

1955

Remington-Rand, Inc. v. Thurman E. O'Neil : Brief of Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

REMINGTON-RAND, INC., a corporation,
Respondent and Plaintiff,

vs.

THURMAN E. O'NEIL and LOIS S.
MACHADO, fdba A - Typewriter
Company,
Defendants,

vs.

DALE E. GRANT and UTAH CASH
REGISTER EXCHANGE, INC., a
corporation,
Appellants and Garnishee Defendants.

No. 8379

BRIEF OF APPELLANTS

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Appellants and Garnishee Defendants.

No. 8379

BRIEF OF APPELLANTS

FACTS OF THE CASE

On January 24, 1955, Remington-Rand, Inc. was awarded a Judgment by Default against defendant Thurman E. O'Neil in Case No. 104038 in the Third District Court of Salt Lake County, State of Utah, in the sum of \$4,243.82, and costs, for merchandise theretofore delivered to Thurman E. O'Neil

while operating a business known as A-1 Typewriter Company at Provo, Utah (R. 19).

Thereafter, on March 18, 1955, two separate garnishments were served upon appellants, Dale E. Grant and Utah Cash Register Exchange, Inc. requesting them to make regular answers concerning any indebtedness, etc. between O'Neil and appellants (R. 11, 13).

Thereupon, Dale E. Grant made negative answers on all questions and Utah Cash Register Exchange, Inc. admitted that it had certain property in its possession, consisting of work benches, a compressor and miscellaneous tools and equipment (R. 16) which it understood belonged to O'Neil, but upon which E. F. White (one of plaintiff's witnesses hereinafter referred to) had a security interest under a Bill of Sale from O'Neil.

Utah Cash Register Exchange, Inc. was a small corporation which was located at 141 East 2nd South Street, Salt Lake City, Utah, and was engaged in the business of selling and servicing cash register machines and similar allied office equipment. Dale E. Grant was its principal stockholder and was also president of the corporation.

About ten (10) days after sending the Answers to Garnishment to plaintiffs, a single instrument entitled "Notice" was received by appellants, stating that on April 18, 1955, (thirteen days thereafter) that (R. 21)—

" . . . plaintiff will call up in the Law and Motion Division of the above-entitled Court, a hearing to determine the indebtedness, if any, due Thurman E. O'Neil by the garnishees above."

On April 16, 1955, appellant Dale E. Grant was served with a subpoena to appear on April 18 as a witness on the part of the plaintiff and was paid a \$6.20 witness fee. In obedience therewith he appeared, accompanied by counsel, and listened to and participated in a hearing which, at its conclusion, resulted in a personal judgment against both Utah Cash Register Exchange, Inc., and himself for \$3,600.00 and costs.

Although appellants have to this time been unable to ascertain what happened, it appears as if plaintiff proceeded at the hearing on the basis of a "Reply to Answers of Garnishees" which was filed in the proceedings, but which was never served on appellants. However, a "Reply to Answers of Garnishees" was actually served on T. E. O'Neil on or about April 5, 1955, at the same time the "Notice" was received by these appellants.

A search of the record (R. 34-35) does not indicate service of the "Reply to Answers of Garnishees" upon anyone. Although appellants knew that O'Neil had received such an instrument, its exact contents were not known to them prior to the hearing.

At the "hearing", the plaintiff put on evidence and Dale E. Grant took the stand and testified in accordance with the appellants' answers to garnishments. At its conclusion the Court announced its decision and promptly arose and left the Courtroom while appellants, dumbfounded, wondered what had happened.

The first Garnishee Judgment was against Dale E. Grant alone (R. 17-18). Later this judgment was set aside as un-

supported by Findings of Fact and Conclusions of Law as required by Rule 64 D(h) Utah Rules of Civil Procedure, and a new "Amended Judgment" was entered against both Dale E. Grant and Utah Cash Register Exchange, Inc., nunc pro tunc (R. 1). The Findings of Fact (R. 5-6) purporting to support the "Amended Judgment" were later amended upon motion of appellants.

NATURE OF THE CASE

The matter before this Court primarily involves procedural due process under the Constitutions of the State of Utah and the United States. There is no question but what a "hearing" was had in the matter, but whether the "Notice" which was given was sufficient to satisfy due process of law is what this Court must decide. Also, the questions of whether appellants were accorded a fair opportunity to demand a trial by jury and to take advantage of the various defensive pre-trial preparation procedures provided by our Rules of Civil Procedure are present in this appeal.

