

1978

Sheila Mason v. George Stephen Mason : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Mason v. Mason*, No. 16010 (Utah Supreme Court, 1978).

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IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of

SHEILA MASON,

Plaintiff-Respondent,

vs.

GEORGE STEPHEN MASON,

Defendant-Appellant.

Case No. 16010

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third
Judicial District Court in and for
Salt Lake County, State of Utah, the
Honorable G. Hal Taylor, presiding.

DON L. BYBEE
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ATTORNEY FOR APPELLANT

ATTORNEYS FOR RESPONDENT

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STATEMENTS OF THE CASE

The issues raised by the Appellant are entirely procedural in nature. The sole issue is whether a District Court Judge has the authority to renew prior judgments by incorporating them into a subsequent judgment.

DISPOSITION OF LOWER COURT

The order of the Honorable Jay E. Banks of September 8, 1977 was that the prior judgment of February 4, 1970 would not be reincorporated into a new judgment for child support arrearages which had incurred after February 4, 1970. Judge Banks advised the Respondent that she would have to collect the support arrearages from the Appellant and that any child support arrearages which had accrued since February of 1970 would be part of a new judgment. Respondent, therefore, filed a new complaint and served Appellant personally with summons and complaint before the eight (8) year limitation period had run. Appellant failed to answer the complaint and Respondent properly took default judgment to renew the February 4, 1970 judgment.

The Honorable G. Hal Taylor properly denied Appellant's motion to set aside the default judgment which, in effect, renewed the February 4, 1970 judgment.

STATEMENT OF FACTS

Respondent was awarded a decree of divorce from the Appellant on April 15, 1959 in the Third Judicial District Court. The decree required Appellant to pay Respondent the sum of \$50.00

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per month per child as child support and further ordered the Appellant to pay the Respondent the sum of \$50.00 per month as alimony. Respondent brought an order to show cause proceeding against Appellant for the nonpayment of past due support payments. Judge Bryant H. Croft heard the matter on May 5, 1966 and entered judgment in favor of the Respondent for the sum of \$300.00 for past due support payments, together with interest thereon at the rate of eight per cent per annum on May 9, 1966. Appellant was further ordered to continue to make the payments of \$100.00 per month to the Respondent for and on behalf of the two minor children. Respondent brought a further order to show cause proceeding against Appellant for additional nonpayment of support and the matter was heard on November 7, 1966 before the Honorable Aldon J. Anderson. Judge Anderson entered a judgment against the Appellant for the sum of \$500.00 for past due support, together with interest thereon at the rate of eight percent per annum on November 21, 1966. Respondent filed an additional order to show cause proceeding for additional support due and the matter was heard before the Honorable Emmett H. Brown on February 2, 1970. Judge Brown assigned a judgment for delinquent alimony and support, attorney fees and order, dated February 4, 1970. As part of the order, Respondent was awarded judgment in the sum of \$11,705.00 representing the total amount by which Appellant was delinquent in alimony and support payments from April of 1959 through December 31, 1969, excluding interest and including all prior judgments entered during that time.

Respondent brought an order to show cause proceeding against Appellant for nonpayment of support, dental expenses,

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and other items which matters were heard before the Honorable Bryant H. Croft on February 17, 1976. The Appellant was represented by Thomas A. Jones at that hearing and the Appellant stipulated in open court to the judgment of February 4, 1970 for the child support arrearages of \$11,705.00. He further stipulated to pay ongoing support, the outstanding dental expenses for the minor children, and other items. An order incorporating these items was signed by Judge Croft to this effect on March 30, 1976. Respondent filed an order to show cause in re declaration of contempt against Appellant for additional delinquent support payments, nonpayment of the dental expenses and other items. The matter was heard initially before the Honorable Jay E. Banks on April 25, 1977. Judge Banks awarded the Respondent \$150.00 for support arrearages, \$374.98 for dental expenses, etc. Judge Banks' order in regard to paragraph 2 entered in September of 1977 stated that no judgment would be granted on judgments or arrearages heretofore entered. Judge Banks intended by this order that he would not incorporate the prior judgment of February 4, 1970 for the sum of \$11,705.00 into his judgment, and, therefore, granted judgment of \$150.00 for child support arrearages for the sum due and owing since February of 1970. Judge Banks did not prevent the Respondent from renewing her judgment against the Appellant for \$11,705.00 entered on February 4, 1970.

