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Rose Marie Hume v. Small Claims Court of Murray City : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ROSE MARIE HUME,

Appellant,

vs.

SMALL CLAIMS COURT
OF MURRAY CITY,

Case No. ~~244268~~
15634

Respondent.

APPELLANT'S BRIEF

Appeal from the Third Judicial District Court

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STATEMENT OF THE CASE

Appellant seeks to reverse the District Court's denial of Appellant's Motion to Alter Judgment denying her Petition for Writ of Mandamus.

STATEMENT OF FACTS

After a hearing on April 21, 1977, in the Small Claims Court of Murray City, Respondent in this case, a judgment was entered in the matter of State of Utah v. Rose Marie Hume against Appellant. Appellant's counsel, who appeared at the hearing, first learned of the adverse judgment from the plaintiff in that matter on July 1, 1977. Appellant has never received notice of the judgment from Respondent. On the next working day, Appellant's counsel mailed Appellant's Notice of Appeal from the judgment to Respondent. The Notice of Appeal was filed in Respondent Court on July 7, 1977. The Respondent Court refused, however, to forward the Notice of Appeal to the District Court, stating that it was untimely, and claiming to have sent notice of entry of judgment to Appellant on May 2, 1977. Appellant petitioned the District Court for a Writ of Mandamus to compel Respondent to forward the Notice of Appeal. This Petition was denied. Appellant then made a timely Motion to Alter Judgment, under Rule 59 U.R.C.P., on the grounds that, as a matter of law, insufficient evidence was presented at the hearing on the Petition to justify a decision that Respondent sent Appellant notice

of entry of judgment. That Motion also was denied, on the grounds that it was improper procedure.

QUESTIONS TO BE DECIDED

1. Was the Rule 59(e) Motion to Alter Judgment a proper procedure to employ?
2. Does Appellant have a constitutional right to notice of entry of judgment from Small Claims Court?
3. Does Appellant have a statutory right to notice of entry of judgment from Small Claims Court?
4. Was there insufficient evidence as a matter of law to establish that Respondent sent Appellant notice of entry of judgment?

ARGUMENT

I APPELLANT'S MOTION TO ALTER JUDGMENT UNDER RULE 59(e) WAS THE PROPER PROCEDURE TO EMPLOY.

Rule 59(e), U.R.C.P., provides: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." A motion under this rule is the proper procedure to use to seek to vacate a judgment. Nichols v. State, 554 P.2d 231 (Utah 1976). In finding the motion in Nichols untimely, this Court stated, "After an order of dismissal, the plaintiff must move under Rules 59(e) or 60(b) to reopen the judgment." 554 P.2d at 232.

U.R.C.P. Rule 59 (e) is identical to Federal Rules of Civil Procedure Rule 59(e). Federal cases under that rule are instructive as to the proper use of a motion to alter

judgment. In American Family Life Assurance Co. v. Planned Marketing Assoc., Inc., 389 F. Supp. 1141 (E.D. Va. 1974), the court had dismissed the complaint for lack of jurisdiction. The plaintiff filed a Rule 59(e) motion requesting the court to vacate its order on the grounds that the dismissal was "contrary to law." In response to this motion, the court stated:

Defendants point out that plaintiff's motion to vacate and set aside the Court's previous order is, in reality, merely an appeal from that order. Defendants concede, however, that Rule 59(e) is available to a movant who seeks to have an order vacated. 11 Wright & Miller Fed. Practice & Procedure, §2804 (1973); 6A Moore, Fed. Practice, para. 59,12[1] (1974). 389 F. Supp. at 1144.

The court, holding the motion proper, proceeded to consider it on its merits.

Here, as in American Family Life, Appellant moved the District Court under Rule 59(e) to alter judgment on the grounds the court's judgment was contrary to law. In holding the procedure improper, the District Court erred in its interpretation of Rule 59(e). Appellant's Motion should be considered on its merits.