A further point is presented by the proceedings, namely: Did the District Court have jurisdiction to grant plaintiff any judgment exceeding that provided by Rule 64 D(i) Utah Rules of Civil Procedure, which basically provides that upon failure of the plaintiff to reply, judgment shall be entered consistent with the answers of the garnishee.

STATEMENT OF POINTS

Appellants submit the following points as reasons for seeking a reversal of the judgment of the lower court:

(1)

APPELLANTS WERE DEPRIVED OF DUE PROCESS OF LAW AND THE OPPORTUNITY TO HAVE A TRIAL BY JURY, OR A FAIR TRIAL WITHOUT A JURY, BECAUSE THEY WERE NOT SERVED WITH NOTICE, AS REQUIRED BY RULE 64 D(h), URCP, THAT PLAINTIFF WAS PROCEEDING AT THE HEARING HELD APRIL 18, 1955, ON THE THEORY AND ALLEGATIONS OF ITS "REPLY TO ANSWERS TO GARNISHEES" WHICH WAS NEVER SERVED ON APPELLANTS.

(II)

THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY WAS WITHOUT JURISDICTION TO MAKE AND ENTER ANY JUDGMENT EXCEEDING THAT ALLOWABLE UNDER THE ANSWERS OF THESE DEFENDANTS TO THE GARNISHMENTS SERVED UPON THEM, AND AS PROVIDED FOR BY RULE 64 D(i), URCP.

(III)

NO EVIDENCE WAS INTRODUCED SUFFICIENT TO SUPPORT A FINDING BY THE COURT THAT UTAH CASH REGISTER EXCHANGE, INC. WAS THE ALTER EGO OF DALE E. GRANT, AND THAT DALE E. GRANT SHOULD ALSO BE SUBJECT TO THE JUDGMENT WHICH WAS ENTERED IN THE GARNISHMENT PROCEEDINGS.

ARGUMENT

(1)

APPELLANTS WERE DEPRIVED OF DUE PROCESS OF LAW AND THE OPPORTUNITY TO HAVE A TRIAL BY JURY, OR A FAIR TRIAL WITHOUT A JURY, BECAUSE THEY WERE NOT SERVED WITH NOTICE, AS REQUIRED BY RULE 64 D(h), URCP, THAT PLAINTIFF WAS PROCEEDING AT THE HEARING HELD APRIL 18, 1955, ON THE THEORY AND ALLEGATIONS OF ITS "REPLY TO ANSWERS TO GARNISHEES" WHICH WAS NEVER SERVED ON APPELLANTS.

When appellants received the April 5th notice of the hearing to be held less than two weeks later, O'Neil also received such a notice, together with the "Reply to Answers of Garnishees." Being unaware of the contents of the papers served on O'Neil or what role O'Neil was to play, appellant Dale E. Grant went to the "hearing" on April 18, 1955, with his attorney. When objections to the procedure were raised, he stated in his affidavit (R. 26) that he would not have had any particular reason to personally attend the hearing except to clarify any questions arising out of his Answers to Garnishments (R. 26):

"Your affiant further represents that he has never had any objection to plaintiff recovering from him, pursuant to a court Order, those items of personal property belonging to defendant O'Neil which your affiant had in his custody as President of Utah Cash Register Exchange, Inc., and that he appeared in Court for the primary purpose of so informing the Court of the same; that he was Subpoened to appear in Court by

the plaintiff in the above-entitled matter, and was paid the regular witness fee of \$6.20; that the documents submitted on his behalf as exhibits in said hearing were ordered to be brought to Court by your affiant pursuant to the subpoena served upon him by the plaintiff in said action; that he did not appear in Court—either through himself or his counsel—prepared or informed that any attempt would be made to charge him personally with any purported or alleged debts due to Thurman E. O'Neil as an alter ego of Utah Cash Register Exchange, Inc.”

That Grant appeared and so testified is evidenced from his testimony at the hearing (R. 76):

Q. Is it satisfactory with you if Remington-Rand takes possession through the sheriff and sells some of that equipment?

A. Absolutely, it is all right.

Q. Could you tell the Court what equipment is on the premises to which you claim no interest that belongs to Mr. O'Neil or to him and others?

