1980

Donald H. Meyers, And Engineering Enterprises, Inc., dba Intermountain Aerial Survey : Brief of Appellant Skychoppers of Colorado : Brief of Plaintiffs-Respondents Donald H. Meyers, And Engineering Enterprises, Inc., dba Intermountain Aerial Surveys

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

DONALD H. MEYERS, and ENGINEERING ENTERPRISES, INC., d/b/a INTERMOUNTAIN AERIAL SURVEYS, Plaintiffs-Respondents, vs. INTERWEST CORPORATION, a Utah corporation; SKYCHOPPERS OF UTAH, a Utah corporation, and SKYCHOPPERS OF COLORADO, a Colorado corporation, Defendant-Appellants.	)	No. 17070

BRIEF OF PLAINTIFFS-RESPONDENTS DONALD H. MEYERS, AND ENGINEERING ENTERPRISES, INC., d/b/a INTERMOUNTAIN AERIAL SURVEYS

Interlocutory Appeal from Orders of the Third District Court for Salt Lake County, Honorable Bryant H. Croft, Judge

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STATUTES AND RULES

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NATURE OF CASE

This is an action by plaintiffs to recover damages for personal injury sustained to the plaintiff, Donald H. Meyers and for loss of services and other expenses incurred by the corporate plaintiff, Engineering Enterprises, Inc.

DISPOSITION IN LOWER COURT

Plaintiff brought this action against the defendants, Interwest Corporation, a Utah corporation; Skychoppers of Utah, a Utah corporation; and Skychoppers of Colorado, a Colorado corporation. Defendants Interwest Corporation and Skychoppers of Utah have filed Answers to plaintiffs' Complaint.

The third defendant, Skychoppers of Colorado, was served with a Summons on August 8, 1978 and no Answer or Default Certificate has ever been filed. Defendant Skychoppers of Colorado's Motion to Quash Service was filed on

August 7, 1980, more than 20 months after the original service. Subsequent to defendant's Motion to Quash Service, the plaintiffs also moved the court for an Order to Amend the process contested by the defendant. After hearing, in which the Motions were argued, the court denied defendant's Motion to Quash and granted the plaintiffs' Motion to Amend the service.

RELIEF SOUGHT ON APPEAL

Defendant Skychoppers of Colorado's Interlocutory Appeal seeks a reversal of the trial court's Order granting plaintiffs' Motion to Amend and denying defendant's Motion to Quash the process served upon it.

STATEMENT OF FACTS

Plaintiffs' Complaint states a cause of action against defendants for injuries sustained by the plaintiff Meyers and damages sustained by the defendant Engineering Enterprises, Inc. which arose out of a helicopter accident that occurred in the State of Colorado on August 8, 1974. Several negotiations were undertaken between the parties and Complaints were finally filed on August 7, 1978. Defendant Skychoppers of Colorado was served in the State of Colorado on August 15, 1978. Nearly 20 months later, on August 7, 1980, Skychoppers of Colorado appeared specially and filed a Motion to Quash the process served upon it. Subsequent to the filing of defendant's Motion, plaintiffs filed their own

Motion to Amend process pursuant to Rule 4(h) of the Utah Rules of Civil Procedure. The hearing on said Motion was held before the Third Judicial District Court in and for Salt Lake County, the Honorable Bryant H. Croft presiding.

The court entered its Order, on April 14, 1980, denying defendant Skychoppers of Colorado's Motion to Quash and granting plaintiffs' Motion to Amend the Summons to show 30 days rather than 20 days as the time for answering. From said Order defendant Skychoppers of Colorado petitioned for interlocutory appeal which was granted by this court.

ARGUMENT

POINT I: RULE 4(h) OF THE UTAH RULES OF CIVIL PROCEDURE MAKES AMENDMENTS TO PROCESS OR PROOF OF SERVICE A DISCRETIONARY MATTER.

The trial court's decision to permit the amendment of the Summons in this case was made pursuant to Rule 4(h) of the Utah Rules of Civil Procedure which specifies as follows:

> At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended . . . .

