1977

Howard V. Drake v. Pat Clark : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

Interlocutory Appeal from decision of Fifth Judicial District Court of Washington County, State of Utah, Honorable J. Harlan Burns, District Judge, presiding, overruling and denying Appellant's Motion to Quash Service of Process and to Order Dismissal of Complaint and First Amended Complaint.

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BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

The action filed by the Plaintiff against the Defendant, in its First Cause of Action, alleges the existence of a partnership between Plaintiff and Defendant, and demands an accounting. The Second Cause of Action sounds in frauds; the Third Cause of Action seeks unpaid wages due to Plaintiff from Defendant; the Fourth Cause of Action sounds in unjust enrichment; while the Fifth Cause of Action is one for replevin. The matter is before the Supreme Court on interlocutory appeal, the appeal being brought by Defendant, who claims error in the Order of the lower court.

DISPOSITION IN LOWER COURT

The Fifth Judicial District Court for Washington County denied Defendant's "Motion to Quash Service of Process

and to Order Dismissal of Complaint and First Amended Co... finding that failure to properly serve summons upon Defe... within one year of the date of filing the Complaint was ... jurisdictional in nature, where Defendant was evading ser... of process.

RELIEF SOUGHT ON APPEAL

Defendant and Appellant CLARK seeks reversal of the lower court's Order. Plaintiff and Respondent seeks affirmation of the same Order.

STATEMENT OF FACTS

On or about 23 January 1976, process was sent to the Clark County Sheriff for service upon Defendant and Appellant PAT CLARK (R. 38). On 26 January 1976, Plaintiff DRAKE filed his Complaint in the Fifth Judicial District Court of Washington County, naming CLARK as Defendant (R. 1). CLARK was served with process in Las Vegas, Nevada, on 27 January 1976 (R. 11). The serving officer failed to endorse on the copy of the summons delivered to CLARK the date of service or the serving officer's signature (R. 12). On 17 February 1976, Defendant CLARK filed a "Motion to Quash Service of Process" (R. 12-15). On 23 February 1976, process was again sent to the Clark County Sheriff to re-serve PAT CLARK, but the summons sent for service lacked the time in which answer was required (R. 19).

On 18 May 1976, Defendant CLARK was again served with process (R. 18). CLARK filed a Motion to Quash based

upon the fact that the summons failed to set forth the number of days in which he had to answer the Complaint (R. 20). Service was quashed by order of the lower court on 17 June 1976 (R. 24).

On 3 December 1976, Plaintiff, as a matter of right, pursuant to U.R.C.P. 15, filed his First Amended Complaint (R. 25).

CLARK was served with a copy of the First Amended Complaint and summons on 11 February 1977, in Las Vegas, Nevada (R. 34). On 9 March 1977, CLARK filed a "Motion to Quash Service of Process and to Order Dismissal of Complaint and First Amended Complaint" (R. 36). This motion was heard on 11 April 1977, and was overruled and denied. CLARK was given 20 days in which to answer the First Amended Complaint (R. 44). A written order to that effect was signed on 25 April 1977 (R. 45).

Other than the 3 instances of service upon Defendant CLARK, the record shows 16 other visits by members of the Clark County Sheriff's Department to Defendant CLARK's home and place of business, and at least one visit by the Washington County Sheriff to Defendant's ranch in Utah, all in effort to serve Defendant CLARK. The record also shows numerous attempts by counsel for Plaintiff to get the United States Marshal and private process servers to accomplish service (R. 38-42).

Defendant CLARK now appeals the order of the

District Court overruling and denying his "Motion to Quash Service of Process and to Order Dismissal of Complaint and First Amended Complaint".

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S "MOTION TO QUASH SERVICE OF PROCESS AND TO ORDER DISMISSAL OF COMPLAINT AND FIRST AMENDED COMPLAINT" FOR THE REASONS THAT (1) DEFENDANT CLARK WAS PROPERLY SERVED WITHIN THE TIME REQUIRED BY LAW, (2) THE PROVISION OF U.R.C.P. 4(b) APPLICABLE HERE IS NOT JURISDICTIONAL BUT PROCEDURAL IN NATURE, AND (3) DEFENDANT CLARK BY REASON OF HIS CONDUCT IN EVADING SERVICE OF PROCESS CANNOT NOW BE HEARD TO COMPLAIN CONCERNING THE TIME REQUIRED TO ACCOMPLISH SERVICE UPON HIM.

