1980

Donald H. Meyers et al v. Interwest Corporation et al : Brief of Appellant

Utah Supreme Court

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Robert W. Brandt; Attorneys for Plaintiffs-Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF APPELLANT SKYCHOPPERS OF COLORADO

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

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CASES CITED

upon it in the State of Colorado. The plaintiffs moved the court for an order permitting them to amend the process in question, which had already been served upon Skychoppers of Colorado. The trial court denied this defendant's motion to quash and granted plaintiffs' motion to amend.

RELIEF SOUGHT ON APPEAL

This interlocutory appeal involves only the defendant Skychoppers of Colorado which seeks a reversal of the trial court's orders to the effect that the trial court be ordered to deny plaintiffs' motion to amend process and to grant this defendant's motion to quash the process served upon it.

STATEMENT OF FACTS

This action arises out of a helicopter accident which occurred in the State of Colorado on August 8, 1974 (R. 3, para. 4 & 5). Plaintiffs filed a complaint against all defendants on August 7, 1978 (R. 2), which was served on Skychoppers of Colorado in the State of Colorado on August 15, 1978 (R. 10). The summons served upon Skychoppers of Colorado provided that the complaint attached thereto be answered within twenty (20) days (R. 9), rathe than thirty (30) days as required by Section 78-27-27, U.C.A., 195 as amended.

On April 7, 1980, Skychoppers of Colorado appeared specia in this action by filing a motion to quash the process served upo

it for the reason that said process did not comply with the jurisdictional requirements of Section 78-27-27, U.C.A., 1953, as amended (R. 11). A hearing on said motion was held before the Honorable Bryant H. Croft, District Judge, on April 11, 1980 (R. 14). At the time of said hearing, plaintiffs filed a motion for leave to amend the process which previously had been served upon this defendant (R. 15-16).

On April 14, 1980, Judge Croft entered orders, in the form of a memorandum decision (R. 17), denying Skychoppers of Colorado's motion to quash the process served upon it and granting plaintiffs' motion to amend the summons, which had already been served, to show 30 days rather than 20 days at the time for answering, and gave this defendant 30 days thereafter in which to answer the complaint.

POINT I

THE TRIAL COURT ERRED IN PERMITTING THE AMENDMENT OF A SUMMONS PREVIOUSLY SERVED, WHICH WAS AN ACCOMPLISHED AND COMPLETED ACT.

This Court has previously distinguished the difference between amending a return to show what was actually done in effecting service of process, and attempting to retroactively amend the process itself. In Redwood Land Company v. Kimball, 20 Utah 2d 113, 433 P.2d 1010 (1967), this Court granted a petition for an interlocutory appeal to review an order of the trial court denying a motion to quash service of summons because the proof of

service thereof was not made until eight days after the service, rather than within five days as required by Rule 4(g), U.R.C.P. The trial court held that the defect in the filing of the "return" was not jurisdictional and this Court affirmed, but in so doing, noted the difference between a defect in the proof of service and a defect in the service itself, in the following language:

> "We are in accord with the view adopted by the trial court in denying the motion: That the defect she complains of is not jurisdictional. It is with respect to the correctness of the summons itself, and the due service, which notifies the defendant that he is being sued, and by which jurisdiction over him is required, that there must be strict compliance. See 42 Am. Jur. 39; Utah Sand and Gravel Products Corp. v. Tolbert, 16 Utah 2d 407, 402 P.2d 703. However, proof of the fact that such service has been made, also referred to as the 'return' of the summons, is something of a different character. Its only purpose is to supply the information to the court, the interested parties and their attorneys, that the defendant has been so served. (Authorities cited)
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> * * *
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> "When the procedure proscribed for the acquisition of jurisdiction of the defendant has been properly carried out, that is, when there has been a correct service of a proper summons, a mistake or irregularity of the kind shown here in the proof of service does not destroy the validity of the service itself." (Emphasis added.)

In the case at bar, there was not correct service of a proper summons, since, as set forth in the following point, the summons incorrectly stated the statutorily prescribed time period for answering the Complaint attached thereto. Therefore, the

trial court erred in permitting the plaintiffs to "amend" a summons which had been issued, served and returned some twenty months earlier.

