

2009

Pamela Cosby v. Adrian Jefferson, an individual,
Rosalind E. Cazares, an individual : Brief of
Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

PAMELA COSBY,

Plaintiff-Appelle,

v.

ADRIAN JEFFERSON, an individual,
ROSALIND E. CAZARES, an individual.

Defendants-Appellants

Appeal No. 20091035

Judge Robert Hilder

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT OF
SALT LAKE COUNTY

BRIEF OF APPELLANTS

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The Court's Ruling and Order Below
Plaintiff's Motion for Summary Judgment

TABLE OF AUTHORITIES

Penn v. Spencer, 17 Gratt. 85 (Va. 1866).

30 AmJur 2d Section 155, Interest of heir

Snow v. Tannasse, 929 P.2d 351 (Utah 1999).

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this matter pursuant to Utah Code Annotated Section 78A-4-103.

ISSUES PRESENTED

Whether or not it is against public policy to allow execution on an unascertained interest in an estate where the intent is not to purchase the asset, but to deprive the owner of pursuing a claim.

NATURE OF THE CASE

See argument.

STATEMENT OF FACTS

1. On or about August 17, 2006 a judgment was entered in favor of Alan J. Prince against Rosalind Cazares in the Third Judicial District Court of Salt Lake County, State of Utah, Case No. 05092074.

2. For value received the judgment was assigned to Pamela Cosby the Alan J. Prince on or about August 29, 2007.

3. In an effort to recover the judgment, Pamela Cosby caused a Writ of Execution and praecipe to be issued by the Third Judicial District Court, wherein all of Rosalind Cazares' interest in the Estate of Rosemary Cosby was attached and ordered to be sold.

4. The Salt Lake Couth Sheriff served notice by leaving a copy of the same with Adrian Jefferson.

5. Adrian Jefferson is the son of Rosalind Cazares.

6. Adrian Jefferson claimed his mother did not live with him and alleged that therefore service on him was not proper.

7. A new praecipe and writ were executed and issued by the court and then served by Constable Sindt.

8. Constable Sindt set the property for sale.

9. On the morning of the sale, Rosalind Cazares filed a chapter 13 bankruptcy, without all the necessary statements and Schedules. (*See Case No. 08-21504 of record*).

10. On April 24, 2008, Pamela Cosby filed a Motion for Relief from Automatic Stay which was scheduled for hearing on May 19, 2008.

11. On April 30, 2008 an Order dismissing the case pursuant to 11 U.S.C. Section 521(i) was entered.

12. Mrs. Cosby again set a sale for execution on her judgment.

13. The Sale was scheduled for May 21, 2008.

14. On the morning of May 23, 2008 Cazares again filed a Chapter 13 bankruptcy.

15. Just as previously, Cazares filed the bankruptcy solely to delay the sale by Mrs. Cosby.

16. Just as previously, the filing by the Debtors failed to meet the requirements of the Bankruptcy code.

17. The sworn statements and schedules filed in the bankruptcy showed Cazares to be insolvent.

18. On February 12, 2009 Cazares' bankruptcy was dismissed by the Federal Bankruptcy Court for willfully failing to comply with the orders of the bankruptcy court.

19. Mrs. Cosby again set the estate interest for sale on April 10, 2009.

20. Fifteen minutes prior to the scheduled time for the sale, Adrian Jefferson appeared at the constable's office.

21. Adrian Jefferson is the son of Mrs. Cazares.

22. Adrian Jefferson was aware that Mrs. Cazares had been in bankruptcy and that she was insolvent.

23. Adrian Jefferson presented a document entitled Assignment to the constable and claimed that pursuant to the assignment he was the owner of the property.

24. Adrian Jefferson also threatened to sue the constable if he proceeded with the sale.

25. In spite of Adrian Jefferson's threats the constable proceeded with the sale and Mrs. Cosby was the successful bidder for the sum of \$5,000.00

In opposition to the motion, Defendants submitted the following evidence:

26. Pamela Cosby testified before the Bankruptcy Court on July 7, 2008 that her intent in trying to purchase the Rosalind Cazares' interest in the estate was not to collect the debt but to stop the litigation. See, In re Cazares, July 7, 2008, Motion for Relief from Stay, page 75, lines 3-18.

