1981

Rosalind Jackson v. Virginius "Jinx" Dabney and James N. Barber : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

ROSALIND JACKSON,	:	
Plaintiff-Appellant,	:	
vs.	:	
VIRGINIUS "JINX" DABNEY,	:	
Defendant-Respondent,	:	Case No. 17601
and	:	
JAMES N. BARBER,	:	
Defendant.	:	

BRIEF OF APPELLANT

An Appeal from the Order granting the defendant-re... Motion for Summary Judgment in the Third Judicial District C... for Salt Lake County, State of Utah, the Honorable M. D. ... Presiding

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-appellant brought an action alleging that defendant-respondent, an attorney licensed to practice in Utah, had been negligent in the disposition of a matter entrusted by the plaintiff-appellant to the care of the defendant-respondent.

DISPOSITION IN THE LOWER COURT

Prior to trial, defendant-respondent Dabney moved for Summary Judgment against the plaintiff-appellant, which was granted below.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant respectfully requests that the decision of the lower court be reversed and the plaintiff-appellant be permitted to present evidence to prove her claim at a trial upon the merits.

STATEMENT OF FACTS

Plaintiff-appellant Jackson was a client of defendant-respondent Dabney, an attorney licensed to practice in Utah. (Trial Court Record Page 105, hereinafter "R. 105"). Plaintiff-appellant sought defendant-respondent Dabney's legal advise and help in preventing a foreclosure sale of her home. (R. 105-106). She took to him the Notice of Sale and other legal documents in her possession prior to the sale. (R. 140). At defendant-respondent Dabney's suggestion, she acquired $400.00 cash to be used for the settlement offer, and delivered it to defendant-respondent Dabney prior to the sale. (R. 140). On that same day, while she was present in his office, defendant-respondent Dabney spoke on the telephone with someone he identified as the attorney representing the judgment creditor, and reported to plaintiff-appellant that he had secured the agreement of the opposing attorney to stop the foreclosure sale for payment of the $400.00. (R. 128, 129, 141). Plaintiff-appellant, having delivered the $400.00 to defendant-respondent Dabney and having heard that the matter was resolved for $400.00, left defendant-respondent Dabney's office, and the matter in his care. (R. 141, 129).

According to defendant-respondent Dabney's answers to plaintiff-appellant's interrogatories, defendant-respondent Dabney did not attempt to deliver the $400.00 to the foreclosing attorney, did not reduce the

settlement agreement in writing, did not confirm the settlement by letter with the opposing attorney, did not check with the sheriff's office to determine whether or not the sale had been cancelled, and did not appear at the time and place of the sale to assure the sale did not take place. (R. 128). He took no further action to stop the foreclosure sale. (R. 128).

A few days after the plaintiff-appellant had delivered the $400.00 to defendant-respondent Dabney, defendant-respondent Dabney called plaintiff-appellant saying that the sale had taken place, the home had been sold and that he had her $400.00 in his possession. He said that she should redeem the property within the next six (6) months. (R. 127, 141). He did not advise her what procedure was necessary to effect a redemption. Upon her demand, defendant-respondent Dabney returned the $400.00 to plaintiff-appellant. (R. 129).

Plaintiff-appellant then sought advise from defendant Barber, also an attorney licensed to practice in Utah. Plaintiff-appellant asked defendant Barber to help correct the problem. Defendant Barber assured plaintiff-appellant that he would convince defendant-respondent Dabney to correct his error. During the six (6) month redemption period, plaintiff-appellant acquired the necessary funds to redeem the residence. She informed defendant Barber of this fact and asked for advice on how to go about redeeming. Defendant Barber failed to instruct plaintiff-appellant properly on how to redeem, and the redemption period expired with plaintiff-appellant still holding the necessary funds and not having redeemed her residence.

Thereafter, plaintiff-appellant was evicted from the residence

and brought this action against both attorneys claiming that her loss o the residence was a result of the negligence of both defendant-responden Dabney and defendant Barber.

Defendant-respondent Dabney brought a motion before the Distr Court seeking Summary Judgment of no cause action on the grounds that no evidence of any negligent act on the part of defendant-respondent Dabney was before the court. (R. 109, 111). The Honorable M. D. Jones, Circui Judge of the Fifth Circuit sitting by designation as a District Judge, granted defendant-respondent Dabney's Motion and entered a Summary Judgm against plaintiff-appellant for no cause of action against the defendant respondent Dabney. (R. 153-154).

ARGUMENT

POINT I

GENUINE ISSUES AS TO MATERIAL FACTS EXISTED, ON THE RECORD, AT THE TIME OF THE GRANTING OF THE SUMMARY JUDGMENT.

At the time the court below granted Summary Judgment, there existed on the record several disputed issues material to the settlement of the controversy.

