

1987

Helen Schumann v. David Barber : Brief of Respondent

Utah Court of Appeals

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BRIEF

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DOCKET NO. 870177-CA

IN THE UTAH COURT OF APPEALS

No. 870177-CA

APPEAL FROM THE SMALL CLAIMS
COURT OF THE FIRTH CIRCIUT COURT,
SALT LAKE DEPARTMENT, STATE OF UTAH

HELEN SCHUMANN,

Plaintiff, Respondent,

- against -

DAVID BARBER,

Defendant, Petitioner.

146

BRIEF FOR THE RESPONDENT

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Constitution

U.S. Constitution Amend. XIV SS 14
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Statutes

SS 78-6-10 of the Utah Code Ann., as ammended 1986.10
SS 78-6-11 of the Utah Code Ann., as ammended 1983.10
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SS 78-6-10 of the Utah Code Ann., as ammended 19865

IN THE UTAH COURT OF APPEALS

No. 870177-CA

APPEAL FROM THE SMALL CLAIMS
COURT OF THE FIFTH CIRCUIT COURT,
SALT LAKE DEPARTMENT, STATE OF UTAH

HELEN SCHUMANN,

Plaintiff. Respondent.

- against -

DAVID BARBER,

Defendant. Petitioner.

BRIEF FOR THE RESPONDENT

Jurisdiction

This is the fourth attempt in the Courts by the Defendant to quash the rights of the Plaintiff. In the Constitution of the United States Amendment XIV Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

In the Utah Judicial Court SS 78-6-8: It specifically states. "with the sole object of dispensing speedy justice between the parties."

Particularly, in Utah Codes 78-6-10. If the matter is heard in the small claims department of the circuit court, the defendant may appeal the judgment of the circuit court to the Court of Appeals by filing a notice of appeal within five days of the entry of the judgement against him.

This Plaintiff's brief defends the three previous judgments and asks the Court of Appeals to once again maintain the letter of the law, to execute speedy justice and deny this appeal.

Case History

Helen Schumann, Plaintiff, commenced action against David Barber, Defendant, on the 21st day of February 1987 after unsuccessfully trying to recoup her expenses for materials and services provided for the remodeling on Defendants property. On the 14th day of March 1987 both Plaintiff and purported counsel for Defendant appeared before the Small Claims Court. The judge adjudicated in favor of Plaintiff in a default judgement. The judge felt that the Defendant had adequate and legal time to prepare for this action commenced against him.

The night before the case came before the court on March 3rd Mr. Gary S. Dye called the Plaintiff requesting that she delay court action as the Defendant had just left his office leaving him, Mr. Dye, the case and information. Mr. Dye felt that he did not have adequate time to prepare for the case. The Plaintiff explained that she had been trying to work with the Defendant in having him pay her for months. She felt that the Defendant was abusing both her and the legal system. She denied his request as the Defendant's actions had placed a great financial stress on her and that she must get it resolved immediately.

On the 4th day of March both the Plaintiff and the purported counsel for the Defendant appeared before the Small Claims Court. The purported legal counsel for the Defendant asked for a two day continuance. The Plaintiff protested. The judge denied the two day continuance request as he too felt that the Defendant had had adequate time to prepare. A default judgement was entered against the Defendant.

The Plaintiff instigated action for garnishment. The purported counsel for Defendant approached Judge Phillip Palmer, a duly appointed Judge of the Fifth Circuit Court, to quash an order of execution of judgment until such time as he could hear the Defendant's motion. On April 16, 1987 Judge Phillip Palmer entered an Order relinquishing the Fifth Circuit Court's jurisdiction over this matter and transferring the matter back to the Small Claims Court.

On May 5th, 1987 the Plaintiff and purported counsel for the Defendant again appeared before the Small Claims Court. The Plaintiff and purported counsel identified themselves. The judge asked Mr. Gary S. Dye if he had a license to practice law in the state of Utah. Mr. Dye said no but that he had licence to practice in the state of California. However he was now acting as an interested agent for the Defendant's behalf. The Small Claims Judge asked for clarification as to rather Mr. Dye was acting as agent or legal counsel. Mr. Dye stammered and stuttered. The judge determined that Mr. Dye had no legal right to represent the Defendant. The judge denied the Defendant's motion again to set aside the original default judgement.

