

1980

Eldon P. Billings v. Weldon H. Brown and Gerda H. Brown : Brief of Appellant

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ELDON P. BILLINGS,

Plaintiff-Appellant

vs.

Case No. ~~1769~~

17348

WELDON H. BROWN and
GERDA H. BROWN,

Defendants-Respondents

BRIEF OF APPELLANT

APPEAL FROM FOURTH DISTRICT COURT
IN AND FOR DUCHESNE COUNTY
HONORABLE ALLEN B. SORENSON, PRESIDING

STEPHEN L. JOHNSTON
431 South 300 East, Suite 204
P. O. Box 1025
Salt Lake City, UT 84110

Attorney for Appellant

DENNIS L. DRANEY
P. O. Box 1886
Roosevelt, UT 84066

Attorney for Respondents

FILED

DEC 23 1988

Clk. Supreme Court, Utah

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STATEMENT OF FACTS

Eldon Billings recovered a judgment against Defendants in the District Court for Uintah County on 9 December, 1970. The judgment was docketed in Duchesne County on 7 March, 1974. Appellant through counsel, initiated execution proceedings on real property owned by Defendants in Duchesne County.

On 29 November, 1978, pursuant to prior telephone instructions that Plaintiff should sign copies of the Notice of Sale and copies of the Execution and Praecipe, with the dates left blank, and that Plaintiff would be billed for the Sheriff's and Clerk's fees later, Plaintiff's counsel forwarded said papers. (See cover memo dated 29 November, 1978.)

Due to clerical error, the papers had Salt Lake County at the heading rather than Duchesne County. The Clerk returned them to Plaintiff's counsel. (See notation of Clerk, lower right hand corner on memo dated 29 November, 1978.) On 9 December, 1978 Plaintiff, through counsel, forwarded the corrected papers to the Duchesne Sheriff. (See memo dated 7 December, 1978.) The Execution was again returned to Plaintiff because of a clerical error in that the execution recited that the judgment was rendered in Duchesne County instead of Uintah County. (See memo from Duchesne County Clerk dated 28 December, 1978, signed by D. Ibach.) The Plaintiff thereupon remedied the typographical error and forwarded the corrected papers. The execution was issued about 11 January, 1979 by the Duchesne Clerk. (See Clerk's bill dated 11 January, 1979.) On 23 March, 1979 the Duchesne Sheriff received the Execution and allied papers. The Sheriff served Defendants on 29 April, 1979 and posted notices on 30 April, 1979. (See affidavit of Mel Dalton,

Duchesne Deputy Sheriff, 30 April, 1979.) The Defendant through counsel, obtained an ex-parte order staying the execution. Pursuant to an agreement reached between counsel for Defendants and counsel for Plaintiff, a Memorandum of Points and Authorities was submitted by Plaintiff in support of the proposition that the execution should go forward. It was the clear understanding between counsel that the Motion to Quash the Execution by Defendants would be submitted on Memoranda and that there would be no oral arguments, pursuant to Rule 2.8, Rules of Practice District and Circuit Courts of Utah. (See Memorandum of Points/Authorities dated 16 June, 1980.)

On 14 July, 1980 when no ruling was forthcoming, counsel for Plaintiff/Appellant wrote a letter to Judge Balliff with regards to the status of the case and asked if there was any additional information the Court needed in order to make its decision. On 28 July, 1980, a Notice of Oral Argument from the District Court was mailed to counsel stating that oral arguments would be heard on 11 August, 1980. It should be pointed out in this connection that there was a clear understanding between counsel for Appellant and counsel for Respondents, that the case would be submitted pursuant to Rule 2.8 referred to above without oral argument. On 31 July, 1980, upon receipt of the Notice of Oral Argument, counsel for Appellant forwarded a letter to Judge Sorenson requesting that the matter be submitted on the basis of the pleadings and memoranda of both parties already submitted. The counsel for Appellant further stated "please let me know if this is satisfactory or if you desire oral argument. I would like to avoid the time and expense of a trip to Roosevelt, if at all possible." (See letter from Appellant's counsel dated 31 July, 1980.)

There was no communication from the Court in response to this letter. The next communication received by counsel for Appellant was a miscellaneous minute entry dated 11 August, 1980 indicating that the matter had come before the Court for oral argument and that Plaintiff was not present or represented and that the Defendant was represented by counsel and that the order staying the execution was granted. Appellant thereupon forwarded the Court a "Verified Motion to Vacate Order Staying Execution". (See Motion dated 19 August, 1980.)

In the Verified Motion, Plaintiff/Appellant's counsel set forth the facts that he did not make a personal appearance to argue the matter because it was agreed between the parties that the case would be submitted pursuant to Rule 2.8 of the Rules of Practice. Plaintiff/Appellant's counsel requested an order vacating the order dated 11 August, 1980 and further requested an order setting at a time for hearing wherein Plaintiff/Appellant would have an opportunity to argue the merits.

