

1980

Isaac Cruz v. Michele Cruz : Brief of Respondent, Michele Cruz

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ISAAC CRUZ,)	
)	
Plaintiff)	Supreme Court No. 16789
Appellant,)	
)	
vs.)	
)	
MICHELE CRUZ,)	
)	
Defendant)	
Respondent.)	
)	

BRIEF OF RESPONDENT, MICHELE CRUZ

Response to Appeal from Judgment of the District Court
of Salt Lake County, State of Utah, Honorable Dean E.
Conder, Judge.

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FILED

MAR 14 1980

Clerk, Supreme Court, Utah

ISAAC CRUZ,

Supreme Court No. 16789

MICHELE CRUZ,

Defendant
Respondent.

Response to Appeal from Judgment of the District Court
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NATURE OF THE CASE

This is an action wherein the Plaintiff appeals from an award of attorney's fees and from an award of alimony, both awards having been made to the Defendant in the action below, Defendant not having by her pleadings and response to Plaintiff's Complaint requested attorney's fees or alimony, but where those responsive pleadings were filed on the day of the trial and where in earlier proceedings the Court specifically reserved issues pertaining to attorney's fees therein.

DISPOSITION IN THE LOWER COURT

The Third Judicial District Court, by and through the Honorable Dean E. Conder, Judge, heard this matter and awarded Respondent the sum of \$1,500.00 for attorney's fees in connection with this matter and further awarded Respondent the sum of \$150.00 per month for eighteen (18) months as alimony. The Court made other rulings which are not pertinent to this appeal, Appellant not having raised them in his brief (Brief of Appellant, Isaac Cruz, Page 3.)

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the order of the District Court awarding Respondent attorney's fees

and awarding them in the amount granted and further seeks affirmance of the Court's order requiring Plaintiff to pay the alimony to the Respondent and in the amount granted. Respondent further seeks attorney's fees for her response to this appeal.

STATEMENT OF FACTS

On or about November 13, 1978, Plaintiff filed his Verified Complaint against Defendant (R.2-7). Thereafter, Respondent filed and served upon Plaintiff an Order to Show Cause and Restraining Order (R.14-15), Affidavit of Respondent (R.16-18) and Motion to Determine Temporary Custody (R.13). A hearing was held upon that matter before the Honorable Peter F. Leary, Judge of the Third Judicial District Court on December 22, 1978 (R.28-29). That matter involved the Appellant's taking of the minor child of the parties and refusing to allow Defendant to have any visitation whatever with the child or custody. In confirmance of the allegations made in Respondent's Affidavit in connection with her Order to Show Cause (R.16-18), the Court found, after having heard testimony of the parties and their witnesses and the arguments of counsel, that "the minor child of the parties was taken from the Defendant [Respondent] by the Plaintiff [Appellant] by threats of intimidation. . . ." (R.28) Respondent was successful in having the child

returned to her. The Court ordered, in connection therewith, "that there was no determination as to child support or attorney's fees, both issues being reserved for a future determination." (R-29). That December 22nd date was the last available Court date prior to the Christmas holidays (R.220) and Respondent and her counsel were required to spend the entire day in Court in an attempt to get the matter heard. (R.220, 223-225). Respondent's attorney's fees for the conduct of this case through trial included the time and efforts expended on behalf of the Respondent (R.221) at the December 22nd hearing.

