1979

Bonnie L. Randall, Formerly Bonnie L. Bricker v. Dannye. Bricker : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

BONNIE L. RANDALL, formerly, BONNIE L. BRICKER,

Plaintiff and Respondent,

vs.

DANNY E. BRICKER,

Defendant and Appellant.

Case No. 16230

BRIEF OF RESPONDENT

Appeal From Order Of The Third Judicial District Court of Salt Lake County, Honorable G. Hal Taylor, District Judge

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This is an action by Plaintiff-Respondent, hereinafter referred to as Respondent, to renew a judgment that was entered on February 26, 1970.

DISPOSITION IN LOWER COURT

Both Respondent and Appellant moved for summary judgment and the lower court granted Respondent's motion and denied the motion of Appellant, reasoning that Appellant's absence from the State of Utah tolled the running of the statute of

limitations during his absence.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the judgment of the lower court affirmed.

STATEMENT OF FACTS

Respondent was divorced from Appellant by decree entered by the First Judicial District Court of Box Elder County, State of Utah, on the 11th day of June, 1968. Respondent was awarded the care and custody of the two (2) minor children of the parties, and Appellant was ordered to pay to Respondent One Dollar ($1.00) per year alimony and One Hundred Dollars ($100.00) per month child support. (R.33.)

On the 26th day of February, 1970, judgment was entered against Appellant and in favor of Respondent in the amount of Two Thousand One Hundred Fifty Dollars ($2,150.00) for arrearages in support payments and Seventy-Five Dollars ($75.00) for attorney's fees. (R.8, 29.) Within eight (8) years prior to the commencement of this action, the attorney's fees were paid but no other sums or amounts whatsoever were paid on said judgment. (R.8, 33.)

On the 30th day of June, 1978, this action was commenced for the purpose of renewing said judgment. (R.2.)

Between the date of entry of said judgment and the date this action was commenced, Appellant resided in the State of North Carolina for a period in excess of one (1) year. (R.9, 20, 27.)

ARGUMENT

POINT I

APPELLANT'S ABSENCE FROM THE STATE OF UTAH TOLLED THE RUNNING OF THE STATUTE OF LIMITATIONS.

Neither the fact that approximately eight years and four months elapsed between the entry of the February 26, 1970, judgment and the commencement of this action nor the fact that Appellant was absent from the State of Utah for more than twelve months during said period of time is in dispute. The issue to be resolved is whether Appellant's absence from the State of Utah tolled the running of the statute of limitations.

Section 78-12-22, Utah Code Annotated, 1953, provides with respect to a suit on a judgment:

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

However, Section 78-12-35 provides:

> If when a cause of action accrues against a person when he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action. (Emphasis added)

It is evident from reading the foregoing sections that the legislature did not intend that a Plaintiff be deprived of his or her cause of action because a potential defendant would absent himself from the State. That policy was first judicially enunciated in the State of Utah in Keith O. Brien Co. v. Snyder, 51 Utah 227, 169 Pac. 954 (1917). In that case, the defendant had absented himself from the State for five and one-half years after the cause of action accrued. Notwithstanding the fact that defendant's family had remained in the State of Utah during that period of time and, therefore, process could have been served upon them, the court said at page 956:

> Indeed, the authorities that hold that absence from the State tolls the Statute all agree that the statute runs only during the time the debtor is openly in the State, and immediately on his leaving it, the statute again ceases to run until his return, and that in computing time, all the period of absence must be considered and added together.

This Court reaffirmed the Keith O. Brien doctrine in the case of Buell v. Duchesne Mercantile Co., 64 Utah 391, 231 Pac. 123 (1924). There, plaintiff sued defendant on a prior judgment. During the running of the Statute of Limitations, the defendant personally had been absent from the State but had maintained a home within the State. This Court held that his absence from the State was sufficient to toll the statute.

Respondent relies primarily on the case of Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915, (1964). The facts of that case are clearly distinguishable from the case at bar. In that case, plaintiff was injured in an automobile accident by a negligent defendant who left the State of Utah, returning to his home in California, after the accident. After the Statute of Limitations had run, plaintiff brought suit in Utah claiming that the statute had been tolled by defendant's absence from the State. This Court held that defendant's absence did not toll the running of the statute, and thus, the action was barred. However, the basis of that decision was the fact that even though the defendant was absent from the State, he was subject to service of process by virtue of Section 41-12-8, Utah Code Annotated, 1953, in that he had appointed the Secretary of State as his agent

for that purpose. Citing those facts and the applicable statute, this Court stated at page 916:

> The defendants thus had an agent within the State upon whom process could have been served for them, and they were not "absent" from the State in the sense contemplated by the statute, that is, unavailable for the service of process. Therefore, the plaintiff was not prevented from commencing her action at any time she desired. (Emphasis added)

In the instant case, the Appellant appointed no agent for service of process, nor was his family within the State, nor was Appellant amenable to process on the judgment. In each case cited by Appellant in his brief, the defendant remained subject to the jurisdiction of the court either by means of an agent within the state upon whom process could be served, or the state's long-arm statue. In the instant case, neither means was at Respondent's disposal to effectuate service on Appellant. Thus, the cases cited by Defendant are inapplicable to the case at bar and are not controlling.

POINT II

WITH RESPECT TO ACTION ON THE 1970 JUDGMENT, APPELLANT WAS NOT SUBJECT TO THE JURISDICTION OF UTAH'S COURTS DURING THE TIME HE WAS ABSENT FROM THE STATE.

Appellant relies on Section 30-2-5, Utah Code Annotated 1953, as amended, which provides in relevant part:

> . . . The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary. . . .

