

1979

James G. Cutrubus, dba 7 C's Motors v. Call Investment Company, A Utah Partnership, And S. M. Horman : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES G. CUTRUBUS, :
 :
 Plaintiff, :
 Appellant :
 :
 vs: No. 16617 :
 (14608) :
 :
 CALL INVESTMENT COMPANY, a :
 Utah Partnership, and S. M. :
 HORMAN :
 :
 Defendants, :
 Respondents. :

BRIEF OF RESPONDENTS

APPEAL FROM THE SUMMARY JUDGMENT OF
THE FIRST DISTRICT COURT FOR BOX ELDER COUNTY, STATE OF UTAH
THE HONORABLE VENYO CHRISTOFFERSON, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES G. CUTRUBUS, :
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 Plaintiff and :
 Appellant : No. 16617
 : (14608)
 vs: :
 :
 CALL INVESTMENT COMPANY, a :
 Utah Partnership, and S. M. :
 HORMAN, :
 :
 Defendants and :
 Respondents, :

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This matter involves the question as to whether or not the Appellant was adequately represented in two separate lawsuits involving ownership of certain personal property located on real estate conveyed by the Appellant to Respondent, S. M. Horman, who in turn conveyed said real estate to Respondent, Call Investment.

DISPOSITION IN LOWER COURT

On March 21, 1978, Judge Venoy Christofferson executed a Judgment by Default in favor of Call Investment Company, as Plaintiff against James G. Cutrubus restraining

Cutrubus from entering upon certain premises and removing any property or interfering with Plaintiff's peaceful enjoyment of said property.

On or about July, 1978, Cutrubus as Plaintiff filed a Complaint against both Respondents alleging the property in question was his. The Respondents filed a Motion for Summary Judgment contending that the earlier case resolved the same issues and they were therefore entitled to Judgment on the grounds of Res Judicata. The Court granted Respondents Motions for Summary Judgment and the Appellant appealed when his Motions to Set Aside the Judgment were denied. Appellant further contends he was not properly represented by counsel despite the fact that the record demonstrates he was represented by several attorneys in both cases.

RELIEF SOUGHT ON APPEAL

Defendants, S. M. Horman and Call Investment Company, seek to have the Summary Judgment entered below affirmed.

STATEMENT OF FACTS

The Respondent adopts the Statement of Facts as set forth in Respondent, Call Investment Company's Brief. However, it should be noted in the first Case No. 14311, Cutrubus, as a Defendant was represented by David G. Knowlton and Findley P. Gridly and that in the second Case No. 14603

the Defendant was represented by Robert A. Echard.

ARGUMENT

POINT I

APPELLANT WAS LEGALLY REPRESENTED BY COUNSEL.

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS MOTION TO SET ASIDE JUDGMENT OR GRANT A CONTINUANCE.

In the first action, Call Investment Company vs: Cutrubus, Civil No. 14311, filed in this matter, the Appellant was represented by David K. Knowlton. It is the contention of the Appellant that the legal representation was inadequate. This Court has consistently ruled that the negligence of an attorney in not responding to suit pleadings is not grounds for setting aside a Default Judgment. Mountain State Telephone and Telegraph Department of Labor and Employment, 520 P2d, 586 (Colorado 1974), 7 Am Jur 2d, Attorneys at Law, Section 110.

Appellant further contends that he requested a continuance which was improperly denied. The record does not disclose such a Motion ever being filed. Again, this court, consistent with the general rule of law, has ruled that it is not an abuse of discretion for the Trial Court to refuse to grant a continuance because counsel withdraws from the case. Van Cott vs: Wall, 53 Ut, 282, 178 P. 41 (1919); Security Adjustment Bureau Inc., vs: West, 20 Ut, 2d 292, 437, P2d, 214 (1968).

The record does disclose that Cutrubus did retain the services of another attorney, Findley P. Gridley. An effort was made to set aside the default judgment which was unsuccessful. Appellant then filed an independent action entitled Cutrubus vs: Call Investment Company and S. M. Horman, Case No. 14608, which involved the identical issues. Judge Christofferson recognized that the same facts and legal issues were involved so he granted Respondent's Motion for Summary Judgment upon the grounds of Res Judicata. Attorney, Robert Echard represented Cutrubus in this second case.

It appears clear that the Appellant has had his day in Court on two separate occasions and he was represented by counsel in both instances. The apparent difficulty Appellant has in retaining counsel is not grounds for denying Respondents the relief they seek.

Although the question has not been specifically and directly raised as to whether or not a party has a constitutional right to be represented by counsel in a civil matter, the cases indicate that such representation is not a right. In Re Smiley, 330 N.E. 2d 53 (N.Y. Court of Appeals 1973); Boddie vs: Connecticut, 4014 S. 371 (1971).

Respondent submits that even if Appellant's attorneys were as incompetent and negligent as he contends, his remedy

is against his former attorneys. The Respondent should not be compelled to incur additional expense and be deprived of a just judgment, simply because Appellant cannot get along with his attorneys.

POINT 2

APPELLANT'S CLAIM IS BARRED BY RES JUDICATA

In Case No. 14311, Respondent, Call brought an action against Cutrubus alleging that Cutrubus had conveyed by Warranty Deed all his right, title and interest in and to the property without reservation to S. M. Horman. Call was therefore entitled to the quiet and peaceful enjoyment of the property purchased from S. M. Horman in good faith. Although the Appellant did not file a formal pleading in the matter, he did appear in person and with his counsel, David G. Knowlton at the hearing for the preliminary injunction which was granted. The final judgment entered on March 21, 1978 was never appealed by Cutrubus. The Court was therefore clearly complying with the law where he ruled in the 2nd case that the principle of the Res Judicata applied and granted Respondents' Motions for Summary Judgment. If Res Judicata were not recognized controversial matters could never be concluded.


CONCLUSION

This matter should now be put to rest. Appellant has been represented by Counsel, and he has had his day in

court. Judge Venoy Christofferson properly granted Respondents Motion's for Summary Judgment.

DATED this 13 day of December, 1979.

RESPECTFULLY SUBMITTED


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I hereby certify that on the 13 day of December, 1979, I caused two copies each of the foregoing Brief of Respondent to be deposited in the United State Mail, postage prepaid, and addressed to:

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