Subsequently, on or about March 23, 1979, Respondent served upon Plaintiff an Order to Show Cause and supporting Affidavit (R.85-89) seeking, among other things, an award of alimony and an award of attorney's fees in connection with that particular action. The hearing on the matter was held April 4, 1979, before the Honorable Homer F. Wilkinson, Judge of the Third Judicial District Court, and made its order in connection therewith wherein Respondent was "required to pay to the Defendant, Michele Cruz, the sum of \$300.00 per month as temporary alimony and support for the benefit of herself and her minor child during the pendency of this

action. It is understood that the Plaintiff, Isaac Cruz, is a teamster and is currently on strike. During the course of the strike that is underway at the date of this hearing Mr. Cruz shall be required to make payments of \$100.00 per month during the course of the strike as a temporary child support and alimony payment to the Defendant. At such time as the strike is resolved Mr. Cruz shall immediately reinstate his payments at the amount of \$300.00 per month, payable to the Defendant, Michele Cruz." (R.95). As to attorney's fees, the Court ordered that "determination of whether or not the Defendant is entitled to an award of attorney's fees for having to bring this action against the Plaintiff shall be reserved until the time of trial". (R.96).

No responsive pleading to Plaintiff's Complaint had been filed through this date nor had any objections been made to that failure. On the day of trial and in open Court, a responsive pleading was filed to Plaintiff's Complaint (R.115), but which failed to request attorney's fees or alimony on behalf of Respondent although they had both been clearly in issue through the course of this matter as shown above and through contact with Plaintiff's counsel prior to the time of trial (R.223).

Trial was had in this matter on June 7, 1979, before the Honorable Dean E. Conder, Judge of the Third Judicial District Court. Evidence was introduced at the trial in behalf of the Respondent regarding an award of alimony (R.201-240), an award of attorney's fees (R.220-225), and Respondent's due but unpaid amounts under the Order of Temporary Support in the amount of \$500.00 (R.191-193; 199-200), the Appellant having paid only \$200.00 under that prior order through the date of trial.

The Court entered its Amended Findings of Fact and Conclusions of Law and Amended Decree of Divorce on September 4, 1979 (R.131-139). On October 23, 1979, the Court heard the Plaintiff's Motion for New Trial (R.143) and on November 8, 1979, entered its Order denying that motion (R.145). Thereafter, Plaintiff brought this appeal.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR
IN AWARDING ALIMONY TO DEFENDANT
OR IN THE AMOUNT AWARDED

The Order appealed from regarding the alimony to Defendant ordered that "the Defendant is awarded \$150.00 a month alimony for eighteen months, at which time, the alimony is to cease, in its entirety." (R.132). Substantial testimony

was elicited from each of the parties regarding their financial conditions at the time of trial (Plaintiff: R.170-176, 178-184, 199; Defendant: R.201-207, 209-211, 216-217). Appellant in his brief does not appear to contest the amount of alimony awarded but rather that there was an award at all. Regardless of whether the amount of the award is in question, it appears that it is a matter that can readily be disposed of by this Court, should the Court decide that an award in this case is justified, by virtue of (a) the Appellant's failure to contest the size of the award in his Brief on Appeal, and (b) the various presumptions ordinarily applied to review of decisions of the lower court, namely, that this Court should not disturb the action of the District Court where there is a reasonable basis in the evidence to support the Court's action (Holman v. Sorenson, 556 P.2d 499 (Utah 1976)), should review the decision below in a light most favorable to the prevailing Respondent in the case below (Nyman v. Cedar City, 361 P.2d 1114, 12 U 2nd 45), and should not overturn the judgment below unless the Appellant is able to prove that the judgment is such a serious inequity as to manifest a clear abuse of discretion on the part of the trial court (Searle vs. Searle, 522 P.2d 697 (Utah 1974)).

The real question appears to be whether the Court should have made any award of alimony to the Defendant at all. The Appellant argues, through his counsel, that he was "mislead in this regard by the Defendant's failure to counterclaim or file an affirmative answer or in any manner request . . . alimony". (Brief of Appellant, Page 2). This case presents an unusual circumstance in that the responsive pleading was not filed until moments before the actual trial of the case. The Plaintiff's Complaint was signed and filed on November 13, 1978, and trial was held on June 7, 1979, a period of nearly seven months from date of filing to date of trial. During this period of time an award of temporary alimony was sought by the Defendant/Respondent and obtained for the pendency of this action as mentioned above. Prior to the trial, settlement attempts were made which included contact between the attorneys regarding payment of alimony to the Defendant, as also mentioned above. Thus, right up until the time of trial, the issue of alimony was, in a practical sense, still an open issue. Counsel for Plaintiff had failed throughout the pendency of this action to require Defendant to file a responsive pleading or to take advantage of her failure to do so.

