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McEwan Irrigation Co. v. Normand Michaud et al : Brief of Appellant

Utah Supreme Court

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Robert L. Gardner; Attorney for Appellant;

David L. Mower; Attorney for Respondent;

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

McEWAN IRRIGATION COMPANY,
aka McEWAN DITCH COMPANY,
a Utah corporation,

Plaintiff and Respondent,

vs.

NORMAND MICHAUD, aka
NORMAND E. MICHAUD aka
BUD N. MICHAUD,

Defendant and Appellant.

BRIEF OF APPEAL

Appeal from the District Court,
Sixth Judicial District,
County of Garfield, State of Utah,
Honorable Don T. Tibbs, Judge.

ROBERT [unclear]
91 West 200 [unclear]
Cedar City, Utah

Attorney for [unclear]

DAVID L. MOWER
55 South Main Street
Panguitch, Utah 84759

Attorney for Respondent

FILED

JUL 2 1976

Clk. Supreme Court

IN THE
S U P R E M E C O U R T
OF THE
STATE OF UTAH

McEWAN IRRIGATION COMPANY,)
aka McEWAN DITCH COMPANY,)
a Utah corporation,)

Plaintiff and Respondent,)

vs.)

Case No. 14601

NORMAND MICHAUD aka)
NORMAND P. MICHAUD aka)
BUD N. MICHAUD,)

Defendant and Appellant.)

BRIEF OF APPELLANT

Appeal from the District Court of the
SIXTH JUDICIAL DISTRICT IN AND FOR THE
COUNTY OF GARFIELD, STATE OF UTAH
Honorable Don V. Tibbs, Judge

ROBERT L. GARDNER
93 West 200 South
Cedar City, Utah 84720
Attorney for Appellant

DAVID L. MOWER
55 South Main Street
Panguitch, Utah 84759
Attorney for Respondent

TABLE OF CONTENTS

STATEMENT OF THE KIND OF CASE 1
DISPOSITION IN LOWER COURT 1
RELIEF SOUGHT ON APPEAL 2
STATEMENT OF FACTS 2
ARGUMENT 8

POINT I:

THE COURT LACKED JURISDICTION TO
HEAR THE MATTER REQUESTED BY THE
ORDER TO SHOW CAUSE BY REASON OF
LACK OF PROPER SERVICE AND NOTICE
TO THE DEFENDANT 8

POINT II:

THE JUDGE, BASED UPON HIS PAST
INVOLVEMENT WITH THE DEFENDANT,
SHOULD HAVE DISQUALIFIED HIMSELF
FROM THE MATTER WHEN REQUESTED
TO DO SO BY DEFENDANT'S
ATTORNEY 10

CONCLUSION 13

RULES CITED

Rule 5(a) Utah Rules of Civil Procedure 9
Rule 65A(a) Utah Rules of Civil Procedure 9
Rule 65A(c) Utah Rules of Civil Procedure 10
Rule 65A(b) Utah Rules of Civil Procedure 10
Rule 63(b) Utah Rules of Civil Procedure 12

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vs.) Case No.

NORMAND MICHAUD aka)
NORMAND P. MICHAUD aka)
BUD N. MICHAUD,)
Defendant and Appellant.)

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This was an action commenced by the Plaintiff (Respondent) to compel the Defendant (Appellant) to remove a bridge he had installed across an irrigation ditch claimed by the Plaintiff, on the Defendant's land, and for damages. The matter was before the court on the Plaintiff's purported order to show cause.

DISPOSITION IN LOWER COURT

The lower court granted judgment to the Plaintiff on the order to show cause permitting the

Plaintiff to remove said bridge in advance of a hearing on the merits and entered Findings of Fact, Conclusions of Law, and Judgment in favor of the Plaintiff.

RELIEF SOUGHT ON APPEAL

To reverse the judgment of the lower court permitting the Plaintiff to remove said bridge prior to a hearing on the merits. For an order requiring the Plaintiff to restore a proper and adequate bridge crossing over said ditch to permit the Defendant access and use of his property during the pendency of this action.

