

1977

# Howard V. Drake v. Pat Clark : Brief of Appellant

Utah Supreme Court

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HOWARD V. DRAKE

Plaintiff

-VS-

BOB CLARK

Defendant

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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HOWARD V. DRAKE,	)
Plaintiff and Respondent,	)
	)
-vs-	) Case No. 15162
PAT CLARK,	)
Defendant and Appellant.	)

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BRIEF OF APPELLANT

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STATEMENT OF KIND OF CASE

The original action filed by Plaintiff against Defendant claims a partnership with Defendant and requests an accounting and dissolution. The case is before the Utah Supreme Court on Interlocutory Appeal regarding a jurisdictional question dealing with Rules 4 (b) and 15 (c), Utah Rules of Civil Procedure.

DISPOSITION IN LOWER COURT

The District Court for Washington County overruled and denied Defendant's "Motion to Quash Service of Process and to Order Dismissal of Complaint and First Amended Complaint" based upon Plaintiff's failure to properly serve Summons upon Defendant within one year of the date of filing the Complaint.

RELIEF SOUGHT ON APPEAL

Defendant and Appellant seeks reversal of the lower Court's order overruling and denying its Motion to Quash and to Dismiss Complaint and First Amended Complaint.

STATEMENT OF FACTS

On January 26, 1976 Howard V. Drake filed his complaint in Fifth District Court for Washington County naming Pat Clark as Defendant (R. 1). Clark was served with process in Las Vegas, Nevada on January 27, 1976 (R. 11). On February 17, 1976 the Defendant Clark filed his Motion to Quash Service of Process based upon the failure of the serving officer to endorse upon the copy of the Summons served upon the Defendant the date of service and sign his name and official title as required by Rule 4 (j), Utah Rules of Civil Procedure (R. 12-15). The motion was heard and granted on April 12, 1976 (R. 16) and the Court entered its order quashing the service on May 13, 1976 (R. 17).

The Defendant Clark was again served with process in Las Vegas on May 18, 1976 (R. 18). Thereafter Clark filed his Motion to Quash based upon the fact that the Summons served upon him was defective in that it did not set forth the number of days in which he had to answer the Complaint (R. 20). The Motion to Quash was heard and granted on June 14, 1976 (R. 23) and an order to that effect was entered by the court on June 17, 1976 (R. 24).

On December 3, 1976 the Plaintiff, without having first obtained leave of court, filed his First Amended Complaint

(R. 25). Clark was served with a copy of the First Amended Complaint and summons on February 11, 1977 in Las Vegas (R. 34). On March 9, 1977 the Defendant filed his "Motion to Quash Service of Process and to Order Dismissal of Complaint and First Amended Complaint" based upon the fact that service of process had not been perfected within one year of the date of the Complaint being filed as required by Rule 4 (b), Utah Rules of Civil Procedure (R. 36). This motion was heard on April 11, 1977 and on that date was overruled and denied with the Defendant being given twenty days in which to answer the First Amended Complaint (R. 44). The Court entered an order to that effect on April 25, 1977 (R. 45) and from that order Defendant has petitioned for leave to perfect an Interlocutory Appeal to the Utah Supreme Court, which petition has been granted.

#### ARGUMENT

##### POINT ON APPEAL

THE LOWER COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO QUASH SERVICE OF PROCESS AND TO ORDER DISMISSAL OF COMPLAINT AND FIRST AMENDED COMPLAINT AS THE SUMMONS WAS NOT SERVED UPON THE DEFENDANT WITHIN ONE YEAR OF THE FILING OF THE COMPLAINT.

It is clear from the record that proper summons was not served upon the Defendant within one year of the filing of the original complaint. In that regard, Rule 4 (b),

Utah Rules of Civil Procedure, reads as follows:

(b) TIME OF ISSUANCE AND SERVICE. If an action is commenced by the filing of a complaint, summons must issue thereon within three months from the date of such filing. The summons must be served within one year after the filing of the complaint or the action will be deemed dismissed, provided that in any action brought against two or more defendants in which personal service has been obtained upon one of them within the year, the other or others may be served or appear at any time before trial.

