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Bank of Ephraim v. Halbert Davis, Et Al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

BANK OF EPHRAIM,
A Utah Corporation,

Plaintiff-Respondent,

vs.

HALBERT DAVIS, et al,
Defendant-Appellant.

Case No. 15349

BRIEF OF APPELLANT

APPEAL FROM AN ORDER OF THE DISTRICT COURT
IN AND FOR SANPETE COUNTY, UTAH
THE HONORABLE DON V. TIBBS, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE
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BANK OF EPHRAIM,	:	
A Utah Corporation,	:	
	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 15349
	:	
HALBERT DAVIS, et al.,	:	
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from an Order of the Sixth Judicial District Court in and for Sanpete County, Honorable Don V. Tibbs presiding, denying Appellant's Motion to have pre-judgment Writ of Attachment discharged.

DISPOSITION IN LOWER COURT

Appellant filed a Motion to have a prejudgment Writ of Attachment, previously obtained by the Plaintiff-Respondent, discharged on the ground that it was improperly issued. Appellant submitted written Memorandum and Affidavit in support of his Motion. Plaintiff-Respondent submitted written Memorandum in opposition to the Motion. The motion was orally argued to the court. From an order of the court denying the Appellant's Motion, this appeal is taken.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Supreme Court declare that the lower court was in error in failing to grant appellant's motion to have said Writ of Attachment discharged, and to direct the lower court to discharge said Writ of Attachment consistent with due process of law.

STATEMENT OF FACTS

This case was originally brought by the Plaintiff-Respondent, Bank of Ephraim, to foreclose a mortgage it had with the Appellant, Halbert Davis, and also to foreclose out creditors of the appellant which are not a part of this present appeal, which mortgage was secured by several parcels of real property owned by the appellant located in Manti, Utah.

Respondent was successful in its foreclosure action and the trial court entered its Findings of Fact and Conclusions of Law, and entered its Decree of Foreclosure on the 6th day of February, 1976.

One of the parcels of real property that was involved in the foreclosure action had a building located on it in which the appellant had operated a cafe business. In said building was a substantial amount of personal

property of the appellant, which property in part was equipment and inventory associated with operation of his cafe business. Respondent had no security interest in the above mentioned personal property.

On the 6th day of February, 1976, the Respondent filed an Affidavit for Writ of Attachment together with an Undertaking for Writ of Attachment. The Deputy District Court Clerk then issued a Writ of Attachment on the same day, February 6, 1976. The Writ of Attachment directed the Sheriff of Sanpete County to attach and safely keep all of the property of the defendant Halbert Davis, located at and within the property known as Hals Palace Cafe, 61 South Main Street, Manti, Utah. The Sheriff filed a Sheriff's Return indicating that he served the Writ of Attachment on Halbert Davis on the 9th day of February, 1976; but the Sheriff failed to file a certificate containing a full inventory of the property attached.

On March 16, 1977, the trial court entered an Order of Sale covering the property contained in the foreclosure. On April 12, 1977, a Sheriff's Sale was held, which resulted in a deficiency judgment against appellant.

Appellant filed a Motion to have the Writ of Attachment discharged on June 15, 1977. The denial of that Motion is the basis for the appeal herein.

ARGUMENT

POINT I: THE WRIT OF ATTACHMENT, DATED FEBRUARY 6, 1976, WAS A PRE-JUDGMENT WRIT OF ATTACHMENT. THE LAW WITH RESPECT TO PRE-JUDGMENT WRIT OF ATTACHMENTS WAS NOT FOLLOWED AND TO BE VALID SHOULD HAVE BEEN FOLLOWED.

A mortgagor does not become personally liable in a foreclosure action until after a foreclosure sale of the security, and then only for the deficiency remaining unpaid. Utah has long followed the so called "one action rule" with respect to foreclosure of mortgages. Under this rule there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate. This action involves the obtaining of a judgment with respect to the debt secured by the real estate and directing the Sheriff to sale the property involved to satisfy the judgement, and if sufficient proceeds are not obtained from the sale, then a deficiency judgment is to be docketed by the clerk. This rule is expressed in sections 78-37-1 and 78-37-2 U.C.A. 1953 as amended.

There is a line of Utah cases dating from early in the state's history holding that courts in mortgage foreclosure cases can impose personal liability on the mortgagor only after having ordered a sale of the mortgaged property and after the sale thereof has been held according to law; and then only in the case of a deficiency. See Jensen v. Lichtenstein et. al., 45 Utah 320, 145 P. 1036 (1915); Hammond v. Wall, 51 Utah 464, 171 P. 148 (1917); First National Bank of Salt Lake City v. Haymond et. al., 89 Utah 151, 57 P. 2d 1401 (1936); First National Bank of Coalville v. Boley, 90 Utah 341, 61 P. 2d 621 (1936). These cases have not been overruled and are controlling case law.

