

2001

Bank of Pleasant Grove v. Earl A. Johnson & Beth R. Johnson : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Bank of Pleasant Grove v. Johnson*, No. 14404.00 (Utah Supreme Court, 2001).
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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH ^{SEP 15 1976}

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

BANK OF PLEASANT GROVE,)

Plaintiff and)
Respondent,)

vs.)

EARL A. JOHNSON and BETH)
R. JOHNSON, dba JOHNSON)
ASPHALT COMPANY,)

Defendants and)
Appellants.)

Case No. 14404

BRIEF OF RESPONDENT

Appeal from the Judgment of the Fourth Judicial
District Court in and for Utah County, State of Utah,
The Honorable Maurice Harding, District Judge, Presiding

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FILED
APR 7 1976

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IN THE SUPREME COURT OF THE STATE OF UTAH

BANK OF PLEASANT GROVE,)
)
 Plaintiff and)
 Respondent,) Case No. 14404
)
 vs.)
)
 EARL A. JOHNSON and BETH)
 R. JOHNSON, dba JOHNSON)
 ASPHALT COMPANY,)
)
 Defendants and)
 Appellants.)

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

Plaintiff commenced an action against the defendants upon a delinquent note secured by personal property which was replevined under a bond and affidavit, sold at foreclosure sale, and a deficiency judgment obtained.

DISPOSITION IN THE LOWER COURT

The Court denied a Motion to Quash the Writ of Replevin, dismissed defendants' Counterclaim and ordered a decree of foreclosure and sale and following the sale, entered a deficiency judgment.

RELIEF SOUGHT ON APPEAL

The Appellee seeks to sustain the judgment of the lower Court.

STATEMENT OF FACTS

The defendants borrowed the sum of \$14,000.00, executed a promissory note, and security agreement properly filed with the Secretary of State. The note became seriously delinquent and the plaintiff, after having received a payment on said delinquency, by a check which was drawn upon insufficient funds, made demand upon the defendants for the equipment and upon their refusal, filed a Replevin Action. The equipment was taken by the sheriff and sold following a Decree of Foreclosure for the sum of \$4,800.00. The plaintiff then obtained a Deficiency Judgment which is unsatisfied in the amount of \$4,956.66.

Defendants filed a Counterclaim for wrongful attachment and moved to quash the Writ of Replevin. However, such Motion was never noticed for hearing and the merits were argued at the time of trial. The lower Court dismissed the Counterclaim and denied the Motion to Quash.

ARGUMENT

POINT I

THE COURT DID NOT ERR IN DENYING DEFENDANTS' MOTION
TO QUASH WRIT OF REPLEVIN.

The defendants, following the replevin of their equipment, filed a Motion to Quash upon the grounds that the Affidavit of Replevin did not meet the technical requirements under the Utah Rules of Civil Procedure. Rule 64B(b), URCP, provides for the filing of an Affidavit in connection with a replevin proceeding. This Affidavit was filed and contained a statement to the effect that the plaintiff was entitled

to the possession of property described therein and that said property was wrongfully detained by the defendants and that its estimated value was \$8,000.00. These averments, together with the allegations of the Complaint in which the security agreement and note were attached and made a part thereof by reference, contained all of the necessary facts required under said Rule. The defendants objected to the plaintiff stating estimated value at \$8,000.00 saying that this figure must be actual value. I submit that actual value cannot be predetermined and in this instance the sheriff's sale produced \$4,800.00 which would be actual value.

The Motion to Quash filed some eight (8) days after service was not pursued by the defendants by insisting upon a hearing and it was not until the time of trial on the 5th day of November, 1975, when this particular objection was argued. It was Judge Harding's finding, in his denying the Motion, that the defendants had made no timely objection.

It appears that irregularities in the Affidavit have been considered to be relatively unimportant as indicated by the statement in 66 AJ2d §63, entitled "Effect of Irregularities":

"Since the purpose of the affidavit in replevin is to secure possession of the property, an irregularity in the affidavit upon which a writ of replevin is obtained does not invalidate the writ once possession is obtained. Accordingly, the omission of the plaintiff to sign the affidavit upon which he obtains the writ is at most an irregularity which does not invalidate the writ nor deprive the officer of protection in executing its commands. Defects in the averments of the affidavit do not affect the sufficiency of the petition."