U.R.C.P. 4(b) states:

> "If an action is commenced by the filing of a complaint, summons must issue thereon within three months from the date of 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."

(1) Defendant CLARK claims that because Plaintiff amended his complaint and issued summons on 1 December 1976 which complaint and summons were served upon Defendant CLARK on 11 February 1977, that the service should be quashed, based upon the wording of U.R.C.P. 4(b). It is clear that the wording of the rule does not support Defendant's claim. The rule provides that the summons must issue within 3 months of the date of filing of the complaint. The record

before the court shows that a summons did in fact issue within 3 months from the date of the filing of the complaint. The wording of the rule also provides that a summons must be served within 1 year after the filing of the complaint, and Defendant claims that this wording is a basis for quashal and dismissal. If the court were to adopt Defendant's contention, it would be ruling that no complaint could ever be amended if it were to be amended in such a manner that the amended complaint could not be served within 1 year of the filing of the complaint. This is clearly beyond the meaning or the intent of U.R.C.P. 4(b).

It is obvious from the wording of U.R.C.P. 4(b) that the Utah Supreme Court, in adopting the rule, merely meant to prevent a dilatory plaintiff from allowing an action to lie at rest without proceeding upon the same. In this case, the record shows in excess of 20 attempts to accomplish service upon Defendant, and shows that the entire year following the filing of the original complaint was spent in diligent effort by Plaintiff attempting to serve Defendant CLARK, who has patently attempted to evade service of process upon him, in derogation of the dignity and authority of the courts of the State of Utah. Equity, justice and good sense dictate that U.R.C.P. 4(b) not be interpreted to bar a diligent plaintiff.

Further, Plaintiff having amended his complaint on 3 December 1976 to show Defendant's correct county of residence,

it was physically impossible to issue a summons to requir Defendant to appear and answer such First Amended Complai before the amendment took place. Defendant's contention, logically, would require that Plaintiff issue a summons o first amended complaint prior to knowing that there was a need to amend the complaint. A proper interpretation of U.R.C.P. 4(b) would be to read it as follows, underlined words being added to the text of the rule:

> "If an action is amended by the filing of an amended 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 amended 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."

Underlined words added to show proper interpreta of U.R.C.P. 4(b).

Since summons issued within 3 months of the filin of the First Amended Complaint, and since service of such summons and First Amended Complaint occurred within 1 year of the filing of the First Amended Complaint, service upon Defendant CLARK was timely.

(2) Defendant CLARK claims that the provision o U.R.C.P. 4(b) here applicable is jurisdictional in nature. Such is not the case. Although this court has in some instances deemed other provisions of U.R.C.P. 4(b) to be

jurisdictional in nature, a reading of all such cases clearly shows that such holdings were based upon the failure of the plaintiffs in those cases to diligently pursue the various actions ruled upon. In this case, Plaintiff has been more than diligent in his efforts to obtain service of process upon Defendant CLARK, and the length of time required to serve Defendant CLARK was the direct result of CLARK's evasion of service of process, and not any delay on the part of Plaintiff.

Further, the wording of U.R.C.P. 4(b) shows that this court did not intend to mandatorily dismiss an action where service upon a defendant was accomplished more than 1 year following the filing of the complaint. The wording is that the action "will be deemed dismissed", not that the action "shall be dismissed". There are no cases interpreting the wording quoted, and there is no similar federal rule to which we might look for further interpretation. However, upon its face, the use of the words "will be deemed" seems to suggest that the Clerk of a trial court may merely deem the action dismissed for his record keeping purposes. Such ruling would favor the hearing of an action upon its merits, rather than permitting Defendant CLARK to avoid appearing before a court of the State of Utah to answer for his delicts.

Defendant CLARK's contention that this action should be dismissed in the lower court, if adopted, would totally invalidate the statutes of the State of Utah with

respect to limitation of actions. CLARK's contention is that there is an automatic one-year statute of limitations upon any cause of action once a complaint has been filed. If service did not take place within a year of filing of complaint, CLARK contends that the action is invalid, contrary to the judgment and decision of the Utah State Legislature which has, in many cases and in this case, provided for limitations upon actions far in excess of the one-year period which Defendant's contention would require the Court to adopt.

In view of all of the foregoing, it is clear that the provision of U.R.C.P. 4(b) here applicable is procedural not jurisdictional in nature.