Rule 4(h) places within the discretion of the court the determination of whether justice will be served by allowing the amendment. The intent of Rule 4(h) was discussed in the case of Ballard v. Buist, 8 Ut.2d 308, 333 P.2d 1071 (1959). The Ballard appeal was brought when the

defendant's Motion to Quash service of Summons and to dismiss the Complaint was granted by the District Court. In that case the action was commenced by a minor prior to the appointment of a guardian ad litem. The guardian ad litem then moved to amend the Summonses and Complaint to show the prosecution of the claim by the guardian. This court held that the District Court erred in quashing service on the grounds that the minor could not initiate the action and thus the District Court never obtained jurisdiction. The court reasoned that the technical error was a mere irregularity which could be cured by amendment, though the act of service, as characterized by defendant in this case, "was a completed act." Specifically, the court stated:

> Although the court obtained jurisdiction when the Summonses were properly served, such Summonses were subject to a Motion to Quash because of the provisions of Rule 17(b) . . .
>
> . . . However, the fact that a minor must appear by a guardian ad litem in a pending suit does not mean that process issued in initiating a suit by a minor makes such process void. It is a mere irregularity which can be cured by the appointment of a guardian ad litem and by amendment. 333 P.2d at 1073. (Emphasis added.)

Speaking concerning the court's discretion to allow amendments pursuant to Rule 4(h), the court further stated:

> . . . The facts in the instant matter clearly require the allowance of the requested amendment so that the matter may be heard upon the merits. The amendments could prejudice none

> of the parties, and could only tend to serve justice. To disallow the amendment was an abuse of discretion. It has always been the rule in this state to be liberal in the allowance of amendment to the end there can be a complete adjudication of the controversy upon the merits and so that justice may be served. 333 P.2d at 1074.

It is clear from the above-referred to case that this court takes the position that mere mistakes in the process do not make the process void but merely voidable and the subject of amendment to cure the defect.

The question of discretion exercised by a court of law has been addressed by this court and other courts on several occasions and it is undisputed in this jurisdiction that where a court is granted discretionary authority to perform a proposed action, that the reviewing court must allow considerable latitude in which the court below may exercise that judgment. Further, it is undisputed law in this jurisdiction that when a court has ruled on a discretionary matter that it shall not be reversed unless its actions are clearly found to be arbitrary. See Carmen v. Slavens, 546 P.2d 601 (1976); Airkem International, Inc. v. Parker, 513 P.2d 429 (Ut. 1973).

Many jurisdictions have made an attempt to define an appropriate test to determine when a court has abused its discretion. The majority of the cases have concluded that the appropriate test of abuse of discretion is whether the trial court exceeded bounds of reason and the judicial

action is arbitrary, fanciful or unreasonable. Marriage of Connolly, 591 P.2d 911 (Cal. 1979); Trompeter v. Trompeter, 545 P.2d 297 (Kan. 1976). Other courts have attempted to refine the test further by indicating that judicial discretion is abused only when there is a finding that no reasonable man could take the same view adopted by the court below. Essentially these courts have held that if reasonable men could differ as to the propriety of the action taken by the court below, then it could not be said that the court has abused its discretion. State v. Wilkins, 556 P.2d 424 (Kan. 1976); Vickers v. Kansas City, 531 P.2d 113 (Kan. 1975); Spingola v. Spingola, 580 P.2d 958 (N.M. 1978).

Based upon the facts of this case, it would be impossible to conclude that the trial court exceeded the bounds of reason, considering all circumstances and facts before it. The fact that the Summons was served upon the defendant Skychoppers on August 8, 1978 and no Answer or Default Certificate was filed prior to defendant's Motion to Quash brought on April 7, 1980, some 20 months thereafter, is evidence that the action taken by the court below has produced the only equitable and just result available. The appellant's Motion could have been granted but was not after full consideration by the trial court. Accordingly, the trial court's decision should not be disturbed.