See Henline v. Reese, 54 Ohio St 599, 44 NE 269; and Harrison v. Mack International Motor Truck Co., 20 Ohio App 256, 151 NE 797.

POINT II

THE COURT DID NOT ERR IN DISMISSING DEFENDANTS' COUNTER-CLAIM IN THAT THERE WERE NO DEFICIENCIES IN THE UNDERTAKING NOR THE AFFIDAVIT OF REPLEVIN

The claim of the defendant that the Undertaking was improper is without merit. I find in searching the Record that the Utah County Clerk has failed to forward the Undertaking as part of the Record. However, plaintiff's counsel has a copy in the file and such Undertaking states as follows:

"WHEREAS, it is alleged by the plaintiff that the defendants in said action wrongfully detain certain personal property belonging to the plaintiff to the possession of which the plaintiff is entitled, and that the value of said personal property is \$8,000.00" (Underlined for emphasis)

Thus, it is obvious that this contention that there was a failure to allege value is false.

Plaintiff's counsel has endeavored to have the filed Undertaking before the Court prior to a determination of this appeal.

POINT III

THE COURT DID NOT ERR IN FINDING THAT THE WRIT OF REPLEVIN DID NOT VIOLATE DUE PROCESS WHEN THE PROVISIONS OF RULE 64B WERE FOLLOWED.

Immediately following the *Fuentes v. Shevin*, 1972, 407 US 67, 32 L Ed 2d 556, 92 S Ct 1983, the Fourth District Court promulgated their local Rule referred to as Rule 21, requiring a Court appearance prior to issuing a Writ of Replevin. However, in view of more recent decisions, which are cited herein, the local Court abandoned said requirement.

These recent decisions are found in 45 ALR3d 1249 Supplement and in essence hold that due process is not violated under Rules requiring the posting of bond and the filing of an Affidavit prior to issuance of the Writ.

See Shirley v. State Nat. Bank (CA2 Conn) 493 F2d 739 (involving Connecticut law), cert den (US) 42 L Ed 2d 284, 95 S Ct 329; Northside Motors of Florida, Inc. v. Brinkley (Fla) 282 So 2d 617; and W. T. Grant Co. v. Mitchell, 263 La 627, 269 So 2d 186, cert gr 411 US 981, 36 L Ed 2d 957, 93 S Ct 2276.

In view of these recent decisions it seems obvious that the Utah procedure complies with due process requirements without the need of an Order to Show Cause, served upon the defendants, prior to the issuance of the Writ.

POINT IV

THAT THE DEFENDANTS' APPEAL IS MOOT IN THAT THE VALUE OF THE REPLEVIN PROPERTY HAS BEEN PROVEN TO BE LESS THAN THE AMOUNT OWING PLAINTIFF.

Following the Court proceeding the equipment taken from the defendants was sold and a sizeable deficiency entered (see Record, page 8). Thus, the argument of defendants as to the Undertaking and Affidavit being insufficient to protect the rights of the defendants, which after all is the primary purpose which they serve, becomes a moot question, one which does not require a ruling from the Appellate Court. When after the rendition of a decision appealed from an event has occurred which renders moot what, except for that event, might be a justiciable issue, then the matter has lost any practical purpose for the parties. See 43 ALR 1184, Atlantic National Bank v. Korrnick, 29 Ariz 468, 242 P 1009.

CONCLUSION

The Court did not err in holding that the Affidavit and Undertaking in support of a Writ of Replevin were not properly and timely questioned. It is also evident such documents substantially met the requirements of the Rules and therefore were not fatally defective.

The Court also, in view of recent decisions, properly held that the defendants were not denied due process.

The question before the Court is also moot in that the sale of the equipment taken is proven to be far less than the balance owing to plaintiff. Therefore, the judgment of the lower Court should be sustained.

Respectfully submitted,

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