filed within five days as provided by the District Court rules; and in any event was not served upon Defendant/Appellant's attorney by Plaintiff/Respondent's attorney.

RELIEF SOUGHT ON APPEAL

Defendant/Appellant seeks an Order of this Honorable Court reversing the Order of Judge Croft and directing that the Judgment by Default be set aside and the action dismissed without prejudice for lack of jurisdiction. Attendant therewith Defendant/Appellant also seeks relief from this Court from the Writ of Execution now pending and exhoneration of the Supersedeas Bond.

STATEMENT OF FACTS

Defendant/Appellant, as a result of an open account with Plaintiff/Respondent became indebted to Plaintiff/ Respondent in the total amount of $13, 278. 45 (Record Page 30). Defendant/ Appellant had no agreement or obligation with Plaintiff/ Respondent to pay attorney's fees or interest on said account. In order to discharge said obligation and to obtain sufficient time to discharge the same, Defendant/Appellant executed several promissory notes with different due dates, wherein he agreed to pay court costs, attorney's fees, and interest to Plaintiff/Respondent (Record Page 33 through 44). Between the date of execution of said notes on January 12, 1975, and the date Plaintiff/Respondent filed its Complaint herein in July, 1975, (Record Page 1), Defendant/Appellant delivered to Plaintiff/Respondent goods and materials and received from Plaintiff/Respondent a credit against said notes ($1, 400. 00 Record Page 27 and $3, 366. 67 Record Page 50). On July 28, 1975, Plaintiff/Respondent filed its Complaint. At that time the only amount due pursuant with the promissory notes which are the subject of Claim 2 of Plaintiff/Respondent's Complaint, after offsetting the credits hereinabove indicated was approximately $1, 624. 77 including interest.

This action was commenced by the service of a Summons pursuant with Rule 3a of the Utah Rules of Civil Procedure on July 17, 1975. Plaintiff/Respondent's filed their complaint with the Clerk of the Court and mailed a copy to the last known address of the defendant on July 28, 1975, the 11th day after the commencement of the action (Record Pages 1, 2, and 3) Defendant was not residing at the address appearing in Plaintiff/ Respondent's Affidavit (Record Page 3 and 14). Plaintiff/ Respondent entered the default of the Defendant/Appellant on August 26, 1975, and on the same date took Judgment by Default before the Honorable Judge Marcellus K. Snow based upon certain promissory notes which were reduced to judgment. Said judgment was for the total sum of $10, 152. 41 principal and interest with attorney's fees of $1, 723. 57 (Record Page 8), On October 14, 1975, Defendant/Appellant filed a Motion to Dismiss and Motion to Quash Service of Summons and Writ of Execution and Motion to Stay Writ of Execution and to Set Aside Default and Judgment by Default, which was denied on December 8, 1975.

ARGUMENT

POINT I

DOES RULE 3(a)(2) OF THE UTAH RULES OF CIVIL PROCEDURE, AS APPLIED TO THE CASE AT HAND VIOLATE FUNDAMENTAL CONCEPTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In 1951 the Utah Supreme Court adopted uniform Rules of Civil Procedure for all Courts of the State of Utah. For the most part, the Utah Rules of Civil Procedure track the Federal Rules of Civil Procedure (see United States Code, United States Code Annotated, and United States Code Service L. ed.).

In the case at hand, Defendant/Appellant was served with a Summons, which, under the provisions of Rule 3(a)(2) commenced the action herein. This Rule, unlike Rule 3 of the Federal Rules of Civil Procedure allows the commencement of an action by the service of a Summons only; there being no requirement for the concurrent service of a complaint. The effect of both rules is to give the Court jurisdiction for the purpose of prosecuting an action unless and until such time as jurisdiction is challenged on other grounds or otherwise lost. In order to retain jurisdiction under the Utah Rules it is required that the initiating party take certain mandatory steps after the commencement of an action by the issuance of

after the service of the Summons on the Defendant, file a copy of the Complaint, the Summons, and Proof of Service of the Summons; and Plaintiff has the further mandatory obligation to either serve or mail a copy of the complaint to the defendant if his address is known or in lieu thereof, to deposit a copy of the complaint with the clerk. If these things are not done as provided in the Rule, the action shall be deemed dismissed and the Court shall have no further jurisdiction thereof.

In this case, the Defendant/Appellant was served with a Summons on Thursday, the 17th day of July, 1975, On Monday, the 28th day of July, 1975, Plaintiff/Respondent filed a copy of the Summons, Return of Service, Complaint, and an Affidavit of Mailing (Record Pages 1 through 6). This filing took place in the afternnon of the 11th day. Because of the mandatory language of the Rule, Defendant/ Appellant filed a Motion on October 14, 1975, seeking the termination of all proceedings in this matter (Record page 12 and 13) along with a Notice of Hearing (Record Page 21). On January 8, 1976, the Honorable Judge Bryant H. Croft entered his Order declaring that the complaint was filed within ten days after service of summons on the defendant as computed within the time computations as set forth in Rule 6(a) of the Utah Rules of Civil Procedure.