Spatz v. Mascone, 368 F. Supp. 352 (W.D. Pa. 1974) explained the origins and breadth of Rule 59(e). There, the plaintiff moved the court under Rule 59(e) to vacate its order granting defendant's motion for summary judgment. In holding that the plaintiff's motion was proper, the court quoted at length from Gainey v. Brotherhood of Ry. and Steamship Clerks, 303 F.2d 716, 718 (3d Cir. 1962):

Rule 59 has been properly described as 'an amalgamation of the motion for new trial at common law and the petition for rehearing in equity adapted to the unified procedure...' 6 Moore, Federal Practice (2d ed. 1953) para. 59.02, at 3707. Of course, technically there is no trial when summary judgment is granted. But even before Rule 59 was amended in 1946 to add subsection (e), specifically providing for motions to alter or amend a judgment, the original provision of the Rule authorizing a party to move for a new trial within ten days after judgment was construed by several courts as broad enough to include motions for reconsideration of orders finally disposing of action before trial. [Citations omitted.] Since the addition of subsection (e) the courts which have considered the problem seem to have experienced no difficulty in concluding that a motion for rehearing or reconsideration, made within ten days after the entry of an appealable order is within the coverage of Rule 59. 368 F. Supp. at 353. (Emphasis added.)

Appellant's Motion, essentially a motion for reconsideration, timely made, is within the coverage of Rule 59(e), was proper, and therefore should be considered on its merits.

II APPELLANT'S MOTION TO ALTER JUDGMENT SHOULD BE GRANTED.

A. PETITIONER HAS A CONSTITUTIONAL RIGHT TO APPEAL THE JUDGMENT OF THE SMALL CLAIMS COURT AND THUS HAS A CONSTITUTIONAL RIGHT TO NOTICE OF ENTRY OF JUDGMENT, WHICH SHE WAS DENIED.

Article VIII, Section 9 of the Utah Constitution provides in relevant part: "Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the District Courts on both questions of law and fact, and with such limitations and restrictions as shall be provided by law." As held in Salt Lake City, v. Peters, 22 Utah 2d 127, 449 P.2d 652 (1969), this constitutional right to

appeal extends to appeals from city courts as well as from justices of the peace.

Under U.C.A. §78-6-1, small claims courts are a department of city courts and justice courts. Therefore the right to appeal city and justice courts' decisions under the Utah Constitution extends also to small claims courts.

Since Appellant has a constitutional right to appeal the decision of the small claims court, she also has the right, under the Due Process Clauses of the Utah and United States Constitutions, to notice of her right to appeal. As stated in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950):

"The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

In the present case, Appellant was not informed that judgment was entered in Respondent Small Claims Court. As will be explained more fully below, under U.C.A. §78-6-10, a dissatisfied defendant in small claims court has five days from notice of entry of judgment to appeal to the district court. Since Appellant had no notice of the entry of judgment in the Small Claims Court, she was not informed when the appeal period began. Lacking this information, she was unable to file an appeal. Because the lack of notice denied Appellant her constitutional right to appeal, she was denied her constitutional right to due process.

B. PETITIONER HAS A STATUTORY RIGHT TO NOTICE OF ENTRY OF JUDGMENT IN SMALL CLAIMS COURT UNDER U.C.A. §§78-6-10 AND 78-6-11 AND RULE 73(h), WHICH SHE WAS DENIED.

U.C.A. §78-6-10, referring to small claims courts, provides:

The judgment of said court shall be conclusive upon the plaintiff unless a counterclaim has been interposed. If the defendant is dissatisfied, he may, within five days from the entry of said judgment against him, appeal to the district court of the county in which said court is held....

This section does not mention the right to notice of the entry of judgment. Nevertheless, U.C.A. §78-6-11, U.R.C.P. Rule 73(h), and Utah case law make it clear that §78-6-10 contemplates the defendant's receiving notice of entry of judgment to mark the beginning of the appeal period.