Foremost, the plaintiff-appellant argued that the evidence before the trial court showed the defendant-respondent had failed to tak any action to assure the settlement, and that that was negligent, in tha the defendant-respondent failed to exercise ordinary care in the perfor of his duties as the attorney for the plaintiff-appellant. The defendan respondent's position was that there was no evidence that the defendant- respondent was guilty of any negligence.

It is generally recognized that legal malpractice consists of the failure of an attorney to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the task which they undertake, [see Lucas v. Ham, (Cal. 1961) 56 Cal2d 583, 591, 15 Cal Rptr. 821, 825, 364 P.2d 685, 689] and that when such failure proximately causes damages, it gives rise to an action in tort. Neal v. Magana, Olney, Levy, Cathcart and Gelfand, (Cal. 1971) 98 Cal Rptr. 837, 491 P.2d 421.

Utah cases have stated that a lawyer has an obligation to discharge his duties in loyalty and fidelity to the interest of his client, [Ellis v. Gilbert, (Ut., 1967) 429 P.2d 39] and also that there is an implied covenant in an attorney's relationship to his client that he will represent the client's interest with competence and diligence. See Dunn v. McKay, Burton, McMurray and Thurmond, (Ut., 1978) 584 P.2d 894.

In the present case, the plaintiff-appellant claims that the defendant-respondent was negligent in the performance of his duties. The failure of the defendant-respondent to make any attempt to consumate the settlement on behalf of the plaintiff-appellant demonstrated a lack of concern for the welfare of the plaintiff-appellant and that the defendant-respondent failed to represent the plaintiff-appellant's interest with competence and diligence. In view of the fact that the defendant-respondent was a professional man to whom the plaintiff-appellant, a layman, could look as having competence to handle her case, it is clear that genuine issues of fact are raised as to whether the defendant-respondent used due care in performing the duties reasonably to be expected of an attorney under

the circumstances.

Another disputed factual issue before the trial court was the question of cause. The defendant-respondent claimed that even if it could be said that he was negligent in failing to secure the compromise settlement on behalf of the plaintiff-appellant, only a small portion of the plaintiff-appellant's injury could be attributable to him, not the total value of lost, the lost equity.

On the other hand, the plaintiff-appellant stated under oath, that had she known prior to the time of the foreclosure sale of her home that the sale had not been stopped, she would have taken further steps to resolve the problem in an effort to prevent the sale. (R. 148).

In a recent case, the court states that "it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact". Holbrook Company v. Adams, (Ut., 1975) 542 P.2d 191.

POINT II

AT THE TIME THE TRIAL COURT GRANTED SUMMARY JUDGMENT FOR DEFENDANT-RESPONDENT DABNEY, HE WAS NOT ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

With respect to summary judgments, the court in Singleton v. Alexander, (Ut., 1967) 19 Utah 2d 292, 431 P.2d 126, stated the following:

> When it comes to determining negligence, contributory negligence and causation, courts are not in such a good position to make a total determination for here enters the prerogative of the jury to make determination of its own, and that is: Did the conduct of the party measure up to that of a reasonable prudent man and if not, was it a proximate cause of the harm done?
> (Citation omitted, emphasis added.)

In the same case, the court also quoted the following from the earlier Utah case of Lowell v. Salt Lake City, (Ut., 1896) 13 Utah 91, 44 P. 1050:

> Before the question of negligence becomes one of law, for the court, the facts shown by the evidence must be such that all reasonable men must draw the same conclusion from them. If the facts proven are such that reasonable men may fairly differ as to whether or not there was negligence, the question is one for the jury to consider.

As discussed in Point I above, at the time the trial court granted the Summary Judgment, the issue of negligence was very much in dispute. In this case it is a question of fact whether or not the defendant-respondent acted as a lawyer of ordinary skill and capacity would act. Therefore, because this is a fact about which reasonable men may differ, the defendant-respondent was not entitled to a judgment as a matter of law at the time of the granting of Summary Judgment. See, 57 Am. Jur. 2d. *Negligence* §9.

POINT III

THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT.

Rule 56 of the Utah Rules of Civil Procedure provides that Summary Judgment shall be rendered if the supporting documents "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". See Durfey v. Bd. of Ed. of Wayne City., Etc., (Ut., 1979) 604 P.2d 480.

Moreover, the Utah cases hold that on Summary Judgment the adverse party is entitled to have the court view the evidence and all reasonable inferences fairly to be drawn therefrom in the light most favorable to the adverse party. Bihlmaier v. Carson, (Ut., 1979) 603

P.2d 790; Pioneer Savings and Loan Association v. Pioneer Finance and Thrift Company, (Ut., 1966) 18 Utah 2d 106, 417 P.2d 121 at 123; Thompson Ford Motor Company, (Ut., 1964) 16 Utah 2d 30, 395 P.2d 62.