In response to this, Plaintiff received a "Ruling" dated 4 September, 1980 from Judge Allen Sorenson denying Plaintiff/Appellant's Motion to Vacate the Order Staying Execution. It is from these two rulings that Eldon Billings appeals.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ITS REFUSAL TO ALLOW PLAINTIFF/
APPELLANT AN OPPORTUNITY TO ARGUE THE MERITS OF HIS CASE.

The following points can be summarized from the facts outlined above:

a) It was the understanding of Plaintiff/Appellant based on a conversation with Defendants' counsel that the Motion to Quash would be submitted to the Court without oral argument on memoranda pursuant to Rule 2.8.

(Plaintiff/Appellant at this time, does not know whether Defendants will dispute this point.)

b) When "Notice of Oral Argument" was received by Plaintiff/Appellant, Plaintiff again requested the matter be handled as above indicated. Plaintiff/Appellant further indicated that if the Court did not want to handle the Motion on Memoranda, but wanted oral argument, to, "please let me know".

(See letter dated 31 July, 1980.)

c) There was no response to this communication. A hearing was convened wherein Plaintiff/Appellant was not represented and where Defendants were represented and a ruling adverse to Plaintiff/Appellant was rendered.

d) Plaintiff/Appellant upon receipt of the ruling moved to vacate the order and requested a hearing wherein he would be allowed to present oral arguments on his behalf.

(See Motion dated 19 August, 1980.)

e) That this motion was summarily denied.

(See Ruling dated 4 September, 1980.)

It is submitted that Eldon Billings has been denied an opportunity to present his case orally by the District Court for Duchesne County and the Court erred in this regard and for this reason, the Court's order quashing the execution herein should be reversed.

POINT II

THE TRIAL COURT'S RULING THAT THE STATUTE OF LIMITATIONS WAS NOT TOLLED BY THE INITIATION OF THE EXECUTION BY PLAINTIFF/APPELLANT WITHIN THE EIGHT YEARS, WAS ERRONEOUS AND SHOULD BE REVERSED.

Title 78, Chapter 12, is the controlling statute. Section 1 states:

"Civil actions can be commenced only within the period described in this chapter, after the cause of action shall have accrued..."

Section 78-12-22 U.C.A., 1953 as Amended states:

"Within eight years: an action upon a judgment or decree of any Court of the United States or any state or territory within the United States."

The case of Sweetser vs. Fox, 43 U 40, 134P 599 (1911), states:

"The statute of limitations begins to run from the time of the entry of judgment."

Section 78-12-40 U.C.A. 1953 reads:

"If any action is commenced within due time and a judgment thereon for the Plaintiff is reversed or if the Plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the Plaintiff...may commence a new action within one year after the reversal or failure."

The case of Thomas V. Braffet's Heirs 6 U (2D) 57, 305 P (2D) 507, held that the term "Plaintiff" within the meaning of Section 78-12-40, means anyone affirmatively seeking relief.

It was there urged by Plaintiff's that the filing of an answer in a prior action, is not the equivalent to the filing of an action within the meaning of 78-12-40. The Utah Supreme Court speaking through Chief Justice Crockett, stated as follows:

"We think, however, that the purpose behind the statute is plain and that the legislature intended that anyone

who had a cause in litigation which was dismissed for some reason 'other than upon the merits' should have a reasonable time which it set as one year to re-assert an attempt to establish his right...We think that the word 'Plaintiff' as used in this section was meant to include not only the party that brings the action, but any party who affirmatively seeks relief as did the Defendants here in this and the prior action."

In this case, Plaintiff/Appellant, initiated a Writ of Execution on 29 November, 1978, well within the time to enforce his judgment against the Defendants. Due to a clerical error the Writ stated that the judgment was rendered in Duchesne County Court on 9 December, 1978 instead of being rendered in Uintah County on 9 December, 1978. Therefore, the Duchesne County Clerk's Office failed to issue the execution. The execution did not fail on its merits, but failed due to a clerical error. Section 78-12-40 comes into play and grants an additional year in which to obtain the Writ of Execution. The error was remedied and a corrected Writ of Execution was submitted to the Duchesne County Clerk on 11 January, 1979. The Clerk issued the execution, and the Sheriff proceeded with it as indicated above.

It can be seen that Appellant, commenced his action to enforce his judgment against the Defendants within the eight years from its entry in Uintah County and that his action failed "otherwise than upon the merits..." within the meaning of Section 78-12-40 U.C.A. 1953 as Amended. It can also be seen that the Plaintiff/Appellant initiated a new cause of action in January of 1979, within one year after the failure.

Based upon the foregoing, Appellant requests that the Court reverse the ruling of the lower Court and direct that the

order quashing Plaintiff/Appellant's Writ of Execution be vacated
and further order the lower Court to allow Plaintiff/Appellant
to proceed with his execution.

DATED this 4th day of December, 1980.

Respectfully submitted,

STEPHEN L. JOHNSTON
431 South 300 East, Suite 204
P. O. Box 1025
Salt Lake City, UT 84110

Attorney for Appellant