2001

Bank v. Major-Blakeney Corporation : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DOWNEY STATE BANK,

Plaintiff-Respondent,

vs.

MAJOR-BLAKENEY CORPORATION, et al

Defendants,

Joseph L. Krofcheck,

Defendant-Appellant,

and,

Franklin D. Richards & Company, and Richard W. Ringwood,

Intervenors.

Case No. 14031

REPLY BRIEF OF APPELLANT JOSEPH L. KROFCHECK

Appeal From The Order Of The Fourth Judicial District Court For Summit County, State Of Utah, The Honorable Allen B. Sorensen, Judge.

* * * * * * * * * * * * *

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REPLY BRIEF OF APPELLANT JOSEPH L. KROFCHECK

In accordance with Rule 75 (p) (2) of the Utah Rules of Civil Procedure, wherein new matter raised in respondent's brief may be answered, Appellant replies with argument as follows:

POINT I

RESPONDENT'S BRIEF SUSTAINS APPELLANT'S CLAIM OF AN INSUFFICIENT AFFIDAVIT TO PUBLISH SUMMONS, BY ADMITTING TO CERTAIN FALSITY THEREIN.

The footnote on page 5 of Appellant's brief refers to circumstances that have been frustrating to Appellant thus far, in that certain representations contained in Respondent's affidavit (R 29, paragraphs 6 & 8) although discovered to be false at the last moment in the court below such issues have not been officially before this Honorable Court until now.

That is, the affidavit (R 28, 29) upon which an order to publish the summons (R 27) was based, states:

> "Affiant has also been advised by said William Richards, ... (that Richards) had numerous contacts with Robert W. Major and Joseph L. Krofcheck, that neither of such persons resides in the State of Utah, and that Joseph L. Krofcheck was believed to be then residing at 16363 Royal Hills Drive, Encino, California 91316...." (Brackets added)

Paragraph 6., Respondent's Affidavit (R 28, 29)

As hereinbefore indicated, attorney William Richards has denied the foregoing statements attributed to him by Respondent's Affidavit (R 28, 29) in a sworn affidavit of his own (Appellant's brief, footnote, page 5).

However, the Respondent has now also implicitly admitted the falsity of the aforesaid quoted recitals appearing in the said Affidavit (R 28, 29), by virtue of these statements from their brief on appeal herein:

> "Mr. Melling was told by Richards' staff that his office had had numerous occasions to contact Major and Krofcheck by mail and the most recent addresses contained in the Richards' files for both men were noted. Melling attempted to have legal process served upon Krofcheck at the address given him by Richards' staff (16363 Royal Hills Drive, Encino, California)..." (Emphasis added)
>
> Brief of Respondent, Statement of Facts, page 9, second paragraph.

Thus, the facts which are admitted to in Respondent's brief (page 9, supra) are not those sworn to by Mr. George D. Melling in his affidavit (R 28, 29); and, since extensive conversations and correspondence as well as a formal hearing in this Honorable Supreme Court specifically embraced the aforesaid conflicting statements prior to the filing of Respondent's brief, it is reasonable to assume that very careful consideration was given to the language which Mr. Melling employed in his said current Brief of Respondent (page 9, supra.)

Therefore, on the face of the record and pleadings now properly before this court on appeal we are able to verify that Mr. Melling's affidavit (R 28, 29) is indeed a false affidavit. Moreover, had said affidavit set forth the true nature of Mr. Melling's "diligent search", as admitted to in his subject brief, it is unlikely that Judge Harding, or any Judge, would have issued an order for the publication of summons as was rendered in this matter (R 27). Specifically, what person on "Richards' staff" "told" Mr. Melling about the "contact" with Appellant, and "noted" information from the "Richards' file", and provided "the

address" for Appellant (3-1/2 year old incorrect address), as finally admitted to herein (Respondent's brief, page 9, supra)? We know that attorney William Richards did not represent those matters, as originally sworn to by Mr. Melling in his affidavit (R 29, par. 6 & 8). However, even if said affidavit had conformed to the facts now admitted to in Respondent's brief (page 9, supra), and the "staff" member was disclosed by name (which has not been done even yet) it is doubtful that such a law firm secretary, receptionist, filing clerk, legal messenger or possibly janitor (constituting the "staff"), could be considered a single competent source for ascertaining Appellant's whereabouts, particularly since attorney Richards and his law firm have never been Appellant's legal counsel!