The provision of Rule 4 (b), Utah Rules of Civil Procedure, are jurisdictional. FIBREBOARD PAPER PRODUCTS CORP. v. DIETRICH, 25 U 2d 65, 475 P. 2d 1005. In the Dietrich case wherein the Utah Supreme Court construed that part of the rule dealing with the requirement that summons be issued within three months after the date of filing the complaint, the court held that issuance of summons more than six months after the complaint was filed was not timely under the rule and as a result the trial court failed to obtain jurisdiction over the defendant.

It is submitted that the same logic as mentioned in the Dietrich case must apply to the remainder of Rule 4 (b) requiring that summons be served upon a Defendant within one year of the filing of the complaint and if such is not accomplished then the trial court is not given proper jurisdiction and therefore cannot proceed to determine the matter on its merits.

Rule 4 (b) also provides that if the summons is not served within one year from the date of filing the complaint the complaint will be "deemed dismissed". One can only

assume that the Utah Supreme Court, in adopting the rule, meant exactly what the rule says and would deem the complaint dismissed unless service was perfected in accordance with its mandate. No exceptions or alternatives were set forth in the rule.

Plaintiff and Appellant will argue that the Defendant submitted himself to the jurisdiction of the court by including in his motion to quash a request that the complaint be dismissed. In that regard, it is pointed out that the motion of the Defendant went to the jurisdictional aspects of the service and complaint and first amended complaint and did not attack the complaint or first amended complaint on its merits. The motion itself sets forth the fact that it was filed as a special appearance to contest jurisdiction. As a result, the Defendant contends that he did not submit himself to the jurisdiction of the court by filing the motion but merely filed his motion to quash and to dismiss asking the court to quash the service and to dismiss the complaint and first amended complaint as a matter of record as the various complaints were already deemed dismissed by virtue of the mandate contained in Rule 4 (b).

The fact that a "First Amended Complaint" was filed and that process was served within one year from the date of that filing does not correct the defect in the process. Rule 15 (c), Utah Rules of Civil Procedure, pro-

vides that such amendment relates back to the date of the original pleading. Because of this, the Plaintiff must still live with his original filing date. If Rule 15 (c) were not given effect and enforced a Plaintiff could file an action and issue summons and then hold the matter in abeyance for years without ever obtaining service of process merely by amending his pleadings annually.

The Plaintiff has designated as part of his record on appeal certain affidavits signed by the attorney for Plaintiff purporting to set forth the difficulty he has had in obtaining service upon the Defendant. Apparently the statements given therein are made in an attempt to lead one to believe that the Defendant was evading service of process. While such activity is not admitted by the Defendant, it is his position that whether or not he was evading process or its service would have no effect on the issues before the court. If failure to effect proper service is jurisdictional and if failure to make such service within one year of the filing of the complaint is jurisdictional then the fact that Defendant may be evading service would have no effect on granting the trial court jurisdiction. The burden is upon the Plaintiff to obtain proper service upon a Defendant and in accordance with the appropriate rules and if he fails to accomplish this then the court involved does not have jurisdiction to hear the matter on its merits or to require the Defendant to make an appearance and answer or otherwise

plead to the complaint. The issue as to whether or not a Defendant is attempting to evade service of process is immaterial.

In conclusion, the Defendant would call the court's attention to the fact that he has been served three times with process out of the above entitled matter. All three times the services were defective, the first being that the serving officer did not endorse the date of service and sign his name and official title to the summons served, the second being that the summons served did not contain the number of days in which to answer the complaint and the third being that the process was not served within one year from the date the original complaint was filed.

#### CONCLUSION

Because of the failure of the Plaintiff to properly serve the Defendant within one year of the date the original complaint was filed the process served upon him was defective and did not confer jurisdiction on the lower court to hear the matter on its merits. The ruling of the lower court should be reversed and the summons and service quashed and the complaint and amended complaint dismissed.

RESPECTFULLY SUBMITTED.

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