Respondent filed a complaint to renew the judgment of February 4, 1970 on March 15, 1977 under Civil No. 241218 and personally served the Appellant with a copy of the complaint and summons on April 18, 1977. The Appellant failed to respond

to the complaint within twenty days and the Respondent took default judgment on July 6, 1977, which, in effect, renewed her former judgment against the Appellant. The Appellant was allowed two and one half months to answer Respondent's complaint and failed to do so before the Respondent took default judgment. Appellant moved the court to set aside the default judgment of the Respondent which renewed the February 4, 1970 judgment of \$11,705.00. The matter was heard on July 6, 1978 before the Honorable G. Hal Taylor. Judge Taylor advised Appellant's counsel that his answer admitted the allegations set forth in the Respondent's complaint on March 15, 1977 and that the Appellant has no affirmative defenses. Judge Taylor denied the Appellant's motion leaving the Respondent's judgment of July 6, 1977 in full force and effect. The only valid defense which Appellant could have raised to the Respondent's complaint would have been proof of payment which was obviously indefensible by Appellant.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the decision of July 6, 1978 of Judge G. Hal Taylor affirmed, wherein Judge Taylor denied the Appellant's motion to set aside default judgment. Respondent further requests the finding of this court that the judgment of July 6, 1977 was the proper renewal of a former judgment dated February 4, 1970.

ARGUMENT

POINT I

RESPONDENT PROPERLY RENEWED THE JUDGMENT OF FEBRUARY 4, 1970 WITH- IN THE EIGHT (8) YEAR STATUTE OF LIMITATION PERIOD IN ACCORDANCE WITH SECTION 78-12-22, UTAH CODE ANNOTATED, 1953, AS AMENDED.

Section 78-12-22, Utah Code Annotated, 1953 as amended, reads as follows:

Within eight years: An action upon a judgment or decree of any court of the United States, or of any State or territory within the United States.

An action to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children.

The past due installment payments for child support due and owing to the Respondent by the Appellant from April 15, 1959 to May of 1966 were reduced to judgment on May 9, 1966 or within the eight year limitation period. Another judgment was entered against the Appellant on November 21, 1966 for additional child support arrearages within the statutory limitation period set forth in Section 78-12-22 of the Utah Code. The Appellant failed to pay child support payments between November 12, 1966 and December of 1969 which resulted in the entry of a judgment of February 4, 1970 by the Honorable Emmett H. Brown. Judge Brown incorporated the judgments of May 9, 1966 and November 21, 1966 into his judgment of February 4, 1970. A district judge has the authority and discretion to incorporate prior judgments for child support and alimony arrearages into a subsequent judgment. The judgment of February 4, 1970 contained all child support arrearages from the date of the decree

of the divorce through December of 1969. All past due child support and alimony arrearages were reduced to judgment within a period of eight (8) years after the same became due in accordance with Section 78-12-22, Utah Code Annotated, 1953, as amended.

The judgment of February 4, 1970 was properly renewed by the Respondent. She filed a complaint to renew the judgment of February 4, 1970 on March 15, 1977 and personally served the Appellant with a copy of the complaint and summons on April 18, 1977. The Appellant failed to answer the Respondent's complaint within a period of twenty days and, as a result thereof, the Respondent took default judgment on July 6, 1977. The judgment of February 4, 1970 was properly renewed within the eight year period of limitations in compliance with Section 78-12-22 of the Utah Code. The eight year period of limitations upon a final judgment applies to past due unpaid installments under a divorce decree for alimony or support of minor children. Seeley v. Park, Utah 2d, 532 P.2d 684 (1975). The Supreme Court of the State of California held that the revival of a judgment by motion resulted in the new judgment having the same force and effect as would an original judgment. Betty v. Superior Court of Los Angeles County, 18 Cal.2d., 619, 116 P.2d 947 (1941). The Respondent has authority to renew her judgment every eight years in compliance with Section 78-12-22 of the Utah Code Annotated in order to preserve her rights to collect for child support and alimony arrearages in the future and, at a point in time, when the Appellant is solvent and she is in a position to collect the same. There is no statutory or common law prohibition in the State of Utah from the continuous renewal