The legal authority cited by Respondent in defense of the purported "sufficiency of the Melling affidavit" (Respondent's brief, page 18, (2)) instead will support Appellant's position under the foregoing circumstances:

> "In Liebhart (Liebhart v Lawrence (Utah) 120 p. 215) this court held that the affidavit was willfully false and that the resulting publication of summons was invalid. And in Bowen, (Bowen v. Olson, (Utah) 246 P.2d 602) this court held that the affidavit which had been prepared on a printed form was apparently fraudulent and that the service of the summons by publication was invalid."
>
> Brief of Respondent, pages 18, 19.

Appellant's brief herein, pages 13 to 17, encompasses his position regarding the insufficiency of the Melling affidavit (R 29,) on grounds other than the falsity charge described above in this reply brief. However, the grounds in both briefs, whether taken together or considered independently, compel the conclusion that the said affidavit (R 29) is certainly insufficient to warrant an order for publication of summons (R 27).

POINT II

RESPONDENT'S BRIEF FURTHER SUPPORTS THE INSUFFICIENCY OF THE MELLING AFFIDAVIT BY ADMITTING TO SPECIFIC KNOWLEDGE OF ANOTHER SOURCE FOR APPELLANT'S ADDRESS, WHICH WAS NOT USED.

Respondent erroneously represents to this court that Utah Code Annotated Sect. 57-3-2 (1953) merely states that Respondent would only be charged with notice of prior documents recorded affecting "that same real property" (Respondent's brief, pp. 21,22) covered by their mortgages. Reference to said statute reveals no such limitation. Moreover, Replacement Volume 6A, Utah Code Annotated, embraces the "general and permanent laws of the state in force at the close of the fortieth legislature ... 1973" (UCA, Vol. 6A, title page). Thus, this Utah case would govern the interpretation of said Sect. 57-3-2 through 1973, having been cited thereunder in said Replacement Volume 6A, to wit:

> "One who deals with real property is charged with notice of what is shown by the records of the county recorder of the county in which the real property is situated." (Emphasis added)
>
> Crompton v. Jenson, 78 U. 55, 1 P.2d 242

Were Respondent's view of the aforesaid statute accurate the past and current practice of federal and state tax authorities, judgment creditors and general lienholders in recording their notices against named individuals without describing specific property, would be unavailing. Such is not the case, however, and county recorder's records are indexed for speedily cross checking names and realty covering extended periods of time, for all documents filed in the respective

Utah counties.

Notwithstanding the foregoing, and the fact there were multiple records readily available disclosing Appellant's current address (Appellant's brief, pages 4, 5, and 16), Respondent has attached a Warranty Deed copy, identified as "Appendix G", to their brief herein. They admit this instrument does in fact affect "that same real property" embraced by their mortgages, (Respondents brief, page 22) and that they knew of this vesting prior to the Melling affidavit (Respondent's brief, page 9). In the upper left hand corner of said deed appears the name: "M. ALAN BUNNAGE, Suite 220, 9220 Sunset Blvd., Los Angeles, California, 90069", which party was legal counsel for Appellant. Respondent has never claimed said attorney for Appellant was ever contacted in any way and the George Melling affidavit (R. 28, 29) nowhere indicates this probable source for Appellant's address was even considered in Respondent's "diligent search" for Appellant's whereabouts. Since Appellant was the grantee under said deed,(Respondent's "Appendix G"), physical possession of that instrument would customarily be directed into the custody and/or control of said Appellant-Grantee; and, a fortiori, the party named to receive by mail said deed "when recorded" (Respondent's "Appendix G.", upper-left) would be a logical source leading to Appellant and would at least put a reasonable person on notice to make inquiry of said "M. Alan Bunnage" (Respondent's "Appendix G.", upper left), particularly when that same deed contained the designation "trustee" for Appellant indicating others were involved in said conveyance.