He contends that since the court which granted the divorce maintained continuing jurisdiction with respect to support and maintenance, the action on the 1970 judgment could have been commenced and process served on Appellant while he was absent from the State and, thus, there was no reason for the running of the statute of limitations to be tolled. However, Appellant ignores the fact that once a judgment for arrearages in support payments is entered, the support obligation merges into the judgment which becomes like any other judgment and the nature of the indebtedness is lost.

In Yergensen v. Ford, 16 Utah 2d 397, 402 P.2d 696, the plaintiff sued to renew a judgment which had been rendered more than eight years before the commencement of the action. The judgment had been rendered in an action on three promissory notes. After the entry of the judgment, the judgment debtors, in order to secure a lien release, entered into a written agreement acknowledging the obligation and thereafter made payments totaling $450.00. The last payment was made within eight years before the commencement of the

action on the judgment. Plaintiff argued that since there had been part payment the statute of limitations had been tolled to the date of the last payment. The court rejected that argument noting that the running of the statute would be tolled by part payment only in cases founded on contract. This Court in affirming the judgment of the lower court stated at page 697 of its opinion:

> It is next argued by plaintiff that the phrase, "In any case founded on contract," contained in 78-12-44 includes the judgment in the instant action because it was founded upon the promissory notes. In effect, the plaintiff claims that the debt (contract) upon which his judgment was rendered is revived so that it retains its original character and thus falls within the tolling provisions of 78-12-44.
>
> This argument is without merit, for when a valid and final judgment for the payment of money is rendered, the original claim is extinguished, and a new cause of action on the judgment is substituted for it. In such case, the original claim loses its character and identity and is merged in the judgment. (Emphasis added)

In Beesley v. Badger, 66 Utah 194, 240 Pac. 458 (1925), this court stated at page 460:

> By the weight of authority, and as we think the better reason, although there are cases to the contrary, a decree for alimony in a gross sum as well as to past due and unpaid installments stands upon the same footing as ordinary money judgments and may be enforced by execution in the same manner as ordinary

money judgments may be enforced. (Emphasis added)

Since a judgment for support money stands on the same footing as an ordinary judgment, like any other judgment, there are only two legal proceedings to enforce it: (1) a suit on the judgment; or (2) some form of proceeding in execution for collection. (Yergensen, supra.) The nature of the original claim for arrearages in support payments having been lost by being merged into the judgment, the domestic court lost its continuing jurisdiction over the claim, but retained jurisdiction with respect to support and maintenance obligations accruing after entry of the judgment.

Appellant next argues that he remained subject to the courts continuing jurisdiction under Utah's long-arm statute. Section 78-27-24 Utah Code Annotated, 1953, provides in relevant part:

> Any person . . . whether or not a citizen or resident of this State who . . . does any of the following enumerated acts, submits himself to the jurisdiction of the courts of this state as to any claim arising from:
>
> * * *
>
> (6) with respect to actions of divorce and separate maintenance, the maintenance in this state of a martimonial domicile at the time the claim arose or the commission in this state of the act giving rise to the claim. (Emphasis added)

This is neither an action for divorce nor separate maintenance, but is an action on a judgment. The claim for support monies arising out of the decree of divorce merged into the judgment and the original nature of the claim was lost. (Yergensen and Beesley, supra.) The long-arm statute was, therefore, inapplicable to this action. This view is supported by Section 78-27-26, Utah Code Annotated, 1953, as amended, which provides:

> Only claims arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this act. (long-arm statute.)

Since there is no provision in said act for an action to renew a judgment, the Utah courts could not have exercised personal jurisdiction over the Appellant, in this action, while he was absent from the State.

Appellant argues that once the courts of this State obtain jurisdiction, they continue to maintain that jurisdiction. However, in Gass v. Hunting, 561 P.2d 1071 (Utah 1977), the plaintiff filed an action to renew an old judgment. The judgment debtor had left the State of Utah after the rendition of the judgment. This issue in that case was: "Is the Statute of Limitations tolled while the judgment debtors are not within this State?" This Court answered that question affirmatively

holding that "A suit on a judgment may be commenced during the eight-year period following the entry thereof, and an absence from the State tolls the eight-year period." (Gass at 1072; emphasis added)

While not addressing the issue directly in that case, this Court recognized the legal principle that once a judgment has been entered, the court no longer has jurisdiction based on the original claim. Otherwise, the court could have asserted that jurisdiction in the subsequent action and there would have been no need to toll the running of the Statute of Limitations.

Additionally, while no Utah case has interpreted Utah's long-arm statute cited above, the subject was treated in the Utah Law Review, Vol. 1970, April, No. 2 at page 242 as follows:

> Thus, an abandoned wife may obtain personal jurisdiction over her deserting spouse and sue in Utah for separate maintenance or alimony incidental to a divorce action. Inconvenience still remains, however, in that she may have to sue on her Utah judgment in a foreign forum. (Emphasis added)

Finally, Appellant argues that each of the support installments became a final judgment as soon as it became due. While it may be true that it is final in the sense that it could not thereafter be modified, it is not final in the sense

that execution will issue on the unpaid amounts. For execution to issue, the amount of the arrearages must be determined and a judgment entered for that amount. Then, and only then, is it a final judgment for all purposes. And it is from that date that the Statute of Limitations begins to run.

CONCLUSION

With respect to the 1970 judgment, Appellant was not subject to the jurisdiction of Utah's Courts while he was absent from the State. His absence, therefore, tolled the running of the statute of limitations. That being the case, the judgment of the lower court should be affirmed.

Respectfully submitted this 12th day of June, 1979.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Respondent's Brief, postage prepaid, to L. Rich Humpherys, Esq., CHRISTENSEN, JENSEN, KENNEDY & POWELL, attorneys for Appellant, 900 Kearns Building, Salt Lake City, Utah 84101, this 13th day of June, 1979.

ROBERT F. ORTON