At this point in time the Plaintiff executed garnishment against the Defendant on BYU Law School as Defendant was a teacher there. She was able to garnish \$501.33 of the amount owed to her. During this time Mr. Gary S. Dye purported legal counsel for Defendant applied for and received status of pro hac vice. On May 11th 1987 Mr. Dye filed for an appeal.

Statement of Facts

The Plaintiff used her only and last recourse in trying to recuperate her expenses for services and materials she provided to the Defendant by appealing to the Utah Judicial System. She followed legal procedure. The case has been heard three (3) times by separate judges. Each time a default judgement was entered against the Defendant. There are five (5) very definitive and clear points of arguments to support the three (3) judges decisions. This brief to the Defendant's appeal supports and defends each of the judicial actions listed above.

Statement of Issues Presented on Appeal

Point I. The appellant did not file notice of appeal within five (5) days of entry.

Point II. The timely filing of an appeal is jurisdictional.

Point III. Defendant did not exercise his right for a continuance in the presentation of the first Small Claims Court.

Point IV. Granting of motion to continue is discretionary in the trial court.

Point V. Mr. Gary S. Dye did not have proper legal status to represent the Defendant.

Summary of Argument

In all five case points the judges followed the Utah Code of Laws. The Defendant and purported legal counsel used and abused the judicial system for their own interest and not for betterment of justice. The Defendant and purported legal counsel are both members of the law profession and have wrongfully used their positions to avoid paying a long due debt.

Argument

Point I

Defendant DID NOT FILE WITHIN THE REQUIRED TIME TO APPEAL.

SS 78-6-10.

If the matter is heard in the Small Claims Department of the Circuit Court, the Defendant may appeal the judgment of the Circuit Court to the Court of Appeals by filing a notice of appeal within five days of the entry of the judgment against him.

Appellant's appeal is untimely. Entry of Small Claims Court default judgment was on May 5th. The Defendant did not appeal until six days later on May 11, 1987. This was not within the five days as required by law. This appeal is untimely.

Point II

THE TIMELY FILING IS JURISDICTIONAL.

SS 78-6-11. Time for filing the notice of appeal - Utah Rules of civil Procedure Annotated.

The failure to meet the time requirement deprives this court of jurisdiction to hear this appeal.

Point III

Defendant DID NOT EXERCISE HIS RIGHT FOR A CONTINUANCE IN THE PRESENTATION OF THE FIRST SMALL CLAIMS COURT.

SS 78-6-3 Preparation and filing of affidavit and counter affidavit - Service of order.

Not later than two days before the date of trial regarding the original affidavit, the Defendant may upon the payment of the fee prepare a counter affidavit as set forth in SS 78 - 2.5, or at his request the judge or justice or clerk of the court shall draft the counter affidavit for him. The counter affidavit shall be sworn to by the Defendant, and the judge or justice or clerk of the court shall file it and set a trial date to hear the original affidavit and counter affidavit at the same time. The date of trial shall not be more than 20 days nor less than ten days from the date of the counter affidavit. The

counteraffidavit shall be given the same case number as the original affidavit. Upon the filing of the counteraffidavit, the clerk of the court shall immediately notify the Plaintiff by telephone, if the original trial date needs to be continued. Service of the counteraffidavit shall be made by clerk or the court mailing the counteraffidavit to the address of the Plaintiff listed on the original affidavit.

If the Defendants purported counsel had merely followed the statute and filed an Answer and Counter Claim the Defendant would have automatically obtained his continuance.

Point IV

GRANTING OF MOTION TO CONTINUE IS DISCRETIONARY IN THE TRIAL COURT.

SS Rule 60 Relief from judgment or order-Utah Rules of Civil Procedure.

--Inconvenience.

