1976

Employers Mutual of Wassau v. Montrose Steel Company : Brief of Appellant

Utah Supreme Court

Frank J. Allen; Attorney for Plaintiff-Appellant.
Kenneth L. Rothey; Attorney for Defendant-Respondent.

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

EMPLOYERS MUTUAL OF WASSAU,

Plaintiff-Appellant,

vs.

MONTROSE STEEL COMPANY,

Defendant-Respondent.

Case No. 14426

BRIEF OF APPELLANT

Appeal from Order Quashing Service of the Third District Court for Salt Lake County, Honorable James S. Sawaya, Judge

FRANK J. ALLEN
Attorney for Plaintiff-Appellant
351 South State Street
Salt Lake City, Utah 84111

KENNETH L. ROTHEY
Attorney for Defendant-Respondent
2275 South West Temple
Salt Lake City, Utah 84115

April 19, 1976

IN THE SUPREME COURT OF THE STATE OF UTAH

EMPLOYERS MUTUAL OF WASSAU,

Plaintiff-Appellant,

vs.

MONTROSE STEEL COMPANY,

Defendant-Respondent.

Case No. 14426

BRIEF OF APPELLANT

Appeal from Order Quashing Service of the Third District Court for Salt Lake County, Honorable James S. Sawaya, Judge

FRANK J. ALLEN
Attorney for Plaintiff-Appellant
351 South State Street
Salt Lake City, Utah 84111

KENNETH L. ROTHEY
Attorney for Defendant-Respondent
2275 South West Temple
Salt Lake City, Utah 84115

April 19, 1976

TABLE OF CONTENTS

Cases Cited

TABLE OF CONTENTS - CONTINUED

IN THE SUPREME COURT OF THE STATE OF UTAH

EMPLOYERS MUTUAL OF WASSAU, Plaintiff-Appellant vs. MONTROSE STEEL COMPANY, Defendant-Respondent.	)	Case No. 14426

BRIEF OF APPELLANT

NATURE OF THE CASE

Appellant commenced this action by obtaining a writ of garnishment based upon a verified complaint and affidavit. The complaint recites that Respondent is a Nevada corporation, not qualified to do business in Utah. Respondent did not answer but moved to quash on the grounds that the court was without jurisdiction because requisites for long arm jurisdiction under the Utah long arm statute were not satisfied even if all of the allegations of the complaint were admitted.

DISPOSITION BELOW

The trial court quashed service of process and released the writ of garnishment (R-24) on the grounds that the court was without jurisdiction "over the defendant or the subject matter" (our emphasis).

STATEMENT OF FACTS

By the nature of the proceedings, the facts must be presumed to be as alleged in the complaint (R-1). In essence they are:

1. Plaintiff is a corporation licensed to do business in the State of Utah and Defendant is a corporation resident of and doing business in the State of Nevada.

2. On May 16, 1975, Defendant was doing work under a subcontract for Gibbons & Reed Company and Defendant at that time had in its employ, Kenneth Harris of Nez Perce, Idaho.

3. As a part of the subcontract agreement with Gibbons & Reed Company, Defendant furnished Gibbons & Reed for the use and benefit of Plaintiff, a representation that Defendant was insured for Workmen's Compensation coverage by the Nevada State Insurance Fund and that said coverage included its employee, Kenneth Harris.

4. On or about May 16, 1975, Kenneth Harris injured himseld while in the employ of Defendant and thereafter made claim for such accident to the Nevada State Insurance Fund as its insurer. The Nevada State Insurance Fund denied the claim because Defendant was not so insured.

5. Plaintiff is the Workmen's Compensation carried for Gibbons & Reed Company, who in accordance with Idaho Code 72-216 is required to meet Workmen's Compensation obligations of Defendant because of Defendant's status as a subcontractor for Gibbons & Reed Company. Gibbons & Reed is by statute entitled to claim over and against Defendant for the amount of said claim, which claim has been subrogated to Plaintiff.

6. Plaintiff has further incurred an additional liability estimated in excess of $2,000 for continuing compensation and permanent partial disability.

7. Defendant has present in this State a chose in action in the nature of a claim against Gibbons & Reed Company for the balance due under its subcontract in an amount of approximately $4,000.

8. Appellant obtained a writ of garnishment based upon affidavit and verified complaint (R-10).

9. Defendant owes Plaintiff a sum in excess of $4,000 as a result of its misrepresentations and subrogated statutory liability as aforesaid and Plaintiff is entitled to judgment for the full amount of the claims of Kenneth Harris against it over and against Defendant.