A. I think I can tell most of it as I remember that. There was the compressor, air compressor, a vat of cleaning—or vat machine, some parts cabinets with parts and some Cole cabinets, file cabinets, file, desk; there were two used machines they sent. There was a question of who owned one between T. E. O'Neil and E. F. White. They were on E. F. White's Bill of Sale.

Q. And as to these items, you claim no interest?

A. No interest whatsoever.

Q. And are those the items to which you made reference in the answers to the garnishment served upon you?

A. Yes.

At the conclusion of the hearing the Judge announced that Dale E. Grant was indebted to O'Neil in the sum of \$3,600.00, and that judgment would issue binding Dale E. Grant personally, because Utah Cash Register Exchange, Inc. was his alter ego. The Judge then forthwith arose from the bench and proceeded to chambers without entertaining any further comment. *It was only afterwards when appellant and his counsel examined the file that it became fully clear that the appellants had been submitted to an actual trial on the "Reply to Answers to Garnishment" which had never been served on them!*

A further inspection of the file revealed that the evidence introduced did not even follow the theory of the "Reply to Answers of Garnishees" in that—

(1) The Reply stated (R. 34) that the sum of \$3,600.00 was asserted therein as a transfer of a stock of merchandise, apparently in violation of the Bulk Sales Act; whereas the controverted evidence submitted by witnesses for the plaintiff was clearly to the effect that O'Neil purportedly loaned money to Utah Cash Register Exchange, Inc., after its incorporation (R. 49), that title to none of O'Neil's goods were transferred to Utah Cash Register Exchange, Inc., and that plaintiff's witness E. L. White actually held a Bill of Sale to the merchandise appellants actually did have in their possession.

Q. Now, Mr. Snyder, you show here the figure \$3,020.00 as owed to Mr. O'Neil. What does that represent?

A. That represents the money that O'Neil gave Mr. Grant to pay off a certain mortgage, chattel mortgage at Farmers State Bank.

Similar and further testimony can be found on pages 45, 46, 47 and 60.

(2) In the "Reply to Answers of Garnishees" it was asserted that O'Neil was a fifty percent "partner" in the business with Grant (R. 34), whereas Snyder testified quite to the contrary on behalf of the plaintiff (R. 53):

Q. And then am I correct in assuming that this was simply a matter of how much money was owed to you and O'Neil by Utah Cash Register?

A. And others.

Q. And others. Am I correct in that?

A. That's correct.

Q. And it did not involve an ownership arrangement then?

A. Only to the point of the merchandise involved.

Q. But by that I mean there was nothing discussed as to whether you or O'Neil owned part of the Utah Cash Register Exchange as a result of that, was there?

A. Nothing was discussed other than what transpired earlier.

(3) The "Reply to Answers of Garnishees" contended that Utah Cash Register Exchange, Inc. was the alter ego of appellant Dale E. Grant (R. 34), organized for the purpose of defrauding creditors of O'Neil; however, Snyder again on behalf of plaintiff, testified as follows (R. 46):

Q. Were you present at conversations between Mr. Grant and his attorney preceding the incorporation of Utah Cash Register?

A. Yes.

Q. And did Mr. Grant on that occasion state the reason for the incorporation of Utah Cash Register?

A. Well, I presume limited liability is the understanding that I had out of the conversation.

Further, the money allegedly loaned to Utah Cash Register Exchange, Inc., was claimed to have been secured by sales of merchandise by O'Neil and Snyder long after incorporation (R. 55).

Appellant has as yet been unable to satisfactorily determine under what theory, basis or ground plaintiff was proceeding in the hearing.

There is no need to cite cases concerning the requirements of procedural due process of law under Section 7 of Article I of the Constitution of the State of Utah or under the Fourteenth Amendment to the Constitution of the United States. Due process of law contemplates notice and an opportunity to be heard. True, an opportunity was had for a hearing in the matter before the Court, and an instrument purporting to be a "Notice" was given. But it is submitted that the "Notice" contained nothing sufficient to inform appellants of the true nature of the proceedings brought before the Court. If anything, the "Notice" served to mislead appellants as to the nature of the relief being sought. Certainly, there was nothing in the "Notice" to inform appellants, particularly appellant Dale E. Grant, that an attempt would be made to hold him personally liable on the ground that the corporation was his alter ego.