Further, and without notice or opportunity to the Defendant/Appellant to object to the findings of the Court, the Honorable Judge Croft further found that the defendant could have requested a copy of the Complaint in accordance with Rule 3 but did not take any action until a Writ of Execution was served on him (Record Page 53). These findings, made without opportunity of Defendant/Appellant to object thereto, totally ignore Rule 77(a), 52(a), and 5(a) of the Utah Rules of Civil Procedure and the 5th and 14th Amendments of the United States Constitution.

Rule 77(a) of the Utah Rules of Civil Procedure provides:

> "The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules."

Rule 12(a) of the Utah Rules allows the defendant 20 days to answer a Complaint after the service of Summons is complete. In accordance with these Rules and the Court's application of Rule 6(a) in interpreting Rule 3(a) it appears obvious that in cases where the Defendant is served with a Summons and Complaint setting forth sufficient allegations to constitute a cause of action that he would have 20

full days to review the allegations and articulate his defenses in a responsive pleading. On the other hand, and within the discretionary parameters of Rule 3(a), after the initiating party commences an action by service of a Summons, he not only restricts substantially the amount of time that the defendant has to review and respond to the complaint; but also is able to employ the use of the mails for delivery of the Complaint which he could not otherwise do if the Summons and Complaint were served together, and impose on the defendant an affirmative duty to seek out and ascertain for himself the nature of Plaintiff's Complaint against him. No such duty is imposed upon the defendant who is served with a Summons and Complaint by processes described in Rule 4(a through e). To further compound this process, the Rules provide that once an action is commenced, whether by service of a Summons or the filing of a Complaint, that service in person can still be compelled in at least two circumstances. Under Rule 3(b) if the defendant serves a written demand upon the Plaintiff for a copy of a Complaint not served upon him with the Summons, then, in that event, the Plaintiff is required to serve a copy on him before the time for answering commences to run. Under Rule 5(a) if an

amended pleading is filed stating new and additional claims for relief after an action has been commenced in either manner in accordance with Rule 3(a), service of such new or additional claims are required to be served in the same manner provided for the service of a Summons in Rule 4.

Defendant/Appellant contends that Rule 6(a) of the Utah Rules of Civil Procedure (a rule which is identical in substance with Rule 6(a) of the Federal Rules of Civil Procedure) was not intended by this honorable court to serve as a basis for the extension of the Court's jurisdiction, but merely was intended as a procedural regulation; and, in any event under fundamental standards of Constitutional Law defendant contends that Rule 3(a)(b) as applied to the circumstances in this case violates defendant's right to due process and equal protection of the laws.

It is conceded by Defendant/Appellant that procedural due process is a subject wholly within the authority of the respective states to regulate and control, Brown vs. Mississippi 297 US 278, 80 L. ed. 682, 56 S. Ct. 461 (1936). This prerogative however, does not transcend the requirement for fundamental protection such as the requirements for hearing and notice, Hooker vs. Los Angeles, 188 US 314, 47 L. ed. 487, 23 S. Ct. 395 (1955), nor breach the prohibitions against

unreasonableness or arbitrariness, American Land Co. vs. Zeiss, 219 US 47, 55 L. ed. 82, 31 S. Ct. 200(1910). In order to meet the test of equal protection and due process as the same relate to procedural law, the law must operate equally on all persons in like circumstances and afford all persons of a reasonable class (i. e. civil litigants) an equal opportunity for notice to be heard, Jones vs. Brim, 165 US 180, 41 L. ed. 677, 17 S. Ct. 282, affm. 11 Utah 200, 39 Pac. 825 (1895), State ex. rel. Sweezer vs. Green, 360 Mo. 1249, 232 SW 2d 897, 24 ALR 2d 340 (1950).

In this matter two essential requirements of due process, notice and an opportunity to be heard, as appear Dr. Jekyl and Mr. Hyde when Rule 3(a) is tested against known standards, see National Farmers Union Property and Gas Co. vs. Thompson, 4 Utah 2d 7, 286 P 2d 249, 61 ALR 2d 635 (1955). As applied to the facts in this case, it is clear that the Defendant/Appellant, Gene Larson Jr., was not offered an equal opportunity under the law with all persons in a reasonable class (i. e. civil litigants as defendants) since the notice afforded him under Rule 3(a) (1) is not controlled by judicial due process or procedure but is up to the election of the initiating party, and (2) only gave him the barest sketch of Plaintiff's Complaint,which sketch in and of itself would not constitute sufficient basis for the entry of a

judgment in the absence of more affirmative allegations Cuebas y Arrendondo vs. Cuebas y Arrendondo, 223 US 376, 56 L. ed. 476, 32 S. Ct. 277 (1912) holding as a general rule that a Judgment by Default must be justified by the pleadings and that in the absence of essential averments to sustain a cause of action it has been held to be fraud on the part of the Plaintiff to procure a Court to enter a judgment, Larson vs. Williams 100 Iowa 110, 63 NW 464 (1895). It goes without saying that Mr. Larsen was not afforded the same opportunity to be heard and respond as a person receiving a Summons and Complaint concurrently would have been. At best he would have had nine days to respond rather than twenty days as provided in Rule 12(a) and the language of the Summons served upon him (Record Page 5) that, of course, assumes that he received the complaint the same day that it was mailed. The effect of Rule 3(a) in this case is to allow the moving party either pro se or through their attorney to elect different procedures which is a fundamental violation of due process and equal protection.