In a recent case before this court, the court stated "in reviewing the record on any appeal from Summary Judgment, we treat the statements and evidentury materials of the appellant as if the jury would receive them as the only creditable evidence, and we sustain the judgment only if no issues of fact which could affect the outcome can be discerned". Blodgett Martsch, (Ut., 1978) 590 P.2d 298 at 300.

In the present case the plaintiff-appellant alleges that the failure of the defendant-respondent to perform his duties in a diligent manner constitutes negligence. As discussed in Point I, above, the plaintiff-appellant's averment clearly constitutes a genuine claim and is in conflict with defendant-respondent's claim of no negligence.

The trial court should not have granted Summary Judgment for the defendant-respondent because there existed on the record a dispute concerning whether or not the defendant-respondent was in fact negligent.

Furthermore, courts have been reluctant to grant Summary Judgment on questions of negligence. See Prestone v. Lamb, (Ut., 1968) 20 Utah 2d 260, 436 P.2d 1021 at 1022; Corbridge v. M. Morrison and Son, Inc., (Ut., 1967)19 Utah 2d 407, 432 P.2d 41. The court in Singleton v. Alexander, supra, quotes as authority the following language found in 38 Am. Jur. *Negligence* §345:

> The right of a party in a negligence action to have the jury pass upon the question of liability becomes

> absolute . . . when the proof discloses such a state of facts, whether controverted or not, that, in essaying to fix responsibility for the injury or damage, different minds may arrive reasonably at different conclusions or may disagree reasonably as to the inferences to be drawn from the facts. Thus, . . . where negligence may reasonably and legitimately be inferred from the evidence, it is for the jury to say whether negligence shall be so inferred. . . . The inferences to be drawn from the evidence must be certain and incontrovertible to be decided by the court; otherwise, they must be determined by the jury. . . .
>
> The question of the defendant's liability lawfully can be withdrawn from a jury and determined by the court as a question of law when, and only when, the facts are indisputable, being stipulated, found by the court or jury, established by evidence that is free from conflict, and raises an inference which is so certain that all reasonable men, in the exercise of a fair and impartial judgment, must agree upon it and grant the same conclusion. (Emphasis added.)

Whether or not the defendant-respondent failed to perform his duty in a lawyerlike manner is certainly an issue of dispute in the present case. The plaintiff-appellant alleges that the defendant-respondent had informed her that the foreclosure sale would be stopped if the plaintiff-appellant could provide $400.00. The plaintiff-appellant in reliance upon the defendant-respondent's advise provided the defendant-respondent the money before the scheduled date of sale. The defendant-respondent, as her attorney, violated the trust placed in him by the plaintiff-appellant in that he failed to do anything whatsoever after receiving the money, to prevent the sale.

Defendant-respondent's advise to plaintiff-appellant to redeem her home after the sheriff's sale does not erase the previous negligence on the part of the defendant-respondent. Furthermore, the fact that the defendant-respondent failed to explain to the plaintiff-appellant any of

the basic steps necessary for redemption is further evidence of the defendant-respondent's complete disregard for the welfare of the plaintiff-appellant and his negligence in handling the matter entrusted to him by the plaintiff-appellant.

In conclusion, the plaintiff-appellant would like to call the court's attention to a statement made by this court in Tangren v. Ingalls, (Ut., 1961) 12 Utah 2d 388, 367 P.2d 179 at 184:

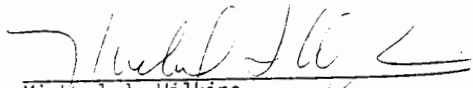
> The sustaining of summary motions without affording the party an opportunity to present his evidence is a stringent measure which the court should be reluctant to grant . . . . Accordingly, the privilege of presenting evidence should be denied only, when taking the view most favorable to the party's claims he cannot in any event establish a right to redress under the law; and unless it clearly so appears doubts should be resolved in favor of permitting him to go to trial.

SUMMARY

Plaintiff-appellant urges the court to vacate the Summary Judgment of no cause of action granted by the trial court against the plaintiff-appellant, and to remand this matter for a trial on the merits as to the defendant-respondent's negligence and liability.

Respectfully submitted,

WILKINS & WILKINS



Michael J. Wilkins
Attorneys for Plaintiff-Appellant

MAILING CERTIFICATE

This is to certify that I mailed a true and exact two copies to the defendant-respondent's attorney, Ray R. Christensen, 900 Kearns Building, Salt Lake City, Utah 84101, on this 4th day of June, 1981, postage prepaid, by U. S. mail.

Michael J. Wilkins
Attorney for Plaintiff-Appellant