2001

Leona M. Nelson Martin v. George L. Nelson Jr. : Brief of Appellant

Utah Supreme Court

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IN THE

STATE OF UTAH

LEONA M. NELSON MARTIN,
Plaintiff and Respondent,

vs.

GEORGE L. NELSON, JR.,
Defendant and Appellant.

Case No. 13805

APPELLANT'S BRIEF

Appeal from Order Denying Motion to Set Aside Judgment and Quash Service of Summons, Honorable Marcellus K. Snow, Judge.

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NATURE OF THE CASE

Appellant brings this appeal to challenge the validity of a Judgment rendered against him by default where the service of process on which the Judgment was based was fatally defective.

DISPOSITION IN LOWER COURT

Respondent obtained a Judgment by default against Appellant. Appellant upon learning of the entry of the Judgment appeared specially through counsel to challenge the Court's jurisdiction on a Motion to Quash the Service of Summons and Set Aside the

Judgment. The lower court, Honorable Marcellus K. Snow, presiding, denied the Motion.

RELIEF SOUGHT ON APPEAL

Appellant appears specially through counsel and seeks to reverse the ruling of the Lower Court denying Appellant's motion to Set Aside the Judgment and Quash Service of Summons.

STATEMENT OF THE FACTS

The Plaintiff-Respondent filed a separate suit in the Third District Court of Salt Lake County, Utah, against the Defendant - Appellant to renew Judgments previously granted to the Plaintiff - Respondent in a divorce action. Service was effected upon the Defendant - Appellant in the State of California the place of his residence for many years. No answer was filed by Defendant - Appellant and after a delay of over a year the Plaintiff - Respondent defaulted the Defendant - Appellant and obtained a Judgment against him. The copy of the Summons with Complaint attached was served upon the Defendant - Appellant in California. The person making the service failed to place the date and sign his name, adding his official title, if an officer, upon the copy left with the Defendant-Appellant, although his return so certifies. The Summons states that action is being taken pursuant to the provisions of Section 78-27-25 through 28, inclusive, Utah Code Annotated (1953), as amended. The Summons provides that

the named defendant must answer the Complaint within 20 days from the date of service.

No appearance was made by the defendant and Judgment by default was therefore granted on November 9, 1973 by the Court.

ARGUMENT

POINT I

THE LOWER COURT DID NOT HAVE JURISDICTION OVER THE DEFENDANT-APPELLANT DUE TO FATALLY DEFECTIVE SERVICE OF PROCESS AND THE JUDGMENT ENTERED BY DEFAULT IS VOID AND OF NO LEGAL EFFECT.

A. The service upon the Defendant - Appellant in California was fatally defective due to the failure of the process server to endorse the date and place of service and add his name thereto upon the copy of the Summons which was served upon the defendant at that time as required by Rule 4(j) Utah Rules of Civil Procedure.

The file shows that the process server, a Gordon M. Keenoy, certifies in his return that he did endorse the date and the place of service and added his name thereto. However, the Affidavits of the Defendant and his attorney, *supported by the actual copy of the Summons with Complaint Attached,* which was served on the

defendant, clearly indicates that the process server did not in fact endorse upon the copy of Summons left with Defendant the date and the place of service and add his name thereto. This fact is not controverted by opposing Affidavits.

This Court has ruled in the case of ***Rees vs. Scott,*** 8 U2d 134, 329 P2d 877, that failure of the deputy sheriff to put the date on a copy of a Summons left with the Defendant rendered the Summons defective and the defect was fatal to the Court's obtaining jurisdiction of that particular defendant.

Again this Court has ruled that the formalities of proper service of process must be strictly adhered to in the case of *Utah Sand & Gravel Products Corporation vs. Tolbert,* 16 U2d 497, 402 P2d 703, where the Defendant was Summoned to appear in the "City Court" whereas the Summons should have stated "District Court" and the Plaintiff's attorney attempted to correct the error by an Exparte Order and Notice to the defendant by letter, advising him of the proper court where the action was filed. This Court held that even though the Defendant was fully informed as to the error and knew that the action was filed properly in the Third District Court of Salt Lake County, still he could ignore the service of Summons to appear in the "City Court," corrected to "District Court" and consider it invalid and this Court so held.