In their motion to amend the process, plaintiffs make the absurd statement "That the granting of plaintiffs' Motion to Amend would in no way prejudice the rights of the defendant, Skychoppers of Colorado." (R. 16, para. 5). This defendant had not been served with a proper summons prior to the expiration of the applicable four-year statute of limitation[1/] and, therefore, was not subject to any liability in this action. By allowing plaintiffs to amend the service of process (an act which had already taken place), the trial court effectively extended the statute of limitations in this action. The complaint in this matter was filed on the last day before the controlling four-year statute of limitation ran. A new complaint cannot now be filed; and a new summons cannot now be issued on the original complaint, since such issuance would not be within three months as required by Rule 4(b) U.R.C.P. See, Fiberboard Paper Products Corp. v. Dietrich, 25 Utah 2d 65, 475 P.2d 1005 (1970); Cook v. Starkley, 548 P.2d 1268 (Utah 1976). It is difficult to conceive of a more prejudicial situation than having a statute of limitation period extended after it has run.

1/ Section 78-12-25, U.C.A., 1953, as amended.

In Utah Sand & Gravel Products v. Tolbert, 16 Utah 2d 407, 402 P.2d 703 (1965), the court made the following observations regarding our rules of civil procedure:

> "It is true that our new rules of civil procedure were intended to eliminate undue emphasis on technicalities and to provide liberality in procedure to the end that disputes be heard and determined on their merits. However, this does not mean that procedure before the courts has become entirely 'without form and void.' The law itself is a system of rules designed to safeguard rights and preserve order, and administration of justice under it must necessarily be carried on with some degree of order. This can be accomplished only by compliance with the rules established for that purpose. Liberality in their interpretation and application should be indulged where no prejudice or disadvantage to anyone results, but where failure to comply with the rules will result in some substantial prejudice or disadvantage to a party, they should be adhered to with fidelity."2/ (Emphasis added.)

POINT II

THE TRIAL COURT ERRED IN FAILING TO QUASH THE SUMMONS WHICH HAD BEEN SERVED UPON THIS DEFENDANT SINCE IT IMPROPERLY DESIGNATED THE TIME REQUIREMENT FOR ANSWERING.

While the case of Winters v. Hughes, 3 Utah 443, 24 Pac. 75 (1861), may be of more historical interest than anything else, it

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2/ In support of this principal, the court footnoted the following cases: Taylor v. E. M. Royle Corp., 1 Utah 2d 175, 264 P.2d 279 (1953); and Holton v. Holton, 121 Utah 451, 243 P.2d 438 (1952); Thomas v. District Court, 110 Utah 245, 171 P.2d 667 (1946); Glasmann v. 2nd Dist. Ct., 80 Utah 1, 12 P.2d 361 (1932

does show that this Court long ago established the legal requirement that a summons must properly set forth the time and place the defendant is required to answer or defend the charge being made against him. In dicta the court there observed:

> ". . . it is unnecessary to consider whether the court erred in overruling the motion to quash the writ, and we only do so for the purpose of settling the practice. Section 2 of the Revised Laws provides 'that when a complaint is filed the court shall issue to the defendant a notice containing a copy of the complaint, and the time and place for the investigation thereof.' Rev. Laws, 133. . . . The legislature can prescribe the manner in which a party may be brought into court, and the method pointed out by law must be substantially followed. Neither time nor place is mentioned, and both are essential under the statute to constitute legal notice to the defendant. 'Ten days after the return' is too vague and indefinite, and is really equivalent to leaving the time blank, for how is the defendant to know when the officer makes his return?
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> * * *
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> "We have no hesitation in saying that the court erred in overruling the motion to dismiss the writ. If the defendant had appeared and pleaded without first interposing the motion, the case would be entirely different, but such was not the fact, and his motion was well taken."

More recently this Court has held in several cases that all statutory requirements of the issuance and service of summons must be properly complied with in order to obtain jurisdiction over a defendant. In Murdock v. Blake, 26 Utah 2d 22, 484 P.2d 164 (1971), the court stated:

> "Service of summons in conformance with the mode prescribed by statute is deemed jurisdictional, for it is service of process, not actual knowledge of the commencement of the action, which confers jurisdiction. Otherwise, a defendant could never object to the sufficiency of service of process, since he must have knowledge of the suit to make such objection. The proper issuance and service of summons is the means of invoking the jurisdiction of the court and of acquiring jurisdiction over the defendant; these cannot be supplanted by mere notice by letter, telephone or any other such means."

