

2002

# Jackson Construction Company, Inc. v. Robert C. Marrs, Douglas R. Marrs : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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JACKSON CONSTRUCTION  
COMPANY, INC.,

Plaintiff and Appellee,

vs.

ROBERT C. MARRS, and DOUGLAS R.  
MARRS, and JOHN DOES I-V,

Defendants and Appellants.

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Appellate No. 20020745

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REPLY BRIEF OF APPELLANT

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Appeal from the Order Dismissing Defendants' Rule 60(b)(4) Motion to Quash Service and Set  
Aside Default Judgment of the District Court of the Fourth Judicial District,  
the Honorable James L. Shumate, Presiding.

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**FILED**  
UTAH SUPREME COURT

**AUG 19 2003**

**PAT BARTHOLOMEW  
CLERK OF THE COURT**

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## **ARGUMENT**

### **I. THE STANDARD OF REVIEW FOR ISSUE # 2 IS DE NOVO.**

Plaintiff argues in its Brief of Appellee that the issue of whether the lower court improperly considered certain facts in determining whether to vacate its prior judgment is an issue to be reviewed under an abuse of discretion standard. Appellee cites *Parker v. Ross*, 217 P.2d 373 (Utah 1950), for this proposition. In *Bonneville Billing v. Whatley*, however, the Court of Appeals stated:

(W)hen a motion to vacate a judgment is based on a claim of lack of jurisdiction, the district court has no discretion: if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs. Therefore, the propriety of the jurisdictional determination, and hence the decision not to vacate, becomes a question of law upon which we do not defer to the district court.

949 P.2d 768, 771 (Utah App. 1997). This claim is based on lack of jurisdiction, making the decision not to vacate a question of law upon which the district court receives no deference. Therefore, the standard of review is de novo.

### **II. PLAINTIFF'S AFFIDAVIT AND EX PARTE MOTION DO NOT SATISFY THE REASONABLE DILLIGENCE REQUIREMENT OF RULE 4(d)(4) OF THE UTAH RULES OF CIVIL PROCEDURE.**

Plaintiff argues that it's Affidavit and Ex Parte Motion was sufficient to satisfy the reasonable diligence requirement of Rule 4(d)(4)(A) of the Utah Rules of Civil Procedure. Rule 4(d)(4)(A) sets forth the general procedural standards a Plaintiff must satisfy before it may resort to service by publication: "Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence... the party seeking service may file a motion supported by affidavit requesting an order allowing service by publication or by some other means."

Plaintiff contends that this case is distinguishable from *Bonneville*, 949 P.2d 768.

Plaintiff argues that the Utah Supreme Court in *Bonneville* was not concerned with the plaintiff's failure to make any efforts to locate the defendant once the plaintiff learned the defendant might be residing in California. While it is true that the Court was also concerned with fraud in the affidavit, the *Bonneville* Court noted that, once the plaintiff was informed that the defendant might be in California, due diligence required at the very least an attempt to locate the defendant's address and an attempt to contact defendant. *Id.* at 775. Because the plaintiff failed to take these steps, the plaintiff failed to meet due diligence requirements.

Like in *Bonneville*, Plaintiff learned from its failed attempt at contact by mail that Defendants were likely living in California. Despite this knowledge, Plaintiff made no further attempt to ascertain any current addresses for Defendants or to contact them. As the *Bonneville* Court noted, "Due diligence requires more than attempting to contact addresses on a single form." *Id.*

Plaintiff attempts to show that *Downey State Bank v. Major-Blakeney Corp.*, 545 P.2d 507 (Utah 1976), is more analogous factually to the case at hand. In *Downey*, the Court found that the plaintiff had met due diligence requirements by contacting the last registered agent of the corporation, obtaining his most recent address in California, sending a sheriff's deputy to the address, and upon finding that he had moved, attempted to discover a new address by speaking to the new occupant. *Id.* at 507. In contrast, Plaintiff sent one letter (there are two Defendants) to an address listed on a single form before submitting its affidavit. Plaintiff's efforts are clearly insufficient to meet the standard met by the plaintiff in *Downey*.