POINT II

DOES THE ENTRY OF JUDGMENT BY DEFAULT BASED UPON PROMISSORY NOTES CONSTITUTE A FRAUDULENT AND VOIDABLE JUDGMENT WHEN THE ALLEGATIONS OF THE COMPLAINT DO NOT ALLEGE THAT PRESENTMENT AND DISHONOR EVER OCCURED OR THAT THE NOTES WERE DUE, IF THE NOTES THEMSELVES AS REDUCED TO JUDGMENT REFLECT A DUE DATE OCCURRING AFTER COMMENCEMENT OF THE ACTION AND AFTER THE JUDGMENT BY DEFAULT WAS ENTERED.

Judgment by Default was entered against the defendant in this matter by the Honorable Marcellus K. Snow on the 26th day of August, 1975 (Record Page 8). Said judgment was based upon a series of promissory notes (Record Page 33 through 44). The action was commenced on the 17th day of July, 1975. At that time, ignoring for the moment the fact that no presentment or dishonor was ever made or alleged to have been made, the maximum amount due excluding interest and attorney's fees would have been $6,000.00 without regard to offsets. Plaintiff/Respondent in its on Affidavits in this matter (Record Pages 26, 28, and 29 and the accompanying exhibits Record Pages 27 and 50) admitting that as of July 17, 1975, Defendant/Appellant was entitled to credits in an amount of $4,766.37 leaving a balance due exclusive of interest of $1,233.63.

Plaintiff/Respondent nevertheless, took judgment on all notes even though the same were not then due and took judgment for $1,723.57, in attorney's fees which Defendant/Appellant contends were not due to them (Record Page 8).

Upon reviewing Plaintiff/Respondent's Complaint on file herein and more particularly Claim II, Plaintiff/Respondent has failed to allege that said notes were due, or that presentment and dishonor had taken place.

In the Larson vs. Williams case supra, it was held that the judgment amounted to fraud because the Plaintiff/Respondent had knowingly procurred the Court's signature without alleging essential elements to a cause of action. In other jurisdictions, Judgments by Default have been regarded as void where they were based solely on allegations of a complaint so deficient in substantive averments as to negate the existence of a cause of action at the time of its rendition, Apple vs. Edwards 123 Mont. 135, 211 P. 2d. 138, (1949), Cleveland vs. Cleveland 262 Ala. 90, 77 So. 2d. 343 (1955). Defendant/Appellant contends that the record in this case which shows on its face that the notes sued upon were at least in part not yet due, is a sufficient basis for vacating the judgment rendered herein pursuant with Defendant/Appellant's Motion and Rule 60(b) of the Utah Rules of Civil Procedure.

In support of this contention, Defendant/Appellant respectfully cites the Court's attention to the following provisions of Article III of the Uniform Commercial Code of the State of Utah

1. A note is not due until the date stated on the face of the note, Utah Code Annotated 70A-3-114.

2. A cause of action on a promissory note does not accrue against the maker thereof until the day after maturity, Utah Code Annotated 70A-3-122(1)(a).

3. The partial failure of consideration (i. e. demand for attorney's fees on a note not yet due) is a defense pro tanto against any person not a holder in due course, Utah Code Annotated 70A-3-408. In this case Plaintiff/Respondent received judgment for $1,723.57 in attorney's fees (Record Page 8).

4. Presentment and notice of dishonor is required by the holder of a note unless presentment is waived, Utah Code Annotated 70A-3-503.

5. Presentment was not waived in this case, Utah Code Annotated 70A-3-511 (see also record in its entirety).

CONCLUSION

Defendant/Appellant was denied the fundamental protections of due process and equal protection of the laws afforded all citizens of this State by virtue of the discretion granted to persons initiating civil actions in this State pursuant with Rule 3(a) of the Utah Rules of Civil Procedure. In light of the Judgment entered against him in this matter, which judgment is patently fraudulent and voidable in light of the record as it stands, such a denial of due process should not be allowed to stand and the judgment of the lower Court and the Order of the Honorable Bryant H. Croft should be reversed by this honorable court and Rule 3(a)(2) of the Utah Rules of Civil Procedure declared unconstitutional.

Respectfully submitted,

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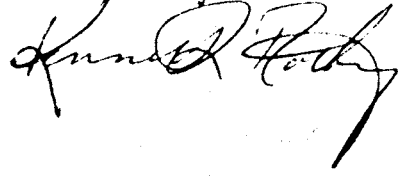

CERTIFICATE OF SERVICE

I hereby certified that I served the foregoing Brief of Defendant/ Appellant to Mr. John Mccoy, 325 South Third East, Salt Lake City, Utah 84111

DATED this 22 day of March, 1976

Susan Rudy