The "other such means" must obviously include service of a summons not in conformity with statutory requirements. See, Rees v. Scott 8 Utah 2d 134, 329 P.2d 877 (1958) regarding the failure of the serving officer to endorse the date of service on the copy of the summons he left with the defendant.

This Court has previously addressed this exact issue in Martin v. Nelson, 533 P.2d 897 (Utah 1975), in which the Court reversed a judgment based on a falsified return and because the summons served on the California defendant required answering within 20 rather than 30 days. The return was conclusively shown to be false in that it indicated that the officer which served the summons in the State of California had endorsed the date and place of service together with signing his name on the summons, but the copy of the summons actually served on the defendant showed such representation to be false. This Court held as follows:

> "Service of process here was defective, not only because of the false return, but because it required answer in 20 days instead of 30 days. Such service is jurisdictional. Defendant, as was his right, appeared specially and raised the point.
>
> "The case is remanded with instruction to vacate the judgment and let the parties take it from there." (Emphasis added.)

Other courts which have had occasion to address the issue have likewise held that statutory requirements regarding the time for answering must be strictly complied with. In Vanover v. Vanover, 307 P.2d 117 (Wyo. 1957), a summons was issued and served upon the defendant requiring an answer the first Monday after its date, rather than the second, third or fourth Monday after its date as required by statute. In reversing judgment for the plaintiff, the court held:

> "The return day of the summons is thus made of special importance as it is from that day the time is computed to determine the day on or before which the defendant is required to act and it also limits the time within which legal service of that process may be made. To permit a plaintiff to transgress these statutes by having the summons specify the return day as the first Monday rather than the second, third, or fourth Monday for its return after issuance, as the case may require it, would leave the date of defendant's answer to the whom of a plaintiff and allow plaintiff to flaunt an express law of this state. This may not be done. In consequence the summons issued April 27, 1955, was defective and could not give the court jurisdiction of the person of the defendant even though it was timely served upon the defendant personally, as appears by the return."

In a later decision, the same court held that a one day miscalculation of when an answer was required in a service by publication was defective. Emery v. Emery, 404 P.2d 745 (Wyo. 1965) at 748:

> "While counsel for appellant-wife has not urged the matter, we think we should call attention to the fact that the record presented to us discloses a further fatal defect in the service om Mrs. Emery. The proof of publication reflects that the last date of publication was July 18, 1961. According to the published notice, defendant was required to answer by August 16, 1961. Consequently, only 29 days were allowed for answer following the last day of publication, instead of 30 days as provided for by Rule 12(a), W.R.C.P.
>
> "This exact situation was present in National Supply Company v. Chittim, supra, and we there held the defect fatal to the jurisdiction of the court. See at 387 P.2d 1012."

Similarly, in Van Gundy v. Ellis, et al., 246 F.Supp. 802 (U.S.D.C. S.D. Iowa 1965), the court noted regarding this issue:

> "Furthermore, the plaintiff's process incorrectly stated the time of required appearance. It has been held that this error in itself is sufficient to label a process defective. Fernekes & Bros. v. Case, 75 Iowa 152, 39 N.W. 238 (1888). Thus, the first service of process upon W. M. Tynan & Co. was defective. Moreover, it was insufficient to toll any applicable statute of limitations. Burkhardt v. Bates, 191 F. Supp. 149 (N.D. Iowa 1961); Fernekes & Bros. v. Case, supra." (Emphasis added.)

POINT III

SKYCHOPPERS OF COLORADO NEVER WAIVED SERVICE OF A PROPER SUMMONS AND THERE IS NO DEFENSE TO LACK OF JURISDICTION.

The trial court in its memorandum decision of April 14, 1980 (R. 17) made the following statement of facts, apparently in justification of its denial of this defendant's motion to quash the process served upon it.

> "Said summons was served on Skycroppers [sic] on August 8, 1978 and no answer or default certificate has ever been filed. Defendant's motion to quash was filed April 7, 1980 -- some 20 months after service. The court denies the motion to quash and grants plaintiffs' motion to amend the summons."