Therefore, we have this evidence of Respondent's actual knowledge of at least one other likely source for Appellant's correct address who could have been easily contacted yet Respondent was satisfied to rest their "diligent search" on a single inquiry of "Richards' staff" (Respondent's brief page 9), and thereafter have their summons and complaint mailed by the Clerk to an address they knew beforehand was erroneous (R. 29, par. 8; R 30; R 42).

POINT III

RESPONDENT'S LEGAL AUTHORITIES SUPPORT APPELLANT'S CLAIM THAT RESPONDENT'S PUBLISHED SUMMONS WAS INSUFFICIENT.

Respondent's brief, pages 26 to 30, engages in argument attempting to show that this statement, from Respondent's published summons, complied with Rule 4 (c) of the Utah Rules of Civil Procedure:

> "This is an action to foreclose two mortgages on real property located in Summit County, Utah." (R 45)
>
> Summit County Bee Newspaper, Dec. 20, 27, 1973; Jan. 3, 10, 1974.

The first in line of legal authorities cited by Respondent seeking to validate the sufficiency of the foregoing "description" of the real property involved herein should be perfunctorily dismissed, since even the portion of the decision quoted from Flanery v. Kuska, 173 NW 652, a 1919 Minnesota case, states: "The statute does not prescribe the form of a summons" (Respondent's brief, page 27), indicating the Minnesota statute did not conform to the requirements of Utah's Rule 4 (c).

Respondent's rely on "the test set out in Flanery", (Respondent's brief, supra.), dealing in very general terms with the question of

the notice intended to be given by a summons generally. However, "Flanery" is not the test for published summons as shown by:

> "It is an established principle that in order to give a court jurisdiction through publication the statutory procedure must be followed, and the courts are disposed to require strict compliance with the statutes." (Emphasis added)
>
> 62 Am. Jur. 2d 896, Sect. 111

As to the legal meaning of the term "strict" we refer to:

> "A narrow construction of a statute...plain, obvious or natural import of the language used."
>
> 50 Am. Jur. Statutes, Sect. 388

Next in the line of Respondent's authorities are two Washington State cases, Decorvet v. Dolan (1893) 35 P. 72, and Chase v. Carney (1939) 90 P. 2d 286, which also must be routinely dismissed since admittedly the publication of summons statute governing said cases "does not specifically require any such description" (Respondent's brief, page 28), again indicating inapplicability to the instant cause before this court which is governed by a Utah statute that does require a "description of the subject matter or res involved in the action" (Rule 4 (c), supra.)

Respondent's next authority must be examined more closely inasmuch as Respondent has failed to encompass the primary essentials of this case, Caldwell v. Bigger, 76 Kan. 49, 90 P. 1095 (Respondent's brief, page 28) which if they had would have destroyed their entire argument that opposes Appellant's position on the subject. Thus, Appellant can summarize the facts in this case to clearly show that a detailed legal description for real property is contemplated under

a Kansas publication of summons statute, as set forth in said case's decision:

> "(1) Process-Service by Publication - Description of Property.
> In an action to quiet title, a notice by publication, which describes the real estate by the lot & block numbers of an addition to a city according to the recorded plat thereof, which plat designates the land by its proper government subdivision, which has in fact been of record for a number of years, which has been recognized by the city and public generally, and which has been acted upon by the authorities for purposes of taxation, sufficiently identifies the property affected to give the court jurisdiction as against a defendant..." (Emphasis added)
>
> Caldwell v. Bigger, 90 P. 1095, (Supra.)
>
> "The certificate to the plat specifically stated that it embraced the NE 1/4 of Section 12, T23 S, R 6 W, of 6th Principal Meridian...Service was made by publication... and the notice was regular in every respect except that the land was described as lots in blocks of the Hutchinson Inv. Company's 9th Addition to the City of Hutchinson according to the recorded plat thereof."
>
> Caldwell v. Bigger, at page 1096 (Supra.)