of judgments each and every successive eight years as long as each judgment is properly renewed within the eight year statutory time period.

A proceeding was brought in the State of Kansas to revive past due installment payments provided for by a divorce decree. The father answered and moved to set aside a previous order to revive. The district court overruled the father's motion and granted the mother's motion to revive; but the order of revivor did not include installments less than five years old. The father appealed to the Supreme Court of Kansas. The Supreme Court held that the attack made by the father on the judgment entered was a collateral attack upon the judgment. The installment payments ripened into final judgment by becoming due and the judgment remained unpaid for more than seven years. The motion to revive such judgments during the seven year period immediately preceding revived such installments which had become dormant under the Kansas statute for a two-year period and also determined the amount due on unpaid payments for a five-year period immediately preceding the order. The total sum was included in the order and constituted a judgment. Riney v. Riney, 205 Kan. 671, 473 P.2d 77 (1970). The Kansas Supreme Court held that a judgment which had been entered in a case and which has become final cannot be collaterally attacked in a subsequent proceeding unless the judgment is void. Id. at 77. The Supreme Court of Kansas further held that a party may by the issuance of execution every five years, keep a judgment alive indefinitely.

In Friesen v. Friesen, 196 Kan. 319, 410 P.2d 429 (1966)

the Kansas Supreme Court upheld a district court decision to enter a judgment dated September 20, 1957, reviewing all child support payments due under a divorce decree from September 1, 1950 to August 1, 1952. The district court, however, went further and included in the total judgment which it entered in favor of the plaintiff all unpaid child support payments under the order of the court in the divorce action which were due and owing for the immediate preceding five years. No appeal was taken, no exceptions were issued or anything further done with respect to this judgment until a subsequent motion on October 2, 1963, was filed to revive the judgment of September 20, 1957. The appellant-father contended that the judgment was void to the extent that the court could not reduce a number of monthly judgments, not yet dormant, to a lump sum judgment. The Supreme Court held that when a judgment has been entered in a case and has become final, it cannot be collaterally attacked in a subsequent proceeding unless it appears the judgment is void. See also McFadden v. McFadden, 187 Kan., 398, 357 P.2d 751 (1960). In the case at bar, the prior 1966 judgments of Respondent were properly incorporated into the judgment of February 4, 1970. The Appellant is not in a position to collaterally attack the February 4, 1970 judgment and its renewal in 1977 as the original judgment of February 4, 1970 was valid and has full force and effect.

The Appellant stipulated in open court before the Honorable Bryant H. Croft as to the validity of the judgment of February 4, 1970 on February 17, 1976. He cannot now collaterally

attack the same judgment. A judgment which is rendered on a stipulation is conclusive of everything adjudicated by it, and it may not be collaterally attacked by a party to it. Klinker v. Klinker, 193 Cal.2d 687, 283 P.2d 83 (1955).

POINT II

APPELLANT HAS SET FORTH NO AFFIRMATIVE DEFENSES TO JUSTIFY THE SETTING ASIDE OF THE RENEWED JUDGMENT DATED JULY 6, 1977 OBTAINED BY RESPONDENT.