STATEMENT OF FACTS

The Defendant purchased a small tract of land north of Panguitch, Utah, in Garfield County, in the Summer of 1975. The Defendant had a small home on the property and had also moved a trailer home on the property for his use and a second trailer home for the use and occupation of his elderly mother. The Defendant is a retired person, living on a small monthly income. His mother suffered from diabetes and heart trouble and was and is under a doctor's continuous care.

The property acquired by the Defendant had a ditch that traversed his property, which was claimed by the Plaintiff company. The ditch cut diagonally through the property, making it necessary to cross said ditch to get from the main road to Panguitch, Utah, to

the Defendant's home. The ditch was only used during the Summer months to get Spring runoff water in the mountains east to the farmland near Defendant's property.

In the Fall of 1975, Defendant wrote a letter to Dale Gubler, an officer of the Plaintiff company, advising him that it was necessary to place a bridge across the ditch for the convenient access of the Defendant to his property. After several weeks without reply, the Defendant caused a bridge to be constructed from large pine poles and bridge timber and placed over the ditch. The ditch banks had built up over the years from the cleanings left by the irrigation company, and the bank was leveled off to the level of the surrounding land where the bridge was installed. The Defendant then commenced the use of the bridge without question or comment by anyone from the irrigation company. The bridge was the only means of access from one side of the property to the other by the Defendant.

In the early part of 1976, the Plaintiff began cleaning the ditch in preparation of the Spring runoff. The ditch was cleaned by use of a bulldozer. They cleaned up to the bridge, and then walked the bulldozer around the bridge and started cleaning again on the opposite side. The Plaintiff irrigation company made no attempt to clean near or under the bridge.

About the time the water was to be delivered to the fields, the Plaintiff gave notice to the Defendant that the bridge was too low and had to be raised. The Defendant was informed that the ditch under the bridge was adequate if the company would clean the ditch under the bridge, and also that the ditch was large enough, under the bridge, to carry the water if they restricted the flow to the amount of water the company was legally entitled to.

The Plaintiff filed suit to compel the Defendant to remove the bridge and for damages. The complaint also requested an order to show cause requiring the Defendant to appear before the court to show cause why an immediate order should not be entered permitting the Plaintiff to remove the bridge in advance of trial on the basis that the bridge constituted an obstruction in the ditch.

The files and records will show that an order to show cause was issued by the Judge but was never served on the Defendant. The record will also show that the Defendant was not served personally with a copy of the summons and complaint, but that the same were served on the Defendant's mother, who lives in a trailer home on Defendant's property. The summons and complaint were served on the 29th day of April, 1976, but the Deputy Sheriff for Garfield County, Utah, testified that by reason

of the fact that he knew that an order to show cause had to be served personally on the Defendant, it was not served with the summons and complaint at that time, and to the best of his knowledge it was never served on the Defendant.

On Tuesday, the 4th day of May, 1976, the Defendant contacted Robert L. Gardner, Attorney at Law, relative to representing him in the action. On that same date, Robert L. Gardner called David Mower, Attorney for Plaintiff, in an effort to resolve the matter by way of settlement if possible. After some discussion, it was agreed that the irrigation company would make some changes in the bridge for its own benefit and the parties would meet at Panguitch, Utah, on Thursday, the 6th day of May, 1976, to stipulate to a settlement and obtain a court order settling the matter, if the parties could ultimately agree on the issues, Thursday, the 6th day of May, 1976, had been selected as the appropriate time to meet as the court would be in Panguitch, Utah, for its regular law and motion calendar, and the Attorney for the Defendant had another matter scheduled before the court on that date.