ARGUMENT

I. EXECUTION UPON MS. CAZARES' UNASCERTAINED INTEREST IN THE ESTATE IS VOID AS A MATTER OF LAW.

As a matter of law, Plaintiff may not execute upon Ms. Cazares' interest in the estate where such interest is unascertained. Ms. Cazares' interest in the estate was unascertained where the value of her interest had yet to be determined, let alone realized. Courts have long held that the execution sale of an unascertained interest in an estate is void. *See e.g. Penn v. Spencer*, 17 Gratt. 85 (Va. 1866). Accordingly, Plaintiff's execution upon the unascertained interest of Ms. Cazares in the estate is void, and Defendants are entitled to judgment as a matter of law.

30 AmJur 2d Section 155, Interest of heir, devisee or legatee addresses this situation.

It has been held, sometimes by virtue of statutory provision, that all legacies are subject to be levied on in satisfaction of a judgment in the same manner as debts due are made subject to execution. On the other hand, there is authority for the rule that until a legacy vests in the legatee it cannot be taken on execution against him, and that a legacy does not vest so as to be taken on until the time has come when he ought to assent to it, and that that time does not come until it appears with reasonable certainty that the executor will not need the legacy to enable him to pay claims of a higher rank than the claim of the legatee. Accordingly, it has been ruled that pending the settlement of an estate, legacies, whether general, demonstrative or specific, are not subject to levy and sale under an execution against the legatee. Moreover, where personal property is

bequeathed to a class the members of which are to be determined by some future event, when the property is to be divided among them, it has been held that until that event arrives and the division is made, the property is not subject to execution on a judgment against a probably member of that class.

If the purported execution is in fact void, or not enforceable until the estate is settled, there can be no fraudulent conveyance of the interest therein.

II. PUBLIC POLICY FORBIDS PLAINTIFFS FROM EXTINGUISHING MS. CAZARES' CLAIM UPON THE ESTATE THROUGH EXECUTION.

As noted in the statement of facts, Pamela Cosby admitted during the bankruptcy hearing that her intent in executing herein is not to get the underlying judgment paid, but instead to stop Rosalind's efforts in the probate court.

It is against public policy for Plaintiff's to execute on Ms. Cazares' interest in the estate for the purposes of extinguishing her claims to the estate and additionally denying her standing. In the case of *Snow v. Tannasse*, 929 P.2d 351 (Utah 1999), the Supreme Court reversed the Utah Court of Appeals and held that public policy forbids a law firm from extinguishing a malpractice claim against it by acquiring that claim on execution. This case is nearly identical. Plaintiff's are attempting to extinguish Ms. Cazares' claim against the estate by acquiring her claim on execution, thereby removing her interest and claiming that she has no standing. Such a legal maneuver is a blatant end-run-around the standing requirement to make an action justiciable. Under the precedent set in *Snow*, Plaintiff's execution on Ms. Cazares' interest in the estate for the purpose of

extinguishing her claim against the estate and denying her standing is void as against public policy, and Ms. Cazares is entitled to judgment as a matter of law.

CONCLUSION

For the reasons cited herein, the judgment of the district court should be reversed.

DATED this 1ST day of JUNE, 2010.

Reoalinda E. Cazares

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of June 2010, I caused to be served via first class U.S. mail, postage pre-paid, a true and correct copy of the foregoing Appellants' Brief to the following:

Shawn Turner
LARSON, TURNER, DALBY & ETHINGTON, L.C.
P.O. Box 95921
1218 West South Jordan Parkway, Suite B
South Jordan, Utah 84095

A handwritten signature in black ink, appearing to read "Shawn Turner", written over a horizontal line.

ADDENDUM

The Court's Ruling and Order Below
Plaintiff's Motion for Summary Judgment

against Rosalind Cazares in the Third Judicial District Court of Salt Lake County, State of Utah, case no. 05092074.