In the case of *Redwood Land Company vs. Kim-*

ball, et al., 20 U2d 113, 433 P2d 1010, this Court restated its position:

> "It is with respect to the *correctness of the Summons* itself, and the *due service thereof,* which notifies the defendant that he is being sued, and *by which jurisdiction over him is acquired, that there must be strict compliance."* (emphasis added)

The facts in the instant case clearly show that the problem was not that of a faulty return which could be corrected by an amended return or a return which was tardy which is not jurisdictionally fatal as held in the Redwood Land Company case, supra, but rather the problem involves a fatal jurisdictional defect i.e., actual failure of the process server to endorse the date and place of service and afix his name to the copy of the Summons left with the Defendant.

In the instant case the return of service of Summons appears on its face to comply with the full requirements of Rule 4(j); however, the Affidavits of Defendant-Appellant and his counsel with the actual copy of the Summons with Complaint, Exhibit 1-D, which was, in fact, served upon the Defendant, indicate to the contrary. How, then, should the Court view this apparent variance in the material facts as to how service of process was made as required?

There is a difference of judicial opinion as to whether or not the return of the process server is conclusive or whether the return is only prima facie evidence

of proper service which may be impeached by proper extrinsic evidence in a direct proceeding challenging the validity of the actual service of process.

This issue is discussed in 62 Am.Jur.2d *Process* Section 177 through Section 181, inclusive. While no Utah cases are cited in this treatise it is submitted that the better rule is the more liberal rule as followed by the United States Supreme Court as stated in the case of *Fitzgerald and M. Construction Company vs. Fitzgerald,* 137 U.S. 98,34 L.ed. 608, 11 S.Ct. 36, paraphrased in this treatise on page 960:

> ". . . the legal sufficiency of a return, on the facts stated therein, is always open to question; that it is the duty of the Court to take notice of the sufficiency or insufficiency of the return of its officers to its process; and that if from the facts stated it appears that no valid service was had, the service will be set aside."

In a recent decision by the Supreme Court of the State of Arizona in the case of *Marsh vs. Hawkins,* 437 P2d 978, is was held that:

> ". . . the return may be impeached by a party if clear and convincing evidence of the return's falsity is presented to the Court. This was done in the instant case . . . . . We decline to hold a process server an absolute insurer of the truth of the return."

Upon receiving the copy of the Summons with

Complaint attached on which the process server failed to endorse the date, place of service and his name, did the Defendant - Appellant in the instant case have any affirmative duty to search the record to see whether or not a false return of service of Summons had been made? The Arizona Court in the *Marsh vs. Hawkins* case, supra, addressed itself to this question and stated:

> "The mere fact that a person knows that an action has been filed against him does not impose on him a duty to search the record at intervals to see whether a false return of service of Summons has been made."

Reviewing the facts of the instant case, it is submitted that proof of the falsity of the return is clear, satisfactory and convincing, there being in the record the actual copy of the Summons with Complaint attached, which was served upon the Defendant - Appellant which copy speaks for itself as to the absence of the date, place of service, and name of the process server appearing thereon as required by Rule 4(j).

B. The Summons was fatally defective in that it stated on its face that default would be entered within 20 days if defendant failed to make an appearance and answer the Complaint, whereas, Section 78-27-27, Utah Code Annotated (1953), as amended, under which statute the Plaintiff - Respondent purported to obtain jurisdiction over Defendant - Appellant expressly provides that the defendant be allowed 30 days notice prior to default.

Again the Court's statement of the law in the case of Redwood Land Company, supra, is most appropos. The actual notice is set forth in the Summons and if the Summons is not correct and states 20 days rather than 30 days for answer as required by the statute and Rule 4, referred to as applicable in Section 78-27-25, Utah Code Annoted, in making such service then failure to strictly comply with the law and rules with respect to the correctness of the Summons itself should render the service ineffectual and thereby deprive the lower court of jurisdiction over the Defendant - Appellant upon which the Judgment by Default was based.

CONCLUSION

In Conclusion it is respectfully submitted that the lower court failed to obtain jurisdiction of the Defendant - Appellant due to a defective service of process and due further to a fatal defect in the body of the Summons itself and that the Judgment rendered by the lower court is null and void and this court should rule accordingly and require the lower court to grant the Defendant - Appellant's Motion to Set the Judgment Aside.

Respectfully submitted,

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