However, the lower court gives no expression of a legal theory or doctrine arising from said facts which would support its denial of defendant's motion to quash.

Also, the plaintiffs in their motion to amend the summons (R. 15-16) make no allegation that defendant did anything which would constitute a waiver of its right to contest jurisdiction of the court over it. In fact, plaintiffs allege only that they have never demanded an answer. They make no claim that the defendant ever represented it would not contest jurisdiction. Plaintiffs do state in their motion:

> "Service of process was made on August 15, 1978; and plaintiffs since that time have extended to defendants through its insurer time within which to answer in that no answer would be required so long as negotiations for settlement were pending." (R. 16, para. 2)

However, as a matter of fact, no settlement negotiations have ever been commenced. While it is impossible to cite a negative fact in the record, plaintiffs must acknowledge in their responding brief that neither during the four-year period between the time of the accident and when suit was commenced, nor during the twenty-month period after suit was filed until defendant moved to quash the summons, did plaintiffs ever make an offer of settlement to this or the other defendants in this action.

Consequently, plaintiffs can complain of no conduct on the part of this defendant which has in any way prejudiced them. In fact, it was the plaintiffs who did not file their complaint until the day before the four-year statute of limitation period ran and thereby incurred the risk that an out-of-state process server may not effect proper service and that such fact may not be discovered until it was too late to issue another summons under Rule 4(b); U.R.C.P. Fiberboard Paper Products Corp. v. Dietrich, supra; Cook v. Starkley, supra.

The lower court decision seems to infer some affirmative duty on the part of the defendant to have brought its motion to quash earlier, but cites no legal doctrine to support such an inference. However, because of the fact that plaintiffs waited

until the day before the statute of limitation ran before filing their complaint and since the summons must issue within three months after the complaint is filed, the same result would obtain if defendant's motion to quash had been brought ninety-one days after the improper service had issued. After that date, November 7, 1978, there is nothing plaintiffs could have done to remedy the defective summons which had been issued, even if such fact had come to their attention.

Since it is not contended that this defendant did anything to waive the requirement that personal jurisdiction must be obtained over it by the service of a proper summons upon it, the lower court erred in not granting its motion to quash. As stated in Rees v. Scott, supra, a defendant has no burden of showing it was misled by an improper summons as a prerequisite to bringing a motion to quash such summons. This Court therein stated:

> "We see no merit in the contention that the defendant has the burden to allege and prove that he was misled by the defect. The trial court properly granted the motion to quash."

CONCLUSION

The record, as noted above, clearly demonstrates that the summons served upon this defendant did not comply with the requirements of the "Utah Long Arm Statute."[3/] The record is also devoid of any waiver of such requirements by the defendant. Consequently,

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3/ Section 78-27-27, U.C.A., 1953, as amended.

defendant's motion to quash the process served upon it in the State of Colorado should have been granted. Likewise, the lower court erred in permitting plaintiffs to "amend" the summons which had been issued, served and returned twenty months earlier.

All facts giving rise to the problem here presented, i.e., filing the complaint one day before expiration of the applicable statute of limitation, drafting the summons requiring an answer in twenty rather than thirty days, indefinitely extending the time for answering (which went beyond the ninety days wherein a correct summons could have been reissued) and never making a settlement offer in over five and one-half years after the accident occurred (which caused defendant to attempt to conclude the matter by litigation and thereby discover the defective service) were generated by and were under the control of the plaintiffs. It would be unjust to now require this defendant to appear and defend a lawsuit which was never properly served upon it during the applicable period of limitation for bringing such an action.

WHEREFORE, the defendant Skychoppers of Colorado respectfully prays that the orders of the trial court be reversed and that the summons which was served upon this defendant be quashed and deemed null and void.

RESPECTFULLY SUBMITTED this _____ day of August, 1980.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed, postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLANT SKYCHOPPERS OF UTAH to Robert W. Brandt, Esq., RICHARDS, BRANDT, MILLER & NELSON, 49 Post Office Place, Salt Lake City, Utah 84110, this ____ day of August, 1980.

Of Defendant's Counsel