U.C.A. §78-6-11, referring to small claims courts, provides, "The appeal shall be in the same manner as appeals generally from a city or justice court." U.R.C.P. Rule 73(h) provides:

An appeal may be taken to the district court from a final judgment rendered in a city or justice court within one month after notice of the entry of such judgment, or within such shorter time as may be provided by law.... (Emphasis added.)

When these two provisions are read together, two points emerge.

(1) Appeals from small claims courts are governed by the five-day period. This period is consistent with the legislature's power under Rule 73(h) to provide for a shorter appeal period than thirty days from city or justice court, of which small

claims court is a department under §78-6-1. (2) The appeal period from small claims court commences upon notice of entry of judgment to the defendant. This notice requirement is clear, since (a) appeal from small claims court is taken in the same manner as appeals generally from city or justice court, and (b) the appeal period from city or justice court of which small claims court is a department, begins upon notice of entry of judgment.

If a dissatisfied defendant in small claims court such as Appellant, receives no notice of entry of judgment, there can be no time limit for the filing of appeal, since the appeal period cannot start without that notice. Therefore, Appellant's appeal should not be time-barred, since the statutory period for filing had not been started by Respondent giving Appellant notice of entry of an adverse judgment in Respondent Court.

Utah case law under current and former statutes supports this interpretation of the notice requirement. The most recent case, Larson Ford Sales, Inc. v. Silver, 551 P.2d 233 (Utah 1976), upheld §78-6-10 against an equal protection challenge, made on the basis that an appellant from small claims court has only five days to appeal, rather than one month as from city and justice court. Implicit in that case is that notice of the entry of judgment is required to begin the appeal period from small claims court. This Court states "[A]s an appellant from the small claims court he is allowed

only five days within which to file his notice of appeal, whereas appeals from city and district court judgments may be made within one month." 551 P.2d at 233. This Court recognized the distinction between appeals from city and from small claims courts as between the time periods only and not in the right to notice of entry of judgment to start the appeal period.

Forsythe v. Third Judicial Dist. Ct., 41 Utah 16, 123 P.621, 623 (1912), decided under Comp. Laws of 1907, §3744, a predecessor of Rule 73(h), explained the purpose of the notice requirement:

Its purpose manifestly is to apprise the losing party of the time the judgment was entered against him in the action, so as to give him ample opportunity to take an appeal to the district court.... The primary object of the service of the notice, therefore, is to set in motion the 30-day period within which an appeal must be taken, and to leave no room for doubt that the losing party has had notice of when that period begins and ends.

It is inconceivable that the Utah Legislature would retain the notice requirement for appellants from city and justice courts, yet abandon the fair-minded purposes behind the notice requirement for the less advantaged appellants from small claims court, who have a much shorter appeal period.

Further, a denial of right to notice of entry of judgment would clearly be a denial of equal protection, as well as a denial of due process as explained supra. Although the shorter appeal period has been held not a denial of equal protection in Larson Ford Sales, Inc. v. Silver, supra, that

case did not address the issue of whether small claims court appellants could be denied notice of entry of judgment consistent with the Equal Protection Clause. It may be reasonable, considering the nature and purpose of small claims court, to provide a shorter appeal period; nothing in the nature and purpose of small claims court, however, justifies denying appellants the opportunity to know when the appeal period begins and ends and thus the opportunity to file timely appeals from adverse judgments.

The appeal period dates from the notice of entry of judgment. In the absence of this notice, the appeal period cannot run. Therefore, in the circumstances of this case, the appeal cannot be time-barred. Here, the judgment was entered against Appellant in Respondent Court on May 2, 1977. Appellant was not given notice of the entry of judgment until July 1, 1977, when Appellant's counsel received notice from the other party to the judgment, the plaintiff in State of Utah v. Rose Marie Hume. On the next working day Appellant's counsel mailed the Notice of Appeal, which was filed in Respondent Court on July 7, 1977. Appellant thus complied with the appeal procedure as rapidly as possible in the circumstances. In similar circumstances, this Court has held an appeal not time-barred. In Bullen v. Anderson, 81 Utah 151, 17 P.2d 213, 215 (1932), decided under an earlier statute allowing filing of the notice of appeal within thirty days of notice of entry of judgment, this Court held

[T]he time for taking an appeal dated from notice of the entry of judgment, not from the date of the entry of the judgment.... In the absence of notice of the entry of judgment, an appeal taken more than six months after its entry is in due time notwithstanding the judgment debtor may have had actual knowledge of its entry.