On Thursday, May 6, 1976, Attorney Gardner met with Attorney Mower at the Garfield County Courthouse, at which time Attorney Mower advised that his client could not agree to the matters previously discussed by the attorneys. The matter between Plaintiff and Defendant was on the Law and Motion Calendar to be heard on the

order to show cause. Attorney Mower, approximately five (5) minutes before the calendar was called, caused a copy of the proposed order to show cause to be delivered to Attorney Gardner. As the matter was called by the court approximately thirty (30) minutes later, Attorney Gardner advised the court that since his client had not been served with the order to show cause and in view of the fact that Attorney Gardner assumed the matter had been settled, the Defendant was neither ready nor prepared to proceed with the hearing at that time but did agree to meet at anytime after the Defendant had a reasonable opportunity to prepare. The court originally acknowledged the fact that it did not have jurisdiction to proceed in the matter by reason of lack of service. (T Page 3, line 19-20.) Thereafter the court asked if the Defendant was in the courthouse, and upon being advised that he was, the court requested that the Defendant be contacted to see about proceeding immediately. Defendant's attorney again objected by reason of the court not having jurisdiction to hear the matter by reason of lack of service of process and adequate notice.

When the matter was recalled later on the calendar, Attorney Gardner again advised the Court that his client was not ready to proceed at that time; that the court had no jurisdiction to consider the matter; and further that based upon information that the Attorney

had just been given by the Defendant concerning some past differences between the Judge and the Defendant, that the Court should disqualify itself in the matter.

The court thereupon ordered the Plaintiff to proceed on the order to show cause and further ordered the Attorney for the Defendant to remain in the courtroom during the hearing although the court had been advised that the Defendant was not prepared to participate nor did Defendant intend to participate.

The Plaintiff called as his first witness Deputy Sheriff Jackson, who testified concerning the service of process on the Defendant, as there was no Return of Service on any of the papers in the file. The Deputy testified in substance that a copy of the summons and complaint had been served on Mrs. Prisley, mother of the Defendant, on the 29th day of April, 1976, but that he specifically recalled that they did not serve the order to show cause at that time as they knew that it had to be served personally. He further testified that to his knowledge the Defendant had never been served with the order to show cause up to that time.

The court then took testimony from another witness representing the Plaintiff, and, at the conclusion of the hearing, entered an order authorizing the Plaintiff to remove the bridge without providing access in any fashion for the Defendant to his property and

without requiring a bond from the Plaintiff. The Court ordered findings of fact and conclusions of law filed and entered, which among other things was to include a finding that the Defendant had acted maliciously and wilfully, although there was no evidence to that effect. (T Page 29, Line 8-14.) The Judge also stated at that point that he would disqualify himself from further consideration of this matter if the Defendant filed an affidavit of bias and prejudice. (T Page 28, Line 25-27.)

The Plaintiff thereafter removed the bridge and widened the ditch in the area of the bridge, which has now rendered the bridge of the Defendant worthless. The Defendant was then left without access to his property.

ARGUMENT

POINT I

THE COURT LACKED JURISDICTION TO HEAR THE MATTER REQUESTED BY THE ORDER TO SHOW CAUSE BY REASON OF LACK OF PROPER SERVICE AND NOTICE TO THE DEFENDANT.

The evidence is clear and not disputed that the Defendant was never served, either personally or otherwise, nor did he ever have a copy or possession of a copy of the order to show cause until a copy of the same was given to the Attorney for the Defendant approximately one-half ($\frac{1}{2}$) hour before the matter was called on for hearing.

Rule 5(a) of the Utah Rules of Civil Procedure requires that a motion for and order requiring the appearance of a party must be served upon the party. Rule 6(d) of said Rules requires that the motion and notice or order must be served not later than five (5) days before the time specified for hearing, unless a different period of time is fixed by these Rules or by order of the court.

The order to show cause signed by the Judge on April 27, 1976, was silent as to the number of days required for service prior to the date of hearing, and, therefore, the five (5) day requirement would have been in effect. Delivery of a copy of the motion and order on the day of the purported hearing would not in any reasonable manner constitute proper service on the Defendant.

Should the Plaintiff take the position that it was proceeding under Rule 65A of the Utah Rules of Civil Procedure seeking injunctive relief, the action taken by the court must also be held invalid for lack of jurisdiction and/or failure to follow the requirements of that rule.