Mere inconvenience or the press of personal or business affairs is not deemed as an excuse for failure to appear at trial. Valley Leasing v. Houghton, 661 P. 2d 959 (Utah 1984).

--Default judgment.

A trial court is justified in denying relief from a default judgment because of lack of timely request, long passage of time before making such request, general procedural neglect, urgency or hypertechnicality about a statute, or an almost complete absence of substance or merit in the relief for which he prayed. Heath v Heath, 541 p. 2d 1040 (Utah 1975).

--Reconsideration of previously denied motion.

Trial court committed no error by first denying a motion for summary judgment made by the Defendant, and then upon subsequent proceedings within the time limits of Subdivision (b) deciding to vacate that order and reconsidering and granting Defendant's motion. Rees v. Albertson's Inc., 587 P. 2d 130 (Utah 1978).

SS Rule 40 Assignment of cases for trial; continuance - Utah
Rules of Civil Procedure.

--Absence of party.

Continuance would not be granted because of absence of a party, unless he was a material witness, and, if so, the facts expected to be proved by him had to be stated under oath, unless the oath was waived. It was also necessary that the party had used due diligence to be present at the trial. McGrath v. Tallent, 7 Utah 256, 26 P.574 (1891)

--Discretion of court.

Refusal of trial court to postpone trial was not abuse of discretion where case was set down for trial, and had once before been continued because of absence of party who was sought by attorney who was not of record in case. Lacino v. Smith, 36, Utah 462, 105 P. 914 (1909)

--Discretion of court.

Denial of motion for continuance was within discretion of trial court. Sharp v. Canakis Gianoulakis, 63 Utah 249, 225 P. 337 (1924).

Point V

PROPER LEGAL STATUS FOR REPRESENTATION

SS 78-51-25. Practicing without a license prohibited - Action or proceeding to enforce - Exception. Utah Codes Annotated.

No person who is not duly admitted and licensed to practice law within this state nor any person whose right or license to so practice has terminated either by disbarment, suspension, failure to pay his license fee or otherwise, shall practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of lawyer within the state. Such practice, or assumption to act or holding out, by any such unlicensed or disbarred or suspended person shall not constitute a crime, but this prohibition action or proceedings, including quo warranto, contempt or injunctive proceedings shall be instituted by the Board of Commissioners of Utah State Bar; providing, that in any action or proceeding to enforce the prohibition against the practice of law, the accused shall be entitled to a trial by jury.

Nothing in this section shall prohibit a person who is unlicensed as an attorney from personally representing his own interest in a cause to which he is a party in his own right and not a assignee.

The Defendant's purported legal counsel had no legal status in Utah in the first, second and third court appearances. He did not receive pro hac vice status until filing for the appeal.

Conclusion

Based on the forgoing all three of the Plaintiff's default judgments entered by the Small Claims Judges demand affirmation by the Utah Court of Appeals.

Certificate of Mailing

I hereby certify that I mailed four true and exact copies of the forgoing Brief, postage prepaid, to Gary S. Dye pro hac vice for Defendant, partitioner John F. Clark, Sessions & Moore, 400 First Federal Plaza, 505 EAST 200 South Salt Lake City, Ut 84102. this day the 14th of October, 1987.

Helen Schumann

CONSTITUTION OF THE UNITED STATES

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Circuit Court, State of Utah

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

HELEN SCHUMANN

Plaintiff
vs
DAVID BARBER

Defendant

SMALL CLAIMS

JUDGMENT

Case No. 874001860 SC

This matter came before the court for hearing on the affidavit of plaintiff, and the defendant has been served with the affidavit of plaintiff and order to defendant, and return of service has been made. The following parties appeared at the hearing:

☒ Plaintiff Only. The defendant failed to appear at the set time, and defendant's default has been entered.

☐ Both plaintiff and defendant appeared and presented evidence.

\$ 985.00 Principal

\$ 33.00 Court Costs, and

\$ 1018.00 TOTAL JUDGMENT

DATED March 4, 19 87

with interest on the total judgment at 12% per annum from the date of this judgment until paid.