Under Bullen, Appellant's appeal was filed in due time. Therefore, that appeal should be heard.

C. THERE WAS INSUFFICIENT EVIDENCE AS A
MATTER OF LAW TO ESTABLISH THAT RESPONDENT
SENT APPELLANT NOTICE OF ENTRY OF JUDGMENT.

At the hearing in the District Court on Appellant's Petition for a Writ of Mandamus to compel Respondent to forward the Notice of Appeal, Respondent produced a copy of a letter that it claimed it had mailed to Appellant giving notice of entry of judgment. This evidence is insufficient as a matter of law to justify a decision that Respondent sent or Appellant received notice of the entry of judgment.

1. TO RAISE A PRESUMPTION IN FACT OF
RECEIPT OF A LETTER, THERE MUST BE
PROOF OF MAILING THE LETTER PROPERLY
ADDRESSED WITH POSTAGE PREPAID.

When a party attempts to prove that another person received a letter in the mail, courts engage in a presumption of fact that if the letter is proved to be properly addressed and mailed, the letter was received by the addressee. That is the rule in Utah, as stated by this Court in Campbell v. Gowans, 35 Utah 268, 100 P.397 (1909), and Brown v. Fraternal Accident Ass'n of America, 18 Utah 265, 55 P.63 (1898). It is important to keep in mind that proof of mailing is an

antecedent to application of the presumption. As stated in Suits v. Order of United Commercial Travelers of America, 139 Minn. 246, 166 N.W. 222, 223 (1918), "The presumption that a properly mailed letter will reach the person to whom addressed has application only when the act of mailing is unquestioned or conclusively established." (Emphasis added) In Suits, the court affirmed the trial court's finding of non-receipt, holding that proof of mailing was not conclusive despite (1) subsequent action by the alleged addressee consistent with receipt of the letter; (2) a stipulation of facts by the parties that a witness would testify to the preparation of the letter, enclosure in a properly addressed envelope, including postage and return address, non-return of the letter, and while no particular recollection of mailing the letter, belief of mailing from habit and custom; (3) a further stipulation that the person who allegedly mailed the letter was methodical; and (4) the fact that after the sender's death, the letter was not found among his papers.

2. MERE PROOF OF WRITING A LETTER DOES
NOT RAISE AN INFERENCE OF MAILING SO
AS TO RAISE THE PRESUMPTION OF RECEIPT

In the present case, the only evidence that the notice of Respondent's judgment was sent to Appellant was a copy of the letter claimed to have been mailed. Such a showing is insufficient to raise an inference of mailing so as to raise the presumption of receipt. In Jacobs v. National Accident and Health Insurance Company, 103 Vt. 5, 151 A. 556 (1930), the court stated:

All that appears is that such a letter is written. It is not shown that it ever found its way into the mails. It is to be remembered that it is the mailing of a letter that raises the so-called presumption that it was ever received by the addressee.... But it would be going too far, we think to say that evidence that a letter was "written" implies that it was deposited in the post office, properly stamped and addressed. It was held in *Uhlman v. A & S Brewing Co.* (C.C.) 53 F. 485, that the mailing of a letter will not be presumed from the fact that it was written. To the same effect are *National Building Association v. Quin*, 120 Ga. 358, 47 S.E. 962; *Best v. German Ins. Co.*, 68 Mo. App. 598; *Bankers' Mutual Cas. Co. v. People's Bank*, 127 Ga. 326, 56 S.E. 429; and *Sills v. Burge*, 141 Mo. App. 148, 124 S.W. 605.