A dormant judgment may be revived and the obligation may be renewed by an independent suit thereon prosecuted prior to the time the judgment becomes dead. State ex. rel. Commissioners of Land Office v. Whitfield, 200 Okla., 300 193 P.2d 306 (1948). The Respondent in the case at bar properly renewed her judgment of February 4, 1970 by an independent suit filed in the Third Judicial District Court on March 15, 1977. The Appellant failed to answer to Respondent's complaint under the new action in Civil No. 241218 or even under the original case file (Civil No. 117445). The Appellant, in fact, failed to respond to Respondent's complaint for a period of two and one half months, at which time, the Respondent took a default judgment on July 6, 1977. Despite the fact Respondent failed to serve the complaint and summons without the Civil No. on the face thereof, the Appellant failed to answer the complaint even under the original file number (Civil No. 117445). After the Appellant moved to set aside the default judgment of July 6, 1977, the Appellant submitted a proposed answer admitting the allegations of the complaint in Respondent's complaint.

The only defenses that can be made in a proceeding to revive a dormant judgment are the non-existence of the judgment, payment or satisfaction thereof, or invalidity thereof appearing on the face of the judgment roll. Shefts v. Oklahoma Co., 192 Okla.483, 137 P.2d 589 (1943). The Oklahoma Supreme Court heard a matter on appeal dealing with the proceeding to revive a divorce action after the death of the husband following the entry of the divorce decree. The Supreme Court of Oklahoma held that the proceedings were timely brought under a statute to revive the action upon the death of the judgment debtor: namely, the deceased husband. The general rule is that the only defenses available to an order of revivor are the non-existence of a judgment, sought to be revived, payment and satisfaction of such judgment, or invalidity of judgment which is apparent on the face of the judgment roll. Whitman v. Whitman, (Okla.), 397 P.2d 664 (1964). It is clear that the Appellant can not argue the non-existence of the judgment. The judgment is clearly of record entered on February 4, 1970. The complaint filed on March 15, 1977 clearly sets forth the existence of the judgment of February 4, 1970 and that the Appellant has not paid or satisfied the same. There is no indication or allegation by the Appellant as to the invalidity on the face of the judgment entered on February 4, 1970 or of the default judgment entered on July 6, 1977. The Appellant had adequate time in which to answer the Respondent's complaint by a proper affirmative defense. The fact that the Appellant had not paid or satisfied the judgment of \$11,705.00 did not give the Appellant a position of which to contest the entry of default

judgment which revived the initial judgment of February 4, 1970. Any defenses which the Appellant may have desired to have raised in May of 1966, November of 1966 or in February of 1970 should have been raised timely at those hearings. All of those matters are now at res judicata and were incorporated as part of the judgment of February 4, 1970. This judgment has now been properly revived in 1977 without affirmative defenses by the Appellant.

POINT III

THE FACT THAT NO CIVIL NUMBER WAS PUT ON THE FACE OF THE COMPLAINT FOR THE RENEWAL OF THE JUDGMENT OF FEBRUARY 4, 1970 DOES NOT CONSTITUTE ANY ERROR TO JUSTIFY THE SETTING ASIDE OF THE DEFAULT JUDGMENT ON JULY 6, 1977.

The Appellant argues that the Respondent attached the complaint and summons to an order to show cause proceeding. The Appellant fails to state the proper facts. The Appellant was personally served with the complaint and summons on April 18, 1977 after the same had been filed in the Third Judicial District Court on March 15, 1977. It is true that the complaint and summons served on Appellant had no civil number on the face of the complaint and summons. The Appellant, however, failed to file any answer in either case number 117445, the original file, or 24128, the new file. Appellant was personally served with the copy of the complaint and summons and could have appropriately answered the allegations set forth in the Respondent's complaint. He, however, failed to respond to the Respondent's complaint resulting in a default judgment on July 6, 1977. This permitted the