By contrast, Respondent's statement in their published summons was limited to: "real property located in Summit County, Utah" (Respondent's brief, "Appendix E"), which certainly fails the conclusion and test contained in Respondent's own cited authority (Respondent's brief, page 28), to wit:

> "The statutory requirement is satisfied if, from the notice published, any person of common understanding would be able to locate and identify the property."
>
> Caldwell v. Bigger, (Supra)

The final case cited by Respondent's brief, page 29 thereof, presumably as relevant authority on the sufficiency of their "description" of the real property involved under said Rule 4 (c), U.R.C.P., is identified as Francis v. Allen, 79 N.E. 2d 803 (Ohio 1947).

There are vital distinctions between Respondent's Francis case and Appellant's cause herein. Foremost among these is the basic Ohio statute concerning the requirements for publication of summons as disclosed by the decision:

> "Section 11295 of the General Code provides that the notice (for publication of summons) ... must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer."
>
> Francis v. Allen, (Supra.)

Thus, said statute does not require a description of the res involved as does Rule 4 (c) U.R.C.P.

Ohio statutory procedure proceeds to further separate itself from Utah by requiring that claimants to real property, whether by mortgage foreclosure or otherwise, first sequester such property by attachment, etc., before serving a non-resident defendant with summons by publication, as indicated from Respondent's aforesaid Francis authority:

> "Where personal service cannot be had on a non-resident defendant and action seeks to establish a claim or demand against such defendant, before court can acquire jurisdiction (over defendant's property), a seizure of property of such non-resident defendant is required as a basis for constructive service. Gen. Code 11292, subdv. 7, and Sect. 11819, subdv. 2" (Emphasis added)
>
> Francis v. Allen (Supra)

However, where a plaintiff, such as Respondent, wishes to obtain jurisdiction in rem over the real property of a non-resident defendant, such as Appellant, through the publication of summons without first sequestering the same pursuant to the foregoing Ohio statute, the said Francis case cites the following authority for doing so, but on the

basis of a detailed description for the land as proposed by Appellant which is contrary to Respondent's view thereof, to wit:

> "Where a petition asks to have specific land appropriated...and the publication notice contains a particular description of the land sought to be appropriated...this constitutes a sequestration of the property and gives the court jurisdiction to dispose thereof upon final decree."
>
> Reed v. Reed, 167 NE 684 (Ohio; cited in Francis v. Allen, supra)

The most charitable view of Respondent's analysis of said Francis v. Allen (supra) case would be that such evaluation as contained in their brief at page 29 is out of context, is incomplete and actually supports Appellant's claim that a more detailed description of realty is necessary.

Therefore, there being no further legal basis cited by Respondent in opposition to the authority shown by Appellant's brief, (pages 10 and 11), Appellant is satisfied that the foregoing analysis of Respondent's own cases on the subject will support Appellant in this respect.

POINT IV

RESPONDENT ALLOWED THE SHERIFF'S SALE TO BE CONDUCTED KNOWING BEFOREHAND THAT PRIOR PROCEEDINGS, INCLUDING THE PUBLICATION OF SUMMONS, USED THE WRONG CASE NUMBER.

Respondent's brief, page 10, second paragraph thereof, admits: "At some time during March, 1974, Downey (Respondent) discovered that the ...Clerk had initially assigned the number 4473 to this case and to a case entitled 'Utah State Employees...etc.' but that upon discovering the error the Clerk had (without informing Downey) added the

letter 'A' to the designation of this case (R 1; R 72, p. 5a and 7). On April 9, 1974, Deputy Sheriff Leon Wilde conducted a sale of the five parcels of land."