Plaintiff contends that the facts of *Parker v. Ross*, 217 P.2d 373 (Utah 1950) are analogous to the case at hand. However, the facts of *Parker*, much like those of *Downey*, show

in comparison how little Plaintiff actually did to locate Defendants. In *Parker*, the plaintiff found the last known address of defendant and sent the Salt Lake County sheriff to serve the summons. Upon not finding the defendant at that location, the plaintiff then searched the records of the County Recorder, the tax rolls in the County Treasurer's office, the judgment and probate indexes, the records of the Assessor and the city treasurer of Salt Lake County, the city directories of Salt Lake City "for many years past", and the telephone directory for Salt Lake City and the surrounding areas. *Id.* at 419-420. In this search, plaintiff found two additional addresses for plaintiff in Butte, Montana and sent letters to the defendant at these addresses and also to General Delivery, Butte, Montana. *Id.* at 420. When this approach proved unfruitful, plaintiff "made inquiry of the city police department of Butte, Montana, and the State Board of Health at Helena, Montana." *Id.*

Again, Plaintiff's efforts consisted of a single letter sent to a single address listed on a single form in order to find the two Defendants. Plaintiff made no other efforts. It is a straightforward call to compare the obvious diligence of the plaintiff in *Parker* with the singularly limited action taken by Plaintiff in the case at hand.

While it is true that Rule 4(d)(4)(A) does not require an exhaustion of all possibilities of locating and serving defendants, the Rule does require due diligence. In citing to Justice Wolfe's concurring opinion in *Parker*, the *Bonneville* Court stated:

The diligence to be pursued and shown by the affidavit is that which is reasonable under the circumstances and not all possible diligence which may be conceived. Nor is it that diligence which stops just short of the place where if it were continued might reasonably be expected to uncover an address or the fact of death of the person on whom service is sought... It is that diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so. If the end sought is the address of an out-of-state defendant it encompasses those steps most likely, under the circumstances, to accomplish that result.

949 P.2d at 775.

As Plaintiff points out, Rule 4(d)(4)(A) does not list specific actions that a plaintiff must take to meet its standard of due diligence. However, taking the above-cited cases as examples, a plaintiff must take actions calculated towards actually obtaining the location of a defendant for service. In 1950, the *Parker* Court found that a diligent search of county and city records, as well as searches conducted outside of the state were actions that satisfied the requirements of Rule 4. 217 P.2d at 419-420. In 1976, the *Downey* Court found that sending a sheriff's deputy to the out-of-state address of the defendant and, upon failure to serve the defendant, attempting to locate a more current address for the defendant satisfied these requirements. 545 P.2d at 509.

In 1999, plaintiffs should have made use of modern resources to satisfy this standard. In fact, considering the abundance of print, telephonic and electronic resources for finding people currently available at little or no cost to the public, including the well-known ability to conduct nationwide Internet name searches in a matter of minutes, modern plaintiffs have little or no excuse for failing to exhaust these resources before resorting to service by publication. It is abundantly clear that Plaintiff's single action clearly falls well short of the due diligence standard of Rule 4(d)(4)(A).

Accordingly, this case presents an excellent opportunity for this Court to establish a specific and objective threshold of essential actions plaintiffs must take before they request the trial court to order service by publication. Obviously, in some situations a court may require additional measures be taken to locate defendants in order to satisfy reasonable diligence; and under other circumstances, the threshold actions may be considered sufficient. In either event, this Court could preserve the discretion of the trial court, provide to plaintiffs more objective and



identifiable criteria to guide their efforts, and, most importantly, better protect defendants against ex parte assertions of reasonable diligence that subvert due process.

### **III. THE DISTRICT COURT ERRED IN CONSIDERING PLAINTIFF'S REDEMPTION OF THE PROPERTY FROM TAX SALES IN THE COURT'S DETERMINATION OF REASONABLE DILIGENCE.**

Plaintiff argues that the district court's consideration of Plaintiff's redemption of the Property from tax sales was proper under a "totality of the circumstances" standard. In support of this proposition, Plaintiff cites to *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Parker*, 217 P.2d 373. Plaintiff specifically refers to *Mullane* where the United States Supreme Court states:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

339 U.S. at 314. Plaintiff then quotes *Parker*, where Justice Wolfe stated in his concurring opinion "The diligence to be pursued and shown by the affidavit is that which is reasonable under the circumstances and not all possible diligence which may be conceived." 217 P.2d at 379.

While Plaintiff argues that this Court should read these two opinions as justification for a lower judge to consider any and all factors in determining due diligence, the actual language of these cases makes it clear that the *Mullane* and *Parker* Courts were not granting such broad discretion. The *Mullane* Court limited this consideration to the factors "reasonably calculated...to apprise interested parties of the pendency of the action..." 339 U.S. at 314. Justice Wolfe in his concurring opinion in *Parker* noted that the relevant circumstances envisioned by this standard are those that relate to "that diligence which is appropriate to

accomplish the end sought and which is reasonably calculated to do so.” 217 P.2d at 379.

Justice Wolfe further explained, “If the end sought is the address of an out-of-state defendant (reasonable diligence) encompasses those steps most likely, under the circumstances, to accomplish that result.” *Id.*

Justice Wade, writing for the majority in *Parker*, quoted with approval from the California Supreme Court case of *Rue v. Quinn*, 137 Cal. 653, 66 P. 216 (1901):

In making the order for the service by publication, the judge acts judicially upon the evidence which the Code requires to be presented to him for that purpose, and can act upon no other evidence than such as is prescribed by the Code.