POINT II.: WHEN THE RETURN DAY OF PROCESS IS MISTAKENLY OR DEFECTIVELY STATED, IT DOES NOT RENDER THE PROCESS VOID BUT MERELY IRREGULAR AND MAY BE AMENDED.

The holding of this court in the Ballard case is also clearly applicable to the instant matter by analogy. Though Ballard, supra, concerned the defect in naming the proper plaintiff, the reasoning of the court's holding is clearly applicable in circumstances where the return day is erroneously or mistakenly stated. Again quoting from Ballard:

> The Summonses served upon respondents fully informed them as to who the real party in interest is, the nature of the action, the name of the court in which they were to appear and the time within which to do so. No disadvantage accrued to them from the fact that the Summonses were brought in the minor appellant's name . . . . 333 P.2d at 1073.

In the case before the court, the defect, which was cured by amendment, was a misstatement as to the time allowed for answering. All of the other elements espoused by the court in Ballard were present, i.e., the real parties in interest were named, the nature of the action was given, and the name of the court in which the parties were to respond was clearly stated.

A notable authority has commented in respect to this type of defect as follows:

> No general rule can be laid down as to the effects of defects or informalities, with regards to the appearance or return day, in a Summons or a Notice of Commencement of an action in a court of record, because some defects are held to render a Summons absolutely void and to invalidate all subsequent proceedings in the action, while other defects are held to be simply irregular and

> subject to amendment, and because the same defect is held in some jurisdictions to be fatal and others curable. It may be said, however, that in the majority of cases considering the fact that the return day of process is mistaken or defectively stated, the rule seems to be that it does not render the process void, but only voidable.
>
> It seems generally agreed that a Summons which is returnable in fewer than the number of days provided by statute will be quashed on Motion, although in many cases the courts have held that a Summons returnable in less than the required time is merely irregular and may be amended or considered sufficient. 62 Am.Jur.2d Process §14 at 796-797. (Emphasis added.)

The following authorities additionally support the proposition that the defect, though subject to a Motion to Quash, does not render the process void nor deprives the court of jurisdiction. See Flannery v. Kusha, 173 N.W. 652 (1919); Richmond and D. R. Company v. Benson, 12 S.E. 357 (Ga. 1890); Krueger v. Lynch, 48 N.W.2d 266 (1951); Lockway v. Modern Woodmen, 133 N.W. 398 (1911); T. A. Howard Lumber Company v. Hopson, 101 So. 363 (1924); Simmons v. Norfolk and B.S.B. Company, 18 S.E. 117 (1893); Barker Company v. Central West Investment Company, 105 N.W. 985 (1905); Gribbon v. Freel, 93 N.Y. 93 (1883); Spokane Merchants Associates v. Acord, 99 Wash. 674, 170 P. 329 (1918).

In the case of Lockway v. Modern Woodmen, supra, the Minnesota Court answered the question here presented. In that case, the Summons required the defendant to answer within 20 days instead of 30. The statute that was

applicable indicated that a Summons requiring less than 30 days for answering would not be valid or binding. Nevertheless, it was held that the Summons was subject to amendment to conform to the statute and defendant's Motion to Quash was properly denied.

The statute in which the appellant relies is §78-27-27, Utah Code Annotated (1953 as amended), which specifically precludes the entry of a default judgment prior to the expiration of at least 30 days following service of process. Respondent has found no authority which would mandate a conclusion that the above-referred to statute acts to void service which mistakenly indicates that the served party only has 20 days to respond. As is stated in a prior section, §78-27-22, Utah Code Annotated (1953):

> The provisions of this act, to ensure maximum protection to the citizens of this state, should be applied so as to assert jurisdiction over non-resident defendants to the fullest expended extent propounded by due process clauses of the Fourteenth Amendment to the United States Constitution. The purpose of the jurisdictional provisions of that act dictate that the construction of the act should be made so that where at all possible, jurisdiction of the court can extend as it pertains to non-residents named as parties in actions instituted in the State of Utah. (Emphasis added.)