To the same effect is *James E. Cashman v. Spellman*, 233 App. Div. 45, 48, 251 N.Y.S. 240 (1931), which also held it error for the trial court to have admitted a copy of a letter in evidence without proof of mailing, which allegedly occurred "in the ordinary course of business."

On these grounds, in the present case no inference of mailing of the notice of the judgment should have arisen, and therefore Respondent could not avail itself of the presumption of receipt, which only flows from proof of the proper mailing.

3. THE PRESUMPTION OF RECEIPT THAT ARISES FROM PROOF OF PROPER MAILING IS A REBUTTABLE PRESUMPTION OF FACT, AND DENIAL OF RECEIPT CREATES A CONFLICT IN THE EVIDENCE TO BE RESOLVED BY THE TRIER OF FACT.

Brown v. Fraternal Accident Ass'n of America, *supra*, 66, established the rule in Utah that "the presumption of fact raised by the proof that the notice was sent by mail was a

circumstance, when opposed by a denial of the receipt of the letter, to be weighed by the jury with all the other evidence in determining the question whether or not the letter was actually received." That is, the presumption of fact is rebuttable. In Campbell, supra, the presumption was in fact successfully rebutted by denial of receipt, coupled with action inconsistent with receipt. The fact situation in Suits, supra, is also relevant, since the court upheld a finding of non-receipt there in the face of a much stronger showing of mailing than was made by Respondent in the present case.

4. THE PARTY ASSERTING RECEIPT OF A
LETTER HAS THE BURDEN OF PROVING
ITS RECEIPT.

In Huntley v. Whittier, 105 Mass. 391, 392-93 7 Am. Rep. 536, (1870), the court stated, "the burden of proving its receipt remains throughout upon the party who asserts it." This rule accords with the basic rule of fairness in the law of evidence that a party should not be forced to prove a negative, e.g., that a letter was not mailed or received. As the court stated in Palicka v. Ruth Fisher School Dist. No. 90 of Maricopa County, 13 Ariz. App. 5, 473 P.2d 807, 811 (1970), "It is the general rule that the party asserting the affirmative of an issue has the burden of proving it." To the same effect are Firkins v. Affolter, 504 P.2d 365 (Colo. App. 1972); and Carter v. Burn Constr. Co., Inc., 85 N.M. 27, 508 P.2d 1324 (1973). This rule is especially salutary in a case such as the present, where the party asserting the affirmative had physical control

the subject matter and thus personal knowledge available as to the handling of the letter.

Since in the present case Respondent has not presented competent evidence to uphold its burden, Appellant should be found not to have received notice of the judgment more than five days before filing her Notice of Appeal. Therefore, this case should be remanded to the District Court to issue a Writ of Mandamus to compel Respondent to forward Appellant's Notice of Appeal to the District Court.

CONCLUSION

Respondent has produced insufficient evidence as a matter of law to support a finding that Respondent sent or Appellant received notice of entry of judgment. Under the Utah Constitution Appellant has a right to notice of entry of judgment. Appellant also has a statutory right to notice of entry of judgment. Therefore the District Court's denial of a Writ of Mandamus to compel Respondent to forward the Notice of Appeal was improper. Further, the denial of Appellant's Motion to Alter the Judgment denying the Writ, on the basis that that Motion was improper procedure, was an error of law.

Wherefore, Appellant prays that this Court:

1. Enter its Judgment that Appellant's Motion to Alter Judgment was proper procedure and that the evidence to support a finding that Respondent sent, or Appellant received,

notice of entry of judgment was insufficient as a matter of law.

2. Reverse the District Court's denial of Appellant's Motion and order the District Court to issue a Writ of Mandamus to compel Respondent to forward Appellant's Notice of Appeal.

DATED this 3rd day of April, 1971

UTAH LEGAL SERVICES, INC.

Lucy Billings
By Lucy Billings
Attorney for Appellant

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I mailed a true and correct copy of the foregoing Appellant's Brief to H. Craig Hall, Attorney for Respondent, 5461 South State Street, Murray, Utah 84107.

DATED this 6th day of April, 1971

Lucy Billings