No question has been raised as to the sufficiency of the procedures by which the garnishment was effected (R-17). It must be assumed for this appeal (and it is in fact true) that there was compliance with Rule 64B in every particular.

ARGUMENT

POINT I

THE IN REM JURISDICTION OF UTAH COURTS EXISTS INDEPENDENT OF THE UTAH LONG ARM STATUTE.

The two grounds for Respondent's motion to quash were (1) the failure of the complaint to allege facts sufficient to justify the Utah court's assertion of in personam jurisdiction over the defendant under the Utah long arm statute (78-27-22 et seq. UCA 1953 as amended), and (2) Appellant's lack of status, as a foreigh corporation authorized to do business in Utah, to enjoy the benefits afforded to "citizens" by the statute. Both grounds erroneously assume the applicability of the long arm statute.

Jurisdiction is not here claimed on the basis of the long arm statute, but by virtue of the inherent power of the state's courts to adjudicate with reference to property within the state. Long arm statutes deal with the circumstances under which a state may assert extraterritorial in personam jurisdiction over a non-resident defendant. Appellant here invokes the power of the state to deal with property within the state. The difference is the historically recognized distinction between in rem and in personam jurisdiction.

Justice Holmes, in McDonald v. Mabee, 243 US 90, 37 Su.Ct. 343, distinguished between the bases of jurisdiction in the two situations. In a garnishment or attachment situation, he said, "the foundation of jurisdiction is physical

power". There are various text treatments of the distinction between in personam and in rem jurisdiction, but all the authorities reach the same conclusion as to the state of the law. The Corpus Juris statement (21 CJS 50, Courts 43) is as follows:

> "Jurisdiction over the res or property is the power of a court over the thing before it, without regard to the persons who may be interested therein, and the presence of the res within the territorial dominion of the sovereign power under authority of which the court acts may confer such jurisdiction. So where a nonresident has property within the jurisdiction the tribunals of a state may inquire into the nature and extent of his obligations, and in connection therewith may control the disposition of such property or may appropriate it to satisfy the claims of citizens of the state. While in a proper case a state court may render a judgment in personam and control the acts of the parties regarding property outside the jurisdiction of the state, if a nonresident over whom the court has not otherwise obtained jurisdiction has no property in the state its courts cannot adjudicate his liability to citizens of the state. In an action in rem, jurisdiction of the court over the property, as the subject matter of the suit, attaches at the institution of the suit."

This court commented along Holmesian lines on the foundation of in rem jurisdiction in Upper Brouch Irrigation Co. v. Continental Bank, 93 U 325, 72 P2d 1048. The issue was raised there, as here, in a due process context. The relevant quote from the decision is:

> "The district court is a court of general jurisdiction. The debt owing by the bank to the district by reason of the funds on deposit was one over which the general powers of the court extended."

The specific jurisdictional issue of the instant case was raised in Bristol v. Brent, 36 U 108, 103 P 1076. The action was commenced by garnishment of a debt (the debtor being a Utah resident) owed to a non-resident defendant. The trial court assumed jurisdiction, and it was challenged on appeal. Although the matter was remanded to permit amendment of pleadings, this court clearly ruled that the trial court had jurisdiction with regard to the debt. Bristol was approvingly cited by the present Court very recently in Brown & Associates, Inc. v. Carnes Corp. filed March 16, 1976.

There are cases from nearly every state which can be cited in support of the proposition we here advance. One which received considerable media attention was Caton v. Reuther, 170 NE2d 835. The Massachusetts court there held the property of an international union in the state (including debts owed to it) to be subject to the jurisdiction of the court so that such property could be applied to the satisfaction of any indebtedness for which all the union members were liable, and notice to international union members by substituted service under the court rules was sufficient to permit application of such property quasi in rem.

The power of state courts to deal with in-state property of (including debts owed to) non-residents has been infrequently questioned in the last decade. There has been a continuing controversy in legal literature about the degree to which federal courts have or ought to have a similar basis of

jurisdiction. It is generally recognized that a plaintiff cannot commence an action in a federal court by attaching property in the forum state of a non-resident of the state in which the court sits. If the action is so commenced in a state court and then removed to the federal court system, the federal court has jurisdiction. The following excerpt from an annotation at 30 ALR2d 231 is pertinent:

> "Attention is called to the fact that the rule that a federal court does not have quasi in rem jurisdiction such as may be assumed in attachment and garnishment proceedings, is limited to actions commenced in a federal court, but does not apply to actions commenced in a state court and removed to a federal court. Moreover, even in an original suit a federal court may enforce, against a non-resident debtor, a lien created by attachment or garnishment proceedings instituted in a state court."

and see Curie, Attachment and Garnishment in the Federal Courts, 59 Michigan Law Review 337.