217 P.2d at 377. The “Code” which prescribes the evidence required to be presented to lower courts in Utah is Rule 4(d)(4)(A) of the Utah Rules of Civil Procedure. This Rule requires a supporting affidavit setting forth the efforts made to locate the defendant and the circumstances making it impracticable to serve all of the individual parties. The affidavit submitted by Plaintiff does not aver the additional facts upon which Judge Shumate based his decision.

Put simply, the means considered by the lower court in determining due diligence must be relevant to the end sought, i.e., giving notice to the Defendants. The factors relied on by the lower court in this case were clearly unrelated to this end. The fact that Plaintiff asserts to have redeemed the Property from two tax sales is irrelevant to the end of giving notice to Defendants as to the pendency of Plaintiff’s claims. The means considered must also be contained in the Plaintiff’s affidavit. Plaintiff did not assert in its affidavit that it redeemed the Property at any tax sales.

The lower court’s consideration of this extraneous factor is tantamount to a ruling that Defendants’ failure to pay property taxes somehow diminishes Defendants’ Constitutional rights to due process. No such declaration is found in Utah law. Also, the facts that Plaintiff did aver

in support of due diligence did not meet any common sense standard of a reasonable effort to locate the Defendants. Therefore, the trial court's order denying Defendants' Motion to Quash Service and Set Aside Default Judgment is improper and should be reversed.

**IV. THE ALLEGATIONS IN PLAINTIFF'S ORIGINAL COMPLAINT FAIL TO ALLEGE FACTS THAT MEET THE LEGAL REQUIREMENTS FOR ADVERSE POSSESSION AGAINST A COTENANT.**

Plaintiff argues that the allegations contained in its Complaint were sufficient to state a cause of action for adverse possession against its cotenants, Defendants. In support of this contention, Plaintiff states that *Mathews v. Baker*, 155 P. 427 (Utah 1916), provides an excellent example of the conduct required to meet the requirements of adverse possession against a cotenant. In order to adversely possess property against a cotenant:

(T)he one in possession must, by acts of the most open and notorious character, clearly show to the world, and to all having occasion to observe the condition and occupancy of the property, that his possession is intended to exclude, and does exclude, the rights of his cotenant...(H)e may do this by conduct, the implication of which cannot escape the notice of the world about him...

*Id.* at 428-429 [Citing *Elder v. McClaskey*, 70F. 529, 542 (1895)]. Plaintiff's Complaint failed to allege facts that satisfy this standard.

Plaintiff argues that *Mathews* is very analogous to the case at hand. Plaintiff claims that its allegations in its complaint were "very similar to the findings in *Mathews*." This claim is simply not accurate. The *Mathews* Court found that the plaintiff in that case had met the necessary standard by making vast improvements of the property that showed the property to be the plaintiff's own. The Plaintiff in *Mathews* built a five-room cottage, built an eight-room cottage, built a seven-room house, leveled the surface of the ground, built walks, planted

shrubbery, and constructed outbuildings for the occupants of the cottages. *Id.* at 427. In short, the plaintiff in that case fully developed the property. The *Mathews* Court stated:

Every act of the plaintiff in improving and using the property in question could be given but one construction or effect. From those acts and the use made of the property but one inference is permissible, and that is that the plaintiff claimed and used the property as her own and did so adversely to all the world.

155 P. at 429.

In contrast, Plaintiff claims to have improved the roads connected with the Property, fenced the perimeter of the Property, and improved the irrigation system. (R. at 3-6). These acts cannot “be given but one construction or effect” like the acts of the plaintiff in *Mathews*. A little work on the perimeter of a piece of property is not sufficient to give notice to the world “by acts of the most open and notorious character,” that Plaintiff’s “possession is intended to exclude, and does exclude, the rights of his cotenant.” Building several multi-room cottages and accompanying outhouses, as well as significantly altering the land itself by leveling it, building walkways, and planting shrubbery are acts that would have the requisite effect of putting the world on notice of a cotenant’s intent.

In short, the difference between the actions taken by the plaintiff in *Mathews* and the actions taken by the Plaintiff is profound. The difference is between significant development of the property in *Mathews* and a bit of work on the perimeter of the Property by Plaintiff. Essentially, *Mathews* is helpful in illustrating how little Plaintiff did to put the world on notice of its “ouster” of Defendants.