Appellant's brief, page 12, first paragraph thereof, refers to a specific instance (R 72; par. 7) where an inquiry was misdirected due to the error admitted to by Respondent herein. Despite this, Appellant argues that such an error is implicitly prejudicial when the same is repeated over and over again on multiple documents in the court below including most of the pleadings, the Melling affidavit (Respondent's Appendix "A"), the Summons (Respondent's Appendix "B"), the California Affidavit of Service (Respondent's Appendix "B", second sheet), the publication of summons and proof thereof (Respondents Appendix "E") and the Proof of Publication of the Sheriff's sale itself (Respondent's Appendix "F"), to mention a few.

Appellant's said argument, of implicit prejudice, is particularly appropriate in the instant circumstances due to what can be considered a further lack of diligence on the part of Respondent by virtue of their prior knowledge of such error "during March, 1974" before the Sheriff's sale on April 9, 1974 (Respondent's brief, page 10).

It seems reasonable that Respondent in an abundance of caution should have at least re-published the defective summons and Notice of Sheriff's Sale of Real Property (Respondent's Appendix "F", reverse side), with the correct numerical designation before permitting the judicial sale of the subject property where Appellant, appearing as the last vestee of record in the capacity of "trustee", had on the face of the record never appeared or otherwise been contacted by

Respondent. Moreover, Respondent admits that the nature of Appellant's trust and the other beneficiaries involved "are as yet unknown to Respondent" (Respondent's brief, page 9, first paragraph). Such admission supports Appellant's argument since "substantial justice" (Respondent's brief, page 30) certainly fails to serve Appellant where the aforesaid matters are known to Respondent before said judicial sale, yet no real diligence is demonstrated in disseminating notice and seeking out the real parties in interest under the subject foreclosure.

POINT V.

RESPONDENT'S INSUFFICIENT, FALSE MELLING AFFIDAVIT AND DEFECTIVE PUBLICATION OF SUMMONS RELIEVES APPELLANT FROM PRESENTING A "MERITORIOUS DEFENSE" TO OR RECOGNIZING THE VOID JUDGMENT RESULTING THEREFROM.

Respondent's brief raises two further issues attempting to support their position, namely: 1) that Appellant did not interpose any meritorious defense to the original foreclosure, in Appellant's motion to set aside said proceeding (Respondent's brief, pages 12 to 14); and, 2) that Appellant made no attempt to redeem the foreclosed real property, after judgment, from the judicial sale buyers (Respondent's brief, pages 6 and 31).

Germane to the foregoing, Appellant's brief makes these points:

a) The extended redemption period was for the purpose of permitting Appellant time to obtain and reconcile mortgage payment records and other matters outside his possession and control, which he still has been unable to accomplish (Appellant's brief, pages 2, 3, 7, 18 and 19);

b) Appellant was a non-assuming successor to the original obligors under the subject mortgages, other parties were obligated to make the mortgage payments for releases of land and they retained all records thereof (which parties were and are now uncooperative and adverse to Appellant), Respondent and Appellant were not in communication with each other, Respondent deviated substantially from the terms of the notes and mortgages involved (moratoriums, changed payment schedules, altered land release schedules) and Appellant was the ultimate (and therefore most important) legal title vestee of record. (Appellant's brief, pages 2, 3, 7, 18 and 19);

c) Appellant still has not been furnished with all the Respondent's relevant records, communications, agreements and other proper evidence concerning the matters referred to in the preceding paragraphs; nor have the parties who were in direct contact with and making payments to Respondent ever furnished a single document to Appellant encompassing such matters, thus entitling Appellant to his legal right of discovery and trial of the issues. (Appellant's brief, pages 2, 3, 7, 8, 18 and 19).