In any event, the "minimal contacts" doctrine which controls in long arm cases has no relevancy here. A recent case which makes this precise point is U.S. Industries, Inc. v. Cregg, 348 F.Supp. 1004 (1972) in which the court said:

> "The 'minimal contacts' doctrine to which Cregg refers is not applicable when, as here, the plaintiff invokes the quasi in rem jurisdiction of the court. . . . a court (may) exercise jurisdiction over property within its jurisdiction regardless of the presence or absence of other contacts with the forum state".

POINT II

AS A FOREIGN CORPORATION QUALIFIED TO DO BUSINESS IN UTAH, APPELLANT HAS THE SAME ACCESS TO UTAH COURTS AS DOMESTIC CORPORATIONS OR OTHER PERSONS

Respondent's argument to the trial court that Appellant is not a citizen and therefore not entitled to the benefits afforded "citizens" by Utah's long arm statute is subject to the initial refutation (as set forth in Point I) that the long arm statute has no application to the jurisdictional issue in this litigation. We submit, however, that the reference to "citizens" in the Utah statute is only in the statement of general purposes and not intended as a limitation on the classes of entities to be benefited.

The notion that foreign corporations qualified to do business in Utah, paying taxes and otherwise subject to the control and contributing to the economy of the state are second class entities, so far as access to the state's judicial system is concerned, has no support in statutes, texts, or cases that we can find.

Section 16-10-103 UCA 1953 as amended specifically treats powers of foreign corporations and provides:

> "A foreign corporation which shall have received a certificate of authority under this act shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes".

It is not questioned in these proceedings that Appellant is fully qualified and certified in Utah. Appellant has, therefore, the same access to the courts and enjoys the same

benefits from legislation (including the long arm statute where it is applicable) as a domestic corporation.

Even in the absence of a direct statutory pronouncement of the kind above quoted, American courts have consistently held that foreign corporations can pursue the remdies of attachment and garnishment in states where they are qualified.

American Jurisprudence comments on the point at sections 63 and 222 of its treatise on Attachment and Garnishment. Recognizing that many states will not give an unqualified foreign corporation access to their courts, the editors say, nonetheless, that "an action of attachment by a foreign corporation which had not, at the time of commencing it, complied with the statutory requirements to enable it to do business in the state will not be dismissed on motion if, at the time of the motion, it has so complied" (6 Am Jur 2d 606).

The editors cite Standard Oil Co. v. Superior Ct., 44 Del 538, 62 A2d 454, Aero Spray, Inc. v. Ace Flying Service, 139 Colo. 249, 338 P2d 275, and Western Urn Mfg. Co. v. Am. Pipe & Steel Corp, 284 F2d 279, as authority for these statements:

> "An action commenced by process of foreign attachment or garnishment may be instituted by a non-resident or a foreign corporation authorized to do business within the state, against a foreign corporation owing property or credits within the state, although the non-resident plaintiff's cause of action arises, or the obligation on which it is based is made

> and is payable, in another state and the defendant corporation was not doing business, or was not qualified to do business, within the state. A foreign corporation not qualified to do business within the state has been held entitled to invoke such a remedy against a foreign corporation also not qualified." (6 Am Jur 2d 720)

It is significant that appeal of Standard Oil v. Sup. Ct., supra, was dismissed by the U.S. Supreme Court, 336 US 930, 69 S.Ct. 738.

CONCLUSION

The trial court erred in reaching the conclusion that it lacked jurisdiction over the subject matter in the circumstances of this case. Respondent relies wholly on cases construing the long arm statutes as support for the argument that a Utah court's assertion of such jurisdiction would violate due process guarantees. Such statutes and such cases have no relevancy here. Appellant invokes in rem jurisdiction in pursuing a traditional remedy in the traditional manner.

Respectfully submitted this 19th day of April, 1976.

FRANK J. ALLEN
Attorney for Plaintiff-Appellant

Mailed two copies of Brief of Appellant to Kenneth L. Rothey, Attorney for Defendant-Respondent, postage prepaid, this 19th day of April, 1976, at 2275 South West Temple, Salt Lake City, Utah 84115.

FRANK J. ALLEN