1955

Donald Buckner v. Main Realty and Insurance Company and Robert Stevenson : Brief on Appeal

Utah Supreme Court

In the Supreme Court of the State of Utah

DONALD BUCKNER,
Respondent,

vs.

MAIN REALTY AND INSURANCE COMPANY, a Corporation, and ROBERT STEVENSON,
Appellants.

Case No. 8345

BRIEF ON APPEAL

LOWRY, KIRTON & BETTILYON
Wilford W. Kirton, Jr.

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STATEMENT OF FACTS

The facts are simple and without dispute, and for the purpose of clarity we shall refer to the parties as they were below.

On the 22nd day of September, 1954, Plaintiff filed an action against the Defendants in this cause in the City Court of Salt Lake City, Salt Lake County, State of Utah (R. 18). The Defendant, Robert Stevenson, was served with Summons

in this matter personally (R. 17), and Defendant, Main Realty & Insurance Company, erroneously denominated a Corporation by the Plaintiff, was purportedly served with Summons by a copy of the Summons being delivered and left with one, Jean Thompson, who according to the Sheriff's Return (R. 16) was "their Secretary of Company." On the 29th day of November, 1954 the Court entered the Default of both Defendants (R. 14). Judgment by Default was taken against them in the sum of $150.00 plus $5.20 costs (R. 13). Thereafter on the 1st day of February, 1955, Defendants filed a Notice of Appeal in the City Court appealing the Judgment taken by the Plaintiff to the District Court (R. 12). In connection therewith, Defendants also filed a Motion to recall and Dismiss the Execution and Attachment theretofore levied by the Plaintiff, pending disposition of the cause on Appeal (R. 11), and in support thereof filed a corporate stay bond. Defendants Motion was noticed for hearing on February 7, 1955 (R. 10) and the Court having heard the arguments of Counsel ordered the execution and attachment recalled and dismissed pending the disposition of the case on appeal (R. 11). Defendants thereupon filed their Answer and Counterclaim in the District Court of the Third Judicial District in and for Salt Lake County to the Complaint of the Plaintiff formerly filed in the City Court (R. 2, 3 and 4) but now filed in the District Court. Thereupon Plaintiff filed his Motion to Strike Defendants' Answer and Counterclaim (R. 7) and a Motion to Dismiss Defendants' Appeal (R. 6). Arguments were presented by Counsel and on the 10th day of March, 1955, the Court granted Plaintiff's Motion to Dismiss Defendants' Appeal (R. 1).

STATEMENT OF POINTS

1. That the Trial Court erred in granting Plaintiff's Order Dismissing Appeal.

ARGUMENT

The record is clear that more than twenty (20) days elapsed from the time of the service of Summons in this case and that thereafter the City Court entered its Judgment in favor of the Plaintiff. The record is equally clear, however, and there is no dispute on this point, that the Plaintiff at no time in this case served upon the Defendants, or either of them, a Notice of the entry of the Judgment in the City Court. The crux of this case is whether such a notice is necessary under the law to toll the right of appeal to the District Court. The City Court held that it was in finding in favor of the defendants and the District Court held it was not in finding in favor of the Plaintiff.

In this connection, Defendants invite the attention of the Court to the provisions of Rule 73 (h) of the Rules of Civil Procedure which provides, in part, as follows:

> "(h) Appeal from a judgment rendered in a City or Justice Court.—An appeal may be taken to the District Court from a final judgment rendered in a City or Justice Court *within one month after notice of the entry of such Judgment* or within such shorter time as may be provided by law." (Emphasis added.)

It has always seemed abundantly clear to this writer that the language of this rule is clear, concise and unambiguous

and that under it, appeal time runs on any final judgment entered in a City Court from the date of the notice of entry of such judgment.

The Plaintiff, in the prior arguments of this case, has always insisted that other rules found elsewhere in the Civil Rules of Procedure which provide that notices generally need not be given to a party in default are to be superimposed upon Rule 73 (h) in order to make that rule provide that an appeal may be taken to the District Court from a final judgment rendered in a City Court within one month after notice of the entry of such judgment to all paries not in default. The Court below adopted this position.