Under those circumstances it might be said that Plaintiff waive his right to a timely notice of issues to be presented at trial, including the issues of alimony and attorney's fees.

Additionally, there is the plain fact that counsel for Plaintiff represented the Plaintiff at the April 4, 1979, hearing wherein the Court specifically reserved the issue of an award of attorney's fees "until the time of trial" (R.96). Plaintiff was on clear and unambiguous notice that at the time of trial attorney's fees would be an issue in some degree yet, Appellant claims that the "Defendant refused to raise the issue of alimony or attorney's fees" and that the Plaintiff was "denied a full opportunity to meet this issue...". (Brief of Appellant, Page 3). He further asserts that "the Plaintiff had a right to assume and rely on the fact that the Defendant was not requesting...attorney's fees. (Brief of Appellant, Page 3).

Another aspect of Appellant's argument relates to the procedure of the presentation into evidence of the issue of alimony. The transcript relevant to this is as follows:

Question: Is it your desire that Mr. Cruz pay alimony in a month for a period of time until you are able to regain some kind of stability economically for yourself?

Answer: Yes.

Mr. Miner: Object to that question,
your Honor.

The Court: Overruled.

Rule 46 of the Utah Rules of Civil Procedure which is substantially similar to the Federal Rules provides the manner of making an objection and the effect thereof. It states in sum that the party needs to both make known to the Court his objection and his grounds therefor. It is patent that no grounds for the objection whatever were asserted by Plaintiff. It is also apparent that the Plaintiff did have ample opportunity to object at the time the ruling was made so that his objection does not fall within the exception provided in Rule 46. Additionally, Rule 4(a) of the Utah Rules of Evidence provides that "A verdict or finding shall not be set aside, nor shall a judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific grounds of the objection...". The objection was timely interposed but in no way made "clear the specific ground of objection." (See Magill v. Westinghouse Electric Corp., C.A. 3rd (1972))

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F.2d 294 to the effect that the Court of Appeals would not consider an argument based upon an objection to a question but which objection never set forth the ground urged on appeal for reversal; Redevelopment Agency of Salt Lake City vs. Barrutia, 526 P.2d 47). Ergo, the Plaintiff cannot now be heard to complaint of the admission into evidence of the request for alimony regardless of the status of the pleadings and after admission into evidence properly became an issue in the case.

The remaining question appears to be that of whether the award of alimony to a Defendant in a divorce action is proper in any event. Section 30-3-5(1), Utah Code Annotated, 1953 as amended, provides that when a decree of divorce is made "the Court may make such orders in relation to the ... parties, in the maintenance of the parties ... as may be equitable." The statute makes no distinction between husband and wife or plaintiff and defendant but affirmatively requires the Court in a divorce action to review the circumstances of the parties and to enter an order based thereon as may be equitable. In this case, the Court below did review the circumstances of the parties and made an award that can certainly be considered equitable under the circumstances. The award was for a relatively small monthly amount over a strictly

limited and brief duration. The statute seems to imply on its face that regardless of the pleadings on both sides in a divorce action, the Court can enter whatever order it chooses as long as it is equitable and, presumably supported by the evidence. This would appear to leave open the possibility of both parties in a divorce action being unprepared to meet the issues the Court may find relevant in a divorce action. This statute substantially and specifically extends well beyond the provisions generally made for judgment as contained in Rule 54 (c)(1) of the Utah Rules of Civil Procedure which seems to imply that relief can be given only to one affirmatively requesting it. The divorce statute quoted specifically mandates, without reference to request for affirmative relief, that the Court review the circumstances of the party and enter a judgment that is "equitable". It appears, therefore, that a divorce action is a "heads up" ball game wherein the pleadings are not determinative in the action or at least have far less effect on the ultimate ruling of the Court than would be the case in all other types of actions. This interpretation seems to be confirmed by the provisions of Section 30-3-3, U.C.A., wherein

it states that "The Court may order either party to pay to the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action." Again, this statute does not make reference to plaintiff and defendant or husband and wife. Given the foregoing, it appears that the Court did have power to enter its award or alimony.