This is an unusual and important case; unusual because it does not involve the standard situation where the defendant has failed to file his Answer and a Default Judgment is obtained against him. It does not involve a

situation where the defendant was served with the improper wording in the Summons and promptly moves to have the service quashed or, if a judgment has been taken, to have that judgment set aside. It does not involve the situation where a defendant through inadvertence or mistake neglected to answer the Complaint served and a default judgment was taken. This case, however, is a case which involves a defendant who has participated in settlement negotiations for a period of time in excess of 20 months, and who never filed an Answer or moved to quash service of the Summons until after the time period had run for issuing a new Summons in this matter. This additionally involves a case in which the defendant has now chosen to appear only after 20 months to quash the service originally considered by all parties to be valid.

This case is important because it involves public policy arguments which if resolved in favor of the defendant Skychoppers of Colorado, would make a mockery of the judicial process and it would allow defendants to take advantage or procedural difficulties while at the same time inducing an adverse party's inaction to their detriment. If plaintiffs had not been induced into inaction on the Complaint, the error or mistake would have been discovered and corrected prior to the time that a new Summons could no longer be issued.

At first impression defendant's arguments have some appeal; however, upon introspection, that appeal is only cosmetic and only would represent a valid argument should the defect in the Summons be necessary to invalidate a Default Judgment against it. Defendant-appellant has analyzed its position not properly considering the realities of the situation. First the defendant-appellant has assumed that the irregularities of the process are jurisdictional and render the judgment void. The cases relied upon by the defendant-appellant on their face appear to support its proposition. However, a closer investigation indicates that the defendant's failure to make a timely Motion has caused the waiver of its rights to claim that the irregularities rendered the service of process void. None of the cases cited by the defendant-appellant is on all fours with this situation and can be distinguished either by the fact that the question presented to the courts does not include whether the defect constituted a void or voidable process and in addition, in almost every case, the question was presented under the circumstances where a Default Judgment was being contested. This case differs factually and equitably because no judgment or action was taken by plaintiff towards default and by the discretion of the court, process was amended.

Defendant-appellant's authorities simply do not hold that the defects rendered the service of no effect but even if they did, the defendant has waived any objection it might have by failing to timely file a Motion to Quash. In

cases where defaults have been taken based upon a defective Summons, which cases are more extreme than the instant case, this court has held that a Motion must be timely raised or it will be waived. Miller v. Ziegler, 3 Ut. 17, 5 P. 518 (1881). The court in Miller justified its position by stating:

> Defendant should not be permitted to sit quietly by and seek judgment against him by default and then in the appellate court successfully ask that judgment be reversed for the reasons that there was no service. 5 P. at 520.

In that case, the court indicated that even where a judgment had been taken, if the Motion was not timely filed that the objection was waived. In this case, where the service did not result in a judgment, certainly the same position would be equally true. In all the cases cited by the defendant-appellant the defect was raised promptly and nowhere therein do any of the courts hold that the defect as claimed rendered the service or a judgment automatically void. On the contrary, a better reasoned approach is that such defect rendered the service and judgment voidable, unless amended, upon timely Motion. In the case of Thomas v. District Court of Third Judicial District in and for Salt Lake County, 171 P.2d 667 (1946), which case appears to be the principal case for this proposition in Utah, stresses this requirement of timeliness in such situations by holding that the service should be quashed "when timely attacked by

Motion." This reflects the view quoted by the court in Thomas in the paragraph immediately preceding its holdings that defective service, such as in the instant case, is voidable and will be avoided by a Motion to Quash if made by the defendant, but if not so avoided, a judgment rendered thereon by default need not be set aside when attacked for defects in the service. 171 P.2d at 677.

Rule 4(h) would be meaningless, if as defendant-appellant contends, that such defects in the service made the process automatically void. There would be no need for the discretionary grant to the court to allow amendment of such process.