2. For value received, the judgment was assigned to Pamela Cosby by Alan J. Prince on or about August 29, 2007.
3. In an effort to recover the judgment, Pamela Cosby caused a Writ of Execution and praecipe to be issued by the Third Judicial District Court, wherein all of Rosalind Cazares' interest in the Estate of Rosemary Cosby was attached and ordered to be sold.
4. The Salt Lake County Sheriff served notice by leaving a copy of the same with Adrian Jefferson.
5. Adrian Jefferson is the son of Rosalind Cazares.
6. Jefferson claimed his mother did not live with him and alleged that therefore service on him was not proper.
7. A new praecipe and writ were executed and issued by the court and then served by Constable Sindt.
8. Constable Sindt set the property for sale.
9. On the morning of the sale, Rosalind Cazares filed a chapter 13 bankruptcy, without all of the necessary statements and schedules. (case # 08-21504).
10. On April 24, 2008, Pamela Cosby filed a Motion for Relief from Automatic Stay which was scheduled for hearing on May 19, 2008.
11. On April 30, 2008, an Order dismissing the case pursuant to 11 U.S.C. Section 521(i) was entered.
12. Mrs. Cosby again set a sale for execution on her judgment.

13. The Sale was scheduled for May 23, 2008.
14. On the morning of May 23, 2008, Cazares again filed a Chapter 13 Bankruptcy.
15. Just as previously, Cazares filed the bankruptcy solely to delay the sale by Mrs. Cosby.
16. Just as previously, the filing by the Debtors failed to meet the requirements of the Bankruptcy code.
17. The sworn statements and schedules filed in the bankruptcy showed Cazares to be insolvent.
18. On February 12, 2009 Cazares' bankruptcy was dismissed by the federal bankruptcy court for willfully failing to comply with the orders of the bankruptcy court.
19. Mrs. Cosby again set the estate interest for sale on April 10, 2009.
20. Fifteen minutes prior to the scheduled time for the sale, Adrian Jefferson appeared at the constable's office.
21. Jefferson is the son of Cazares.
22. Jefferson was aware that Cazares had been in bankruptcy and that she was insolvent.
23. Jefferson presented a document entitled Assignment to the constable and claimed that pursuant to the assignment he was the owner of the property.
24. Jefferson also threatened to sue the constable if he proceeded with the sale.
25. In spite of Jefferson's threats the constable proceeded with the sale and Mrs Cosby was the successful bidder for the sum of \$5,000.00.

CONCLUSIONS OF LAW

Based on the findings of fact, the Court makes the following conclusions of law:

- 1 There are no issues of material fact which would preclude granting summary

judgment in this case.

2. The purported transfer by Rosalind Cazares of the estate of Rosemary Cosby to her son Adrian Jefferson was invalid because it purported to transfer property she did not own.
3. The purported transfer by Rosalind Cazares of the estate of Rosemary Cosby to her son Adrian Jefferson was an invalid fraudulent conveyance.
4. Rosalind Cazares' interests in the Estate of Rosemary were vested in her at the time of the constable's sale.
5. The sale of Ms. Cosby's interests in the estate is not against the public interest.
6. The constable's sale of all of Ms. Cazares' interests in the Estate of Rosemary Cosby is valid and title to those interests, subject to the claim of the Inheritance Funding Company is hereby quieted in Pamela Cosby.

JUDGMENT

Plaintiff's motion for summary judgment is granted. The purported transfer of any of Rosalind Cazares' interest in the Estate of Rosemary Cosby to Adrian Jefferson is void. All of Rosalind Cazares' interest in the Estate of Rosemary Cosby Civ. # 973900220ES are quieted in Pamela Cosby subject only to the interest of the Inheritance Funding Company as that claim is disclosed in the probate action. Plaintiff is awarded her costs in this action against the Defendants jointly and severally in the amount of \$ 220.00.

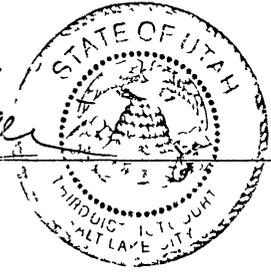
Dated this 19th day of November, 2009

090907838

BY THE COURT



Hon. Robert K. Hilder
District Court Judge



CERTIFICATE OF MAILING

I hereby certify that on November 18th, 2009 a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Summary Judgment was mailed first class postage prepaid to the following:

Rosalind Cazares
6842 Windy Ridge Drive
Herriman, UT 84096

Adrian Jefferson
PO Box 2481
Sandy, UT 84091