The conclusion that the Court was justified in making its award of alimony (and its award of attorney's fees) is further bolstered by the ruling of this Court in Palombi v. D and C Builders, 452 P.2nd 325, 22 Utah 2nd 297 (1969) wherein the Court ruled that even though there was no request for an attorney's fee in the plaintiff's Complaint, because the action was governed by a statute, in this case lien statute, the statute in effect was incorporated by reference into the pleading and thereby justified the Court in awarding an attorney's fee. While the divorce statute is not so explicit as the lien statute involved in that case (Section 38-1-18, U.C.A., 1953), in a like manner it may, nevertheless, be incorporated into the pleadings of both parties to a divorce action and in this case specifically to support the awards given to the Respondent.

The Court, in the Palombi case, cautioned, however, that it was important that the issue be raised at some point in order to give the parties a full opportunity to meet it, which would presumably apply to Section 30-3-5(1), Utah Code Annotated, 1953. In the present case, however, it may not matter greatly whether or not the divorce statute is interpreted in the same manner as the lien statute, i.e., incorporating the terms of the statute into the pleadings of the parties by implicit reference. This is so because in the present case the specific issues complained of are the award of alimony and the award of attorney's fees. In both of these matters the Plaintiff had prior notice that these issues may or would be raised at the time of trial. Plaintiff did not complain at the time of trial that he was surprised by the issue of alimony (or the issue of attorney's fees), but rather could fairly assume over the pendency of the action that inasmuch as no responsive pleading had been filed it might be of issue at trial.

It might be noted as well that in his brief Appellant states that he would have no objection to the award had the matter been pleaded and tried (Brief of Appellant, Page 2). It is submitted that Plaintiff

has made no case that an award granted to Defendant would be any different than that already entered by the Court nor to show that it is in any way inequitable. It might also be noted that Plaintiff was given full opportunity to examine or cross-examine the parties and other witnesses.

For the foregoing reasons, Respondent submits that the Court's award of alimony was properly granted in a reasonable amount and that the judgment of the Court should be affirmed.

POINT II.

THE TRIAL COURT DID NOT ERR
IN AWARDING ATTORNEY'S FEES
TO DEFENDANT OR IN THE AMOUNT
GRANTED

The Court will recognize that a substantial portion of the argument contained in Point I is applicable to Point II, the issue of the award of attorney's fees, and thus the arguments there will not generally be repeated.

Counsel for the Respondent was sworn and testified without objection as to the December, 1978, Order to Show Cause and the April, 1979, Order to Show Cause and the trial in this matter (R.220-221). Specifically included in that testimony, again without objection, was testimony to the effect that the amount of attorney's

fees expended included "today's trial time" (R.221), i.e. the divorce trial. The testimony was to the effect that the Respondent's attorney's fees were incurred on an hourly basis (R.224) and that in excess of 25 hours had been expended in behalf of Respondent, including the one-half day in trial (R.131). The December 1978 hearing necessitated Respondent and her counsel to spend the entire day, the last court day before Christmas, in order to be heard in their attempts to regain custody of the Respondent's son (R.220), i.e. from 9:00 o'clock in the morning until 5:00 p.m. that afternoon (R.224). Additionally, time was spent preparing the Order to Show Cause, Temporary Restraining Order, the Affidavit and the Motion to Shorten Time in preparing the Order to Show Cause and Request for Temporary Alimony and Support in April of 1979, as well as discovery, correspondence and attempts to work out visitation and support between the parties (R.220-221). It is apparent from the record that a substantial amount of the time spent by the attorney for the Respondent, and therefore, the attorney's fees incurred, were in connection with matters specifically reserving the attorney's fees as an issue until trial. Unopposed and uncontroverted testimony was also given that the attorney's fees were reasonable (R.221).