(3) In any event, Defendant CLARK should be barred and estopped from claiming that this action should be dismissed and service of process quashed, by reason of said Defendant's own wrongful conduct in purposely evading service of process upon him. CLARK should be estopped from claiming that more than one year had passed between the filing of the complaint and service of process upon him.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S "MOTION TO QUASH SERVICE OF PROCESS AND TO ORDER DISMISSAL OF COMPLAINT AND FIRST AMENDED COMPLAINT" FOR THE REASON THAT DEFENDANT PAT CLARK VOLUNTARILY SUBMITTED HIMSELF TO THE JURISDICTION OF THE COURTS OF THE STATE OF UTAH AND SHOULD THEREFORE BE REQUIRED TO ANSWER THE FIRST AMENDED COMPLAINT.

Defendant CLARK asserts that he appeared before the courts of the State of Utah solely for the purpose of contesting jurisdiction. Such statement would be true if there had been filed solely a motion to quash. The only proper remedy available where a special appearance is sought to be made is a motion to quash. Defendant CLARK did not choose to make a special appearance before the lower court solely to contest the jurisdiction of said Court, but went further, made a general appearance, and sought to have the entire action dismissed, including the complaint and first amended complaint, which is relief much more extensive than simple quashal of process.

CLARK's filing of his "Motion to Quash Service of Process and to Order Dismissal of Complaint and First Amended Complaint" constituted a general appearance which submitted CLARK to the general jurisdiction of the trial court for all purposes. In the case of Barnato v. Second Judicial District Court, 353 P.2d 1103 (Nev. 1960), the Nevada Supreme Court considered whether or not the filing of a motion to dismiss constituted a general appearance. Nevada has adopted the Federal Rules of Civil Procedure, with some modifications, as has Utah. Under wording almost exactly that of the Utah rules, the Nevada Supreme Court held that the defendant wife's filing of a motion to dismiss because of lack of jurisdiction over her person, lack of sufficiency of process, and insufficiency of service of process, constituted a general appearance

involving the general jurisdiction of the trial court, and did not constitute a special appearance.

Utah has specifically recognized and held that the filing of a motion to dismiss constitutes a general appearance since such a motion invokes the power of the court to grant relief on other than jurisdictional grounds. See Ricks v. Wade, 97 Utah 402, 93 P.2d 479 (1935), involving a divorce action in which a non-resident defendant, after having been served with process outside of Utah, moved to quash service of process but at the same time requested a dismissal of the cause, thereby entering a general appearance and submitting himself voluntarily to the jurisdiction of the court. Also see Clawson v. Boston Acme Mines Development Company, 72 Utah 137, 269 P. 147, 59 A.L.R. 1318. The facts in this case are very similar to those involved in Ricks, above. Here, CLARK was served outside the State of Utah. He filed a motion to quash, and also to dismiss. The motion to dismiss is an invocation of the general jurisdiction of the courts of the State of Utah, and CLARK has therefore voluntarily entered an appearance before the same. Such being the case, the trial court did not err in overruling and denying CLARK's motion to dismiss.

POINT III

IN THE EVENT THIS COURT REVERSES THE TRIAL COURT, AND ORDERS THE CASE REMANDED FOR DISMISSAL, THIS COURT SHOULD REQUIRE THAT SUCH DISMISSAL BE WITHOUT PREJUDICE.

U.R.C.P. 4(b) cannot be construed to be a court-adopted provision negating the statutes of limitations passed by the Utah State Legislature. Defendant's contention is that the entire matter should be dismissed. If it is dismissed, such dismissal should be without prejudice, and Plaintiff should be specifically permitted to refile and reserve Defendant, because a ruling in the nature of a dismissal with prejudice would, in effect, negate the statutes of limitations applicable to Plaintiff's various causes of action. Further, U.C.A. 78-12-40 (1953, as amended) states:

> "If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure."

The Utah State Legislature having expressed its policy that actions which do not fail upon the merits should not be barred, this Court should affirm the trial court's order, but failing that, should remand the case to the trial court for dismissal without prejudice, in order to allow Plaintiff to refile the action, and reserve Defendant CLARK.

CONCLUSION

This Court should affirm the ruling of the trial court, and remand this matter to the District Court for further proceedings. However, in the event that this Court

reverses the ruling of the trial court, the matter should remanded to the trial court for a dismissal without preju

DATED: 1 August 1977.

Respectfully submitted,

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By _____
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