Beyond the argument embraced by the foregoing, the fact remains that the judgment rendered by the court below is void not voidable. (see POINTS I, II, III, and IV hereof) This being the case, Appellant did not have to present a meritorious defense, or submit to the courts jurisdiction by redeeming the property based on said void decree, as a condition to setting aside said decree in the said lower court, as indicated by the following Utah case:

"(2)...Defects In Service. In a suit to set aside a decree of divorce (quasi in rem action; 24 Am. Jur. 2d Div. & Sep. Sect. 245) it is not necessary for the plaintiff to allege that she had a meritorious defense... or to offer to submit to the jurisdiction of the court in that action, where the court had never had jurisdiction of her person....(Involves defective service of summons by publication on non-resident based on misrepresentation in affidavit)"
(Emphasis and brackets added)

Atkinson v. Atkinson, 43 Utah 53, 134 p. 595.

"Under such circumstances (defective summons by publication) the respondent was entitled to have the judgment set aside as a matter of right and not as a matter of grace, (citing: 1 Black on Judgments (2d Ed.), Sect. 348)"
(Emphasis and brackets added)

Atkinson v. Atkinson (supra.)

This court did acknowledge the existence of a doctrine which requires a moving party in an original action to show a meritorious defense. However, Utah departs from said principle under the following reasoning:

"But is this the rule without exception, and must a party also do this in a case wherein the plaintiff has been guilty of fraud in inducing the court to assume jurisdiction of the action in which the default judgment is entered, or where, as here, the court never acquired jurisdiction of the person, because the order for service by publication and the pretended summons were void?....the (Utah) state courts can acquire no jurisdiction of the res or subject-matter so as to render judgment which would be binding."
(Emphasis added)

Atkinson v. Atkinson, (supra; at page 597, first column)

Utah is supported in its adoption of the principle that a party need not present a meritorious defense, or otherwise submit to jurisdiction under a void judgment, according to these decisions: Holcomb v. Creech (Ken. 1933) 56 SW 2d 998 (Action to vacate default

judgment for want of proper service of process); John Hancock Mut. Life Ins. Co. v. Cooley (Washington) 83 p.2d 221 (Cross complaint to avoid default judgment for invalid service of process); Dixie Meadows etc. v. Kight (1935 Oregon) 45 p2d 909 (Suit to set aside judgment for defective service of process); and, here is a more recent case quoted on issues close to Appellant's cause:

> "(1) Statute authorizing service of process by publication must be strictly complied with...";
>
> "(4) Where affidavit for service by publication was defective, the attempted service by publication was void and the court did not acquire jurisdiction over the defendant." (Emphasis added);
>
> "(5) Tender of meritorious defense is necessary in ordinary proceedings to vacate judgment, but where ground for vacation of judgment is that court rendering judgment sought to be vacated was without jurisdiction of defendant by failure to comply with statutory requirements as to service of process (by publication) tender of meritorious defense is unnecessary."
> (Emphasis added)
>
> Beachler et. al. v. Ford (1945 Ohio) 60 NE 2d 330

Even more recent decisions are available, following the foregoing doctrine, as shown by:

> "Meritorious defense is not essential or relevant on motion to set aside default judgment for lack of jurisdiction by reason of want of service of summons."
>
> Kleinfeldt v. Shoney's of Charlotte (1962 N.C.) 127 SE 2d 573.
>
> "Defendant was not required to show meritorious defense where default judgment which defendant sought to have set aside was void."
>
> Stafford v. Dickison (1962 Hawaii) 374 P.2d 665.

WHEREFORE, Appellant requests this Honorable Supreme Court to consider the elements of this reply brief together with Appellant's opening brief in determining the merits of the subject appeal.

DATED this 8th day of October, 1975.

Respectfully submitted,

DON R. STRONG
Appellant's Attorney

CERTIFICATE OF SERVICE

Served two copies of the foregoing Reply Brief of Appellant Joseph L. Krofcheck, upon each counsel for Respondent and the Intervenors named on the title cover hereof, by mailing the same to the addresses set forth on said cover, postage prepaid, this 8th day of October, 1975.