Appellant a period of two and one half months in which to answer the complaint if he had wanted to raise any affirmative defenses. There were, however, no affirmative defenses which could have been raised by the Appellant as pointed out in Point II of this Brief. The service of the complaint and summons without the Civil No. is merely a technical mistake and did not deprive the Appellant of his right to set forth affirmative defenses in a timely manner. The Arizona Court of Appeals held that the identity of a judgment sought to be renewed is capable of being ascertained from the face of the renewal affidavit and technical omissions or error in the affidavit would not defeat the renewal of the judgment. Weltsch v. O'Brien, 25 Ariz. App. 50, 540 P.2d 1269 (1975). In this case the judgment creditor renewed his judgment by appropriate pleadings. The affidavit intended to effect the renewal of the judgment, which contained the names of parties to the judgment sought to be renewed, civil cause number of judgment, date of judgment and information as to where the judgment was recorded, sufficiently and was considered to have sufficiently identified the judgment sought to be renewed, despite the omission in the clerk's docket number and page number since the provision of the statute allowing the renewal of judgments by the affidavit indicate that either judgments which had been docketed or those which had been recorded could be renewed. The court held that the judgment renewal affidavit was not invalid for failing to list beneficial owners of the judgment sought to be renewed for such affidavit contained the name of the owner and the judgment for purposes of collection. The Supreme Court of Kansas in Riney v. Riney, 205 Kan., 671 473 P.2d 77 (1970) held that in matters

pertaining to the revivor of dormant judgments where there is no special reason for strict formality of procedure, the existence of irregularities does not render void the judicial process by which parties endeavor to maintain their rights.

It is the Respondent's position in this case that there has been no error as a result of the absence of the civil number on the complaint and summons served upon the Appellant personally on April 18, 1977. The Appellant received complaint and summons which clearly stated the nature of the renewal of the prior judgment on its face. It was clear from the face of the pleading itself that the Appellant could have discovered that the purpose of the complaint was to revive the judgment of February 4, 1970. If the Appellant had wanted to raise any defenses, he could have filed an answer under the original action or the renewal action and mailed a copy to Respondent. The Appellant, however, filed no answer in either Civil No. 117445 or 241218. Respondent properly entered default judgment against the Appellant in Civil No. 241218, the revival action to renew the judgment of February 4, 1970.

CONCLUSION

The Respondent properly renewed the judgment of February 4, 1970 within the eight year period of limitations as set forth in Section 78-12-22 of the Utah Code. The Appellant had adequate opportunity to raise any affirmative defenses against the renewal of this judgment. The Appellant did not, however, respond to the complaint of March 15, 1977. It is clear that the Appellant had no affirmative defenses in the form of the non-

existence of the original judgment, payment or satisfaction thereof, or the invalidity appearing on the face of the judgment roll. Therefore, the Appellant was in no position to raise any affirmative defenses against the renewal of the judgment of February 4, 1970. The district court had full discretion in incorporating the judgments in 1966 into the judgment of February 4, 1970. All of the judgments obtained by the Respondent against the Appellant were for past due installments which had accrued within a period of eight years prior to the time they became due and owing in accordance with Section 78-12-22 of the Utah Code. Respondent has full authority to renew her judgment against the Appellant on a continuous basis within a period of eight years in order to assure her the right of collection to which she is entitled. The absence of the civil number on the complaint and summons served upon the Appellant is merely a mistake and does not constitute error sufficient to set aside the default judgment of July 6, 1977. The Appellant had adequate opportunity to have filed an answer in either civil case, which he did not elect to do. Therefore, Respondent respectfully requests this court to affirm the decision of Judge G. Hal Taylor of July 6, 1978 in denying the Appellant's motion to set aside default judgment. Respondent further requests the above-entitled court to enter its finding that the judgment of July 6, 1977 was the proper renewal of the judgment of February 4, 1970 in accordance with Section 78-12-22 of the Utah Code.

DATED this 30 day of January, 1979

Respectfully submitted:

READING, SNOW & HALLIDAY
Attorneys for Respondent

By: John Spencer Snow
JOHN SPENCER SNOW

DELIVERY CERTIFICATE

I hereby certify that I delivered two true and exact copies of the foregoing Brief of Respondent on the 31st day of JANUARY, 1979, to Don L. Bybee, attorney for Appellant, 431 South 300 East, Salt Lake City, Utah 84111.

Clayton Thomas