Appellant, Halbert Davis, did not become personally liable under the Judgment and Foreclosure Order of the court until after April 12, 1977, when the Sheriff's sale occurred and a deficiency resulted and said deficiency was docketed by the clerk. Therefore the Writ of Attachment issued by the Clerk of the District Court on February 6, 1976, and covering the appellants' personal property was a pre-judgment writ of attachment and its issuance legally

must be governed by the rules and law pertaining to pre-judgment writ of attachments.

POINT II: APPELLANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN A PRE-JUDGMENT WRIT OF ATTACHMENT WAS ISSUED WITHOUT PRIOR NOTICE, HEARING, OR COURT SUPERVISION.

The Writ of Attachment issued February 6, 1977, which attached the appellant's personal property located at Hal's Palace Cafe, was issued without any prior notice to the appellant or hearing, and was issued by the clerk of the district court. This court in March, 1976, approved Rule 64A of the Utah Rules of Civil Procedure. Rule 64A concerns itself with prejudgment writs of replevin, attachment and garnishment. It provides that before any prejudgment writ may be issued, notice must be given to the adverse party and an opportunity to be heard must be given, except under very specific circumstances. It also provides that such a writ shall be issued only on written motion and pursuant to a written order of the court. This Court approved Rule 64A to bring the Utah Rules of Civil Procedure in conformity with recent U.S. Supreme Court decisions involving prejudgment writs hereafter discussed.

The leading case in the area is Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), wherein the U. S. Supreme Court declared invalid the replevin statutes of Florida and Pennsylvania. The invalidated statutes permitted a secured party under an installment contract to repossess goods, without notice or hearing and without judicial order or supervision and the sheriff operated under a writ issued by the clerk of the court at the behest of the seller. The Court held that an official seizure carried out, without notice, and without opportunity for a hearing or other safeguard against wrongful repossession violated Fourteenth Amendment right to Due Process of Law.

There have been several subsequent U. S. Supreme Court cases that have modified or clarified the Fuentes decision. In Mitchell v. W. T. Grant Co., 416 U.S. 602 94 S. Ct. 1895, 40 L. Ed. 406 (1974), the U. S. Supreme Court upheld Louisiana's sequestration statute, although it didn't require prior notice or hearing. The Court found that due process was not violated because the statute entitled the debtor immediately to seek dissolution of the writ, and the writ of sequestration could only be issued by a judge. The writ could also only be issued upon the

filing of an affidavit going beyond mere conclusory allegations and clearly setting out the facts entitling the creditor to sequestration.

The U. S. Supreme Court in the case North Georgia Finishing Inc. v. Di-Chem Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975), held the Georgia garnishment statute unconstitutional as a violation of the due process clause of the Fourteenth Amendment, in that it deprived a person of the use of property, pending litigation, and making no provision for prior notice, an early hearing or participation by a judicial officer.

The Arizona and Idaho Supreme Courts recently declared unconstitutional under the Fourteenth Amendment their replevin statutes which had provisions substantially similar to Rule 64B U.R.C.P, before the modifications made by Rule 64A. See Massey-Ferguson Credit Corp. v. Peterson, 96 Idaho 94, 524 P. 2d 1066 (1974); Thorton v. Carson, 111 Ariz 490, 533 P. 2d 657 (1975).

The appellant in the present case had a substantial amount of his personal property attached without prior notice or a chance for a timely hearing. The writ of attachment involved was also issued without judicial supervision by the clerk of the district court. Further the

Sheriff did not file an inventory of the items attached, to enable the appellant to know exactly which items the Sheriff was holding under his supervision.

The appellant has been damaged as a result of this long period of attachment. He has been unable to deliver several items of equipment to other creditors who had security interests covering them. Since no inventory was filed, the appellant was uncertain as to what property was attached; and was therefore prevented from freely using his personal property.

The procedure followed in the issuance of the Writ of Attachment in this case violated the appellant's right to due process of law under the Fourteenth Amendment, as set forth by the U.S. Supreme Court in the cases cited above. This court also recognized the deficiency of the former rule, when you approved Rule 64A, which requires prior notice, hearing, and judicial supervision before a pre-judgment writ of attachment is issued. The lower court therefore erred in denying appellant's motion to have writ of attachment discharged.

CONCLUSION

Since a deficiency judgment had not been obtained against the appellant at the time the writ of attachment was issued, it was a pre-judgment writ of attachment, and the law covering pre-judgment remedies should have been

followed. The lower court therefore erred in failing to discharge the writ of attachment because the appellant's right to due process was violated in its issuance. This court should direct the lower court to discharge the writ of attachment which was improperly issued.

Respectfully submitted,



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Attorney for the
Appellant-Defendant