In its Brief of Appellee, Plaintiff attempts to distinguish several cases cited by Defendants in the Brief of Appellant. Plaintiff first attempts to distinguish the case at hand from *McCready v. Frederickson*, 126 P. 316 (Utah 1912). While the case at hand is somewhat

different factually from *McCready*, the two cases deal with a similar issue: whether the purchase or redemption of property by a cotenant at a tax sale “can be construed as constituting an ouster of appellant, his cotenant.” *Id.* at 320. The *McCready* Court’s answer to this question was a firm “no.” *Id.* at 320. The *McCready* Court specifically held that in circumstances where a cotenant redeems the property at a tax sale, “the one who pays does so, not only for the benefit of himself, but also for the use and benefit of all of his cotenants.” *Id.* In addition, that Court stated, “The mere act of paying the taxes under such circumstances cannot be regarded as an act which in any way disturbs any right of the cotenant; but under the law, the presumption always is that the act was for the use and benefit of all interested in the premises.” *Id.* This Court reaffirmed this legal principle in subsequent cases. *See Jolley v. Corry*, 671 P.2d 139, 141-142 (Utah 1983); *Massey v. Prothero*, 664 P.2d 1176, 1178 (Utah 1983); *Sweeney Land Co. v. Kimball*, 786 P.2d 760, 762 (Utah 1990); *Olwell v. Clark*, 658 P.2d 585, 589 (Utah 1982).

Plaintiff proposes that the language of the Court’s opinion in *McCready* “suggests the decision is limited to the facts of the case.” (*See* Brief of Appellee, p. 21). However, nowhere in this opinion does the Court specifically state or even imply that their decision is so limited. In fact, this Court has unequivocally reaffirmed the legal principles set forth in *McCready* in several subsequent cases. *See Jolley*, 671 P.2d at 141-142; *Massey*, 664 P.2d at 1178; *Sweeney Land Co.*, 786 P.2d at 762 (Utah 1990); *Olwell*, 658 P.2d at 589. Even the Court’s opinion in *Mathews*, upon which Plaintiff relies so heavily, specifically cites with approval to the legal principles set forth in *McCready*. 155 P. at 428.

Plaintiff next attempts to distinguish *Olwell*, 658 P.2d 585, from the case at hand by claiming factual distinctions. Specifically, Plaintiff claims that *Olwell* is distinguishable because the plaintiff in that case did not make any improvements upon the property. However,

Defendants did not cite *Olwell* for that proposition. Instead, *Olwell* stands for the proposition that a claimant's payment of taxes, preservation of title, possession, use and reputation as sole owner are insufficient to inform cotenants of the adverse claim. *Id.* at 589.

Finally, Plaintiff attempts to distinguish *Sperry v. Tolley*, 199 P.2d 542 (Utah 1948), from the present case. Plaintiff argues that due to factual differences, *Sperry* does not control the case at hand. While the facts of the two cases are not identical, the factual differences upon which Plaintiff relies are inconsequential to the legal issues presented in *Sperry* and in the case at hand. Plaintiff argues that *Sperry* is distinguishable because, here, unlike in *Sperry*, Plaintiff acted alone in paying taxes on the Property and in improving the Property. The *Sperry* Court, however, ruled, "any act done by a cotenant for the protection of the common property will be presumed to be for the benefit of all tenants. 199 P.2d at 546 (*Quoting McCready*, 126 P. 316). The *Sperry* Court clearly stated that the purchase by one cotenant of a tax title is such an act that is presumed to be for the benefit of all. 199 P.2d at 546. Therefore, this act, whether done by one cotenant or two, is insufficient to put the other cotenants on notice of adverse claims. *Id.*

Likewise, the *Sperry* Court ruled that "the repairs and improvements made in the dwellings, buildings and fences are acts normally consistent with a tenancy in common and not adverse to it." *Id.* Here, Plaintiff made no improvement on the Property itself besides putting a fence on the perimeter and improving the existing irrigation system. Whether these acts are done by one or more cotenants, these acts are not sufficient to put the other cotenants on notice of any adverse claims.

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## CONCLUSION

For the foregoing reasons, trial court's order denying Defendants' Rule 60(b)(4) Motion to Quash Service and Set Aside Default Judgment should be reversed.

DATED this 15 day of August 2003.

A handwritten signature in black ink, appearing to read "Russell J. Gallian", is written over a horizontal line.

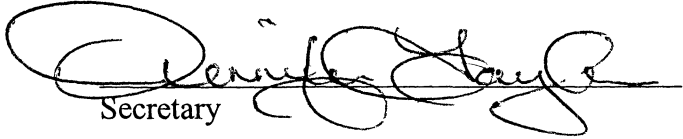
Russell J. Gallian  
of and for  
GALLIAN, WESTFALL,  
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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Brief of Defendants/Appellants Robert C. and Douglas R. Marrs was served this 18<sup>th</sup> day of August 2003, to Plaintiff/Appellee's counsel via United States Postal Service, to the following:

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