Appellants believe that the record so clearly shows a complete failure of giving reasonable notice that the need for quoting extensive authority is considered wholly unnecessary.

Another interesting observation to be made concerning the entire proceeding is that Section 64 D(h) of our Utah Rules of Civil Procedure specifically affords a jury trial in such actions.

(h) Reply to Answer of Garnishee; Trial of Issues; Judgment.

" . . . the matter thus at issue shall be tried in the same manner as other issues of like nature. Judgment shall be entered upon the verdict or finding the same as if the garnishee had answered according to such verdict or finding. Costs shall be awarded in accordance with the provisions of Rule 54(d)."

Appellants submit that the form and substance of the "Notice"—besides having the matter set in the Law and Motion Division of the Third District Court within thirteen (13) days—deprived them of the kind of notice that would have reasonably informed them that they might demand a jury trial and that they should utilize the various remedies afforded by the Utah Rules of Civil Procedure for depositions, interrogatories and other pre-trial discovery techniques. See annotation in 88 ALR beginning at page 1148.

It is submitted that garnishment hearings, particularly if the garnishee demands the same, should be set on the trial calendar and not heard in the Law and Motion Division of the Court.

(II)

THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY WAS WITHOUT JURISDICTION TO MAKE AND ENTER ANY JUDGMENT EXCEEDING THAT ALLOWABLE UNDER THE ANSWERS OF THESE DEFENDANTS TO THE GARNISHMENTS SERVED UPON THEM, AND AS PROVIDED FOR BY RULE 64 D(i), URCP.

Rule 64 D(h) further provides as follows:

“ . . . if the garnishee answers, the plaintiff may, within 10 days after the expiration of the time allowed for the filing of such answer, serve upon the garnishee and file a reply to the whole or any part thereof; and may also allege any matters which would charge the garnishee with liability . . . ”

It is submitted that the failure of plaintiff to serve the Reply upon the garnishees is jurisdictional, and that because of plaintiff's failure the Court had no jurisdiction to make and enter judgment in the absence of a clear showing that appellants were fully informed of the proceedings, nor did it have jurisdiction over the subject matter upon which it passed judgment. It can hardly be argued that the Court should hear a matter involving a Reply to Answers of Garnishees when in fact one of the garnishees appeared pursuant to Subpoena and for purposes consistent with Rule 64 (D)(i), URCP.

Appellant appeared pursuant to subpoena and for the purpose of informing the Court that Utah Cash Register Exchange, Inc. had no objection to the plaintiff's taking such equipment from its premises as was owned by O'Neil and

White. He also expected to give whatever information concerning the personal property which was levied upon as was desired of him. His affidavit was clearly to such effect (R. 26).

Appellants could have fully expected judgment to be entered consistent only with Rule 64 D(i), URCP:

Judgment on Answer to Garnishee.

If the plaintiff fails to reply to the answer of the garnishee, he shall be deemed to have accepted it as correct, and judgment may be entered thereon . . . In no event shall the garnishee be chargeable with costs, except under the provisions of subdivisions (b) and (j) of this Rule.

(III)

NO EVIDENCE WAS INTRODUCED SUFFICIENT TO SUPPORT A FINDING BY THE COURT THAT UTAH CASH REGISTER EXCHANGE, INC. WAS THE ALTER EGO OF DALE E. GRANT, AND THAT DALE E. GRANT SHOULD ALSO BE SUBJECT TO THE JUDGMENT WHICH WAS ENTERED IN THE GARNISHMENT PROCEEDINGS.

The plaintiff's irregular method of proceeding at the hearing is once again drawn into sharp focus when one attempts to determine whether plaintiff was trying to hold appellant Dale E. Grant personally liable simply because Grant allegedly owed money to O'Neil, or whether plaintiff intended to hold Dale E. Grant liable on the theory that the corporation of which he was president and the principal stockholder was his alter ego.

Appellants submit that nothing can be found in the record to support any finding or conclusion that Utah Cash Register Exchange, Inc. was the alter ego of Dale E. Grant. The evidence introduced by plaintiff was entirely to the contrary. Reference to some of the evidence has heretofore been made in former portions of this brief.

From 1 ALR 611 the basic law is stated:

“ . . . Ordinarily, corporate existence cannot be disregarded. The exceptions to this rule are few.”