JUDGE

☐ Both Plaintiff and Defendant received copies of the Judgment at Hearing _____
Clerk

TO THE DEFENDANT ONLY:

If the above judgment was granted in favor of the plaintiff, you now have a judgment against you in the Circuit Court in the amount specified above. If you are dissatisfied with this judgment, you have FIVE (5) days from receipt of this notice to appeal the case.

TO THE PLAINTIFF:

You should mail a copy of this notice of judgment to the defendant IMMEDIATELY. The defendant has five days from receipt of the notice to appeal the case. You must complete the mailing certificate and file the original of this judgment with the court before you can proceed with any further court action.

I hereby certify that I mailed a copy of this judgment, postage prepaid addressed to the above named defendant(s) at 2025 Lincoln Park, Salt Lake City, Utah

Address & Zip Code

Dated March 5, 1987

Helen Schumann
SIGNATURE

84124

Case.....: 874001800 SC Small Claims

Filing Date: 02/13/87

Case Title:

SCHUMANN, HELEN VS BARBER, DAVID

02/13/87	Began tracking	Review on 04/14/87	KGM
	870300263 Small claims filing fee received	15.00	KGM
02/23/87	FILED AFFID & ORDER ON RET 03/04/87		JJD
02/24/87	TRL scheduled for 3/ 4/87 at 5:30 P in room D with SC1		SGL
03/03/87	TRL rescheduled to 3/ 4/87 at 5:30 P in room C with ?		SGL
03/04/87	T 471 COUNTER 1674/1779 JUDGE CONNIE HOLBROOK, PLAINTIFF PRESENT		TSB
	DEFENDANT NOT PRESENT, COURT ORDERED JUDGMENT TO PLAINTIFF,		TSB
	PRINCIPAL 985.00 PLUS COSTS 33.00 TOTAL 1018.00		TSB
03/05/87	ISSUED WRIT OF GARN & AFF		KGM
	870430375 Miscellaneous civil fee received	1.25	KGM
	FILED JUDGMENT/COPY		DEC
I 03/18/87	FILED ANSWER OF GARNISHEE 501.83		DEC
03/23/87	PKP ENTERED EX PARTE MOTION FOR ORDER STAYING ENFORCEMENT OF		KGM
	DEFAULT JUDGMENT.		KGM
	ISSUED THREE CERTIFIED COPIES OF ORDER.		KGM
	870550417 Miscellaneous civil fee received	3.00	KGM
03/24/87	CORRECTION OF ENTRY ON 03/23/87 IT SHOULD READ PKP ENTERED EX		KGM
	PARTY MOTION & ORDER STAYING ENFORCEMENT OF DEFAULT JUDGMENT.		KGM
	STAY TO APRIL 23, 1987.		KGM
I 04/01/87	FILED NOTICE OF HEARING , SET FOR HEARING 04/16/87, FILED		JJD
I	CERTIFICATE OF MAILING		JJD
I	FILED ANSWER AND COUNTERCLAIM HEARING 4-16-87		JVS
04/02/87	FILED AFFIDAVIT OF GARY G DYE		JJD
	870630464 Miscellaneous civil fee received	2.50	JCS
I	FILED MOTION TO SET ASIDE DEFAULT JUDGMENT		DEC
04/06/87	870650039 Miscellaneous civil fee received	15.00	JVS
	COUNTERCLAIM EXCEEDS SMALL CLAIMS JURISDICTION CANCELL HEARING		SGC
I 04/07/87	NEW CASE NUMBER IS 873-4923CV. . . . DO NOT USE THIS CASE		SGC
I	GO TO CIVIL CASE FOR ENTRIES ON THIS MATTER		SGC
04/16/87	C/O ORDER STAYING ENFORCEMENT OF DEFAULT JUDGMENT AMENDED TO		JVS
	READ "MATTER MAY BE HEARD BY SMALL CLAIMS COURT, JUDGE PKP"		JVS
	IF JUDGMENT IS UPHOLD THEN COUNTER CLAIM EXCEEDS JURIDICION OF		JVS
	SMALL CLAIMS COURT. PAPERS FROM SC FILE ARE IN CIVIL 873-4923		JVS
	DEFENDANT TO FILE NEW MOTION IN SC COURT. BOTH FILES NEED TO BE		JVS
	PULLED FOR HEARING		JVS
04/17/87	FILED MOTION TO SET ASIDE DEFAULT JUDGMENT		KGM
	870740335 Miscellaneous civil fee received	1.25	KGM
	FILED AFFIDAVIT OF GARY G. DYE		KGM
	FILED ANSWER AND COUNTERCLAIM		KGM
I 04/24/87	AMENDED NOTICE OF HEARING 05/05/87		JJD
05/01/87	MO scheduled for 5/ 5/87 at 5:30 P in room L with ?		SGC
I 05/05/87	MOTION TO SET ASIDE CAME BEFORE THE COURT. BASED ON THE NON-		JVS
I	APPEARANCE OF THE DEFENDANT, THE MOTION WAS DENIED AND THE ORDER		JVS
I	STAYING THE EXECUTION OF THE SMALL CLAIMS JUDGMENT WAS ORDERED		JVS
I	LIFTED AND FUNDS GARNISHED. NO FEES WERE PAID TO THE COURT FOR		JVS
I	THE COUNTERCLAIM		JVS
I	DISREGARD ENTRY THAT COUNTERCLAIM FEES WERE NOT PAID. FEES WERE		JVS
I	PAID WHEN COUNTERCLAIM WAS FILED		JVS
05/06/87	MDJ SINGED GARN JUDGMENT \$501.83		KGM