Rule 65A(a) provides:

"No preliminary injunction shall be issued without notice to the adverse party."

No notice was given.

Rule 65A(c) further requires that before any preliminary injunctive relief is granted that the applicant must post a bond to secure the payment of damages should it later be determined that the injunction was not proper. In the instant case, the Plaintiff was asking for the removal of a bridge, and in removing the bridge the same would be damaged and possibly totally useless thereafter; yet, the court proceeded with a hearing without opportunity for the Defendant to be heard, and thereafter granted an order permitting the destruction of the bridge without requiring any security as required by law.

The court totally failed to comply with Rule 65A(b) for a temporary order without notice as might be permitted if the court had followed the law.

The court in one of its several injudicious statements agreed that a person's right to his water was too important to reconsider at some later time after proper notice, totally ignoring the rights that the owner of the fee should be entitled to.

POINT II

THE JUDGE, BASED UPON HIS PAST INVOLVEMENT WITH THE DEFENDANT, SHOULD HAVE DISQUALIFIED HIMSELF FROM THE MATTER WHEN REQUESTED TO DO SO BY DEFENDANT'S ATTORNEY.

The Judge and the Defendant, Norman Michaud, had previously had several confrontations which had resulted in the Defendant making statements and/or writing letters and purported pleadings that were highly uncomplimentary to the Judge. The difficulty between the Defendant and the Judge was also referred to the Utah State Bar Commission, and it could not be disputed by the Judge that he was most upset and disturbed by the actions of the Defendant. This all occurred prior to this hearing and the Judge was certainly cognizant of the problem.

The attorney for Defendant was not aware of this problem until after the court had attempted to force the hearing on that occasion. There was not sufficient time to prepare an affidavit of bias and prejudice, but the issue was raised by the attorney for the Defendant.

Regardless of how or what the Judge may have felt toward the Defendant, he should have either put the feeling aside and treated him as he would have any other litigant before the court or in the alternative disqualified himself and referred the matter to another judge.

The feelings of the Judge were obvious when he ruled that the actions of the Defendant in placing the bridge on the ditch and failing to thereafter remove the same were malicious and wilfull, although there was no

testimony to that effect. The Court's impression in that regard had to be the result of information otherwise obtained. Also, the court's final conclusion that if the Defendant wanted to file an affidavit, he (the Judge) would disqualify himself. (T 28). If the Judge felt that he should disqualify himself after the hearing without testimony by the Defendant, he should have done so to begin with.

Although Rule 63(b) talks in terms of requiring that an affidavit of bias and prejudice be filed with the court, it would seem that if the matter arose for the first time at the proposed hearing and the Judge in fact felt that there was sufficient grounds or basis not to act further in the matter, he should withdraw on his own at that time.

The fact is that Judge Tibbs did, on his own motion after a letter from the Defendant, on the 19th day of June, 1976, enter an order disqualifying himself from further action in the matter.

In all fairness to this Defendant, Judge Tibbs, when the question of bias was raised and in his then state of mind, should have disqualified himself and caused the matter to be assigned to another judge.

CONCLUSION

The court did not have jurisdiction to hold a hearing upon an order to show cause that was never served upon the Defendant and where neither the Defendant nor his counsel had opportunity, after proper notice, to prepare for the hearing. There was a complete denial of due process in proceeding in the matter as the court did.

Further, by reason of the prior proceedings involving Judge Tibbs and this Defendant and by reason of the attitude of Judge Tibbs against the Defendant, which was evident by the record and the subsequent actions of the Judge, Judge Tibbs should have disqualified himself prior to taking any action in the matter.

The case should be remanded with instruction requiring the Plaintiff to restore the bridge of the Defendant allowing him access to his own property and to reset the matter for hearing after proper notice, should the Plaintiff still want that action.

Respectfully submitted

ROBERT L. GARDNER
93 West 200 South
Cedar City, Utah 84720

Attorney for Appellant