Plaintiff's witness Snyder readily admitted (R. 46) that his conclusion concerning the purpose of forming the corporation, while being present at the time of the discussion, was that *“limited liability is the understanding that I had out of the conversation.”* There is nothing in Snyder's testimony or in any other portion of the record that slightly or remotely indicates that the corporation was formed for the purpose of defrauding creditors of O'Neil or of Grant, or that any other illegal purpose was present. To secure limited liability is certainly a proper legal purpose and reason for using the corporate device for doing business.

The basis upon which judgment was entered seemed to be that by some manner of dealing—which plaintiff's evidence did not make clear—Utah Cash Register Exchange, Inc. became indebted to O'Neil in the amount of \$3,000.00, either because of a cash contribution which O'Neil was to have made to the business (R. 45), or a loan to the business of a similar amount (R. 49). In any event, an inspection of the testimony on pages 45, 47, and 49 of the record clearly shows that anything

O'Neil may have put into the business was cash which he personally acquired separate and apart from any dealings with or on behalf of Utah Cash Register Exchange, Inc., or Dale E. Grant, and that the money was derived from sales of his own merchandise while being assisted by plaintiff's own witnesses Snyder and White.

Since title to no property was actually ever transferred to the corporation in violation of the Bulk Sales Act, what difference would it make whether Grant or the corporation itself allegedly owed O'Neil in the absence of a showing of some sort of a collusive plan at the time of incorporation? Unless a reason appears, and unless the corporation was initially Grant's alter ego, why should Grant be held liable for the corporation's doings? This premise becomes clear when we consider that the corporation was formed in July (R. 46), it officially began business on August 1 (R. 47), but the sale of O'Neil's goods from which money was allegedly loaned or transferred to Utah Cash Register Exchange, Inc. arose from sales which occurred in the latter part of August and September (R. 55). And as to these sales the record is conclusive that neither Grant nor Utah Cash Register Exchange, Inc. took any part in the same, yet the Court entered judgment against *both* appellants.

An examination of the testimony and the remainder of the record cannot produce the slightest indication of any evidence tending to support a finding that the corporation was originally formed as the alter ego for Dale E. Grant to effectuate a transfer of property from O'Neil to the corporation in violation of the Bulk Sales Act, or to otherwise defraud credi-

tors or to evade the law in any respect. Nor does anything in the record give the Court any basis for making a finding that Dale E. Grant was operating individually under the alter ego of Utah Cash Register Exchange, Inc. during the time of the transactions referred to in the testimony while being president of the Utah Cash Register Exchange, Inc.

To further substantiate the foregoing argument, appellant submit that respondent cannot possibly show any form of notice sufficient to inform appellant Dale E. Grant that he was being brought into Court to answer a charge that the corporation of which he was president was his alter ego. It is believed this point has been sufficiently covered heretofore

CONCLUSION

This Court is squarely confronted with the problem of deciding whether the Utah Rules of Civil Procedure mean what they say, or whether the Court should once again engrave exceptions upon the mandate of the rules, thus encouraging a too prevalent practice among many members of the Bar to treat Court procedure as some sort of a necessary evil to be dispensed with by sleight of hand.

The writer wishes it to be understood that the foregoing criticism is not leveled at counsel for respondent, particularly since the failure to serve the "Reply to Answers of Garnishees" on appellants has all of the earmarks of an inter-office clerical error. But to charge appellants with the results of the error is something which this Court should not lightly dismiss.

Appellants fully recognize that an appellate court could, even in this case, probably reason itself into a position of holding that upon some approach to the matter due process of law and other matters raised herein were satisfied to the extent of granting substantial justice to appellants. But such an approach would necessarily have to assume facts and matters which might be entirely inaccurate and contrary to the true situation.

The Utah Rules of Civil Procedure in and of themselves are designed for liberality. But when they are not followed at all, or when whatever attempt to follow them is improper and actually misleads the other side of the litigation, it is time to draw the line.

It is submitted that the "Amended Judgment" should be set aside and the decision of the lower Court should be reversed.

Respectfully submitted,

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"Notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principle that under our system of justice, if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it."

Mr. Justice Crockett in National Farmers Union Prop. & Cos. Co v. Thompson 286 P. 2d 249 (Utah--July 12, 1955)