Case.....: 874001800 SC Small Claims

Filing Date: 02/13/87

Case Title:

SCHUMANN, HELEN VS BARBER, DAVID

05/06/87	ISSUED GARN EXECUTION \$501.83	KGM
	ISSUED WRIT OF GARN & AFF	KGM
	870870047 Miscellaneous civil fee received	5.00 KGM
	870870048 Transaction Reversed (Sm.Claims Fe)	5.00- KGM
	870870049 Miscellaneous civil fee received	2.50 KGM
	C/O DENIED MOTION TO VACATE JUDGMENT FOR NON APPEARANCE OF DEFEN	JCS
	DANT. T 932 C 400	JCS
I	(MOTION WAS DENIED ON 5-5-87 BY JUDGE PRO TEM, JAMES SOPER)	MAG
05/11/87	ISSUED WRIT OF GARN AND FILED AFF	BDS
	870900185 Miscellaneous civil fee received	1.25 S
	FILED NOTICE OF APPEAL	KGM
	FILED COST BOND ON APPEAL \$300.00	KGM
	FILED THREE HUNDRED DOLLAR BOND CHECK #10202	KGM
	FILED \$125.00 TO COURT OF APPEALS	KGM
	870900468 Miscellaneous civil fee received	20.00 KGM
I	FILED ANSWER OF GARNISHEE TERMINATED 4-30-87	JSG
05/14/87	TRANSFERRED CERTIFIED COPY OF NOTICE OF APPEAL, COST BOND ON	BVO
	APPEAL (SURETY NOT SIGNED), \$125.00 CHECK (CK. #10201), AND \$300	BVO
	CHECK (CK. #10202) TO THE COURT OF APPEALS.	BVO
I	FILED GARNISHMENT ON RETURN	JSG
05/15/87	870940006 Miscellaneous civil fee received	3.00 PAH
	FILED MOTION AND ORDER FOR PROPERTY BOND AND STAY OF EXECUTION	PAH
	UPON APPEAL MCCLEVE	PAH
I 06/12/87	FILED ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE DEFAULT	DEC
I	JUDGMENT	DEC
07/07/87	TRANSFERRED FILE, TAPE, INDEX OF RECORD, AND INDEX OF TRANSCRIPT	BVO
	TO COURT OF APPEALS	BVO
	TRANSFERRED WITH CASE NUMBER 873004923CV	BVO

End of the docket report for this case.