Defendant-appellant apparently relies heavily on the case of Martin v. Nelson, 533 P.2d 897 (1975), in which the court held service of process was defective because it required an Answer in 20 days instead of 30 days. Nowhere is it stated in that opinion or any other opinion found within the decisions of this court that such defect acts to void the process. It is admitted, by the amendment requested, that the process was defective in that it stated 20 days for answering instead of 30. The crucial question becomes whether the defect could be cured by amendment as is indicated in Rule 4(h). Plaintiff-respondent points to the arguments above and the case authorities cited for the proposition that process was cured by amendment and that defendant-appellant's Motion to Quash was properly denied.

POINT III.: DEFENDANT-APPELLANT WAS NOT MISLED OR DISADVANTAGED BY THE MISTAKENLY STATED RETURN DAY AND THUS IS NOT ENTITLED TO THE RELIEF SOUGHT.

It is the general rule of law that the effect of misstating the return day depends to a considerable extent upon whether the defendant was misled to its disadvantage thereby. Flannery v. Kusha, supra; Spokane Merchant's Association v. Acord, supra; 62 Am.Jur.2d Process §15 at 798. Defendant-appellants in their Brief and also in their Petition for Appeal have made no allegations that they were in any way misled to their disadvantage. In fact, they impliedly indicate that they were not aware of the defect until 20 months after the original service had been effected. All parties considered the process to be proper and sufficient and had through mutual agreement, contemplating settlement, not required the defendant Skychoppers of Colorado to answer or otherwise plead. The question left begging in these circumstances is just exactly how the defendant Skychoppers of Colorado was disadvantaged in these circumstances where no action toward default was ever taken. If anything, the plaintiffs-respondents would be the only parties who could complain of being misled to their disadvantage. If in fact the defendant Skychoppers of Colorado did know of the defect and induced the plaintiff to not require that an answer be filed and thus the defect be discovered, then of course the defendant Skychoppers of Colorado

would be equitably estopped in raising the defense to the process at this point in time. If on the other hand, the defendant Skychoppers of Colorado did not know of the defect or was not aware of the defect at the time, but still induced the plaintiffs into inaction, thus creating a situation where the defect was not discovered until after the time in which new process could be issued, then only the plaintiffs-respondents have been misled to their disadvantage and not the defendant in this matter. Accordingly, if there are any equities in this case at all, they lie in favor of the plaintiffs-respondents.

CONCLUSION

The Order entered by the court below is clearly supported by the case law and rules of procedure of this jurisdiction. Acting pursuant to discretionary power, the court ruled, based upon justice and equity, that the process served upon the defendant-appellant Skychoppers of Colorado was defective yet curable by amendment. There is no case law or any other authority which can contradict this position.

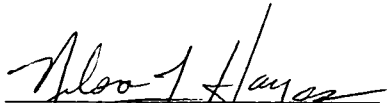
It must be assumed by the record on file herein that the court considered all possible arguments that were, or should have been raised by the defendant-appellant, and that in the court's discretion, equity and justice were best served by not allowing an extreme forfeiture to take place.

Allowing the plaintiffs to amend their process and let the matter be tried on the merits rather than be destroyed by a technical deficiency is a proper result of this controversy.

WHEREFORE, plaintiffs-respondents urge the court to affirm the decision of the court below.

Respectfully submitted this 22 day of September, 1980.

RICHARDS, BRANDT, MILLER
& NELSON



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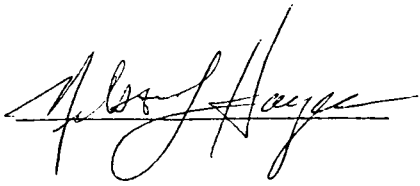
CERTIFICATE OF SERVICE

HAND-DELIVERED, a true and correct copy of the foregoing Plaintiffs-Respondents' Brief this 22 day of September, 1980 to Messrs. David K. Watkiss and H. Wayne Wadsworth, 310 South Main, 12th Floor, Salt Lake City, Utah 84101.



CERTIFICATE OF MAILING

MAILED, a true and correct copy of the foregoing Plaintiffs-Respondents' Brief by first-class mail, postage prepaid, this 22 day of September, 1980 to Mr. Fred C. Begy, III, 115 South LaSalle Street, Chicago, Illinois 60603.