It is respectfully submitted by Defendants that such reasoning is erroneous for the following reasons:

FIRST: The rules upon which the Plaintiff has relied are clearly and specifically stated to be rules applicable to the District Courts. It is true that under Rule 81 (c) these rules apply to civil actions in City Courts except in so far as such rules are by their nature clearly inapplicabe to such Courts or proceedings therein. Nothing coud be clearer, however, in the matter of the necessity of the notice of the entry of judgment than a specific provision such as Rule 73 (h) which clearly and unequivocally sets forth the procedure as to the taking of an appeal from the City Court to the District Court. The language is plain and unambiguous. No distinction is attempted between judgments entered by default or judgments entered at the conclusion of the trial of the particular case. This Court in promulgating this particular rule has simply and clearly

provided that one may appeal to the District Court from a final judgment within one month after the notice of entry of such judgment.

SECOND: The reasoning of the Court below is erroneous when the Court properly considers the historical aspect of the promulgation of Rule 73 (h). It will be remembered that the procedure for appeal from a City or Justice Court prior to the promulgation of the new Rules of Civil Procedure was crystal clear in requiring the prevailing party in any judgment rendered in the City or Justice Court to serve upon the adverse party a notice of the entry of the judgment in such proceedings in order to toll the time within which an appeal might be taken. This rule in the City Courts had therefore been established by long practice. When the new Rules of Civil Procedure were promulgated by this Court on the 1st day of January, 1950, Rule 73 (h) was not one of the original rules. On the 3rd day of December, 1951, this Court adopted certain amendments to the Utah Rules of Civil Procedure to have an effective date January 1, 1952, which amendments had been prepared by the Committee on preparation of Rules pursuant to the direction of the Supreme Court. Among the various amendments made were Rules 73 (h) through (m). Herein the Court adopted a set of rules which it specifically applied to the method and means by which appeals should be taken from City or Justice Courts to the various District Courts. It is submitted that it was the intention of the Court in adopting these amendments herein referred to to restablish the method of taking an appeal to the District Court from a City Court as it had been formerly established under the Statutes and Rules

of Courts existing prior to the adoption of the new Rules of Civil Procedure. Had this Court intended to change the former rule, it could have done so very easily by specifically providing that a notice of entry of judgment should be required in all cases except those involving a default judgment. No such limitation was made in the Rule, and it is submitted that none was intended; but rather that this Court did intend specifically to reinact the former Rule which had been one of long standing and wide practice to remain the rule in so far as appeals from City Courts were concerned.

One might speculate as to why, in the original instance, notice of the entry of judgment was required in order to toll the time for taking an Appeal in the City Courts when such a rule was not required in the District Courts. Perhaps no satisfactory answer can be given to such a query. It would seem to this writer, however, that if a valid reason did and does now exist for the requirement of the giving of the notice of the entry of judgment, the reason is much more persuasive in cases in volving a default where a meritorious claim may exist in favor of the Defendant than in a case which has been tried to the Court and decided at the conclusion of the trial. Certainly one who is in default is much less likely to know of the action which has been taken by the Court than one who has been present personally or by and through his Counsel during the course of the trial and has heard the Judge announce his decision.

THIRD: To adopt the rule as the Court below has done is to violate the well settled rules of noscitur a sociis and

ejusdem generis. Where one or more of the rules of civil procedure announce general statements of procedure but where other rules are specific and make particular application to specific phases of procedure, the specific will control the general. Under these rules of construction, Rule 73 (h) is a specific rule having particular application to the precise procedure to be followed in taking appeals from City or Justice Courts and shall control other general rules which at no time specifically mention anything concerning city court appeals and the requirement of notices of entry of judgment.

We desire to call to the attention of the Court the fact that the appeal from the City Court to the Disrict Court was not taken for a frivolous purpose or for the purpose of delay. The Answer and Counterclaim filed herein puts in issue valuable rights centered around specific performance of an alleged Contract for the sale of real property. This mention is made only to indicate that the appeal was not one which is sometimes taken for what might be termed "other than legitimate reasons."

CONCLUSION

Appellants earnestly submit that the granting of Plaintiff's Order Dismissing Defendants' Appeal entered in the Court below and from which this Appeal is taken is contrary to the law and the rules of civil procedure adopted by this Court governing the procedure for taking an appeal from the City of Justice Court to the District Court.

WHEREFORE, Appellants pray that the Order of the Court below appealed from be reversed and that the cause be remanded with instructions to the Court below to vacate said Order.

Respectfully submitted,

LOWRY, KIRTON & BETTILYON
Wilford W. Kirton, Jr.