It clearly appears that an undetermined but substantial portion of the attorney's fees awarded by the Court are completely justified as being awarded in relation to the earlier orders of the Court which held in abeyance until trial the issue of attorney's fees.

Counsel for Plaintiff cross-examined Respondent's counsel on the issue of his attorney's fees, but did not inquire as to a breakdown of those fees, although the cross-examination was apparently of the scope desired by Plaintiff's counsel. (R.225). It should be noted that no objection had been raised to the introduction of evidence regarding the attorney's fees in any manner. Therefore, the objections urged now on appeal that were not urged in the trial court should not be considered by the reviewing court in absence of a showing of any special circumstances why such objections were not made below (Steele v. Wilkinson, 349 P.2d 1117, 10 U 2d. 159) and inasmuch as the Plaintiff had full opportunity to object he has not come within the exception provided in Rule 46, that if a party has no opportunity to object that the absence of an objection will not thereafter prejudice him. (Rule 46, Utah Rules of Civil Procedure; Hanks v. Christensen, 354 P.2d 564, 11 U 2d. 8). In any event, the award

of attorney's fees has long been held by the Court to be a matter of discretion for the trial judge in a divorce case and that in absence of clear abuse of that discretion the Court's award will not be disturbed. (See for example, Bader v. Bader, 424 P.2d 150, 18 U.2d 407 (1967); conversely see Allredge v. Allredge, 229 P.2d 681, 119 U. 504 (1953)).

For the foregoing reasons, Respondent submits that the Court's award of attorney's fees was properly granted in a reasonable amount and that the judgment of the Court should be affirmed.

SUMMARY AND CONCLUSION

This case presents an unusual circumstance in that while a divorce was granted to the Plaintiff and no affirmative relief was sought in Respondent's pleadings, the Court, nevertheless, in granting the Plaintiff's divorce, awarded the Defendant alimony and attorney's fees. As to each the Plaintiff claims surprise because no affirmative relief was sought in the Respondent's pleadings below. Those pleadings were filed, however, on the day of trial, after a seven month pendency of the case before trial Respondent additionally had been, in an earlier proceeding, awarded temporary alimony. Thus, a claim of surprise

does not appear well-founded. Utah law specifically allows such an award to be made absent affirmative requests in the pleadings, and finally, during the course of the trial, Plaintiff failed to appropriately object to the Respondent's request for attorney's fees. Even had that objection been properly made, however, the Court had within its discretion the power to make such an award and did so after a review of the circumstances of the parties.

As to attorney's fees, it appears likewise that no timely objection was made or attempted regarding the issue of attorney's fees to be awarded to Respondent at trial of her action below. The record clearly shows that the issue of attorney's fees on two prior proceedings specifically reserved for the time of trial the issue of attorney's fees which prior hearings appear to represent a substantial portion of the attorney's fees granted even if Appellant was unjustly surprised by the attorney's fees issue. It thus appears that under the circumstances of this case under the statutes of the State of Utah cited, and under case law the Court in its discretion reasonably awarded alimony and attorney's fees to the Defendant and in reasonable amounts. The Order

of the Court below should be affirmed in all respects.

Respectfully submitted this 14th day of
March, 1980.

HUNT, LAREW & KINATEDER

By: 

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent were served upon the Plaintiff/Appellant by mailing the same, postage prepaid, to Mark S. Miner, Attorney for Plaintiff/Appellant, 525 Newhouse Building, Salt Lake City, Utah 84111, this 14th day of March, 1980.
